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GUEST EDITORIAL

Courts in transition: Administration of justice and how to organize it

Celebrating six decades of the Court of Justice in a close community of magistrates

At the end of 2012, the Court of Justice of the EU celebrated its 60th anniversary with an "audience solennelle" and the launch of a volume under the weighty title *The Court of Justice and the Construction of Europe*.[1] The book is appropriate to the event, purporting to chart sixty years of vast legal development in retrospect and also to look ahead. Solemn speeches and contributions to the volume alike draw a picture of continuous change and expansion, as well as unstoppable dynamism. Moreover, there is probably no other professional sector where the sense of co-responsibility between the European level and the equivalent circle at national level has taken shape so remarkably. As on previous such occasions, the audience at the formal sitting consisted largely of presidents of national supreme and constitutional courts, who had also been convened to the annual forum for national magistrates to discuss topical issues of common interest. The joining of the annual encounter with the solemn celebration expresses a close bond between the judges of the Court and their national counterparts, in supreme and constitutional courts, which in turn reflects the existence of a blossoming professional community of high European magistrates representing as such an important prerequisite for coherent legal development.

It may not be a coincidence that the Court preferred to celebrate its anniversary with its national counterparts rather than with the political institutions of the EU. At the ceremony for the award of the Nobel Peace Prize, the presidents of the political institutions[2] were in the front row, with a conspicuous absence of the Court, as if the rule of law had not played its part in the process. One wonders, then, how the role of the political institutions is to be appreciated in the most recent expressions of dynamic transition of the judicial institution which are to be found in the proposed changes, requested by the Court by virtue of Article 281 TFEU for all three branches of the institution and laid down in modifications of the Statute of the Court and further implementing measures, partly achieved and proclaimed in the

1. A. Rosas, E. Levits, Y. Bot (Eds), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case Law* (Asser Press, The Hague, 2012).
2. European Council, European Commission and European Parliament.

Official Journal,[3] partly in suspense. It remains to be seen to what extent the delicate necessities of the administration of justice have been able to compete with political considerations.

Three courts, diverging needs, different measures

For courts, continuous change and dynamic expansion mean constant pressure on workload, production, and length of proceedings. Statistics in the recent annual reports show that substantial increases in numbers of incoming cases as a result of accessions and new areas of litigation flowing from the Treaty of Lisbon have plainly reached the Court. A growing number of preliminary references from the courts of the Member States who acceded in 2004 and 2007, as well as in the areas of civil and criminal judicial cooperation, mean a gradual shift in the proportion of preliminary references, from almost half to two-thirds of the total number of cases before the Court of Justice.[4] At the same time, as a result of simplifying procedures[5] and rigorous case management, the Court has managed over the past years to cut back the length of proceedings in ordinary preliminary references to roughly 16 months on average, from well over 20 months not so many years ago. Although the pressure seems to be rising again, this success may explain why the proposed changes for the judicial branch Court of Justice have remained restricted to internal organizational measures such as the introduction of a vice-president and an adaptation of the configuration of the Grand Chamber. As well as replacing the President when necessary, the Vice-President assists the President, at his request, in matters of representation and in his administrative responsibilities.[6] As from 1 November 2012, the Vice-President also takes over the President's judicial duties in proceedings for interim relief.[7] The Grand Chamber is enlarged from 13 to 15 judges, following a slightly modified rotation scheme so as to allow judges to participate more frequently in the work of the Grand Chamber.[8]

3. Council Documents 8786/11 and 8787/11 of 7 April 2011; Regulation (EU/Euratom) No 741/2012 of the European Parliament and of the Council of 11 Aug. 2012 amending the Protocol on the Statute of the Court of Justice of the European Union and Annex 1 thereto, O.J. 2012, L 228/1.

4. In 2011: 423 preliminary references, out of a total of 688 incoming cases.

5. Parallel to the proposed changes to the Statute, a complete revision of the Rules of Procedure of the Court of Justice has been achieved; the new Rules entered into force on 1 Nov 2012, O.J. 2012, L 265/9.

6. Art. 9a of the Statute in conjunction with Art. 10 of the new Rules of Procedure.

7. Decision of the Court of 23 October 2012, O.J. 2012, L 300/47. The first Vice-President, Judge Koen Lenaerts, was elected on 9 Oct. 2012 following the triennial partial renewal of the Court.

8. Art. 16(2) of the Statute.

For the General Court the picture is less bright. For consecutive years it has struggled with rising numbers of pending cases and unacceptably increasing length of proceedings, in particular in the core areas of its case load such as competition and State aid cases.[9] It rang the alarm bell in an analytical document submitted to the Court of Justice early 2010: asserting that virtually all options for internal reform had been exhausted in a continuous process of review of working methods and of internal procedures since 2007, it claimed that the structural and growing backlog in the closing of cases required a structural approach. It suggested as its favoured solution the creation of a specialized court in the vein of the Civil Service Tribunal, under Article 257 TFEU, more particularly for Community trade mark and other intellectual property cases. The Court of Justice, in its own proposal, took a different approach, requesting an enlargement of the General Court with 12 additional new judges.[10] This raises tricky questions some of which will be briefly considered hereafter. Meanwhile, the introduction of a vice-president is equally extended to the General Court, with effect from its next partial renewal in September 2013.[11]

The Civil Service Tribunal in turn is reported to be a success story.[12] By the end of 2011, the number of pending cases (172) was hardly bigger than the number of cases closed in 2011 (166), which may be considered an acceptable stock. Interestingly, the statutory change proposed and adopted for the Civil Service Tribunal relates rather to its more vulnerable aspect, which is its reduced membership of only seven judges. Each instance of unavailability of

9. According to the Annual Reports the numbers of cases filed increased from 522 in 2007 to 722 in 2011; the number of cases decided each year also substantially increased over the same period of time from 397 in 2007 to 714 in 2011, however, with particular variations and from a structural point of view not sufficiently to keep pace with the incoming case load; as a consequence the number of pending cases rose from 1154 in 2007 to 1308 ultimo 2011. In 2012 the number of decided cases(ca. 685) for the first time since many years exceeded the number of incoming cases (ca.580), bringing down the number of pending cases to ca. 1200. More importantly, however, the average length of proceedings, in particular in competition cases increased to over 4 years.

10. The Court's Request under Art. 281 TFEU, as well as the Commission's Opinion under that provision, may be found at the Council's website as Interinstitutional File 2011/0901(COD) and 2011/0902(COD). In the perspective of Arts. 13 and 19 TEU, defining the institution as the Court of Justice of the European Union and the Court of Justice as one of its branches, the wording of Art. 281 is ambiguous to the extent that it seems to confer the legislative initiative and/or the consultative power on the judicial branch Court of Justice rather than to the institution; see *infra*. The General Court's document, although widely circulated, is not a part of the File.

11. Art. 47 of the Statute as modified.

12. House of Lords EU Committee, 14th Report of Session 2010–11, 6 April 2011,"The Workload of the Court of Justice of the European Union", HL Paper 128, § 56; see also Krämer, "The European Union Civil Service Tribunal: A new Community court examined after four years of operation",46 CML Rev. (2009), 1873–1913.

one of the judges for a prolonged period of time has immediate consequences for its operation and production, as practice has shown, alas. Therefore it was proposed and decided to create a pool of three temporary judges in order to be able to fill a gap whenever it might occur.[13]

Supplementary judges for the General Court?

The Court of Justice's proposal to add twelve new judges to the General Court has given rise to extended debate and negotiation. As is well known, Article 19 TEU determines the number of judges in the Court of Justice at one for each Member State, and for the General Court at one per Member State at least, thus leaving the possibility of extending the number of judges in the General Court beyond this threshold. In the Court's view extending the number of judges in the General Court is more effective than establishing a separate specialized court, as the trade mark cases which would be transferred to a specialized court are not the cause of the problem, as they are repetitive and can be dealt with swiftly. As it would not make sense in the prevailing situation to transfer preliminary reference jurisdiction in trade mark cases to the General Court in parallel with appellate jurisdiction from a specialized court, coherence, in the Court's view, also pleads in favour of more judges in the General Court while keeping appellate jurisdiction and preliminary reference jurisdiction in the same hand at the Court of Justice. The advantages of specialization could, according to the Court of Justice, also be achieved through the creation of specialized chambers within the General Court. The Commission and the European Parliament support the proposal.

In its Opinion[14] pursuant to Article 281 TFEU, the Commission proposes to introduce in the Statute a provision to the effect that the new enlarged General Court establishes at least two specialized chambers for particularly voluminous classes of action. This suggestion pinpoints a major problem. Certainly, it may be useful to concentrate some categories of cases with one or two judge-rapporteurs and/or one or two chambers to counter sudden flows of incoming cases e.g. in new areas of jurisdiction. This has been done in the past, and the power of the president to make such arrangements should indeed be formally confirmed. However, the establishment of specialized chambers in a court of general jurisdiction raises the question of recruitment of specialists and differentiation of categories of judges. After all, in contrast with national

13. Art. 1, point 7 of Regulation (EU, Euratom) No 741/2012, adding a corresponding paragraph to Article 62c of the Statute, implemented by Regulation (EU, Euratom) No 979/2012 relating to temporary judges of the European Union Civil Service Tribunal, O.J. 2012, L 303/83.

14. COM(2011)596 Final.

courts where judges are recruited for a lifetime professional career, six year-terms of office hardly seem compatible with rotation of judges for substantial periods of time over various specialized and non-specialized chambers. Moreover, the creation of specialized chambers in a general court is bound to put an extra burden on the management of coherence, which as such is already a weak spot in extended international courts.

For the designation of the additional judges the Commission suggested two extremely complex alternative formulae, one based on strict equality of the Member States and the other providing for separate selection of judges for specialized chambers, in both cases, however, following rotation schemes based on drawing of lots. Apparently the latter option was unacceptable to many delegations in the Council negotiations. It was said that a number of Member States' delegations insisted on better insight in the operation of the court and in methods to reinforce weak spots giving rise to congestion in the treatment of cases. Some also showed interest in the budgetary consequences, estimated at around € 13.6 million. According to a press release at the end of the Cyprus Council Presidency a final compromise proposal involved an extra nine judges designated on the basis of two parallel rotation schemes, one for six larger Member States designating four judges, each time for two successive mandates, the other for all the remaining Member States designating five judges each time for a single mandate. However, as some Member States insist on having a permanent post among the additional judges, in over 18 months since the submission of the proposal to the legislative authorities no agreement has been reached. It was announced that the Council does not intend to further discuss the issue of extra judges at least until new rules of procedure for the General Court have been adopted.[15]

Perhaps this is just as well for two reasons. Firstly, any rotation scheme for the recruitment of judges fails to provide the required stability and continuity in the composition of the court. Secondly, the deadlock in the negotiations on the distribution issue allows attention to focus on the real issues underlying the present critical situation.

…or a specialized court?

The architecture designed in the Treaty of Nice does not seem to enjoy much popularity any more. The relevant Treaty provisions aimed to provide relief for the judicial branch Court of Justice by the establishment of specialized courts of first instance for certain classes of action,[16] in particular in specific areas of

15. Press release 17439/12 of the Council of the EU of 11 Dec. 2012.
16. Art. 257 TFEU.

mass litigation, with appeal before the General Court and only exceptionally review of the appellate decisions by the Court of Justice.[17]

The idea of judicial specialization is often perceived by reference to a particular area of the law. However, the characteristic specialism of a judge is in each case to engage in a balanced search for the relevant facts and trace the appropriate rules in a closely intertwined process while exercising strict surveillance over the parties' equality of arms, irrespective of the substance of the matter or the area in which the case arises. Concentration of a certain class of cases in the hands of one judge, chamber or court is a practical measure to draw on experience with the substance of the matter and thus to save time and energy and to enhance production. In this perspective, concentration of a certain class of cases would undoubtedly enhance productivity. If certain classes of mass litigation are concentrated in specialized courts of first instance, when the important questions of law have properly surfaced and crystallized, appeal may be directed to a court of broader, general jurisdiction. This is the perspective in which the Treaty of Nice provided for specialized courts in the EU judicial architecture.[18]

Initially, in particular the idea of a special competition court was explored, however, without compelling conclusions to that effect.[19] To the extent that competition cases in a broad sense are considered the core business of the General Court, it may not appear logical to take them out. Even if the sheer size and complexity of most competition cases would call for a measure of concentration, it is not a typical class of mass litigation. Moreover, the political sensitivity of some competition cases would make agreement on the composition of a smaller specialized court even more difficult. However, in the light of the present development of the General Court's case load and the increasing number of EU agencies producing challengeable decisions, one should not be surprised if, in the course of the coming years parameters would develop pointing to the establishment of two other specialized courts. Beyond the Civil Service Tribunal, at present already the conditions, in terms of class of action and number of cases, are fulfilled to create a specialized Community Trade Mark Court.[20] A suitable candidate for another specialized court of first

17. Art. 256(2) TFEU.

18. Cf. Soldevila Fragoso, "La création de juridictions spécialisées: la réponse des traités au traitement des contentieux de masse", *Europe, Actualité du droit de l'Union européenne, Revue mensuelle LexisNexis Jurisclasseur*, février 2011, p. 4–7.

19. Cf. House of Lords EU Committee, 15th Report of Session 2006-07, 23 April 2007,"An EU Competition Court", HL Paper 75, para. 84.

20. The sometimes suggested transformation of the boards of appeal of OHIM in a specialized court of first instance within the meaning of Art. 257 TFEU (cf. Dehousse, "The Reform of the EU Courts, The need of a Management Approach", Egmont Paper 53, December 2011, para. 3.6.) does not appear viable for various reasons. This fails to distinguish

instance in coming years could be the class of cases concerning market authorizations, comprising not only the cases expected from the REACH agency in charge of renewal of virtually all authorizations for thousands of chemical substances, but also several other domains where authorization is required in order to obtain access to a market, such as for the marketing of medicines, pesticides, additives in human and animal food, packaging material for foodstuffs etc. According to circulating documents, the budgetary effect of a court composed of 7 specialized judges would amount to around 50 percent of the cost of 12 additional judges in the General Court. In view of the difficulty for the Member States to reach agreement on the allocation of posts, it may be borne in mind that three specialized courts of between 7 and 11 members hypothetically cover all Member States, thus facilitating geographical spread and representation of national legal systems more easily than any rotation system.

Issues to be considered prior to a structural solution

In the debate on the measures to be taken for the General Court, other relevant facts have remained somewhat underexposed. Two issues require appropriate attention, firstly, an analysis of productivity parameters and, secondly, an evaluation of production losses caused by the terms of office of the judges. As to the first point, it is not quite clear what part of the 1200 or so cases pending in the General Court (per 31 Dec. 2012) is to be considered regular stock and what part is "unacceptable backlog". Taking into account the number of cases which are at some stage in the course of treatment, the real backlog may not be more than about 300 cases. Time consumption analysis for various stages of proceedings seems to be well on its way in the General Court. The President and the Chamber Presidents closely cooperate with the judge-rapporteurs in an intensive process of case management and monitoring. It is no secret that the notorious bottlenecks are the large groups of voluminous and complex cartel cases and State aid cases, as well as – on the level of the written proceedings – the frequent requests for confidentiality opposed to intervening parties and requiring extensive examination of hundreds of file pages. It is no surprise, then, that cartel and State aid cases are comparatively

administration from judiciary (hence the principle of "functional continuity", developed in the very first trade mark case, *Baby Dry*, to qualify the boards of appeal, even if functionally independent, as extension of the administration). Also, the boards of appeal in Alicante excellently fulfil the function of filtering mechanism, so that although around 100 000 trade mark applications per annum generate roughly 2200–2500 cases a year in the boards of appeal, only an average of nearly 10 % of the cases decided by the boards of appeal appear in the General Court. Thirdly, it would hardly appear appropriate to locate a court so closely to, virtually on top of the administration it is supposed to control.

over-represented in the persisting backlog. In view of the size of the files and the complexity of the facts and the law, there are no easy solutions for speeding up competition cases, assuming one does not want to give in on quality of the result. Further exploration with party representatives of instruments to reduce and focus the debate, as is provided for accelerated proceedings, appears indispensable. In these circumstances and in the unavoidable perspective of future adaptation of the court's structure, a first swift step towards absorption of the backlog might consist in the creation of a pool of specialized legal secretaries specifically designed in order to intervene in the bottlenecks.

The initial proposal to enlarge the General Court does not include indications of a correlation between the actual backlog and the proposed number of judges and cabinets. In the course of the negotiations, more data seem to have been provided at the request of certain delegations. However, in the end, the distribution of posts among the Member States turned out to be the stumbling block. Nonetheless, the development of planning instruments is indispensable also for another purpose. Attention has been drawn to the necessity for the legislative and budgetary authorities to prepare assessments of the impact of new legislative initiatives on the court system. In view of the critical situation, notably in the General Court, after the introduction of several series of legislative measures provoking substantial amounts of litigation, it is to be seriously regretted that the Commission so far has shown no signs of following suit in this regard.[21]

As regards the second issue, an important obstacle to achieving better productivity is to be found in the lack of stability and continuity of the composition of the EU Courts as a consequence of the six year mandate of the judges and the current renewal practice, i.e. to reappoint or replace half of the number of judges every three years.[22] This problem does exist for all the three courts, but it is even more pressing for the General Court in view of the number of huge, time-consuming cases it has to deal with, so that there is a substantial risk that a judge starting such a case, as *rapporteur* or *assesseur*, is in the end no longer in a position to pronounce judgment. Since judgment has to be pronounced and signed by the judges who have heard the case, it does not make sense for a judge to start a case which he/she cannot pronounce and sign in the end. Undoubtedly, the committee provided for in Article 255 TFEU since the Treaty of Lisbon for the scrutiny of new candidate judges proposed

21. Cf. Van der Woude, "Editorial: Judicial reform and reasonable delay", (2012) *Journal of European Competition Law and Practice*, 123–125, at 125; Meij, "Guest editorial: Architects or judges? Some comments in relation to the current debate", 37 CML Rev. (2000) 1039–1045, at 1045.

22. Cf. Malenovsky, "Les éléments constitutifs du mandat des juges de la Cour de justice à l'épreuve du temps: l'iceberg commence à fondre", (2011) *Il diritto dell'Unione Europea*, 801–836; Dehousse, op. cit. *supra* note 20, para. 3.1.

by the Member States has already done extremely important work issuing critical assessments about several candidates for the General Court.[23] Its impact, however, would be much greater if and when the General Court could benefit from the excellent judges so selected for more than a single mandate. An educated guess indicates that about 18 months of production time is lost on initial orientation of a newly appointed judge at the beginning and on inability to finish cases at the end of a six-year term. Uncertainty about reappointment towards the end of the mandate not only affects the judge as such but the work of his or her chamber as a whole. Moreover, expertise built up during one mandate is lost in case of replacement after one mandate, which is current practice of some Member States.[24] Not only in view of protection of independence and impartiality, but also for the Court's productivity, it would seem preferable for the Member States to reach a gentleman's agreement to the effect that at least in the General Court and the Civil Service Tribunal two six year mandates become normal practice.[25]

Against this background the debate on whether to enlarge the General Court or to create another specialized court may well suggest a false opposition, to the extent that some real bottlenecks are elsewhere.

Managing a judicial institution

It would appear that the decision-making process resulting in divergent positions of the Court of Justice and the General Court on the solutions to be adopted concerning the workload of the General Court reflects a shortcoming in the internal administrative decision making of the institution, and that a balanced decision-making mechanism, permitting trade-offs or balancing of opposing views is lacking. In the institution Court of Justice of the European Union, along with its explosive growth, the organization of its administrative services has been adapted proportionally. Strikingly, however, the decision-making model concerning the final responsibilities in terms of administrative

23. Cf. Vesterdorf, "Editorial: La nomination des juges de la Cour de justice de l'Union européenne, Le Comité Sauvé (l'article 255 TFEU)", (2011) CDE, 601–610; Sauvé, "Le rôle du comité 255 dans la sélection du juge de l'Union", in Rosas, Levits, Bot, op. cit. *supra* note 1, p. 99–119.

24. Surprisingly such practice also emerged at the occasion of the renewal of part of the Civil Service Tribunal after the first six years in 2011.

25. Cf Dehousse, op. cit. *supra* note 20, para. 3.1.2. and Malenovsky, op. cit. *supra* note 22,.828.

direction and management is still based on the historic single branch institution and has never been adapted to its new structure and contours. For the first time, Article 19 TEU draws the overall picture to the effect that the institution Court of Justice of the European Union is composed of the judicial branches Court of Justice, General Court and specialized courts. As may have transpired from the terminology used above, it is not obvious how to distinguish the institution from the judicial branch Court of Justice. If it is true that the notion Court of Justice does not refer to the institution but to the judicial branch, the old provision of Article 12 of the Statute concerning officials and other servants responsible to the Registrar under the authority of the President solely refers to the judicial branch Court of Justice. In addition, curiously, arrangements for the direction and management responsibilities concerning the services of the institution are to be found in the Rules of Procedure of one of the judicial branches.[26] According to Article 52 of the Statute, the General Court may use services of the Court of Justice in common accord with its President. A similar provision exists for the Civil Service Tribunal. As a result, the prevailing model is still that the judicial branch Court of Justice coincides with the institution. Joint committees for several purposes and regular joint meetings of the presidents have provided some relief in terms of cooperation and agreement on administrative matters. The final decision on administrative issues, however, according to Article 25 of the Rules of Procedure lies with the general meeting of the judicial branch Court of Justice. This may also be true for non-judicial issues such as taking the initiative in the legislative sphere, e.g. for requests or proposals to amend the Statute by virtue of Article 281 TFEU. As a result there is not a single common position supported as a matter of common interest by the whole of the professional community in question. In modern judicial organizations, however, hierarchy in a pyramidal judicial model does not necessarily imply dependence in administrative organization. An up-to-date model of such an organization may be found in the Agreement on a Unified Patent Court and its Statute, which provides for a Presidium composed of the presidents of the Court of Appeal and of the Court of First Instance and of two judges elected from the Court of Appeal and three judges elected from the Court of First Instance. This presidium, in which the president of the Court of Appeal is chairperson, but the larger first instance in the majority, is responsible for the management of

26. Arts. 9 and 25 of the Rules of Procedure of the Court of Justice.

the institution, the elected presidents and judges apparently acting as delegated commissioners. Even if other models may be imagined, it may be time to adapt the managerial system of the institution Court of Justice of the EU to the requirements of a modern professional organization, by and large ten times bigger than the modest court of seven members it started out as 60 years ago.

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