

PROFESSIONALIZATION OF THE JUDICIARY BY RECRUITMENT AND SELECTION

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Abstract

Considered as key elements of the human resources policy of an organization, recruitment and selection influence the status of human potential. Given that the main resource of each judicial system is the human resource, the present study aims to analyze the means of recruitment and selection of magistrates, both from the perspective of the national legislation, as well as from the perspective of the international provisions, identifying all vulnerabilities and directions for improvement.

Keywords: national legislation, human resources management, recruitment, selection, international provisions.

Introduction

The present study which is part of the area of the judiciary organization aims the synthetic analysis of the recruitment and selection of magistrates (judges and prosecutors), both from the perspective of the international provisions, as well as from the perspective of the national legislation. As the research area approached is exclusively in the competence of the legislator, references to the literature are general and come from the area of human resources management.

Regarding my original contribution, it consists of the indication of the vulnerabilities of recruitment and selection of the Romanian magistrates, by referring both to the legislation in force, as well as to the Romanian actual socio-economic context, for in the end to present the ways in which the two managerial processes can be perfected.

The success of an organization can be ensured only if the employees are recruited and selected following the appropriate procedures. Recruitment ensures the number of persons on who the selection will be applied on. Having a bigger number of candidates, it is possible the recruitment of those who best fit the job requirements and who, by their skills guarantee performance.

Recruitment is the process by which the organization seeks candidates for its vacancies¹. This process is unfolded continuously, permanently and systematic or spontaneous, triggered at certain time intervals² and must consider the following requirements: provide the organization the necessary personnel both quantitative as well as qualitative, create a rational relation between different categories of personnel, preoccupation to achieve a stability of the employees and reduce fluctuations, comply with the legal provisions in the area etc³.

Because recruitment consumes money and resources, it is necessary to be unfolded following a methodology that will make possible the identification and attraction of the right persons and a well thought out plan⁴.

On the other hand, **selection** is defined as the process by which the organization is trying to identify the candidates who possess the knowledge, skills and any other characteristics necessary for the organization to achieve its objectives⁵.

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¹ Noe Raymond, Hollenbeck John, Gerhart Barry, Wright Patrick, *Fundamentals of Human Resource Management*, (New York: McGraw Hill, Irwin, 2004), p.6.

² Cornescu V. and Bonciu C., *Managementul resurselor umane*, (Bucharest: Trei, 1999), p.21

³ Cornescu V, Mihăilescu I. and Stanciu S., *Managementul organizației*, (Bucharest: All Beck, 2009), p.202

⁴ Mathis Robert L., Panaite Luca and Rusu Costache (coord.), *Managementul resurselor umane*, (Bucharest: Economic Publishing house, 1997), p.85-86

Professional selection assumes a confrontation between the particularities of the job considered and the individual characteristics (skills, qualifications, personality etc) of each job seeker who applies for that vacancy⁶.

1. Recruitment and selection of magistrates

Because magistrates are the best jurists, due to the social importance of the position as judge or prosecutor, democracies consider as very important the recruitment and selection of magistrates, but also of the authorities invested with prerogatives in this area, being established the principles and methodology which must be followed when these two essential processes are unfolded.

1.1 Principles and normative framework establishing the recruitment and selection of magistrates

The United Nations General Assembly, starting from the necessity of granting a special attention to judges in the legal system and to the importance of selection, training and professional conduct, adopted by the Seventh United Nations Congress and endorsed by **resolutions 40/32 of 29 November 1985 and 40/146 of 13 December the Basic Principles on the Independence of the Judiciary**⁷. According to this international document Member States have the obligation to ensure and promote the independence of justice, considering and introducing these principles in their national legislation and judicial practice. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, color, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory (Point 10).

Recommendation No 94 (12) of the Committee of Minister to Member States on judges: independence, efficiency and responsibilities⁸ adopted by the Committee of Ministers on 13 December 1994 recommends to Members States to adopt or to enforce all necessary measures for the promotion of judges as individuals and of the judicial system, to state their independence and efficiency, by implementing a number of principles.

According to the first principle stated (I), selection and career of judges must be based on merit, having regard to the evaluations, integrity, skills and efficiency. The authority competent with the selection and promotion of judges must be independent from the Government or public administration. Express provisions must be stated in order to guarantee its independence, to insure the appointment of its members by the judiciary itself, the latter one having the power to decide over the procedural rules of the appointment.

For the application of the Recommendation No 94 (12), the Consultative Council of European Judges (called CCJE) adopted the **Opinion no 1 (2001) for the attention of the Committee of Ministers of the Council of Europe on standards concerning the independence of the judiciary and the irremovability of judge**⁹ stating that the independence of the judges is not a prerogative or a

⁵ Noe Raymond, Hollenbeck John, Gerhart Barry, Wright Patrick, *Fundamentals of Human Resource Management*,

⁶ Dumitrescu Mihail (coord.), *Enciclopedia conducerii întreprinderii*, (Bucharest: Scientific and Encyclopedic Publishing house, 1981), p.346-347

⁷ Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December the Basic Principles on the Independence of the Judiciary, available at: <http://www2.ohchr.org/english/law/indjudiciary.htm>

⁸ Recommendation No 94 (12) of the Committee of Minister to Member States on judges: independence, efficiency and responsibilities available at: <https://wcd.coe.int/ViewDoc.jsp?id=1707137&Site=CM>

⁹ Opinion no 1 (2001) for the attention of the Committee of Ministers of the Council of Europe on standards concerning the independence of the judiciary and the irremovability of judge, available at: <https://wcd.coe.int/ViewDoc.jsp?id=1707137&Site=CM>

privilege in their own interest, but also in the interest of the state of law and of those who seek justice.

CCJE has established that in the Member States there is a variety of methods by which judges are appointed, also noticing that there is a unanimous opinion that appointments must be grounded on merit and performed based on objective criteria, any political considerations being inadmissible.

Any “objective criteria” seeking to guarantee that recruitment and career of judges are based on merit, considering their professional background, integrity, capacity and efficiency can only be defined in general terms. Thus it is primarily followed the insurance of a content for the general aspirations for an “appointment grounded on merit” and “objectivism”, aligning theory with reality.

In the CCJE opinion it is necessary that the authorities of each Member State responsible with the appointments and proposals for appointments and promotion to insert publish and immediately apply objective criteria insuring that selection and promotion of judges is made based on merit, considering qualifications, integrity, capacity and efficiency.

Opinion no 10 of 23 November 2007 of the Consultative Council of European Judges for the Judiciary¹⁰ at the service of society states important provisions regarding the competencies of the authority independent of the executive and legislative, competent with the selection, appointment and promotion of judges. It is shown that, in order to maintain the independence of the judiciary, it is essential that the selection and promotion of judges be made independently by the Superior Council of Magistracy, with the exclusion of the implication of the legislative or executive powers. The Opinion emphasizes the features necessary for the appointment of magistrates: total transparency of the conditions of selection by the dissemination of the criteria for appointment and promotion, a selection based on the merits of the candidates, appreciated by their qualifications, competence, integrity, independence, impartiality and efficiency, opening the procedures for appointment for a large area of candidates, who are representative for the community.

The European Charter on the statute for judges¹¹, adopted in a reunion organized by the Council of Europe in 1998, regarding the procedure for the selection and appointment of magistrates, states that the selection and recruitment of judges must be performed by a court of an independent commission and must be grounded on their capacity to freely and impartially appreciate all the judicial situations they face and to apply the law in the spirit preserving the dignity of persons.

Not only the selection and career of judges have been a preoccupation for European and international organisms, but also the statute and methods of selection and appointment of prosecutors, considering the same principles. **Recommendation 19 (2000) of the Committee of Ministers to Member States on the role of public prosecution in the criminal justice system¹²**, adopted on 6 October 2000, emphasizes that Member States should take measures to ensure that the recruitment, the promotion and the transfer of public prosecutors are carried out according to fair and impartial procedures embodying safeguards against any approach which favors the interests of specific groups, and excluding discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status. The careers of public prosecutors, their promotions and their mobility are governed by known and objective criteria, such as competence and experience.

The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (27 August-7 September 1990) adopted the **Guidelines on the Role of Prosecutors¹³**.

¹⁰ Opinion no 10 of 23 November 2007 of the Consultative Council of European Judges for the Judiciary¹⁰ at the service of society, available at: http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/CCJE-opinion-10-2007_EN.pdf

¹¹ European Charter on the statute of judges, available at: http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/European-Charter-on-Statute-of-Judges_EN.pdf

¹² Recommendation 19 (2000) of the Committee of Ministers to Member States on the role of public prosecution in the criminal justice system, available at: <https://wcd.coe.int/ViewDoc.jsp?id=376859&Site=CM>

¹³ Guidelines on the Role of Prosecutors available at: <http://www2.ohchr.org/english/law/prosecutors.htm>

These stated as main principles the need that all prosecutors possess the professional qualifications required for the accomplishment of their functions through improved methods of recruitment and legal and professional training, and through the provision of all necessary means for the proper performance of their role in combating criminality. These guidelines have been formulated as to assist Member States in their tasks of securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings, and should be respected and taken into account by Governments within the framework of their national legislation and practice.

According to these guidelines, persons selected as prosecutors shall be individuals of integrity and ability, with appropriate training and qualifications. States shall ensure that selection criteria for prosecutors embody safeguards against appointments based on partiality or prejudice, excluding any discrimination against a person on the grounds of race, color, sex, language, religion, political or other opinion, national, social or ethnic origin, property, birth, economic or other status.

1.2 Recruitment and selection of magistrates settled by the actual Romanian law – Law 303/2004 on the statute of judges and prosecutors

Title II of the Law No 303/2004 on the statute of judges and prosecutors settles the career of judges and prosecutors, the first chapter of this Title being dedicated to the admission into magistracy and the initial professional training of judges and prosecutors.

According to Art 12 of the Law No 303/2004 the “admission of judges and prosecutors into magistracy shall take place through competitive examination, based on professional competence, aptitudes and good reputation”. We do not consider necessary to emphasize even more the clarity of the quoted text, the legislator establishing the rule that the admission into magistracy be made based on a competitive examination.

Starting from this rule, two different possibilities of admission into magistracy are distinguished: the promotion of the competitive examination organized by the National Institute of Magistracy or the promotion of the courses of the National Institute of Magistracy. The examinations organized by the N.I.M are performed based on a detailed methodology drafted by the Superior Council of Magistracy.

1.2.1 Admission to the National Institute of Magistracy

Legal texts (Art 13, Art 14, Art 26 Para 1 and Art 33 Para 2 of the Law No 303/2004) establish the main coordinates of the activity of the National Institute of Magistracy, namely the organization of the competitive examinations for the admission into magistracy and initial professional training of judges and prosecutors.

According to Art 14 Para 1 of the Law No 303/2004, the admission to the National Institute of Magistracy is made by observing the principles of transparency and equality, exclusively on the basis of a competitive examination. The same article establishes the requirements which have to be met cumulatively by the persons who apply for the National Institute of Magistracy, namely:

- to be Romanian citizens, with permanent residence in Romania and have full legal capacity;

- to be bachelors of law;
- to have no criminal and fiscal record;
- to speak Romanian;
- to be able, medically and psychologically, to exercise this office.

The candidates must pass theoretical exams and then an interview establishes the evaluation both of their psychological profile, and of their capacity to react accordingly to the professional deontological norms in different situations, as well as a logical test.

The persons who have promoted this examination have the quality of auditors of justice and will attend, for the next 2 years the initial professional training courses at the N.I.M, consisting of

academic education and practical training, according to the training program approved by the Scientific Council of the Institute and by the Superior Council of Magistracy, according to Law No 303/2004 and to Art 17-20 of the Regulation of the National Institute of Magistracy¹⁴.

Based on their general average marks the graduates may choose either the position of debutant judge or prosecutor in courts or prosecutor's offices attached to these courts, in accordance with Art 21 Para 2 of the Law No 303/2004.

The length of the probation is of one year, during which the debutant judges or prosecutors have to continue their initial professional training under the coordination of a judge or prosecutor especially appointed by the president of the first instance court or, as the case may be, by the prime-prosecutor of the prosecutor's office attached to this court. After completing the probation period, the debutant judges and prosecutors shall be obliged to sit for the capacity exam, according to Art 25 Para 1 of the Law No 303/2004. The capacity exam shall consist of verification of the theoretical and practical knowledge, by way of written and oral examinations. Theoretical tests shall concern the constitutional foundations of the rule of law, the basic legal institutions, judicial organization and the Deontological Code for judges and prosecutors. The practical tests shall consist in solving moot cases and drafting judicial acts, separately for judges and prosecutors, according to the specific nature of their activity according to Art 28 of the Law No 303/2004.

1.2.2 Appointment into magistracy

This mean of appointment into magistracy is stated by Art 33 Para 1 of the Law No 303/2004, previous to its modification by the Government Emergency Injunction No 100/2007 "persons who were judges or prosecutors and ceased their activity for reasons not imputable to them, judicial specialized personnel provided by Art 87 Para 1, lawyers, notaries, judiciary assistants, legal advisers, the probation personnel with higher legal education, judiciary police officers with higher legal education, the court clerks with higher legal education, persons who have held judicial specialized offices within the apparatus of the Parliament, the Presidential Administration, the Government, the Constitutional Court, the Ombudsman, the Court of Accounts or the Legislative Council, the Juridical Research Institute within the Romanian Academy and the Romanian Institute for Human Rights, the professors at law within the accredited institutions, as well as the assistant-magistrate with the High Court of Cassation and Justice with at least 5 years length of service within the specific field, may be appointed into magistracy, based on a competitive exam, if they meet the requirements provided by Art 14 Para 2". First of all we must note the addressability of the text, this mean of appointment being opened for a large, diverse and representative for the society group of candidates, the quoted law being in accordance with the recommendations of the Opinion No 10/2007 of the Consultative Council of European Judges.

As it is shown by the Opinion No 1/2001 of the CCJE "seniority requirements based on years of professional experience can assist to support independence", this being an important condition for the promotion of magistrates, without being absolute, in the prejudice of the one regarding professional skills.

According to Art 33 Para 13 as modified by the Government Emergency Injunction No 100/2007, and approved by Law No 97/2008¹⁵ it is necessary that the candidates admitted have the obligation to attend to professional training courses organized by the N.I.M. These courses ensure

¹⁴ Regulation of the National Institute of Magistracy was published in the Official Gazette Part I, No 193/31 March 2007, modified and amended by Decision No 452/21 June 2007 for the modification and completion of the Regulation of the National Institute of Magistracy, approved by Decision of the Superior Council of Magistracy Plenum No 127/2007, published in the Official Gazette Part I, No. 530/6 August 2007 and Decision No 81/2008, approved by Decision of the Superior Council of Magistracy Plenum No. 127/2007, published in the Official Gazette Part I No. 89/5 February 2008.

¹⁵ Law No 97/2008 approving Government Emergency Ordinance No 100/2007 amending certain legal instruments in the justice area, published in the Official Gazette Part I, No. 294/15 April 2008.

training appropriate for the needs of the system, and closely respect the recommendations made by the international organisms, aiming the necessity of initial professional training for all categories of magistrates, regardless of their mean of admission into magistracy (see in this regard Recommendation R 94(12)/1994, the European Charter on the statute of judges and the Guidelines on the Role of Prosecutors).

2. Weaknesses in the area of recruitment and selection of magistrates in the Romanian judicial system

- It has not yet been established a policy of personnel for the Romanian judicial system, in accordance with the requirements of the European Commission¹⁶, thus it is impossible both the correlation between midterm and long term needs of the system and the number of posts open for competition, as well as the stabilization of the number of posts opened for competition. From this point of view, until this moment, the decision on the number of posts opened for competition consider the near future, exclusively based on the number of posts opened at the moment of the decision. Such system promotes the present lack of balance in the future.

- Though according to the law, the main mean of recruitment into magistracy is by N.I.M, more than half of the recruitments made in the past five years were made by exceptions and simplified (including in the perspective of the rigorous selection and training subsequent to admission)¹⁷.

- The examination based on multiple choice tests, which does not valorize professional reasoning, but shows a “muscle mind” and not a judicial thinking.

- The important elements in the profile of the magistrate remain insufficiently or not at all tested at the admission into magistracy (critical thinking, capacity to persuade in writing, linguistic competences, axiological system, general culture).

- Two years as the duration of the training courses is too long if we correlate it with the system’s crisis of human resources.

- The inefficient capacity of the N.I.M to administrate the professional training of human resources necessary for the judicial system in relation to the large number of retirements.

To all of these we must add:

- Excessively rigorous selection of the candidates¹⁸.
- The initial professional training of the auditors does not emphasize enough the social component of the training, the transfer of values and attitudes or the understanding of the economic mechanisms¹⁹.

¹⁶ See the European Commission reports under the Cooperation and Verification Mechanism, available at: http://ec.europa.eu/dgs/secretariat_general/cvm/progress_reports_en.htm; by Decision No 1320/27 November 2008, SCM approved the Project on the analysis of the human resources management between 2005 – August 2008 and the strategy in this area between August 2009 – 2011; this strategy was revised following a program for technical assistance financed by the EU and unfolded between December 2009 – September 2010; nevertheless, the conclusions presented are still valid, due to the short time, insufficient for the evaluation of the application of this revised strategy.

¹⁷ SAR Policy Brief No 47, Men of Justice – Policy of personnel in magistracy on short and medium term, September 2010, (it is about 1300 persons recruited by exceptional means, out of a total of 2050 new magistrates admitted into the system between 2005-2009) available at: http://www.sar.org.ro/files/520_Policy%20memo47.pdf, since 15 June 2011

¹⁸ The Activity Report of the National Institute of Magistracy in 2005-2009, available at: http://www.inm-lex.ro/fisiere/pag_1/det_1139/6415.pdf, since 15 June 2011.

¹⁹ Recommendation CM/Rec (2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, Point 56 states that “Judges should be provided with theoretical and practical initial and in-service training, entirely funded by the state. This should include economic, social and cultural issues related to the exercise of judicial functions. The intensity and duration of such training should be determined in the light of previous professional experience”, available since 15 June 2011 at:

<https://wcd.coe.int/ViewDoc.jsp?id=1707137&Site=CM>

- Insufficient practice of the future magistrates.
 - The admission examination way too exaggerated, without any utility for the future magistrate.
 - Within courts, the poor professional communication between N.I.M graduates, leading to vague judicial decisions and with a reduced responsibility.
 - The lack of feedback from the graduates of the professional training courses organized by N.I.M and the Superior Council of Magistracy.
 - Overloading the curricula with disciplines that are useless in training the magistrate as a practitioner of the law.
 - The presence of theoreticians among trainers, without judicial practical experience limits the development of the practical skills of the future magistrates.
 - The lack of balance between the number of judges-trainers and prosecutors-trainers.
 - The absence of the evaluation of the socio-professional profile of the future magistrate.
- Though the consulted factors have emphasized a series of conjunctures which have aggravated these vulnerabilities, namely:
- The deficiency of the stimulation of retirement of the magistrates against the stimulation of staying in the system.
 - “The passenger entry” into the system, the magistrate’s pension it is not assimilated for other categories of personnel. The principle of the service pension is violated.
 - The lack of financial motivations for the magistrate to stay into the system, as a consequence of the substantial wage cuts.

3. Directions to improve the recruitment and selection process

Because it has not yet been defined a policy for the Romanian judicial system personnel, in accordance with the requirements of the European Commission²⁰, it is impossible the correlation between the midterm and long-term needs of the system and the number of vacancies, but also the stabilization of the number of vacancies.

From this point of view, until this moment, the decisions concerning the number of vacancies were taken considering the near future, based exclusively on the number of vacancies available at the moment of the decision. Such system can only push to the future the present imbalances. The advantages in ensuring a constant number of vacancies are obvious: predictability of costs, the correct estimation of the number of trainers and the necessary spaces for the initial training courses etc.

The admission into magistracy, regardless of the followed procedure, as we have already shown, tests in a significant measure, the knowledge about the law of the candidates, and the important elements in the profile of the candidate are insufficiently tested or are not tested at all (critical thinking, capacity to persuade in writing, linguistic competences, axiological system, general knowledge). Psychological test is inefficient, for reasons of regulation, but also its validation on specific population.

3.1 Midterm objectives

- The correlation of the number of posts opened for competition with the midterm and long-term need of personnel of the judicial system, in accordance with the human resources policy of the Superior Council of Magistracy;

²⁰ See the European Commission reports under the Cooperation and Verification Mechanism, available at: http://ec.europa.eu/dgs/secretariat_general/cvm/progress_reports_en.htm; by Decision No 1320/27 November 2008, SCM approved the Project on the analysis of the human resources management between 2005 – August 2008 and the strategy in this area between August 2009 – 2011; this strategy was revised following a program for technical assistance financed by the EU and unfolded between December 2009 – September 2010; nevertheless, the conclusions presented are still valid, due to the short time, insufficient for the evaluation of the application of this revised strategy.

- The stabilization of the entrances into the system on a midterm area;
- Ensuring the objective, transparent, relevant, efficient and equitable feature of the means of recruitment into magistracy;
- The attraction into the system of the most valuable law graduates of each generation.

3.2 Implementation means

Regarding the first objective, the preconditions for its fulfillment are: completion and maintain updated the magistracy human resources database; the implementation of some midterm and long-term forecasts regarding the exits from the system and the development of an appropriate human resources policy.

A second set of measures aims the stabilization of the entrances into the system, so that it is permanently ensured a correct dimension of the N.I.M (costs, spaces, trainers), as well as an equitable access to the superior levels of jurisdiction, regardless of the generation. Thus, are necessary: the establishment of a realistic target (minimal and maximal number of vacancies annually), the creation of a number of tampon/reserve posts, which will allow the amortization of occasional imbalances caused by the exits from the system, a correct dimension of the number of posts opened for promotion etc.

The achievement of the third objective – the insurance of an objective, transparent, relevant, efficient and equitable feature of the means of recruitment – assumes the adoption of some measures such as:

- The limitation of the maximum number of posts which can be occupied by extraordinary recruitment means (for instance, no more than 30% of the total number of posts annually opened for competition).
- The insurance of similar standards of difficulty for the admission into magistracy, regardless of the procedure followed and the target group of candidates.
- Rethinking the examination for the admission into magistracy, such as to verify as many as possible psychological elements from the candidate's profile and the weight shown in the profile (the reduction of the weight of the tests of law knowledge and memory skills and the increment of those which test the abilities and attitudes, including general culture and linguistic competences).
- The professionalization of the development of examination subjects (establishing a theme, selection of a team of specialists who will continuously work and concluding a collaboration with them, applying these subjects in examinations, creating a database of exam subjects, development of partnerships with institutions specialized in the development of exam subjects etc).

The last objective is probably the most difficult to be achieved in the context of the immediate financial advantages that the lawyer's profession can offer for graduates and depends, without a doubt, on the improvement of the image of justice and of the material and financial conditions attached to the statute of magistrate. Among them, can be adopted other measures, such as:

- The development of long-term partnerships between the National Institute for Magistracy – law schools, which will assume promoting campaigns in universities, the possibility of training stages into magistracy for students and
- An increased transparency, objectiveness and predictability of the exam for admission into magistracy.

Conclusions

Aiming the consolidation of the integration of Romania into the “*European Area of freedom, security and justice*”, in which the preoccupations on the quality are constant and durable, the Romanian judicial system by the mechanisms offered by the human resources management is in a process of reformation and modernization, which assumes a resize of the judicial organizations so that these will be able to answer in a more efficient way to the requirements of the society, corresponding to their role to insure justice.

Though the admission into magistracy of judges and prosecutors is made by competition, based on their professional competence, skills and reputation, the recruitment means does not cover the need of personnel, nor does it insure justice above all suspicions. Even more, it is necessary a rethinking of the examinations for the admission into magistracy, so that it will test as many elements as possible from the psychological profile of the candidate and in the weight indicated by the profile, the diminution of the tests verifying law knowledge and memory skills and the appropriate increment of the test verifying abilities and aptitudes, including general knowledge and linguistic competences.

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