

Advisory Panel(2013)12EN

11 December 2013

Final activity report for the attention of the Committee of Ministers¹

1) Creation of the Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights

1. The European Court of Human Rights (“the Court”) is at the core of human rights protection throughout Europe. The legitimacy of the Court as a judicial institution in the eyes of national institutions, Governments and supreme or constitutional courts is vital to the continuing effectiveness of the system based on the European Convention on Human Rights (“the Convention”), and the respect for the integrity and quality of the Court’s judgments at national level. For the foregoing reasons it is crucial that candidates presented for election to the Court are persons of high standing with all the special professional qualities necessary for the exercise of the judicial function as a judge of an international court whose decisions have such an impact in all High Contracting Parties.
2. Undoubtedly, it was with many of these considerations in mind that the Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights (“the Panel”) was created by Committee of Ministers’ Resolution CM/Res(2010)26 adopted on 10 November 2010. This decision was part of the implementation of the Interlaken Declaration of 19 February 2010 which called on the High Contracting Parties to ensure “*full satisfaction of the Convention’s criteria for office as a judge of the Court, including knowledge of public international law and of the national legal systems as well as proficiency in at least one official language.*” By letter dated 9 June 2010 addressed to the Ministers’ Deputies, Jean-Paul Costa, then President of the Court, called on the High Contracting Parties to set up a Panel of independent experts to ensure the quality of the candidates for election. He recalled that the Group of Wise Persons had already made such a proposal in its 2006 report on the reform of the Court and that the Secretary General of the Council of Europe had made a similar proposal in his contribution to the Interlaken Declaration.

¹ This public version has been subject to minor editorial changes compared to the version submitted to the Committee of Ministers in order to respect the confidentiality of proceedings before the Panel.

3. According to Resolution CM/Res(2010)26 the Panel's mandate is to advise the High Contracting Parties whether candidates for election as judge to the Court meet the criteria stipulated in Article 21(1) of the Convention which reads as follows:

“The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence.”

4. In order to obtain the Panel's opinion, the Governments should provide the Panel with the names and *curricula vitae* of the three candidates selected at national level prior to their submission to the Parliamentary Assembly of the Council of Europe (“the PACE”). After having given its opinion to the Government concerned, the Panel also informs the PACE of its opinion.

2) Members of the Panel

5. The following seven members were appointed by the Committee of Ministers on 8 December 2010 for a period of three years, renewable once:

Ms Katarzyna Gonera (Poland)

Ms Renate Jaeger (Germany)

Mr John Murray (Ireland)

Mr Matti Pellonpää (Finland)

Mr Sami Selçuk (Turkey)

Mr Luzius Wildhaber (Switzerland)

Mr Valery Zorkin (Russia)²

6. Following the resignation of Mr Zorkin, the Ministers' Deputies appointed **Ms Nina Vajić (Croatia)** as a new Panel member on 7 May 2013.
7. Unlike members of other independent expert bodies in the Council of Europe, the Panel members do not receive any honoraria while working at home. They are only reimbursed while on mission in the exercise of their functions.

² Mr Zorkin resigned. The members took note of his resignation during their fifth meeting on 8 February 2013 in Basel.

3) Working methods

8. The procedure to elect a judge begins with a letter by the Secretary General of the PACE inviting the High Contracting Party concerned to submit a list of three candidates by a certain time-limit. The PACE has recently started to communicate the letter up to fourteen months in advance before the election of the judge. This letter also draws the High Contracting Parties' attention to the existence of the Panel. Copies of those letters are sent to the Advisory Panel's Secretariat.
9. The Panel has developed the practice to send a separate letter to the Contracting Party recalling the Panel's tasks and working methods and setting a (shorter) time-limit for the submission to it of the names and *curricula vitae* of candidates. In the most recent cases the letters were sent without further delay after a copy of the letter from the Secretary General of the PACE had been received.
10. According to the Panel's Operating Rules (vi) the Panel shall inform the High Contracting Parties of its views no later than four weeks after the submission of the *curricula vitae*. In order to allow for sufficient time to request additional information, if necessary, the Panel invites the Governments to submit the *curricula vitae* at least six weeks before the expiration of the time-limit for the submission of the lists of candidates to the PACE. In order to ensure that the time-limit for the submission of the *curricula vitae* to the Panel is respected, the Secretary to the Panel contacts the Permanent Representatives of the High Contracting Parties concerned one month before the expiration of the Panel's time-limit.
11. Point (iii) of the Panel's operating rules stipulates that the Panel's procedure shall be a written one. However, point (iv) provides also for the possibility of organising meetings "where [the Panel] deems it necessary to the performance of its function".
12. Immediately after the receipt of the *curricula vitae* the Secretariat forwards the documents to the Panel members with a request for comments within at the latest five working days if a written procedure is chosen.
13. Point (viii) of the Panel's Operating Rules provides that the Panel may seek additional information or clarification from the High Contracting Party in relation to any candidate under its consideration. Should the members require additional information from the High Contracting Party, it is requested within the next five working days if a written procedure is chosen.
14. If the Panel considers all candidates qualified, it informs the High Contracting Party of its view without providing any further information, as stipulated in Article 5(2) of Resolution CM/Res (2010)26.
15. If the Panel members have doubts as to a candidate's qualification, the Panel requests either additional information or clarifications from the Government concerned. Either the Chair or the Secretary to the Panel contacts the Permanent Representation of the State concerned to request that information and explain the reasons for the Panel's request. In most cases the contact is by telephone, but in at least five cases the Chair

and/or the Secretary to the Panel met in person with the Permanent Representatives to share the Panel's concerns. No candidate has, therefore, ever been rejected as not being qualified by the Panel without giving the Government concerned the opportunity of supplying additional information or clarifications in favour of the candidate.

16. If the Panel members conclude that a candidate does not meet the requirements of Article 21(1) of the Convention, it provides the High Contracting Party with reasons for its opinion. While the Panel has always clearly indicated its reasons, it has carefully chosen a neutral and succinct language as a sign of respect towards the candidates and to protect their reputation.

17. In accordance with Article 5(4) of Resolution CM/Res(2010)26, the Panel informs the PACE of its opinion on the candidates.

4) Sources of information

18. In addition to the *curricula vitae* and any further information provided by the Governments upon the Panel's request, the Panel has received on several occasions unsolicited information from various sources (e. g. non-governmental organisations). The Panel does not actively seek information from such sources. It should be emphasised that the Panel has never rejected any candidate as not qualified based on information received from a different source than the Government. However, it should not be forgotten that the Committee of Ministers appointed the seven Panel members *ad personam* because of their considerable personal and professional experience and their high standing. The Panel members are well-known in the legal profession and they have naturally personal contacts with judges at the highest national courts, other legal professionals or non-governmental human rights organisations, who may use such personal contacts to transmit information to the Panel.

19. The Panel decided at its last meeting in October 2013 to further define the notion of "source other than the Government" and to develop safeguards. The Panel members agree that only information from reliable and objectively verifiable sources should be used. Furthermore, if such information put into question the qualification of a candidate, the Panel would ask the Government concerned for clarifications before possibly using such information to the detriment of a candidate.

5) Organisation of meetings

20. During the first three years of its existence the Panel organised seven meetings³. The first two meetings in 2011 were constituent meetings dealing with the Panel's internal working methods and the establishment of criteria for the evaluation of candidates' qualifications. Furthermore, the first lists of candidates were examined. During the meeting in March 2012 seven lists of candidates were examined. The second meeting

³ The Chair convened two meetings in 2011 and 2012 each as well as three meetings in 2013. See Appendix 1 for a detailed description of the Panel's meetings and activities as well as a summary of the events having affected the Panel's work.

that year was convened to discuss the Panel's relations with the PACE as well as several High Contracting Parties. The Chair then held a number of meetings with the major stakeholders of the election procedure, including an exchange of views with the Committee of Ministers. The outcome of those meetings was discussed at a subsequent meeting at the beginning of 2013. The two last meetings in March and October were organised for the examination of in total six lists of candidates and also served the discussion of the present report.

21. The Panel members recognised that while an exchange of information as well as the transmission of opinions may be carried out effectively in writing, a real and fruitful exchange of views can only take place during a meeting. This has been especially so in cases of complex matters, such as the criteria for the assessment of candidates' qualifications, the relationship with the other stakeholders in the election procedure or the examination of highly controversial lists of candidates. The Panel has not and does not intend to organise meetings at regular intervals, but only if it is justified both in terms of the workload and the importance of issues to be discussed. Where this has not been the case, the Panel has already organised conference calls, for example, to discuss additional information provided by a Government or the *curricula vitae* of a replacement candidate. However, on many occasions the members of the Panel have submitted their views only by email or otherwise in writing.
22. In order to organise meetings in the most economical manner, the Panel members have met either in the Council of Europe Offices in Paris or Brussels or in venues put at its disposal free of charge, such as in Berlin at the invitation of the Ministry of Foreign Affairs of Germany. The meetings have also been organised in a way to reduce the number of overnight stays, as far as possible, to one overnight stay.⁴ (

6) Criteria for the evaluation of the qualifications of the candidates

23. Since the second meeting in Paris the Panel members have been defining criteria for the evaluation of the candidates' qualifications which, however, may be further adapted and refined in light of the Panel's future experience.
24. According to Article 21(1) of the Convention, the judges "*shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence*". The Panel has given thorough consideration to this provision.
25. It has had due regard to the Guidelines of the Committee of Ministers on the selection of candidates for the post of judge at the European Court of Human Rights⁵.
26. Furthermore, the Panel has noted that in the European Union there is a similar Committee which has the task of advising on the aptitude of candidates for election as Judges to the Court of Justice of the European Union. According to this Committee's

⁴ The costs for the organisation of the meetings (including the provision of interpreters in some instances) were 8,214.50 € in January 2011, 8,310.42 € in May 2011, 11,242.19 € in March 2012, 7,781.47 € in October 2012, 4,250.33 € in February 2013, 7,540.96 € in March 2013 and an estimated 8,500 € in October 2013 (the reimbursement of expenses for the last meeting was not finished yet at the time of the submission of this report).

⁵ CM(2012)40

general approach, it is necessary to look for six elements: *“the candidate’s legal expertise, the professional experience the candidate has acquired (characterised by both its length and nature), the suitability of the candidate to exercise the role of judge, the guarantees of independence and impartiality that the candidate presents, the linguistic abilities and suitability to work as part of a team within an international environment in which several legal traditions are represented”*.⁶

27. The Panel shares this endeavour to obtain a comprehensive picture of candidates. It believes that there should be a global assessment of all the qualities of a candidate, whatever his or her professional career path, with a view to determining whether a candidate has an aptitude for the judicial function, in particular the judicial interpretation of the law at a level as is appropriate for a constitutional or international court (of which knowledge of human rights would only be one component).
28. “High moral character”: Article 21(1) of the Convention insists that Judges be of a “high moral character”. In the Panel’s discussions, qualities such as integrity, a high sense of responsibility, courage, dignity, diligence, honesty, discretion, respect for others and absence of conviction for crimes were mentioned as key components of this requirement, as well as (obviously) independence and impartiality. Most of these qualities are also enumerated in the Resolution on Judicial Ethics, which was adopted by the Plenary of the European Court of Human Rights in 2008. Since – contrary to the situation in the European Union⁷ – the Panel is not expressly empowered to convene the candidates for interviews, it is difficult, or delicate, to make judgments concerning the character of candidates unless it is manifestly apparent. The absence of interviews makes it also very difficult to assess the candidates’ language skills.
29. “Qualifications for appointment to high judicial office”: Judges of the Court can issue judgments which in effect depart from or even implicitly overrule judgments of the highest national courts. Those courts may nonetheless be obliged, in accordance with national laws implementing the Convention, to respect and follow the decision of the European Court of Human Rights. The Panel has of course to base its views on the wording of Article 21(1) of the Convention, *i.e.* on the expression “high judicial office” (rather than “highest”). This expression would seem to include judges who have held office in national supreme and constitutional courts, whereas it would seem to exclude judges of lower national first-instance courts. The provision must be given a substantive interpretation consistent with its purpose and not a purely formal one. Accordingly, even in the case of candidates holding office in a highest national Court, the Panel’s view is that such persons should not, for that reason alone, be automatically considered qualified to be candidates for election to the Court.
30. Additional factors may constitute key elements in qualification for election as judge, such as a significant length of service at a high level, service on international tribunals, together with publication of important books or articles. In this context it

⁶ Report of Mr Jean-Marc Sauvé, Chair of the Committee established by Article 255 of the Treaty on the Functioning of the European Union, page 6

⁷ The comparable process for the EU is structured and resourced differently and only one candidate is proposed to fill a vacancy by the Member State concerned.

should be borne in mind that national judicial structures vary considerably. For example, in some countries a person may be nominated to a Supreme Court (often consisting of many members) at a relatively young age because of his or her innate ability, but nonetheless with limited judicial experience. This limited experience can be accommodated in various ways in a national structure and over time the judge will acquire standing within the national court as his or her judicial skills and experience will mature. On the other hand, the European Court of Human Rights, by its nature, status and pan-European role assumes that its members already have, on election, all the fully developed judicial qualities that come from long experience. It would appear unlikely to find such qualities in a candidate of a relatively young age. However, in countries with a small population it might prove difficult to find three candidates of an equally long professional experience.⁸ It is, therefore, even more important that the High Contracting Parties widely advertise calls for candidatures at national level⁹ in order to ensure to have the highest number of qualified candidates possible. For this reason the Panel has requested more and more often information about the national selection procedures.

31. Long professional experience is of particular importance in an international court where its members are elected for one fixed term of just nine years. Moreover, it takes significant time for even the most experienced judge to induct him or herself into the practices and day to day functions of a judicial institution such as the Court.
32. For present purposes the foregoing considerations have been necessarily expressed in the most general terms, but they do indicate that High Contracting Parties when presenting a list of candidates, and the PACE when deciding which candidate to elect as a member of the Court, should acknowledge that their decisions in this regard are of quite a momentous importance requiring careful and thorough consideration so as to ensure that candidates of mature professional experience and unquestionable qualifications are put forward or elected.
33. The Panel has noted that there has been an unexpectedly low level of candidates with substantial judicial experience, particularly in the highest courts. Given the special international jurisdiction of the Court referred to at the outset of this report, it appears important to the Panel that the High Contracting Parties consider adopting measures which would encourage and result in a greater number of very experienced judges from the highest courts making themselves available as candidates for election to the Court.
34. Article 21(1) of the Convention also looks for “Jurisconsults of recognised competence”: In his letter to the Ministers’ Deputies, then President Jean-Paul Costa wrote: *“To be a ‘jurisconsult of recognised competence’ requires extensive experience in the practice and/or teaching of law, the latter generally entailing publication of important academic works. One objective indication of this requirement would be the length of occupation of a professorial chair”*. Experience

⁸ Another subsidiary, but nonetheless important consideration, is the implications which the election of relatively young judges to the Court of Human Rights may potentially have for judicial independence, since he or she may, in some cases, be dependent on the national authorities of his country for the continuation of his or her judicial career when they are still at a relatively young age at the completion of their nine year term at the Court.

⁹ See the Guidelines of the Committee of Ministers on the selection of candidates at national level.

of working in teams at international level would be an important asset, as judges need to be able to work in a collective body such as a court in an international environment representing different legal traditions.

35. Once again, inherent in these observations, is the importance of electing to the Court persons of mature professional experience. In accepting the description of the former President of the Court the Panel would consider that the level of “recognised competence” of a jurist is normally reached when a person has been a professor at a well-known university for many years and has published important works, including work relating to the protection of human rights and the relationship between those rights and the constitutional functions of States. It would also be relevant to identify whether such jurists have any experience in advising or appearing in cases involving the protection of such rights or other constitutional cases before national or international tribunals. However, the selection of persons other than professors, such as advocates, legal professionals in the public (including political) or private domains, particularly where they have, through long experience, professional intimacy with the functioning of courts, is also possible as long as those persons by virtue of a mature experience qualify as “jurisconsults of recognised competence”.
36. Requirements not expressly mentioned in Article 21(1) of the Convention: As the Court has explained in its Advisory Opinion on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the Court of 2008, “there is nothing to prevent Contracting Parties from taking into account additional criteria or considerations” (§ 42). As illustrations the Court mentioned “a certain balance between the sexes or between different branches of the legal profession” (§ 47). The aim of achieving a certain balance between the sexes has been discussed at length in recent years. The Panel has taken into account these new rules with respect to gender balance when it had to advise on an all-male list.

7) Report of Activities for the Steering Committee for Human Rights (CDDH)

37. When establishing the Panel, the Committee of Ministers decided to review its functioning after an initial three-year-period and entrusted this task to the CDDH. In order to facilitate the performance of this task, the Advisory Panel submitted a report covering its activities to date. The Panel considered a first draft report at the sixth meeting in Brussels which was then further complemented by the members. The Chair presented the report of activities to the members of the Drafting Group E of the Committee of Experts on the Reform of the Court (GT-GDR-E) on 23 May 2013. The Panel’s activity report contained a number of proposals to the Governments of the member states, the PACE as a whole and the PACE Sub-Committee on the election of judges (“the Sub-Committee”). Those proposals are enclosed in Appendix 2.

8) Number of *curricula vitae* examined by the Panel since its creation

38. To date the Advisory Panel has examined the *curricula vitae* of candidates submitted by seventeen Governments.
39. In respect of eight country lists the Panel considered all candidates to be qualified within the meaning of Article 21(1) of the Convention.

40. In the case of eight other lists of candidates the Panel requested additional information on one or more of the nominated candidates (seventeen in total). In respect of eight candidates, the Panel came to the final conclusion that the candidates met the requirements of Article 21(1) of the Convention. In six cases, the Panel concluded that the candidates were not qualified. Two candidates were replaced by their governments with candidates who were then considered qualified within the meaning of Article 21(1) of the Convention. In another case, a candidate withdrew during the process and the replacement candidate was considered qualified by the Panel. In case of three candidates the Governments concerned maintained the candidatures and submitted the lists as such to the PACE.
41. In the case of another list the Government submitted the *curricula vitae* to the PACE before the Panel could assess the additional information provided in respect of three candidates.
42. Finally in the case of one list, the Panel considered one candidate not to be qualified, but decided not to request any additional information as the list had already been submitted to the PACE and could, therefore, no longer be changed.

9) Proposals increasing the Panel's impact on the election procedure

43. The Panel was established with the overall mandate to contribute to the improvement of the standing of the European Court of Human Rights. The members of this independent body of experts have no personal stake in the election procedure and were elected in light of their professional experience as judges of the highest national or international courts. The Panel has been entrusted with a crucial task and requires sufficient means and support on the part of the major stakeholders in the election procedure to carry out that task effectively.
44. The number of lists of candidates dealt with by the Panel has allowed the members to identify existing shortcomings and to propose concrete measures not only to render the Panel's own work more effective, but also to increase its impact on the procedure to elect judges to the Court. While the Panel members consider that their work has already had an impact on the election procedure, they believe that its impact could be further increased through a set of measures to be adopted by the major stakeholders in the election procedure.

a) The High Contracting Parties to the Convention

45. It is the responsibility of the High Contracting Parties to submit a list of three qualified candidates to the PACE. In order to fulfill their responsibility the Panel would like to invite the High Contracting Parties to benefit from its expertise to the fullest extent possible. This may be achieved by presenting the names and *curricula vitae* in time so as to allow the Panel to examine the candidates' qualifications thoroughly and, if necessary, to allow for sufficient time for presenting a replacement candidate. This would also imply not to submit lists of candidates to the PACE before having received the Panel's opinion and, thus, not having been able to take into account the Panel's views.

46. One possible step to achieve this would be to extend the time-limit for the submission of the names and *curricula vitae* to the Panel from six weeks to three months. The Committee of Ministers' Guidelines on the selection of candidates for the post of judge at the European Court of Human Rights or the Resolution establishing the Panel could be amended to that effect. Those Guidelines could also be amended to stipulate that the High Contracting Parties should not submit lists of candidates to the PACE before having obtained the Panel's view. The Panel would also benefit from receiving information about the national selection procedure. This concern may also be addressed in the above Guidelines.

47. The scope of the Guidelines could be slightly modified and they could be supplemented as follows:

VI. Consultation of the Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights

- 1) The High Contracting Parties should not submit the list of candidates to the Parliamentary Assembly before having obtained the Advisory Panel's opinion on the candidates' qualifications.*
- 2) The High Contracting Parties are requested to submit information about the national selection procedures to the Panel when transmitting the names and curricula vitae of the candidates.*

48. The Panel is, however, sceptical as regards the establishment of a reserve list at national level, because such a procedure may lend itself to manipulations, for example, compromise solutions or campaigns to eliminate one candidate from a list to replace him or her with a candidate from a reserve list. It should also be stressed that the High Contracting Parties are to submit only three candidates to the Panel for its opinion.

b) Parliamentary Assembly of the Council of Europe

49. The prerogative for the election of judges to the Court lies with the PACE. It is its Sub-Committee on the Election of Judges that interviews the candidates and gives a recommendation to the members of the PACE. The Panel would, therefore, also invite the PACE and in particular its Sub-Committee to benefit from the Panel's expertise to the fullest extent possible by taking into account the Panel's opinion. The Sub-Committee should, therefore, not proceed with an election until it has received the Panel's final opinion on the candidates' qualification. The Sub-Committee may also consider not accepting any lists of candidates containing names of candidates who were rejected as not qualified by the Panel. Lastly, the PACE may also consider disseminating the Panel's opinion among all members of the PACE and not only among the members of the Sub-Committee.

50. The Committee of Ministers may consider suggesting these proposals to the Parliamentary Assembly.

c) The Committee of Ministers

51. As stated above in paragraph 46, the High Contracting Parties may be requested to submit the names and *curricula vitae* at the latest three months before the expiration of the time-limit set by the PACE for the submission of the lists of candidates. Article 5 of Resolution CM/Res(2010)26 may be amended as follows:

“Before submitting a list to the Parliamentary Assembly as provided for in Article 22 of the Convention, each High Contracting Party will forward to the Panel, via its secretariat, the names and curricula vitae of the intended candidates at the latest three months before the expiration of the time-limit for the submission of the list of candidates to the Parliamentary Assembly.”

52. Finally, as the Panel’s working methods are concerned, it would appear necessary to adapt them according to the experience gained during the last three years. As already outlined, the Panel members have realised that a purely written procedure does not allow the Panel to carry out its work effectively. While the Panel does not intend to meet at regular intervals, it should nevertheless be free to organise a meeting whenever it is necessary for the exercise of its tasks, or, if a meeting does not appear justified, to organise a conference call.

53. Operating Rules (iii) and (iv) of Resolution CM/Res(2010)26 may, therefore, be combined to read:

(iii) The Panel’s procedure shall be in principle a written one. The Panel may hold a meeting or a conference call where it deems this necessary to the performance of its functions.

Appendix 1

Overview of the Panel's meetings and activities (omitted for reasons of confidentiality)

Appendix 2

Proposals made by the Panel in its submission to the CDDH in May 2013

- i. *The PACE Sub-Committee should not accept any list of candidates containing names of candidates who were not considered qualified by the Panel.*
- ii. *The Sub-Committee should not proceed with an election as long as it has not received the Panel's opinion on the candidates' qualifications.*
- iii. *The flow of information between the Sub-Committee and the Plenary of the PACE should be improved by making the Panel's opinion available to all PACE members before the election.*
- iv. *The Committee of Ministers may consider suggesting to the members of the PACE not to vote for candidates not considered qualified by the Panel.*
- v. *The Panel may provide a more detailed opinion on a candidate's qualification to the Government concerned which would allow the Panel to provide also more detailed information to the Sub-Committee.*
- vi. *The Panel should publish an annual report every year regardless of the number of elections having taken place during that year to render the work of the Panel more transparent.*
- vii. *Meetings of the Panel should become the rule rather than the exception as a purely written procedure does not allow for a meaningful discussion based on direct exchange of views. Where there is no need for a meeting, the Panel will use the written procedure.*
- viii. *In order to increase transparency of the selection of the candidates, the members of the PACE should also be informed about the national selection procedure.*