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# Europe Is Looking for a Super-Judge

**Abstract.** One of the cornerstones of the rule of law is an independent, impartial, and high-quality court. It is therefore of the utmost importance that respect for the rule of law in the European Union (inclusive of its member states) be ensured by a court whose members are themselves elected in accordance with the rule of law. This means that, just as for the courts of the Member States, the ideal – which one would hope gets reflected in real-world practice in most cases – is for the Court of Justice of the European Union to be led by independent and impartial judges. Judges who are not only well-versed in their own national law but also fluent in the nuances of European Union law, are oriented toward the global legal world, display an ability to work in an international environment (encompassing several languages, most importantly French as the working language of said court), have an outstanding record of professional and scientific excellence, express themselves clearly and convincingly (both verbally and in writing), and possess impeccable moral and ethical integrity – in short, individuals who are unquestionably leaders in their field and role models for other judges. Indeed, Article 253 (1) of the Treaty on the Functioning of the European Union (TFEU) specifies that the Court of Justice's judges and Advocates General shall be chosen from among 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 lawyers of recognised competence, with appointment by common accord of the governments of the Member States for a term of six years after consulting with the panel provided for by Article 255 TFEU. Membership of the institution's General Court is similarly regulated. Accordingly, Europe is looking for super-judges and super-Advocates General for the Court of Justice of the European Union. The article gives an overview of the process involved, focusing in particular on the work of the so-called Article 255 panel.

**Keywords:** Court of Justice of the European Union, Article 255 TFEU panel, appointment of judges to international/European courts, judicial independence and impartiality

A television-series format based on the popular British show *Pop Idol* has been circulating globally for some time. The premise involves finding the best new young singer, with the winner to be rewarded with a record deal and cash. The show, which progresses through several rounds, has continued for numerous series, with versions under various names, many using words such as 'Idol', with Bulgaria's *Music Idol* being one example. Sometimes the word is in the plural (e.g., in Finland), and often it is placed alongside the name of the respective country (as with *Greek Idol*). Synonyms pointing to a shining light feature also, giving us

Turkey's *Türkstar* and novelty-focused forms such as the French *Nouvelle Star*.<sup>\*1</sup> In Iceland, meanwhile, they are trying to find an 'idolstar'. Germany, Slovakia, the Czech Republic, and Estonia all are looking for a 'superstar'. It is the title 'Estonia Is Searching for a Superstar' that inspired this article about the hunt for a bright light of jurisprudence.

Finding the best of the best to meet heightened demands is essential for developing and improving quality not only in culture and sport but in every discipline.

## 1. Why seek super-judges?

Of the European Union institutions, among which there is a democratic balance of power, the Court of Justice of the European Union (CJEU), based in Luxembourg – made up of the Court of Justice and the General Court – has one of the most significant and responsibility-heavy roles in protecting people's fundamental rights and freedoms and in upholding the rule of law.

The CJEU also plays a prominent role in the further development of European law, which sometimes entails stepping in where politicians have failed to reach a compromise irrespective of the EU's establishing treaties and fundamental European values needing to be implemented.

One of the cornerstones of the rule of law is an independent, impartial, and competent court.<sup>\*2</sup> It is therefore of the utmost importance that respect for the rule of law in the European Union (not least within its member states) be ensured by a court whose members are themselves elected in accordance with the rule of law. This means that, just as in the courts of the Member States, ideally – and, one would hope, in reality too most of the time – the CJEU should be led by independent and impartial judges. Judges who not only are well-versed in their own national law but also are fluent in the nuances of European Union law, are oriented toward the global legal world, are able to work in an international environment with the multiple languages utilised (especially the working language of the CJEU: French), have an exemplary record of professional and scientific excellence, express themselves clearly and convincingly both verbally and in writing, and have impeccable moral and ethical integrity. In short, they should indisputably be leaders in their field and role models for other judges.

Therefore, Europe is looking for super-judges and super-advocates general for the Court of Justice of the European Union.

The Court of Justice is composed of one judge from each member state of the European Union (27 states at present), assisted by 11 Advocates General, who are elected in the same way as the judges. The five most populous Member States – Germany, France, Spain, Italy, and Poland – always have the right to appoint their own Advocates General, while the other six are appointed by rotation from the other 22 states. Advocates General are jurisconsults of recognised competence who, rather than participate in the deciding on a case, provide the Court of Justice with their independent and impartial non-binding legal opinion on the case.

The General Court has two judges per Member State, for a total of 54 judges.

We are therefore talking about nearly a hundred highly qualified members of the CJEU who are simultaneously involved in the administration of justice. This is daunting even though there are not 92 gaps that need filling with new members all at once (judges and Advocates General from large Member States may be re-elected after their first term, for example).

For the work at the CJEU, which is hard but interesting, judges and Advocates General have several assistants, including a private office with advisers (*référendaires*) and a secretary (*assistants*). The conditions, including those related to salaries, are attractive for many, even if one has to leave one's home country for a while.

There is a huge burden of responsibility on both those involved in the selection process and those who are selected. The judges at the Court of Justice of the European Union (CJEU) are among Europe's most

<sup>1</sup> The information comes from the Wikipedia Web site, under a key phrase meaning 'Estonia is searching for a superstar'. 'Eesti otsib superstaari' (21 September 2023) <[https://et.wikipedia.org/wiki/Eesti\\_otsib\\_superstaari](https://et.wikipedia.org/wiki/Eesti_otsib_superstaari)> accessed 25 September 2023.

<sup>2</sup> See also J-M Sauvé, 'Les leçons du comité 255 au service d'une justice indépendante, impartiale et de qualité' in J Urbanik and A Bodnar (eds), *Law in a Time of Constitutional Crisis: Studies Offered to Miroslaw Wyrzykowski* (Warsaw, CH Beck 2021) 639. – DOI: <https://doi.org/10.5771/9783748931232-639>.

powerful political figures. CJEU judges decide hundreds of cases a year that define and enforce the rights of hundreds of millions of EU citizens and shape the rules of the world's second largest economy. It matters which judges get appointed to Europe's highest court – and how effective they are at their jobs.<sup>3</sup>

In accordance with Article 253(1) of the Treaty on the Functioning of the European Union (TFEU), the Judges and Advocates General of the Court of Justice shall be chosen from among 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 lawyers of recognised competence; they shall be appointed by common accord of the governments of the Member States for a term of six years, after consultation with the panel provided for in Article 255 TFEU hereinafter as (the) Article 255 panel or simply panel).

In accordance with Article 254 TFEU, the members of the General Court are to be persons whose independence is beyond doubt and who are qualified for appointment to **high** judicial office. They too shall be appointed by common accord of the Member States' governments, for a term of six years after consultation with the panel provided for in Article 255.

In addition, the European level features the European Court of Human Rights (ECtHR), based in Strasbourg, which elects judges for a non-renewable term of nine years (one from each member state of the Council of Europe, or 46 as of today). While this entity is extremely influential in establishing and shaping human-rights jurisprudence on a wider scale, the associated selection system is discussed in this paper only insofar as is necessary for pertinent comparison with the process for making decisions about the suitability of candidates for the CJEU.<sup>4</sup>

## 2. The Article 255 panel: who 'judges' the judges?

The selection of judges, especially for supreme and constitutional courts, is already a sensitive issue at national level, let alone in the international arena. For a long time, the appointment of judges to international tribunals was a purely diplomatic matter, left for discussion by ministers in the corridors of power, where personnel decisions, guided by the wisdom of national governments, were made behind closed doors.<sup>5</sup>

Nowadays, however, the above-mentioned CJEU and ECtHR judgements in particular are no longer rare. Neither do they purely settle disputes reaching only the higher levels of states far and wide as the classic international courts used to do. It bears reiterating that these decisions have an impact on people's day-to-day life, on democratic institutions; they resolve social conflicts and set precedents. Likewise, it is far from unimportant that these courts control and legitimise the power exercised by others, similarly to national constitutional or supreme courts.<sup>6</sup> In addition, at multinational level, they are in constant contact with the institutions of the Member States, especially the judiciary.

Paradoxically, though, judges at European level can be, on one hand, vulnerable and weak – for example, their appointment hinges on political factors internal to the Member States, while there are also issues of having to find a job and return to their home country after the end of their international term of office – while also, on the other hand, extremely influential on account of the impact of their decisions on the whole

<sup>3</sup> J Fjelstul and M Gabel, 'How Can the EU Fairly Evaluate the Job Performance of Its Judges?' (LSE European Institute EUROPP blog, 10 May 2023) <<https://blogs.lse.ac.uk/europpblog/2023/05/10/how-can-the-eu-fairly-evaluate-the-job-performance-of-its-judges/>> accessed 13 August 2023.

<sup>4</sup> The author of the article has personal experience of both the European Court of Human Rights and the CJEU: she has successfully completed the process for selection as an ECtHR judge and served nine years as a judge in Strasbourg (between 2011 and 2020); on 21 January 2021, she was elected, on the proposal of the European Parliament, as a member of the Article 255 TFEU panel for the selection of judges and Advocates General of the CJEU (with re-election for service as of 1 March 2022). This article, based on work experience, expresses the personal views of the author; the deliberations of the Article 255 TFEU panel are closed, in line with a principle to which the author of this article remains committed.

<sup>5</sup> A von Bogdandy and C Krenn, 'On the Democratic Legitimacy of Europe's Judges: A Principled and Comparative Reconstruction of the Selection Procedures' in M Bobek (ed), *Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts* (Oxford University Press 2015) 162. – DOI: <https://doi.org/10.1093/acprof:oso/9780198727781.003.0008>.

<sup>6</sup> S Besson, 'European Human Rights, Supranational Judicial Review and Democracy: Thinking outside the Judicial Box' in P Popelier, C Van de Heyning, and P Van Nuffel (eds), *Human Rights Protection in the European Legal Order: The Interaction between the European and the National Courts* (Intersentia 2011) 97.

of Europe.<sup>7</sup> In this context, the independence and impartiality of judges are indisputably important, as is the participation of independent experts in the selection of pan-European judges, experts who are keenly aware of what objective knowledge is necessary for high-quality work in the European courts.

Until 2009, the normative framework for the selection of judges and advocates general of the CJEU changed little.<sup>8</sup> Each Member State nominated its own candidate for the post of judge, while the principle ‘live and let others live’ applied to candidates nominated by other Member States.<sup>9</sup> It can be said that the system was based solely on mutual trust among the Member States. Any candidate proposed by a Member State was appointed to the CJEU almost automatically. Prior to the changes introduced by the Treaty of Lisbon<sup>10</sup>, the process of appointing judges to the CJEU had been repeatedly criticised precisely for its lack of transparency and accountability<sup>11</sup>, yet – to this very day – there has not been much academic literature on this sensitive subject.<sup>12</sup>

While its roots run deep, the need for changes to the founding treaties of the European Union in this respect did not arise overnight. It was recognised to some extent in the 1990s, with a debate about reform. Certainly, the requirements intended primarily for national judges, the application of which to international judges became increasingly recommended, had an indirect and later more direct impact. After all, basic UN principles<sup>13</sup> for the independence of judges are in place at international level, and several important Council of Europe documents, such as the Convention for the Protection of Human Rights and Fundamental Freedoms, or ECHR (specifically, Article 6)<sup>14</sup>, address these, while case-law of the European Court of Human Rights applies and interprets it. There are Recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe on judges<sup>15</sup>, the 1998 European Charter on the Law of Judges<sup>16</sup>, etc.<sup>17</sup> The opinions of the Consultative Council of European Judges (CCJE) of the Council of Europe<sup>18</sup>, among them ‘Opinion No 5’, on the law and practice of judicial appointments to the European Court of Human Rights, require separate mention. The European Union, not least via the CJEU itself, has

<sup>7</sup> M de S.-O.-l'E Lasser, *Judicial Dis-Appointments: Judicial Appointments Reform and the Rise of European Judicial Independence* (Oxford University Press 2020) 14.

<sup>8</sup> C Krenn, ‘Self-Government at the Court of Justice of the European Union: A Bedrock for Institutional Success’ (2018) 19(7) German Law Journal 2017. – DOI: <https://doi.org/10.1017/s2071832200023312>.

<sup>9</sup> H de Waele, ‘Not Quite the Bed that Procrustes Built: Dissecting the System for Selecting Judges at the Court of Justice of the European Union’ in M Bobek (ed), *Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts* (Oxford University Press 2015) 49. – DOI: <https://doi.org/10.1093/acprof:oso/9780198727781.003.0002>.

<sup>10</sup> The Intergovernmental Conference (IGC), which was tasked with drawing up the European Reform Treaty, was opened in Lisbon on 23 July 2007. The text of said treaty was approved by the Heads of State and Government meeting held in Lisbon on 18–19 October 2007, it was signed in Lisbon on 13 December of that year, and it entered into force on 1 December 2009.

<sup>11</sup> I Solanke, ‘Independence and Diversity in the European Court of Justice’ (2009) 15(1) Columbia Journal of European Law 91.

<sup>12</sup> For example, T Dumbrovský, B Petkova, and M van der Sluis tried to fill this gap. ‘Judicial Appointments: The Article 255 TFEU Advisory Panel and Selection Procedures in the Member States’ (2014) 51(2) Common Market Law Review 455, 456. – DOI: <https://doi.org/10.54648/cola2014034>.

<sup>13</sup> Principles of judicial independence approved by the United Nations General Assembly at its session of 29 November 1985. ‘Basic Principles on the Independence of the Judiciary’ (6 September 1985) <<https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-independence-judiciary>> accessed 23 August 2023; the UN Human Rights Committee’s General Comment 32 on Article 14 of the International Covenant on Civil and Political Rights (in particular, paragraph 21, according to which the court must also appear impartial to an ordinary observer), accessible online via <<https://digitallibrary.un.org/record/606075>> accessed 23 August 2023; and the Bangalore Principles of Judicial Conduct (2002) <[www.unodc.org/pdf/crime/corruption/judicial\\_group/Bangalore\\_principles.pdf](https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf)> accessed 14 August 2023.

<sup>14</sup> RT II 2010, 14, 54.

<sup>15</sup> Recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe, ‘Judges: Independence, Efficiency and Responsibilities’ (17 November 2010) <<https://rm.coe.int/cmrec-2010-12-on-independence-efficiency-responsibilities-of-judges/16809f007d>> accessed 23 August 2023.

<sup>16</sup> European Charter on the Statute for Judges, DAJ/DOC 98 (23) (1998) <<https://rm.coe.int/16807473ef>> accessed 23 August 2023.

<sup>17</sup> For example, the Council of Europe Plan of Action on Strengthening Judicial Independence and Impartiality. CM (2016) 36 final (13 April 2016) <<https://rm.coe.int/1680700285>> accessed 23 August 2023. The Venice Commission’s reports on judicial independence are certainly interesting; for further details, see J Laffranque, ‘Judicial Independence Based on the Case-Law of the European Court of Human Rights’ in A Parmas (chief ed), *Yearbook of Estonian Courts 2018* (Supreme Court 2019) 41, 57–82.

<sup>18</sup> See the CCJE Web page ‘CCJE Opinions and Magna Carta’ <<https://www.coe.int/en/web/ccje/ccje-opinions-and-magna-carta>> and Estonia-language material (from the Supreme Court Web site) <<https://www.riigikohus.ee/et/oigusalased-materjalid/rahvusvahelised-dokumendid>>; in particular, see the CCJE’s Magna Carta of Judges (2010) 3 final (17 November 2010) <<https://rm.coe.int/16807482c6>> all accessed 14 August 2023.

delineated the need for judicial independence primarily by derivation from the Treaty on European Union (TEU) and the Charter of Fundamental Rights of the European Union.<sup>\*19</sup>

Numerous factors may have influenced the need for reforms to the appointment of judges to the supranational court system: the enormous influence of the European courts, ever stricter demands for independence of judges in parallel with the tendency toward greater autonomy of the courts, self-regulation (e.g., the establishment of the Article 255 TFEU panel, discussed below, has been called an embryonic form of unintended judicial self-government)<sup>\*20</sup>, pressure from the European Parliament to make the appointment of the CJEU judges more transparent and accountable, the enlargement of Europe to the east (with the attendant increase in the number of pan-European court judges), and the 2008 economic/financial crisis interwoven with immigration issues. All of these, to a greater or lesser extent, come into play in efforts to guarantee the judges' independence not only from European political power but also from national influences.<sup>\*21</sup>

The calls to improve the expertise of judges and to limit the absolute discretion of national governments in the appointment process have therefore led to the establishment of expert panels of judges to supervise judicial candidates in both the CJEU and the ECtHR.<sup>\*22</sup>

Article 255 TFEU in its present form dates back to the Convention on the Future of Europe, which in the early 2000s prepared the draft Treaty Establishing a Constitution for Europe. Scholars have identified its impetus as fears of the rise of 'political candidates', particularly with regard to the impending enlargement of the European Union.<sup>\*23</sup>

Laying the foundations for the renewed Treaty on European Union and the TFEU, the Treaty of Lisbon, signed on 13 December 2007 and entering into force on 1 December 2009, introduced Article 255 TFEU, which states:

A panel shall be set up in order to give an opinion on candidates' suitability to perform the duties of Judge and Advocate General of the Court of Justice and the General Court before the governments of the Member States make the appointments referred to in Articles 253 and 254.

The panel shall comprise 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 shall be proposed by the European Parliament. The Council shall adopt a decision establishing the panel's operating rules and a decision appointing its members. It shall act on the initiative of the President of the Court of Justice.

That article must, of course, be viewed in the context of Articles 253 and 254 TFEU, the relevant text of which has been referred to above.

The first panel set up under Article 255 TFEU took office on 1 March 2010, immediately after the entry into force of decisions 2010/124/EU and 2010/125/EU (of 25 February 2010), by which the Council of the European Union adopted the rules of procedure, or the 'operating rules', of the panel and appointed its initial membership. In that form, it was chaired by the charismatic Jean-Marc Sauvé, then Vice-Chairman of the French Council of State, a man of outstanding leadership qualities.<sup>\*24</sup> The Article

<sup>19</sup> In particular, Article 47; see OJ C/326 (26 October 2012) 391–407.

<sup>20</sup> Literally, 'some embryonic form of unintended judicial self-government'; see, for instance, A Alemanno, 'How Transparent Is Transparent Enough? Balancing Access to Information against Privacy in European Judicial Selections' in M Bobek (ed), *Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts* (Oxford University Press 2015) 204. – DOI: <https://doi.org/10.1093/acprof:oso/9780198727781.003.0010>.

<sup>21</sup> de S.-O.-l'E Lasser (n 7) 14; Dumbrovský, Petkova, and van der Sluis (n 12) 456.

<sup>22</sup> B Petkova, 'Selecting Europe's Judges: On the Evolving Legitimacy of Appointments in Luxembourg and Strasbourg' (*Völkerrechtsblog*, 16 July 2014) <<https://voelkerrechtsblog.org/selecting-europees-judges-on-the-evolving-legitimacy-of-appointments-in-luxembourg-and-strasbourg/>> accessed 14 August 2023.

<sup>23</sup> R Barents, 'The Court of Justice in the Draft Constitution' (2004) 11(2) Maastricht Journal of European and Comparative Law 121, 139. – DOI: <https://doi.org/10.1177/1023263x0401100202>; see also T Björnsson and Y Shany, 'The Court of Justice of the European Union' in Y Shany (ed), *Assessing the Effectiveness of International Courts* (Oxford University Press 2014) 292. – DOI: <https://doi.org/10.1093/acprof:oso/9780199643295.003.0012>.

<sup>24</sup> Council Decision 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 (2010/124/EU) (27 February 2010) OJ L50 18–19; Council Decision 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 (2010/125/EU) (27 February 2010) OJ L50 20. The first composition of the Article 255 panel consisted of Jean-Marc Sauvé, Vice-President (substantive head) of the French Council of State (Conseil d'État), as President; Peter Jann, former Judge of the Court of Justice; Lord Jonathan Mance, Judge and former Deputy President of the Supreme Court of the United

255 TFEU panel is now in its fourth composition (the current one is hereinafter referred to simply as ‘the panel’).<sup>25</sup>

The panel is, in accordance with the description presented above, composed of seven members 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 shall be nominated by the European Parliament. In doing so, the latter takes into account the proposal of its Committee on Legal Affairs (JURI Committee) and Rule 128 of the Rules of Procedure of the European Parliament.<sup>26</sup> The author of this article is the first European-Parliament-nominated member of the panel who has never been a politician or a member of the European Parliament but is a judge.

The European Parliament instructs its president to forward the relevant decision on the candidate for membership of the panel to the President of the Court of Justice. The six names proposed on the president’s own initiative (comprising former members of the CJEU and judges of the supreme courts of the Member States) get submitted alongside the European-Parliament-proposed candidate’s name<sup>27</sup> to the Council of the European Union, which, in turn, takes into account the initiative of the President of the Court of Justice, as the provisions of Article 255(2) TFEU dictate. However, the above-mentioned decision of the Council of the European Union states that account should be taken of a balanced membership of the panel, both in geographic terms and in terms of representation of the legal systems of Member States.<sup>28</sup>

Critics have observed that the Court of Justice’s president holds considerable power to nominate candidates for membership of the panel (encompassing all candidates apart from the single one proposed by the European Parliament)<sup>29</sup> and that, when adopting the operating rules for the panel, the Council of the

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Kingdom, also Member of the House of Lords; Torben Melchior, former President of the Supreme Court of Denmark; Peter Paczolay, President of the Constitutional Court of Hungary; Professor Ana Palacio Vallelersundi, Spanish State Counsellor nominated by the European Parliament, herself a former Member of the European Parliament; and Virpi Tiili, former Judge of the General Court. Sauvé continued as the panel chair for the entire second four-year term, with Lord Mance and Paczolay as the other members (until the latter’s resignation, whereupon he was replaced by Miroslaw Wyrzykowski, a former Judge of the Constitutional Court of Poland). Further members of the panel during the second term were Ljuigi Berlinguer, First Vice-President of the European Parliament’s Committee on Legal Affairs; Pauliine Koskelo, a judge with the ECtHR and former President of the Supreme Court of Finland; Professor Andreas Voßkuhle, President of the Constitutional Court of the Federal Republic of Germany, and Christiaan Timmermans, former judge for the Court of Justice. The second composition was confirmed by EU Council Decision 2014/76/EU, of 11 February 2014 (see OJ L41, from 12 February 2014, 18), and commenced work on 1 March 2014.

The third composition of the panel was confirmed by Decision 2017/2262/EU of the EU Council, of 4 December 2017 (OJ L324, 8 December 2017, 50), and started its work on 1 March 2018. The original composition’s Voskkuhle, Wyrzykowski, and Timmermans remained, with Timmermans becoming the chair of the panel. Carlos Lesmes Serrano, President of the Supreme Court of Spain and the head of the Council for the Administration of Courts; Frank Clarke, President of the Supreme Court of Ireland; Maria Eugénia Martins de Nazaré Ribeiro, a former Judge of the General Court; and, per a proposal from the European Parliament, Simon Busuttil, a former Member of the European Parliament and a member of the Maltese Parliament, were added as new members. By Decision 2020/539/EU of the EU Council, of 15 April 2020 (OJ L122, from 20 April 2020, 1), upon the resignation of Timmermans, Professor Allan Rosas, former Judge and former Vice-President of the Court of Justice, was appointed as a member and also as the president of the panel. By Decision 2021/47/EU of the EU Council, of 21 January 2021 (OJ L21, from 22 January 2021, 1–2), the resignation of Busuttil was followed by the appointment of the author of this article to the panel. Both new members were appointed to serve until the end of the panel’s third term, 28 February 2022.

<sup>25</sup> The current composition of the Article 255 panel, its fourth, was approved by EU Council Decision 2021/2232, of 14 December 2021 (OJ L448, from 15 December 2021, 1). The panel has been chaired by Rosas since 1 March 2022 and continues to comprise Clarke, the author, and Ribeiro. The new members are Barbara Pořízková, Vice-President of the Supreme Administrative Court of the Czech Republic; Silvana Sciarra, a judge with the Italian Constitutional Court and its current President; and Vassilios Skouris, who served for many years as President of the Court of Justice.

<sup>26</sup> Rule 128 of the Rules of Procedure of the European Parliament, ‘Nomination of Judges and Advocates General at the Court of Justice of the European Union’, states: ‘On a proposal from the committee responsible, Parliament shall appoint its nominee to the panel of seven persons charged with scrutinising the suitability of candidates to hold the office of Judge or Advocate General of the Court of Justice and the General Court. The committee responsible shall select the nominee that it wishes to propose by holding a vote by simple majority. For that purpose, the coordinators of that committee shall establish a shortlist of candidates’. The rules as of July 2023 are accessible via <[https://www.europarl.europa.eu/doceo/document/RULES-9-2023-07-10-RULE-128\\_ET.html](https://www.europarl.europa.eu/doceo/document/RULES-9-2023-07-10-RULE-128_ET.html)> accessed 14 August 2023.

<sup>27</sup> Allegedly, several Member States lobbied hard for the appointment of their representative; see Dumbrovský, Petkova, and van der Sluis (n 12) 460.

<sup>28</sup> For example, see paragraph 3 of the preamble to the decision of the EU Council 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 (2010/125/EU) and the corresponding list in the preamble to Decision 2021/2232 of the EU Council, of 14 December 2021, in paragraph 3.

<sup>29</sup> With regard to the first composition of the panel, proposed by then President of the Court of Justice Skouris, see his recommendation to the EU Council ‘Recommendation Concerning the Composition of the Panel Provided for in Article 255 TFEU’

European Union reproduced the draft by the President of the Court of Justice nearly word for word, making only cosmetic linguistic corrections.<sup>\*30</sup>

A letter from the office of the President of the Court of Justice to the Council of the European Union from 11 January 2010 explains that its recommendations are based on the experience of the panel established under Article 3(3) of Annex I to the Protocol on the Statute of the Court of Justice. At the time, that panel drew up a list of candidates with the high-level experience most suited to fulfilling the duties of a judge with the Civil Service Tribunal.<sup>\*31</sup> That tribunal, which specialised in resolving EU civil service disputes between institutions of the European Union and their functionaries, operated from 2005 to 2016 and consisted of seven members, elected Europe-wide.<sup>\*32</sup>

Clearly, then, although the CJEU itself is not directly involved in the selection of its new members, it exerts an indirect influence on that selection<sup>\*33</sup>, in that the candidates for membership of the panel proposed by the President of the Court of Justice gain the Member States' tacit approval via the Council of the European Union. It has been stressed in the legal literature that the establishment of the Article 255 panel certainly represents a significant improvement in the selection process for the members of the CJEU: the integration of criteria connected with expertise makes sense as a contribution to thoroughly assessing the professional competence of the candidates. At the same time, some doubts have been expressed in the legal literature from the angle of democratic principles, however.<sup>\*34</sup>

At the very least, the European Parliament participates in the process indirectly by proposing a candidate for the Article 255 panel, but it acts less directly than in the case of the selection of judges for the ECtHR, where the final decision is taken by the Parliamentary Assembly of the Council of Europe (PACE), which comprises representatives of the national parliaments. The directly elected European Parliament does not participate in choosing the judges for the CJEU.

In the selection of ECtHR judges, an advisory panel of experts (officially dubbed the Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights), also established in 2010 (the seven members of which, as are the members of the Article 255 panel, are either former judges of the ECtHR or senior judges of the Member States)<sup>\*35</sup>, issues its opinion on the basis of written submissions after ascertaining whether three candidates per Member State of the Council of Europe are qualified. This is followed by a hearing of the three candidates from each Member State before the PACE special committee (officially the Committee on the Election of Judges to the European Court of Human Rights, or AS/Cdh), which, in turn, makes a recommendation as to the best candidate, submitting this to the PACE plenary session, wherein the final vote takes place.<sup>\*36</sup>

The selection of the ECtHR and CJEU judges has been characterised as '[n]oise and cooperation in Strasbourg: International parliamentarism in action' in contrast against '[s]ilence and solitude in Brussels:

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(Council Document 5932/10, 2 February 2010) <<https://data.consilium.europa.eu/doc/document/ST-5932-2010-INIT/en/pdf>> accessed 23 August 2023 and the EU Council Decision 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 (2010/125/EU). See Krenn (n 9) 2018.

<sup>30</sup> Ibid 2018; V Skouris, 'Recommendations Relating to the Operating Rules of the Panel Provided for in Article 255 TFEU' 5195/10 (11 January 2010) <<https://data.consilium.europa.eu/doc/document/ST-5195-2010-INIT/en/pdf>> accessed 14 August 2023 ('Recommendations by President Skouris'); EU Council Decision 2010/124/EU. At the same time, Article 255(2) TFEU mentions that the EU Council acts on the initiative of the President of the Court of Justice; that is to say, according to the wording of the Treaty, the President of the Court of Justice must take the initiative.

<sup>31</sup> Recommendations by President Skouris (*ibid*).

<sup>32</sup> See also G Butler, 'An Interim Post-Mortem: Specialised Courts in the EU Judicial Architecture after the Civil Service Tribunal' (2020) 17(3) *International Organizations Law Review* 586. – DOI: <https://doi.org/10.1163/15723747-2019010>.

<sup>33</sup> U Karpenstein, 'Artikel 255 AEUV' in E Grabitz, M Hilf, and M Nettesheim (eds), *Das Recht der Europäischen Union* (CH Beck 2017) comments 11–12 on art 255.

<sup>34</sup> von Bogdandy and Krenn (n 5) 174.

<sup>35</sup> To read more about the panel of experts, see Advisory Panel of Experts on Candidates for Election As Judge to the European Court of Human Rights, 'A Short Guide on the Panel's Role and the Minimum Qualifications Required of a Candidate' (Council of Europe 2020) <<https://rm.coe.int/short-guide-panel-pdf-a5-2757-1197-8497-v-1/1680a0ae31>> accessed 14 August 2023.

<sup>36</sup> For the best overview of the ECtHR procedure for selection of judges, see 'Procedure for the Election of Judges to the European Court of Human Rights' (PACE Information document SG-AS (2023) 01rev02, 25 January 2023) <<https://assembly.coe.int/LifeRay/CDH/Pdf/ProcedureElectionJudges-EN.pdf>> accessed 14 August 2023. For an example from the relevant literature, see M Pellonpää and C Grabenwarter, "High Judicial Office" and "Jurisconsult of Recognised Competence": Reflections on the Qualifications for Becoming a Judge at the Strasbourg Court' (2020) 80 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 13.

experts in charge'.<sup>37</sup> In 2013, Michal Bobek, who would later serve as Advocate General of the Court of Justice, emphasised the importance of controlling the 'point of entry' to the highest courts of Europe and highlighted the contrast between the more democratic procedure of appointment of ECtHR judges and the 'technocratic' procedure of appointment of CJEU judges, while praising the quality of the latter appointments, which has improved precisely because of the Article 255 panel.<sup>38</sup>

But it has been concluded also that the selection of judges only by qualified majority in the Council of the European Union or by a majority in the European Parliament would create a risk of getting caught up in the political maelstrom and render the legal qualifications of the candidates secondary.<sup>39</sup> Contrary to representation, judicial quality directly affects the legitimacy of individual decisions: if judges are not independent, if they are biased, or if they lack basic legal skills, their decisions are not worth the paper they are written on.<sup>40</sup>

It is not easy to strike a balance between avoiding political pressure and the emergence of a community of European judges. Ideally, though, the selection of judges should respect the principles of democracy, legitimacy, independence, impartiality, quality, transparency, and representativeness.

As of the time of writing, in 2023, three of the seven members of the Article 255 panel are former judges of the CJEU: a former President of the Court of Justice, a former Vice-President of the Court of Justice (Allan Rosas, who also acts as the committee president), and a former Judge of the General Court. The remaining four members are all judges of their state's highest courts, some of whom are from their national constitutional court, one of them being also a former judge at the ECtHR. With its current membership, the panel has a majority of women for the first time (four out of seven). In terms of geography and legal systems, Southern Europe shows the strongest representation by numbers, thanks to Italy, Portugal, and Greece. According to the EU's traditional classification, there are two members from Eastern Europe (the Czech Republic and Estonia), one from a Nordic country (Finland), and one from a common-law country (Ireland). A mere 13 years ago, the starting line-up was dominated by Western Europe. These and other aspects of the panel members' background and activities are detailed further on the panel's Web site.<sup>41</sup>

It is a great honour to be a member of the panel, a truly pan-European club of wise people – indeed the finest group of experts in EU law. While the choice of a super-judge is still limited to the potential of the Member State concerned, the members for the super-judge jury can be chosen from among the best of the best, established super-judges from all over the EU.

The members of the panel are appointed for four years. Someone replacing a member whose term of office expires before the end of that period shall be appointed for the remainder of the term of office of said predecessor.<sup>42</sup> A member of the panel may be reappointed, to serve for one further term of office.<sup>43</sup> The panel has a quorum if at least five members are present<sup>44</sup>, and it shall be chaired by one of its members, appointed to serve in this capacity by the Council of the European Union.<sup>45</sup>

The General Secretariat of the Council of the European Union provides secretarial services for the panel: the administrative assistance necessary for its work, including the translation of documents.<sup>46</sup> Members of the secretariat's staff shall receive remuneration; however, the members of the panel do not get remunerated for their work – they do it of their own free will and with their own time. The work entails considerable 'homework': before the members hear each candidate, it is necessary for them to prepare thoroughly by familiarising themselves with a large amount of written material (the nature of which is discussed in the next section of the paper). At the hearing of the candidate all members of the panel pose questions.

<sup>37</sup> von Bogdandy and Krenn (n 5) 171 and 173.

<sup>38</sup> M Bobek speaking on 4 November 2013 at the College of Europe, Bruges, in a debate on the process of appointing judges to the CJEU and the ECtHR. See 'Selecting Europe's Judges: Time for More Democratic Legitimacy?' (European Parliament Research Service, 7 November 2013) <<https://epthinktank.eu/2013/11/07/selecting-europe-s-judges-time-for-more-democratic-legitimacy/>> accessed 14 August 2023.

<sup>39</sup> Sauvé (n 2) 641.

<sup>40</sup> M van der Sluis, 'Judicial Appointments and the Right Kind of Politics' (*Völkerrechtsblog*, 21 April 2014) <<https://voelkerrechtsblog.org/judicial-appointments-and-the-right-kind-of-politics/>> accessed 15 August 2023.

<sup>41</sup> See <<https://comite255.europa.eu/en/home>> accessed 14 August 2023.

<sup>42</sup> See the panel's rule of operation, 3.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid 5.

<sup>45</sup> Ibid 6.

<sup>46</sup> Ibid 6, second and third sentences.

The system takes mobility into account. Travel expenses do get covered: the panel meets in Brussels (not Luxembourg, where the CJEU is based), and those members of the panel who have to travel there from their place of residence for performing their duties for the panel are reimbursed for this and paid a daily allowance from the budget of the Council of the European Union.<sup>\*47</sup> During the SARS-CoV-2 pandemic and beyond, some panel meetings have been held online – in cases of less extensive debate and when, for example, candidates are not being listened to.

### 3. Procedures and policy: What does the panel do?

The literature has presented the star-search panel as mysterious, not least because the Article 255 panel's deliberations are closed<sup>\*48</sup>. Although the panel gives proper and clear reasons for every opinion<sup>\*49</sup>, those decisions are communicated only to the representatives of the governments of the Member States<sup>\*50</sup>, not even to the candidates, let alone disclosed online or in other public or semi-public venues.

Such procedures and practices have given rise to conflicting opinions<sup>\*51</sup> about what constitutes sufficient transparency (i.e., how much transparency makes something ‘transparent’) and how to achieve balance between access to information and privacy in the selection of European judges.<sup>\*52</sup>

The panel itself, in response to a request for information addressed to the General Secretariat of the Council of the European Union, has stated that its opinions, in principle, fall within the scope of EU Regulation 1049/2001<sup>\*53</sup>. However, insofar as the panel forwards those opinions to the Council of the European Union, which then passes them on to the governments of the Member States, it is the council that is the custodian or possessor of the opinions.<sup>\*54</sup> In either case, the above-mentioned European Union regulation provides for certain exceptional cases in which documents are not disclosed, and the panel, relying on the relevant case-law of the Court of Justice<sup>\*55</sup>, has concluded that the disclosure of its opinions, which contain candidates' personal data, could undermine the protection of their privacy (addressed in Article 4(1) (b) of the regulation). In addition, the panel has found that full disclosure of its opinions would place the quality of the consultation with the Article 255 panel at risk and imperil both the procedure for appointing members for the CJEU and the objectives, since it would eliminate the secrecy of the deliberations. This is why opinions are addressed solely to national governments and are not subject to either direct or indirect publication. In its responses to requests for information, the panel has, therefore, communicated only what does not place the protection of personal data in jeopardy.<sup>\*56</sup> The European Ombudsman has supported this approach.<sup>\*57</sup>

<sup>47</sup> Ibid 9.

<sup>48</sup> Ibid 5, second sentence.

<sup>49</sup> Ibid 8, first and second sentence of the first paragraph.

<sup>50</sup> Ibid 8, second paragraph (third and fourth sentence).

<sup>51</sup> It is characterised by the views expressed on 4 November 2013 by the distinguished European researchers and practitioners who gathered at the College of Europe in Bruges to discuss the process for appointment of judges of the CJEU and the ECtHR. Armin von Bogdandy (from the Max Planck Institute of Public Law) called for the provisions for EU democratic principles (articles 9–12 TEU) to be applied in practice in the process of appointing judges to the CJEU, and he criticised the current procedure for lacking transparency. Alberto Alemanno (from Paris University of Economics, HEC) presented detailed legal arguments for allowing public access to the documents of the Article 255 panel. However, Sauvé (Article 255 panel chairman at the time) advocated confidentiality of the panel's activities. For further details, see Bobek's speech ‘Selecting Europe's Judges’ (n 38).

<sup>52</sup> See also Alemanno (n 20) 202–21.

<sup>53</sup> Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (31 May 2001) OJ L145 43–48.

<sup>54</sup> See ‘Seventh Activity Report of the Panel Provided for by Article 255 of the Treaty on the Functioning of the European Union’ (2022) <[https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-07/2022.2597-qcar22002enn\\_002.pdf](https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-07/2022.2597-qcar22002enn_002.pdf)> accessed 15 August 2023 (‘Seventh Activity Report’), especially page 16.

<sup>55</sup> *Commission v Bavarian Lager* (29 June 2010) ICJ C-28/08 EU:C:2010:378.

<sup>56</sup> Seventh Activity Report (n 54) 16.

<sup>57</sup> Decision of the European Ombudsman in Case 1995/2017/THH concerning the refusal of the Council of the EU to grant public access to opinions of the Council of the European Union to opinions assessing candidates for the position of Member of the Court of Justice and of the General Court (2019) 22–25 <<https://www.ombudsman.europa.eu/en/decision/en/114212>> accessed 15 August 2023.

Again, however, critics have argued that, while the lack of transparency in the functioning of the panel is aimed in part at protecting the identity of candidates, it does not achieve this end in practice, since the Member States are obliged to submit all candidates' names to the General Secretariat of the Council of the European Union. Accordingly, unsuccessful candidates are quite easy to identify via the computer network in any case.\*<sup>58</sup>

Irrespective of transparency issues, for the general public and probably also for future candidates, the periodic reporting on the activities of the Article 255 panel provides by far the most important and useful material. Each panel 'activity report' is a very useful document, which not only describes the work of the panel over the period in question but also contains detailed information on the procedures established by the panel for the evaluation of candidates, alongside details of the criteria to be applied to candidates, through descriptions of how the panel interprets the requirements laid down in the treaties on which the European Union is founded. At the time of writing, seven activity reports had been published.\*<sup>59</sup>

Arguably, Sauvé, who selflessly served as the panel's first president (for two consecutive terms) and established many of the traditions and principles of operation that have endured to the present day, is the one behind the Article 255 panel's way of working and reporting on its activities. For good reason, the panel was known as the Sauvé panel for many years.\*<sup>60</sup> He greatly increased the visibility of the panel by introducing it, writing articles, and giving presentations on the subject.\*<sup>61</sup>

The work of the panel is cyclical and aligned with the judges' terms of office. For example, between 1 October 2019 and 28 February 2022, there were 13 meetings (on average, one every two months). The largest number of meetings held in any year, from the panel's inception in 2010 through 2022, comes from 2016, when there were 11 in total. In three years – 2010, 2013, and 2021 – there were eight such meetings, while in 2011 there were only three. Meeting length varies also: these are mostly one-day meetings, but two-day meetings may be held at busier times.

Further elucidating the cycle, the panel's Web site provides a graphical depiction of the stages in the panel's work: from application, transfer of the application, examination of the dossier, interview of the candidate to reasoned opinion.\*<sup>62</sup> The work mainly includes the phase of examining the file and oral hearing. In summary, as soon as the government of a Member State submits a nomination to the Council of the European Union, the General Secretariat of the council forwards that nomination to the president of the panel\*<sup>63</sup>, which then asks the candidate for materials to inform the deliberations; after this, the members of the panel start to study the incoming written material, which can sum to dozens of pages per candidate, and form their opinion. In addition, the panel may request the proposing government to provide supplementary information (e.g., on the national application procedure) that it considers necessary for the consultation.\*<sup>64</sup> Alongside the details submitted to it, the panel may take into account objective information readily available to the public when assessing a candidate. In the event that information comes to the attention of the panel that could lead to a negative opinion on the candidate, the panel will take it into account only once the candidate and the government of the Member State concerned have had an opportunity to comment on this information.

It has always been important for the panel that the procedure be as efficient as possible and not take too long. Meetings of the panel are held when there are enough vacancies to warrant them and when the term of office of the current CJEU members is about to expire. Per data current as of the last reporting period, it has taken the panel, on average, 82 days from receipt of a nomination to issue its opinion. The process takes

<sup>58</sup> Dumbrovský, Petkova, and van der Sluis (n 12) 461.

<sup>59</sup> Hence, the Seventh Activity Report (n 54) is the most recent.

<sup>60</sup> Lord Mance, 'Jean-Marc Sauvé et le comité 255' in P Delvolvéd and others (eds), *Qu'est-ce que le bien commun ? Hommage à Jean-Marc Sauvé* (Paris, Berger-Levrault 2020) 179.

<sup>61</sup> J-M Sauvé, 'Les juges européens désormais nommés après avis d'un comité indépendant. Entretien' *Les Petites Affiches* (53) (16 March 2011) 3; J-M Sauvé, 'Qu'est-ce qu'un bon juge européen ?' *Dalloz* (19) (10 May 2011); J-M Sauvé, 'Le rôle du comité 255 dans la sélection du juge de l'Union' in A Rosas, E Levits, and Y Bot (eds), *La Cour de justice et la construction de l'Europe: Analyses et perspectives de soixante ans de jurisprudence* (Springer 2013) 99; an interview with Sauvé in the magazine *Revue de l'Union européenne* [2013] (June/569) 325 and, for instance, one of the many presentations he has given, 'La sélection des juges de l'Union européenne : la pratique du comité de l'article 255', at the colloquium Judges: A Critical Appraisal of Appointment Processes to the European Courts (College of Europe in Bruges, 4 November 2013); Sauvé (n 2).

<sup>62</sup> At [at <https://comite255.europa.eu/en/fonctionnement>](https://comite255.europa.eu/en/fonctionnement) accessed 15 August 2023.

<sup>63</sup> Operating rules of the panel 6, first sentence.

<sup>64</sup> Ibid 6, second sentence.

into account the need to allow sufficient time for the nominee to send the written documents required and, if necessary, for the panel to translate them.<sup>\*65</sup>

The panel has developed a CV in a harmonised format<sup>\*66</sup> for candidates for membership of the CJEU, which contains enough mandatory fields to ensure that the candidate's file includes all the information needed for the decision-making process: personal details, professional experience, educational background, language proficiency, data related to the proficiency required for the post, additional information on published research articles and conference presentations, and any other information the candidate considers relevant.

In addition to the CV, the candidate must submit a letter of motivation explaining their reasons for applying and, if possible, 1–3 recent scientific publications under the candidate's authorship that either were originally in English or French or have been translated into one or the other language, as appropriate. In addition to these materials, a presentation of one to three complex legal cases which the candidate has handled in their professional practice must be submitted. The latter is not to exceed five pages per case. If any of this material is missing, the panel asks for the file to be completed. However, a lack of published works or the provision of older works cannot in itself penalise a candidate.

The national government, for its part, must set out for the file the main reasons for preferring this particular candidate and describe the selection mechanism employed in the Member State.

In short, the panel decides on the basis of the following elements:

- the important reasons for which the government submitted the nomination;
- information on the national procedure under which the candidate was selected;
- a letter from the candidate that justifies the application;
- a CV in standardised (harmonized) form;
- the text of 1–3 recent publications by the candidate, written in or translated to English/French;
- a presentation of 1–3 complex judicial cases dealt with in the candidate's professional practice, not exceeding five pages per case.

Candidates usually submit three articles and solutions to three cases. Examination of these and the other written materials is followed by an oral round, which completes the body of information based on the file. To safeguard against decisions being unduly influenced by impressions gathered during personal interviews, the Sauvé panel instituted the general practice of forming a preliminary position on the basis of documentation before testing it via interviews.<sup>\*67</sup> Indeed, the interview is preceded by round-table discussion among the members of the panel, which continues after the interview, with the aim of either confirming or refuting the initial impression created through the written material about the candidate. It should be stressed that the panel's opinion is never based solely on the oral interview; it is formed in accordance with the results of analysing the candidate's entire file.

The interview lasts exactly one hour. It starts with a short introduction (about 10 minutes long) in which the candidate must, among other things, choose and present one of the above-mentioned legal issues dealt with that are related to EU law and the possible future job at issue. Candidates may speak English, French, or one of the other official languages of the European Union. In practice, the interviews are conducted in English and French, with questions testing both languages.

The introduction is followed by a 50-minute question-and-answer session with no additional preparation time for the candidate, who must immediately answer the prompt in the language in which the question was asked (either English or French). The panel may ask questions connected with the CV and request clarification, but in most cases the questions pertain to the practice of the CJEU, in aims of assessing the candidate's analysis and reasoning skills, especially in relation to EU law. Also, candidates may be asked for clarification of cases that they have helped resolve, for an opinion on topical issues of EU law, for a general overview of the state of EU law, to present their views on the dialogue between the courts (relations between the EU and the legal systems of the Member States), and (for prospective judges and Advocates General of the Court of Justice) to describe their vision of the mission of the Court of Justice. Furthermore, the candidate often is asked about the rule of law, the Charter of Fundamental Rights, and European integration. The questions are not confined to abstract and theoretical issues; they also probe the

<sup>65</sup> Seventh Activity Report (n 54) 9.

<sup>66</sup> It has been included, for example, in the seventh activity report of the panel as an example (n 54).

<sup>67</sup> Lord Mance (n 60) 182.

candidate's practical experience of EU law. In addition to specific questions, including ones arising from the candidate's written work, there are open-ended queries that provide an opportunity to prove one's potential.

After the oral hearing of the candidate, there is discussion among the members of the panel, to reach a final reasoned opinion. The explanatory memorandum on opinions of the Article 255 panel sets out the main grounds for an opinion. Lord Mance has described the 'kitchen side' of the Sauvé panel thus:

After the interviews, and once a consensus or sometimes a majority had emerged, the panel had the advantage of being able to select and work from one of two rival draft opinions developed by its president, setting out the pros and cons of the particular candidate. Every such draft received close scrutiny and often underwent considerable revision.<sup>\*68</sup>

In most cases, the panel tries to reach consensus on the suitability of the candidate. If arriving at consensus is impossible, the decision is taken by majority. However, a minority member cannot attach a dissenting opinion to the panel's opinion, and the public are not informed as to which members of the Article 255 panel may have been opposed to the candidate's appointment. A member of the panel has the option of withdrawing from the decision if having been involved personally with the candidates' affairs or associated circumstances. There is no known regulation on this recusal, but it has happened in practice.

In the next step, already mentioned, the opinion of the panel is sent to the representative of the national government. In addition, at the request of the EU Presidency, the chairman of the panel may delegate arriving at an opinion to the representatives of the governments of the Member States meeting in EU Council session<sup>\*69</sup>, since the final decision on the basis of the panel's opinion is actually taken by the governments of the Member States.

There is a separate procedure for the re-election of judges already in office with the Court of Justice and for judges of the General Court and Advocates General<sup>\*70</sup> who are eligible for re-election. That is addressed further on in the paper.

## 4. Which criteria are set, and how are they applied?

Article 255 TFEU requires the panel to give an opinion on the suitability of the candidates. In that regard, the treaty's articles 253 and 254, as referred to above, are rather succinct in terms of the requirements to be met by candidates. They state the condition of independence, firstly. In the case of judges and Advocates General of the Court of Justice, there is the criterion of either possessing the qualifications required for appointment to the highest judicial office in their respective countries or being jurisconsults of recognised competence, whereas in applying for the General Court it is sufficient to qualify for high judicial office.

The Article 255 panel has therefore enjoyed a considerable margin for manoeuvring in the content and clarification of these criteria. Though they must be closed, they are still relatively general. The panel has consistently emphasised that it considers all patterns and competencies in one's legal career to be equally legitimate in an application for membership of the CJEU, on the grounds that it is not the panel's task to participate in dictating the composition of the Court of Justice or the General Court<sup>\*71</sup>. Nevertheless, the panel's most recent activity report singled out a judge, a university professor, a lawyer, and a senior civil servant as examples of potential candidates.<sup>\*72</sup>

<sup>68</sup> Ibid 181.

<sup>69</sup> Operating rules of the panel (n 63) 8, third and fourth sentence of the second paragraph.

<sup>70</sup> As explained above, there are currently five Member States (the most populous) that have the right to appoint their own Advocates General – namely, Germany, France, Spain, Italy, and Poland. Other EU member states appoint Advocates General on a rotating basis (six Member States at a time). Each Advocate General serves for a term of six years, is eligible for reappointment, and cannot be removed during the term of office except in the event of disciplinary removal or resignation. However, given that nominations for countries that are not members of the institution of the Advocate General with permanent standing is on a rotating basis, the extensions are, in effect, limited to the five countries that can always send their own Advocates General.

<sup>71</sup> 'Activity Report of the Panel Provided for by Article 255 of the Treaty on the Functioning of the European Union' (6509/11 / (18.12) (OR. fr), 17 February 2011) <<https://data.consilium.europa.eu/doc/document/ST-6509-2011-INIT/en/pdf>> accessed 22 August 2023 ('First Activity Report') 4.

<sup>72</sup> Seventh Activity Report (n 54) 17.

The panel bases its assessment of the candidate on six considerations, which it has publicised and substantiated in its activity reports.<sup>\*73</sup> These are:

- the legal skills of the candidate;
- the candidate's professional experience;
- the ability of the candidate to perform the duties of a Judge;
- language knowledge possessed by the candidate;
- the ability of the candidate to work in an international team where multiple legal systems are represented; and
- the independence, impartiality, probity and integrity are beyond doubt.

The panel assesses all these qualities as a whole; however, a candidate's lack of one of them may lead to forming a negative opinion about that candidate. In its first activity report, the panel gave a thorough characterisation of these criteria: legal expertise, professional experience, ability to perform the duties of a Judge, assurance of independence and impartiality, language skills and aptitude for working in an international environment in which several legal systems are represented. For example, it explained that when assessing legal knowledge it takes into account candidates' discharge of high-level judicial, administrative or academic duties, university degrees (such as a doctorate) and experience of teaching or training, as well as experience as a legal expert or consultant to supreme courts or very important institutions, or participation in scientific associations devoted to the study of law.<sup>\*74</sup>

The panel cannot be tasked with testing a candidate's legal knowledge, but if, for example, it emerges during the interview that the candidate has significant gaps in legal knowledge, this may have an impact on the final result of the application. In addition to theory-based knowledge, the panel assesses specifically whether the candidate has a highly developed analytical capacity and knows under what conditions and methods the law may be applied to vital circumstances – with particular regard to, for example, the application of European Union law in the legal systems of the Member States. This is why candidates must prove that they have sufficient knowledge of EU law, that they are able to navigate the material and also to articulate coherent stances on the general issues of EU law, and that they are consistent in their answers.

The wider the range of the candidate's opinions, the greater the interest the panel will take in exploring those opinions. The candidate must be able to demonstrate a solid ability to think independently, as the panel highly appreciates originality. It is necessary, from the panel's perspective, that candidates be able to 'settle in' and contribute effectively to the work of the CJEU within a reasonable timeframe, such that they are prepared for the challenges ahead and understand the mission of the CJEU. Candidates for the position of either judge or Advocate General with the Court of Justice must demonstrate that they are capable of promoting the necessary and legitimate dialogue between the Court of Justice and the Member States' supreme courts. Candidates for the post of Judge or Advocate General of the Court of Justice are therefore expected to demonstrate very extensive legal capabilities, and candidates for the post of Judge of the General Court are expected to demonstrate extensive legal capabilities.<sup>\*75</sup>

As for professional experience, the panel shall look at its level, its nature, and the length of service. The panel has come under criticism related to whether it is possible to ascertain from the number of years whether or not someone has amassed sufficient professional experience, all the more so because, in some commentators' view at least, the panel has not expressed a very clear position on whether, for example, a full 20 years of work experience in high office is required or, instead, it is sufficient that a portion of that 20-year span consist of such work (e.g., the candidate may have been a judge of lower instances and then in recent years reached the Supreme Court).<sup>\*76</sup> At the same time, some kind of line must be drawn somewhere, and the work-experience conditions for various other important posts in the European Union are presented as fixed numbers. It is precisely with reference to the case of the European Union civil service, but also of the national practices of the Member States administration, that the panel considers that less than 20 years' experience of high-level duties for candidates for the office of Judge or Advocate General of the Court of Justice, and less than 12 or even 15 years' experience of similar duties for candidates for the office of Judge of the General Court, would be unlikely to be deemed sufficient.<sup>\*77</sup> The panel applies the general

<sup>73</sup> Ibid.

<sup>74</sup> First Activity Report (n 71) 9.

<sup>75</sup> Seventh Activity Report (n 54) 18.

<sup>76</sup> Dumbrovský, Petkova, and van der Sluis (n 12) 465.

<sup>77</sup> Seventh Activity Report (n 54) 18.

rule that candidates who do not reach this minimum are not suitable for the post in question. That said, the presumption is open to reconsideration if the candidate demonstrates exceptional legal knowledge.<sup>\*78</sup>

Of course, the panel must also take into account the traditions and circumstances of the respective Member State, the administrative practice of the relevant countries, and the peculiarities of specific judicial and university systems. For example, in Eastern European countries, it has been somewhat easier for a certain post-Communist generation to establish an ascending career in the legal profession quickly, while in many countries with common-law traditions it is more typical to become a judge only after many years of successful practice as a lawyer.

The panel also places emphasis on whether the candidate is sufficiently aware of the professional demands imposed on the members of the CJEU, including what independence and impartiality of a judge means concretely, along with the responsibilities that working as a CJEU judge requires: the workload, collegiality, and the need to make clear and well-reasoned decisions. How the candidate perceives these components can be judged by the candidate's answers, which reveal whether the individual is good at reasoning, gives clear and accurate answers, and shows sufficient authority and maturity. The skills of working with and leading a team are of no small importance either (after all, the CJEU members have their own offices and teams, which they have to manage). The same is true of computer/IT skills. Every candidate must be highly adaptable and prepared to start making a personal contribution to the work of the CJEU, preferably from a few months after the start of the work, not just several years after settling in.

Candidates must be able to express themselves in the various official languages of the European Union (ability to speak, or at least understand, a number of official languages of the European Union,) and must have the ability to acquire proficiency, within a reasonable time, in the working language of the CJEU (French) and thus be in a position to contribute to deliberations with other members of the court and take part in case hearings in that language. The latter is by no means a low hurdle, especially for candidates from newer and non-Francophone Member States.

In any case, candidates must have the ability to contribute to court debates and be able to work in an international environment with colleagues from different backgrounds and legal systems. Therefore, it is useful if they have experience of working in a European or international context.

It is certainly difficult to assess whether a candidate is independent, impartial, reliable, has integrity and probity. Still, the panel tries to make sure that there is no factor the influence of which could jeopardise these qualities in the candidate. The panel may request further information in this regard, if necessary, from the Member State.

A further issue has been raised in addition: some have asked whether, when making its choice, the Article 255 TFEU panel should not take into account any shortage of judges with a certain specialisation in the CJEU's membership, such as tax law, intellectual property law, criminal law, or labour law, since some areas of law that previously had little contact with European Union law are increasingly encompassed within the competence of the European Union.<sup>\*79</sup>

Another question raised is one of principle as to whether a career system should be favoured for connections between EU judicial bodies, à la from the 'Judicial Counsel (*référendaire*) to the President of the Court' approach, which has the advantage that, when making a choice, one could assume that a person who has worked in the system for a long time knows that system very well. At the same time, however, such conditions inevitably lead to encapsulation and stagnation – EU-level law could become the domain of a certain closed circle. The question, in other words, is how a balance can be struck such that the posts of judge and Advocate General of the Court of Justice are also open to the top players from the outside, to fresh eyes, without the General Court being a springboard, but at the same time the cross-appointment of judges between the courts of the CJEU in justified cases is not excluded, with redirection probably still occurring from the General Court to the higher court, the Court of Justice. As the requirements for a judge of the Court of Justice and the General Court are different and there are differences too in the content of the work, can it be automatically assumed that all the judges of the General Court are suitable, or should they even want to be judges of the Court of Justice at all? Would it be more reasonable for them to rotate back

<sup>78</sup> Ibid. This has rarely happened in practice.

<sup>79</sup> Damian Chalmers, with the London School of Economics, discussed this on 4 November 2013 at the College of Europe debate in Bruges pertaining to the process of appointing judges to the CJEU and the ECtHR; for further details, consult Bobek's speech 'Selecting Europe's Judges (n 38).

to their Member States, even temporarily, so as to contribute to a better understanding of European Union law in those (national) courts?

An additional important aspect is diversity in the composition of the CJEU. Should regard be given to, for example, the candidate's gender (cf. the election of ECtHR judges, wherein the national governments are compelled to present at least one candidate of underrepresented gender – so far, female – in their lists of three candidate judges for the Strasbourg court), age (for instance, there is no upper age limit for CJEU appointments as there is for the ECtHR at present), religious affiliation, or disability? Might such considerations be justified?

The rise of anti-Europeanism observed in recent years has prompted some writers to ask whether, in addition, the political philosophy of future judges should be taken into account when one is assessing how someone is represented before the Court of Justice; alongside this question, the literature has raised the issue of whether the panel might be biased in relation to views on such matters.<sup>\*80</sup> That is, should political ideology (e.g., a pro-European stance) be an important factor in the selection and appointment of the CJEU judges, or, on the contrary, should the panel exert an influence such that equality of representation in the CJEU in this regard, if possible at all, is guaranteed, in the short or long term?

After all, the Court of Justice has been regarded as one of the engines of the European Union's legal community: the guardian of the rule of law in the European Union, whose role is to act as both the constitutional and the supreme court of the European Union<sup>\*81</sup> in aims of ensuring that, among other things, the Member States respect the primacy, unity, and effectiveness of European Union law.<sup>\*82</sup> There has been talk also of European political philosophy (*la philosophie politique européenne*) as a common value.<sup>\*83</sup>

The first argument by advocates of diversity in the court's composition is that the variety of real-world personal experiences of judges from different backgrounds yields a balanced perspective for court decisions and has a substantive impact on the law. Another argument made is that even if the personal experiences of judges do not – or, some argue, should not – affect the substance of the law, the representation of underrepresented groups among the judges provides a sense of involvement and procedural fairness, which encourages more representatives of such groups to respect and utilise mechanisms of the judiciary.<sup>\*84</sup>

In the end, potential future judges' character in terms of their personal traits and personalities is probably not insignificant. Is the CJEU faceless, or, if it has a face, what is the role of its individual members in shaping that face?<sup>\*85</sup> In choosing candidates for membership of the CJEU, is it necessary to look for legends similar to former star of the US Supreme Court Ruth Bader Ginsburg, or should the CJEU have rather impersonal authority and employ experts of an even level who are not known to the public and who shall not even express a dissenting opinion anyway when remaining in the minority<sup>\*86</sup>? Must a super-judge act as a superstar, or is there both room for and indeed a need for 'ordinary' judges to shine – for each one's light to be visible in the institution's constellation as it dispatches its heavy workload?

It should not be forgotten that the judges of the CJEU promote European Union law; i.e., they must also be able to pass it on, teach it, and explain European law to the public in simple language as necessary. These efforts include communicating with the media and, most importantly of all, not only being independent and impartial in all this but giving a clear impression of being so (just as justice must be done and seen to be done). They should also not forget about humanity and empathy.

<sup>80</sup> van der Sluis (n 40).

<sup>81</sup> See also, for example, the presentation by K Lenaerts before the ECtHR titled 'The ECHR and the CJEU: Creating Synergies in the Field of Fundamental Rights Protection' (solemn hearing for the opening of the judicial year, 26 January 2018) <[https://www.echr.coe.int/documents/d/echr/Speech\\_20180126\\_Lenaerts\\_jy\\_eng](https://www.echr.coe.int/documents/d/echr/Speech_20180126_Lenaerts_jy_eng)> accessed 15 August 2023.

<sup>82</sup> On the prohibition, arising from the direct effect of EU law, of jeopardising the primacy, unity, and effectiveness of EU law in the context of Estonian law, see, for instance, Supreme Court *en banc* 5-19-29/38 (15 March 2022) 49.

<sup>83</sup> Also Sauvé (n 2) 646.

<sup>84</sup> Petkova (n 22).

<sup>85</sup> P Gragl, 'The Faceless Court? The Role of Individual CJEU Members' (2023) 30(1) Maastricht Journal of European and Comparative Law 15. – DOI: <https://doi.org/10.1177/1023263x231162771>.

<sup>86</sup> J Laffranque, 'Dissenting Opinion of a Judge: Its Possibility and Necessity in the Supreme Court of the Republic of Estonia and the European Court of Justice' (*Dissertationes iuridicae Universitatis Tartuensis* (10), Ülikooli Kirjastus) (doctoral thesis, Tartu University 2003).

## 5. Successes and problems revealed by time: where would the panel go if granted three wishes?

Sauvé himself acknowledged that the mission of the Article 255 panel seems, at first sight, limited and modest, since it cannot replace the member states of the European Union either in proposing or in appointing candidates for membership of the CJEU.<sup>87</sup> Indeed, let us not lose sight of the end goal: the purpose of the panel's opinions is to **inform** the governments of the Member States before the Member States take a decision on the appointment of judges and advocates general. The opinions of the panel are not legally binding on the Member States.

However, the panel has gained such authority that its opinions have been solidly respected by the national governments. Thus far, no candidate subject to a negative opinion from the panel has been appointed to the position in question (judge of the Court of Justice or of the General Court or Advocate General of the Court of Justice).

In rendering these opinions, the panel has made a serious contribution to strengthening the guarantees (of independence, impartiality, and high-quality knowledge and skills) for the appointment of the CJEU judges and Advocates General. In this regard, it must be borne in mind that, before appointment, any candidate for membership of the CJEU must be approved unanimously by the governments of the Member States.

For example, over the time covered by the seventh report of the Article 255 TFEU panel, it delivered opinions on 53 candidates for the post of Judge or Advocate General of the CJEU. Of these, 29 opinions pertained to the first term of office, which necessitated extensive analysis and consultation by the panel. Seven of those 29 were unfavourable. In all cases, the governments of the Member States took account of the panel's opinion.<sup>88</sup>

If we compare these figures with those from the early years of the Article 255 panel, the results seem to have been fairly stable. In the first four years of the panel, 22% of cases involved unfavourable opinions; that is, seven out of 32 candidates for the first term of office were rejected, while the corresponding figure for the second four-year period was 17%, or seven out of 41 candidates.<sup>89</sup> Between 1 March 2018 and 30 September 2019, the third panel issued, in total, 43 opinions, 29 of which were related to the first appointment. Eight in all were unfavourable; i.e., 28% of the candidates were rejected.<sup>90</sup> The larger statistical landscape, from the dozen years between 1 March 2010 and 1 March 2022, reveals that the panel has delivered 243 opinions in all (67 by the panel in its initial composition, 80 by the second panel, and 96 by the third), of which 97 concerned judges and Advocates General for the Court of Justice, 52 of which pertained to renewal of the term of office, and 146 of which concerned judges of the General Court (61 of whom considered the re-election). In total, there were 113 opinions on re-election, which leaves 130 opinions issued on new candidates: 45 on candidates for the Court of Justice and 85 on nominees for the General Court. In all, 27 of the 130 (i.e., about 21%) were negative.<sup>91</sup> The rejections of candidates have involved countries all over Europe, and rejections have encompassed candidates for judges and Advocates General of the Court of Justice and for judges of the General Court.

The panel has also delivered unfavourable opinions where the candidates' legal capabilities appeared inadequate in light of the requirements set for the office of Advocate General or for that of Judge of the Court of Justice or the General Court. Opinions of such a nature have likewise been issued where the candidate did not demonstrate sufficient knowledge of European Union law or appropriate understanding of the major issues that fall within the jurisdiction of the courts involved.

In that Advocates General have faced particularly demanding conditions, the legal abilities of weaker candidates for this position in particular were found to be actually inadequate. A similar pattern has been visible to some extent with regard to certain candidates for judges with the Court of Justice and the General

<sup>87</sup> Sauvé (n 2) 640.

<sup>88</sup> 'Appointments to the EU Court of Justice: Seventh Activity Report of the Article 255 Panel Published' (Council of the EU press release, 15 July 2022) <<https://www.consilium.europa.eu/et/press/press-releases/2022/07/15/appointments-to-the-eu-court-of-justice-seventh-activity-report-of-the-article-255-panel-published/>> accessed (25 September 2023).

<sup>89</sup> Lord Mance (n 60) 180.

<sup>90</sup> See page 8 of the sixth activity report of the Article 255 TFEU panel, available via <<https://comite255.europa.eu/en/work>> accessed 15 August 2023.

<sup>91</sup> Seventh Activity Report (n 54) 9–10.

Court; it has sometimes evidenced itself in the candidate's failure to demonstrate sufficient knowledge of European Union law (on a few occasions, there have even been gaps in basic knowledge of European law) or show an appropriate understanding of which major issues fall within CJEU jurisdiction.<sup>\*92</sup>

While the panel believes that candidates for appointment to the office Advocate General or Judge of the Court of Justice cannot be expected to possess the same capabilities as someone already holding the position in question, it also holds the view that a favourable opinion shall not be delivered in respect of any candidates unless they demonstrate that they possess the ability to make an effective personal contribution.

Both the panel and its first president personally have stressed that, while there is no desire to denigrate the skills of unsuccessful candidates in any way or underestimate their achievements, sometimes even in high positions, in 'the duties they have performed, especially in their Member State of origin [...], all candidates must be capable of demonstrating appropriately', on the basis of their file and oral statements, that their knowledge of the EU legal system is adequate and that they are able to grasp the broad issues involved in 'the application of EU law and relationships between legal systems' and to contribute to the work of the CJEU without any particular familiarisation effort and time.<sup>\*93</sup>

The panel may also express concerns as to whether a candidate's integrity and probity are beyond doubt. Since these qualities are vital in carrying out the duties of Advocate General or for a judge of the Court of Justice or the General Court, the panel issued an unfavourable opinion in a case wherein its serious doubts in this regard were not allayed over the course of the assessment procedure. Additionally, given that the candidates have had several months in which to prepare for their hearing, conduct research into EU law, and reflect on the case-law and missions of the courts of the Union, the panel is especially mindful of candidates' shortcomings with regard to these. In this context, a candidate who manifests serious inadequacies in knowledge or reasoning stands at a clear disadvantage. That said, the panel has in certain cases stated a positive opinion even where the candidate did not answer a very specific technical question but did exhibit general reasoning ability that led its members to conclude that the candidate possessed potential to perform the duties required.<sup>\*94</sup>

In contrast, no candidate nominated for re-election to either the Court of Justice or the General Court (i.e., a judge already in office) has been rejected. It is worth noting that a candidate for re-election does not get heard orally. This principle is laid down in the rules governing the operation of the panel<sup>\*95</sup>, and it is likewise noteworthy that there is no direct legal basis for such a distinction in the TFEU, since its articles 253–255 do not provide for any exceptions connected with re-election.

Correspondingly, the panel's reasoning for re-election opinions takes a briefer form.<sup>\*96</sup> One factor might be that, as literature specifically focused on this matter states, if the panel deciding on the quality or continuation of judges' work gives a negative assessment to a judge whom they initially recommended, this might be tantamount to acknowledging that it was mistaken in its original view.<sup>\*97</sup> However, the panel has explicitly stated when reporting on its activities that it does not rule out the possibility that, in certain particular circumstances, it may conclude that a judge put forward for re-election is not or is no longer capable of carrying out the functions of a judge to the necessary high or very high standard and, therefore, does not meet the requirements of Article 255 TFEU. It has clarified that, should the detailed written material prove insufficient and if doubts arise, it may choose to pose questions to the candidate put forward for re-election, if necessary by hearing that individual (in the event that the panel's examination of a candidate's activity leads it to question the individual's capacity to keep performing the requisite duties, it will ask the candidate for any explanations that said person wishes to provide, which may be done in the context of a hearing).<sup>\*98</sup>

When examining re-election cases, the panel shall request that the relevant government submit the candidate's CV, in the harmonised form defined by the panel, listing in particular published writings by

<sup>92</sup> Ibid 19.

<sup>93</sup> See also Sauvé (n 2) 643.

<sup>94</sup> Seventh Activity Report (n 54) 20.

<sup>95</sup> According to the operating rules of the panel (n 63) 7, unless the proposal is for the reappointment of a judge or an Advocate General, the panel shall hear the nominee in closed session.

<sup>96</sup> Also Sauvé (n 2) 644.

<sup>97</sup> S Cheruvu and others, 'How Do Merit Commissions Affect Judicial Behaviour? Evidence from the Court of Justice of the European Union' (2 October 2022) 2 <<https://www.joshuafelstul.com/Ffelstul-merit-commissions.pdf>> accessed 15 August 2023.

<sup>98</sup> Seventh Activity Report (n 54) 14–15.

the candidate, and shall ask the President of the Court of Justice or the General Court, as the case may be, to send the panel a list of the cases in which the candidate for re-election has participated as a judge. This list of closed cases must distinguish between judgements and orders, and it must indicate the size of the formation, the subject matter involved, and the time taken to resolve the case. The panel takes into account also the list of pending cases for which the candidates are rapporteurs. Similarly, for candidates for the office of Advocate General of the Court of Justice, the panel examines the list of cases in which the individual has delivered an opinion, again distinguishing between particular formations of the court.<sup>\*99</sup>

While an assessment of productivity may well be necessary, a metric for this is by no means easy to implement: given how many things, of varying volume and complexity, judges handle, measuring and comparing productivity in a fair manner is no easy task.<sup>\*100</sup> The panel considers it necessary to obtain additional data, therefore, to reveal how productive candidates are in comparison with other judges. For example, from 2021 onward, the panel has compared the processing time for the candidate's decisions with estimates of time spent on comparable cases, where the latter are based on indicative deadlines set by the court itself.<sup>\*101</sup> In this context, it is of the utmost importance that the Court of Justice and the General Court be co-operative in sharing information with the panel.

In the past, when an ECtHR judge was appointed for a term of six years and could be re-elected, the individual had to go through re-nomination alongside two new candidates from the same country; now, ever since the entry into force of the 14th Protocol to the ECHR (on 1 June 2010), the term of office of an ECtHR judge is nine years without the possibility of re-election.<sup>\*102</sup> A judge can still be re-elected to the CJEU, however, and this in itself creates problems of independence.<sup>\*103</sup> Still, reshaping the situation would require a change in the TFEU, which, in turn, is managed by the member states of the European Union.<sup>\*104</sup>

Re-election brings with it several issues related to the possibility of political influence. Unfortunately, the Article 255 TFEU panel has already encountered some of these. For example, in the event of a change of government, some Member States have sought without good reason to replace serving judges. On one memorable occasion, the time interval involved was extremely short – the judge appointed had been in office for only a few months when the government set out to attempt replacement. The Article 255 panel articulated the potential threats to Member States with regard to judicial independence. In response, the newly proposed candidate withdrew from consideration, and the incumbent judge continued.<sup>\*105</sup>

At this point, we can return to Sauvé's discussion of shortcomings. At the root of one of the most serious problems with the selection process is that the Member States submit only one candidate to the panel, while the equivalent procedure for ECtHR nominees obliges Member States, in accordance with the ECHR, to put forward three candidates<sup>\*106</sup> and, among other things, as discussed above, to respect gender equality in their submission of candidates.<sup>\*107</sup> The treaties of the European Union do not specify the number of candidates for any such positions. The single-candidate method leaves the Article 255 panel no point of comparison in the hearing of the candidate. Even though several candidates may be heard on the same day,

<sup>99</sup> Ibid 14–15.

<sup>100</sup> Fjelstul and Gabel (n 4), who have provided a new productivity index to measure the work done by CJEU judges.

<sup>101</sup> Seventh Activity Report (n 54) 14–15.

<sup>102</sup> Article 23(1) of the ECHR.

<sup>103</sup> For analysis of problems related to the re-election of judges to international courts, see also, for example, AF Tatham, 'Reappointment to International Courts and the Case of the EFTA Court' (2021) 20(1) *The Law & Practice of International Courts and Tribunals* 119. – DOI: <https://doi.org/10.1163/15718034-12341441>.

<sup>104</sup> Articles 253 and 254 TFEU provide that, upon ending, the term of office of a judge of the Court of Justice or of the General Court may be renewed.

<sup>105</sup> For more information, consult Lord Mance (n 60) 183–84.

<sup>106</sup> Article 22 of the ECHR, 'Election of Judges', states: 'The judges shall be elected by the Parliamentary Assembly with respect to each High Contracting Party by a majority of votes cast from a list of three candidates nominated by the High Contracting Party.'

<sup>107</sup> National selection procedures must, by a general rule, result in a list of three candidates, including at least one male and one female. A list comprising members of only one sex is acceptable if the candidates' sex is under-represented in the ECtHR (i.e., the one accounting for under 40% of the judges as of the date on which the Secretary-General of the Council of Europe invites the Government to submit a list and informs it of the current gender balance of the judges). In exceptional cases, where the government has taken all necessary and appropriate measures to ensure that the list includes candidates of both sexes, PACE may decide to consider a single-sex list even if the candidates are not of the under-represented sex (a two-thirds majority is required). See also 'Guidelines of the Committee of Ministers on the Selection of Candidates for the Post of Judge at the European Court of Human Rights' CM (29 March 2012) 40 final <[https://rm.coe.int/16805cb1ac#\\_ftn1](https://rm.coe.int/16805cb1ac#_ftn1)> accessed 15 August 2023.

they are not comparable – there is one candidate for each seat, with each country submitting a single one. The panel, then, in the words of Lord Mance, ‘must therefore evaluate candidates, one by one, not knowing, if it rejects a candidate, whether the State in question will [sic] even be able to present a better candidate the next time’.\*<sup>108</sup> The panel therefore stresses in each of its reports that, fundamentally, responsibility for appointing the CJEU judges and advocates general lies with the Member States.\*<sup>109</sup>

Regrettably, the panel’s hands do not extend far enough to assess the Member States’ choices, although that is where the whole process begins and not rarely is where central problems lie. The level of other possible candidates in the country and why they were not deemed worthy of selection may never be known to the Art 255 panel. The Article 255 TFEU panel is confined to either accepting or rejecting the sole candidate proposed by the Member State. That said, the panel does urge the Member States to remember that national selection must be open, transparent, and rigorous, meeting the requirements of independence, impartiality, and objectivity. National-level evaluation of candidates should be led by an independent and impartial panel, which should be composed of highly qualified persons – in particular, members of national supreme courts or former members of the CJEU.\*<sup>110</sup> Professional criteria must function as the basis for the assessment. Such a procedure presupposes organisation of an open competition (open call) in the relevant Member State.\*<sup>111</sup>

If the selection procedure in a Member State does not comply precisely with the principles set out by the Article 255 panel, it is for that state to ascertain whether its selection procedure affords at least equivalent guarantees – e.g., ensuring that, even if no open call was held, the candidate is an experienced and independent judge of the highest court of that Member State. If the panel does not have information on the procedure followed in the Member State, it can request it, in accordance with point 6 of its rules of operation. The panel is interested in the conclusions from the selection procedure carried out within the Member State, where such outputs exist. The panel therefore encourages each state ‘to share with it the ranking of the successful candidates in the final stage of the procedure from among whom the government made its choice, including the identity of those candidates’. Finally, it has stated that it attaches the greatest importance to Member States’ compliance with national rules, where they have been put in place, for the selection of candidates put forth to serve as a judge of the European or international courts.\*<sup>112</sup>

The panel has taken care to note that the absence of an independent and objective procedure at Member State level shall not lead to unfavourable treatment of any candidate proposed, since the national selection is the sole responsibility of the Member States and, by the same token, even a very extensive and credible national selection mechanism cannot guarantee a candidate whom the panel deems suitably qualified. Still, a proper and fair national selection procedure can help the panel overcome doubts that may arise in the course of evaluating a candidate, so it can work in the candidate’s favour.\*<sup>113</sup>

It thus becomes evident that the independence of a panel of independent experts is limited to the competence of the Member States to pre-select their own candidate, put forth a candidate, and ultimately approve the candidate. The panel’s competence does not extend to these tasks. After all, also the members of the panel ultimately are officially confirmed by the representatives of the same Member States, although it is crucial for both the President of the Court of Justice and the European Parliament to have a say in proposing the composition of the panel.

Several problematic aspects have been noted above, such as the dilemma of whether the selection of judges should have greater legitimacy in addition to the opinion of experts, the possibly disproportionate influence of the Member States in the submission and validation of a given candidate, and the restrictions imposed by the panel’s own way of operating (criticised for such elements as the denial of public access to the opinions and the failure to hear candidates for re-election).

A further issue raised in the legal literature, alluded to just above, is whether the Article 255 panel has enough freedom and independence. For instance, can it appropriately examine whether any legal basis before the Court of Justice exists for handling the vacancy that the Member States are rushing to fill – in

<sup>108</sup> Lord Mance (n 60) 181.

<sup>109</sup> See, for instance, the Seventh Activity Report (n 54) 11.

<sup>110</sup> Ibid.

<sup>111</sup> The panel notes that, from 2016 onwards, 17 Member States are conducting open competitions and in 10 countries candidates are being examined by commissions with a majority of independent and qualified members; see the Seventh Activity Report (n 54) 11.

<sup>112</sup> Ibid.

<sup>113</sup> Ibid.

other words, when the Council of the European Union has supplied the panel with a Member State's proposal for a candidate on the basis of Article 255 TFEU (e.g., a nominee for the post of Advocate General), whether the panel is obliged to evaluate that candidate in any and all circumstances or is free to decide instead that there is no basis for nominating a candidate.<sup>\*114</sup> Some jurists have concluded that the panel being able to operate in this way would contribute an essential safeguard for judicial independence and the rule of law – i.e., the principle of irremovability of judges protecting their office.<sup>\*115</sup>

Brexit ushered in a special, hitherto unique situation of this nature. Without elaboration on the host of legal issues raised by the withdrawal of the United Kingdom from the European Union, it may be noted relatively simply that at the heart of the matter was the Declaration of the Representatives of the Governments of the Member States on the consequences of the UK's withdrawal for the position of Advocate General of the Court of Justice (adopted on 29 January 2020)<sup>\*116</sup> and whether the British Advocate General, who is not directly linked to a Member State by the TFEU, had to resign immediately, with a Greek candidate put forward in that individual's place, or was instead entitled to work at the Court of Justice until the formal end of the term of office envisioned at the time of the appointment (on 6 October 2021). The Article 255 TFEU panel did not weigh in on that issue; it just assessed the substantive relevance of the application submitted to it on behalf of the Greek candidate for the post. This matter ultimately was resolved when the Court of Justice declared inadmissible the appeal brought by the former British Advocate General against the General Court judgement that had rejected the action for annulling the EU Council decision to appoint a new Advocate General.<sup>\*117</sup>

On the other hand, it is an indisputable fact that the Article 255 panel has gone much further in guaranteeing the independence of the judiciary than the Member States could have predicted when establishing the panel: The panel has created the ideal of a European super-judge, in the development of the criteria for which it has established itself *vis-à-vis* the Member States. It has also made demands of the Member States with regard to the national selection procedure, *inter alia* having formulated the condition that, in the ideal scenario, an open competition with independent selection procedure should be held for finding a candidate. Finally, the panel has dared to produce a significant number of opinions oriented toward rejecting unsuitable candidates.<sup>\*118</sup>

The Article 255 TFEU panel has carried out its tasks effectively and comprehensively. Analysing the first experiences, both on the basis of the reports on the panel's activities and in light of some solid legal literature<sup>\*119</sup>, one can be satisfied with the result.

Certainly, the panel is a success story of sorts – although no-one has directly investigated what any super-judges found by the panel have accomplished in the CJEU (while this can be assessed to some extent in the context of validation connected with re-election of judges, there are associated problems, identified above).

The literature presents arguments that the panel has contributed to improving the selection process in the Member States, to efforts to optimise the level of judicial independence, to more responsible operation of the courts, and perhaps also to fair representation. One thing is beyond doubt, though: the selection of judges with the necessary qualifications has certainly helped to strike a balance in the seeming contradiction between independence of the judiciary and accountability of the judiciary, where fair appointment mechanisms are important.<sup>\*120</sup>

It has also served as a model for organs related to other international courts. The above-mentioned advisory panel of experts,<sup>\*121</sup> set up in November 2010 after the Article 255 TFEU panel had already begun

<sup>114</sup> DV Kochenov and G Butler, 'Independence of the Court of Justice of the European Union: Unchecked Member States Power after the Sharpston Affair' (2021) 27(1–3) European Law Journal 262–96. – DOI: <https://doi.org/10.1111/eulj.12434>.

<sup>115</sup> Ibid.

<sup>116</sup> 'Declaration by the Conference of the Representatives of the Governments of the Member States on the Consequences of the Withdrawal of the United Kingdom from the European Union for the Advocates General of the Court of Justice of the European Union' XT 21018/20 (29 January 2020) <<https://data.consilium.europa.eu/doc/document/XT-21018-2020-INIT/en/pdf>> accessed 15 August 2023.

<sup>117</sup> *Eleanor Sharpston v Council of the European Union and Representatives of the Governments of the Member States* (Order of the Court) (16 June 2021) C-685/20 P, ECLI:EU:C:2021:485.

<sup>118</sup> De S.-O.-l'E Lasser (n 7) 23.

<sup>119</sup> See, for instance, F Battaglia, 'The Role of the Panel Established under Article 255 TFEU' in PP de Albuquerque and K Wojtyczek (eds), *Judicial Power in a Globalized World: Liber Amicorum Vincent De Gaetano* (Springer 2019) 33. – DOI: [https://doi.org/10.1007/978-3-030-20744-1\\_2](https://doi.org/10.1007/978-3-030-20744-1_2).

<sup>120</sup> O Larsson and others, 'Selection and Appointment in International Adjudication: Insights from Political Science' (2023) 14(2) Journal of International Dispute Settlement 134, 146. – DOI: <https://doi.org/10.1093/jnlids/idac014>.

<sup>121</sup> On 10 November 2010, the EC Committee of Ministers adopted CM Res (2010) 26 on the establishment of an Advisory Panel of Experts on Candidates for Election As the ECHR Judge; see 'The Advisory Panel' <<https://www.coe.int/en/web/dlapil/>>

its work (on 1 March of that year), is one example. Another involves the European Free Trade Association Surveillance Authority, which had to resolve a case related to alleged failure by the European Economic Area's EFTA states to establish an 'Article 255 TFEU panel' in the EFTA pillar for the EEA. The complainants asserted that, by not creating an equivalent to the Article 255 TFEU panel, the states were in breach of certain principles of EEA law – namely, those of homogeneity, reciprocity, and loyalty, alongside protection of individual and fundamental rights. In essence the complainants submitted that, without an equivalent to the Article 255 panel, there is no guarantee that the people appointed as EFTA Court judges are sufficiently independent and possess the professional qualifications required for their roles as members of that court. The surveillance authority concluded the complaint on these grounds to be unfounded, though, taking the stance that it must be for the contracting parties to create a legal basis for the establishment of an equivalent to the Article 255 panel in the EFTA pillar, that the EEA-law principles highlighted in the complaint cannot of themselves impose a specific and positive obligation on those parties, and that the current EEA legal framework comprises several institutional safeguards to EFTA Court judges' sufficient independence and qualification for their office.<sup>\*122</sup>

The work performed under Article 255 TFEU and by the panel set up on the basis thereof is one small, albeit essential, part of a large whole for a brighter future for the administration of justice in Europe and its Member States in these difficult times, in pursuit of ensuring impeccable protection of human rights and access to an independent, impartial, high-quality court anywhere in Europe. Hopes remain strong that the success story of the Article 255 panel will continue and that Europe will long find its competent super-judges.

If, however, a genie in the bottle were to fulfil three wishes for making current practice even more effective, a wisher not at all officially representing the Article 255 TFEU panel might informally express a desire for a few changes.

Firstly, one could wish that, instead of a single candidate, the Member States would put forward several candidates for each CJEU seat, so that there would be a genuine choice before the Article 255 panel beyond 'take or leave it'. The panel could dream of choosing the best.

Linked to the same issue is the hope that a fair procedure at Member State level could be established to find members for the CJEU. While this is rather non-binding wishful thinking by the Article 255 TFEU panel at present and does not play a decisive role, the harmonisation of certain rules would certainly ensure better justice for the candidates and higher-quality administration of justice as a whole. For example, perhaps 'small Article 255 TFEU panels', which could include not only local but also external experts, might be able to play a decisive role in national choice, for greater assurance of objectivity, especially in smaller or apparently problem-laden countries.

Secondly, one might wish to review the regulation on re-election. Again, this is a matter for the Member States and requires a change in the TFEU, but serious consideration ought to be given to whether, for example, extending the term of office while making it non-renewable would be a more effective way to guarantee the independence of the members of the CJEU<sup>\*123</sup>. Another option, for the meantime, is to improve the Article 255 TFEU panel's control over re-election, so that it is not a rubber stamp and neither appears to be nor truly is caught up in the political maelstrom.

I leave the third wish hanging in the air so that it can come true later as the work on Article 255 develops further in the course of time. This might be linked either to the strengthening of legitimacy and transparency in the selection process generally or, in a more forward-looking approach, to the role of a panel of the Article 255 TFEU type in scenarios such as the European Union's accession to the ECHR, which would entail the selection of candidates for the position of ECtHR judge representing the European Union itself. In particular, there is already a need to analyse how the three candidates to be put forward for that post should be selected and what conditions should be met in the event of the Union's accession, as provided for in Article 6(2) of the Treaty on European Union. Another matter is how, if necessary, to appoint an *ad hoc* European Union judge to the ECtHR and, of course, what role the TFEU's Article 255 could play here, so that a European Union super-judge will also reach the ECtHR domain, where there are already super-judges waiting in the wings.

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advisory-panel> accessed 15 August 2023.

<sup>122</sup> See the EFTA Surveillance Authority decision of 17 December 2021 closing a complaint case pertaining to an alleged failure by the European Economic Area's EFTA States to establish an 'Article 255 TFEU panel' in the EFTA pillar of the EEA (Decision 285/21/COL, on case 86579) <<https://www.eftasurv.int/cms/sites/default/files/documents/gopro/Decision%20to%20close%20complaint%20Case%20876579%20regarding%20an%20alleged%20failure%20by%20the%20EEA%20EFTA%20States%20to%20establish%20an%20Article.pdf>> accessed 15 August 2023.

<sup>123</sup> Sauvé, for example, has written that this term could be 12 years without re-election; see Sauvé (n 2) 646.