

MLex Ab Extra:

Judgment day

Mathew Heim of Qualcomm examines the appointment of Judges to Europe's Supreme Court



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Mathew Heim works in the Government Affairs department of Qualcomm. He has spent many years involved in discussions on the role of the European Court of Justice within the European Union, notably on improvements to the functioning of the European judicial system and on the institutional provisions around access to justice and fundamental rights protection.

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A quiet revolution took place with the entry into force of the Lisbon Treaty. The new Treaty created an oversight mechanism to scrutinise the suitability of Member States' nominees to Europe's highest courts, the European Court of Justice and General Court. What may appear to be merely an additional step in the process of judicial appointment could well change the culture of Europe's judiciary, increasing the European Courts' independence and strengthening the administration of European Justice.

The previous system for the appointment of Judges and Advocates General to the European Courts contained a significant flaw, that effectively resulted in the criteria for nominations being overlooked.¹ The governments of the Member States agreed on nominations by 'common accord,' which meant that Member States did not formally question the suitability of candidates put forward by another Member State.

This led to concern that Member State governments could nominate, without any constraint, candidates not necessarily best qualified for the post. As one commentator put it, "the danger was that Member States would rubber-stamp each others' nominations with no regard to technical qualifications for the job, leaving space for Member State governments, were they so inclined, to nominate candidates on the basis of political or other bias."² Although informal contacts between governments exist, which can assist in addressing particularly problematic situations, such networks are ad hoc, non-transparent and particularly political.

National judicial appointments processes are applied for European judicial nominations. As a result, political considerations do at times enter into the selection of judges, given that judicial appointments processes in some Member States have a specific political facet. Indeed, in certain Member States political affiliations are important considerations in domestic judicial appointment, in others academic credentials or high political office are considered as qualifications for judicial office.

Previous members of the European Court have come from a wide range of backgrounds, including former Ministers of Justice, of Finance and of Agriculture, senior government officials, members who were politically active, including members of the Italian Senate, the German, French, Dutch

and Belgian Parliaments, as well as the European Parliament.³ But it must also be acknowledged that a court whose members come from a varied background is by no means a negative trait, if that court must render decisions on a wide variety of socio-economic issues, especially where an understanding of the practical impact of its decisions is needed.

However, the Member States have clearly felt the need to review the situation and they used the opportunity of the revision of the Treaty to create a panel to scrutinise nominations to the Court. It is worth noting that the Lisbon Treaty does not directly change the method for Member States to select their candidates, nor does it change the final approval of nomination by common accord. Instead, the Member States imposed on themselves a layer of review on the existing system, which should fundamentally affect European judicial appointments.

The provisions of the Lisbon Treaty setting up the panel are simple. The first paragraph of Article 255 sets out the function of panel: "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 European Court of Justice and the High Court before the governments of the Member States take the decisions referred to in Articles 253 and 254."

The importance of this new panel is two-fold. First, it ensures that Member States are rigorous in their initial nominations process, given the possibility of a negative opinion. Second, the 'suitability' test provides an additional review of the candidate's ability to satisfy the conditions of the Treaty,⁴ ensuring that the most appropriate candidates are appointed; candidates who possess the requisite qualities and competences to fulfil the task required at the highest levels of European judicature.

The Treaty makes a number of things clear. The governments of the Member States have to consult the panel and consider the opinion of the panel before they may take the decision to appoint new members to the Court. In addition, the criteria for 'suitability to perform the duties' is not a direct review of the national appointments process, but rather a review of the appropriateness of the candidate for the particular tasks expected of them.

The second paragraph of Article 255 sets out some operative elements: "The panel shall comprise seven persons chosen

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from among former members of the European Court of Justice and the High Court, members of national supreme courts and lawyers of recognised competence, one of whom shall be proposed by the European Parliament. The Council of Ministers shall adopt a European decision establishing the panel's operating rules and a European decision appointing its members. It shall act on the initiative of the President of the European Court of Justice.”

The President of the European Court of Justice has initiated this process and in February 2010, the Council adopted a Decision on the operating rules of the panel.⁵ Overall, the Council followed the recommendations of the President of the European Court of Justice. Importantly, the panel will deliberate in camera and hold hearings of candidates in private. This demonstrates that the new panel is not intended to increase the politicisation of the process; quite the opposite. As a result, current Members of the Court who are being re-appointed will still need to be assessed by the panel, but will be spared the need to attend hearings. Notably, the Council decided to make hearings for new candidates mandatory, rather than at the discretion of the panel.

Furthermore, rather than merely rely on information provided to them, the panel “may ask the government making the proposal to send additional information or other material which the panel considers necessary for its deliberations.” This will be an important consideration, given that the panel is assessing substantive issues and will not simply undertake a review of a candidate's qualifications. The panel will therefore be able to delve more deeply into issues at stake. But the panel is notably not allowed to seek information elsewhere, such as the view of a candidate's national bar association.

Naturally, the more public the results of the panel's deliberations are, the more effective their impact would be in calling the Member States to account. Indeed, if the purpose of the panel is to strengthen the system of accountability, some may argue that the opinions of the panel should be made available to the public.

The critical question is naturally the level of influence that the panel will have. The Treaty only requires the Member States to consult the panel and the opinion of the panel is certainly not binding on the Member States. Indeed, the Member States remain solely responsible for the appointment of members to the Court and they could, in theory at least, approve a nominee even after receiving a negative opinion from the panel. While one might therefore question whether this panel will actually have any effect on the accountability of appointment of members of the Court, indications are the panel will play an important role in influencing European judicial appointments.

The panel may affect the appointment of Judges in a number of ways. First, its very existence will have a preventive role,

designed to influence Member States' nomination process and encourage them to propose candidates that the panel will assess as suitable. Second, the panel may coerce Member States through an adverse opinion on a candidate, forcing Member States to recognise the unsuitability of that candidate and therefore prevent them common accord on that appointment. Indeed, according to the Council's Decision, the panel's opinion on the suitability of a candidate needs to be reasoned, and must set out the principal grounds on which the panel's opinion is based. Not only does the opinion need to be sent to Governments of the Member States, but the President of the panel may be called to present that opinion to the Council.

In addition, we also have the example of the panel set up for the appointment of members of the European Union Civil Service Tribunal, known as the committee. It is notable that the Council adopted wholesale the committee's opinions recommending the appointment of members of the Tribunal, including the grading of candidates by order of suitability, even though the opinion was not binding.⁶ It is notable too that, in recommending the operating rules of the panel to the Council (and which were largely accepted by the Council), the President of the European Court specifically referred to the operating rules of the EU Civil Service Tribunal committee as both ‘influential and informative.’

Most importantly, however, is the impact of the panel on the Member States' approach to selecting candidates to the Court. As noted, the Treaty has never required the Member States to create any particular mechanisms for appointment to the European Courts, merely to apply their existing systems to the Treaty criteria for appointment to the European Courts. Nor is it the specific role of the panel to directly review national selection process, only to provide an opinion on the outcome of that process. Indeed, national criteria vary widely, from open competition to parliamentary hearings, although ultimately the choice is one for the government in power. However, there is a clear possibility that, were the panel to find a candidate lacking, it is implicitly criticising the national judicial selection system for not being able to weed out inappropriate candidates.

The purpose of the panel is to provide an objective technical review of whether a candidate fulfils the criteria set out in the Treaty. The panel must certainly look at the critical issue of judicial independence. This is naturally paramount to address any concerns that a candidate may represent the interests of their member state or party. As such, it might well be that the national system for appointment to the highest judicial offices will need an explanation by the respective Member State.

Whether the panel goes beyond independence or qualifications and ability, or even competence in the case of Advocates General (although clearly these are critical criteria to suitability) is an interesting question. Suitability may look deeper into the ability of candidates to undertake the particular tasks expected of them

in the European Courts. There are a number of issues the panel may also wish to consider, such as the Rules of Procedure of the European Courts that refer to criteria including impartiality, conscientiousness and confidentiality of deliberations.

The Treaty requires a panel of seven members. These can clearly not represent every Member State, but the President of the European Court proposed a group that can achieve a balanced membership, both in geographical terms and in terms of representation of the legal systems of the Member States. In January 2010 the President of the European Court of Justice sent to the Council a list of list of seven persons to be members of the panel for a period of four years. The council accepted the proposal, as well as the recommendation for the president of the panel.⁷

In addition, the Treaty expressly allows a role for the European Parliament to propose one panel member. The involvement of the European Parliament was initially criticised for potentially bringing European political influence in the appointment process. Given the calibre of the European Parliament's first panel candidate (as accepted by the President of the European Court of Justice) it is clear that the European Parliament takes this responsibility seriously. So, while the European Parliament's involvement is limited, democratic accountability requirements of the appointments process have been satisfied. However, the panel's opinion remains for the Member States in Council.

As in all processes, imposing an additional stage may improve the result, but may lengthen the procedure. It is in the interest of the Court, the person nominated, and the Member States that appointments be made sufficiently far ahead to allow the persons appointed to familiarise themselves with the duties of the office, and for the Court to make its arrangements to receive them.

The European Union is built on the principle of the rule of law, at the heart of which lie the European Court of Justice and the General Court. The administration of European justice has been paramount to the success of the European Union. While the precise effect of the panel may be argued over, it cannot be disputed that the introduction of the panel is an improvement in screening the appointments of members to the European Courts. At the very least, the creation of the appointments panel will require the Member States to reflect more deeply on their nominations and ensure that the candidates proposed not only fulfil the criteria on paper, but are suitable for holding the highest judicial office that the European Union has to offer. ■

Mathew Heim works in the Government Affairs department of Qualcomm, an international technology firm. This article was written in a personal capacity and does not reflect the views of Qualcomm.

Footnotes

- 1 The criteria for members of the European Court, the General Court, including Advocates General essentially focus on independence, qualifications and ability, but differ to reflect the different functions of the members and the courts or office. See footnote 4.
- 2 "The Establishment of the European Union Civil Service Tribunal" by Hazel Cameron OBE, in *The Law and Practice of International Courts and Tribunals*, Volume 5, Number 2, 2006, pp. 273-283(11).
- 3 See for example "The European Court of Justice: The Politics of Judicial Integration" by Renaud Dehousse, St. Martin's Press, 1998, and "Brown & Jacobs: The Court of Justice of the European Communities," 5th Edition by Lionel Neville Brown and Tom Kennedy, Sweet & Maxwell, 2000.
- 4 Article 253 of the Treaty on the Functioning of the European Union (TFEU) states that "The Judges and Advocates-General of the Court of Justice 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 jurists 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 of the panel provided for in Article 255." Article 254 TFEU states that "The members of the General Court shall be chosen from persons whose independence is beyond doubt and who possess the ability required for appointment to high judicial office. They shall be appointed by common accord of the governments of the Member States for a term of six years, after consultation of the panel provided for in Article 255. The membership shall be partially renewed every three years." Emphases added.
- 5 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), OJ L 50/18.
- 6 Although the setting up and functioning of the Tribunal Committee is instructive (and indeed its genesis is the same as that of the European court panel) there are notable differences, e.g. the Committee reviews candidates in an open application process, requiring a majority vote of the Member States.
- 7 The members of the panel are Jean-Marc Sauvé, president of the panel and current Vice-President of the Council of State of the French Republic; Mr Peter Jann, former judge at the ECJ; Lord Mance, currently member of the UK Supreme Court; Mr Torben Melchior, currently President of the Danish Supreme Court; Mr Péter Paczolay, currently President of the Constitutional Court of Hungary; Ms Palacios Vallersundi, former Member of the European Parliament (and proposed by the European Parliament); and Ms Virpi Tiili, former judge at the Court of First Instance.