



“Justice must not only be done, it must also
be seen to be done”

Selecting judges of the Court of Justice

Itsiq Benizri

Thesis submitted for assessment with a view to obtaining the degree of
Master in Comparative, European and International Laws (LL.M.)
of the European University Institute

Florence, September 2014

European University Institute
Department of Law

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THIS THESIS HAS BEEN SUBMITTED FOR LANGUAGE CORRECTION.

ACKNOWLEDGEMENTS

I would like to express the deepest appreciation to my supervisor, Professor Loïc Azoulai, for his help, his availability, and his precious advice.

I particularly thank Professor Denis Waelbroeck whose classes in Brussels sparked my interest in this research topic.

I also thank Ian Forrester, as well as all the people I cannot quote by name in order to preserve the confidentiality of our conversations, who helped me a lot in my research.

I express all my gratitude to Nicola Hargreaves, Hubert de Verdelhan and Barend Van Leeuwen. They taught me more than I could have ever expected and I owe them a lot.

Finally, I thank my parents. Without their constant help, this thesis would not have been possible.

SUMMARY

This research addresses the issue of the appearance of independence of the judges of the Court of Justice regarding the manner of their selection. It highlights the lack of interest of the literature in this issue despite its importance and it suggests that the selection procedure established by art. 255 TFEU weakens the appearance of independence of the judges of the Court of Justice. According to this procedure, national governments submit a candidate to the “255 Committee”, which gives a non-binding opinion on his or her suitability. Afterwards, all Member States decide on the appointment of the candidate at unanimity. With regard to the national stage of the selection, the procedure can be different from one Member State to another. After analysing these procedures in Belgium, France, and the United Kingdom, it turns out that the national selection procedures are sometimes very opaque and based on subjective criteria. With regard to the European stage of the selection, the powers of the 255 Committee are limited, although less than they seem to be. In conclusion, this research shows that the selection procedure of the judges of the Court of Justice does not affect their appearance of independence so that it would lead to a breach of the right to be judged by an independent tribunal. However, the manner of this selection weakens their appearance of independence. Given how great a role the Court of Justice plays in the European Union, this weakening should be a primary concern.

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INTRODUCTION

Independence of the judges is a key feature of any democracy.¹ It is required by two democratic values: the separation of powers and the right to justice, the latter embodying the duty to render justice.

In every democracy, the exercise of power is shaped through the separation of powers.² Since the judiciary ensures that the legislative and the executive respect the rule of law, it has to be independent from them. In this regard, the independence of the judges is one of the most fundamental aspects of the European Union as a democratic area of “*freedom, security and justice*”.³

In every democracy, everyone has a right to justice.⁴ To render justice, judges must apply the law without being influenced by the other powers.⁵ If there is no independence, there is no fair trial,⁶ and if there is no fair trial, there is no justice. Therefore, there can be no right to justice without judicial independence. Independence of the judges is then recognized as the pillar of any fair trial and as a fundamental right in the European Union through article 6 of the European Convention of Human Rights and article 47 of the Charter of Fundamental Rights of the European Union.

¹ Iacobucci, F. (2007), “Foreword”, in K. Malleson & P. H. Russel (eds.), *Appointing Judges in an Age of Judicial Power. Critical Perspectives from Around the World* (University of Toronto Press), p IX.

² Regarding judicial independence, the concept of separation of powers is absolutely central in the case law of the European Court of Human Rights. See *Stafford v. the United Kingdom* [GC], no. 46295/99, §78, ECHR, 2002-IV and *Maktouf and Damjanovic v. Bosnia and Herzegovina* [GC], nos. 2312/08 and 34179/08, §49, ECHR, 2013. I will refer to the case law of the European Court of Human Rights all along this dissertation. This is justified by the Charter of Fundamental Rights of the European Union, which States that “*in so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection*” (Charter of Fundamental Rights of the European Union [2010] O.J. C83/02, Art. 52(3)). More specifically, the Court of Justice has already referred itself to the case law of the European Court of Human Rights regarding judicial independence (Case C-506/04 *Wilson* [2006] ECR I-08613, §§51, 53 and 57). In particular, in this case, the Court of Justice has referred to the following cases: *Campbell and Fell*, nos. 7819/77 and 7878/77, ECHR, 1984; *De Cubber v. Belgium*, no. 9186/80, ECHR, 1984; *Langborger v. Sweden*, no. 11179/84, ECHR, 1989.

³ Consolidated Version of the Treaty on European Union [2008] OJ C115/13, Art. 3§2.

⁴ In particular, “*access to justice is a fundamental pillar of western legal culture. ‘To no one will we sell, to no one will we deny or delay right or justice’ proclaimed the Magna Carta in 1215, expressing an axiom which has remained in force in Europe to the extent that it features in the European Convention on Human Rights, the Charter of Fundamental Rights of the European Union and the case law of the Court*” (C-14/08 *Roda Golf & Beach Resort* [2009] ECR I-05439, opinion of AG Colomer, §29).

⁵ Case C-506/04 *Wilson* [2006] ECR I-08613, §53.

⁶ *Türkmen v. Turkey*, no. 43124/98, §62, ECHR, 2006.

In every democracy, every judge has the duty to render justice in order to respect everyone's right to justice. Since there is no right to justice without judicial independence, independence is "*inherent in the mission of judging*".⁷ In that sense, the Court of Justice does not even consider a body as a jurisdiction if this body is not independent.⁸

For all of these reasons, the concept of judicial independence is fundamental. However, this concept is also very broad. It is therefore necessary to approach it from two angles. First, what does one mean by judicial independence? Second, how can one determine whether a judge is independent?

With regard to judicial independence, the Court of Justice distinguishes two aspects of this concept:⁹ internal and external independence. Internal independence is related to the parties. It seeks to ensure that the judge will respect an equal distance to the parties and the interests at stake.¹⁰ In that sense, independence does rather correspond to impartiality.¹¹ External independence entails that "*the body is protected against external intervention or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them*".¹² External independence is then evaluated with regard to the other institutional powers, especially the executive.¹³ Yet internal and external independence do not always refer to different realities: they merge when the State is one of the parties at stake.

⁷ Case C-506/04 *Wilson* [2006] ECR I-08613, §49.

⁸ Case C-24/92 *Corbiau* [1993] ECR I-01277, §15; C-393/92 *Gemeente Almelo e.a./Energiebedrijf IJsselmij* [1994] ECR I-01477, §21; Case C-54/96 *Dorsch Consult Ingenieurgesellschaft/Bundesbaugesellschaft Berlin* [1997] ECR I-04961, §23; Case C-110/98 *Gabalfria e.a.* [2000] ECR I-01577, §33; Case C-516/99 *Schmid* [2002] ECR I-04573, §34 and 36; Case C-53/03 *Syfait e.a.* [2005] ECR I-04609, §29; Case C-506/04 *Wilson* [2006] ECR I-08613, §49; Case C-517/09 *RTL Belgium* [2010] ECR I-14093, §36 and 38-41; Case C-196/09 *Miles e.a* [2011] ECR I-05105, §37; Case C-363/11 *Epitropos tou Elegktikou Synedriou* [2012], §23; Case C-175/11 *D. and A.* [2013], §83. See also Oliver, P. (2001), "La recevabilité des questions préjudicielles : la jurisprudence des années 1990", *CDE*, p. 17.

⁹ Case C-175/11 *D. and A.* [2013], §96. See also Gilliaux, P. (2012), *Droit(s) européen(s) à un procès équitable*, (Brussels: Bruylant), p. 470.

¹⁰ Case C-175/11 *D. and A.* [2013], §96.

¹¹ C-506/04 *Wilson* [2006] ECR I-08613, §51. See also Closset-Marchal, G. (2011), "Les garanties du procès équitable en droit judiciaire privé", *J.T.*, p. 683; Soyer, J.-Cl. and De Salva, M., (1999), "Article 6", in *La Convention européenne des droits de l'homme : commentaire article par article* (Paris: Economica), p. 260.

¹² Case C-175/11 *D. and A.* [2013], §96.

¹³ *De Wilde, Ooms and Versyp v. Belgium*, nos. 2832/66, 2835/66 and 2899/66, ECHR, 1971, §78; Case C-174/98 *Nederlands and Van der Wal v. Commission* [2013] ECR I-00001, §17.

With regard to the evaluation of judicial independence, both the Court of Justice and the European Court of Human Rights have identified a set of criteria.¹⁴ One can find six criteria in their case law: (1) the existence of guarantees against outside pressures; (2) the composition of the tribunal¹⁵; (3) the term of office of the judges; (4) the grounds for abstention, rejection and dismissal of its members; (5) the fact that the body *appears* to be independent¹⁶; (6) and the manner of appointment of the judges. For the purposes of this dissertation, I will only consider external independence and assess it through the criterion of the appearance of independence.

I submit that the selection procedure of the judges is a determining process regarding their appearance of independence.¹⁷ With regard to the Court of Justice, the relationship between appearance of independence and the manner of selection of the judges is expressed through art. 19 TEU and 253(1) TFEU, which state that judges of the Court “*shall be chosen from persons whose independence is beyond doubt*”.¹⁸ Therefore, it is necessary to analyse the selection procedure of the judges of the Court of Justice in order to determine whether it ensures its appearance of independence¹⁹ *beyond doubt*.

¹⁴ *Cooper v. the United Kingdom*, no. 48843/99, ECHR, 2003, §104; Case C-175/11 *D. and A.* [2013], §97.

¹⁵ According to the case law of the European Court of Human Rights, the composition of a tribunal clearly embodies the issue of the selection of the judges. See for example *Savino and others v. Italy*, nos. 17214/05, 20329/05 and 42113/04, ECHR, 2009, §103-104; *Taxquet v. Belgium* [GC], no. 926/05, ECHR, 2010, §72; *Oleksandr Volkov v. Ukraine*, no. 21722/11, ECHR, 2013, §110-111.

¹⁶ For the Court of Justice: Case C-24/92 *Corbiau* [1993] ECR I-01277; Case C-53/03 *Syfait e.a.* [2005] ECR I-04609, §29; Case C-517/09 *RTL Belgium* [2010] ECR I-14093, §36; Case C-196/09 *Miles e.a* [2011] ECR I-05105, §37; Case C-175/11 *D. and A.* [2013], §83 and §95-97. For the European Court of Human Rights: *Campbell and Fell*, nos. 7819/77 and 7878/77, ECHR, 1984, §78; *Langborger v. Sweden*, no. 11179/84, ECHR, 1989, §32; *Findlay v. the United Kingdom*, no. 22107/93, ECHR, 1997; *Cooper v. the United Kingdom*, no. 48843/99, ECHR, 2003, §104; *Ergin v. Turkey*, no. 47533/99, ECHR, 2006-VI, §38; *Miroshnik v. Ukraine*, no. 75804/01, ECHR, 2008, §61; *Olujic v. Croatia*, no. 22330/05, ECHR, 2009, §38.

¹⁷ See Malenovski, J. (2011), “L’indépendance des juges internationaux”, *Collected Courses of the Hague Academy of International Law*, vol. 349, p. 115.

¹⁸ Consolidated Version of the Treaty on European Union [2008] OJ C115/13, Art. 19; Consolidated Version of the Treaty on the Functioning of the European Union [2008] O.J. C 115/47, Art. 253(1).

¹⁹ Case C-175/11 *D. and A.* [2013], §99; *Findlay v. the United Kingdom*, no. 22107/93, ECHR 1997, §73; *Cooper v. the United Kingdom*, no. 48843/99, ECHR, 2003, §104; *Zolotas v. Greece*, no. 38240/02, ECHR, 2005, §24; *Ergin v. Turkey*, no. 47533/99, ECHR, 2006-VI, §38. See also Brisard, S. (2011), “The European Court of Justice: Empowered after Lisbon, European Policy Institutes Network”, *EPIN Papers*, n°31, p. 7. See also Consultative Council of European Judges (2001), *Opinion no. 1 for the attention of the Committee of Ministers of the Council of Europe on standards concerning the independence of the judiciary and the irremovability of judges*, <https://wcd.coe.int>, Art. 10-11.

Although some research has been carried out into the independence of the Court of Justice, the literature does not seem to be interested in the selection procedure of its judges.²⁰ The very rare scholars who showed interest for this issue were not lawyers, but political scientists.²¹ Nevertheless, very recently, lawyers slowly began to discuss the selection procedure of the judges of the Court of Justice.²² Yet, there is still nothing written regarding the appearance of independence of these judges, as it is perceived in the light of the manner of their selection. In addition, the selection of the candidates at the national level, which precedes the appointment of the judges at the European level, is largely ignored or, at least, underestimated whereas it plays a primary role in the selection of the judges of the Court of Justice. Hence, this dissertation aims to show how appearances are neglected by the current selection procedure as well as by the literature despite their importance. In doing so, it is based in good part on the selection of the candidates organized at the national level.

Given the space limitations of this dissertation, a choice had to be made regarding the analysed national selection procedures. I choose to analyse these procedures in the United Kingdom, France and Belgium for three reasons. First, the procedures established in these

²⁰ Kelemen, R. D. (2012), “The Political Foundations of Judicial Independence in the European Union”, in S. K. Schmidt and R. D. Kelemen (eds.), *The Power of the European Court of Justice*, (Routledge), p. 50. See also Sauvé, J.-M., (forthcoming), “La sélection des juges de l’Union européenne : la pratique du comité de l’article 255” in M. Bobek (ed.), *Selecting Europe’s Judges* (Oxford University Press), p. 1). For an example of such a disinterest, see Guinard, D. “Les éléments d’indépendance et de dépendance de la justice : l’exemple de l’Union européenne” in Sedky, J. A., Delmas, G., and Robbe, S. (eds.), *L’indépendance de la Justice*, (Paris: l’Harmattan), p. 132. As to the Court of Justice case law, the independence of the Court has been questioned only once and the objection was clumsily expressed, which led the Court to brush it aside. Accordingly, one could hardly claim that the Court totally rejects any questioning of its independence on the basis of this case. The Court answered as follows: “as to the objection raised by the defendants in the main proceedings that the power of review is conferred on the Court of Justice, whose independence they claim is undermined on the ground that the Court is itself an EU institution, suffice it to state that it is wholly unfounded in the light of all the safeguards laid down in the Treaties, which ensure the independence and impartiality of the Court of Justice, and the fact that all judicial bodies necessarily form part of the State or supranational organisation to which they belong, a fact which on its own is not capable of entailing an infringement of Article 47 of the Charter or Article 6 of the ECHR” (Case C-199/11 *Europese Gemeenschap v. Otis nv and others* [2012] §64 – I emphasize). Furthermore, since the objection of the defendants was not related to the selection procedure of the judges of the Court of Justice, it is not relevant for this dissertation and will not be discussed here.

²¹ Kelemen, R. D. (2012), *ibid.* See especially the remarkable paper of Kenney, S. J. (1998-1999), “The Members of the Court of Justice of the European Communities”, *Columbia Journal of European Law*, vol. 5, p. 101-133. Kenney was already making the same observation at the time (*ibid.*, p. 104-105).

²² See for example the conference organized by the College of Europe late 2013: *Selecting Europe’s Judges: A Critical Appraisal of Appointment Processes to the European Courts* (<https://www.coleurope.eu>) and the forthcoming book based on it, M. Bobek (ed.), *Selecting Europe’s Judges* (Oxford University Press). See also Ritleng, D. (forthcoming), “The Independence and Legitimacy of the European Court of Justice”, in D. Ritleng (ed.), *Independence and Legitimacy in the Institutional System of the EU*, (Oxford University Press).

Member States constitute three different models, which provide a contrasted overview of the issue. Second, this reason has to be combined with the issue of the access to data. In this regard, I choose the analysed Member States depending of my language skills. Third, the opacity of some of the national selection procedures makes sometimes extremely difficult the collection of collect data on their functioning. As a result, I had to focus on some Member State in order to collect these data as efficiently as possible, and to select the Member States for which I had the possibility to find these data.

As for the methodology, with the exception of the United Kingdom, there is no legal or official public source establishing or explaining the organization of the selection procedure for the candidates to the position of judge at the Court of Justice at the national level in the analysed Member States. As a result, the data I use in this dissertation come mainly from personal interviews with judges of the Court of Justice, European Union lawyers and academics,²³ and from the *Network of the Presidents of the Supreme Judicial Courts of the European Union*, which has organized its fifth colloquium in Paris on 25 and 26 October 2012 on the *Appointment of Judges to the Supreme Court, to the Court of Justice of the European Union and to the European Court of Human Rights*. For the purposes of this colloquium, every President of the network had to answer to a standard questionnaire on the national selection procedure of the judges for these Courts in his Member State. These questionnaires include useful information on this issue.²⁴

This dissertation is structured as follows. I will start by establishing a theoretical framework, in which I will develop the concept of appearance of independence (**I**). I will then proceed to an empirical analysis of the selection procedure of the judges of the Court of Justice at the European level and at the national level in Belgium, France, and the United Kingdom (**II**). Finally, I will evaluate this selection procedure with regard to the theoretical framework established in the first part (**III**). The conclusion suggests that appearances should be more taken into account in order to strengthen the independence of the Court of Justice and the public confidence towards it.

²³ According to these people's wishes, I keep their identity confidential.

²⁴ See appendix.

I

THE CONCEPT OF APPEARANCE OF INDEPENDENCE

I will start by defining the concept of appearance of independence (1). I will then address an important preliminary observation regarding the relationship between appearance and reality in order to avoid any misunderstanding of my claim (2). Next, I will explain why appearance of independence matters beyond independence itself (3). I will then try to clarify the relationship between the appearance of independence and the selection of the judges by showing how the latter affects the former (4). This will lead me to address a more normative aspect: how should one select the judges in order to ensure their appearance of independence (5)? Finally, I will analyse the case law of the Court of Justice and the European Court of Human Rights to find out how these Courts deal with the concept of appearance of independence (6).

1. What is appearance of independence?

According to the case law of the Court of Justice and the European Court of Human Rights, appearance of independence can be described as the requirement that obliges a judicial body to act in such a way that it “*dispel[s] any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it*”.²⁵

2. The relationship between appearance and reality in the concept of appearance of independence

According to the concept of appearance of independence, a judge *is* not independent if he²⁶ does not *appear* to be independent.²⁷ In that sense and in this context, appearance is no longer understood as opposed to reality, as dismissing or deceiving from reality, which is

²⁵ Case C-175/11 *D. and A.* [2013], §95-97.

²⁶ For reasons of clarity, I use the masculine form throughout this dissertation, although the feminine is *always* equally implied.

²⁷ A judge who appears to be independent is not *necessarily* independent. This is because appearance of independence is only one of the evaluation criteria of judicial independence.

perceived as being the truth.²⁸ Nor is it an illusion, or in Sartre's words, "*that which is not being*"²⁹, or the insignificant part of the reality as in Plato's allegory of the cave.³⁰ As a consequence, under certain circumstances, appearance *is* reality, and reality is made of appearances. In this regard, in order to understand the importance of the concept of appearance of independence, one has first to realize that appearance and reality cannot be separated in this framework.³¹ Indeed, such an approach has two major consequences.

First, the objectivity of reality must be rethought. In the scope of the concept of appearance of independence, appearance *is* reality because it is the reality from the point of view of a determined actor. As a result, appearance is still reality even if this reality can be perceived as being different from the point of view of a different actor. A judge might then appear to be absolutely independent to the first actor, while he would not appear to be so to the second one.³² Let us say, for instance,³³ that A has a disagreement with the State on the interpretation of a tax law. Between two hearings, A discovers that the judge is negotiating with the State in order to become an official of the Ministry of Finance. In this case, the judge would not appear to be independent to A. Yet, a third judge might consider that, in reality, the judge at stake has a strong statute protecting his independence and works perfectly independently. There would then be two realities: the *appearance-reality* of A and the *realistic-reality* of the third judge. In this regard, reality is not objective anymore inasmuch as there is not only one reality. However, it is still objective insofar as appearances can be expressed objectively. This condition is essential to the concept of appearance of

²⁸ Martens, P. (2002), "Réflexions sur le maniérisme judiciaire", *Revue trimestrielle des droits de l'Homme*, p. 337.

²⁹ Sartre, J.-P. (1956), *Being and Nothingness*, (New York: The Philosophical Library), 1956.

³⁰ McKoski, R. J. (2010), "Judicial Discipline and the Appearance of Impropriety: What the Public Sees Is What the Justice Gets", *Minnesota Law Review*, vol. 94, p. 1916.

³¹ This approach reminds the abolition of the dualism of being and appearance claimed by Jean-Paul Sartre in *Being and Nothingness*: there is no more "*being-behind-the-appearance*" (Sartre, J.-P., *op. cit.*, p. xlv). Sartre claimed that "*the dualism of being and appearance is no longer entitled to any legal status within philosophy*". He then considered that "*modern thought has realized considerable progress by reducing the existent to the series of appearances which manifest it*" (*ibidem*, p. xlv).

³² In that sense, the European Court of Human Rights Stated that: "*regardless of the acknowledged objectivity of the Advocate-General or his equivalent, that officer, in recommending that an appeal on points of law should be allowed or dismissed, became objectively speaking the ally or opponent of one of the parties and that his presence at the deliberations afforded him, if only to outward appearances, an additional opportunity to bolster his submissions in private, without fear of contradiction*" (*Kress v. France*, no. 39594/98, ECHR, 2001, §82). See also *Borgers v. Belgium*, no. 12005/86, ECHR, 1991, §26.

³³ I took my inspiration from a real case. See *Sacilor Lormines v. France*, no. 65411/01, ECHR, 2006.

independence. Otherwise, appearance could not *be* reality. In order to express appearances objectively, the standard applied should be as follows: different reasonable persons could perceive the same reality as the actor concerned if they observe the appearance from his point of view.³⁴

Second, in the scope of the concept of appearance of independence, appearances are not designed to replace reality. As a consequence, when I claim that the selection procedure of the judges should be organized in such a way that it would more take appearances into account, I certainly do not claim that this procedure should only be an appearance disconnected from any reality. On the contrary, I claim that appearances should reinforce reality, not deceive from it. Again, an appearance that could not be perceived as reality from the point of view of the *reasonable person* would not fall within the scope of the concept of appearance of independence or within the scope of my submission. Let us illustrate this point more concretely. Let us imagine three different selection procedures of judges. In the first one, the Minister just picks a judge subjectively and appoints him. In the second one, a panel with a high reputation of independence selects a judge following a very objective, public and transparent procedure. In the third one, a panel selects a judge following a procedure, which is supposed to be objective, public, transparent, and ran by independent people. However, upon closer examination, the *reasonable person* can see that this procedure has only been designed in order to hide the reality, which is that the judge appointed had been selected from the true beginning. These three examples illustrate three different relationships between reality and appearance. These are *reality out of appearances*, *reality supported by appearances*, and *reality disconnected from appearances*. In the first situation, there is a reality out of appearances, that is to say a reality built out of any concern regarding appearances.³⁵ Even if the judge selected would have been selected in any case, he has been chosen in such a way that none appearance can support the reality of his superior competences towards the public. In the second situation, reality is supported by appearances. Strong appearances reinforce the righteousness of the appointment of the judge to the public.

³⁴ See below.

³⁵ This is slightly different from a reality without appearances, which does not exist. For instance, in the case provided as an example above, even though the selection procedure is organized without any concern regarding appearances, it still has an appearance.

Finally, in the last situation, reality is disconnected from appearances. The judge selected might be great or not. Appearances do not tell anything on reality. They can deceive it or not, but they can certainly not support it. Throughout these examples, my will is to show that my claim, which is that appearances should be taken into account in the selection procedure of the judges, does only rely on a reality perceived as being supported by appearances, as opposed to a reality built out of appearances or disconnected from appearances. Appearances should then not be ignored as they are in the first situation because, as explained below, they matter too much to do so. Nor should they be exposed as a mask showing an illusory appearance and hiding a shameful reality, as they are in the third situation. Appearances should be taken into account in order to strengthen reality towards the public. This idea and these nuances are at the core of the concept of appearance of independence. As a consequence, being interested in appearances does not mean neglecting reality. On the contrary, it means being interested in reinforcing reality.

3. Why does appearance matter?³⁶

A major concern of this dissertation is to explain why appearance matters. This is all the more necessary knowing that there is a tendency to ignore or to neglect this issue in the *European Union law village* (a). Yet, the context in which the Court of Justice has to work is very specific and should lead to consider its appearance as a primary concern (b). I will then explain why the appearance of independence matters (d) after exposing to whom judges must appear to be independent (c).

a. Ignoring appearances in the *European Union Law village*

Above all, it is important to underline the lack of interest regarding the issue of the appearance of independence of the Court of Justice in the *European Union Law village*, especially when it comes to evaluating it through the selection procedure of the judges. This

³⁶ In common law, the importance of appearances belongs to the principle of “*open justice*”. According to this principle, proceedings must be open to the public, including the contents of court files and public viewing of trials. See Spigelman, J. J. (2006), “The Principle of Open Justice: A Comparative Perspective”, *University of New South Wales Law Journal*, vol. 29, no. 1, pp. 147-166. See also Nettheim, G. (1984), “The Principle of Open Justice”, *University of Tasmania Law Review*, no. 8, p. 28; Baylis, C. (2001) “Justice Done and Justice Seen to be Done – The Public Administration of Justice”, *Victoria University Law Review*, no. 21, p. 177.

lack of interest can be observed in the literature, since there is little written on this issue.³⁷ There is a tendency among European Union law lawyers, scholars, and judges to avoid the issue by looking exclusively at the quality of the decisions of the Court.³⁸ In their view, judges of the Court of Justice can be seen to be independent because they produce decisions of good quality.³⁹ Since these decisions concretely show their independence, why should one bother with simple appearances? The Court of Justice itself seems to be more interested in the competences of the judges than in their independence.⁴⁰ However, such an approach cannot be satisfying for four reasons.

First, this approach moves the issue of appearance to the issue of quality. In this regard, it is based on a wrong premise: judges who do *not* appear to be independent can take good decisions, especially considering they might appear to be independent from the point of view of someone else.

Second, this approach does not meet the rationale of the concept of appearance of independence. As explained below, appearance of independence is required because judges must inspire confidence to the public. People should be able to trust their judges when they expect them to take a decision. As a consequence, appearance of independence is appreciated *ex ante*, before the judgement, when facing the judge, while the quality of the decision is appreciated *ex post*, after the judgement delivery. These are then two different concepts that cannot be confused.

Third, this approach does not meet the expectations of the public. People can never accept things they are not allowed to see, observe or know without any reasonable justification.⁴¹ As a consequence, they could never accept an opaque selection of the judges, since such a procedure would only let the shadow of suspicion hovers over it, while it could not be reasonably justified. This foundation of the concept of appearance of independence cannot be compensated by the quality of the decisions, in particular because of the previous argument.

³⁷ Kelemen, R. D., *op. cit.*, p. 50.

³⁸ Several members of the Court of Justice share this point of view. I do not cite them by name in order to keep the confidentiality of our conversations.

³⁹ Naturally, the quality of the decisions of the Court of Justice might be discussed. However, this is a whole topic in itself and I do not intend to discuss it here.

⁴⁰ Case C-175/11 *D. and A.* [2013], §99. See above, section 6b for a more detailed explanation.

⁴¹ *Richmond Newspapers inc v. Virginia*, 448 U.S. 555 (1980), at 571-572.

Four, this approach does actually not correspond to reality. In fact, the 255 Committee established by the Lisbon Treaty in order to give an opinion on the suitability of the candidates for the position of judges at the Court of Justice has a double task. It does not only have “*to make sure that the selected judges have the necessary qualities to perform their future duties*”, which refers to a pure issue of competence, but it also has to “*distance the mechanism for appointing judges from political passions and power issues*”, which refers to the issue of the selection of the judges and thus to the issue of their appearance of independence.⁴²

Aristotle distinguished two kinds of virtues of the rulers when he was conceiving the organization of society: *intellectual* and *moral virtues*. *Intellectual virtues* should guarantee the competences of the rulers, while *moral virtues* should inspire confidence to people in them. The *moral virtue* of Aristotle can be assimilated to an “*institutional based-trust*”, that is to say a confidence related to the structure of an institution that guarantees some characteristics, such as the appearance of independence of the judges of the Court of Justice ensured through the selection procedure.⁴³ In this view, this issue is not anymore a matter of morality, but rather an institutional issue. Still, regarding the lack of interest of the *European Union Law village* for this issue, this *village* seems to focus on the intellectual virtue and to ignore the moral one. I will argue below that such a selective approach is unfortunate.

b. The specific context of the Court of Justice

The issue of the appearance of independence is all the more important considering the specific institutional context in which the Court of Justice has to work.

First, since there is one judge for each Member State, there is already a “*tension between representativeness and the independence*” of the judges of the Court of Justice.⁴⁴ Indeed, one

⁴² Sauvé, J.-M., “La sélection des juges de l’Union européenne : la pratique du comité de l’article 255”, *op. cit.*, p. 2 (my translation). This goal of the 255 Committee, and its creation as well, contradict the expectations of some authors before (see Legal, H. (2001), “Composition et fonctionnement des Cours européennes”, *Pouvoirs*, no. 96, p. 76). Regarding the relationship between the selection procedure of the judges and their appearance of independence, see below.

⁴³ Zucker, L. G. (1986), “Production of Trust: Institutional Sources of Economic Structure, 1840-1920”, in B. M. Staw & L. L. Cummings (eds.), *Research in Organizational Behavior*, p. 53-111.

⁴⁴ Dehousse, R. (1994), *La Cour de Justice des communautés européennes*, (Paris: Montchrestien), p. 17. See also Malenovski, J. (2011), *op. cit.*, vol. 349, p. 89-91. When proceeding to judicial appointments to the U.S.

might consider that this organization is not designed to guarantee the independence of the judges but on the contrary, to ensure that they will be good ambassadors for their Member States. As a consequence, the appearance of independence of the judges of the Court of Justice is already fragile. Surely, it is not ignored. As a matter of fact, their representativeness can also be a good thing, since it can lead the public to feel represented, which is important regarding its perception of the judges and, therefore, their legitimacy.⁴⁵ Judges are legitimate when they are perceived in such a way that people accept their authority.⁴⁶ In this respect, judges cannot be considered to be legitimate when they cannot be seen to be independent. As a result, the public can only trust its judges if it is convinced that they represent it and not the interests of their Member State. Still, given the fragility of the appearance of independence of the judges of the Court of Justice, it is even more important to ensure they appear to be independent regarding the manner of their selection.

Second, addressing the issue of appearance of independence of the judges of the Court of Justice at this time is not innocent. My concern regarding this issue is in particular due to the fact that appearances play a key role for the development of confidence. Confidence in the European Union has decreased a lot between 2007 and 2013.⁴⁷ The Court of Justice is particularly badly placed in this context. First, it is the less trusted European institution. Only a minority of people trust the Court.⁴⁸ Second, it is less trusted than national Courts.⁴⁹ The unpopularity of the Court of Justice might explain why the issue of the selection of its judges

Supreme Court, the President does also take representational criterion into account, including the geographical origin of the appointee. See Kahn, M. A. (1995), "The Appointment of a Supreme Court Justice: A Political Process from Beginning to End", *Presidential Studies Quarterly*, vol. 25, no. 1, p. 33.

⁴⁵ Dehousse, R., *op. cit.*, p. 17. See also Ritleng, D. *op. cit.*

⁴⁶ Ritleng, D. *op. cit.*

⁴⁷ 57% of the interviewed people trusted the European Union in spring 2007, while they were only 31% in autumn 2013. In the same time, confidence in national parliament and government has also decreased, respectively from 43% to 25% and from 41% to 23%. The decreasing is still significantly higher for the European Union, with a loss of 26%, than for national parliaments and governments, with a loss of 18%. See European Commission (2013), *Public opinion in the European Union*, Standard Eurobarometer no. 80, <http://ec.europa.eu>, p. 5.

⁴⁸ Arnold, Ch., Sapir, E. V. and Zapryanova, G. (2012): "Trust in the institutions of the European Union: A cross-country examination", in L. Beaudonnet and D. Di Mauro (eds) "Beyond Euro-skepticism: Understanding attitudes towards the EU", *EIoP*, Special Mini-Issue 2, Vol. 16, Article 8, p. 20.

⁴⁹ Arnold, Ch., Sapir, E. V. and Zapryanova, G., *op. cit.*, p. 20. In the EU, 53% of people tend to trust justice in their own member State. However, this level of trust can be very different from one member State to another. It is very high in some countries such as Finland (85%), while it is very low in others, such as Slovenia (24%). See European Commission (2013), *Justice in the EU*, flash eurobarometer no. 385, <http://ec.europa.eu>, p. 13-14.

is not openly discussed despite its importance for the public.⁵⁰ The level of public confidence in the Court is so low that people might not be interested in knowing how its judges are selected. They just do not trust the Court. Moreover, as I will show below, the selection procedure of the judges of the Court of Justice can be very opaque. People rarely debate over things made in secret before they are made public or, at least, before the secrecy has been unveiled.

c. To whom must judges appear to be independent?

Naturally, judges must appear to be independent to the parties at stake. But, more broadly, they must appear to be independent to the public. Three elements indicate this solution.

First, the European Court of Human Rights has stated that judges must inspire confidence “*in the public and above all, as far as criminal proceedings are concerned, in the accused*”.⁵¹ This clearly shows that parties are the priority, but not the exclusive target of this confidence and therefore of this appearance.

Second, the *reasonable doubt* regarding the appearance of independence of a judge must be appreciated from the point of view of any *reasonable person* in the same circumstances of the party at stake, and not only from the point of view of the party itself.⁵² This also shows that the judge must appear to be independent to the public, and not only to the party at stake.

Third, the democratic role of the judges is expressed through their relationship with the public. This relationship is expressed through the idea that judges must render justice to the public, the *demos*. Judges must render justice to every citizen.⁵³ This relationship is also expressed through the right to a public trial.⁵⁴ This right expresses two ideas. First, the public is concerned with judicial decisions. Second, the public can control judges. Therefore, the

⁵⁰ This general statement must be qualified. In Italy, for instance, a parliamentary interpellation has already been presented in order to know the selection criteria of the judges of the Court of Justice (Atti parlamentari, Camera dei Deputati, XVI legislatura, Allegato B ai Resoconti, Seduta del’8 marzo 2012, Interrogazione a risposta orale 3-02154, p. 28664).

⁵¹ *Incal v. Turkey* [GC], no. 22678/93, ECHR, 1998, §71. See also *Sahiner v. Turkey*, no. 29279/95, ECHR, 2001, §44 and *Hauschildt v. Denmark*, no. 10486/83, ECHR, 1989, §48.

⁵² See below.

⁵³ Kenny, S. (1999), “Maintaining Public Confidence in the Judiciary: A Precarious Equilibrium”, *Monash University Law Review*, vol. 25, no. 2, p. 210.

⁵⁴ Charter of Fundamental Rights of the European Union [2010] O.J. C83/02, Art. 47.

public has a right to attend proceedings. As a consequence, judges must appear independent to every person who attends the hearing that is to say, virtually, everyone.⁵⁵

d. Appearance is a matter of trust

Appearance of independence is at the core of judicial independence. This principle is referred to in the famous legal maxim: “*justice must not only be done, it must also be seen to be done*”.⁵⁶ Yet, its importance has still to be explained.

Appearance of independence matters for judicial independence because of confidence. Judges cannot render justice if they do not inspire confidence to the public. It is for this reason that the European Court of Human Rights takes appearances into account when “*they are necessary to establish or to maintain the confidence that tribunals must inspire to the public*”.⁵⁷ This rationale for the appearance of independence can be analysed from two standpoints. First, from a general standpoint, judges must inspire confidence to the public, which includes, in particular, investors. Second, from a more specific standpoint, the Court of Justice must inspire confidence to all the actors who participate in the construction of the European Union.

As a preliminary observation, it is essential to clarify the statute of confidence in sciences before proceeding further. This statute has considerably evolved throughout the history of

⁵⁵ Spigelman, J. J. (2000), “Seen to be Done : The Principle of Open Justice”, *Australian Law Journal*, no. 74, p. 290.

⁵⁶ This legal maxim appeared for the first time in an English case (*Rex v. Sussex Justices ex parte McCarthy* (1924), 1 K.B. 256, 259). It is generally attributed to Lord Gordon Hewart. However, this is quite surprising, knowing that he was known to be extremely “biased and incompetent” (Spencer, J. R. (1989), *Jackson’s Machinery of Justice*, Cambridge University Press, 8th ed., p. 375) and even as “the worst english judge in living memory” (*ibidem* (1977), 7th ed., p. 475. See also, in the same sense, Lord Devlin (1985), *Easing the passing: the trial of Dr John Bodkin Adams* (London: Bodly)). Actually, there is evidence that Lord Gordon Hewart did not care at all of appearances (see Spigelman, J. J. (2000), “Seen to be Done : The Principle of Open Justice”, *op. cit.*). According to Spigelman (*ibidem*), the legal maxim should then be attributed to Lord Sankey, who wrote that “the Bar is just as important as the Bench in the administration of justice, and misunderstandings between the Bar and the Bench are regrettable, for they prevent the attainment of that which all of us desire - namely, that justice should not only be done, but should appear to have been done” (*Hobbs v. Tinling and Company Limited*, 1929, 2K.B. 1, at 48). Still, the legal maxim has been adopted by the European Court of Human Rights, in particular, in *De Cubber v. Belgium*, no. 9186/80, ECHR, 1984, §26 and *Micallef v. Malta*, no. 17056/06, ECHR, 2009, §98.

⁵⁷ Gilliaux, P., *op. cit.*, p. 15 (my translation). See *Piersack v. Belgium*, no. 8692/79, ECHR, 1982, §30 and *Remli v. France*, no. 16838/90, ECHR, 1996, §48.

ideas.⁵⁸ Plato had already seen a link between appearance and confidence. As has been point out above, he perceived appearances as deceiving from reality. Plato then thought there was no room for appearances in a rational world. As a consequence, since appearances and confidence were strongly related in his opinion, there was neither room for confidence in a rational world. Indeed, in Greek mythology, confidence used to be a social link between people who shared a same belief perceived as the truth.⁵⁹ However, in Plato's view, only certainty based on rationality can lead to the truth. As a result, there was an opposition between confidence, conceived as an opinion, and rationality, conceived as a certainty.⁶⁰ The same reasoning led Descartes to consider confidence as an "*illusory belief*".⁶¹ Confidence has then been kept away from sciences for centuries. It is only recently that confidence appeared again in sociology, but mostly in economics. I will now develop the statute of confidence in the concept of appearance of independence throughout the following detailed explanation of the rationale of this concept.

From a general point of view, appearance of independence is necessary in a democratic society, because judges must inspire confidence to the people.⁶² Judges must then appear to be independent in order to raise public confidence in them. Five reasons explain this.

⁵⁸ See Neveu, V. (2004), "La confiance organisationnelle : définition et mesure", in *Actes du XVème congrès de l'AGRH*, tome 2, p. 1072.

⁵⁹ Neveu, V., *op. cit.*, p. 1072.

⁶⁰ Neveu, V., *op. cit.*, p. 1072.

⁶¹ Neveu, V., *op. cit.*, p. 1073.

⁶² *Findlay v. the United Kingdom*, no. 22107/93, ECHR, 1997, §76; *Incal v. Turkey* [GC], no. 22678/93, ECHR, 1998, §71; *Sahiner v. Turkey*, no. 29279/95, ECHR, 2001, §48. The issue of public confidence in the Courts is central in the American literature. One might be tempted to think that the American literature's interest for public confidence in the judiciary is due to the fact that, in the U.S., the public elects the judges. However, the literature focuses on the public support for Supreme Court, while there is very little literature regarding State Courts (Wenzel, J. P. *et al.*, *op. cit.*, p. 193). Since judges of the American Supreme Court are not elected, but appointed by the President with the approval of the Senate, the American literature's interest for public confidence in the judiciary cannot be reduced to the election system. Regarding public confidence in the Supreme Court, one can find two assumptions (Wenzel, J. P. *et al.*, *op. cit.*, p. 192). Some authors think this support comes from a general reverence, which is due to the status of the Court as an institution and its relationship with the Constitution (See Casey, G. (1974), "The Supreme Court and myth", *Law and Society Review*, vol. 8, p. 385-419; Jaros, D. and Roper, R. (1980), "The U.S. Supreme Court: Myth, diffuse support, specific support, and legitimacy", *American Politics Quarterly*, vol. 8, no. 1, p. 85-105). Others suggest it comes from the fact that the Court is seen as the guardian of the rule of law and then as the most democratic institution (See Caldeira, G.A. and Gibson, J.L., "The Etiology of Public Support for the Supreme Court", *op. cit.*, 635-664). In that sense, the public support of the Court would come from its specific decisions (See Caldeira, G. A., "Neither the purse nor the sword: Dynamics of public support for the United States Supreme Court", *op. cit.*, p. 1209-1226; Caldeira, G. (1991), "Courts and public opinion" in J. B. Gates and C. Johnson (eds.), *The American*

First, judges must appear to be independent in any democratic society because, as a democratic institution, they must have legitimacy. This legitimacy comes for a large part from the public confidence and support.⁶³ As a matter of fact, public support is all the more important for the judges considering they have “*neither the purse nor the sword*”⁶⁴. Another reason that justifies the necessity of judicial appearance of independence in democracy comes from Locke’s political philosophy. In his view, society relies on the mutual confidence between the rulers and the ruled.⁶⁵ In a democracy, the ruled retire their confidence to the rulers when they do not trust them anymore.⁶⁶ As a result, rulers are not democratic and legitimate anymore and they must change. This principle applies to all democratic institutions that have to be legitimate, including judges. Judges have then to give signs to the public, if they want it to support them.⁶⁷ Otherwise, without confidence, the public might be less likely to comply with the rulings of the judges.⁶⁸ As a consequence, judges remain on the goodwill of the public.⁶⁹ This maybe joins Hart’s concept of law. In his view, judicial authority relies on the public acceptance of this authority. Such a public acceptance is not possible without public confidence. Therefore, basing judicial authority on the public acceptance of its authority or on the public confidence in this authority might be seen as two merging

courts: A critical assessment (Washington, DC: Congressional Quarterly); Hoekstra, V. J. (2000), “The Supreme Court and local public opinion”, *American Political Science Review*, vol. 94, no. 1, p. 89-100; Mondak, J. J. and Smithey, S. I. (1997), “The dynamics of public support for the Supreme Court”, *Journal of Politics*, vol. 59, no. 4, p. 1114-1142; Tannenhaus, J. and Murphy, W. (1981), “Patterns of public support for the Supreme Court”, *Journal of Politics*, vol. 48, no. 1, p. 24-39). These propositions are not contradictory, but may be seen as complementary: the public support is made of a general or diffuse support and a more specific support (See Murphy, W. F. and Tanenhaus, J. (1990), “Publicity, Public Opinion, and the Court”, *Northwestern University Law Review*, vol. 84, p. 985-1023; Caldeira, G.A. and Gibson, J.L., “The Etiology of Public Support for the Supreme Court”, *op. cit.*, p. 636-638). Still, I do not claim that appearance of independence is the only or the most important component of public confidence in judges. I only claim that it is an essential criterion to generate public confidence.

⁶³ Wenzel, J. P., Bowler, S., Lanoue, D. J. (2003), “The Sources of Public Confidence in State Courts. Experience and Institutions”, *American Politics Research*, vol. 31, no. 2, p. 192.

⁶⁴ Caldeira, G. A. (1986), “Neither the purse nor the sword: Dynamics of public support for the United States Supreme Court”, *American Political Science Review*, vol. 80, no. 4, p. 1209-1226.

⁶⁵ Marzano, M. (2012), *op. cit.*, p. 85.

⁶⁶ Locke thinks that confidence is conditional, while Hobbes claims it is absolute so that people cannot question it (Marzano, M. (2012), *op. cit.*, p. 85).

⁶⁷ Caldeira G. A. and Gibson J. L. (1995), “The legitimacy of the Court of Justice in the European Union: Models of institutional support”, *American Political Science Review*, vol. 89, no. 2, p. 356-376.

⁶⁸ See Murphy, W. F. and Tanenhaus, J. (1968a), “Public Opinion and the Supreme Court: The Goldwater Campaign”, *Public Opinion Quarterly*, vol. 32, no. 1, p. 31-50; Murphy, W. F. and Tanenhaus, J. (1968b), “Public Opinion and the United States Supreme Court: A Preliminary Mapping of Some Prerequisites for Court Legitimation of Regime Changes”, *Law and Society Review*, vol. 2, no. 2, p. 357-382; Tyler, T. R. (1990), *Why People Obey the Law* (New Haven: Yale University Press).

⁶⁹ Wenzel, J. P. *et al.*, *op. cit.*, p. 192.

concepts.⁷⁰ In a similar vein, the European Court of Human Rights has justified “*the growing importance attached to appearances*” by “*the public’s increased sensitivity to the fair administration of justice*”.⁷¹ This naturally includes the public interest in judicial appointments.⁷²

Second, public confidence is essential for judges, because there is a huge asymmetry of knowledge between the public and them. From this point of view, public confidence involves a belief in the judge.⁷³ People rely on judges because they trust them, and they trust them because they believe they are able to render justice. Law, and in particular European Union Law, is so complex that people who are not experts in this field do not have any other choice than trusting judges in order to reduce uncertainty.⁷⁴ Even more simply, once one has submitted his case to a judge, he has to trust him. As a matter of fact, faith is implicit in the notion of confidence.⁷⁵ According to the Oxford dictionary, confidence is defined as “*the feeling or belief that one can have faith in or rely on someone or something*”.⁷⁶ Such a definition can be better understood in the light of the Latin etymology of the word confidence, *confidere*, which means having full trust. Trust and belief are essential to confidence. Indeed, it requires the weakest party to trust the strongest one. Moreover, the one who gives his confidence to someone else becomes necessarily vulnerable, because he becomes dependent of this person.⁷⁷ Confidence is then a “*human bet*”⁷⁸ at the core of society: on the one hand, every society relies on a minimum level of confidence but, on the other hand, this confidence can be disappointed or betrayed.⁷⁹ This is the belief dimension of confidence: people trust the judges because they accept to see them to be independent and competent, but they can never

⁷⁰ Kenny, S., *op. cit.*, p. 213.

⁷¹ *Kress v. France*, no. 39594/98, ECHR, 2001, §82. See also *Borgers v. Belgium*, no. 12005/86, ECHR, 1991, §24.

⁷² Lord Mance, *The composition of the European Court of Justice*, *op. cit.*, p. 6.

⁷³ Miller, A. S. (1970), “Public Confidence in the Judiciary: Some Notes and Reflections”, *Law and Contemporary Problems*, vol. 35, no.1, p. 74.

⁷⁴ Luhmann, N. (1979), *Trust and Power* (Chichester: J. Wiley & Sons). See also Giddens, A. (1990), *The Consequences of Modernity* (Stanford University Press) and Neveu, V., *op. cit.*, p. 1075-1076.

⁷⁵ For this reason, confidence has been analysed as a faith by Thomas Aquinas in his famous *Summa Theologica*. As a consequence, he thought that only christian people are faithworthy. See Marzano, M. (2012), “Qu’est-ce que la confiance ?”, *Revue Interdisciplinaire sur le Management et l’Humanisme*, n°1, p. 85.

⁷⁶ Stevenson, A. (2010), *Oxford English Dictionary*, Oxford University Press, p. 365.

⁷⁷ Marzano, M. (2010), “Qu’est-ce que la confiance ?”, *Etudes*, Janvier, vol. 412, no. 1, p. 53.

⁷⁸ Marzano, M. (2012), *op. cit.*, p. 85-86.

⁷⁹ Marzano, M. (2012), *op. cit.*, p. 85-86.

be absolutely sure that the judges will provide a correct and independent judgment. As a consequence, in order to be the recognized and trusted expert of the European Union law system,⁸⁰ judges of the Court of Justice must give signs to the public in order to raise its confidence in them. Otherwise, without confidence, the public might be less likely to submit cases to the judges.⁸¹

Third, judges need public confidence in order to preserve their credibility regarding the other powers.⁸² This is because, from a certain perspective, judges are part of “*the system*”. On the one hand, they represent the power, together with the other institutions they have to control.⁸³ On the other hand, they are “*charged with the ultimate decision over life, freedoms, rights, duties and property of citizens*” regarding the laws and acts established by the power.⁸⁴ Regarding their specific institutional position, judges must then appear to be independent to the public, which seeks and expects justice.⁸⁵ Obviously, a judge would not have any credibility if he would appear to be connected or influenced by the power that made or applied the law, that is to say, *to be* this power.⁸⁶

Four, judges need public confidence to consolidate their independence regarding the political power and to function adequately.⁸⁷ This is because “*the higher the levels of diffuse public support for a court, the greater the costs politicians will face for attempting to undermine that court’s independence or to otherwise challenge its rulings*”.⁸⁸ So, schematically speaking, judges must ensure the respect of the rule of law, which requires

⁸⁰ Neveu, V., *op. cit.*, p. 1075-1076. See also Giddens, A., *op. cit.*, and Luhmann, N., *op. cit.*

⁸¹ See Roberts, J. V., and Stalans, L. J. (1997), *Public Opinion, Crime, and Criminal Justice* (Boulder: Westview Press).

⁸² European Commission (2012), *Report on Progress in Romania under the Cooperation and Verification Mechanism*, *op. cit.*, p. 20.

⁸³ Judges have to ensure that “*governments and the administration can be held to account for their actions, and, with regard to the legislature, it is involved in ensuring that duly enacted laws are enforced, and, to a greater or lesser extent, in ensuring that they comply with any relevant constitution or higher law (such as that of the European Union)*”. (Consultative Council of European Judges (2001), *op. cit.*, Art. 11).

⁸⁴ United Nations (1985), *Basic Principles on the Independence of the Judiciary*, recital 7. See also Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 5 and 6.

⁸⁵ Consultative Council of European Judges (2001), *op. cit.*, Art. 10.

⁸⁶ Consultative Council of European Judges (2001), *op. cit.*, Art. 11.

⁸⁷ Benesh, S. C. (2006), “Understanding Public Confidence in American Courts”, *The Journal of Politics*, vol. 68, no. 3, p. 697.

⁸⁸ Kelemen, R. D., *op. cit.*, p. 45. See also Caldeira, G.A. and Gibson, J.L. (1992) “The Etiology of Public Support for the Supreme Court”, *American Journal of Political Science*, vol. 36, no. 3, p. 635–664.

them to function adequately. This requires that judges benefit from public support, which in turn requires the public to trust the judges.⁸⁹

Five, judges do also need to appear to be independent in order to raise public confidence from an economic point of view.⁹⁰ As a matter of fact, confidence is a key element for the effectiveness and promotion of economic activities, and it is at the core of almost all of them.⁹¹ Schematically speaking, economic activities can be seen as relying on a *horizontal* and a *vertical confidence*. *Horizontal confidence* refers to the mutual and interpersonal confidence between people that allows them to conclude economic agreements.⁹² *Vertical confidence* does rather refer to the trust shared by all the actors in an actor, such as the authority that emits the money regarding its ability to guarantee its value.⁹³ In this regard, judges appear to be key actors attracting *vertical confidence* regarding their ability to guarantee the rights of individuals independently. As a consequence, the European Commission has recently stated that efficient and independent justice systems “play a key role in [contributing and] restoring confidence [for the investors] and the return to growth”.⁹⁴ This led the European Commission to create the *European Union Justice*

⁸⁹ Benesh, S. C., *op. cit.*, p. 697.

⁹⁰ Shetreet, Sh., *op. cit.*, p. 3. See also Ryssdal, A. (2014), “The Social Importance of Courts and Judges”, in N. A. Engstad, A. L. Frøseth, and B. Tønder (eds.), *The Independence of Judges*, (The Hague: Eleven International Publishing), p. 265-267.

⁹¹ As a consequence, “it can be plausibly argued that much of the economic backwardness in the world can be explained by the lack of mutual confidence” (Arrow, K.-J. (1972), “Gifts and Exchanges”, *Philosophy and Public Affairs*, vol. 1, n° 4, p. 357).

⁹² See Peyrefitte, A. (1995), *La société de confiance* (Paris : Odile Jacob) and Arrow, K.-J., *op. cit.* The society of confidence is not limited to the economic activities. It concerns the development of any project, which includes the European Union construction, as explained above (See Centre d’analyse stratégique, *op. cit.*, p. 4. On the advantages of reciprocity and horizontal links between actors, see Putnam, R.-D., Leonardi, R. and Nanetti, R. (1993), *Making Democracy Work. Civic Tradition in Modern Italy* (Princeton University Press)).

⁹³ A money whose value is not guaranteed would not be used and a money without users would quickly disappear (Centre d’analyse stratégique (2007), *Confiance et croissance*, www.strategie.gouv.fr, p. 4).

⁹⁴ European Commission (2013), *The EU Justice Scoreboard. A tool to promote effective justice and growth*, COM(2013) 160 final, p. 1. There is no unanimity regarding the link between confidence and growth (see, for example, Helliwell, J.-F. (1996), “Economic Growth and Social Capital in Asia”, *NBER Working Paper Series*, n°5470, <http://www.nber.org>). However, most of recent research tends to support the existence of this link (See Knack, S. and Keefer, P. (1997), “Does Social Capital have an Economic Payoff? A Cross-country Investigation”, *Quarterly Journal of Economics*, vol. 112, n° 4, p. 1251-1288; La Porta, R., Lopez-de-Silanes, F., Schleifer, A. and Vishny, R.-W. (1997), “Trust in Large Organizations”, *American Economic Review*, vol. 87, p. 333-338; Hjerpe, R. (1998), “Social Capital and Economic Growth”, *VATT Discussion Papers*, n°183, <http://www.vatt.fi>; Zak, P.-J. and Knack, S. (2001), “Trust and Growth”, *Economic Journal*, vol. 111, p. 295-321; Akcomak, I.-S. and Weel, B.-T. (2006), “Social Capital, Innovation and Growth: Evidence from Europe”, *UNU-MERIT Working Paper*, n° 2006-040). Still, one should bear in mind that the link between confidence and growth is a correlation, not causation. As a consequence, if it is possible that more confidence generates more

Scoreboard in 2013, an indicator designed to promote effective justice and growth.⁹⁵ Since this *scoreboard* is based on the idea that judicial independence generates confidence among investors, it includes findings based on indicators built on the independence of national judicial systems, as investors perceive it.⁹⁶ The *World Justice Project*⁹⁷ and the *World Economic Forum* in its annual *Global Competitiveness Report*⁹⁸ also use the notion of perceived independence. The *Organisation for Economic Co-operation and Development* refers to the notion of trust in the government, which includes in particular trust in an independent judiciary.⁹⁹ It then turns out that investors do not look at rules committed to paper, but rather at what is translated in reality, that is to say at what they can concretely *see*, at what appears to them.¹⁰⁰

From a more specific point of view, the appearance of independence of the judges of the Court of Justice is all the more essential to the Court of justice must be appreciated regarding how great a role it plays in the construction of the European Union¹⁰¹. Surely, the Court of Justice is the most powerful Court in Europe. All judges, including the national highest Courts and the Member States must comply with its case law. But it also shapes a union of law¹⁰² and *through* law.¹⁰³ Throughout its case law, the Court of Justice has “*cemented the*

growth, it is also possible that more growth generates more confidence (Knack, S. and Keefer, P., *op. cit.* See also I. Benizri, “Le droit par la corrélation dans la société de l’information. Mutations, dépassements et défis du droit dans la gouvernance globale par les indicateurs”, *Perelman Centre for Legal Philosophy Working Papers*, www.philodroit.be). In any case, as Stated above, the relationship between confidence and growth is at the core of the European economic policy.

⁹⁵ European Commission (2013), *The EU Justice Scoreboard. A tool to promote effective justice and growth*, *op. cit.* On the indicators, see I. Benizri, *op. cit.*

⁹⁶ European Commission (2013), *The EU Justice Scoreboard. A tool to promote effective justice and growth*, *op. cit.*, p. 5-6. The European Commission considers the use of these indicators to be consistent, since “*a perceived lack of independence can deter investments*” (*ibidem*, p. 18. See also World Economic Forum (2013), *The global competitiveness Report*, <http://reports.weforum.org>, p. 27).

⁹⁷ The World Justice Project (2012), *The Rule of Law Index*, <http://worldjusticeproject.org>.

⁹⁸ See World Economic Forum, *op. cit.*

⁹⁹ OECD (2013), *Government at a Glance*, <http://www.oecd.org>, p. 21-23.

¹⁰⁰ Feld, L. P. and Voigt, S. (2003), “Economic Growth and judicial independence: cross country evidence using a new set of indicators”, *CESifo Working Paper*, no. 906, www.CESifo.de

¹⁰¹ Russel, P. H. (2007), “Conclusion”, in K. Malleson & P. H. Russel (eds.), *op. cit.*, p. 421. See also Alter, K. J. (2009), *The European Court’s Political Power* (Oxford University Press); Dehousse, R., *op. cit.*, p. 20 and following; Sauvé, J.-M. (2013), “Le rôle du Comité 255 dans la sélection du juge de l’Union” in *The Court of Justice and the Construction of Europe: analyses and Perspectives on Sixty Years of Case law* (The Hague: Asser Press and Springer), p. 100-101; Tamn, D. (2013), “The History of the Court of Justice of the European Union Since its Origin”, *ibidem*, p. 29-30.

¹⁰² Case C-294/83 *Les Verts v. Parliament* [1986], § 23.

development of Europe".¹⁰⁴ It has played "a central role in driving forward the process of European integration",¹⁰⁵ in particular by establishing the principles of direct effect and primacy of European Union Law.¹⁰⁶ The European Union is a construction, a common project of sovereign Member States, who decided to build together an internal market and an area of freedom, security and justice. Such a project needs the confidence of each participant. Everyone has to be sure that the others will respect the rules.¹⁰⁷ Surely, the European Union is based on the rule of law, but the rule of law would be meaningless without an independent judicial system.¹⁰⁸ In this regard, the founding of the Court of Justice "was supported by the great vision that conflicts in a future Europe should not be the cause of war or subject to political and economic struggles but should be solved by common institutions using legal means or negotiation in an atmosphere of collaboration between former enemies".¹⁰⁹ For this reason, the authority of the Court of Justice is obligatory to every Member State¹¹⁰. It is not possible to join the European Union without accepting its authority. This authority is even exclusive: only the Court can judge the interpretation and the application of the Treaties.¹¹¹ The Court of Justice is thus clearly consubstantial to the European project. Therefore, it is crucial for all the participants to the European construction to be completely confident in the

¹⁰³ Vauchez, A. (2013), *L'Union par le droit. L'invention d'un programme institutionnel pour l'Europe* (Paris: Presses de Sciences Po).

¹⁰⁴ Lord Mance (2013), *La nomination des juges à la Cour de Justice de l'Union européenne et à la Cour européenne des droits de l'homme*, <http://www.network-presidents.eu>, §1. See also Sauvé, J.-M., *La séparation des pouvoirs, l'Union européenne et le Comité 255*, *op. cit.*, p. 5-6.

¹⁰⁵ Kelemen, R. D., *op. cit.*, p. 43. See also Weiler, J. H. H. (1991), "The transformation of Europe", *The Yale Law Journal*, vol. 100, no. 8, p. 2403-2483 and Pollack, M. (2003), *The Engines of Integration* (Oxford University Press).

¹⁰⁶ Lord Mance, *The composition of the European Court of Justice*, *op. cit.*, p. 1. See also Case C-26/62 *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963]; Case C-6/64 *Costa v. Enel* [1964] ECR 01141.

¹⁰⁷ European Commission (2006), *Decision of 13/XII/2006 establishing a mechanism for cooperation and verification of progress in Bulgaria to address specific benchmarks in the areas of judicial reform and the fight against corruption and organised crime*, C (2006) 6570 final, recital 1; European Commission (2006), *Decision of 13/XII/2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption and organised crime*, C (2006) 6569 final, recital 1-3.

¹⁰⁸ Consultative Council of European Judges (2001), *op. cit.*, Art. 10.

¹⁰⁹ D. Tamn, *op. cit.*, p. 13.

¹¹⁰ Dehousse, R., *op. cit.*, p. 22.

¹¹¹ Consolidated Version of the Treaty on the Functioning of the European Union [2008] O.J. C 115/47, Art. 344. See also Dehousse, R., *op. cit.*, p. 22; Daukšienė, I. (2012), "Recognition of Jurisdiction of the Court of Justice of the European Union in International Courts", *Jurisprudence*, vol. 19, no. 2, p. 459-475; Case C-459/03 *Commission v. Ireland*, [2006] ECR I-04635.

independence of this supreme arbiter.¹¹² In this context, the Court of Justice has to appear *particularly* independent in order to create confidence among all the Member States. This looks even more crucial considering that “*attacks on the legitimacy of the Court of Justice come primarily from the Member States*”.¹¹³

For all of these reasons, appearance of independence of the judges should always be a primary concern. The European Commission has already particularly insisted on the fact that public confidence rests in particular on judicial independence.¹¹⁴ In this regard, the European Union expects that new Member States, such as Bulgaria and Romania, give more consideration to the appearance of independence of their judges, in order to increase public confidence in their judicial system.¹¹⁵ It is time to show the same concern for the Court of Justice. It is absolutely unthinkable that the Court of Justice, which is so powerful and which plays such an important role in the construction of the European Union could generate *any* doubt regarding its independence. In that sense, the Court must not only be independent, it must also be seen to be *absolutely* independent. As Lord Bowen put it: “*Judges, like Caesar’s wife, should be above suspicion*”.¹¹⁶ Therefore, it is the interest of the European Union to adopt transparent and objective selection procedures of the judges of the Court of Justice in order to avoid any doubt as to their independence.¹¹⁷ These procedures are at the core of the next section.

¹¹² See D. Tamn, *op. cit.*, p. 19

¹¹³ Ritleng, D., *op. cit.*

¹¹⁴ European Commission (2012), *Report on Progress in Bulgaria under the Cooperation and Verification Mechanism*, COM(2012) 411 final, p. 3. See also Gilliaux, P., *op. cit.*, p. 469-470 and Shetreet, Sh. (2011), “Judicial Independence and accountability: Core Values in Liberal Democracies” in H. P. Lee (ed.), *Judiciaries in Comparative Perspective* (Cambridge University Press), p. 6.

¹¹⁵ For Bulgaria, see European Commission (2012), *Report on Progress in Bulgaria under the Cooperation and Verification Mechanism*, *op. cit.*, p. 6. See also Frison-Roche, F. and Spas-Dimitrov, S. (2005), “Les enjeux de la Réforme du système judiciaire en Bulgarie”, *Revue Internationale des Sciences Administratives*, vol. 71, no. 4, p. 631-645. For Romania, see European Commission (2012), *Report on Progress in Romania under the Cooperation and Verification Mechanism*, COM(2012) 410 final.

¹¹⁶ *Leeson v. The General Medical Council* (1889) LJ 59 Ch NS 233, at 241. This expression comes from the following story: “[w]hen Julius Caesar was asked why he chose to divorce his wife after a false accusation of adultery, Caesar’s laconic answer is said to have been that ‘Caesar’s wife must be above suspicion,’ or as it is usually rendered, ‘Caesar’s wife must be above reproach.’” (cited in McKoski, R. J., *op. cit.*, p. 1916).

¹¹⁷ Lord Mance, *La nomination des juges à la Cour de Justice de l’Union européenne et à la Cour européenne des droits de l’homme*, *op. cit.*, §30.

4. How does the selection of the judges affect their appearance of independence?

How a judge is selected is likely to affect his appearance of independence¹¹⁸. In this regard, the Court of Justice has judged that “[...] *guarantees concerning the composition of the tribunal are the corner stone of the right to a fair trial*”,¹¹⁹ which embodies guarantees concerning the selection of the judges.¹²⁰ The main concern is about political selections and appointments.¹²¹ This is because such selections and appointments weaken public confidence in the judges.¹²² The European Union shares this concern. It is for this reason that it has created the “255 Committee”¹²³ or, for instance, that it has criticized the political influence on a number of key judicial appointments in Bulgaria.¹²⁴

Selecting judges for political reasons weakens their appearance of independence because it does not respect the principle of the separation of powers,¹²⁵ which is the original rationale behind the principle of judicial independence.¹²⁶ If a judge has been selected because of some political favours, he will not appear to be independent, to be a separated power. On the contrary, he will be identified to this power.

In this context, one must distinguish judicial appointments only made by a political body from such appointments made for political reasons. If selecting judges for political reasons necessarily weakens their appearance of independence, the mere fact that a political body appoints a judge does not affect their appearance of independence in itself. Indeed, as long as

¹¹⁸ Case C-175/11 *D. and A.* [2013], §97; *Zolotas v. Greece*, no. 38240/02, ECHR, 2005, §24; Mahoney, P. (2008), “The international judiciary - Independence and accountability”, *The Law and practice of International Courts and Tribunals*, vol. 7, no. 3, p. 324.

¹¹⁹ Case T-146/04 *Gorostiaga Atxalandabaso v. Parliament* [2005] ECR II-05989, §42.

¹²⁰ See observation, footnote no. 15.

¹²¹ See Fiss, O. M. (1993), “The Limits of Judicial Independence”, *Inter-American Law Review*, vol. 25, no. 1, p. 62; Bingham, T. (2011), *The Business of judging: selected essays and speeches* (Oxford University Press), p. 5.

¹²² Gilliaux, P., *op. cit.*, p. 469-470.

¹²³ Sauvé, J.-M., “La sélection des juges de l’Union européenne : la pratique du comité de l’article 255”, *op. cit.*, p. 2 (my translation). This goal of the 255 Committee, and its creation as well, contradict the expectations of some authors before (see Legal, H. (2001), “Composition et fonctionnement des Cours européennes”, *Pouvoirs*, no. 96, p. 76).

¹²⁴ European Commission (2012), *Report on Progress in Bulgaria under the Cooperation and Verification Mechanism*, *op. cit.*, p. 6.

¹²⁵ Sauvé, J.-M., “La sélection des juges de l’Union européenne : la pratique du comité de l’article 255”, *op. cit.*, p. 6.

¹²⁶ See Ervin Jr., S. J. (1970), “Separation of Powers: Judicial Independence”, *Law and Contemporary Problems*, vol. 35, no. 1, p. 108-110. See also Sauvé, J.-M. (2013), *La séparation des pouvoirs, l’Union européenne et le Comité 255*, <http://www.conseil-etat.fr>, p. 1-3.

judges have a strong statute, which protects them from any political dismissal,¹²⁷ the decisive issue is not about the authority that appoints them, but rather about the authority that selects them and the reasons that motivated its choice. In many Member States, judges are appointed by the government while selected and proposed by an independent body. In such cases, the authority of appointment does not undermine the appearance of independence of the judges. However, the situation is different when the political authority proceeds to the selection of the judges through their appointment. Indeed, the selection procedure of the judges constitutes a mechanism “*through which political actors can influence courts to make judgments that do not diverge excessively from the political actors’ preferences*”.¹²⁸ The selection procedure of the judges might even be the opportunity for the political power “*to staff the court with judges who reflect political actors’ preferences*”.¹²⁹

The appointment of the U.S. Supreme Court judges by the American President constitutes a good and famous example to illustrate this point. The candidates are selected and appointed by the President and should be confirmed by the Senate.¹³⁰ The selection procedure clearly constitutes a political process at the two stages.¹³¹ First, when the President proceeds to the

¹²⁷ See the case law of the European Court of Human Rights mentioned below.

¹²⁸ Kelemen, R. D., *op. cit.*, p. 44.

¹²⁹ Kelemen, R. D., *op. cit.*, p. 45.

¹³⁰ U.S. Constitution, Article II, section 2, clause 2. The Senate shall give advice and consent to the President’s choice. The meaning of the word “*advice*” is extremely discussed in the American literature and its implementation has varied depending on the President. In addition, the President may also receive advice from whomever he or she wants, such as personal advisers, party leaders, interest groups, or judges of the Supreme Court. See Rutkus, D. S. (2010), “Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate”, *Congressional Research Service Report for Congress*, www.crs.gov, p. 6 and 8. Legal scholars are also sometimes consulted by the President in order to identify potential candidates or to the Senate’s deliberation process. See Rutkus, D. S., *op. cit.*, p. 12; McAfee, Th. B. (1991), “The Role of Legal Scholars in the Confirmation Hearings for Supreme Court Nominees – Some Reflections”, *Journal of Legal Commentary*, vol. 7, p. 211.

¹³¹ Darby, J.J. (2003), “Garanties et limites à l’indépendance et à l’impartialité du juge aux Etats-Unis d’Amérique”, *Revue internationale de droit comparé*, vol. 55, no. 2, p. 355. The political nature of the selection procedure is not the fact of a certain President or Senate. It is inherent to the American system : “*Supreme Court Justices have always been appointed for political reasons by politicians and their confirmation process has always been dictated by politicians for political purposes*” (Kahn, M. A. (1995), “The Appointment of a Supreme Court Justice: A Political Process from Beginning to End”, *Presidential Studies Quarterly*, vol. 25, no. 1, p. 26). In this light, the selection of the judges of the U.S. Supreme Court is “*one of the most contentious aspects of American politics. It represents a seismic, and oftentimes public, struggle between the president and the U.S. Senate over the ideological makeup of the nation’s highest court*” (Johnson, T. R. and Roberts, J. M. (2004), “Presidential Capital and the Supreme Court Confirmation Process”, *The Journal of Politics*, vol. 66, no. 3, p. 663).

selection, he looks for candidates' political opinions rather than for their competences.¹³² As a result, appointees are nearly always from the same political party as the President.¹³³ Second, when the Senate proceeds to the confirmation, it can reject a candidate when it perceives its opinions as a threat to its political agenda.¹³⁴ This might also happen and happened despite the high competences of the candidate.¹³⁵ In this context, candidates are questioned on "*their beliefs, their views on the law or their previous decisions*".¹³⁶ Although they are not asked how they will rule on forthcoming cases or how they would have ruled on leading cases, candidates are questioned on their judicial philosophy in order to indirectly learn how they would vote on hot issues.¹³⁷

The selection procedure of the judges of the Court of Justice is also led by political considerations in some Member States of the European Union. By providing that candidates to the position of judge at the Court of Justice should be of recognised competence, the TFEU excludes *exclusively* political selections.¹³⁸ As a result, no candidate could be selected *only* for political reasons. Yet, political reasons can still be decisive in the choice of a candidate, just as it is the case in the United States, where judges are selected for political reasons, but never,

¹³² Darby, J.J., *op. cit.*, p. 355. See also Dorsen, N. (2006), "The selection of U.S. Supreme Court justices", *International Journal of Constitutional Law*, vol. 4, no. 4, p. 655. It is important to notice that, even though judges are appointed for political reasons, they are never, or at least almost never, *only* appointed for those reasons. However, nominees are sometimes not appointed because of political reasons. See Rutkus, D. S., *op. cit.*, p. 8; Kahn, M. A., *op. cit.*; Epstein, L., Lindstädt, R., Segal, J. A. and Westerland, C. (2006), "The Changing Dynamics of Senate Voting on Supreme Court Nominees", *The Journal of Politics*, vol. 68, no. 2, p. 296-307.

¹³³ Kahn, M. A., *op. cit.*, p. 33.

¹³⁴ Darby, J.J., *op. cit.*, p. 355. The Senate has already rejected, postponed or lead to withdraw 36 candidatures. See Rutkus, D. S., *op. cit.*, p. 50-51; Dorsen, *op. cit.*, p. 652; Grossman, J. B. and Wasby, S. L. (1972), "The Senate and Supreme Court Nominations: Some Reflections", *Duke Law Journal*, p. 557-591; Whittington, K. E. (2007), "Presidents, Senates, and Failed Supreme Court Nominations", *2006 Supreme Court Review*, p. 401-438, especially p. 438.

¹³⁵ For example, this happened in 1987 with Robert H. Bork who was not confirmed by the Senate because the left feared he would not interpret the Constitution as it expected, while he was extremely qualified. Darby, *op. cit.*, p. 355-356. See also Bork, R. H. (1990), *The Tempting of America*, (New York: The Free Press), especially p. 267-343. More recently, the same happened in 2005 with Harriet Miers, right-wing Republicans considering that she "would not be reliable on the "social" issues – including abortion, gay marriage, and voluntary and of life" (Dorsen, N. *op. cit.*, p. 655).

¹³⁶ McLachlin, B., cited in Dorsen, N., *op. cit.*, p. 653.

¹³⁷ Dorsen, N., *op. cit.*, p. 660-661. In this context, "*the process is not tidy, and the line between proper and inappropriate questioning is unclear*" (*ibid.*, p. 661).

¹³⁸ Consolidated Version of the Treaty on the Functioning of the European Union [2008] O.J. C 115/47, Art. 253. See Ritleng, D., *op. cit.*

or at least almost never, irrespective of their competences¹³⁹, and where they are sometimes not selected only for political reasons.¹⁴⁰

Concretely, in 1998, Alter has observed that, in selecting judges for the Court of Justice, France and Germany took into account candidates' opinions regarding European integration in order to limit the judicial activism of the Court.¹⁴¹ Surely, only these two Member States on the eight analysed by Alter took this factor into consideration, but still, they did. This example thus shows that, if Member States come to consider that the Court of Justice has gone too far in the European integration, they might seek to send Euroskeptic judges to the Court.¹⁴² More recently, the Czech Republic asked to a candidate what she would do to safeguard the Czech interests once at the Court. She answered that she did not have to defend the interests of her State, but to apply European Union law and guarantee its respect. As a consequence, the government did not nominate this candidate and preferred to disobey the rules of its own selection procedure to nominate another one.¹⁴³

The consequence of political selections of judges is that one might fear that the political power expects the judge to follow certain guidelines or, at least, to return the favour.¹⁴⁴ In such a case, the judge would not be seen to be independent, because people would fear that his judgement would be biased in favour of the political power.¹⁴⁵ Otherwise, the judge would be removed.

¹³⁹ Rutkus, D. S., *op. cit.*, p. 8; Epstein, L., Lindstädt, R., Segal, J. A. and Westerland, C. (2006), "The Changing Dynamics of Senate Voting on Supreme Court Nominees", *The Journal of Politics*, vol. 68, no. 2, p. 296-307. This is even more striking in the U.S. than it is in the EU, since Art. III, section 1 of the U.S. Constitution does not establish any requirement for the position of judge at the U.S. Supreme Court. As a matter of fact, judges of the Supreme Court do not even have to be lawyers. Yet, all of them have always been lawyers. See Dorsen, N. *op. cit.*, p. 654.

¹⁴⁰ Kahn, M. A., *op. cit.*

¹⁴¹ Alter, K. (1998), "Who are the 'Masters of the Treaty'?": European governments and the European Court of Justice", *International Organization*, vol. 52, no. 1, p. 139. See also Kenney, S. J. *op. cit.*, p. 111-115.

¹⁴² Kelemen, R. D., *op. cit.*, p. 52.

¹⁴³ See Minutes from the 37th meeting of the committee for European affairs held on 22 November 2012. Chamber of Deputies, Parliament of the Czech Republic. Available at: <http://www.psp.cz/sqw/hp.sqw?k=505&o=6&kk=4>. See also Němeček, T., "Petr Mlsna do vlády - a do Lucemburku?" *Lidové noviny*, 13 December 2012, p. 19. At the end of the day, the 255 Committee gave an unfavourable opinion on the candidate nominated by the Czech government, so that the mandate of the existing Czech judge at the Court of Justice has been renewed.

¹⁴⁴ Kelemen, R. D., *op. cit.*, p. 50.

¹⁴⁵ For some evidences of this assumption, see Shepherd, J. (2009) "The influence of retention politics on judges' voting", *Journal of Legal Studies*, vol. 38, no. 1, p.169-203. In the United States, "eighty percent "[of the

In the United States, political appointments are not perceived as questioning the independence of the judges of the Supreme Court, because they benefit from a strong statute, which makes them free to take their decisions without being influenced, or having to fear the Executive.¹⁴⁶ In particular, these judges are appointed for life.¹⁴⁷ In addition, it has already happened that judges “*veered from the philosophy of the appointing president or were asked to decide new and unpredictable issues*”.¹⁴⁸ The fact that they did is all the more known, since the confirmation procedure takes place after televised hearings and public debate by and at the Senate, which often sparks the attention of the public.¹⁴⁹

However, the situation is different with regard to the Court of Justice. First, judges at the Court are appointed for a renewable mandate, so that it could not be renewed for political reasons. Second, it is impossible for the public to know if the judges veered from the philosophy of the appointing Member State, since candidates’ answers during the selection procedure are not public.

It might still be objected that the rejection of political appointments is not as clear for ordinary judges as it is for judges of the highest Courts. Let us take the example of the Belgian Constitutional Court, where half judges are former parliamentarians and half are professional judges. Through this example, I will expose three reasons that explain why the theoretical framework I have developed above also applies to the highest Courts, including the Court of Justice.

First, according to the Belgian law, the fact that a judge had participated to the vote of the law at stake when he was a deputy or a senator does not constitute *in itself* a reason for objecting, thus to consider him not to appear or to be independent.¹⁵⁰ As a result, the law and the Constitutional Court as well have let some room to consider that there would be a reason

electorate] *believes that when judges are elected, they are subject to influence from campaign contributors who made the judges’ election possible*” (Geyh, C. G. (2003), “Why Judicial Elections Stink”, *Ohio State Law Journal*, vol. 64, p. 43).

¹⁴⁶ Darby, *op. cit.*, p. 356.

¹⁴⁷ U.S. Constitution, Article III, section 1. This status is considered by the american literature to guarantee the judicial independence of the U.S. Supreme Court judges despite the very political manner of their selection. See Dorsen, N., *op. cit.*, p. 653; Darby, J.J. *op. cit.*, p. 356.

¹⁴⁸ Dorsen, N., *op. cit.*, p. 655.

¹⁴⁹ Dorsen, N., *ibid.*, p. 652-653.

¹⁵⁰ Loi spéciale du 6 janvier 1989 sur la Cour constitutionnelle, Art. 101. See also the following decision of the Belgian Constitutionnal Court in this sense: C.A. no. 35/94 and no. 36/94, 10 May 1994, §B.2.2.

for objecting if a judge had not only voted a law, but if he had showed a more important commitment in defending it.¹⁵¹ This position might be related to the rule established for the Court of Justice, which states that “*a party may not apply for a change in the composition of the Court or of one of its chambers on the grounds of either the nationality of a Judge or the absence from the Court or from the chamber of a Judge of the nationality of that party*”.¹⁵² In this regard, appearance of independence calls for a cautious and pragmatic case-by-case analysis, rather than for a general and abstract statement.

Second, the Belgian Constitutional Court is balanced in two respects. First, only half judges are former parliamentarians, while the other half are professional judges. In that sense, such a composition can be seen as a political choice that constitutes an advantage for the Court, which beneficiaries from the experience of former parliamentarians while respecting the right to be judged by an independent body. In this regard, one should distinguish the selection of judges because of the political experience they could bring to a Court and the selection of judges for political reasons, which hide suspicious motivations and raise suspicion. Second, judges are all appointed for a long life term. In this regard, the composition of a Court such as the one of the Belgian Constitutional Court should present some advantages for it and the judges should beneficiary from a strong statute in order to respect the principle of appearance of independence.

Third, it is the Belgian law that establishes the manner of appointment of the judges of the Belgian Constitutional Court. As a consequence, everyone knows that some of these judges have been appointed due to their political past. In this regard, the composition of a Court such as the one of the Belgian Constitutional Court should certainly not be secretly influenced by political choices. Secrecy is the worst enemy of confidence.

It then turns out that there is a link between appearance of independence and the selection procedure of judges. In particular, an opaque and/or subjective a selection procedure is likely to generate doubts on the independence of the judges and then to reduce public confidence in

¹⁵¹ C.A. nos. 35/94 and 36/94, 10 May 1994, §B.4. See in this sense: Verdussen, M. (2012), *Justice constitutionnelle* (Brussels: Larcier), p. 344 and Uyttendaele, M. (2005), *Précis de droit constitutionnel belge*, (Brussels: Bruylant), p. 564 and 566.

¹⁵² Consolidated version on the statute of the Court of Justice of the European Union, Art. 17(4).

them. As a result, such a selection procedure would reduce the legitimacy of the judges.¹⁵³ A selection procedure should then be organized in such a way that it would remove any ambiguity regarding the independence of the judges.¹⁵⁴

5. How judges are supposed to be selected to protect their appearance of independence?

No one can be inside the mind of a judge. As a result, considering a judge to be independent before he had made his decision requires taking appearance into account. It is then necessary to create an institutional context that could generate public confidence in the judges.¹⁵⁵ This institutional context consists in particular in a selection procedure that takes into account the criteria affecting the public perception of the judge.

The Venice Commission has recognized that one could not pretend to establish a single selection model that would guarantee the full independence of the judiciary.¹⁵⁶ In the same vein, the European Court of Human Rights has judged that it is not up to the Court to say to the States how they must organize themselves in order to comply with article 6 of the European Convention of Human Rights.¹⁵⁷ Nevertheless, the Council of Europe has recommended a reference model for the selection of judges in its recommendation (94)12. This recommendation applies to all persons exercising judicial functions, including those dealing with constitutional matters.¹⁵⁸ The Venice Commission refers to this model.¹⁵⁹ The European Court of Human Rights refers to the Venice Commission and to the European Charter on the Statute of Judges.¹⁶⁰

¹⁵³ Kelemen, R. D., *op. cit.*, p. 45.

¹⁵⁴ European Commission (2006), *Decision of 13/XII/2006 establishing a mechanism for cooperation and verification of progress in Bulgaria to address specific benchmarks in the areas of judicial reform and the fight against corruption and organised crime*, *op. cit.*, annex 1.

¹⁵⁵ Such an institutional context has also the merit of constituting a shield for the judges against external influences (Ferejohn, J. (1999), "Independent judges, dependant judiciary: explaining judicial independence", *Southern California Law Review*, vol. 72, p. 353).

¹⁵⁶ European Commission for Democracy through Law (2007), *Judicial Appointments*, p. 2, §2.

¹⁵⁷ *Savino and others v. Italy*, nos. 17214/05, 20329/05 and 42113/04, ECHR, §105.

¹⁵⁸ Scope of the Recommendation, Art. 1.

¹⁵⁹ European Commission for Democracy through Law (2007), *Judicial Appointments*, p. 10, §45.

¹⁶⁰ *Oleksandr Volkov v. Ukraine*, no. 21722/11, ECHR, 2013, §109 and 114.

The selection model recommended by the Council of Europe is built on two axes: the body in charge of the selection and the selection criteria. Ideally, both of these aspects should be combined. However, if the first one is not realized, the second one should be respected in any case.

First, the Recommendation (94)12 shows a preference for a judicial council. This council should be independent of the government. According to the Recommendation, its independence could be safeguarded if, for example, the judiciary selected its members and if the council could decide itself on its procedural rules.

A major concern with such a model would be not to leave the power of appointing judges to a body exclusively composed of lawyers, because this could lead to corporatism: a social group – the lawyers – could get a monopolistic representation of their interest and prevail the interest of their cast to the public interest.¹⁶¹ They could capture a field of public policy and then government powers¹⁶² while they would not have been elected and their legitimacy might be discussed. For this reason, corporatism creates defiance in a pluralistic democracy, while the purpose of rethinking judicial selection is to increase public confidence. Moreover, in modern democracy, all the political system is organized around checks and balances. A selection body that would escape to this system would then clearly not be welcome.

In this light, a model that would promote appearance of independence of the judges should strike the right balance between a political and a corporatist judicial selection. In this view, an independent body composed of lawyers and elected representatives would be particularly suitable. So might also be an independent selection body exclusively composed of lawyers that would give a non-binding opinion to the government.¹⁶³

Second, the Recommendation (94)12 suggests that every selection procedure of the judges should be based on objectivity and transparency.¹⁶⁴ In this regard, the purpose of any selection procedure should consist in trying to choose in the most transparent manner the best

¹⁶¹ See Schmitter, P. C. (1974), “Still the century of corporatism?”, *Review of politics*, vol. 36, no. 1, p. 85-131.

¹⁶² See Grossman, E and Saurugger, S. (2012), *Les groupes d'intérêt. Actions collectives et stratégies de représentation*, (Paris: Armand Colin).

¹⁶³ See Malenovski, J., *op. cit.*, p. 156.

¹⁶⁴ Sauvé, J.-M., “Le rôle du Comité 255 dans la sélection du juge de l'Union”, *op. cit.*, p. 102-103.

judge who could be absolutely competent and appreciate cases with full independence.¹⁶⁵ The European Union totally shares these views on the selection criteria. For instance, the European Commission has particularly criticized Bulgaria for the lack of objectivity and transparency in the appointment of its important judges. It has then recommended to Bulgaria to “*make transparency, objectivity and integrity the top priority in appraisals, promotions, appointments and disciplinary decisions for the judiciary*”.¹⁶⁶ Finally, the European Court of Human Rights does also look, in particular, at the objectivity of the selection criteria.¹⁶⁷

With regard to objectivity, the Consultative Council of European Judges recommends that the selection authority introduce, publish and give effect to objective criteria.¹⁶⁸ In particular, according to the Council of Europe, the selection should be based on merit, having regard to qualifications, integrity, ability and efficiency.

With regard to transparency, a transparent selection procedure is highly recommended.¹⁶⁹ I see mainly three reasons for this. First, in a certain perspective, determining what is a “*good judge*” always constitutes a political assumption. In this regard, “*no matter how the [selection procedure of the judges] is constructed it always has a political dimension*”.¹⁷⁰ In that light, and surely when there is a political composition of the Court, the only choice of the public is between “*a process in which the politics is open, and possesses some degree of balance or a system in which political power and influence is masked, unacknowledged, and unilateral*”.¹⁷¹ Second, as a democratic institution, judges must be accountable to the public. Naturally, no accountability is possible in the absence of information.¹⁷² Since there cannot be information without transparency, transparency is crucial in order to allow accountability.

¹⁶⁵ Bingham, T., *op. cit.*, p. 6.

¹⁶⁶ European Commission (2012), *Report on Progress in Bulgaria under the Cooperation and Verification Mechanism*, *op. cit.*, p. 21.

¹⁶⁷ For example, in *Maktouf and Damjanovic*, the European Court of Human Rights noticed that the appointments of judges “were made on the basis of a recommendation from the highest judicial figures” (*Maktouf and Damjanovic v. Bosnia and Herzegovina* [GC], nos. 2312/08 and 34179/08, §49, ECHR, 2013, §51).

¹⁶⁸ Consultative Council of European Judges (2001), *op. cit.*, Art. 25.

¹⁶⁹ Brisard, S., *op. cit.*, p. 7. See also European Commission for Democracy through Law (2008), *Report on the Independence of the Judicial System. Part I: The Independence of Judges*.

¹⁷⁰ Russel, P. H., “Conclusion”, *op. cit.*, p. 420.

¹⁷¹ Russel, P. H., “Conclusion”, *op. cit.*, p. 420.

¹⁷² Harris, D. H. (1993), “The Appearance of Justice: Court TV, Conventional Television, and Public understanding of the Criminal Justice System”, *Arizona Law Review*, vol. 35, p. 786.

Third, transparency is a solution to exaggeration. Selection procedures built on political reasons, such as the one exposed in the previous section (e.g. the political choice of France and Germany highlighted by Alter), might be rare from an academic and scientific point of view, but they left room for exaggeration when they are opaque. Indeed, if the public comes to know that two judges out of twenty eight have been selected for political reasons, and if it does not know how the other judges have been selected, then how could it not become suspicious regarding the independence of all of the judges? On the contrary, if the selection procedure is transparent, this situation will not be exaggerated, because everyone would know that politicized selections are limited to only two cases. In that sense, the more the selection procedure is transparent, the more it ensures the appearance of independence of the judges.¹⁷³

The reference model recommended by the Council of Europe has merits and limits.

The most noticeable merit of this model is to generate public confidence in the judges. First, the requirement of an independent selection body leads to a selection perceived as an expertise. People can trust this body because it is only designed to proceed to a selection providing its expertise, without any interest in the choices made. Second, the requirement of objective selection criteria allow people to think that the selected candidate is the best one, the one who had to be selected. Third, as exposed above, transparency is necessary in order to create confidence.¹⁷⁴ In this regard, transparency is the modern extension of publicity,¹⁷⁵

¹⁷³ On the link between appearance of independence and transparency of the selection procedure, see Solanke, I. (2009), "Diversity and Independence in the European Court of Justice", *Colombia Journal of European Law*, vol. 15, p. 92. See also Limbach, J., Villalon, P. C., Errera, R., Lester, A., Morshchakova, T., Sedely, S. and Zoll, A. (2003), *Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights* (Interights), p. 20-23.

¹⁷⁴ This is also the assumption of Fukuyama. In particular, harmful behaviours will persist if they cannot be identified. See Fukuyama, F. (2003), *Le grand bouleversement : la nature humaine et la reconstruction de l'ordre social* (Paris : La Table Ronde).

¹⁷⁵ Under the *Old Regime*, the purpose of publicity was to force people to show who they really were, so that everyone could clearly identify them. It was then an instrument of State power. The Enlightenment philosophers then turned publicity against the power. Judgements, as the law, had to be published and hearings had to be public (See Frydman, B. (2007), "La transparence, un concept opaque ?", *Journal des tribunaux*, no. 6265, p. 300-301). Bentham, for instance, wrote that "*publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge, while trying, under trial*" (Bentham, J. (1843), *The Works of Jeremy Bentham*, (J. Bowring, ed.), vol. 4, p. 316). In the European Union, transparency is ensured through the principle of openness (Transparency encompasses openness. See Craig, P. (2012) *EU Administrative Law* (Oxford University Press), p. 357; Alemanno, A. and Stefan, O. (2014) "Openness at the Court of Justice of the European Union: Toppling a Taboo", *Common Market Law Review*, vol. 51, no. 1;

which is essential to maintain public confidence.¹⁷⁶ It is designed “*to illuminate the mysteries and to thwart [the] obsession with secrecy*”¹⁷⁷ of the power, which are the worst enemies of public confidence. However, it should be borne in mind that transparency should not be understood as nudity or as an opportunity for voyeurism. In this regard, a transparent selection procedure should respect and protect the privacy of the candidates. As a result, their identity might be kept secret.¹⁷⁸ In my opinion, transparency in the selection procedure does not necessarily have to apply to the identity and the application file of the candidates, but rather to the assessment of the selection criteria. Not only should the public know what are the selection criteria of the judges, but it should also know how they are applied concretely. Otherwise, the objectivity of the selection criteria might be purely superficial.

The most noticeable limit of the reference model recommended by the Council of Europe is that it does not constitute an absolute and perfect guarantee. First, objective and transparent procedures can always be diverted to become pure illusions. Specific interests can also capture an independent selection body. As a consequence, the real implementation of this model and the respect of its requirements should always be controlled. The absence of a perfect model should not lead to abandon this one. There comes a time when it is necessary to apply the best possible solution. The rest necessarily relies on confidence, which is a “*human bet*”.¹⁷⁹ Second, “*the existence of an objective appointments procedure independent of executive influence can provide some assurance about the quality of a candidate for*

Prechal, S. and de Leeuw, M. E. (2008), “Transparency: A General Principle of European Law?” in Bernitz, U., Nergelius, J., and Cardner, C. (eds.), *General Principles of EC Law in a Process of Development* (Kluwer), p. 201-242). According to article 1 of the TEU, “*decisions are taken as openly as possible and as closely as possible to the citizen*” (Consolidated Version of the Treaty on European Union [2008] OJ C115/13, Art. 1). In addition, article 15(1) TFEU states that, “*in order to promote good governance and ensure the participation of civil society, the Union’s institutions, bodies, offices and agencies shall conduct their work as openly as possible*” (Consolidated Version of the Treaty on the Functioning of the European Union [2008] O.J. C 115/47, Art. 15(1)).

¹⁷⁶ Kenny, S., *op. cit.*, p. 217-218.

¹⁷⁷ Frydman, B., *op. cit.*, p. 300.

¹⁷⁸ Alemanno, A. and Von Bogdandy, A. do not agree with this point of view and called for more transparency at the conference *Selecting Europe’s Judges* of the College of Europe (*op. cit.*). See their forthcoming contributions in M. Bobek (ed.), *op. cit.* I for my part consider that the reputation of the candidates should be preserved. This is all the more important considering that their applications should not be deterred or discouraged, since some good candidates might not apply for these reasons. See, in this sense, Sauvé, J.-M., “Le rôle du Comité 255 dans la sélection du juge de l’Union”, *op. cit.*, p. 116.

¹⁷⁹ Marzano, M. (2012), *op. cit.*, p. 85-86.

judicial office".¹⁸⁰ However, the model of the Council of Europe does not *necessarily* lead to the selection of the best candidate. Still, this is not the purpose of the selection procedure in the context of this dissertation.

6. European Courts dealing with appearance of independence

According to both the Court of Justice and the European Court of Human Rights, any *reasonable doubt* regarding the independence of the judges must be dispelled in the mind of individuals. The criterion of a *reasonable doubt* means that any other person in the same situation as the party at stake would feel the same doubt. This involves that the doubt should rely on some objective criteria. In that sense, subjective doubts are determining only if they rely on "*elements of verifiable facts and law*".¹⁸¹

I will now address two questions. First, from whose perspective can a doubt be considered to be *reasonable (a)*? Second, in which concrete conditions does the Court consider that there is such a *reasonable doubt (b)*?

a. From which perspective does one have to appreciate the *reasonable doubt*?

Since the problematic doubt must be reasonable, it must be appreciated from the point of view of a *reasonable person*, that is to say a "*a fair minded observer acting reasonably*".¹⁸² The reasonableness of this person means that his doubt must be based on some objectivity. According to the European Court of Human Rights, "*the standpoint of the accused is important without being decisive. What is decisive is whether his doubts can be held to be objectively justified*".¹⁸³ However, it should be borne in mind that this objectivity does not mean completeness. The *reasonable person* cannot be conceived as a person who knows everything, because there would not be any problem of appearance in such a case. Indeed, the

¹⁸⁰ Lord Mance (2011), *The composition of the European Court of Justice*, talk given to the UK Association for European Law, <http://ukael.org>, p. 18.

¹⁸¹ Gilliaux, P., *op. cit.*, p. 17. See *ibidem*, p. 15. See also *Hauschildt v. Denmark*, no. 10486/83, ECHR, 1989, §48 and *Kleyn and others v. the Netherlands*, nos. 39343/98, 39651/98, 43147/98 and 46664/99, ECHR, 2003, §191. The case law of the European Court of Human Rights has not always been very clear, which raised some critics. See for example: Sudre, F. commenting *Kress v. France*, no. 39594/98, ECHR, 2001, *J.C.P.*, *La semaine juridique*, 2001, II, p. 10578 and Martens, P. (1996), "La tyrannie des apparences", *Rev. trim. dr. h.*, p. 640-656.

¹⁸² Spigelman, J. J. (2000), "Seen to be Done: The Principle of Open Justice", *op. cit.*, p. 299.

¹⁸³ *Sahiner v. Turkey*, no. 29279/95, ECHR, 2001, §44; *Gautrin and others v. France*, nos. 21257/93, 21258/93 and 21259/93; 21260/93, ECHR, 1998, §58; *Incal v. Turkey* [GC], no. 22678/93, ECHR, 1998, §71.

appearance of independence of a judge is evaluated before he had made his decision. This involves that the party at stake has only partial information. He will only have all the information once the decision will have been made.

b. When do the European judges consider a doubt to be reasonable?

For the purposes of this dissertation, I will only focus on the situations in which a reasonable doubt on the independence of a judge is raised because of the way he has been selected. In this regard, three kinds of situations should be distinguished. Schematically, these are the identity of the authority that has selected the judge, the considerations that guide the reasoning of the judge, and the positioning of the judge regarding the parties to the hearings.

First, the identity of the body that appointed the judge does not raise a *reasonable doubt* in itself, but it raises such a doubt when the judge does not benefit from a strong statute that ensures his independence. In this regard, both the European Court of Human Rights and the Court of Justice have judged that the appointment of a judge by the executive does not raise a *reasonable doubt* regarding his appearance of independence.¹⁸⁴ However, the rationale for this decision is different in the case law of these Courts.

According to the European Court of Human Rights, the appointment of a judge by the executive does not affect its independence as long as the statute of the judge “clearly *shows that, once he is appointed, he is not under any pressure, he does not receive any instructions from the executive, and he works independently*”.¹⁸⁵ In that light, the European Court of Human Rights has considered that there is no *reasonable doubt* when there is no contact between a Minister and a judge, so that one could not be confused with the other.¹⁸⁶ On the contrary, there is a *reasonable doubt* when there is a hierarchical subordination between a

¹⁸⁴ *Campbell and Fell*, nos. 7819/77 and 7878/77, ECHR, 1984, §79; *Weeks v. the United Kingdom*, no. 9787/82, ECHR, 1987, §62; *Zolotas v. Greece*, no. 38240/02, ECHR, 2005, §24; Case C-175/11 *D. and A.* [2013], §99.

¹⁸⁵ *Zolotas v. Greece*, no. 38240/02, ECHR, 2005, §24 (I emphasize). See also *Weeks v. the United Kingdom*, no. 9787/82, ECHR, 1987, §62; *Kadubec v. Slovakia*, no. 27061/95, ECHR, 1998-VI, §57; *Lauko v. Slovakia*, no. 26138/95, ECHR, 1998-VI, §64; *Kleyn and others v. the Netherlands*, nos. 39343/98, 39651/98, 43147/98 and 46664/99, ECHR, 2003, §195; *Sacilor Lormines v. France*, no. 65411/01, ECHR, 2006, §67; *Salov v. Ukraine*, no. 65518/01, ECHR, 2004, §86; *Brudnicka and others v. Poland*, no. 54723/00, ECHR, 2005, §41; *Maktouf and Damjanovic v. Bosnia and Herzegovina* [GC], nos. 2312/08 and 34179/08, §49, ECHR, 2013, §51.

¹⁸⁶ *Weeks v. the United Kingdom*, no. 9787/82, ECHR, 1987, §62. See also *Bryan v. UK* no. 19178/91, ECHR, 1995, §38.

Minister and a judge.¹⁸⁷ In such a case, judges could not appear anymore to be a third party.¹⁸⁸ According to the European Court of Human Rights, “*such a situation seriously affects the confidence which the courts must inspire in a democratic society*”.¹⁸⁹

The justification of the Court of Justice is much more limited. It is based on two criteria and one general observation.¹⁹⁰ The first criterion addresses the statute of the judge. With regard to this criterion, the Court has only considered that the judge had been appointed for a specific term. The second criterion addresses the competences of the judge. In this regard, the Court has considered that judges were selected from among persons with a certain and satisfying experience. Finally, the Court of Justice has observed that judicial appointments by Ministers are a common practice in several Member States.

It then turns out that the European Court of Human Rights and the Court of Justice have a different approach. On the one hand, the European Court of Human Rights does not take the competences of the judges into account and has adopted a high standard: the appointment of a judge by the executive affects its independence if his statute does not *clearly* show that he is independent. On the other hand, the Court of Justice seems to adopt a much lower standard when judges are competent. In that light, and in the context of the appearance of independence of the judges regarding the manner of their appointment, the European Court of Human Rights seems to be more interested in the independence of the judges than in their competences, while the Court of Justice seems to be more interested in their competences than in their independence. This appears to support the idea that the issue of competences appears to override the issue of appearances in the *European Union Law village*.

¹⁸⁷ *Brudnicka and others v. Poland*, no. 54723/00, ECHR, 2005, §41. See also *Findlay v. the United Kingdom*, no. 22107/93, ECHR, 1997, §76.

¹⁸⁸ Case C-516/99 *Schmid* [2002] ECR I-04573, 40.

¹⁸⁹ *Sahiner v. Turkey*, no. 29279/95, ECHR, 2001, §45. See also *Sramek v. Austria*, no. 8790/79, ECHR, 1984, §42 (I emphasize).

¹⁹⁰ The Court of Justice has judged that, “*as for the rules governing the appointment of members of the Refugee Appeals Tribunal, these are not capable of calling into question the independence of that tribunal. The members of the Tribunal are appointed for a specific term from among persons with at least five years’ experience as a practising barrister or a practising solicitor, and the circumstances of their appointment by the Minister do not differ substantially from the practice in many other Member States*” (Case C-175/11 *D. and A.* [2013], §99).

Second, there is a *reasonable doubt* when one could fear that the judge comes to the case with a predetermined idea of the solution.¹⁹¹ In this respect, a judge cannot appear to have any interest in the case.¹⁹² In particular, he cannot appear to have an opposite interest to the one of the party at stake.¹⁹³ According to the Court of Justice and to the Court of Human Rights, this is because such a situation generates legitimate grounds for suspecting that the balance of the interests concerned is upset.¹⁹⁴ Since the judge has to be neutral, he has to keep an equal distance with the interests at stake. If a judge appears to have any interest and *a fortiori* an opposite interest to the one of a party, he does not respect this distance and raises a *reasonable doubt* regarding his appearance of independence.

Third, there is a *reasonable doubt* when the judge can be assimilated to one of the parties at stake¹⁹⁵ or to an interest group, unless his presence constitutes an advantage to render justice.

A tribunal can be assimilated to one of the parties at stake, for instance, when it is composed of military officers while it is charged with offences relating to propaganda against military service.¹⁹⁶ Another example is the case of a tribunal that has to judge over an action in liability against itself, while the indemnity would be charged on its budget.¹⁹⁷

¹⁹¹ *Gomez De Liano y Botella v. Spain*, no. 21369/04, ECHR, 2008, §71.

¹⁹² Case C-506/04 *Wilson* [2006] ECR I-08613, §52. For instance, a judge who is negotiating with a Minister in order to obtain a new job in his Ministry while this Minister is one of the party at stake would appear to have an interest in the case (*Sacilor Lormines v. France*, no. 65411/01, ECHR, 2006, §69). More generally, the fact that a judge can be guided by external considerations to the case raises a *reasonable doubt* regarding his appearance of independence (*Incal v. Turkey* [GC], no. 22678/93, ECHR, 1998, §72).

¹⁹³ *Langborger v. Sweden*, no. 11179/84, ECHR, 1989, §35.

¹⁹⁴ *Langborger v. Sweden*, no. 11179/84, ECHR, 1989, §35. In *Wilson*, the Court of Justice applied the principle of appearance implicitly, considering that the applicant had “legitimate grounds for concern that either all or the majority, as the case may be, of the members of those bodies [had] a common interest contrary to his own” (Case C-506/04 *Wilson* [2006] ECR I-08613, §57 - I emphasize).

¹⁹⁵ Case C-517/09 *RTL Belgium* [2010] ECR I-14093, §45. Here, I am only talking about judges who can be assimilated to one of the parties at stake and who do not appear to be independent. This is different from judges who are not independent because they are not “a third party in relation to the authority which adopted the decision forming the subject-matter of the proceedings” (Case C-24/92 *Corbiau* [1993] ECR I-01277, §15. See also Case C-506/04 *Wilson* [2006] ECR I-08613, §49). The Court of Justice considers that a judge is not a third party if he has an organizational link with one party (Case C-24/92 *Corbiau* [1993] ECR I-01277, §16; Case C-516/99 *Schmid* [2002] ECR I-04573, §37; Case C-110/98 *Gabalfrisa e.a.* [2000] ECR I-01577, §39-40) unless if, despite this link, there is a separation of functions (Case C-516/99 *Schmid* [2002] ECR I-04573, §37; Case C-110/98 *Gabalfrisa e.a.* [2000] ECR I-01577, §39-40). The European Court of Human Rights has a similar approach. See *Savino and others v. Italy*, nos. 17214/05, 20329/05 and 42113/04, ECHR, §104).

¹⁹⁶ *Ergin v. Turkey*, no. 47533/99, ECHR, 2006-VI, §54.

¹⁹⁷ *Mihalkov v. Bulgaria*, no. 67719/01, ECHR, 2008, §47-48.

The fact that some of the judges have a clear affiliation (e.g. interest groups representatives) does not constitute a proof of partiality in itself.¹⁹⁸ According to the European Court of Human Rights, their presence in a tribunal often constitutes an advantage to render justice.¹⁹⁹ Therefore, in my opinion, it is only when the presence of judges with a clear affiliation in a tribunal constitutes an advantage for this tribunal to render justice that it does not raise a *reasonable doubt*. In that light, the presence of workers and employers representative in a Labour Court would not raise a *reasonable doubt* regarding their appearance of independence, while the presence of a representative of the Minister in a Court such as the Court of Justice would necessarily generate such doubts.

These developments call for two general remarks to be made.

First, according to the European Court of Human Rights, the existence of a *reasonable doubt* regarding the appearance of independence of some judges generates a *reasonable doubt* towards the entire tribunal.²⁰⁰ This may be explained because the parties cannot trust one of the judges and they do not know how he could influence the others.²⁰¹ However, the Court of Justice does not follow the same logic. It has rather decided that the *reasonable doubt* was established when all or at least the majority of the tribunal generates it.²⁰²

Second, with regard to the guarantees of independence, the European Court of Human Rights is more interested in what is done in reality than to what is supposed to be in theory. In this regard, the European Court of Human Rights does even consider guarantees that are not written anywhere but that can be observed in practice as satisfactory.²⁰³

¹⁹⁸ *Luka v. Romania*, no. 34197/02, ECHR, 2009, §41.

¹⁹⁹ *Luka v. Romania*, no. 34197/02, ECHR, 2009, §42.

²⁰⁰ *Langborger v. Sweden*, no. 11179/84, ECHR, 1989, §35; *Sadak and others v. Turkey*, nos. 29900/96, 29901/96, 29902/96 and 29903/96, ECHR, 2001, §39.

²⁰¹ The European Court of Human Rights gives a great importance to the deliberate. As a matter of fact, it considers that the presence at the deliberate of someone who has defended a certain position during the hearings constitutes a lack of independence of the tribunal, even if this person does not have a deliberative or a consultative vote. This is because he could defend once again his opinion without contradictory (*Lobo Machado v. Portugal* [GC], no. 15764/89, ECHR, 1996, §32). So what is important is the participation to the deliberate, not the influence on it (*Castellino v. Belgium*, no. 504/08, ECHR, 2013, §47).

²⁰² Case C-506/04 *Wilson* [2006] ECR I-08613, §57.

²⁰³ *Sacilor Lormines v. France*, no. 65411/01, ECHR, 2006, §65.

As a conclusion, it turns out that a selection procedure cannot lead to abandon the choice of a judge to an interested party if the judge does not benefit from a strong statute that clearly shows his independence. A selection procedure can also not lead to choose a judge who can appear to have an interest in the case, and *a fortiori*, who have an opposite interest to the one of the parties or who can *appear* to be assimilated to a specific party.

II

SELECTING JUDGES OF THE COURT OF JUSTICE

Since the Lisbon Treaty, the selection procedure of the judges of the Court of Justice is established in article 19(2) TEU and developed in article 253 and 255 TFEU. The procedure is basically organized in three stages. First, Member States select their candidates. Afterwards, they submit these candidates to a panel, which gives a non-binding opinion on their suitability.²⁰⁴ This panel is usually but not officially called the “255 Committee” because of the article of the TFEU that establishes it. Finally, candidates are appointed by common accord of the governments of the Member States. I will then analyse the selection procedure following these three stages, one after the other.

1. The selection procedure at the national level

According to article 253 TFEU, Member States have to respect only two conditions when they select their candidates for the Court of Justice. They must choose candidates “*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*”.²⁰⁵ There is no further prescription or any kind of regulation of the conditions established by the Member States for the selection procedure at the national level.²⁰⁶ As a result, it is up to each Member State to decide of the organization of their selection procedure, as long as it fulfils the two criteria established by the Treaty. For this reason, selection can be very different from one Member State to another.²⁰⁷

²⁰⁴ The creation of such a panel had already been suggested by the *Due Group* in order “*to verify the legal competence of candidates*” (Working Party on the Future of the European Communities Court System (2000), *Report*, p. 51. See also Sauv , J.-M., “Le r le du Comit  255 dans la s lection du juge de l’Union”, *op. cit.*, p. 104). For another similar suggestion, see Discussion Circle on the Court of Justice (2003), *Final Report*, CONV 636/03, p. 2, §6.

²⁰⁵ Consolidated Version of the Treaty on the Functioning of the European Union [2008] O.J. C 115/47, Art. 253.

²⁰⁶ Sauv , J.-M., “La s lection des juges de l’Union europ enne : la pratique du comit  de l’article 255”, *op. cit.*, p. 4.

²⁰⁷ See Malenovski, J., *op. cit.*, p. 134-135. Malenovski highlights that, since national selection procedures are not equivalent, they are not about to lead to the selection of judges of an equivalent quality, which affects the quality of the Court of Justice. As explained below, the creation of the 255 Committee does not guarantee such an equivalence.

Surely, the 255 *Committee* plays the role of a filter in the selection procedure of the judges of the Court of Justice. Since its creation, Member States are no longer the only one to appreciate the independence of their candidates.²⁰⁸ However, despite the creation of the 255 *Committee*, it is still necessary to analyse the selection procedure at the national level. This is mainly because the 255 *Committee* has to face two limits in its task. I do not include the non-binding aspect of the Committee's opinions in these limits. Although this might seem to be an important limit in theory, it is not the case in practice, since Member States always follow the opinion of the Committee.²⁰⁹

The first limit that the 255 *Committee* has to face concerns the nature of its opinions. The Committee only gives “*an opinion on candidates' suitability to perform the duties of Judge*”.²¹⁰ Its role is limited to say if the candidate fits or not the function.²¹¹ As a consequence, the 255 *Committee* does only ensure that the minimum requirements are met, not the maximum.

The second limit that the 255 *Committee* has to face is that it cannot choose a candidate among several one.²¹² The Committee cannot “*rank multiple applications or privilege one profile at the expense of another*”²¹³. As a consequence, the Committee considers that “*the fundamental responsibility in the appointment of Judges [...] of the Court of Justice [...] lies with the Member States who, in particular, must propose the best candidates, taking into account the criteria laid down by Articles 253, 254 and 255 TFEU*”.²¹⁴

With regard to these limits, it appears that the national selection procedure plays a primary role in the selection of the judges of the Court of Justice since, from a certain

²⁰⁸ Sauv , J.-M., “La s lection des juges de l’Union europ enne : la pratique du comit  de l’article 255”, *op. cit.*, p. 1.

²⁰⁹ See below.

²¹⁰ Sauv , J.-M. (2012), *Second Activity Report of the Panel Provided for by Article 255 of the Treaty on the Functioning of the European Union*, 5091/13, p. 5 (I emphasize).

²¹¹ Sauv , J.-M., “Le r le du Comit  255 dans la s lection du juge de l’Union”, *op. cit.*, p. 115.

²¹² Sauv , J.-M., *Second Activity Report of the Panel Provided for by Article 255 of the Treaty on the Functioning of the European Union*, *op. cit.*, p. 7.

²¹³ Sauv , J.-M., “Le r le du Comit  255 dans la s lection du juge de l’Union”, *op. cit.*, p. 115.

²¹⁴ Sauv , J.-M., *Second Activity Report of the Panel Provided for by Article 255 of the Treaty on the Functioning of the European Union*, *op. cit.*, p. 7. Note that this observation of the 255 *Committee* is all the more interesting considering that, according to the wording of article 253 TFEU, judges of the Court of Justice should be chosen *among* the best, and not necessarily *be* the best, as the Committee seems to interpret it.

perspective, the selection is pre-established at this stage. In addition, since the national selection procedures are freely organized by the Member States, their variety makes all the more important to analyse them.

I will now analyse the selection procedures in the United Kingdom **(a)**, France **(b)** and Belgium **(c)** through a common analysis grid based on seven points. First, what is the national legal basis for the selection procedure? Second, how is the vacancy advertised? Third, who can participate to the selection procedure? Four, what are the selection criteria, which are established in addition to those provided by the Treaty? Five, who is the selection committee? Six, what are its powers? Seven, what are the roles of the government, the judiciary, and the judges of the Court of Justice in the procedure?

a. The selection procedure in the United Kingdom

Since the *Constitutional Reform Act* of 2005, judicial appointments in the United Kingdom are submitted to the recommendation of an independent judicial appointment Commission.²¹⁵ This procedure is not compulsory regarding the selection of candidates for the Court of Justice. However, the Lord Chancellor can request the advice of the Commission on appointments that are not listed in the Act.²¹⁶ This is what has been done for the selection of the United Kingdom's candidate for the Court of Justice.

The vacancy is publicly and broadly advertised through many official websites such as the one of the *Judicial Appointment Commission*²¹⁷, but also in the press. It is open to anyone who is able to demonstrate compliance with the agreed eligibility criteria.

The selection criteria are publicly known. They are as follows:

“Excellent understanding and experience of EU law, including the wider impact of the ECJ’s judgments on Member States; Good operational level of French; Excellent

²¹⁵ See Lord Mance (2014), “The Independence of Judges”, in N. A. Engstad, A. L. Frøseth, and B. Tønder (eds.), *The Independence of Judges*, (The Hague: Eleven International Publishing), p. 60-62.

²¹⁶ Dumbrovsky, T., Petkova, B., and Van Der Sluis, M. (2014), “Judicial Appointments: The Article 255 TFEU Advisory Panel and Selection Procedures in the Member States”, *Common Market Law Review*, vol. 51, p. 17-18.

²¹⁷ In particular, the vacancy is advertised through the websites of the three territorial appointments bodies: the *Judicial Appointments Commission* for England & Wales, the *Judicial Appointments Board* for Scotland, and the *Northern Ireland Judicial Appointments Commission*. See for example: <http://jac.judiciary.gov.uk>.

*intellectual ability and drafting skills; Experience of legal practice; Good organisational and case management skills, including an ability to effectively delegate to, and work with, a support team at the Court; Excellent interpersonal skills including an ability to communicate effectively and persuasively with colleagues in the Court”.*²¹⁸

The preferred candidate is selected on merit, based upon the selection criteria. A balance has also often but not systematically been made in the past between a Scottish judge for the Court of Justice and an English judge for the General Court.

An independent selection panel composed of seven members has been appointed to consider the applications received in order to identify the preferred candidate. The current lay chair of the *Judicial Appointments Board* for Scotland chairs the panel.²¹⁹ The other members are two members of the senior United Kingdom judiciary, two senior Government legal advisors and two legal academics.²²⁰

The panel considers all applications through two stages. First, all candidates must fill in a questionnaire and collect references. Second, they must attend an interview with the panel. The panel then makes a recommendation to the Lord Chancellor, who in turn formally advise the Foreign Secretary of the preferred candidate. At the end of the day, it is the Foreign Secretary who decides on the candidate who will be proposed to the *255 Committee*. For the moment, it has followed the advice of the panel. So, even if the panel is only an advisory organ, its role in the final selection is important.²²¹

The Government intervenes in the selection procedure in three respects: it agrees the creation of the panel, its membership, and it considers the best candidate identified by the panel.²²²

Judges are also involved in the selection procedure. Indeed, *“all of the Chief Justices of the UK, including the President of the UK Supreme Court, are consulted on the membership*

²¹⁸ Network of the Presidents of the Supreme Judicial Courts of the European Union, “Questionnaire of the United Kingdom”, *Appointment of Judges to the Supreme Court, to the Court of Justice of the European Union and to the European Court of Human Rights*, p. 3.

²¹⁹ “Questionnaire of the United Kingdom”, p. 4.

²²⁰ “Questionnaire of the United Kingdom”, p. 4.

²²¹ Dumbrovsky, T., *et al.*, *op. cit.*, p. 17-18.

²²² “Questionnaire of the United Kingdom”, p. 5.

*of the selection panel and on the name of the preferred candidate as and when identified”.*²²³

In the same vein, the then sitting United Kingdom’s judge to the Court of Justice assist the selection panel in identifying the most meritorious candidate for the post by providing a background presentation on the work of the Court, in order to make sure the panel knows what is expected from a judge at the Court of Justice.²²⁴

b. The selection procedure in France

In France, the selection procedure does not lie in any legal text, but it relies on a thirty years old tradition. According to this tradition, the post of judge at the Court of Justice is attributed to a judge of the Council of State, while the post of advocate general goes to a judge chosen among the judicial order.²²⁵ As a logical consequence of such a selection procedure, there is no public advertising of the vacancy. Only members of the Council of State are taken into account for the selection.

All the selection procedure is decided internally and the choice made is not publicly justified. As a result, the selection criteria are absolutely unknown.

The Vice-President of the Council of State and the president of the litigation section²²⁶ choose the candidate. The role of the Council of State in this selection procedure can be explained regarding the dual role it plays in France: it is not only the judge of the administration, but also the government adviser. In that sense, the government used to ask the Council opinion before proceeding to appointments.

In practice, the government automatically proposes the candidate chosen by the Council of State, because it considers the choice of the Council of State to be an exclusive prerogative. For this reason, the government does not interfere in the membership of the selection panel, neither in the consideration of the submitted candidate. In this regard, the power of the

²²³ “Questionnaire of the United Kingdom”, p. 6.

²²⁴ “Questionnaire of the United Kingdom”, p. 6.

²²⁵ Network of the Presidents of the Supreme Judicial Courts of the European Union, “Questionnaire of France”, *Appointment of Judges to the Supreme Court, to the Court of Justice of the European Union and to the European Court of Human Rights*, p. 9. Since there is no advocate general at the General Court, this balance between the Council of State and the judiciary cannot be realized. As a consequence, the position of Judge at the General Court is alternatively occupied by a member of the Council of State and by a member of the judiciary. For this reason, French judges at the General Court instance never stay there more than six years.

²²⁶ That is the “Président de la Section du Contentieux du Conseil d’Etat”.

Council of State can be seen to be an *indirect proposition* of the candidate to the 255 Committee through the government that will *formally* submit his candidature.²²⁷

c. The selection procedure in Belgium

In Belgium, the selection procedure does not lie in any legal text, nor does it rely on any practice. Still, the selection procedure seems to rely on a practice, which I will describe as follows.

With regard to the advertising of the vacancy, it is not public.

With regard to the selection criteria, the answer is the same. Here again, since the choice of the candidate is not justified, the selection criteria cannot be guessed. However, when the government announces the identity of the selected candidate to the public, it presents this candidate in such a way that one might discover why he has been chosen. Yet, there are two limits to this approach. First, the government does surely highlight the qualities of the candidate it has selected, but it is impossible to know if this candidate has been selected because of these qualities, or if he has been selected for other reasons, his qualities being highlighted afterwards in order to hide the real rationale of his selection. Second, even if one could know why a candidate has been selected, this would not tell him why others have not been selected. Still, the criteria that seem to be found in the communications of the government are all related to the skills of the selected candidate. In this regard, references are especially made to the degrees and the academic and professional experience of the candidate, in particular to its publications and teaching activities.²²⁸ When it comes to decide of the renewal of a mandate, the government reduces the elements of its communication to the minimum. One can only find an allusion in these communications to the quality of the work made by the judge, which might justifies the renewal of his mandate. This allusion has already been expressed by highlighting that the colleagues of the judge at stake have elected

²²⁷ It is the Minister of Justice who selects the advocate general.

²²⁸ Gouvernement fédéral belge (2003), *Communication - Nominations auprès de la Cour de Justice et du Tribunal de première instance des communautés européennes*, www.presscenter.org

him president of the chamber.²²⁹ In any case, there is no trace of any justification with regard to the non-renewal of the mandate of a judge.

In addition, since Belgium is composed of two linguistic communities (Dutch-speaking in the north and French-speaking in the south), everything in this country is organized on the idea of a balancing between their representativeness. This approach is perceived as a matter of mutual respect. For this reason, if the judge of the Court of Justice is Dutch-speaking, the advocate general will be French-speaking, and vice-versa. However, the balancing can also be made between the judge of the Court of Justice on the one hand, and the advocate general, the judge of the General Court and the Civil Service Tribunal. In this regard, the post of judge at the Court of Justice looks to be considered to be the most important.²³⁰ Finally, elements related to the representativeness of both linguistic communities are also taken into account when it comes to select a judge among one of them. In this regard, a candidate from one community is advantaged if he can demonstrate links that bring him closer to the other community.²³¹

In practice, it is the Minister of Justice who seeks to find the Belgian candidate for the Court of Justice. The Minister asks to the national Superior Council of Justice, to the Presidents of the Council of State and the Court of Cassation and to deans of universities to suggest him some names.²³² It has also happened that the Minister consults the then sitting Belgian Judge at the Court of Justice to the same end. Afterwards, candidates are asked whether they are interested to be judges at the Court of Justice. Next, they meet the Ministers of Justice and Foreign affairs. This appointment might be purely formal, since the decision seems to already have been taken before. As a matter of fact, the proposition of a candidate for the post of judge at the Court of Justice depends on intense political discussions and

²²⁹ Conseil des Ministres (2008), *Communication - Prolongation du mandat du juge belge à la Cour de Justice des communautés européennes*, www.presscenter.org

²³⁰ As is stands at the time of writing this dissertation, the Belgian judge at the Court of Justice is the only Dutch speaking member of the Court of Justice of the European Union. The advocate general, the judge at the General Court of Justice and the judge at the Civil Service Tribunal are all French-speaking.

²³¹ For instance, a lawyer who have studied in a French *and* a Dutch speaking university, or a judge who have defended his thesis in Dutch but published it in French would have a major advantage.

²³² I have decided to directly translate the name of these institutions in English in the text, in order to facilitate the reading of this dissertation. In Belgium, these institutions are called in French and Dutch, respectively, and in the same order, as follows: Conseil Supérieur de la Justice/Hoge Raad voor de Justitie, Conseil d'Etat/Raad van State and Cour de cassation/Hof van Cassatie.

negotiations regarding the distribution of the mandates, especially when it comes to constitute the federal government.²³³ As a consequence, candidates need to be supported by political parties in order to have a chance of obtaining the post.²³⁴ Finally, the Prime Minister, the Minister of Justice, and the Minister of Foreign Affairs jointly propose a candidate to the Council of Ministers, which has in turn to propose the finally selected candidate to the 255 Committee.

2. The 255 Committee

The 255 Committee has been established by the Treaty of Lisbon. It started to work in March 2010, immediately after the European Union has determined the conditions of its functioning and has appointed its first members.²³⁵

The 255 Committee is composed of seven members appointed for four years.²³⁶ These members are “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”.²³⁷ In this regard, the composition of the 255 Committee appears to have been smartly determined for three reasons.

First, the current Committee is mostly composed of members of the national highest Courts. Since there is no judicial remedy under the national law against the decisions of these Courts, they have the obligation to refer a question to the Court of Justice for a preliminary

²³³ Destrebecq, F. (2011), *Melchior Wathelet de retour à la Cour de Justice européenne ?*, <http://www.lavenir.net>.

²³⁴ La Libre (2003), *Lenaerts replace Wathelet*, <http://www.lalibre.be>.

²³⁵ With regard to the functioning of the 255 Committee, see Council Decision no. 2010/124/EU relating to the operating rules of the panel provided for in Article 255 of the Treaty on the Functioning of the European Union (Hereinafter: Council Decision no. 2010/124/EU). With regard to the appointment of its members, see Council Decision no. 2010/125/EU appointing the members of the panel provided for in Article 255 of the Treaty on the Functioning of the European Union. The current members of the 255 Committee are designed until the 1 March 2014. They are J.-M. Sauvé (Vice-president of the French Council of State and President of the Committee), Peter Jann (former Austrian judge at the Court of Justice), Lord Mance (Judge at the Supreme Court of the United Kingdom), Torben Melchior (former President of the Supreme Court of Denmark), Péter Paczolay (President of the Hungarian Constitutional Court), Ana Palacio Vallelersundi (Professor of Law, member of the Spanish Council of State, former Deputee of the European Parliament and Spanish Minister of Foreign Affairs, proposed by the European Parliament), Virpi Tiili (former Finnish judge at the Court of first Instance). See Sauvé, J.-M., “Le rôle du Comité 255 dans la sélection du juge de l’Union”, *op. cit.*, p. 101.

²³⁶ Council Decision no. 2010/124/EU, Annex, §3.

²³⁷ Council Decision no. 2010/124/EU, Annex, §2.

ruling.²³⁸ Accordingly, these Courts do particularly have to trust the Court of Justice. From this point of view, one might consider that members of the *255 Committee* who belong to the national highest Courts underpin and nurture the confidence inspired by the judges of the Court of Justice when they show themselves that they trust them through the selection procedure.

Second, the former judges of the European Court of Justice present in the Committee can inform members of national Supreme Courts on the requirements of the work at the Court.

Third, given its composition, the *255 Committee* escapes to national governments considerations and to any politicization.

With regard to the selection criteria, the Treaty does only establish two of them: competence and independence.²³⁹ These criteria are exhaustive. However, the *255 Committee* has considered that they “*could be more clearly and precisely explained*”.²⁴⁰ According to the Committee, it does not invent anything in doing so. Yet, adopting criteria in order to evaluate the suitability of a candidate implies defining this suitability, which is, in a certain perspective, a political act.²⁴¹ Still, the six criteria taken into account by the *255 Committee* in assessing the suitability of the candidates are as follows: “*the candidate's legal expertise, professional experience, ability to perform the duties of a Judge, their impartiality and independence being beyond doubt, language skills and aptitude for working as part of a team in an international environment in which several legal systems are represented*”.²⁴² This raises an interesting question. Since Member States always follow the opinion of the *255 Committee*, it is their interest to adopt the same selection criteria than the one established by the Committee in order to ensure that they will receive a favourable opinion and that their

²³⁸ Consolidated Version of the Treaty on the Functioning of the European Union [2008] O.J. C 115/47, Art. 267. This principle applies unless the national Supreme Court at stake “[...] *has established that the question raised is irrelevant or that the Community provision in question has already been interpreted by the Court or that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt*” (Case C-283/81 *Cilfit* [1982] ECR 03415, §21).

²³⁹ Consolidated Version of the Treaty on the Functioning of the European Union [2008] O.J. C 115/47, Art. 253(1).

²⁴⁰ Sauvé, J.-M., *Activity report of the panel provided for by Article 255 of the Treaty on the Functioning of the European Union*, *op. cit.*, p. 12.

²⁴¹ Von Bogdandy, A. claimed this point during the conference *Selecting Europe's Judges* (*op. cit.*).

²⁴² Sauvé, J.-M., *Activity report of the panel provided for by Article 255 of the Treaty on the Functioning of the European Union*, *op. cit.*, p. 12.

candidate will be appointed. The 255 Committee is well aware that its opinions have a “deterrence and virtuous effect on the selection by the Member States of the fittest candidates”.²⁴³ As a result, the Committee does also perfectly know that it “can contribute to guide the governments in their choice of candidates, as well as it can orientate their definition of the national selection procedure”.²⁴⁴ This seems to be happening in practice.²⁴⁵ National selection procedures in Finland, Bulgaria and the Czech Republic have already evaluated towards more transparency through public call for applications and objectivity through advisory boards. In the Czech Republic, the new selection procedure has clearly been set up in 2011 in response to opinions of the Panel.²⁴⁶ In this light, although it is too early to say if the 255 Committee’s opinions influence the selection procedure in the United Kingdom, France and Belgium,²⁴⁷ this would be a fascinating question for the next years and one should monitor with great attention the evolution of the selection procedure of the judges of the Court of Justice in these Member States and in the European Union more generally.

The 255 Committee is clearly interested in the functioning of the national selection procedure. However, its position is ambiguous. On the one hand, according to its first report, the 255 Committee takes into account the selection criteria of the national procedures in order to “support” its assessment of the candidate and, in particular, of his independence.²⁴⁸ First, the Committee requires Member States to explain to it the “essential reasons why it chose the proposed candidate”.²⁴⁹ Second, the Committee considers how the candidate has been selected at the national level. This includes considerations such as transparency, objectivity,

²⁴³ Sauv , J.-M., “Le r le du Comit  255 dans la s lection du juge de l’Union”, *op. cit.*, p. 116 (my translation).

²⁴⁴ Sauv , J.-M., “Le r le du Comit  255 dans la s lection du juge de l’Union”, *op. cit.*, p. 113 (my translation).

²⁴⁵ See Ritleng, D., *op. cit.*

²⁴⁶ I do not mention here Germany, which changed its procedure in a similar way in 2009, before the publication of the first report of the 255 Committee.

²⁴⁷ The United Kingdom is the only Member State that has appointed a new judge after the Lisbon Treaty. The French judge has been appointed in 2006 and reappointed in 2012. The Belgian judge has been appointed in 2003 and reappointed in 2008.

²⁴⁸ Sauv , J.-M. (2013), *First Activity Report of the Panel Provided by Article 255 of the Treaty on the Functioning of the European Union*, 6509/11, p. 6. In French, the 255 Committee used the word “ tayer”. See also Lord Mance, *The composition of the European Court of Justice*, *op. cit.*, p. 18.

²⁴⁹ Sauv , J.-M. (2013), *First Activity Report of the Panel Provided by Article 255 of the Treaty on the Functioning of the European Union*, 6509/11, p. 6.

and selection committee²⁵⁰. On the other hand, in its last report, the 255 Committee has considered that:

“ [...] *The method for selecting the candidate chosen at national level may not be prejudicial to him or her. In particular, the lack of a procedure enabling candidates' merits to be assessed in an independent and objective manner may not in itself constitute a handicap. It would, after all, be illogical to disadvantage candidates whose merits are to be assessed on the grounds of a selection process over which they have no control. Furthermore, the panel is aware that the selection procedure is the sole responsibility of Member States and is not framed by the TFEU. As a result, the panel naturally gave favourable opinions on suitable candidatures within the meaning of the Treaty, even in the absence of public call for applications or an independent national procedure for assessing merits*”²⁵¹.

What seems to be a subsequent development of the Committee's position is surprising for four reasons. First, if the 255 Committee does not take into account in its evaluation the way national selections procedures are organized, then why does it want to know how they work? Second, the Committee has considered that *any* aspect of the selection procedure can raise a doubt on the independence of a candidate.²⁵² Then why would it not consider the functioning of the national selection procedure in this respect? Three, while stating that the national selection procedure cannot constitute an advantage or a disadvantage for a candidate, the 255 Committee does also state that a strong national selection procedure can dispel its doubts on a candidate.²⁵³ In this respect, the position of the Committee does not look consistent. Let us illustrate this point by taking the example of two equal candidates, that is to say two persons

²⁵⁰ Sauv , J.-M. (2013), *First Activity Report of the Panel Provided by Article 255 of the Treaty on the Functioning of the European Union*, op. cit., p. 7. In this regard, a member of the 255 Committee has considered that “*the existence of an objective appointments procedure independent of executive influence can provide some assurance about the quality of a candidate for judicial office*” (Lord Mance, *The composition of the European Court of Justice*, op. cit., p. 18).

²⁵¹ Sauv , J.-M. (2013), *Third Activity Report of the Panel Provided by Article 255 of the Treaty on the Functioning of the European Union*, op. cit., p. 14.

²⁵² Sauv , J.-M. (2013), *Third Activity Report of the Panel Provided by Article 255 of the Treaty on the Functioning of the European Union*, op. cit., p. 19. See also Sauv , J.-M., “Le r le du Comit  255 dans la s lection du juge de l'Union”, op. cit., p. 113.

²⁵³ Sauv , J.-M., *Second Activity Report of the Panel Provided for by Article 255 of the Treaty on the Functioning of the European Union*, op. cit., p. 9.

submitting the exact same application file but who have been selected through different selection procedures. If A has been selected through a weak procedure and B through a strong procedure (that is, among other things, an objective and transparent procedure), B will have an advantage on A. Four, the Treaty requires candidates to be independent *beyond doubt*. In that light, the 255 Committee cannot be followed when it considers that “*the selection procedure is the sole responsibility of Member States and is not framed by the TFEU*”.²⁵⁴ The 255 Committee has to ensure the independence beyond doubt of the judges of the Court of Justice. Given the determining importance of the national selection procedure in this regard, the Committee cannot ignore it. It is not about disadvantaging candidates for something they are not responsible for. It is about guaranteeing the independence of the judges of the Court of Justice, as the Treaty requires it.

Since the beginning of its work, the 255 Committee has provided 67 opinions, 32 of them being candidatures for a first term.²⁵⁵ 7 of these 32 opinions were unfavourable, so that 22% of the Committee’s opinions on candidatures for a first term are unfavourable.²⁵⁶ According to its reports, it seems that the 255 Committee has not yet delivered an unfavourable opinion because it would have had some doubts regarding the independence of a candidate. Nevertheless, the Committee has delivered unfavourable opinions when a candidate had not enough experience or too limited competences in European Union law.²⁵⁷ Such grounds raise some doubts on the reasons that led to select these candidates. How is it that a Member State sent a candidate to sit on the Court of Justice while he is not enough experience and/or competences? This does not necessarily means that such a candidate has been selected for political reasons but it raises doubts in that sense.

²⁵⁴ Sauv , J.-M. (2013), *Third Activity Report of the Panel Provided by Article 255 of the Treaty on the Functioning of the European Union*, *op. cit.*, p. 14.

²⁵⁵ Sauv , J.-M. (2013), *Third Activity Report of the Panel Provided by Article 255 of the Treaty on the Functioning of the European Union*, SN 1118/2014, p. 9.

²⁵⁶ Sauv , J.-M. (2013), *Third Activity Report of the Panel Provided by Article 255 of the Treaty on the Functioning of the European Union*, *op. cit.*, p. 9.

²⁵⁷ Sauv , J.-M., *Activity report of the panel provided for by Article 255 of the Treaty on the Functioning of the European Union*, *op. cit.*, p. 14. See also Sauv , J.-M., “La s lection des juges de l’Union europ enne : la pratique du comit  de l’article 255”, *op. cit.*

The deliberations of the 255 *Committee* take place in camera.²⁵⁸ There are no rules with regard to the way the Committee has to decide of its opinions. There is no clear answer to this question. Until now, it seems that the Committee has nearly always found a way to reach a consensus.²⁵⁹ Exceptionally, the absence of consensus has been reflected in the wording and the reasoning of the Committee's opinion.

Finally, the 255 *Committee* has interpreted the rules of its functioning in such a way that it considers that its opinions should not be public. This interpretation is twofold.²⁶⁰ First, according to the operating rules of the Committee, the Committee deliberates in camera and it only forwards its opinions to the Representatives of the Member States for the selection procedure.²⁶¹ Second, “*the institutions shall refuse access to a document where disclosure would undermine the protection of [...] privacy and the integrity of the individual [...]*”.²⁶²

3. The appointment by the Member States

At the end of the day, it is up to the governments of the Member States to appoint the candidates by common accord. In theory, the Member States are not bound by the opinion of the 255 *Committee*. However, they have always followed it, so far.²⁶³ Two reasons explain the attitude of the Member States. First, none of them wants to challenge the Committee's opinion. The appointment of a judge to the Court of Justice is a politically sensitive matter. In this regard, it is extremely delicate for one Member State to refuse the appointment of the judge of another Member State. In this view, the 255 *Committee's* opinions constitute an umbrella under which Member States find a comfortable refuge: they can all take refuge behind the Committee's opinion without generating any political offense.²⁶⁴ Second, all Member States know the Committee's opinion and the reason why it has provided an

²⁵⁸ Council Decision no. 2010/124/EU, Annex, §5.

²⁵⁹ Sauvé, J.-M., answering to a question, at the conference *Selecting Europe's Judges* (op. cit.).

²⁶⁰ Sauvé, J.-M. (2013), *First Activity Report of the Panel Provided by Article 255 of the Treaty on the Functioning of the European Union*, op. cit., p. 7-8.

²⁶¹ Council Decision no. 2010/124/EU, Annex, §§5 and 8.

²⁶² European Parliament and Council Regulation (EC) 1049/2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L145/43, Art. 4(1)(b).

²⁶³ Sauvé, J.-M., *Second Activity Report of the Panel Provided for by Article 255 of the Treaty on the Functioning of the European Union*, op. cit., p. 6.

²⁶⁴ It can also be delicate for the 255 *Committee* to provide unfavourable opinions in certain circumstances (e.g. when a Member State proposes the President of its national Supreme Court). Still, it is the essence of the Committee's task not to please everybody.

unfavourable opinion. Accordingly, even if a Member State wants to maintain its support for its candidate, it is very unlikely that all other Member States would follow it, since the Committee's opinion should have convinced them that this would be inappropriate.²⁶⁵ As a matter of fact, Member States have almost always withdrawn their candidate by themselves when he had received an unfavourable opinion from the *255 Committee*. There is only one case in which Member States have observed that no consensus could be reached.²⁶⁶ In addition, just as unanimity among Member States is required to appoint a judge, unanimity is required to go beyond an unfavourable opinion of the Committee, which strengthens its opinions.²⁶⁷

As a consequence, it turns out that, by contrast to its theoretical powers, the *255 Committee* has a highly determining role in the selection procedure of the judges of the Court of Justice.²⁶⁸

²⁶⁵ Sauv , J.-M., "Le r le du Comit  255 dans la s lection du juge de l'Union", *op. cit.*, p. 116.

²⁶⁶ Sauv , J.-M., "La s lection des juges de l'Union europ enne : la pratique du comit  de l'article 255", *op. cit.*, p. 5.

²⁶⁷ Sauv , J.-M., "La s lection des juges de l'Union europ enne : la pratique du comit  de l'article 255", *op. cit.*, p. 5.

²⁶⁸ According to the President of the *255 Committee*, "*the appointment procedure provides de facto to the opinion of the committee a force comparable to an assent, especially when it is negative*" (Sauv , J.-M., "La s lection des juges de l'Union europ enne : la pratique du comit  de l'article 255", *op. cit.*, p. 5 - my translation).

III

THE SELECTION PROCEDURE OF THE JUDGES OF THE COURT OF JUSTICE WITH REGARD TO THE CONCEPT OF APPEARANCE OF INDEPENDENCE

In this last part, I will compare the practice of the selection procedure of the judges of the Court of Justice with the theoretical framework developed in the first part, in order to determine the impact of this procedure on the appearance of independence of the judges of the Court of Justice.

I will make this comparison through a two-phase approach. I will start by analysing the national stage (1) and I will continue with the European stage (2). Again, I will make the comparison between theory and practice in both sections through a common analysis grid. In this regard, I will systematically start by addressing the existence of an independent selection body in the selection procedure at stake. I will then focus on the selection criteria that guide it with regard to the requirements of objectivity and transparency. I will then highlight the forces and weaknesses of the selection procedure of the judges of the Court of Justice regarding their appearance of independence (3). Finally, I will consider if this procedure raises a *reasonable doubt* in this respect (4).

1. The national stage

With regard to the existence of an independent selection body, it turns out that such a body does not always exist at the national level. In the United Kingdom, the existing independent selection body does not really select the candidate. It only suggests the one it considers to be the best. Nevertheless, the British government follows its opinion. In France, the Council of State can be seen as an independent selection body. Its choice is communicated to the French government forwards it to the *255 Committee*.

In addition, the composition of these bodies is different in these two countries. In the United Kingdom, besides its President, the panel is equally composed of academics, judges, and government legal advisors. Such a composition appears to be rather well balanced between objective and representative considerations, especially regarding the way the procedure is organized and the fact that, at the end of the day, it is the national government

that will proceed to the appointment of the candidate. On the contrary, in France, the selection is entirely made by the Council of State and among its own members. As a consequence, this “*selection body*” might look corporatist. This feeling could be all the more justified, knowing that there is a strong esprit de corps at the French Council of State, that is to say, according to the Oxford dictionary, “*a feeling of pride and mutual loyalty shared by the members of a group*”.²⁶⁹ This is because 80% of the members of the Council of State are alumni of the famous *Ecole Nationale d’Administration* (“ENA”).²⁷⁰ These members join the Council of State young and carve out their career in this institution.²⁷¹ Since the choice of the Council of State is not legally binding, the fact that the government appoints the candidate might theoretically counterbalance the corporatist aspect of the selection. However, in practice, the government automatically and systematically proposes the candidate selected by the Council of State.

Finally, in Belgium, there is no independent selection body at all. The selection is entirely made by the executive. The appointment of a judge by the executive does not affect its independence as long as the statute of the judge “*clearly shows that, once he is appointed, he is not under any pressure, he does not receive any instructions from the executive, and he works independently*”.²⁷² In this regard, the selection of the Belgian candidate by the Belgian government is problematic because the statute of the judges of the Court of Justice is not strong enough to *clearly* show that they are not under any pressure. Surely, there is no

²⁶⁹ Stevenson, A. (2010), Oxford English Dictionary, Oxford University Press, p. 598. See also, Latour, B. (2004), *La fabrique du droit. Une ethnographie du Conseil d’Etat*, (Paris: La Découverte), especially p. 119-138.

²⁷⁰ According to French law, two-third of the members of the Council of State are recruited from among the alumni of the ENA (Code de Justice Administrative, Art. L233-2 and L233-3). In practice, the number of alumni of the ENA at the Council of State is even more higher (see Latour, B., *op. cit.*, p. 124). The *Ecole Nationale d’Administration* (National School of Administration) has been created by General de Gaulle in 1945. It is designed “*to broaden access to the highest executive levels of government service*”, including positions at the Council of State (www.ena.fr).

²⁷¹ Pacteau, B. (2008), *Traité de contentieux administratif*, (Paris: Presses Universitaires de France), p. 66. A typical path of an alumnus of the ENA can be exposed as follows: the alumnus joins the Council of State as an *auditeur*. He then becomes a *maître des requêtes* after three years and finally a councillor after twelve years.

²⁷² *Zolotas v. Greece*, no. 38240/02, ECHR, 2005, §24 (I emphasize). See also *Weeks v. the United Kingdom*, no. 9787/82, ECHR, 1987, §62; *Kadubec v. Slovakia*, no. 27061/95, ECHR, 1998-VI, §57; *Lauko v. Slovakia*, no. 26138/95, ECHR, 1998-VI, §64; *Kleyn and others v. the Netherlands*, nos. 39343/98, 39651/98, 43147/98 and 46664/99, ECHR, 2003, §195; *Sacilor Lormines v. France*, no. 65411/01, ECHR, 2006, §67; *Salov v. Ukraine*, no. 65518/01, ECHR, 2004, §86; *Brudnicka and others v. Poland*, no. 54723/00, ECHR, 2005, §41; *Maktouf and Damjanovic v. Bosnia and Herzegovina* [GC], nos. 2312/08 and 34179/08, §49, ECHR, 2013, §51.

hierarchical subordination between Ministers and judges²⁷³ and there is probably no contact between them.²⁷⁴ However, a major concern regarding the statute of the judges of the Court of Justice is their appointment for a renewable period of six years.²⁷⁵ This is because one could fear that a judge who would not satisfy his Member State would not be renewed.²⁷⁶ This fear is all the more justified considering that it has already happen that judges of the Court of Justice have not been reappointed for political reasons.²⁷⁷

With regard to the selection criteria, the situation is also very different from one of the analysed Member States to another. In the United Kingdom, the selection procedure is transparent and based on objective criteria. However, transparency is limited to the advertising of the vacancy.²⁷⁸ This limitation of transparency does also limit the appearance of objectivity of the selection criteria. Indeed, the recommendation of the selection body is not published.²⁷⁹ Again, I do not claim that it *should* be published. I rather claim that one could not totally be confident in the objectivity of a selection procedure if one does not know how the objective criteria are applied. In France, the procedure is not transparent at all. As a result, nothing can be known regarding the selection criteria. Nevertheless, the selection is made by judges among judges of one of the French Supreme Courts, the prestigious Council of State. In this regard, the selection of a judge who should appear to be independent is supposed to be made among judges who already offer this guarantee by judges who offer it as well. In Belgium, the selection procedure is not transparent at all. The selection is the result of a political agreement and it can hardly be seen to be objective.

²⁷³ *Brudnicka and others v. Poland*, no. 54723/00, ECHR, 2005, §41. See also *Findlay v. the United Kingdom*, no. 22107/93, ECHR, 1997, §76.

²⁷⁴ *Weeks v. the United Kingdom*, no. 9787/82, ECHR, 1987, §62. See also *Bryan v. UK* no. 19178/91, ECHR, 1995, §38.

²⁷⁵ Judges of the Court of Justice are well aware themselves of this problem. Both the President of the Court of Justice and the President of the General Court had proposed to appoint judges for a longer but non renewable term (12 years), but their proposition has been rejected (See Discussion Circle on the Court of Justice (2003), *Speech of Gil Carlos Rodríguez Iglesias*, CONV 572/03 and Discussion Circle on the Court of Justice (2003), *Speech of Bo Vesterdorf*, CONV 575/03). Member States seem to consider the rule of renewable six-year term to be extremely important. This is all the more striking, knowing that this rule is established in the Treaty (Consolidated Version of the Treaty on the Functioning of the European Union [2008] O.J. C 115/47, Art. 253).

²⁷⁶ See Malenovski, J., *op. cit.*, p. 194-195.

²⁷⁷ Lord Mance, *La nomination des juges à la Cour de Justice de l'Union européenne et à la Cour européenne des droits de l'homme*, *op. cit.*, §16.

²⁷⁸ Dumbrovsky, T., *et al.*, *op. cit.*, p. 17-18.p. 17-18.

²⁷⁹ Dumbrovsky, T., *et al.*, *op. cit.*, p. 17-18.p. 17-18.

2. The European stage

With regard to the existence of an independent selection body, it is incarnated in the 255 Committee.²⁸⁰ Given the limits the Committee has to face in its mission – that is giving an opinion on the suitability of one candidate and no more than that – it can be described as a “light or a minima High Council of Justice”.²⁸¹

With regard to the selection criteria, a major concern is the opacity of the 255 Committee’s opinions. The evaluation criteria established by the Committee are very general and flexible. It is then particularly necessary to know how they are applied, which is impossible at the moment. Surely, candidates’ privacy should be respected. However, a balance might be found between these two imperatives. In this respect, nothing would prevent the 255 Committee to explain in general and anonymous terms how it applies its evaluation criteria.

3. Forces, weaknesses and evolution of the selection procedure of the judges of the Court of Justice

With regard to the observations made above, the selection procedure of the judges of the Court of Justice marks a progress in the strengthening of their appearance of independence (a). However, this progress is not yet achieved. The selection procedure still suffers from some weaknesses (b). As a consequence, it is intended to evolve (c).

a. Forces of the selection procedure

The new selection procedure of the judges of the Court of Justice constitutes a real progress regarding the previous one in two respects.

First, the selection of the judges does no longer depend solely on the Member States. It does now rely on the opinion provided by an independent Committee composed of highly competent and respected members.

²⁸⁰ Sauv , J.-M., “La s lection des juges de l’Union europ enne : la pratique du comit  de l’article 255”, *op. cit.*, p. 2.

²⁸¹ See Sauv , J.-M., *La s paration des pouvoirs, l’Union europ enne et le Comit  255*, *op. cit.*, p. 10.

Before the Lisbon Treaty, the selection procedure relied entirely on mutual confidence between Member States²⁸². In this context, each of them selected freely its candidate and there was no external control of this selection at the European level. In theory, the appointment of the candidate was supposed to be made by mutual agreement of all Member States. However, in practice, no Member State has ever refused the candidate of another Member State.²⁸³ As a result, in fact, the selection procedure of each judge was only made by his Member State.²⁸⁴

The appointment at unanimity by Member States has been maintained in the Lisbon Treaty and it still a fiction. Just as no Member State wanted to question the choice of another Member State, none of them wants to question the opinion of the *255 Committee*. However, the novelty of the Lisbon Treaty is that the *255 Committee* now exercises an external control on the national selections. In this regard, the creation of the Committee allowed it to do what Member States did not want to do.

Second, the intervention of the *255 Committee* in the selection procedure strengthens the legitimacy of the Court²⁸⁵ by providing the guarantee that the selection is supported by some objective considerations. In this regard, the *255 Committee* has a “*moral authority*”, which has been developed through the delivering of its reports and opinions, that is a real “*doctrine*”, depicting the figure of the “*good European judge*”.²⁸⁶ As a consequence of this *moral authority*, it is likely that the more the Committee will develop its *doctrine*, the harder it will be for the Member States not to follow its opinions.

²⁸² Sauv , J.-M., “La s lection des juges de l’Union europ enne : la pratique du comit  de l’article 255”, *op. cit.*, p. 2.

²⁸³ J.-M. Sauv , les petites affiches, p. 3. Lord Mance, *The composition of the European Court of Justice*, *op. cit.*, p. 9.

²⁸⁴ Sauv , J.-M., “La s lection des juges de l’Union europ enne : la pratique du comit  de l’article 255”, *op. cit.*, p. 2.

²⁸⁵ Sauv , J.-M., “Le r le du Comit  255 dans la s lection du juge de l’Union”, *op. cit.*, p. 114.

²⁸⁶ Sauv , J.-M., “La s lection des juges de l’Union europ enne : la pratique du comit  de l’article 255”, *op. cit.*, p. 4.

b. Weaknesses of the selection procedure

Although the selection procedure established in the Lisbon Treaty constitutes an “*additional warranty*”²⁸⁷ to the appearance of independence of the judges of the Court of Justice, it is not sufficient for the next five reasons.

First, while a control is now exercised on the candidates, Member States still decide absolutely freely of their national selection procedure without having to meet real and specific requirements. This is all the more striking considering the major importance of the national stage in the selection procedure.

Second, the *255 Committee* controls the national selections but not the national selection procedures. For instance, a candidate chosen in the detriment of another one for political reasons at the national level can receive a favourable opinion from the Committee.

Third, the Committee only evaluate the suitability of one candidate for the post of judge at the Court of Justice. It can neither give an unfavourable opinion to a candidate because he is not the best possible, nor evaluate and rank several candidates.

Four, the Committee’s opinions suffer from an absence of transparency, which does not allow the Committee to generate as much confidence as it should and could do.

Five, the decision of a Member State not to reappoint a judge totally escapes to the competences of the *255 Committee*, while it is sometimes due to political reasons.²⁸⁸

c. Evolution of the selection procedure

Given the weaknesses of the current selection procedure, it is set to evolve. Three main changes can be considered.

First, Member States’ freedom of organization of the selection procedure at the national level should be balanced. On the one hand, following the European motto “*united in*

²⁸⁷ Sauvé, J.-M., “Le rôle du Comité 255 dans la sélection du juge de l’Union”, *op. cit.*, p. 119.

²⁸⁸ The issue of reappointments constitute a problem in itself with regard to the statute of the judges of the Court of Justice and their independence. As stated above, many propositions have been made in order to appoint these judges for a non-renewable but longer mandate. From this point of view, the issue of reappointments does rather depends on the length of judges’ mandates than on the Committee’s competences. See in that sense Sauvé, J.-M., “Le rôle du Comité 255 dans la sélection du juge de l’Union”, *op. cit.*, p. 117-118.

diversity”, their freedom should be maintained. With regard to the selection of a judge for the Court of Justice, each Member State has its own views or traditions. Some Member States, such as the Netherlands, tend to send Professors to the Court of Justice. Others, such as France, rather tend to send judges, while others, such as Denmark, prefer to send high functionaries. This diversity reflects internal political and cultural respectable choices. However, on the other hand, diversity does not mean that each Member State could do anything without having to respect any rule. It does not lead to the absence of procedure. In this regard, some common criteria should be established in order to provide a framework for the national selection procedures. As a matter of fact, the progressive increase of the European Union law knowledge in the Member States will render the establishment of such criteria inevitable.²⁸⁹ These criteria should be the one that enforce the appearance of independence of the judges of the Court of Justice, that is transparency and objectivity of the procedure. The 255 Committee would then play the role of the independent body giving its opinion for the whole European Union. In particular, it should control the reality of the transparency and the objectivity of the national selection procedures.

Second, the 255 Committee might become able to evaluate and rank several candidates. Nothing prevents the Committee to do this. The 255 Committee is inspired from the Committee for the Civil Service Tribunal.²⁹⁰ By contrast, this latter Committee examine candidatures, which are directly sent to it by the candidates.²⁹¹ This is because the Civil Service Tribunal is not composed of one judge for each Member State as the Court of Justice is. In addition, the Committee for the Civil Service Tribunal has the competence to submit a list of the most appropriated candidates to the Member States. This list can include twice as much candidate as the number of free positions. In addition, in case of an increase of the

²⁸⁹ Let us take the example of Belgium. This is a small Member State, where a balance has always to be made between the two linguistic communities. As a result, the first step in the selection of a candidate is to decide if he will be French-speaking (4 millions people) or Dutch-speaking (6 millions people). Afterwards, people with good knowledge of European Union law and other researched qualities, such as knowledge of languages and experience, must be found. This considerably reduces the spectrum of possibilities. However, this is much less true today than it was twenty years ago, and it will be less and less true, since there will be more and more people that will fulfil all of these conditions with the time. In this regard, it might have been quiet easy to select a judge for the Court of Justice twenty years ago without any public and objective procedure, because of the very limited number of possible candidates. However, this is no longer possible and it will certainly not be in the future.

²⁹⁰ Sauvé, J.-M., “Le rôle du Comité 255 dans la sélection du juge de l’Union”, *op. cit.*, p. 106.

²⁹¹ Council Decision no. 2004/752/EC (European Union Civil Service Tribunal), 2004, OJEU n°233.

number of judges at the Court of Justice (from 27 to 39), all Member States could not be equally represented. As a result, it would become necessary to adapt the selection procedure.²⁹² According to the President of the *255 Committee*, the task of the Committee might then evolve. It could proceed to a public call for applications and rank candidates regarding their merits.²⁹³ The *255 Committee* is ready for this.²⁹⁴ As a consequence, if the Committee for the Civil Service Tribunal can rank candidates, and if the *255 Committee* itself could do so in case of an increase of the number of judges at the Court of Justice, then nothing in theory prevents the *255 Committee* to evaluate and rank several candidates. However, in my opinion, this solution should not necessarily be applied if national selection procedures were objective and transparent, and if the *255 Committee* were controlling them in this respect.

Third, the Committee's reports should clarify the way the *255 Committee* applies its evaluation criteria in general and anonyms but understandable and sufficient terms.

4. Does the selection procedure of the judges of the Court of Justice raise a reasonable doubt regarding their appearance of independence?

I have identified above three situations in which a selection procedure might raise a *reasonable doubt*. I will now try to find out if one of these situations applies to the selection of the judges of the Court of Justice.

First, the selection of a judge by the executive raises a *reasonable doubt* when its statute does not “clearly shows that, once he is appointed, he is not under any pressure, he does not receive any instructions from the executive, and he works independently”.²⁹⁵ On the one hand, as stated above, the statute of the judges of the Court of Justice is not strong enough to fulfil this criterion. On the other hand, it is not obvious that the executive appoints and selects these

²⁹² Sauvé, J.-M., “Le rôle du Comité 255 dans la sélection du juge de l’Union”, *op. cit.*, p. 118.

²⁹³ Sauvé, J.-M., “La sélection des juges de l’Union européenne : la pratique du comité de l’article 255”, *op. cit.*, p. 6. See also Sauvé, J.-M. (2013), *Le rôle du Comité chargé de donner un avis sur l’aptitude à exercer les fonctions de juge de l’Union européenne*, *op. cit.*, p. 5 and Sauvé, J.-M., *La séparation des pouvoirs, l’Union européenne et le Comité 255*, *op. cit.*, p. 9.

²⁹⁴ Sauvé, J.-M., “La sélection des juges de l’Union européenne : la pratique du comité de l’article 255”, *op. cit.*, p. 6. See also Sauvé, J.-M. (2013), *Le rôle du Comité chargé de donner un avis sur l’aptitude à exercer les fonctions de juge de l’Union européenne*, <http://www.conseil-etat.fr>, p. 6; Sauvé, J.-M., *La séparation des pouvoirs, l’Union européenne et le Comité 255*, *op. cit.*, p. 9.

²⁹⁵ *Zolotas v. Greece*, no. 38240/02, ECHR, 2005, §24 (I emphasize).

judges. Surely, Member States proceed to the appointment and some national executives proceed alone to the selection of their candidate. However, the 255 *Committee* plays the role of a filter and its opinions are always respected. Even though an important part of the selection is made at the national level, the 255 *Committee* is supposed to address an unfavourable opinion to a candidate whose independence is not beyond doubt.

Second, the selection of a judge who appears to have any interest in the case raises a *reasonable doubt*. The selection of a judge who can *appear* to be assimilated to a specific party does also raise a *reasonable doubt*, unless his presence constitutes an advantage to render justice. A judge cannot be suspected to fall into these categories just because he has the nationality of a party at stake. As a result, the statute on the Court of Justice states that “*a party may not apply for a change in the composition of the Court or of one of its chambers on the grounds of either the nationality of a Judge or the absence from the Court or from the chamber of a Judge of the nationality of that party*”.²⁹⁶ Furthermore, the presence of judges from each Member States represents an advantage for the Court of Justice to render justice, since it allows the Court to benefit from their in-depth knowledge of their own national law.

In addition, two considerations should be born in mind, since they largely nuance the margin of influence of Member States on the judges at the Court of Justice.

First, most cases are dealt with chambers composed of three to five judges.²⁹⁷ Since judges sit in chambers, and since cases are allocated to them by rotational shifts, Member States cannot anticipate if their national judge will decide the case at stake.²⁹⁸ As a result,

²⁹⁶ Consolidated version on the statute of the Court of Justice of the European Union, Art. 17(4).

²⁹⁷ “The Court shall sit in a Grand Chamber when a Member State or an institution of the Union that is party to the proceedings so requests. The Court shall sit as a full Court where cases are brought before it pursuant to Article 228(2), Article 245(2), Article 247 or Article 286(6) of the Treaty on the Functioning of the European Union. Moreover, where it considers that a case before it is of exceptional importance, the Court may decide, after hearing the Advocate-General, to refer the case to the full Court.” (Consolidated version on the statute of the Court of Justice of the European Union, Art. 16(3-5)). See also Malecki, M. (2012), “Do ECJ judges all speak with the same voice? Evidence of divergent preferences from the judgments of chambers”, in S. K. Schmidt and R. D. Kelemen (eds.), *The Power of the European Court of Justice*, (Routledge), p. 62-64.

²⁹⁸ Malenovski, J. (2011), “L’indépendance des juges internationaux”, *Collected Courses of the Hague Academy of International Law*, vol. 349, p. 90. See also Ritleng, D., *op. cit.* One could identify two consequences of this mechanism. The first is that the nationality of a judge does not affect his right to sit if his Member State is one of the parties at stake (Malenovski, *ibid.*). The second is that some Member States can be judged by a Court in which their national judge seats, while others could be judged by a Court in which their national judge is absent. Moreover, when a case opposes two Member States, the Court could be composed of a judge of one of these

national governments might always try to *staff* the Court with judges sharing their preferences, but they could never be sure that such a strategy will be bearing fruit.

Second, it is never said whether decisions have been taken at majority or unanimity and dissenting opinions are not admitted at the Court of Justice.²⁹⁹ As a consequence, Member States cannot know how their judge behaved during the deliberate and what role he took in the decision.

In conclusion, it turns out that the selection of the judges of the Court of Justice does not really raise a *reasonable doubt*, so that it would be excessive to consider the Court not to be independent because of a lack of appearance of independence. Nevertheless, I have shown that this selection procedure raises some doubts, especially because of the political influence on the national selection procedure combined with the renewable term of office of the judges of the Court of Justice. If these doubts do not break the independence of the judges of the Court of Justice, they weaken it. There is then clearly room for strengthening their independence.

Member States but not the other one. This has been the case, for instance, in the following case: Case C-364/10 *Hungary v. Slovak Republic* [2012]. See Ritleng, D., *ibid.*

²⁹⁹ Malenovski, J., *op. cit.*, p. 91. Such protections are necessary, since the threat to a sanction for judges who would have adopted positions that their States would not appreciate is real. Examples of such pressures, public attacks and call to loyalty can particularly be found in the history of the International Court of Justice (*ibidem*, p. 94. See also p. 264-267). There is even statistical evidence that judges at this Court do almost always vote in favour of their State. See Smith, A. M. (2005), “‘Judicial Nationalism’ in International Law: National Identity and Judicial Autonomy at the ICJ”, *Texas International Law Journal*, vol. 40, no. 2, p. 197-231.

CONCLUSION

Appearance is perception. Appearance is a matter of confidence. The European Union is made of people's perception. So is the Court of Justice. Accordingly, the public perception of the Court should be a primary concern for the European Union. Everything should be done in order to reinforce public confidence in the Court of Justice. In this regard, it is necessary to ensure that transparent and objective selection procedures of the judges of the Court of Justice generate and raise confidence regarding their appearance of independence. Opacity and subjectivity are the worst enemies to confidence. As a result, they are serious enemies to the European Union and the Court of Justice. Furthermore, an unjustified lack of transparency and an inappropriate use of subjectivity are completely incompatible with the information society characterised by equality in which we live.

Five centuries ago, Rabelais created the character of the judge Bridlegoose. In appearance, all of his judgments were full of complicated sentences and Latin maxims. In reality, Bridlegoose casted the dice to judge complicated cases.³⁰⁰ I do not claim that we should go back to the Bridlegoose's system, where apparent formality creates respect regardless of reality.³⁰¹ I do not promote the model of judges' red robes hiding feet of clay.³⁰² I claim that the European Union should care more of appearances and organize its institutions, and in particular the Court of Justice, in such a way that appearances reinforce and support reality. In that sense, one should renounce to build a reality regardless of appearances.

The European Union looks already forward to increasing the confidence in the judiciary within its borders. However, this attention focuses on public confidence in national courts and mutual confidence in the judicial European network.³⁰³ Yet, public confidence in the

³⁰⁰ Rabelais, F. (1823), *La vie de Pantagruel et Gargantua*, (Paris: Dalibon), p. 154 and following. The judge Bridlegoose said to his judges: "I do like the rest of you, gentlemen, and like the use of justice" (*ibidem*, p. 160, my translation).

³⁰¹ Harris, D. H., *op. cit.*, p. 786.

³⁰² Miller, A. S., *op. cit.*, p. 74.

³⁰³ These concerns were at the core of the "Assises de la Justice" hosted by the European Commission on 21-22 November 2013 in Brussels. As Stated the EU's Justice Commissioner, V. Reding, "building bridges between the different justice systems means building trust. A truly European Area of Justice can only work if there is trust in each other's justice systems". (European Commission (2013), Press Release, *Building Trust in Justice Systems in Europe: "Assises de la Justice" forum to shape the future of EU Justice Policy*).

Court of Justice and thus appearance of independence of its judges should constitute a primary concern for the European Union.

The selection procedure of the judges of the Court of Justice weakens without breaking their appearance of independence. Can we be content with such a “*borderline situation*”, or should we have greater ambitions for the most powerful Court of the European Union? The creation of the 255 Committee is a step forward in the right direction, but it is still not enough. Given its current limits, the selection procedure of the judges of the Court of Justice should not be seen as achieved, but as still being “*under development*”.³⁰⁴ This is only the beginning.³⁰⁵ Among the different possible evolutions of the 255 Committee, the most likely and convincing scenario is for the 255 Committee to become competent in order to control not only the candidates submitted by the Member States, but also the national selection procedures.

The way we choose our judges depends on the role we want to see them playing. A strong European Union must inspire confidence through its institutions, and in particular the Court of Justice. Accordingly, a strong European Union needs a strong Court of Justice.³⁰⁶ In this view, as Sir David Edward, former judge at the Court of Justice, once put it, “*it is highly regrettable that more time is not given to thinking how the Court should be structured. This is the Cinderella of all intergovernmental conferences*”.³⁰⁷ It is now time to dress Cinderella for the ball.

³⁰⁴ Lord Mance, *The composition of the European Court of Justice*, *op. cit.*, p. 27.

³⁰⁵ Sauvé, J.-M., “Le rôle du Comité 255 dans la sélection du juge de l’Union”, *op. cit.*, p. 118.

³⁰⁶ See Darby, J. J., *op. cit.*, p. 354 and 362.

³⁰⁷ Cited in House of Lords, *The Treaty of Lisbon: An Impact Assessment*, 10th Report of Session 2007-2008, Paper 62-II, vol. 2, 538 Q134.

APPENDIX

Here are the answers provided by the Presidents of the Supreme Judicial Court of the United Kingdom and France³⁰⁸ to the questionnaire established by the *Network of the Presidents of the Supreme Judicial Courts of the European Union* in order to organize its colloquium on the *Appointment of Judges to the Supreme Court, to the Court of Justice of the European Union and to the European Court of Human Rights*.

The questionnaire was about the national selection and appointment procedure of judges to the national Supreme Courts, the European Court of Human Rights, and the European Court of Justice. I only reproduce the answers covering the selection procedure of the candidates to the Court of Justice.

1. Answers provided by the United Kingdom

1) What are the qualifications for the candidates (independence and impartiality, professional experience, legal training, linguistic abilities, ability to work in an international environment)?

The following is the agreed eligibility criterion for the identification of the UK nominee to the ECJ:

Qualifications necessary for appointment to the ECJ

In accordance with Article 253 TFEU, judges of the Court of Justice are to be chosen from:

“persons whose independence is beyond doubt and who possess the qualifications required for the appointment to the highest judicial offices in their respective countries, or who are jurisconsults of recognised competence”.

Selection criteria

Taking the above qualifications into account, candidates will be expected to demonstrate the following qualities, which are essential for this post:

- Excellent understanding and experience of EU law, including the wider impact of the ECJ’s judgments on Member States;
- Good operational level of French;

³⁰⁸ The answers provided by Belgium were not available.

- Excellent intellectual ability and drafting skills;
- Experience of legal practice;
- Good organisational and case management skills, including an ability to effectively delegate to, and work with, a support team at the Court;
- Excellent interpersonal skills including an ability to communicate effectively and persuasively with colleagues in the Court.

2) How is selection of the candidates conducted on national level?

In relation to the ECJ, the vacancy was advertised through the websites for the three territorial appointments bodies, Judicial Appointments Commission for England & Wales, Judicial Appointments Board for Scotland and Northern Ireland Judicial Appointments Commission. It was also advertised in the national and regional printed media.

The vacancy was open to anyone who was able to demonstrate compliance with the agreed eligibility criteria. A seven member independent selection panel has been appointed to consider the applications received in order to identify the preferred candidate. The preferred candidate will have been selected on merit, based upon the selection criteria.

The selection panel is chaired by the current lay chair of the Judicial Appointments Board for Scotland, Sir Muir Russell, with the other members being made up of two members of the senior UK judiciary, two senior Government legal advisors and two legal academics. The panel will consider all applications before making a recommendation to the Lord Chancellor, who in turn will formally advise the Foreign Secretary of the preferred candidate.

3) What is the transparency of the selection / appointment process?

The availability of the vacancy has been advertised and disseminated through the existing independent appointments organizations. The preferred candidate will have been appointed through fair and open competition and will be appointed on merit.

4) What is and should be the role of the Governments? Should a non-Government supported application be taken into consideration?

The role of the Government is limited within the agreed process to the creation of the independent selection panel and agreeing its membership, and then to consider the name of the preferred candidate identified by the selection panel as the most meritorious of those who applied.

5) Are the Presidents of the Supreme Courts consulted or otherwise involved?

All of the Chief Justices of the UK, including the President of the UK Supreme Court, have been consulted on the membership of the selection panel and they will be consulted on the name of the preferred candidate as and when identified.

6) Is the European Courts or their Members involved in the process (officially / unofficially)?

As part of the preparation for the members of the selection panel it has been agreed that the existing UK judge to the ECJ, Sir Konrad Schiemann, will provide a background presentation on the work of the ECJ in order to assist the selection panel in identifying the most meritorious candidate for the post.

2. Answers provided by France³⁰⁹

1) What are the qualifications for the candidates (independence and impartiality, professional experience, legal training, linguistic abilities, ability to work in an international environment)?

(Question not answered)

2) How is selection of the candidates conducted on national level?

The selection of the judges is not formalized in any text, but it rests on a thirty old year tradition (twenty for the General Court):

Traditionally, the position of judge at the Court of Justice is reserved for a State Councillor and the position of advocate general for a judge from the judicial order. The position of judge at the General Court is alternately granted to a judge of the judicial or administrative order since 1989.

France appoints a candidate for each of these positions. The candidate is auditionned by the 255 Committee, which provides a non-binding and not public opinion on its suitability for the position at stake. The judge is then appointed by the governments of the Member States by common accord.

3) What is the transparency of the selection / appointment process?

(Question not answered)

4) What is and should be the role of the Governments? Should a non-Government supported application be taken into consideration?

³⁰⁹ For this questionnaire, answers were originally provided in French. The translation into English is mine.

The French Government appoints a candidate for each position (judge at the Court of Justice, advocate general at the Court of Justice and judge at the General Court).

5) Are the Presidents of the Supreme Courts consulted or otherwise involved?

(Question not answered)

6) Is the European Courts or their Members involved in the process (officially / unofficially)?

(Question not answered)

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