



EGMONT

## THE “REFORM” OF THE STATUTE OF THE COURT

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On 28 March 2011, the President of the Court of Justice of the European Union has sent to the President of the European Parliament and the President of the Council, draft amendments to the Statute of the Court of Justice<sup>1</sup>.

We know that since the entry into force of the Lisbon Treaty, the provisions of the statute may be amended by ordinary legislative procedure, with the exception of Title I of the Status of Judges and Advocates-General (for review only by the revision procedure of the Treaties) and Article 64 on the languages whose provisions are established by a Council regulation adopted unanimously. The European Parliament and the Council shall be requested by the Court of Justice and after consulting the Commission, either on a proposal from the Commission and after consulting the Court of Justice.

The proposals made by the Court concern respectively and independently, the three Courts comprising the Court of Justice as an institution. In parallel, the Court undertook an overhaul of its rules of procedure.

The initiative of the Court is to deal with the constant increase in the number of cases before the Court and the General Court due to EU enlargements and new powers conferred by the Treaty of Lisbon<sup>2</sup>. The Court also refers to other sources of disputes like the one that will most likely be generated by the REACH<sup>3</sup> regulation or the impact of the accession of the

<sup>1</sup> Proposed Amendments to the Statute of the Court of Justice of the European Union and Annex 1, 28 March 2011, Council of the European Union, 8787/11 CODEC 607 COURT INST 18 JUR 197 160 112 PARLNAT. On this project as well as the new Rules of Procedure, cf. "Editorial Comments: Delivering Justice: small steps and bigger at the ECJ," CMLRev 48, 987-993, 2011.

<sup>2</sup>cf. with respect to the area of freedom, security and justice and the control measures taken against individuals in the context of the CFSP, Koen Lenaerts, , « Le traité de Lisbonne et la protection juridictionnelle des particuliers dans le droit de l'Union », ces *Cahiers*, 2009, p. 711-745, spéc. p. 728-741.

<sup>3</sup> Report of the House of Lords, “The Workload of the Court of Justice of the European Union”, European Union Committee, published on 6 April 2011, HL Paper 128, No 52.

Union to the European Convention on Human Rights and Fundamental Freedoms. Other developments such as the creation of three new authorities in charge of financial supervision may be the source of cases brought by way of direct appeals to the General Court or preliminary rulings to the Court.

The situation of the General Court to which have been progressively devolved significant and varied powers is considered critical because the number of new cases submitted annually currently exceeds that of the cases brought to term. As a result, the average duration of proceedings reached unacceptable proportions for the parties. In its draft, the Court refers to the decision of 6 July 2009, *Der Grüne Punkt*, C-385/07 P, ECR. p. I-6155, in which it held that a competitive procedure before the General Court, for a period of five years and ten months, infringed the fundamental right to have the case dealt within a reasonable time as recognised by Article 47, paragraph 1 of the Charter of Fundamental Rights and by Article 6, paragraph 1, of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Proposals (in fact, the only proposal) on the General Court and aiming at the designation of twelve additional Judges, are the subject of the most important developments and it is upon these that the debate focuses on the European Parliament and the Council. Before returning in greater detail, it is appropriate to refer to other points in the project.

The proposals relating to the Court concern the creation of the office of Vice-President, the composition of the Grand Chamber sees its workforce from 11 to 15 Judges, a quorum for the validity of its deliberations (from 9 to 11), the quorum of the plenary session (from 15 to 17), the removal of the required reading at the hearing (having already occurs in practice) of its report by the Judge-Rapporteur.

One proposal concerns the Civil Service Tribunal and is based on the experience of it. This is the opportunity to choose a Judge ad interim in specialized Courts, to avoid blocking their operation in case of long unavailability of a member of these jurisdictions (currently, only the Civil Service Tribunal ) with reduced composition.

It should be noted, about these proposals that the Vice-President, called to relief the President in the exercise of his mission (especially in its duties of representation) will also sit with him in the Grand Chamber. However, the systematic participation of Presidents of Chambers of five Judges in it, once considered "*an important safeguard for the coherence of the case-law*"<sup>4</sup> is deleted. This is to prevent these presidents, having in addition a very heavy workload, appearing in the Grand Chamber, as representatives of their Chamber, a situation that the proposal "could be perceived as likely to affect the principle of equality between the Judges. " This perception may get worse if it was decided to create a new Chamber of five Judges. With the simultaneous increase in the number of Judges who compose the Grand Chamber, this change will allow other Judges to participate more frequently in the latter (which may ease some bitterness) and the Presidents of Chambers to be more available for their Chamber. It is the participation of the President and the Vice-President as well as more Judges who now seems to "ensure the consistency of the case-law of this formation." In any case, at least one or two Presidents of Chambers will continue to participate in the Grand Chamber, under the current rules appointing Judges.

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<sup>4</sup> Vassilios SKOURIS, « Self-Conception, Challenges and Perspectives of the EU Courts » in Ingolf Pernice, Juliane Kokott, Cheryl Sanders (eds.), *The Future of the European Judicial System in a Comparative Perspective*, Nomos, Baden-Baden, 2006, p.19-31, ad p. 23

But the most important for the institutions with legislative power, as we have noted, is not in the proposals we have mentioned up to now. The Court, and its president who became the convinced spokesman about this choice, opted in favor of increasing the number of Judges of the General Court (a number set by the Statute, under Article 254, first paragraph TFEU) in preference to the alternative offered by the Treaty: the creation, under section 257, first paragraph TFEU, one (or more) specialized Courts, added to the General Court. It is "after having weighed one or the other option"<sup>5</sup> that the Court has chosen the increasing number of Judges of the General Court. However, it has, consistently delivered for the creation of a specialized Court in the field of intellectual property<sup>6</sup>. The President of the General Court submitted to the Council by letter dated April 19, 2011, an analysis document of 22 December 2009, with an update on April 15, 2011 confirming his choice.

As well for the Court as for the General Court the proposed measures will not solve all problems. It must necessarily be accompanied by other measures.

The same virtues are invoked by the Court and the General Court to justify their respective choices, but at this point stops the convergence.

The Court cites the *effectiveness* of its solution: the engorgement of the General Court would not be settled by the creation of a specialized Court in the trademark area where cases are repetitive and their treatment relatively fast, while complex cases would remain the General Court's jurisdiction, without forgetting to mention that it should also take care of appeals by the specialized Court. Moreover, the increased number of Judges also allows specialization at the Chambers level of the General Court.

The solution recommended by the Court would be more likely to meet the *urgent need* to remedy the current situation that the creation of a specialized Court that requires the establishment of its own organization, with its rules and its administrative framework.

*Flexibility* of the increase in the number of Judges is also invoked. It is easier to reassign Judges than to remove a Court whose existence no longer meet the needs<sup>7</sup>.

Finally, the *coherence* of EU law is expected to support the solution proposed by the Court, particularly given the links between the right of the Registration of Marks and notions of trademark law in Directive 89/104, for which the interpretation would remain the responsibility of the Court. The Court considers, in fact, that in the congestion of the role of the General Court, it would be inappropriate to give her also the task of taking care of preliminary rulings in this area, as allowed since the Treaty of Nice.

For its part, in favour of the creation of specialized Court, the General Court argues the *efficiency* of judicial work, given the general trend toward specialization recognized by the Treaty of Nice. It states: "*Judges, legal secretaries and administrators recruited according to the requirements of special skills are quantitatively and qualitatively more efficient in the*

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<sup>5</sup> A "long thought to which the Tribunal has been associated," as indicated by the Court in an "Additional product information in response to questions from delegations within the group" Court "of the Council, Council the European Union, Interinstitutional File 2011/0901 (COD), doc. 12719/11 of 11 July 2011.

<sup>6</sup> The Court refers in this respect the position taken by the Court at the Plenary sessions of 8 April 2008 and April 22, 2009. He confirmed this choice in the document of December 22, 2009 mentioned in the text. So there are a number of years that the question called, with good reasons, the Court of urgent is the subject of discussion within the institution.

<sup>7</sup> The Director General of the Legal Service Commission has also used this argument in his testimony before the House of Lords: "... Creating a Specialized Court would inhibit flexibility if the pattern of the incoming exchange box-load." Report, quoted, No. 131.

*treatment of specific cases involved.* " This argument is certainly of great importance and we will come back to that.

The *cost* of the working of a specialized Court, measured in terms of productivity per unit of staff in these curtailed formations (such as Civil Service Tribunal and its seven members and a legal secretary by Judge) is mentioned as another positive point.

The General Court also refers to the *adaptability of structures*. While underlining that the creation of specialized Courts are a "source of strength," the document states that the proposal seeks only to establish a single Court for intellectual property because there is a dispute on the matter known as important to expand. This second experience would allow a new evaluation of the mechanism.

The General Court further notes the need "to address a long-term reform from the long-term needs." Both the Court and the General Court "may find themselves choked."

It then states that to deal with the emergency, a "partial answer" faster and cheaper could be found in the increasing number of employees of the General Court.

Finally, the General Court notes in case of growing the number of Judges would still be retained, the value to avoid too much instability among the Judges which would be bad for the productivity. We know, indeed, the Judge may, several months before the end of his term, and pending the decision on its renewal<sup>8</sup>, be given no new cases<sup>9</sup> and in case of resignation or death of a Judge, the new Judge appointed shall complete the term of his predecessor (Statute, Article 7) while in the Civil Service Tribunal, the newly appointed Judge in these circumstances is appointed for a term of six years (Appendix to the Statute, Article 2). The Court itself noted in his testimony before the House of Lords, the problems faced in the management of litigation due to the partial replacement every three years and to the uncertainty about the appointments. It concluded that "*this lack of stability has a significant impact on their* [of the Judges and the Chambers to which they belong] *efficiency.*"<sup>10</sup>

Moreover, *consistency* is not necessarily easy to maintain in a Court involving thirteen Chambers of three Judges.

Finally, for the General Court, the specialization of Chambers is difficult to reconcile with the Judges term and with the need for a good representation of the legal systems in key litigation. A partial specialization within the jurisdiction of a general nature creates heavy constraints, recruitment problems and large inequalities in the workload.

If we venture to advance a few thoughts in the minefield that has engaged in a discussion that deserves more attention in the literature and practitioners, we first confess our sympathy for the approach of the General Court. The creation of a Trade Mark Court whose jurisdiction could extend to other aspects of intellectual property or that of other specialized Courts, has the favour of practitioners, notes the House of Lords in its report<sup>11</sup>. Judge Forwood notes on

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<sup>8</sup> Unless it has been relieved of his duties, the Judge will continue to hold office until the inauguration of his successor. cf. Article 5, paragraph 3 and Article 6 of the Statute.

<sup>9</sup> One issue raised in the report of the House of Lords, cit., No. 84: "The Committee recommends that the Member States heed AG Sharpston 's request and state their intentions regarding the appointment of Judges in good time. We suggest that the Court stipulates what constitutes a reasonable period of time. " There is concern that this suggestion will not be of much effect on Member States that have their own agenda and their own priorities with regard to appointments.

<sup>10</sup> Report of the House of Lords, cit., No 83

<sup>11</sup> It cites in this regard, the testimony of the Confederation of British Industry (CBI), the European Circuit of the Bar of England and Wales, the Law Society and the CCBE, Report, cit., No. 127-128.

this subject that this Court would have as many cases relating to trademarks to deal with than there were in the public service during the creation of the first specialized Court. He added: "*The substantive law is relatively self-contained, and also relatively homogeneous, and should be easily amenable to transfer.*"<sup>12</sup> If the House of Lords ultimately rejects this solution it was due to its fear of a proliferation of specialized Courts separated from the General Court. It cites the cost of translations higher than in the case of Civil Service Tribunal and the lack of contribution to reducing the workload by too many specialized Judges<sup>13</sup>.

This conclusion of the House of Lords illustrates the importance for the decision to take considerations of cost of any solution. The argument of the cost of increasing the number of Judges was, in fact, also opposed from the outset by a number of governments in the project of the Court to increase the number of Judges and the Court, asked about this subject and the cost of alternative solutions, found no reason to provide additional details. The number of additional expenses were estimated at 13, 6 million for the twelve Judges to be appointed and their offices (72 positions: 12 Judges, 36 legal secretaries and 24 assistants)<sup>14</sup>. The current period lends itself more than any other to reserves based on budgetary arguments. One more reason to this is that the Court is not considered worse off regarding staff employed as well as the occupied buildings.

The other difficulty is the selection of additional Judges. It is on this reef that a first proposal of the Court stumbled, referring only to the possibility of appointing six additional Judges. This was in the years ninety. Despite the insistence of the Court of Justice Committee of the Council, the Court refused to take a stand on an issue which it considers to fall within the competence of the Council.

It is often said that the experience of the Civil Service Tribunal cannot be extrapolated by reason of its specific focus. The matter of the public service concerns the internal life of institutions and bodies. It has little to do with the heart of the legal order of the Union, even if its case law presents interesting contributions, for example, on human rights and the principles of good administration<sup>15</sup>. The subject is less "political" than number of cases before the Court and it does not involve the significant economic and political interests (competition, state aid, blocking assets in the context of international sanctions, etc. .) present in the cases before the General Court, at least it raises less the attention of governments, which made possible the creation of the Civil Service Tribunal.

This does not mean that lessons can not be learned from the Civil Service Tribunal experience for other areas and that, as suggested by the General Court, it would not be useful to examine the merits of the formula of the specialized Court to another area. The lesson taken by Judge Gervasoni from the Civil Service Tribunal experience should be considered : "... it seems hard to deny the specific contribution of a specialized Court in a given dispute: the contribution of Judges dedicated to a specific area, the special dynamics of collegiality permitted by the small size of the Court gradually shape the face of a different trial, facilitate the emergence of an

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<sup>12</sup> Nicholas FORWOOD, « The Court of First Instance, Its Development, and Future Role in the Legal Architecture of the European Union », *Liber Amicorum Francis Jacobs*, OUP, 2008, p.34-47, ad p. 44.

<sup>13</sup> Report, cit., No 135.

<sup>14</sup> Add to that the additional costs of staff translation and documentation. According to European Voice.Com of 20 July 2011, are the Czech, French, Swedish and United Kingdom were the most "Vociferous" in their criticism of the cost of the operation.

<sup>15</sup> In this case, cf. Stéphane GERVASONI, « Le Tribunal de la fonction publique de l'Union européenne : Cinq ans de jurisprudence », ces *Cahiers*, 2010, p. 731-790 ; « Le Tribunal de la fonction publique de l'Union européenne (TFP) 2005 – 2010 », Actes du colloque organisé à l'occasion du 5<sup>e</sup> anniversaire du TFP, Luxembourg, le 1<sup>er</sup> octobre 2010, *Revue universelle des droits de l'homme (RUDH)*, 30 juin 2011, vol. 20, p.1-116.

original case-law, eager to integrate new standards of judicial protection while being respectful of general interest and requirements of the functioning of the administration. "<sup>16</sup>

This specialization is based on criteria and a specific appointment procedure. Article 257, paragraph 4 merely states that "members of the specialized Courts will be chosen from persons whose independence is beyond doubt and who possess the ability required for appointment to judicial office" but Article 3 of Annex of the Statute of the Court on the Civil Service Tribunal specifies that a committee of seven persons chosen from among former members of the Court and the General Court and lawyers of recognized competence must give its opinion "on the candidates' suitability to the exercise of judicial functions of Civil Service Tribunal "and attach to its opinion a list of candidates" with experience in the most appropriated level "; the list should include a number of candidates corresponding to at least twice the number of Judges to appoint. It will then be for the Council to ensure "a balanced composition of the Civil Service Tribunal on a geographical basis as possible from among nationals of Member States and with regard to national legal systems represented. "<sup>17</sup> The committee ranked the candidates in order of merit, not alphabetically. At the expiration of the mandates of three Judges, who have applied for renewal, it puts them in a separated list because of their level of experience obviously larger than that of the candidates running for first time. The Council did not like the ranking, but it has become the rule even if the Commission is not bound by it. It also expressed his dissatisfaction with the preparation of a double list, while Article 3, paragraph 4 of the Annex to the Statute provides for one list only <sup>18</sup>. It is hoped that the non-renewal of the three Judges on the end of their mandate does not reflect the desire to achieve a nationalities rotation in the Courts of small size and being used as a precedent when it comes to renewing additional members at the General Court.

This procedure was analysed by an author as reconciling "the requirements of impartiality, independence and professional competence imposed on the International Judges with political realism."<sup>19</sup>

It should be noted that if, for the appointment of Judges of the Court and the General Court, a committee was set up under Article 255 TFEU, with a composition and a similar role to the committee on the Civil Service Tribunal, the treaty merely states that the committee is asked to give an opinion "on the candidates' suitability to perform the duties of Judge and Advocate General." The criteria required for the exercise of these functions to the Court and the General Court are set out in Articles 253 and 254 TFEU. The operating rules of the committee of the Council are set out in Annex to Council Decision of 25 February 2010<sup>20</sup>. These rules apply whether for an initial appointment or a renewal. However, point 7 of the rules of the committee states that "Except in the case of a renewal proposal ..., the Committee shall hear the applicant during a non-public hearing. "The committee declared in a progress report of great interest on its first year of operation, the interpretation he gave of " provisions it has the task for applying. "<sup>21</sup> He has held that that provision means that "candidates for a first term are subject to a mandatory hearing process while the candidates proposed for renewal are not

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<sup>16</sup> Stéphane GERVASONI, loc. cit., p. 789.

<sup>17</sup> cf. for a recent example, the Council Decision of 18 July 2011 appointing Judges at the Civil Service Tribunal of the European Union, OJ L194, 26 July 2011. In this procedure, cf. Leif SEVÓN, "La procédure de sélection des Membres du TFP : une expérience pionnière", in RUDH, June 30, 2011, p. 5-9.

<sup>18</sup> President Sevón details his experience of the procedure, *ibid.*, p. 8-9.

<sup>19</sup> J. MALENOVSKY, "La justice internationale face à la mondialisation : les nouveaux défis de l'indépendance du juge international" in *Prawo w wieku XXI*, Warsaw, 2006, P.530, quoted *ibid.*, Note 20.

<sup>20</sup> Council Decision of 25 February 2010 on the rules of the Committee provided for in Article 255 of the Treaty on the Functioning of the European Union, OJEU, L50, 27 February 2010, p. 18.

<sup>21</sup> cf. Progress Report of the Committee provided for in Article 255 of the Treaty on the Functioning of the European Union, 11 February 2011, Council of the European Union, February 17, 2011, 6509/11, COUR 3 JUR 57.

covered by this procedure. " This interpretation of the text is regrettable because it did not appear to exclude optional hearings. They could have been useful for the renewal of members of the Court or the General Court appointed before the coming into force of the Lisbon Treaty and therefore before the establishment of the committee.

Member States do not seem to attach the same degree of importance matching the profile of the candidates they present to the requirements of the function. These are discussed in detail in the report of the committee of Article 255 TFEU. We can summarize them by highlighting the ability to judge, which is impartiality and independence above all suspicion and sufficient legal principles apprehension governing a specific and original legal order.

Requirements of competence and character should also be required of legal secretaries who have a major role in the processing of cases before the General Court as well as to the Court, but have no special status. We have seen that the General Court suggests, given the urgency of the resorption of the backlog, to add an additional employee to Judges. The measure would certainly be useful and cost less than the increase in the number of Judges, but it raises the question of limiting the number of office members of the Judges of the Plateau du Kirchberg, which already enjoy a substantial assistance, the requirements of candidates and their status.

The foregoing shows that the solutions being considered are not, by themselves, a panacea. Their promoters are also well aware. Preferences may be asserted for a particular orientation. But in addition to the measures to be taken urgently, it is necessary to build a strategy for the organization of the judicial system for the European Union's future.

The doctrine has an essential role in thinking about it.

Jean-Victor Louis

After writing this editorial, the Commission adopted its opinion on the draft of the Court<sup>22</sup>. The Commission approved the draft of the Court but suggested changes and additions in some respects (paragraph 11). We limit our analysis here to the main aspects of the opinion.

Regarding the Court, the Commission is in favor of the creation of the office of Vice-President while noting that it would be inappropriate that the President decides on a discretionary basis and on an ad hoc basis to be replaced in procedures for interim measures and other judicial acts. It relies in this respect the principle of legal judge and suggests a modification of the project on this point (paragraph 16).

The Commission also decides (paragraphs 16 to 24) for more stability than expected in the project (which eliminated the need for the automatic presence of the Presidents of the Chambers of five Judges) for the composition of the Grand Chamber in the interest of consistency of the case-law. It suggested an amendment to involve three Presidents of the Chambers of five Judges (with the President and Vice-President of the Court).

But it was obviously in the composition of the General Court that the opinion of the Commission was the most anticipated. It appeared quite likely that the Commission would vote in favor of the appointment of twelve additional Judges. It relies the emergency of action to take to address the backlog of cases and greater flexibility of this solution that would adapt more easily to changes in the evolution of litigation (paragraph 29).

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<sup>22</sup> COM (2011) 596 final, 30 September 2011.

However, it shall append to its opinion of suggestions concerning the internal organization of the General Court. The Commission is in favor of the creation of specialized Chambers and the appointment of a Vice-President. It also opts for change in the procedure for appointing Judges. It makes in this regard detailed proposals.

It motivates his view concerning the creation of specialized Chambers because it would ensure the cases to be dealt more efficiently and swiftly while maintaining flexibility to adapt to new types of disputes. The current system based on strict equality between the different Chambers, each of which is automatically assigned seeing all types of cases, except for exemptions by the President in exceptional cases, can not be maintained. It requires, indeed, the Judges to master the most diverse branches of law (paragraphs 34 and 35). The Commission suggests the creation of specialized Chambers only for substances where there is a large volume of litigation. It proposes to do an amendment to Article 50 of the Statute which would provide the creation of two specialized Chambers.

The role of the Vice-President is defined in the same terms as regarded for the Court itself (paragraph 40).

About the rules governing the appointment of Judges, one difficulty is that many of the rules concerning them can be changed only by the revision procedure of the Treaties (term limits, partial renewals). Only the number of Judges is submitted to the legislative procedure. The Commission suggests, therefore, that when approving the amendments to the Statute, a statement on the arrangements for appointments is adopted.

The Commission sets out the objectives that should pursue this statement and makes suggestions on the modalities of their implementation. First, the Commission stresses the need to appoint the most qualified for the task ahead, a goal partially realized, it writes, by the committee of Article 255 TFEU. Then, considering the technical nature of litigation and the increasing need for specialization, the Commission notes the importance that Judges who have worked effectively to be renamed. If so, increasing the number of Judges would undermine this possibility, the reform should be seriously reconsidered. However, the Commission also appreciates the concern of Member States to see, as the saying goes, all legal systems represented (paragraph 45).

It suggests two models, one of which implements the principles that at least one Judge and at the most two of the same Member State are appointed. The timing of the ends of mandates must be organized on the three-year period in order to avoid, according to the Commission, a competition between the two Judges which would be detrimental to their independence. The other model takes into account a composition which allows representation of all different legal systems but also the need for the organization of specialized Chambers. Half of the new Judges would be appointed taking into account the need for specialization.

We can not expand here on the proposed arrangements that will surely be the subject of careful consideration and a lively debate. We should note also that, always inspired by the emergency of the needs that underlie the reform, the Commission rules for the appointment of new Judges as soon as possible and in any case without waiting for the next triennial renewal part (paragraph 51) .

In the same vein, the Commission also proposes that once the policy decision to appoint new Judges will be made, budgetary resources are made available to recruit "a significant number of additional legal secretaries," without waiting for the adoption and entry into force of amendments to the Statute. The new legal secretaries would be assigned according to the already based Judges, which would begin to address the backlog until the new Judges take

office. These legal secretaries could then be transferred to the new Judges (paragraph 41). This suggestion apparently small but actually very bold must be upheld. It fits perfectly in the context of specialization of some Chambers and in the adoption of a status for the legal secretaries in coherence with the importance of the role they act in the European Courts.

In brief, while agreeing with the direction of the Court for increasing the number of Judges of the General Court, the Commission makes proposals that are useful supplements and essential to the project of the Court. These however do not relieve the need to think longer term about the future of the judicial organization in the Union.

