CHAPTER 10

Belonging to a Club That Accepts You as One of Its Members: Some Further Thoughts on the Modern Procedure for Selection and Appointment as Judge or Advocate General

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§10.01 INTRODUCTION

In neither national, international nor supranational jurisdictions does there exist uniformity or consensus with regard to the methods for selection and appointment of members of the judiciary. Countless variations may be observed, grand as well as subtle – ranging from entirely open recruitment strategies to less manifest 'direct tapping', and from elaborate scrutiny procedures to more marginal suitability assessments. The lack of agreement on how judges are best recruited could well explain the frequency with which controversies arise. The reader is *inter alia* reminded of famous disputes in the context of the US Supreme Court,[1] recent quarrelling at the World Trade Organization (WTO) on the non-renewal of tenure of members of the Appellate Body,[2]

* This contribution formulates further thoughts that build on my 'Not Quite the Bed that Procrustes Built – Dissecting the Mechanism for Selecting Judges at the Court of Justice of the European Union', in: Michal Bobek (ed.), *Selecting Europe's Judges – A Critical Review of the Appointment Procedures to the European Courts* 24-50 (Oxford University Press 2015).

1. *See* e.g. Bruce Ackerman, *The Stealth Revolution, Continued*, 28 London Review of Books 18 (2006).
2. *See* Arman Sarvarian & Filippo Fontanelli, *The USA and Re-Appointment at the WTO: A 'Legitimacy Crisis'?*, http://www.ejiltalk.org/the-usa-and-re-appointment-at-the-wto-a-legitimacy-crisis (accessed 14 June 2017).

or recurring disputes within the Council of Europe on nominations for the European Court of Human Rights.[3]

In contrast, it seems that the Court of Justice of the European Union (CJEU) has stood out as an institution where these matters proceed gently, with only little acrimony or debate – which might explain why the relevant procedure failed to attract much academic attention so far.[4] A salient innovation introduced in 2010 suggests however that, even here, politicians came to believe that the approach adhered to up until then could no longer be maintained and that even a practice that produced satisfactory results should not be considered impervious to further improvement.

At present, the dust has still not sufficiently settled on the novel framework to draw up a comprehensive inquiry, or develop and test advanced theories of efficacy.[5] The extinguishing of the separate mechanism set up for the Civil Service Tribunal, in the wake of the dissolution of the latter, underscores that the EU architecture remains subject to change.[6] The expansion of the empirical body of knowledge, especially with regard to the Panel created to evaluate candidates for appointment to the Court of Justice and the General Court, is, however, undeniable; and because of its entrenchment in primary law, the future of that body looks certain to be more stable.[7] It does, therefore, appear warranted to engage in a more modest appraisal of the *nouvelle méthode*, thereby taking on board the first scholarly insights, comments, and impressions, outlining where we currently stand and what further progress (if any) could possibly be made.

It has been argued that the challenge facing the Union courts today is more qualitative than quantitative in nature.[8] That qualitative challenge extends to the personal domain: for a smooth day-to-day operation, obviously, the right people need to be put to task. This presupposes, at every level, an adequate monitoring and

3. *See* e.g. David Kosař, 'Selecting Strasbourg Judges – A Critique', in: Michal Bobek (ed.), *Selecting Europe's Judges – A Critical Review of the Appointment Procedures to the European Courts*, 149-156 (Oxford University Press 2015).
4. *See* Werner Feld, *The Judges of the Court of Justice of the European Communities*, 9 Villanova Law Review 37 (1963); L. Neville Brown & Tom Kennedy, *Brown & Jacobs – The Court of Justice of the European Communities* 44-52 (Sweet & Maxwell 2000); Sally J. Kenney, *Breaking the Silence: Gender Mainstreaming and The Composition of the European Court of Justice*, 10 Feminist Legal Studies 257 (2002); Anthony Arnull, *The European Union and its Court of Justice* 10-25 (2nd edition, Oxford University Press 2006); Iyiola Solanke, *Diversity and Independence in the European Court of Justice*, 15 Columbia Journal of European Law 89 (2009); Thomas Dumbrovský, Bilyana Petkova & Marijn van der Sluis, *Judicial Appointments: The Article 255 TFEU Advisory Panel and Selection Procedures in the Member States* 51 *Common Market Law Review* 460 (2014).
5. Similarly Michal Bobek, 'Epilogue – Searching for the European Hercules' in: Michal Bobek (ed.), *Selecting Europe's Judges – A Critical Review of the Appointment Procedures to the European Courts* 280 (Oxford University Press 2015).
6. Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union, O.J. [2015] L 341/14.
7. But cf. Bobek, *supra* n. 5, 287.
8. Alberto Alemanno & Laurent Pech, 'Reform of the EU's Court System: Why a More Accountable – Not A Larger – Court Is The Way Forward', http://verfassungsblog.de/reform-of-the-eus-court-system-why-a-more-accountable-not-a-larger-court-is-the-way-forward (accessed 14 June 2017).

safeguards on the influx in terms of human resources. With the introduction of the Panel pursuant to Article 255 of the Treaty on the Functioning of the EU (TFEU), that monitoring and those safeguards have duly been installed, so that there would actually seem to be less cause for concern. In terms of quantity though, with the size of the General Court rising to 56, alongside a Court of Justice comprising 28, the eventual prospect is a daunting total of 84 judges and 11 advocates general. Upon the expiry of their mandate, these 95 will all have to be replaced or approved for a new term. Potential difficulties may thus not only flow from the need to ensure quality in itself, but also very well materialise because of the sheer numbers the body entrusted with the prior screening will need to contend with. Hence, whether it is capable of rising to that challenge deserves to be explored as well.

Before plunging in, one slightly heretical remark is best expressed at this stage already. It is a fact of common knowledge that in reality some members of the Court profit considerably from, and occasionally rely excessively on, the zeal and acumen of their legal secretaries. Consequently, the importance of the prior screening should be placed in perspective, when the persons that are scrutinised do not get round to writing judgments, but in most cases limit themselves to supervising their clerks and reflecting on their submissions.[9] At least the productivity, but probably also the material quality of the work, could then be more closely linked to the number and competence of the support staff – enabling even nominees that failed to impress the selectors to boast a decent track record during their term of office. In this light, perhaps the issues addressed below are ultimately not so pressing, with the real question that ought to be investigated pertaining to the recruitment of this invisible college of assistants and the acceptability of their presence and involvement.[10]

On the other hand, while surely questionable, this state of affairs cannot tempt us to conclude that 'anything goes' with regard to (the standards that are to be met by) the Court's official members. For the institution to enjoy legitimacy, the latter do not just have to be competent, but that competence has to be verified as well – justifying an analysis of the verification mechanism.

The chapter is structured as follows. First, section §10.02 offers a general examination of the selection and appointment process, highlighting how it evolved over time, as well as its present functioning. This is followed by a review of the selected elements that are thought to leave the new mechanism vulnerable to critique, namely, the criteria applied, its democratic credentials, the role of national governments, and the (perceived) lack of transparency in section §10.03. Section §10.04 engages in a

9. Some 150 *référendaires* were employed at the CJEU in 2015, with drafting, deciding, and editing often being placed in entirely different hands; *see*, extensively, Mathilde Cohen, 'Judges of Hostages? Sitting at the Court of Justice of the European Union and the European Court of Human Rights', in: Bill Davies & Fernanda Nicola (eds), *European Law Stories* 58-80 (Cambridge University Press 2017).
10. Research is scarce; *see* e.g. Stéphane Gervasoni, 'Des référendaires et de la magistrature communautaire', in: François Alabrune et al., *État souverain dans le monde d'aujourd'hui: Mélanges en l'honneur de Jean-Pierre Puissochet*; Martin Johansson, 'Les référendaires de la Cour de justice des Communautés européennes: hommes et femmes de l'ombre?', *Revue des affaires européennes* 2007-2008, pp. 563-568.

tentative sketch of a radically alternative design. We wrap up with some concluding reflections in section §10.05.

§10.02 THE PROCEDURE FOR SELECTION AND APPOINTMENT: OUT WITH THE OLD, IN WITH THE NEW

For almost sixty years, during the entire lifespan of the European Communities and the first years of the European Union, the system for selecting and appointing judges and advocates general at the Court of Justice was neither very complicated nor very demanding. Member States were expected – and trusted – to come up with a suitable candidate whenever a vacancy arose. The nomination was forwarded to the Council, where as a rule it was approved.[11] There is no record of anyone ever being rejected; so once nominated, appointment was guaranteed. No inspection took place whether those selected had been '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'.[12]

The year 2010 marks a watershed, when the novel Article 255 TFEU, introduced by the Lisbon Treaty in December 2009, sparked the creation of a panel that was henceforth to produce 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 idea had originally been mooted in the Due Report of 2000.[13] After further conferrals at the Convention on the Future of Europe (2002-2003), the suggestion was incorporated in Article III-357 of the stillborn Constitutional Treaty. It ended up in its eventual successor, Article 255 TFEU. The Panel was officially established on 1 March 2010, pursuant to a decision of the Council of 25 February 2010.[14]

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 recognised competence, one of whom has been proposed by the European Parliament. After conducting the necessary investigations (including a possible interview), they draft a collective opinion on the merits of the proposed candidate. Blazing

11. Officially submitted to what is called the 'Conference of the Representatives of the Governments of the Member States'; in practice, the Committee of Permanent Representatives (Coreper) ensures prior approval.
12. Article 167 TEEC, later Article 223 TEC, now Article 253 TFEU.
13. Ole Due et al., *Report by the Working Party on the Future of the European Communities' Court System*, January 2000, http://ec.europa.eu/dgs/legal_service/pdf/due_en.pdf at 56 (accessed 14 June 2017), at 56.
14. Council Decision 2010/125/EU of 25 February 2010 appointing the members of the panel provided for in Article 255 of the Treaty on the Functioning of the European Union, O.J. [2010] L 50/20. The decision laying down the Panel's operating rules was adopted simultaneously: Council Decision 2010/124/EU of 25 February 2010 relating to the operating rules of the panel provided for in Article 255 of the Treaty on the Functioning of the European Union, O.J. [2010] L 50/18. In line with the terms of Article 255 TFEU, both decisions were taken on the initiative of the President of the Court of Justice; *see* Vassilios Skouris, 'Recommendation Concerning the Composition of the Panel Provided for in Article 255 TFEU', Brussels, 2 February 2010, 5932/10 JUR 57 INST 26 COUR 13.

a trail for this new creation, a similar body was set up in 2005, in order to facilitate the selection of judges for the Union's Civil Service Tribunal (CST).[15] This so-called Evaluation Committee, disbanded in 2016, consisted of seven members of reputable provenance, but did not 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 the selected individuals for an interview, and thereafter drawing up a list of most suitable candidates. Whereas the Panel resembled the Committee, they thus differed greatly from one another in their modus operandi.

Since the Panel is only to be consulted before the Member States may proceed to the appointment phase, they have at least on paper retained a full mastery of the process. Bypassing the Panel and following the old-fashioned route instead, i.e. a government proposing his candidate directly to the Council, would represent an egregious violation though, for Articles 253 and 254 TFEU place the mandatory character of the consultation beyond doubt. Nevertheless, the opinion delivered by the Panel is not officially legally binding. In theory, it may therefore be ignored or brushed aside without consequence.[16] Naturally, the Panel would serve little purpose if its advice was to be regularly disregarded, but the fact remains that the Council is not formally bound to follow it through. At the same time, if an individual Member State attempts to ignore or downplay a negative opinion on the eligibility of its own candidate, in reality the chances may be slim that the required 'common accord of the governments' can be procured; in that sorority, the predominant feeling will probably be that the appointment of an unqualified person is bound to damage the credibility and effective functioning of the Courts.[17] What is more, having happily outsourced a share of their own responsibilities to the Panel, they are likely to be ill-disposed to erode the whole arrangement in that way. Finally, once a Member State acquiesces to an unfavourable verdict from the Panel on its nominee, it is henceforth unlikely to let disqualified candidates proposed by other Member States slip through the net.[18] In sum, while theoretically the Panel finds itself in a weak and potentially most ungrateful institutional position, it exerts significant political influence nevertheless. In actual

15. Its creation was set out in the Annex to Council Decision 2004/752/EC, Euratom, of 2 November 2004 establishing the European Union Civil Service Tribunal, O.J. [2004] L 333/7; its operating rules were laid down in the Annex to Council Decision 2005/49/EC concerning the operating rules of the committee provided for in Article 3(3) of Annex I to the Protocol to the Statute of the Court of Justice, O.J. [2005] L 21/13.
16. Conversely, nominees or Member States that disapprove of the Panel decision are unable to turn to the General Court seeking the annulment thereof; after all, pursuant to Article 263 TFEU, that action requires a Union measure intended to produce legal effects vis-à-vis third parties, which is lacking here. *See* Case 22/70 *Commission v. Council* (ERTA), *ECLI*:EU:C:1971:32; Case 60/81 *International Business Machines Corporation v. Commission, ECLI*:EU:C:*1981*:264.
17. Jean-Marc Sauvé, 'Le rôle du comité 255 dans le sélection du juge de l'Union', in Allan Rosas, Egils Levits and Yves Bot (eds), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law – La Cour de Justice et la Construction de l'Europe: Analyses et Perspectives de Soixante Ans de Jurisprudence* 102-103 (Asser Press/Springer 2013); Bo Vesterdorf, *La nomination des juges de la Cour de Justice de l'Union européenne*, 47 Cahiers de droit européen 607 (2012).
18. Bobek, *supra* n. 5, 287.

practice, since its negative assessments can only be overturned through unanimity, the convoluted dynamics and prisoners' dilemmas that spring from the unanimity rule have de facto handed it a veto power. This sizeably diminished the once unassailable prerogative of the governments.

Underscoring the foregoing assertions, up until 2016, the Panel delivered ten negative opinions which have all been heeded.[19] With regard to appointments at the Civil Service Tribunal, the Council experienced a similar marginalisation; devoid of the power to select a candidate from the very beginning, on the whole, it faithfully resigned itself to rubber-stamping the names of the candidates put forward by the Evaluation Committee.[20] Moreover, the installation of the Panel induced multiple governments to recalibrate their national approaches for identifying and deciding on their nominees, in order to avoid disqualification at the supranational level.[21] From this perspective, the novelty introduced by the Lisbon Treaty can be labelled a complete success.

The further reforms that are on the cards, in particular the enlargement of the General Court foreseen to be completed in 2019, pose notable risks for the future though. So far, the new approach seems to have imposed no excessive strain on the Panel or the Committee, which were able to reach their unequivocal conclusions in a few dozen meetings. As flagged above, the total membership of the Court as an institution is set to rise to a staggering 95. With the dissolution the Evaluation Committee concomitant to the Civil Service Tribunal, the scrutiny process is placed in the exclusive hands of the Panel. The latter comprises just seven persons, most of them holding supremely responsible offices.[22] There is anyhow a natural limit to the number of times per year such a body can be convened. This raises the serious question if, in the face of an inevitable increase in the frequency with which persons need be vetted for (re)appointment to the CJEU, the current constellation still proves adequate. Only up to an extent is the burgeoning workload likely to be countered by optimising the Panel's working methods. Of course, the problem can definitely be considered minor, in light of other matters that have to be addressed with greater urgency. Yet, to

19. *See* the overview in the *Third Activity Report of the Panel provided for by Article 255 of the Treaty on the Functioning of the European Union*, http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-02/rapport-c-255-en.pdf (accessed 14 June 2017; hereinafter: Third Activity Report), as well as Renaud Dehousse, 'The Reform of the EU Courts (II)', Egmont Paper 83/2016, at 53.
20. *See* Georges Vandersanden, 'The Real Test – How To Contribute To a Better Justice: The Experience of the Civil Service Tribunal', in: Michal Bobek (ed.), *Selecting Europe's Judges – A Critical Review of the Appointment Procedures to the European Courts* 86-94 (Oxford University Press 2015). In 2011, the Council did deviate from the proposal by refusing the reappointment of three sitting judges, in favour of fresh ones.
21. Dumbrovský, Petkova & Van der Sluis, *supra* n. 4, at 466-481, offer a detailed review.
22. For the 2014-2018 period, it consists of Jean-Marc Sauvé, Vice-President of the French Council of State; Lord Mance, Judge of the Supreme Court of the United Kingdom; Péter Paczolay, ambassador of Hungary in Rome, and former President of the Hungarian Constitutional Court; Luigi Berlinguer, Member of the European Parliament and former Italian minister; Pauliine Koskelo, Judge at the European Court of Human Rights; Christiaan Timmermans, former Judge at the Court of Justice; Andreas Voßkuhle, President of the German Federal Constitutional Court. *See* Council Decision 2014/76/EU of 11 February 2014 appointing the members of the panel provided for in Article 255 of the Treaty on the Functioning of the European Union [2014] O.J. L 41/18, Article 1.

guarantee a stable future for the new mechanism and a continuation of the present success story, a Treaty amendment would be perfectly justified that allows for additional appointments to the Panel. This could already turn out to be necessary on relatively short notice.

§10.03 SOME (ALLEGED) WEAKNESSES AND SHORTCOMINGS

The number of publications devoted to the new judicial selection architecture is growing equally quickly. Therein, four elements have been repeatedly singled out for critique. When intending to advance the scholarship on the topic, we can hardly afford to sidestep those (often critical) reflections. They warrant a separate, searching analysis instead. For that reason, in the paragraphs below, assessments are made of, respectively, the suitability criteria as operationalised by the Panel (section §10.03[A]); the democratic credentials of the selection and appointment process (§10.03[B]); the role of national governments and its impact on judicial independence (§10.03[C]); the perceived (lack of) transparency (§10.03[D]).

[A] The Criteria for Suitability and Their Operationalisation

Whereas the Lisbon Treaty enjoined the establishing of the Panel, it refrained from beefing up the criteria for taking up office. For the Court of Justice, Article 253 TFEU continued to demand 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.[23] In line with Article 254 TFEU, to the General Court can only be admitted persons whose independence is beyond doubt, and who possess the ability required for appointment to high judicial office.[24] The Treaties leave it there.[25] The Panel nevertheless ventured to 'more clearly and precisely explain' the conditions listed in Articles 253 and 254, expounding that its scrutiny encompasses six aspects: 1) a candidate's legal expertise, demonstrating a real capacity for analysis and reflection upon the conditions and mechanisms of the application of EU law; 2) the candidate 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) the candidate possessing the general ability to perform the duties of a judge; 4) the presence of solid guarantees of independence and

23. These requirements were originally derived from the Statute of the International Court of Justice; *see* Antonin Cohen, '"Ten Majestic Figures in Long Amaranth Robes": The Formation of the Court of Justice of the European Communities', in: Antoine Vauchez & Bruno de Witte (eds), *Lawyering Europe – European Law as a Transnational Social Field* 30 (Hart Publishing 2013).
24. The Lisbon Treaty inserted the adjective 'high'. Most remarkable here is the (continuing) omission of the phrase 'in their respective countries'.
25. Article 19 TEU containing merely a rehearsal of the foregoing.

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.[26]

Doubts have been expressed with regard to the appropriateness of this 'fleshing out'. More than one author has pointed to the exhaustiveness of the criteria included in the TFEU, arguing that in its supposed elaboration, the Panel in fact created wholly new conditions.[27] The objection could appear a bit far-fetched, however, since the Treaty conditions are extremely terse, rendering it difficult to carry out an in-depth assessment on that basis alone. Besides, the six distilled criteria do not stray very far, and in themselves make very good sense. What is more, they have meanwhile been validated by the EU legislator.[28]

A bone of contention remains nevertheless how much experience candidates must have acquired in order to stand a chance of passing muster, whereby the Panel conveyed the impression that the bar lies at twenty years of 'high-level duties' for taking up office at the Court of Justice.[29] Yet, there is little evidence that this requirement is applied overly rigorously, especially when other redeeming or compensatory achievements can be presented. All the same, there are perhaps sound reasons to invert the customary practice that holds the Court of Justice in higher esteem than the General Court, and to acknowledge that there is a greater need for experienced candidates at the General Court – since the latter deals with rules, facts and a myriad of technical aspects, whereas the Court of Justice can afford to focus on the law, and often take its cue from the status quo in the domestic legal order.[30]

The possession of specialised knowledge has hitherto not featured prominently in the evaluations undertaken by the Panel, nor is there currently (according to its President) an explicit mandate for attaching much weight to that factor.[31] In principle, this can be applauded, as it keeps the CJEU accessible to generalists, ensures its versatility, and prevents it from mutating into an unwieldy collection of *connoisseurs*. Again, the doubling in size of the General Court and the abolition of the Civil Service Tribunal do challenge the nested assertions. At 56 members, for the sake of consistency, the minds might finally warm to the thought of creating specialised chambers, e.g. for competition, VAT or trademark cases. With the absorption of a panel dedicated to EU staff cases, that accumulated expertise must not go to waste either. Of course, history shows that a lot of 'training on the job' has taken place, enabling new

26. 'Activity Report of the Panel provided for in Article 255 of the Treaty on the Functioning of the European Union', Brussels, 11 February 2011, 6509/11, COUR 3 JUR 57, at 6-9 (hereinafter: First Activity Report). In the margins of the Third Activity Report (*supra* n. 19, p. 7), a substantial adaptability factor is stressed as well: 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'.
27. *See* e.g. Armin von Bogdandy & Christoph Krenn, 'On the Democratic Legitimacy of Europe's Judges – A Principled and Comparative Reconstruction of the Selection Procedures', in Michal Bobek (ed.), *Selecting Europe's Judges – A Critical Review of the Appointment Procedures to the European Courts* 173-174 (Oxford University Press 2015).
28. Regulation (EU, Euratom) 2015/2422 (*supra*, n. 6), point 7 of the Preamble.
29. *See* discussion in Bobek, *supra* n. 5, at 300-303.
30. Renaud Dehousse, 'The Reform of the EU Courts (I) – The Need of a Management Approach', Egmont Paper 53/2011, at 17.
31. Sauvé, *supra* n. 17, 117.

appointees to gradually expand their grasp of different subjects, aided by well-versed peers. Nonetheless, the EU Courts were smaller in the past, and the risk of fragmentation/divergence is, in comparison, becoming much greater. This strongly militates in favour of specialisation *ab initio*. In addition, time constraints are nowadays much more severe, hampering the possibilities for 'training on the job'. Besides, back then the wish to promote specialisation amounted to a glorious pipe dream, as there simply existed no opportunity for a preliminary probing of candidates. Since in the modern selection process, it *has* become possible to pay attention to (looming) special needs, the criteria of expertise and experience deserve to be specified and delineated accordingly.[32]

Remarkably, no distinction is drawn, in EU law nor in the Panels' activities, between judges and advocates general. Apparently, identical qualifications are believed required to function in either capacity. As everyone familiar with the Court will agree, this verges on the absurd. It has rightly been advanced that this situation ought to change as well.[33] The easiest solution would be to tailor the Panel's criteria to the office concerned.

One would perhaps expect a mastery of French to be of critical importance, given that it is the CJEU's internal working language. The Panel has however stated that for a favourable decision, the linguistic skills of the nominee are not considered decisive.[34] That statement may be welcomed, as specific demands in this regard risk to narrow the circle of suitable candidates disproportionally. At the same time, it would be unwise for appointees to (have to) rely too heavily on clerks and translators. Support staff should not exercise undue influence in deliberations and decisions.[35] Surely fluency is too much to ask; but up until the day that English is established as the Court's *lingua franca*, the nominee as well as his prospective working environment undoubtedly stand to gain from at least a basic affinity.

Lastly and maybe most controversially, conspicuous by their absence are considerations with regard to gender. On the one hand, this is perfectly logical. In contrast to the freedom awarded to the CST Evaluation Committee, the procedure before the Panel offers no leeway to pick and choose candidates that ensure a balanced composition of the EU Courts overall.[36] Indeed, attaching value to the sex of the nominee evidently goes beyond the mandate conferred to the Panel, as well as the (sparse) criteria laid down in primary law.[37] On the other hand, this situation sits uneasily with

32. Albeit that the outcome of the process remains unfortunately binary, not handing the Panel a free choice for one more specialised candidate over another. Theoretically though, the Treaty text does offer room for individual Member States to present a shortlist, instead of just one name. For more radical proposals, *see* below, §10.04.
33. Bobek, *supra* n. 5, 291-292.
34. First Activity Report, *supra* n. 26, at 9. Cf. Bobek, *supra* n. 5, at 306-309.
35. Harrowing examples of this occurring at the CJEU offers Mathilde Cohen, *On the Linguistic Design of Multinational Courts: The French Capture*, 14 International Journal of Constitutional Law 511-512 (2016).
36. But cf. *supra*, n. 32.
37. Interestingly, despite its conservative reading of its task description, the Panel has indicated that it could take productivity into account for sitting judges nominated for reappointment (*see* First Activity Report, *supra* n. 26, at 3). Dehousse (*supra* n. 30, at 17) hails the idea: 'At the end of their mandate [judges could] present an activity report, indicating the number of settled cases

twenty-first century views of sound human resource management.[38] When the scrutiny regime itself cannot deliver, perhaps it ought to be reformed so that it can. Until that is the case, there lies a prime responsibility with the Member States, provisionally bound by a moral obligation to (pre-)select an equal number of male and female candidates.

[B] Democratic Defects?

Another string of comments has been directed towards the perceived democratic failings of the modern system. The general hesitation concerns the overly technocratic nature of the process, leaving the Council with 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. The European Parliament repeatedly asked for being given a greater say.[39] Indeed, its prerogative to nominate one Panel member does not exactly cut the mustard. To be sure, the argument is not one for a wholesale politicisation, but for a meaningful involvement of representative bodies in the selection and appointment process.[40]

The question remains how to organise the coveted 'meaningful involvement', shying away from an open election process that easily morphs into a shallow popularity contest. Without downplaying the importance of input legitimacy altogether, the output legitimacy is worthy of an equally firm underlining – and appears very tangible, as far as the functioning of the Panel is concerned. It oozes competence and authority. Its internal modus operandi comes across as fair, clever and balanced. Member States did not resist its decisions, and without exception dropped candidates that were deemed not to make the grade. Above, we flagged the academic appreciation of the Panel's operationalisation of the eligibility criteria, indicating that the problem must not be overstated, particularly in light of the subsequent endorsement by the Parliament and Council. Finally, the procedure favoured 'next door' in the Council of Europe, marked by unpredictable, occasionally acrimonious discussions in the Parliamentary Assembly, hardly constitutes an attractive alternative template.[41] Below, we

and of backlog cases. The Panel could then organise a hearing with candidates with a backlog 20% greater than the average. A dialogue could thus help to determine the causes of such a situation (which can be extremely different according to the context).' If adopted, this assessment calls for utmost caution; it may be difficult to attribute delays to a single person, and speediness in delivering justice does not guarantee quality anyway.

38. Cf. Kenney, *supra* n. 4; Bilyana Petkova, 'Spillovers in Selecting Europe's Judges: Will the Criterion of Gender Equality Make it to Luxembourg?', in: Michal Bobek (ed.), *Selecting Europe's Judges – A Critical Review of the Appointment Procedures to the European Courts* 224-229 (Oxford University Press 2015).
39. *See* Arnull, *supra* n. 4, at 21.
40. Dan Kelemen, 'Selection, Appointment, and Legitimacy – A Political Perspective', in: Michal Bobek (ed.), *Selecting Europe's Judges – A Critical Review of the Appointment Procedures to the European Courts*, 258-259 (Oxford University Press 2015); *see also* von Bogdandy & Krenn, *supra* n. 27, at 176-177.
41. *See* Kosař, *supra* n. 3; also Koen Lemmens, '(S)electing Judges for Strasbourg – A (Dis)appointing Process?', in: Michal Bobek (ed.), *Selecting Europe's Judges – A Critical Review of the Appointment Procedures to the European Courts* 94-119 (Oxford University Press 2015). Von

sketch a radical design that is, admittedly, only realistic in a fully federalised context. The underlying belief is that, at the present day and time, everything else amounts to marginal tinkering that will never manage to dispel the lingering democratic doubts.

[C] Adequate Safeguards for Judicial Independence?

We may very briefly muse on the comment that the selection and appointment process as it stands does not offer enough safeguards for judicial independence. The Member States are in the driver's seat, presenting persons that have earned their confidence – but how the latter did so can still be nebulous, despite the visible improvements in the domestic approaches of some countries.[42] The situation is exacerbated 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 curry the favour of their government.[43]

The criticism contains a core of truth, but displays a 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 wonders who or what would be.[44] Second, it urges most incisively for changes to be made to the tenure and renewal regime. In recent decades, such calls have unfortunately become a staple of legal discourse, without the *Herren der Verträge* deigning to respond.[45] Arguably then, the matter ought to be taken out of their hands entirely by installing an open procedure – a tempting idea to which we will imminently return, but one that requires the approval of those same *Herren*. Moreover, as even such a setup is not completely watertight, devising total safeguards for judicial independence might well be illusionary, regardless of the context.

[D] A Lack of Transparency?

Among learned observers, a final (vigorously shared) complaint pertains to the opacity of the selection and appointment process.[46] This complaint can be broken down into two desiderata: that the hearings conducted by the Panel are made publicly accessible,

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Bogdandy & Krenn, *supra* n. 27, at 180, argue that the EU should emulate the Council of Europe, 'but only as regards its law, not its practice' – which is easier said than done.

42. As illustrated by, e.g., Itsiq Benizri, *Justice Must Not Only Be Done, It Must Also Appear to Be Done – Selecting Judges of the Court of Justice*, 54 *Cahiers de droit européen* 365-397 (2015).
43. *See* Aida Torres Pérez, 'Can Judicial Selection Secure Judicial Independence? Constraining State Governments in Selecting International Judges', in: Michal Bobek (ed.), *Selecting Europe's Judges – A Critical Review of the Appointment Procedures to the European Courts* 199 (Oxford University Press 2015).
44. In the US, despite meticulous inquiries *ex ante*, both the appointing President and the confirming Senate have frequently been surprised by a candidate revealing his 'true colours' ex post; *see* e.g. Norman Dorsen, *The Selection of US Supreme Court Justices* 4 *International Journal of Constitutional Law* 652-663 (2006).
45. E.g. J.H.H. Weiler, 'Epilogue: Judging the Judges – Apology and Critique', in: Maurice Adams, Henri de Waele, Gert Straetmans & Johan Meeusen (eds), *Judging Europe's Judges – The Legitimacy of the Case Law of the European Court of Justice* 251-252 (Hart Publishing, 2013).
46. In part, it also takes aim at the national level; we leave that dimension aside here.

and that its Reports become available to a wider readership. The rationale of both requests is that openness advances public trust; judicial quality need not just be present, but also be seen to be present. In close conjunction, this type of greater accountability is said to result in an enhanced authority of the appointees, and thus of the Court itself.[47]

As regards the principle to let all interviews take place *in camera*, the key interest here has been to secure the privacy of the candidates.[48] Additionally, the arrangement is thought to facilitate the frankness of the conversation, obviating the need for excessively diplomatic answers.[49] An earlier proposal to organise hearings with the proposed nominees before the Parliament was moreover rejected for undermining judicial independence.[50] Similar grounds underpin the non-disclosure of the Panel report, in reference to the legal imperative to protect personal data.[51] Another objective is to avoid a chilling effect, i.e. discouraging people from letting their name go forward, due to the risk of being rejected (potentially causing reputational damage).

Those advocating a broader access and general dissemination employ a rich variety of counter-arguments, opining inter alia that the legal reasons for maintaining confidentiality are flawed;[52] that 'someone inclined to seek highest judicial office, who has a passion for the cause, should have the stomach and ability to stand a certain degree of public scrutiny';[53] adding that it may be for their own good, as it staves off wild rumours in case of failure;[54] that it above all discourages those that do not meet the necessary criteria anyway;[55] and that solutions can be worked out that do no disproportionally affect the right to privacy (e.g. broadcasting to a restricted audience, redacting the Panel opinions before release).[56]

On the whole, the pros and cons are evenly matched. Remarkably, their persuasiveness appears almost identical. The idea that public hearings and published reports are in fact to the benefit of those interviewed, does seem a bit presumptuous though. After all, in the absence of transparency, speculation on why a candidate was rejected will always remain just that – speculation. When beyond the Panel and the Council, no-one knows the exact details, unfounded and damaging nonsense can still be plausibly contradicted. Besides, it is easily overlooked that even the disclosure of

47. More extensively, *see* Alberto Alemanno, 'How Transparent is Transparent Enough? Balancing Access to Information Against Privacy in European Judicial Selections', in: Michal Bobek (ed.), *Selecting Europe's Judges – A Critical Review of the Appointment Procedures to the European Courts* 202-221 (Oxford University Press 2015).
48. 'Final Report of the Discussion Circle on the Court of Justice at the European Convention', Brussels, 25 March 2003, CONV 636/03, point 6.
49. Torres Pérez, *supra* n. 43, 196.
50. Arnull, *supra* n. 4, 21.
51. Citing Case C-28/08 P *European Commission v. The Bavarian Lager Co. Ltd*, ECLI-:EU:C:2010:378, and Article 5 of Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] O.J. L145/43.
52. Alemanno, *supra* n. 47, at 213-214.
53. Von Bogdandy & Krenn, *supra* n. 27, at 179.
54. *Ibid*.
55. Torres Pérez, *supra* n. 43, at 197-198.
56. *Ibid*.

positive opinions carries risks, since these may have been decided upon by majority; consequently, they might contain (damaging) minority observations or remarks with regard to the nominee's eligibility, which could go on to affect the latter's functioning at the Court. We should not ignore either the Panel's commitment to the regular publication of activity reports, which, albeit cursorily, do enrich our understanding of what transpired during the relevant period. Thereby, the transparency in the EU eclipses that in many other jurisdictions. Contrary to a popular assumption, the approach in the US (intense hearings at the Senate preceding confirmation of nominations to the Supreme Court) forms an exception rather than the rule. While the critics of the Union's model will be left grumbling, to the mind of the present author the uncertain advantages of more openness, as well as the unpredictability of the ramifications, are enough to caution against it.[57]

§10.04 ALTERNATIVELY …

The preceding paragraphs provoke the thought that it is nigh impossible to address the (alleged) failings of the system without conjuring up new problems. In this respect, everything may already be as good as it can possibly get. This does not mean that all downsides must be swept under a rug, nor taboos placed on thinking up alternatives. Indeed, if it were possible to start from scratch, an architect with *carte blanche* would quite probably have arrived at a radically different design.

Coming close to such a proposal, in 2015, a European Parliament rapporteur 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 the high courts of the Member States; the imposition of a non-renewable, nine-year tenure; the contemporary importance of gender parity.[58]

These intriguing suggestions do not touch upon the actual method of appointment. When contemplating the ideal model, are we to retain the usual format, i.e. approval by the Council? Or, in supposedly more democratic style, grant that prerogative to the Parliament? Or rather, hand that power to an independent recruitment body composed of peers ('judicial self-government')? Mind that the choice is not necessarily between a politicised or non-politicised approach – consider e.g. a political election

57. A request for integral access to the Panel's opinion has recently been rejected by the Council (*see* Working Party on Information, 'Public access to documents – Confirmatory application No 13/c/01/16', doc. no. 9503/16, Brussels, 6 July 2016). If this were to result in litigation, it evokes the spectre of EU judges having to rule on the disclosure of information with regard to their own qualifications…
58. Antonio Marinho e Pinto, 'Draft recommendation for second reading on the Council position at first reading with a view to the adoption of a regulation of the European Parliament and of the Council amending Protocol No. 3 on the Statute of the Court of Justice of the European Union', 09375/1/2015 – C8-0166/2015 –2011/0901B(COD), Brussels, 10 September 2015, p. 18.

whereby a decision is reached on the preferred candidate from a shortlist, after a (technocratic) verification of their qualifications.[59]

If we were anyhow to break with the principle of individual proposals from the Member States, the importance of a candidate's origin is neutered, while nationality might still play a role in the eventual choice. Arguably, this takes us not even so far from the current setup of the Treaties, which does not prevent a future Court exclusively composed of third country nationals.[60] In addition, the open recruitment through tender was successfully practiced at the Civil Service Tribunal before its dissolution. Indirectly, that practice underscores that the EU Member States are willing to tolerate a supranational judiciary that is non-representative. Consequently, we could decrease the size (albeit that the limited clout of the CST diminishes the value of the precedent). In this vision, competence gains the highest priority. Competence is also the most compelling ground for placing confidence in a dispute settlement body, instead of the primitive distrust of a bench on which not every stakeholder has a member.

If any of these proposals were ever adopted, that would herald a spectacular turn in European integration. A readiness to sculpt the 'least dangerous branch' along federal lines opens the door to other institutions (e.g. the Commission) following suit. Precisely on that footing, to be sure, the prospects of realising a radically different design are very, very dim.

§10.05 CONCLUSION

Groucho Marx famously quipped that he would not want to belong to a club that is willing to accept him as one of its members.[61] The principal mission of the EU's revised appointment and selection procedure is to make sure that not all who are proposed to join the club will inevitably be admitted. Before, the willingness to accept some that did not fit the bill signalled an inversion of Groucho's theorem. Today, only those that truly belong there deserve to be taken on board.

In previous scholarship, the Panel established pursuant to Article 255 TFEU has been rightly hailed as a triumph that has produced a notable increase of legitimacy.[62] In its previous form the process was extremely straightforward, but vulnerable to political pressures, shady motives and undue interference.[63] By and large, this has become a thing of the past – a somewhat surprising outcome, as the changes

59. As argued, it is impossible to objectively determine the 'correct' measure of transparency for each phase.
60. Cf. Tom Kennedy, 'Thirteen Russians! The Composition of the European Court of Justice', in: Angus I.L. Campbell & Meropi Voyatzi (eds), *Legal Reasoning and Judicial Interpretation of European Law. Essays in honour of Lord Mackenzie-Stuart* 69 (Trenton Publishing 1996). *Contra* Feld, *supra* n. 4, at 41, referring to the personnel statutes of the EU that stipulate that normally only nationals of the Member States can be given a permanent civil service appointment.
61. Fred R. Shapiro, *The Yale Book of Quotations* 497 (Yale University Press 2006).
62. *See* e.g. David Hadroušek & Martin Smolek, *Solving the European Union's General Court*, 40 European Law Review 194 (2015).
63. Francis G. Jacobs, 'Advocates General and Judges in the European Court of Justice: Some Personal Reflections', in: David O'Keeffe & Antonio Bavasso (eds), *Judicial Review in European*

themselves were hardly large-scale, or wildly revolutionary. With a little creativity, it is actually easier to devise major supplementary adjustments.

As illustrated in this chapter, the current system remains blemished by weaknesses and shortcomings, some pressing, some largely academic. Conversely, prognoses that the Panel would operate as a paper tiger have not come true.[64] It manifestly performed a filtering function, undoubtedly to the disappointment of more than one Member State – yet the bitter pills were obediently swallowed. At the same time, even its privacy-friendly modus operandi has not prevented the emergence of a chilling effect, apparently rendering it more difficult than before to attract capable nominees.[65] On the one hand, this seems no cause for anxiety: those who fear the Panel's evaluation in advance are perhaps unlikely to sail through the procedure anyway. On the other hand, the existence of the filter may equally deter suitable candidates who, in light of their strong credentials, resent any elaborate vetting whatsoever.[66]

A wholesome 'vertical' effect has been the recalibration of (pre)selection mechanisms in a growing number of Member States, to avoid predictable defeats at the EU level. In all likelihood, however, this has further narrowed the circle of (interested) nominees. It obliquely buttresses a plea for more care and consistency as far as renewals are concerned – for once a new member has jumped through all the new hoops and has been found acceptable to join the club, it is advisable to keep him there as long as possible. Apart from considerations of efficiency, such would also prevent suspicions with regard to judges' independence.[67] Naturally, the renewal option can itself be criticised; but as long as that option exists, it is counterproductive to write off seasoned candidates prematurely, in view of the aforementioned scarcity.[68]

A last (potentially) worrying trend could be the 'professional endogamy' phenomenon that has become visible at the Civil Service Tribunal: the recruitment of many a court member from amongst the ranks of former *référendaires*. While the warnings that this tendency risks to foment bureaucratisation are not entirely convincing, it does reinforce hostility towards magistrates basking in their supranational bubble, aloof from their Member State constituency, insufficiently rooted in the legal culture of their country of origin.[69] In the long run, the phenomenon could prove marginal, dispelling

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Law – Liber Amicorum in Honour of Lord Slynn of Hadley, at 24, notes for example how appointments of sitting judges and advocates general have mysteriously not been renewed.

64. For example, Laura Parret, *En wat met de rechtsbescherming? Het Verdrag van Lissabon en de communautaire rechter*, SEW Tijdschrift voor Europees en economisch recht 104 (2003).
65. *See* Working Party on Information, *supra* n. 57, at 18.
66. Bobek, *supra* n. 5, 304.
67. The Panel has expressed support by following a 'light' procedure for sitting judges – *see* First Activity Report, *supra* n. 26, p. 5. This lies somewhat at odds with the perceived need to conduct a thorough productivity review; compare *supra* n. 37.
68. Ironically, this argument militates against limiting tenure to one single period, since even a longer term of office (say 7-11 years) would hamper the rising through the ranks of those appointed at a relatively young age.
69. Cf. Sally J. Kenney, *Beyond Principals and Agents. Seeing Court as Organizations by Comparing Référendaires at the European Court of Justice and Law Clerks at the U.S. Supreme Court* 33 Comparative Legal Studies 595-596 (2000). More positively, Cohen, *supra* n. 9, arguing that '[h]aving learned the ropes of the institution, former bureaucrat judges are presumably in a better position to avert a staff capture'.

these (latently jingoistic) sentiments. At any rate, until the Council starts to pay serious attention to diversity, and instructs the Panel accordingly, there are both legal and ethical objections to disqualification when the official conditions for appointment have been fulfilled.

There are some who contend that no mechanism ever allows for a truly accurate appraisal of a candidate's personality and his ability to decide cases.[70] Such sceptics will challenge the claim that those now admitted to join the CJEU club are always worthy of that acceptance. The scepticism extends both to the procedure as it was, and as it is – questioning even the feasibility of future ameliorations. The present author would not venture to suggest that complete certainty on a person's fitness is ever attainable. This contribution did put forward that the safety-valve installed in 2010 has brought us a little bit closer to that ideal.

70. Leif Sevón, *La procédure de sélection des membres du TFPUE*, 20 Revue universelle des droits de l'homme 8 (2011).