Appointment of Judges: Court of Justice of the European Union (CJEU)

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A. Introduction

1 In a modern democracy functioning under the rule of law, members of the judiciary are rarely able to take up office without prior scrutiny (→ Election of adjudicators; → Qualifications of adjudicators; → Appointment of adjudicators). This applies equally nowadays to the Court of Justice of the European Union (‘CJEU’) (→ European Union, Court of Justice and General Court). Pursuant to the entry into force of the Treaty of Lisbon, the liberal approach adopted at the inception of the Communities in the 1950s was subjected to significant reform. The centrepiece has been the introduction in 2010 of a special Panel, tasked to verify the suitability of candidates proposed by the governments of the Member States to perform the duties of Judge or Advocate General. The modifications that were made have sparked an intriguing dynamic.

2 Before the introduction of the novel selection mechanism, as far as known, no candidate for appointment to the Court of Justice or the General Court (formerly the Court of First Instance) ever suffered rejection. The competence of Judges and Advocates-General was generally thought to be high, albeit that no benchmarking was ever conducted either. In the eyes of the Herren der Verträge though, a practice that produced satisfactory results ought not to be considered impervious to improvement. In particular, the consecutive enlargements of the EU since the early 2000s that added over a dozen new countries, in turn substantially diversifying the CJEU’s membership, are believed to have strengthened the case for a greater vigilance. The more recent decision to double the number of Judges at the General Court from 28 to 56 reinforced the argument, so as to avert the risk that quality falls victim to (an increase in) quantity.

3 How Member States come to their individual nominations—a matter not governed by EU law—has varied, and continues to vary. In this respect, it appears a distinction can be made between countries where the pre-selection procedure is somewhat obscure but largely dominated by the executive; and countries where advisory committees have been installed as intermediaries, commanding varying degrees of influence over the eventual appointment. Multi-stage trajectories occur as well, whereby eg a pre-selection panel engages in a first scrutiny, and a further sifting or ranking exercise is undertaken at a higher level, after which the executive takes the final decision (Benizri, 2015, 382–92; Dumbrovský, Petkova, and van der Sluis, 2014, 466–81).

B. Traditional Approach

4 Between 1952 and 2010, the system for selecting and appointing Judges and Advocates General at (what is today) the Court of Justice of the European Union was neither very complicated nor very demanding. The traditional approach entailed that, whenever a vacancy arose, the government of the Member State concerned selected a suitable candidate for office. The nomination then proceeded to the conference of representatives of the Member States meeting at the level of the Council of Ministers where, as a rule, it was approved. In practice, the approval amounted to a simple rubber stamping, after a summary ex ante review by the committee of permanent representatives (‘COREPER’). This traditional setup conformed entirely to the instructions contained in Article 167 Treaty establishing the European Economic Community [1957] (subsequently Arts 167 and 168a Treaty establishing the European Community [1993]; Arts 223 and 225 Treaty establishing the European Community [2003]).
In terms of profile, said provision merely demanded that nominees be ‘chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries, or who are jurisconsults of recognised competence’. The earlier Article 32 Treaty establishing the European Coal and Steel Community [1951] set an even lower threshold, simply demanding that judges be ‘chosen from persons of recognised independence and competence’.

Key to the procedure was the idea of mutual trust. Every government enjoyed full discretion to present a candidate of its choice. At no point did a rigorous inspection take place as to whether the nominee indeed possessed the independence and qualifications prescribed. In other words: once nominated, appointment was guaranteed (Feld, 1963; de Waele, 2015).

C. Modern System

1. Legal Foundations

The modern system is premised on Article 255 Treaty on the Functioning of the EU (‘TFEU’) (2009). This provision ordains the creation of a Panel to deliver an opinion on the suitability of candidates proposed to perform the duties of Judge and Advocate General at the Court of Justice and the General Court. The setting up of such a mechanism had originally been mooted in the Due Report (Due et al, 2000), was further discussed in the Convention on the Future of Europe that drafted the Constitutional Treaty in 2002–2003, and eventually incorporated in the latter’s Article III-357. After the demise of that project, the text was salvaged and carried over into the Treaty of Lisbon (2007), entering into force on 1 December 2009. The intended Panel was then officially established on 1 March 2010, pursuant to Council Decision 2010/125/EU. The decision laying down the Panel’s operating rules was adopted in parallel, viz. Council Decision 2010/124/EU. In line with the requirements of Article 255 TFEU, both these acts were adopted on the initiative of the President of the CJEU. The operating rules charge the General Secretariat of the Council with providing administrative support including translation services to the Panel.

In 2016, the Civil Service Tribunal (‘CST’), the first and only example of the ‘specialised courts’ mentioned in Article 257 TFEU, was disbanded (Hakenberg, 2017; Vandersanden 2015; for its establishment and rules of procedure, see respectively Council Decision 2004/752/EC and Council Decision 2005/49/EC). In the short decade of its existence, the CST maintained a separate scrutiny mechanism in the form of an ‘Evaluation Committee’. Just like the Panel foreseen in Article 255 TFEU, this Committee consisted of seven members. However, it was not charged to vet candidates put forward by Member State governments. Instead, after a publicly advertised vacancy notice, it took a pick from all applications submitted by those who desired to be appointed to the CST, inviting selected individuals to an interview, and thereafter drawing up a list of the most able candidates. This Committee thus resembled the Panel for the CJEU, in a way serving as a trailblazer; yet the two differed fundamentally from each other in their modi operandi.

2. Composition of the Panel

In keeping with the text of Article 255 TFEU, the Panel comprises seven persons chosen from among former members of the Court of Justice and the General Court, members of national supreme courts and lawyers of recognized competence, one of whom is proposed by the European Parliament. The Council decides on their appointment, also indicating who is to serve as the Panel’s chair. Neither Article 255 TFEU nor Council Decision 2010/125/EU contains specific rules on gender balance, geographic criteria or other factors that must be taken into account. How suitable Panel members are identified in reality, and to what extent they are (pre-)screened themselves, is just as much shrouded in secrecy. Much has been
suggested to hinge on direct lobbying with the CJEU President (Dumbrovský, Petkova, and van der Sluis, 2014, 460), who is to draw up an exhaustive shortlist, and subsequently submit it to the Council. Decision 2014/12/EU rehearses that Panel members are appointed for four years, and that they may be reappointed once; it moreover declares that a person who is to replace a member before the expiry of that period shall be appointed for the remainder of his predecessor’s term.

10 On 25 February 2010, pursuant to Council Decision 2010/125/EU, the following persons were appointed to serve on the 255 Panel for a period of four years: Jean-Marc Sauvé, Vice-President of the French Council of State (since 2006); Peter Jann, former Judge at the Court of Justice of the European Union (1995–2009) and before that Judge at the Austrian Constitutional Court (1976–1995); Lord Mance, Judge of the Supreme Court of the United Kingdom; Torben Melchior, former President of the Danish Supreme Court (2004–2010); Péter Paczolay, (then) President of the Hungarian Constitutional Court; Ana Palacio Vallelersundi, Member of the Spanish Council of State, former Spanish minister, and former Member of the European Parliament (1994–2002); Virpi Tilli, former Judge at the Court of First Instance of the European Union (1995–2009). Mr Sauvé was designated President.

11 With the expiry of the mandate of the first équipe close at hand, on 11 February 2014, pursuant to Council Decision 2014/76/EU, the following persons were appointed to the second incarnation of the 255 Panel: Jean-Marc Sauvé, Lord Mance, and Péter Paczolay, as before; Luigi Berlinguer, former Member of the European Parliament and former Italian minister; Pauliine Koskelo, then President of the Finnish Supreme Court (2005–2015), presently Judge at the European Court of Human Rights; Christiaan Timmermans, former Judge at the Court of Justice (2000–2010); Andreas Voßkuhle, President of the German Federal Constitutional Court (since 2010). Mr Sauvé was once again designated as the Panel’s President. On 27 January 2016, Mr Paczolay resigned from office. On 29 February 2016, Mr Miroslaw Wyrzykowski, former Judge of the Polish Constitutional Court, was appointed as his replacement (Council Decision 2016/296/EU).

12 With Council Decision 2017/2262, the Panel underwent its most radical transformation so far. From 1 March 2018, it would be composed as follows: Mr Christiaan Timmermans, Mr Andreas Voßkuhle, and Mr Miroslaw Wyrzykowski, as before; Mr Simon Bussutil, Member of the Maltese Parliament (since 2013), former Member of the European Parliament (2004–2013); Mr Frank Clarke, Chief Justice of Ireland; Mr Carlos Lesmes Serrano, President of the Spanish Supreme Court and President of the Spanish General Council of the Judiciary; Ms Maria Eugénia Martins de Nazaré Ribeiro, former Judge at the General Court (2003–2016). Mr Timmermans was simultaneously anointed as the new chair, in place of the retiring Mr Sauvé.

13 These brief inventories expose that the composition of the Panel clearly tilts towards senior members of national judiciaries, to the detriment of their junior colleagues and/or lawyers of recognized competence who, according to Article 255 TFEU, might also have been considered. Nevertheless, at both counts, the official recruitment criteria were faithfully met. Moreover, with all corners of the EU covered, a basic geographic equilibrium was attained in 2010 and 2014, as well as in 2018. Equally justifiable was the decision to reappoint four panellists in 2014 and three in 2018, in the interest of continuity.

3. Modus Operandi

14 The operating rules of the Panel indicate that Member State governments, once they have selected their nominee, are to send their proposal to the General Secretariat of the Council. The General Secretariat then forwards this proposal to the President of the Panel. If it wishes, the Panel can request the government to submit extra information or proffer
other materials. Yet, it possesses no self-standing powers of investigation, and is thus dependent on the latter’s voluntary cooperation.

15 At this stage, where it concerns candidatures for a first term of office, particular account is taken of the essential reasons which led the government to propose the candidate; the letter from the candidate explaining the reasons for the application; a bibliographic list of works (if any) published by the candidate; the text of recent publications, of which the candidate is the author, written in or translated into English or French; information on the national procedure that led to the candidate being selected; other works published by the candidate, if publicly available. Whenever any of these elements, bar the last one, are not included in the dossier submitted, the standard practice of the Panel has become to ask the government of the Member State concerned to supplement it. Should any unfavourable or potentially damaging facts come to the Panel members’ attention, these are never taken for granted, but always discussed with the Member State government and/or the candidate himself (First Activity Report, 2011, 6).

16 Unless the procedure pertains to the reappointment of a Judge or Advocate General, an interview constitutes the centrepiece of the entire parcours. The Panel’s operating rules stipulate that this hearing takes place in private. Suggestions to open up these sessions to the broader public have been mooted during the deliberations of the Discussion Circle on the Court of Justice at the European Convention, but were ultimately rejected in order to protect the candidate’s privacy (see Final Report of the Discussion Circle on the Court, 2003). The interview lasts one hour, whereby the first ten minutes are reserved for a short presentation by the nominee that may be conducted in any of the official languages of the EU. Next, the Panel members pose questions on various aspects related to his/her candidacy, either in English or in French. Thereby, the interviewee is expressly invited to respond in the language in which the question was asked, yet he/she may still resort to answering in any other official EU language. When the procedure concerns a candidate for renewal, the nomination is only evaluated on paper at a Panel meeting (First Activity Report, 2011, 5; Fifth Activity Report, 2018, 19).

17 As the operating rules declare categorically, all deliberations take place in camera. Once the Panel members have formulated their reasoned opinion on the candidate’s suitability, it is communicated to the representatives of the Member State governments. If so desired, the Presidency of the Council may call upon the Panel’s President to elaborate on the decision before the Member States’ representatives. For the rest, the opinion is kept confidential. The Panel has concluded from Article 4 of Regulation 1049/2001/EC, in conjunction with the judgement of the Court in the Bavarian Lager case (Commission v The Bavarian Lager Co Ltd, 2010), that its opinions on individual candidates should be principally qualified as personal data; their content ought therefore not be disseminated to a wider audience. By way of compensation, the Panel has moved to publish periodic reports on its activities. In addition, its members deliver various talks and publications that are thought to offer insight on its working methods and proceedings. Furthermore, since the documents pertaining to governments’ nominations to the panel are more easily retrievable, whenever a second candidate is put forward, one can easily infer that the first candidate did not make the grade.

18 The operating rules fix a quorum for the decision-making, determining that meetings of the Panel are only valid if at least five of its members are present. Interestingly, nothing is stipulated for situations of deadlock, eg in a scenario when five members show up, one of them abstains, and consequently, the votes in favour and against the proposed candidate turn out to be equally divided. This could be perceived as a rejection, since the candidate did not garner a majority. At the same time, the vote cast by the President might be attributed a double weight (Karpenstein, 2018). Therewith, the ayes could outnumber the
nays (or vice versa). However, such an approach falls short if the President himself were to be the person who chose to abstain. Another conundrum threatens to arise if six members show up, one of them abstains, and three turn out to favour the proposed candidate, while the other two reject him. Though in this scenario, once again, the basic quorum has been attained, it might seem awkward that the person elected did not obtain an overall majority. Though such situations are undoubtedly very rare, it is unknown how they would be addressed in practice.

19 The Panel’s meeting frequency, detailed in the various Activity Reports, follows a natural cycle. It corresponds to the periodic replacement of Judges at the Court of Justice and the General Court, as dictated by Article 253, Article 254 TFEU, and Article 9 of the Statute (ie every three years). On average, this leads to the Panel suffering a heavy workload every two years out of three. A surplus convening of the members is only necessary in the uncommon situations of judicial mandates being terminated prematurely, because of voluntary retirement, compulsory dismissal or death. The recent structural reform at the General Court, increasing the latter’s membership from 28 to 56, led to a rare temporary spike (Fifth Activity Report, 2018, 7).

4. Criteria Applied

20 The operating rules do not elaborate on the criteria that are to be used when assessing a candidate’s suitability for office. Primary EU law provides the most general of yardsticks. As regards the Court of Justice, Article 253 TFEU demands that the Judges and Advocates-General are chosen from ‘persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries, or who are jurisconsults of recognised competence’ (a phrase originally derived from the Statute of the International Court of Justice (→ International Court of Justice (ICJ))). Article 254 TFEU requires that members of the General Court be chosen from ‘persons whose independence is beyond doubt and who possess the ability required for appointment to high judicial office’. No nationality criterion is included, so that theoretically, non-EU citizens might be deemed eligible as well (Kennedy, 1996, 69; contra Feld, 1963, 37).

21 The Activity Reports reveal that, when evaluating a candidate’s suitability, the Panel has in practice concentrated on six aspects:

1. his/her legal expertise, demonstrating a real capacity for analysis and reflection upon the conditions and mechanisms of the application of EU law;

2. having acquired professional experience at the appropriate level of at least twenty years for appointment to the Court of Justice, and at least twelve to fifteen years for appointment to the General Court;

3. possessing the general ability to perform the duties of a judge;

4. the presence of solid guarantees of independence and impartiality;

5. knowledge of languages;

6. aptitude for working as part of a team in an international environment in which several legal systems are represented (see eg First Activity Report, 2011, 7; Fourth Activity Report, 2017, 23–24).
Of late, a seventh criterion was added, focusing on the physical capacity of candidates to carry out duties which, given their highly demanding nature, require good health (Fifth Activity Report, 2018, 22).

More incidentally, a substantial adaptability factor is stressed: all candidates are expected to show that they possess the capacity ‘to make an effective personal contribution, after a period of adjustment of a number of months, rather than a number of years, to the judicial role for which they are being considered’ (Third Activity Report, 2014, 7; Fourth Activity Report, 2017, 26).

Mastery of French, despite being the CJEU’s internal working language, is not seen as crucial: in the eyes of the Panel, the linguistic skills of the nominee are not decisive for obtaining a favourable decision (First Activity Report, 2011, 9). Conversely though, if a candidate displays a manifest deficiency in any one of the aforementioned elements, this may trigger a negative outcome. Not taken into account at all are gender considerations, a desire to strike a balance between different professional backgrounds, or the need to secure the presence of a specific legal expertise—for allegedly, these elements go beyond the limits of the mandate conferred (Sauvé, 2013, 117).

5. Place within the Institutional Framework

Articles 253 and 254 TFEU, listing the contemporary requirements for appointment as Judge or Advocate General, clearly prescribe that the Panel is consulted before the representatives of the national governments take their decision. However, the provision does not declare the Panel’s opinion to be legally binding. At first blush, this suggests that the procedure possesses a largely ceremonial or ritual character, with the Member States (at least on paper) retaining a full mastery over the process. The only thing that would seem to be legally off-limits is a bypassing of the Panel altogether; not seeking its advice, and following the traditional approach instead (ie a government directly presenting his candidate to the other Member States). After all, the mandatory nature of the consultation stands beyond doubt. At the same time, since the Panel opinion is itself not legally binding, it may ad libitum be ignored or brushed aside (Wegener, 2016; Huber, 2018; Karpenstein, 2018). Arguably, it may for that reason not be the subject of an action for annulment either (compare Commission of the European Communities v Council of the European Communities (ERTA), 1971, para 39).

Despite the Panel opinion not being legally binding, it appears difficult for the representative of an individual Member State to reject or downplay a negative verdict on the eligibility of its candidate. Articles 253 and 254 TFEU stipulate that the ‘common accord of the governments’ is necessary for appointment. When the panel has issued an unfavourable opinion, the effect is thus a disqualification of the nominee that will require unanimity in order to be overruled. Moreover, the predominant sentiment could well be that the appointment of any such candidate damages the credibility and effective functioning of the Courts. Besides, the whole idea behind the introduction of a prior scrutiny by professionals would go to waste if their eventual conclusions were to be habitually disregarded. The governments are unlikely to erode the arrangement in that way, having deliberately outsourced a share of their own responsibilities. Conversely, once a Member State acquiesces to an unfavourable verdict on its nominee, it is henceforth unlikely to let disqualified candidates proposed by other Member States slip through the net. The scenario in which it would stick with the disqualified nominee, insist on appointment and block all decisions until then cannot be ruled out (Hartley, 2014, 78), yet hardly chimes with diplomatic courtesy. It has meanwhile been disproven in reality, when one Member State
ultimately gave in, after first refusing to withdraw its candidate for a couple of months (Dumbrovský, Petkova, and van der Sluis, 2014, 476).

26 In sum, whereas the Panel theoretically finds itself in a weak and ineffective institutional position, it actually exerts a most significant influence. The practical dynamics and prisoners’ dilemmas that spring from the unanimity rule have handed it a de facto → veto power. The ensuing reverse consensus rule somewhat resembles the setup at the WTO’s Dispute Settlement Body (→ World Trade Organization, Dispute Settlement), where the report of a panel or the Appellate Body can also only be overturned when all the ‘political overlords’ so desire. As a consequence, the once unassailable prerogatives of the appointers have undergone a notable devaluation.

6. Output and Impact

27 The Panel has been actively discharging itself of the entrusted task since its inception. The periodic Activity Reports provide useful insight with regard to the number of meetings, assessments made, and the favourable or unfavourable nature thereof. Between 2010 and 2018, the Panel delivered 147 opinions (Third Activity Report, 2014, 8; Fourth Activity Report, 2017, 11; Fifth Activity Report, 2018, 8). Of these, 14 were negative. With regard to the motives underpinning the verdicts, the principle of confidentiality holds sway. Clues are nevertheless dropped occasionally, with the Panel eg pointing to an instance where a candidate’s length of high-level professional experience was found to be uncomfortably short, a drawback that was not compensated for by exceptional or extraordinary legal expertise (Second Activity Report, 2012, 14). In another dossier, a nominee displayed a complete absence of any professional experience relevant to EU law. The Panel also issued a negative advice at a moment when it had the impression that the legal abilities of the nominee were inadequate—prompting it to stress that all candidates ought to be capable of demonstrating that they have sufficient knowledge of the Union’s legal system, and a sufficient grasp of the broad issues relating to the application of EU law, as well as the relationships between legal systems (Third Activity Report, 2014, 20).

28 While there exists no fixed timeframe within which the Panel is bound to come up with its advice, between 2010 and 2013 it has managed to do so within a period that averaged 64 days. Roughly 61 per cent of the assessments were wrapped up within a span of 45 to 90 days, and in roughly 30 per cent of cases within a span of less than 45 days. The remaining 9 per cent took more than 90 days (Third Activity Report, 2014, 10). Between 2014 and 2018, the average time that was needed rose to 85 days. 46 per cent of the assessments were wrapped up within a span of 45 to 90 days, and 21 per cent within a span of fewer than 45 days. The remaining 33 per cent took more than 90 days. No detailed explanations are given for these increases but the total number of files handled will likely have been a relevant factor. The longest examination periods are generally attributed to inertia from the side of some governments on the one hand (Second Activity Report, 2012, 7), and premature nominations on the other (Fourth Activity Report, 2017, 13).

29 Underscoring the Panel’s clout, characterizable as a de facto veto power, the negative opinions it produced have hitherto all been heeded by the Member States’ governments. Prima facie, it might look as if only 10 per cent of the nominations ended in rejection. Since 74 of the 147 assessments made between 2010 and 2018 concerned renewals however, the more pertinent rejection rate based on first-time nominees comes to roughly 20 per cent (Third Activity Report, 2014, 8; Fifth Activity Report, 2018, 12). From this perspective, the new mechanism can be considered forceful and highly effective, living up to the intended ‘filtering’ objective. Simultaneously, the relatively high number of persons turned down may give one pause: for one thing, it suggests that the national pre-selection procedures are anything but infallible. On a positive note, the dossiers that ended in failure have already
stimulated a change of approach in a number of countries, so as to minimize the risk of future disqualifications (Dumbrovský, Petkova, and van der Sluis, 2014, 457).

D. Appraisal

1. Merits and Strengths

The merits and strengths of the modern system for appointing Judges and Advocates General at the CJEU are almost self-evident. To begin with, it entails a thorough assessment of the competences of proposed magistrates, where previously there existed nothing of the kind. As noted, the traditional approach was premised on mutual trust but that could not prevent unsuitable candidates from being appointed to office (Jacobs, 2000, 24). The modern system ensures a judiciary of the expected quality, virtually guaranteeing that the members of the EU Courts meet the formal requirements specified in Articles 253 and 254 TFEU. The essential, concomitant trait of judicial independence is safeguarded now better than ever before (Karpenstein, 2018). Furthermore, although the opinions are not disclosed themselves, the novel setup has led to increased transparency, inter alia through the periodic reports published by the Panel, and the miscellaneous documents surrounding the nomination trajectory (Wegener, 2018). Last but not least, breaking with the previous (executive-dominated) approach, a small dose of democracy has been injected into the process, by virtue of the fact that the Parliament gets to nominate one panellist. This has added a modicum of legitimacy to the eventual appointments.

2. Weaknesses and Shortcomings

In the studies conducted on the modern system in recent years, four elements have repeatedly been labelled as weaknesses or shortcomings and singled out for critique. The first pertains to the criteria that are applied, the second to the procedure’s democratic credentials, the third to the role of national governments, and the fourth to the measure of transparency.

For starters, objections have been lodged against the Panel’s decision to more precisely define the criteria mentioned in Articles 253 and 254 TFEU. Authors hereby point to the exhaustiveness of the criteria included in the Treaty, arguing that in its supposed elaboration, the Panel created wholly new conditions (von Bogdandy and Krenn, 2015, 173–74). It should be noted though that the seven sub-criteria distilled by the Panel do not stray very far. Six of these have meanwhile been validated by the EU legislator (Regulation 2015/2422/EU, Preamble, 7). At a more general level, it is flagged that both the Panel and EU law itself neglects to differentiate between prospective Judges on the one hand and Advocates General on the other. Ostensibly, identical qualifications are required to function in either capacity. It has been advanced that this does not recognize the particular qualities germane to the respective offices, and that this aberration ought to be corrected as well (Bobek, 2015, 291–92). Similarly conspicuous by their absence are considerations with regard to gender. The procedure before the Panel offers it no leeway to pick and choose candidates that ensure a balanced composition of the EU Courts (→ Representativeness of international adjudicatory bodies). Indeed, attaching value to the gender of the nominee goes beyond its official mandate, as well as the criteria laid down in Article 253 and 254 TFEU. Nonetheless, this situation sits uneasily with 21st century views of sound human resource management (Petkova, 2015). By the same token, the balance within the Panel itself could be deemed rather skewed. Only three females have been included so far, during their term always outnumbered six to one by male colleagues: Ms Ana Palacio (2010–2014), Ms Pauliine Koskelo (2014–2018), and Ms Maria Eugénia Martins de Nazaré Ribeiro (since 2018). On both counts, under the current regime, the responsibility to ensure an equal presence of women and men lies with the Member States. While the legal rules continue to
pay no attention to the gender dimension, inter alia the Parliament makes repeated calls for greater diligence in this respect (Bradley, 2018, 250).

33 A second string of comments has been directed towards the democratic credentials of the modern system. The general hesitation concerns the overly technocratic nature of the process, leaving little or no room to depart from the conclusions of the Panel and offering no forum for broader debate on the make-up and needs of the CJEU. Here also, the Parliament has repeatedly asked to be given a greater say (Arnull, 2006, 21). To be sure, the argument is not one for a wholesale politicization but for a meaningful involvement of representative bodies in the selection and appointment process (Kelemen, 2015, 258–59; von Bogdandy and Krenn, 2015, 176–77). The question that still lingers here is how to best organize such meaningful involvement. Various scholars believe that the contemporary setup may well be as good as it gets (de Waele, 2017, 206). Some emphasize that the procedure at the Council of Europe (→ Election of judges: European Court of Human Rights (ECHR)), marked by unpredictable, sometimes acrimonious discussions in the Parliamentary Assembly, does not necessarily constitute an attractive alternative template (Kosar, 2015; Lemmens, 2015).

34 A third line of critique asserts that the modern appointment regime at the CJEU still does not offer enough safeguards for judicial independence. After all, the Member States continue to be in the driver’s seat, presenting persons that have earned their confidence—but how the latter did so can still be nebulous, despite the tangible improvements in the domestic approaches of some countries. The situation is compounded by the relatively short period of office (six years), coupled with the (unlimited) possibility for reappointment—entailing that sitting judges might adapt their behaviour to retain the favour of their government (Torres Pérez, 2015, 199; Weiler, 2013, 251–52; Hartley, 2014, 78; Weiler, 2017, 665–68). These critics display a remarkable lack of trust in the ability of the Panel to pierce through this veil and gauge whether the criterion of independence, and its sibling, impartiality, are met. If the Panel is not considered competent to do so, one does wonder who or what would be. Moreover, the argument carries greater force with regard to Advocates General, since it is only in this office that an individual position becomes visible to the outside world. At the CJEU, Judges always participate in rulings collectively and no practice of concurring or dissenting opinions exists. Above all, the changes that some regard as necessary here would have to be made to the tenure and renewal regime rather than to the modern appointment procedure.

35 Although the novel regime brought with it a notable increase of transparency, a final complaint is that the regime remains overly opaque. This translates into two desiderata, viz. that the hearings conducted by the Panel are made generally accessible, and that its opinions become available to a wider readership. The rationale is that judicial quality need not just be present but also be seen to be present. In close conjunction, the greater openness here is said to result in an enhanced authority of the appointees and thus of the CJEU itself (Alemanno, 2015, 202–21). As regards the principle to let all interviews take place in camera, however, a key interest has been to secure the privacy of the candidates. Additionally, the arrangement is thought to facilitate frankness of conversation, obviating the need for excessively diplomatic answers (Torres Pérez, 2015, 196). A kindred, earlier proposal to organize hearings with nominees before the Parliament was rejected for undermining judicial independence (Arnull, 2006, 21). Similar grounds underpin the nondisclosure of the Panel opinions with reference to the legal imperative to protect personal data. A further objective is to avoid a chilling effect, ie discouraging people from letting their name go forward due to risk of being rejected, which may potentially cause reputational damage. Those advocating a broader access and general dissemination adduce a variety of responses, opining inter alia that the legal reasons for maintaining confidentiality are flawed (Alemanno, 2015, 213–14), that those seeking to occupy high
judicial offices should be able to cope with a certain degree of public scrutiny (von Bogdandy and Krenn, 2015, 179), and that solutions can be worked out that do not disproportionately affect the right to privacy (Torres Pérez, 2015, 197–98). By and large, the pros and cons of a greater transparency would seem to be evenly matched. In any case, at least in the short term, no changes are foreseen to the current regime on this front either.

E. Potential for Reform

36 In light of the criticisms expressed, the modern system for the appointing of judges at the CJEU harbours an undeniable reform potential. Even when attempts to address the (alleged) shortcomings are likely to stir up new problems in turn, several leads have already been sketched that deserve a cursory, tentative exploration.

37 In 2015, a rapporteur of the Parliament recommended the establishment of a committee of experts to analyse the overall workings of justice in the EU and formulate suggestions for improvement. To his mind, that committee could thereby take into account, inter alia: the possibility to recruit judges through open tender from amongst reputable law professors and judges from Member State high courts; the imposition of a non-renewable, nine-year tenure; the contemporary importance of gender parity (Marinho e Pinto, 2015). While the idea has not yet received any follow-up, it is fit for revival at forthcoming rounds of EU Treaty amendment.

38 Focusing on the actual appointment decision, counter to what one might assume to be the inevitable default rule, the supreme power in this regard need not necessarily rest with national governments. Elsewhere, it is eg also bestowed onto an independent recruitment body composed of peers—a setup often referred to as ‘judicial self-government’. As regards the preceding selection phase, breaking with the principle of individual proposals from Member States would neuter the importance of a candidate’s origin. Nationality may then still play a role in the eventual choice viz. to ensure a geographic balance in a broader sense, but alongside other, no less pertinent criteria. Open recruitment through tender was already practiced at the Civil Service Tribunal before its dissolution. The Unified Patent Court proceeds likewise, mainly on the basis of merit (Stjerna, 2017, 190). These experiences evince a certain tolerance towards genuinely supranational, non-representative judiciaries (but compare Hakenberg, 2017, 169–70). On that footing, the EU’s least dangerous branch might yet undergo a more profound reform.

F. Conclusion

39 The modernization of the procedure for appointments to the Court of Justice of the European Union could have boiled down to the introduction of a paper tiger. On the contrary, an effective screening system was installed that has made a more objective review possible, especially in comparison to the previous setup that left more room for subjective preferences and considerations. Before, the process proved extremely straightforward but vulnerable to political pressures, shady motives and undue interference (Jacobs, 2000, 24). At the same time, the changes made in 2010 were hardly large-scale or wildly revolutionary. Moreover, the modern system is not free from weaknesses and shortcomings—some pressing, some largely academic. Still, the Panel has proven successful in the performance of its main task and nowadays manifestly performs the intended filtering function. It was never meant to usurp the national governments’ prerogatives anyway but merely facilitate their decision-making. Thus, the Member States have not entirely lost their sovereign discretion.
For a complete picture, we should lastly not overlook the cardinal role of legal secretaries. Every Judge and Advocate General at the CJEU commands a cabinet consisting of several such référendaires (→ Référendaire: Court of Justice of the European Union (CJEU)), relying to a lesser or greater extent on their efforts and talents (Gervasoni, 2008; Streho, 2017). Consequently, the value of the screening by the Panel should be placed in perspective when the persons scrutinized do not always get around to writing judgments themselves but supervise clerks and reflect on their inputs instead. Tellingly, the productivity and output of a member of the CJEU are said to correlate most strongly with the number and competence of the available support staff (Dehousse and Marsicola, 2016, 47–64; Alemanno and Pech, 2017, 160–65). The upshot is that even nominees the Panel only grudgingly approved of could eventually build up a satisfactory track record during their term of office. Conversely, of course, this cannot rescue proposed members of the Court that fail to make the grade at all.

Cited Bibliography


**Further Bibliography**


Cited Documents


Cited Cases

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