

Mr Nicholas Khan QC - European Commission Legal Service

Nicholas Khan QC was one of two employed advocates appointed to silk in the 2017 competition, and the first lawyer to be appointed while working in a European Union institution. Nicholas was called to the Bar in 1983 and has practised almost exclusively in the field of European law, both in private practice at the Bar in London and for many years now as a member of the legal service of the European Commission. He has worked on a wide range of subjects but in recent years his work has principally been in the field of competition law, advising on and defending decisions involving household names (e.g. Microsoft, Intel and Google), often entailing “phenomenally large sums of money” from the fines imposed and the damages claims that are likely to ensue.



Nicholas said that a “happy chapter of accidents” had put him on his particular and rather unusual career path. After studying law at Southampton University, at his tutor’s suggestion, Nicholas applied successfully to become a *stagiaire* (trainee) in the European Commission’s Industry Directorate, working for six months on EU copyright laws. He did this after his first six months of pupillage at a Chancery set, and although one cannot directly obtain a permanent post from being a *stagiaire*, it provides experience of working life in Brussels and is frequently the launch pad to an EU career.

Following his ‘stage’ Nicholas returned to London to do his second six months’ pupillage in a London copyright set, but no tenancy was available at the end of it. He returned to Brussels, working in a small law firm, during which time he sat the Commission’s entrance examination for young lawyers, but remained focused on the Bar, securing a third six months in a London set. He was just on the point of being taken on by chambers when he learned that he had been successful in the written stages of the Commission’s entrance exam; only the interview remained – a long process! Presented with the dilemma of which opportunity to follow, with the assurance of being able to return to the set if he later wanted to, Nicholas took up a position as a lawyer at the Department of Trade and Industry, which was invaluable experience in preparing for the final interview and, on passing, being an attractive candidate for recruitment to the Commission.

Initially, Nicholas worked on infringements of environmental Directives, which he said, provided extremely useful experience of dealing with an entirely new area of law to him and learning how the Commission machine operated. Still keen on advocacy however, Nicholas secured a move into the Commission’s central legal service. This he compared with the UK’s Government Legal Service, but with one vital difference: unlike the UK government, the EU uses its own in-house advocates. This exposed Nicholas to a wide range of work, from social security coordination, free movement of persons and sex discrimination to state aid and anti-dumping investigations. He relished this work as it entailed questions of law at a high level - one of his early opponents in court being a young David Pannick. The cases he dealt with became steadily more legally and factually complex and demanding, frequently featuring Member States and huge multi-national companies like BA and Air France.

After ten years, Nicholas returned to practice in Blackstone Chambers in London at the end of 1999. Highpoints during his period in Blackstone Chambers included two House of Lords cases, one as junior to the “fabulously eloquent” Michael Beloff QC and another where he did much of the oral argument and was faced with five Law Lords “firing off questions” at him. However, the workflow was patchy and Nicholas remained concerned that he was not receiving much assistance in developing his practice, so after some three years in London, he took up the offer to return to the Commission’s Legal Service, in 2003. Having got married at about that time, Nicholas and family put down roots in Brussels, where Nicholas

has continued to build his career, initially working on state aid matters, and more recently competition.

In Nicholas's view, one of the great attractions of being an employed barrister working for the EU, is that one never has to go "running after work" and that it is inherent to an area like competition law at EU level that the cases are demanding and important - more often than not involving novel points of law, such as his current cases about Google's dominance over various internet related markets. His cases also provided occasional opportunities to appear in the national courts, such as in important state aid and competition cases, where the Commission has a right to intervene. Appropriately enough, Nicholas's first court appearance since becoming a QC was before the Master of the Rolls, intervening in a series of appeals about the interpretation of a Commission decision regarding MasterCard's interchange fees.

Nicholas first thought about applying for QC when he began to find himself frequently up against QCs. He therefore looked into the silk application process and was pleased to see that assessments from foreign jurisdictions and courts like those of the EU Institutions were admissible. Nicholas said that the QC appointment process was so much better than the old 'tap on the shoulder' system which it had replaced and which had lost much credibility in the period before it was suspended. The new process was more transparent and objective, although also extremely demanding. Nicholas had also noted that the operation of the QC competition had become more open to people with unusual practices, notably in terms of the range of eligible assessors. The possibility to rely on assessments from judges in the European Courts was indispensable for his application.

The application process was formidable. Nicholas had no difficulty in identifying twelve cases that met the scheme's definition of substantial, but he would have appreciated a little bit more space on the application form to describe them, given that his practice was out of the mainstream. You needed to be careful to ensure every word used advances your application, he said. Having the necessary cases of substance provided invaluable read-across to the 'understanding and using the law' competency. Similarly it was not difficult to find the evidence for written advocacy, as the EU judicial system relies heavily on written submissions. However, convincing the QC Selection Panel that his oral advocacy met the criteria for excellence in the higher courts of England and Wales was more of a challenge, which he was able to meet by emphasising the importance placed by the EU Courts at oral hearings on putting questions to the parties.

Working in the EU institutions, in Nicholas's experience, tended to be of a much more collaborative nature than working in chambers. This meant that he was well placed to provide the necessary evidence which the Selection Panel sought as regards the 'working with others' competency. Similarly, working with colleagues from 27 other member states meant that Nicholas had made diversity (another competency) "part-and-parcel" of his approach to work. So much so in fact that he "had to stand back" and distil for the Panel not just his views and knowledge on the subject but also what he had proactively done to value and encourage diversity. In contrast, Nicholas felt that working in chambers with similar people, although a "comfortable" environment ("people understood your jokes") could perhaps militate against dealing with and valuing difference.

As regards his preparation for the silk interview, Nicholas said that he had had the benefit of having had other competency-based interviews during his career in the EU. But he still needed to focus fully on the competencies, and in the build-up to his interview he had gone carefully over his application form to crystallise the aspects of his cases which demonstrated the competencies. The interview was fairly short (no longer than 40 minutes) which meant that not every aspect could be tested. In his interview, for example, there was little time devoted to questions on the 'understanding and using the law' competency. He said that

discussion flowed naturally from talking about his cases to, for example, working with others. The interviewers were skilled at drawing him out with probing questions. He considered that he was given a fair hearing, although he would not go so far as some applicants who claimed to have “enjoyed” it! He did feel that - despite the guidance for applicants emphasising that the interview was not in itself determinative of the outcome of the application - a great deal did hang on the interview. Nicholas appreciated the opening question about current cases, which eased him into the interview and gave the opportunity to update the interviewers on his practice.

Finally, asked what the QC ‘badge’ meant to Nicholas, he said that he was delighted for the Commission Legal Service that one of its own had been recognised with this prestigious accolade. On a personal level, Nicholas said that he finds he is sought out more by colleagues working on other areas of EU law, wanting him to “moonlight” for them!