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SELECTING JUDGES FOR REGIONAL COURTS IN EUROPE: A SHORT STUDY IN THE USE AND PRACTICE OF JUDICIAL PANELS

I Introduction

In most examples of regional courts, candidates for the bench are proposed by their governments and are appointed by a body of the relevant regional community. Such body, however, is usually the one on which sit the representatives of the governments of the member states of that community. For some regional courts, opportunities can therefore arise for national or regional executives to interfere in the processes of appointment of judges as well as having the potential to affect the outcomes of the decision-making of individual judges through political or other pressure.

Consequently, in order to avoid or at least to reduce any prospect of politicisation of the operation of regional benches, various forms of (quasi-) independent

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judicial councils or judicial appointments commissions have been developed.[1] The aim of the creators of such bodies vis-à-vis regional courts is to attempt to render more transparent the procedures for judicial selections and appointments, taking them out of the hands (to some extent) of the national and/or regional executives and allowing third parties an active input. The judicial council – however designated – thus acts as an intermediary entity, sitting between the judiciary and the politically-responsible members on the relevant executive and/or in the parliament, at either the national or regional levels. Like judicial councils at national level,[2] regional judicial councils are designed, e.g., to insulate the functions of appointment of regional judges from the partisan political process (at national and/or regional level) while ensuring some level of accountability by leaving the actual appointment decision to the regional executive. The wide variety of bodies, in which the composition and competences reflect the concern about the judiciary in a specific regional context, thus attempt to balance the demands for accountability and independence.

This brief study looks at the different types of models for judicial appointments panels that have been created in order to deal with issues surrounding independence and accountability with respect to the courts of the three main regional communities in Europe: the Court of Justice of the European Union ("CJEU"); the European Court of Human Rights ("ECtHR"); and the Court of Justice of the European Free Trade Association ("EFTA Court"). The conclusion attempts to draw some common threads from these experiences while highlighting possible future developments in the operation of the panels discussed.

II Court of Justice of the European Union

1. Background

The CJEU's approach[3] to judicial independence[4] has undergone some refinement and amendment in form and practice since its creation. While initially based on

[1] K. Malleson, "Introduction," in K. Malleson & P.H. Russell (eds.), *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World*, University of Toronto Press, Toronto (2006), 3, at 3-4; and M.L. Volcansek, "Judicial Elections and American Exceptionalism: A Comparative Perspective" (2011) 60 *DePaul L. Rev*. 805, at 805-806 and 812-819.

[2] N. Garoupa & T. Ginsburg, "Guarding the Guardians: Judicial Councils and Judicial Independence" (2009) 57 *AJCL* 103, at 106.

[3] See generally 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, *Selecting Europe's Judges: A Critical Appraisal of Appointment Processes to the European Courts*, OUP, Oxford (2015), 24-50.

the rules concerning the International Court of Justice in The Hague,[5] certain features are novel or have evolved differently within the context of the Union's development and the pivotal role of the CJEU.

Article 253 Treaty on the Functioning of the European Union ("TFEU") – the wording of which has remained substantially unaltered since first employed in its original incarnation in the 1951 Treaty Establishing the European Coal and Steel Community – requires judges and advocates-general of the Court of Justice ("CoJ") to be "chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence."[6] Similarly, under Article 254 TFEU, members of the General Court ("GC") need to be "chosen from persons whose independence is beyond doubt and who possess the ability required for appointment to high judicial office."[7]

One element of accountability lies in the appointment of the judges, under Article 253 TFEU, which is made by "common accord of the governments of the Member states for a term of six years" and which further allows them to be reappointed for a non-defined number of occasions. The reappointment process is staggered:[8] every three years, half the judges are replaced in rotation.[9] In this way, the process of appointment has both a national and a Union aspect. From a national perspective, the Member States employ various procedures in selecting judges although they tend to reflect the approaches they use for candidate selection for

[4] On this point, see S. Rozès, "Independence of Judges of the Court of Justice of the European Communities," in S. Shetreet & J. Deschênes (eds.), *Judicial Independence: The Contemporary Debate*, Martinus Nijhoff, Dordrecht (1985), 501-511.

[5] L. Neville Brown & T. Kennedy, *Brown & Jacobs: The Court of Justice of the European Communities*, 5th ed., Sweet & Maxwell, London (2000), at 49.

[6] This term is wide enough to cover lawyers in private practice and academic lawyers, even where they are not eligible for judicial appointment in their own countries: A. Arnull, *The European Union and Its Court of Justice*, 2nd ed., OUP, Oxford (2006), at 20.

[7] The Lisbon Treaty, in contrast to previous treaties, includes the adjective "high" in order to distinguish candidates for the GC from those of the specialist courts of which only one was eventually created. Its creation was set out in Council Decision 2004/752 establishing the European Union Civil Service Tribunal, annex: 2004 OJ L333/7, 9-11. It was dissolved on 1 September 2016: Regulation 2016/1192 on the transfer to the General Court of jurisdiction at first instance in disputes between the European Union and its servants: 2016 OJ L200/138.

[8] Protocol (No. 3) on the Statute of the Court of Justice of the European Union, annexed to the TEU, the TFEU and the EAEC Treaty, Art. 9(1): 2010 OJ L83/210, at 212 ("CJEU Statute").

[9] If the number of judges is an uneven number, the number who are to be replaced will alternately be the number which is the next above one half of the number and the number which is next below one half: CJEU Statute, ibid., Art. 9(1), second sentence, introduced by Regulation 2015/2422 amending Protocol No. 3 on the Statute of the Court of Justice of the European Union, Art. 1(1): 2015 OJ L341/14, at 14.

the ECtHR and international courts.[10] While the judges are nominated and, in effect, appointed by their own Member States, in the deliberations and rulings of the CoJ, they reflect the influence of their own legal systems and not the interests of their respective home states.[11]

2. Establishment and operation of the judicial panel

Although the Lisbon Treaty maintained the strong prerogative powers of Member States in the appointment of CJEU members,[12] it did introduce changes to control their discretion in order to enhance somewhat the independence of the Court and the accountability of its members. This was done in procedural terms with the establishment of a panel[13] under Article 255 TFEU to produce an opinion on the suitability of candidates proposed by the member state governments for members of the CoJ and the GC.[14]

While the EU Council of Ministers is responsible for establishing the Panel[15] and its operating rules,[16] its decisions in both these matters are made following the initiative of the President of the CoJ.[17] Moreover, although on paper the Council

[10] De Waele, note 3 above, at pts. I(c) and II.

[11] N. March Hunnings, *The European Courts*, Cartermill Publishing, London (1996), at 52.

[12] T. Tridimas, "The European Court of Justice and the Draft Constitution: A Supreme Court for the Union?," in T. Tridimas & P. Nebbia (eds.), *European Union Law for the Twenty-First Century: Rethinking the New Legal Order*, Hart Publishing, Oxford (2004), vol. 1, 113, at 118.

[13] The idea for such panel was originally proposed in O. Due *et al.*, "Report by the Working Party on the Future of the European Communities' Court System ('The Group of Wise Persons' or 'The Due Report')," in A. Dashwood & A. Johnston (eds.), *The Future of the Judicial System of the European Union*, Hart Publishing, Oxford (2001). It was subsequently included in the report of the discussion circle on the operation of the Court of Justice, established in February 2003 by the Praesidium of the Convention on a Constitution for Europe, that had been asked to examine possible changes to the system of judicial protection as part of the new Constitution including the issue of appointments to the Court and Council voting on such appointments: Secretariat of the European Convention, *Final report of the discussion circle on the Court of Justice*, 25 March 2003, Brussels, at 2: <http://european-convention.europa.eu/pdf/reg/en/03/cv00/cv00636.en03.pdf>, retrieved 3 March 2019 ("*Final report*").

[14] J-M Sauvé, "Le rôle du comité 255 dans le sélection du juge de l'Union," in A. Rosas, E. Levits & Y. Bot (eds.), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-Law*, T.M.C. Asser Press, The Hague (2013), 99-119.

[15] Council Decision 2010/125 appointing the members of the panel provided for in Article 255 of the Treaty on the Functioning of the European Union: 2010 OJ L50/20.

[16] Council Decision 2010/124 relating to the operating rules of the panel provided for in Article 255 of the Treaty on the Functioning of the European Union: 2010 OJ L50/18 ("Operating Rules").

[17] V. Skouris, *Recommendation concerning the composition of the panel provided for in Article 255 TFEU*, 26 January 2010:

remains in the driving seat in appointing the members of the Panel (i.e., Member States "select the selectors"[18]) and in determining its chair, in practice the nominations to the Panel made by the CoJ President are complied with by the Member States, thus allowing the CoJ to have an influence over its own composition.[19]

In addition, under Articles 253 and 254 TFEU, Member State governments need only consult the Panel before making the relevant appointments: this would appear to emphasise its role as facilitator and not decision-maker.[20] And yet, as will be seen below, the practice that has evolved indicates that the Member States invariably affirm the non-binding opinions of the Panel. On its own, the Article 255 Panel might form the weakest form of regional judicial council under consideration in this study, focusing as it does only on judicial appointments. Yet if the disciplinary and removal powers of the CJEU, discussed below, are also added as a complement to such appointment powers, and these are then added to the evolution of the role played by the CoJ President and the Panel throughout the appointments process then the EU judicial council model could be regarded as being much more effective.

The Article 255 Panel is independent and is made up of seven persons chosen from among former members of the CoJ and the GC, members of national supreme courts, and lawyers of recognised competence, one of whom is proposed by the European Parliament ("EP") (the one minor contribution to democratic accountability in the whole selection process). Panel members are appointed for four years and may be reappointed once.[21] The Panel makes its assessment on the suitability of potential members of the EU judiciary on the

<http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%205932%202010%20INIT>, retrieved 3 March 2019.

[18] In selecting the selectors, the Member States are not expressly bound by any specific rules on gender balance, geographic criteria, or other factors that should be taken into account. The process for selecting the potential selectors is thus completely opaque, although it would probably entail extensive lobbying with the CoJ President: De Waele, note 3 above, at pt. I.

[19] In the first selection, the Member State governments approved all six nominees that were recommended by the then CoJ President and also the nominee from the European Parliament: Skouris, note 17 above, at 105. This practice has been subsequently followed: Council Decision 2014/76 appointing the members of the panel provided for in Article 255 of the Treaty on the Functioning of the European Union: 2014 OJL 41/18; Council Decision 2016/296 replacing a member of the panel provided for in Article 255 of the Treaty on the Functioning of the European Union: 2016 OJ L55/14; and Council Decision 2017/2262 appointing the members of the panel provided for in Article 255 of the Treaty on the Functioning of the European Union: 2017 OJ L324/50.

[20] De Waele, note 3 above, Introduction and at pt. IV.

[21] Operating Rules, note 15 above, at point 3.

basis of six considerations:[22] legal expertise, professional experience, ability to perform the duties of a judge, assurance of independence and impartiality, language skills, and aptitude for working as part of a team in an international environment in which several legal systems are represented. The General Secretariat of the Council of Ministers acts as the secretariat. Any proposal for a candidate is submitted to the Panel via the General Secretariat. The Panel can ask the relevant Government for additional information or other material. Except where the proposal relates to a reappointment, it hears the candidate (in private). The Panel has interpreted its rules to mean that, while in the case of a new appointment it must have a hearing, in the case of re-appointments it cannot have a hearing. That interpretation might seem controversial but appeared to be supported by the drafting history.[23]

At least five members must be present at any meeting and their deliberations take place *in camera*. The sitting Panel members must give a collective reasoned opinion on the merits of each proposed candidate, setting out the principal grounds for its opinion.[24] Such opinion remains confidential and is never made public;[25] it is forwarded to the Representatives of the Governments of Member States, and the rules further provide that, if the Presidency of the Council of Ministers so requests, the President of the Panel shall present it to the Representatives meeting within the Council. It should further be remembered that the appointment of a judge to the CJEU (either CoJ or GC) still requires unanimous agreements of the EU member state governments. Thus even one adverse voice could, in theory, prevent nomination. The governments moreover are not bound to follow the Panel's advice in respect of any particular candidate, although the Panel might not serve much purpose if they did not do so.[26]

Yet, in assessing the first four years of its operation, it could be seen that the Panel had effectively blocked about 22% candidates who were all fresh

[22] *[First] Activity report of the* panel *provided for by Article 255 of the Treaty on the Functioning of the European Union*, 11 February 2011, at 8-11: <https://register.consilium.europa.eu/doc/srv?l=EN&f=ST%206509%202011%20INIT>, retrieved 3 March 2019.

[23] Lord Mance, "The Composition of the European Court of Justice," talk delivered to the United Kingdom Association for European Law, 19 October 2011, London, at 13-14: <https://www.supremecourt.uk/docs/speech_111019.pdf>, retrieved 2 March 2019.

[24] De Waele, note 3 above, Introduction.

[25] The Panel's analysis of EU regulations on public access to EU documents and protection of personal data – as interpreted by the CoJ in Case C-28/08P, *Commission v. Bavarian Lager Co. Ltd.*, ECLI:EU:C:2010:378 – led it to judge that the content of the opinions it gives, whether favourable or not, may not be made public either directly or even, through statistical details, indirectly: *[First] Activity Report*, note 24 above, at 3.

[26] Lord Mance, note 23 above, at 14.

nominations;[27] for the following period (2014-2016), that figure fell to 16.6%, again for first term candidates[28] and, for the most recent period (2017-2018), the figure went down to 6.25% that represented one unfavourable opinion out of 16 nominations for first term candidates.[29] In total, since 2010 the Panel has delivered a total of 147 opinions of which 14 were unfavourable: since no negative opinions were given for candidates seeking renewal of their mandate, this means that 14 out of 73 opinions on candidates for a first term of office were unfavourable, thereby amounting to 19.2% of such opinions.[30] Although the Panel had given formally non-binding opinions, all of them had been followed by Member State governments. As Bobek observed:[31]

The reason for this might be, apart from the unquestionable expertise of the 255 Panel members and ensuing authority, quite simple: unanimity. To depart from the opinion of the 255 Panel and to appoint a candidate previously not recommended by the 255 Panel, all Member States would have to agree, as their "common accord" is required. Thus, in fact, unanimity is required for overruling a formally "non-binding" opinion of the 255 Panel.

More recent research has tended towards balancing the effectiveness of the introduction of the Panel as a supranational element in the process of judicial appointments to the CJEU with the continuing lack of transparency in its working methods, being a reflection of similar or even greater opacity in many of the Panel's national counterparts.[32] A potential shift along the spectrum between

[27] *Third Activity Report of the Panel provided for by Article 255 of the Treaty on the Functioning of the European Union*, 13 December 2013, at 8-9: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2014-02/rapport-c-255-en.pdf>, retrieved 2 March 2019.

[28] *Fourth Activity Report of the Panel provided for by Article 255 of the Treaty on the Functioning of the European Union*, 10 February 2017, at 9-12: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-03/rapport_activite__c255_-_en.pdf>, retrieved 2 March 2019.

[29] *Fifth Activity Report of the Panel provided for by Article 255 of the Treaty on the Functioning of the European Union*, 28 February 2018, at 9-14: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-05/5eme_rapport_dactivite_du_c255_-_en_final_-_public.pdf>, retrieved 2 March 2019.

[30] *Ibid.*, at 15.

[31] M. Bobek, "The Court of Justice of the European Union," in D. Chalmers & A. Arnull (eds.), *The Oxford Handbook of European Union Law*, OUP, Oxford (2015), 153, at 164.

[32] T. Dumbrovský, B. Petkova & M. van der Sluis, "Judicial appointments: The Article 255 TFEU Advisory Panel and selection procedures in the Member States" (2014) 51 *CML Rev*. 455, at 481-482.

judicial self-management and a purely political appointments process has also been noted by Dumbrovský, Petkova and van der Sluis:[33]

At present, the Court of Justice and the General Court are clearly far from judicial self-government, but if the Article 255 TFEU Panel proves to have a substantive say on appointments, as it has so far, and if the majority of its members are chosen at the will of the Court of Justice's President, as has happened so far, one might foresee a subtle move in that direction.

The basis for this, as they observed, was the fact that former CJEU judges had had a profound influence on the way in which the reform of appointments had been conducted.[34]

III European Court of Human Rights

1. Background

The appointment process for a judge of the ECtHR involves more actors and a much greater degree of (apparent) democratic legitimacy[35] when compared to that for the CJEU.

Every time a vacancy arises on the ECtHR, the Member State concerned makes the initial selection of three suitably qualified candidates, according to its own domestic procedures.[36] Unlike the national procedural rules in respect of candidates for the CJEU bench, the Parliamentary Assembly of the Council of Europe ("PACE") has used its practical experience to develop a body of recommendations[37] to guide States concerning the operation of their individual procedures for selecting candidates for their post of judge at the Court. Indeed, while under Article 22 ECHR[38] PACE has the exclusive competence to elect ECtHR judges, it recognises that the quality of those judges depends in the first

[33] *Ibid.*

[34] *Ibid.*, at 458-459 and at 482.

[35] Steering Committee for Human Rights, *Report on the process of selection and election of judges of the European Court of Human Rights*, Council of Europe, Strasbourg, 20 March 2018, at 23-67 ("CDDH Report 2018").

[36] Article 22 of the European Convention on Human Rights and Fundamental Freedoms (ECHR), 4 November 1950: E.T.S. No. 5.

[37] See Committee on the Election of Judges to the Court, *Procedure for electing judges to the European Court of Human Rights*, Information document prepared by the Secretariat of the Parliamentary Assembly, 23 January 2019, Strasbourg: AS/Cdh/Inf (2019) 01 rev.

[38] Article 22 ECHR provides: "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."

place on the quality of the candidates nominated by the States.[39] Consequently, in its 2009 Resolution on the matter,[40] PACE reiterated the point that:[41]

[T]he process of nominating candidates to the Court must reflect the principles of democratic procedure, transparency and non−discrimination. In the absence of a real choice among the candidates submitted by a State Party to the Convention, the Assembly shall reject lists submitted to it. In addition, in the absence of a fair, transparent and consistent national selection procedure, the Assembly may reject such lists.

In that same Resolution,[42] States were also asked, when submitting the names of candidates to the Assembly, to describe the manner in which they had been selected.

Many of these PACE recommendations have been incorporated into the Committee of Ministers' Guidelines for selecting candidates for the post of ECtHR judge ("the Guidelines").[43] These Guidelines as well as the accompanying examples of good practices, apply to national procedures for the selection of candidates for the post of judge at the ECtHR.

The selection criteria for judicial office is set out in Article 21(1) ECHR. These criteria require judges to be of high moral character, to possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence, to sit in their individual capacity, and not to engage in any activity which is incompatible with their independence, impartiality or with the demands of full−time office. As is clear from these criteria, just as it is with those for CJEU judges, ECtHR candidates need not have been judges in their own state before being nominated to the Strasbourg bench. The Guidelines reiterate these criteria

[39] If a list is not composed of qualified candidates, the most that the Assembly can do is to reject it.

[40] PACE, Resolution 1646 (2009), "Nomination of candidates and election of judges to the European Court of Human Rights," 27 January 2009, Strasbourg ("2009 Resolution"). It also referred to PACE, Recommendation 1649 (2004), "Candidates for the European Court of Human Rights," 30 January 2004.

[41] 2009 Resolution, at para. 2.

[42] *Ibid*., at para. 4.2.

[43] Committee of Ministers, "Guidelines on the selection of candidates for the post of judge at the European Court of Human Rights," 29 March 2012, Strasbourg: CM(2012)40-final (as amended at the 1213th meeting, 26 November 2014: decision CM/Del/Dec(2014)1213/1.5) ("2012 Guidelines"). These Guidelines were prepared by the Steering Committee for Human Rights (known by its French acronym "CDDH" representing "*Comité directeur pour les droits de l'homme*"), through its Ad hoc Working Group on national procedures for the selection of candidates for the post of judge at the European Court of Human Rights ("CDDH−SC").

and give further detail, for instance on requirements related to language skills, legal knowledge and gender balance.[44]

The Guidelines apply prior to the presentation of a proposed list of national candidates to the Advisory Panel (see below) and thus also before submission of the list to PACE.[45] They also provide that:[46] "The High Contracting Parties are requested to submit information about the national selection procedures to the Panel when transmitting the names and curricula vitae of the candidates." Yet despite the best efforts over the years of PACE and of the Committee of Ministers, there still remains a considerable variation across the 47 States[47] as to how they choose their candidates for the ECtHR.[48]

2. Establishment and operation of the judicial panel

Once the State has drawn up a list of three possible nominees, it must send their names and curricula vitae to the Council of Europe Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights (the "Advisory Panel"), prior to their submission to PACE. The idea for such a panel had been mooted in 2003 by a group of high-level judge and academics as a way to ensure quality and suitability of the candidates proposed:[49]

> The body making recommendations on the eligibility or suitability of candidates to the Parliamentary Assembly should itself be independent, follow a fair and open procedure and possess the requisite expertise to fulfil its role.

[44] The lists of candidates should, as a general rule, contain at least one candidate of each sex, unless the sex of the candidates on the list is under-represented on the ECtHR (under 40% of judges) or if exceptional circumstances exist to derogate from this rule: 2012 Guidelines, note 43 above, Part II, at para. 8.

[45] 2012 Guidelines, ibid., Part VI, at para. 1

[46] *Ibid*., at para. 2.

[47] It is clear from ECtHR case-law that the principle of a lawful judge requires that the provisions governing the procedure for judicial appointments be respected: see *Ilatovskiy v. Russia*, App. No. 6945/04, paras. 40 and 41 (2009).

[48] This process has been criticised by D. Košar, "Selecting Strasbourg Judges: A Critique," in Bobek, note 3 above, chap. 6, 120-161. For further studies on the ECtHR, see J.F. Flauss, "Les élections de juges à la Cour européenne des Droits de l'Homme (2005-2008)" (2008) 19 RTDH 713; A. Drzemczewski, "Election of judges to the Strasbourg Court: an overview" [2010] EHRLR 377; N.P. Engel, "More Transparency and Governmental Loyalty for Maintaining Professional Quality in the Election of Judges to the European Court of Human Rights" (2012) 32 HRLJ 448; and A. Follesdal, "Independent yet Accountable: Stress test lessons for the European Court of Human Rights" (2017) 24:4 MJ 484.

[49] J. Limbach et al., *Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights*, INTERIGHTS, London (2003), at 34-35.

> This could be done by engaging a body of independent persons with relevant expertise, including persons with judicial experience, to provide advice to the Assembly on the candidates submitted to it. It would review the submitted curricula vitae and interview candidates thoroughly, with a view to identifying the most suitable professional judge. The independent body would provide reasons for its views.

Eventually following on from this suggestion, the Committee of Ministers created such a body in a 2010 Resolution.[50] It formed part of the implementation of the Interlaken Declaration[51] that earlier that year had called on the Member States of the Council of Europe to ensure: "full satisfaction of the Convention's criteria for office as a judge of the Court, including knowledge of public international law and of the national legal systems as well as proficiency in at least one official language."

Referring in its 2010 Resolution to the States' responsibility "to ensure a fair and transparent national selection procedure," the Committee of Ministers stated its conviction that "the establishment of a Panel of Experts mandated to advise on the suitability of candidates that the member States intend to put forward for office as judges of the Court would constitute an adequate mechanism in this regard."

This underlines the fact that the principal role of the Advisory Panel is to provide advice to States during the process of selection of their candidates. According to the 2010 Resolution, the Advisory Panel's role is to advise confidentially the States whether candidates for election as ECtHR judges meet the criteria stipulated in Article 21(1) ECHR.[52] The Panel can hold confidential discussions with the State in question and, after having given its confidential opinion to the Government concerned, it must also inform the Parliamentary Assembly in a confidential manner of its opinion.[53]

The seven members of this Advisory Panel[54] are appointed by the Council of Europe Committee of Ministers after consulting the ECtHR President.[55] They

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[50] Committee of Ministers, Resolution on the establishment of an Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights, 10 November 2010, Strasbourg: CM/Res(2010)26 (as amended by Committee of Ministers, Resolution CM/Res(2014)44, 26 November 2014) ("2010 Resolution").

[51] Interlaken Declaration of 19 February 2010, in Proceedings of the High Level Conference on the Future of the European Court of Human Rights, 18-19 February 2010, Interlaken: H/Inf(2010)5, 119, point E8(a), at 123.

[52] 2010 Resolution, note 50 above, para. 1.

[53] *Ibid*., para. 5.

[54] *Ibid*., para. 2.

must be chosen[56] from among members of the highest national courts, former judges of international courts (including the ECtHR) and other lawyers of recognised competence and who serve in their personal capacity. Moreover, the composition of the Panel must also be geographically and gender balanced. Members are appointed for a term of three years, renewable once and where a member does not complete their term, a successor is to be appointed for a full term.

However, unlike the Panel for the CJEU, the provision of advice by the Advisory Panel is limited by the fact that it cannot interview candidates itself although it can ask for additional information from the proposing state.[57] Interviews lay in the exclusive hands of the relevant parliamentarians on the relevant PACE committee. Consequently, having received the opinion of the Advisory Panel, the State then submits its list of three candidates to PACE. Thereupon PACE invites its Committee on the Election of Judges[58] to scrutinise the three candidates' CVs (in a standardised form)[59] and to interview each of them in person. The Committee's report, containing its recommendations, addressed to the plenary Assembly, is prepared by its Chairperson and is transmitted to PACE via its Bureau.[60]

The final stage is for the full PACE vote on the three candidates approved by the Committee, according to Article 22 ECHR. PACE accordingly holds a secret ballot during a plenary session, based on the recommendations of the Committee. If a candidate obtains an absolute majority of votes cast, they are elected to the Court. If no candidate obtains an absolute majority, a second ballot is held, and the candidate who has obtained the most votes is declared elected. Election results are announced publicly by the President of the Assembly during the part−session and published − in the form of a press release − on PACE's website shortly afterwards.

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[55] *Ibid*., para. 3.

[56] *Ibid*., paras. 2-3.

[57] CDDH Report 2018, note 35 above, para. 83, at 37.

[58] This Committee was established in 2015, replacing an earlier sub-committee of PACE's Committee on Legal Affairs and Human Rights: generally A. Drzemczewski, "The Parliamentary Assembly's Committee on the Election of Judges to the European Court of Human Rights" (2015) 35:1-8 HRLJ 269-274.

[59] A model CV is appended to Resolution 1646 (2009).

[60] An important development of the new procedure is that the report is now made public prior to the commencement of the election procedure.

How then has the Advisory Panel's contribution been considered in the nine years or so of operation? In 2013 the CDDH published its report[61] on the review of the functioning of the Advisory Panel that addressed, *inter alia*, procedural questions; the interaction between the various stakeholders involved in the process; the reasons for the Panel's opinions; and the confidentiality of the process. There was a general agreement that the work of the Advisory Panel was a useful additional safeguard to guarantee that proposed candidates were of the highest standards.[62] Following submission of the report, the Committee of Ministers adopted an amendment to its 2010 Resolution[63] to take account of some of the recommendations made by the CDDH.[64] It also amended the Guidelines, specifying that the States should submit their list of candidates to PACE after having obtained the Advisory Panel's opinion on the candidates' suitability to fulfil the requirements under the ECHR.

According to the CDDH 2013 Report, the existence of the Advisory Panel has had a positive impact on the improvement of national selection procedures. It was further noted by the then President of the Advisory Panel, Mr. John Murray that:[65]

[T]he mere establishment of the Panel by the Committee [of Ministers] has made an impact. Governments, where they may not have done so before, are now beginning to have a greater understanding of the need to more carefully seek and select the candidates which they put forward. There seems to be a growing consciousness of the need to meet Convention criteria for election to the Court in a substantial way. I think the very existence of the process of submitting the list of candidates to the Panel, of having to consider and await the outcome of the Panel's assessment has strengthened the overall process of selection.

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[61] Report of the CDDH on the review of the functioning of the Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights: CDDH(2013)R79 Addendum II ("CDDH Report 2013").

[62] *Ibid*., at para. 55.

[63] Committee of Ministers, Resolution CM/Res(2014)44 amending Resolution CM/Res(2010)26: Document DD(2014)513, 16 April 2014.

[64] These were that an explicit reference was to be made to the Committee of Ministers' Guidelines and that the recommendation to submit the lists of candidates to the Advisory Panel was to be made at least three months before the time-limit set by the Assembly for submission of the list of candidates: CDDH Report 2013, note 61 above, paras. 38 and 48.

[65] See Exchange of views between Mr. John Murray, President of the Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights and the Ministers' Deputies, 4 May 2017, Strasbourg: Doc. DH−SYSC−I(2017)016, at 6.

Despite this measured success, there are still issues that need to be addressed[66] in order to allow the Advisory Panel the opportunity to evolve its position in the judicial selection process, without necessarily needing further clarification in the 2010 Resolution.

Taking into account the practical experience deriving from its published activity reports,[67] it appears that the Panel considers that it is facing challenges regarding its role in the selection procedure, e.g.: (i) its opinions are not always followed: in the period January 2014 – June 2017, from among the 29 lists examined by the Panel, in nine cases the candidates were maintained on the list by PACE despite the Panel's negative opinion; (ii) the need for meetings to conduct its business properly: as originally set up, it was not expected that the Panel would meet routinely to conduct its business. However, the Panel members considered that while an exchange of information as well as the transmission of opinions may be, and is, carried out effectively in writing, a meaningful and fruitful exchange of views can, in certain circumstances, only take place during a meeting;[68] and (iii) the financial means for a proper functioning of the Panel: for the time being it does not have sufficient means if it is to meet regularly. The budgetary appropriation for the Panel in the Council of Europe's ordinary budget has consistently barely covered the costs of two meetings.[69] It is clear from these comments that the Advisory Panel is in a much weaker position financially than the Article 255 TFEU Panel is for the CJEU.

In addition, there have been suggestions that the Advisory Panel take part (in some form) in the PACE Committee interviews,[70] while rejecting the idea of Panel interviews on the grounds, *inter alia*, that this option would go against the role of the Panel advising the States and would further prolong the selection process.[71] The merits of co-operation between the two bodies were shared by the

[66] K. Lemmens, "(S)electing Judges for Strasbourg: A (Dis)appointing Process?," in Bobek, note 3 above, chap. 5, section 3.3, for a discussion on how the Advisory Panel met expectations.

[67] Final [First] activity report for the attention of the Committee of Ministers (2010−2013), 11 December 2013, Strasbourg: Document Advisory Panel (2013)12 EN; Second activity report for the attention of the Committee of Ministers (2014−2015), 25 February 2016, Strasbourg: Document Advisory Panel(2016)1; and Third activity report for the attention of the Committee of Ministers (2016−2017), 30 June 2017, Strasbourg: Document Advisory Panel(2017)2.

[68] Second activity report, ibid., para. 28.

[69] Ibid., para. 32; and *Third activity report*, note 67 above, at para. 31.

[70] It has been noted in this regard that a more direct and horizontal approach in the interaction between the two bodies would further this objective: see the remarks of Mr. John Murray, note 65 above, at 5.

[71] CDDH Report 2018, note 35 above, para. 88, at 39.

then President of the Advisory Panel as well as by the Secretary General of the Assembly.[72]

In fact, the idea of having the President of the Advisory Panel or their representative to attend the meeting of the PACE Committee on the Election of Judges has already been considered[73] – although the details would need to be defined (observer role or possibility to put questions to the candidates). In addition, the oral report by the Panel could be supplemented by a more thorough written one: thus, in strengthening the reasoning of the Panel's decisions would facilitate the work of the Committee while, at the same time, respecting the confidentiality principle so as not to harm the reputation of candidates.[74]

IV The Court of Justice of the European Free Trade Association

1. Background

The basic rules on judicial independence and accountability of EFTA Court[75] judges reflect those of the CoJ at the time the EEA Agreement[76] was signed in 1992, i.e., the time before the Article 255 TFEU Panel was established. Reflecting in the main the wording of Article 253 TFEU, Article 30 of the EFTA Surveillance Authority and Court Agreement ("SCA")[77] states:

> The Judges shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence. They shall be appointed by common accord of the Governments of the EFTA States for a term of six years.

[72] See the intervention by Mr. John Murray at the 1233rd meeting of the Ministers' Deputies, 8 July 2015, Appendix II of the *Second activity report*, note 67 above; and see Exchange of views with Mr. Wojciech Sawicki, Secretary General to the Parliamentary Assembly of the Council of Europe, 4 November 2016, Strasbourg: Doc. DH−SYSC−I(2016)008, at para. 10.

[73] According to the information provided by the Secretary General of the Assembly at the 3rd meeting of the Drafting Group, confirmed by the then President of the Advisory Panel during its exchange of views with the Ministers' Deputies on 1st March 2017: CDDH Report 2018, note 35 above, para. 99, at 43.

[74] *Ibid*., para. 99, at 43.

[75] For an extensive series of essays on this court, see EFTA Court (ed.), *The EEA and the EFTA Court: Decentred Integration*, Hart Publishing, Oxford (2017).

[76] Agreement of the European Economic Area, 2 May 1992: 1994 OJ L1/3 ("EEA Agreement").

[77] Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, 2 May 1992: 1994 OJ L344/3 ("SCA").

Paragraph 4 of the same article provides that where one of the judges, in the opinion of the other two judges, is disqualified from acting in a particular case then those two can choose – as a replacement – an ad hoc judge chosen by them from a list of six (two from each EFTA State), previously established by common accord by the governments of the EFTA States. This provision is particularly important as there are only three judges appointed to the EFTA Court – one each from Iceland, Liechtenstein and Norway ("the EEA EFTA States").

In a way reminiscent of the various ways EU Member States and those of the Council of Europe nominate their judges, the EEA EFTA governments use their distinct national procedures for proposing their candidates to the regional bench.[78] In fact, not only nationals of the EEA EFTA States are nominated and appointed to the EFTA Court bench: this is best exemplified by the appointment in 1995 of Carl Baudenbacher, a Swiss national, by Liechtenstein.

2. Possibilities for the establishment and operation of a judicial panel

Considering the positive experience of the Article 255 TFEU Panel for the CJEU, President Baudenbacher made the suggestion (on his retirement from the bench) to adopt a judicial panel for the EFTA Court in his farewell statement at the ESA/Court Committee annual meeting in December 2017.[79]

In fact, as a means to provide greater independence and accountability as well as to homogenise[80] and modernise the practice of the EFTA Court to that of the CJEU under Article 255 TFEU, the EFTA Court had already proposed – in a request to the EFTA governments of 14 October 2011 – the amendment of the SCA. The aim of such amendment was to provide for a judicial panel to deal with appointments to the regional bench. The proposed amendment, Article 30a2 read:[81]

The panel shall comprise of five persons: one chosen from among former members of the Court who shall also be Chairman, and one from among the former members of the Court of Justice of the European Union. The other members of the panel, each coming from a separate EFTA State, shall be chosen

[78] C. Baudenbacher, "Some thoughts on the EFTA Court's Phases of Life," in EFTA Ct. (ed.), *Judicial Protection in the European Economic Area*, German Law Publishers, Stuttgart (2012), 2, at 23.

[79] C. Baudenbacher, Farewell statement at the annual meeting of the ESA/Court Committee of 13 December 2017, 13 December 2017, Brussels, at 3-4. Copy on file with author.

[80] On the importance of homogeneity between the EEA EFTA and EU pillars under the EEA Agreement, A.F. Tatham, "Where culture, language and politics meet: Is there any place for national identity in the EEA legal system?" (2016) 2/2 *UNIO – EU LJ* 108, at 115-122.

[81] C. Baudenbacher & M.-J. Clifton, "Courts of Regional Economic and Political Integration Agreements," in C.P.R. Romano, K.J. Alter & Y. Shany (eds.), *The Oxford Handbook of International Adjudication*, OUP, Oxford (2015), chap. 12, 250, at 257 n. 53.

from among present or former members of the highest judicial offices of the EFTA States or be lawyers of recognised competence. The EFTA States shall adopt a decision establishing the panel's operating rules and a decision appointing its members as well as their remuneration. It shall act on the initiative of the President of the Court.

Building on this proposal, it might be possible for the CJEU model to find some resonance in respect of the EFTA Court selection and appointments process, with selectors nominated, e.g., by the Presidents of the Supreme Courts of Iceland, Norway and Liechtenstein.[82] In addition, following the Article 255 TFEU Panel example, the President of the EFTA Court might be permitted to nominate one or more selectors.

Moreover, adducing some form of parliamentary accountability and reflecting the practice of the Article 255 TFEU Panel that has a selector chosen by the EP, the EFTA Committee of Members of Parliament of the EFTA States ("MPS")[83] could also be called upon to nominate a selector. The MPS deals with EEA-related matters and forms the EFTA side of the EEA Joint Parliamentary Committee:[84] although not a representative assembly, it does bring together politicians from the EEA EFTA states into a stable, consultative parliamentary forum whose work is prepared and co-ordinated by a Bureau.[85]

Further, in this new configuration, a way would need to be found to ensure that gender balance would be maintained in the selectors as with the candidates.[86]

V CONCLUSION

Issues of independence and accountability are subject to a fine balancing. However, this equilibrium for the regional courts examined here occurs against a background of a common regional constitutional culture, where judicial independence and accountability for them are part of the intertwining of the

[82] Since there are three superior courts in Liechtenstein – State Court, Supreme Court and Administrative Court – it may be that they could rotate the responsibility between them.

[83] Agreement on a Committee of Members of Parliament of the EFTA States, 20 May 1992 (as amended 17 March 1993 and 29 December 1994), <www.efta.int/media/documents/legal-texts/committee-agreements/efta-committees/agreement-on-a-committee-of-membersof-parliament-of-the-efta-states.pdf>, retrieved 2 March 2019.

[84] EEA Agreement Art. 95; and Protocol 36 [to the EEA Agreement] on the Statute of the EEA Joint Parliamentary Committee, 2 May 1992: 1994 OJ L1/205.

[85] Committee of Members of Parliament of the EFTA States, Rules of Procedure, 29 February 1996, Brussels, Art. 4: <www.efta.int/media/documents/advisory-bodies/parliamentary-committee/1072843-v1-070101_MPS_Rules_of_Procedure.pdf>, retrieved 2 March 2019.

[86] A requirement for gender balance for the GC has been made to EU Member States in their nominations to the bench through Regulation 2015/2422, note 9 above, Recital 11, at 15.

regional community and national constitutional orders. The recent innovation of a judicial panel model for these three courts will/would no doubt help to address certain concerns about judicial independence, taking such appointments out of the exclusive hands of the Member State governments, due to individual state nominations or through the high-level regional executive body which brings the Member States together.

The accountability of regional judges, the flip side to their independence, is addressed in some way by the judicial panels detailed here. Yet trying to find the proper balance is clearly fraught with problems. In many ways this situation does, in fact, further reflect the hybrid nature of regional courts as being somewhere between national and international tribunals.

Introducing parliamentary scrutiny and voting – into the CJEU and EFTA Court procedures – might be seen as allowing more transparency and democratic accountability to the whole process of judicial appointments.[87] Adding public interviews or hearings to the process of appointing regional judges might, however, put an unnecessary additional burden on those seeking such appointment and critics would be wary of such a process politicising the entire process,[88] much of which has already been said of the US Senate's interventions in the approval of justices to the US Supreme Court.[89]

If regional parliaments or parliamentary bodies were to have an enhanced role (as they have in respect of the ECtHR) in the overall process, e.g., of judicial selection in order to increase accountability, the necessary institutions already exist. The European Parliament would certainly relish the prospect of flexing its

[87] EP voting on candidates for the CJEU has been considered on several occasions. Proposals have been made, e.g., for half the number of judges to be voted on by the EP and half by the Council: Draft Treaty Establishing the European Union, 14 February 1984, Art. 30(2): 1984 OJ C77/33; as well as e.g., for permitting the EP to give its approval by a simple majority to nominations of the Council: EP, Resolution on the Intergovernmental Conference in the context of Parliament's strategy for European Union: 1990 OJ C231/97, at 104.

[88] The CJEU has previously maintained this position, CJEC, *Report of the Court of Justice on certain aspects of the application of the treaty on European Union* (May 17, 1995), reproduced in CJEC, *Annual Report 1995*, 19, at 28 (1997): "However … the Court considers that a reform involving a hearing of each nominee by a parliamentary committee would be unacceptable. Prospective appointees would be unable adequately to answer the questions put to them without betraying the discretion incumbent upon persons whose independence must, in the words of the treaties, be beyond doubt and without prejudging positions they might have to adopt with regard to contentious issues which they would have to decide in the exercise of their judicial function." This was also the conclusion of the members of the discussion circle on the operation of the Court of Justice that reported to the Praesidium of the Convention on a Constitution for Europe: *Final report,* note 13 above, at 2.

[89] See generally, R. Davis, *Electing Justice: Fixing the Supreme Court Nomination Process*, OUP, New York (2005).

muscles in vetting CJEU candidates, even if it were to be done in a committee setting in camera. In respect of the EEA EFTA states, the MPS – although not a representative assembly – does exercise at least some consultative powers and might have them extended to hear EFTA Court candidates.

While useful and perhaps also indicative of a future evolution, certain aspects of judicial panel models are not likely to have much resonance at this time. One of these would be to extend the requirement for general and direct advertisement through various media (including in the specialised press, where it exists, or in the national press) of positions at these regional courts. Such advertising of these positions is already done in some EU Member States when seeking good quality candidates for the CJEU[90] and it is also done domestically in respect of ECtHR candidates.[91] While advertising in various media to fill posts on the CJEU and EFTA Court benches are unlikely at this time,[92] it might be worth considering instead rendering advertisements compulsory in each Member State before national nominations to either bench are made.

In conclusion, the political accountability of the regional judiciaries in the courts under examination ultimately lies in the hands of the national executives of the Member States of each community, meeting in the community's (highest) executive body. Yet this situation may be regarded as too much of a compromise for the judicial independence of the regional bench. While judicial panels cannot in themselves be regarded as a panacea for these challenges, they may at least be able to provide a buffer between the diverse interests of the stakeholders in regional communities, allowing for the articulation of various priorities while allowing for a degree of de-politicisation of the procedures for appointment judges to the regional benches.

[90] For example, Finland and the Netherlands: Dumbrovský, Petkova & van der Sluis, note 33 above, at 470.

[91] 2012 Guidelines, note 43 above, Part III, at para. 2.

[92] This had however previously been mooted in respect of the ECtHR: A. Coomber, "Judicial independence: Law and practice of appointments to the European Court of Human Rights" (2003) 5 *EHRLR* 486, at 498.