LEGAL DEVELOPMENTS

Amending the Statute of the EU Courts

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§1. INTRODUCTION

Last summer, some amendments to the Statute of the EU Court of Justice made their way, relatively unnoticed, into the *Official Journal*.[1] The adopted amendments are concerned with all three branches of the institution. However, the most substantial among the proposals submitted to the legislative authorities, an enlargement of the General Court with 12 additional judges, has not so far been agreed on.[2]

The courts which are united in the EU's judicial institution, in particular the Court of Justice and the General Court, find themselves in a somewhat paradoxical situation. The composition of judges, who are appointed for terms of office of six years, represent as many legal traditions and cultures as there are Member States, and operation in only a slightly lower number of languages of procedure, with French as an internal working language, counts for an unprecedented but time and energy consuming effort to achieve an administration of justice of some coherence. It is no surprise therefore that their production in terms of numbers of judgments and decisions does not compare with any national court system.

On the contrary, it is a sheer miracle that these courts succeed in producing several hundreds of reasonably coherent decisions each year. However, it is to be noted, paradoxically, that statistics in recent annual reports continue to show increases in the numbers of incoming cases. At present this is mainly a result of subsequent accessions, and of new areas of litigation flowing from the Treaty of Lisbon. A growing number of preliminary references from the courts of the new Member States of 2004 and 2007, as well as in the areas of civil and criminal judicial cooperation make up for a gradual

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1 Regulation (EU/Euratom) No 741/2012 of the European Parliament and of the Council of 11 August 2012 amending the Protocol on the Statute of the Court of Justice of the European Union and Annex 1 thereto, [2012] OJ L 228/1.

2 See also A.W.H. Meij, 'Courts in transition: Administration of Justice and how to organize it', 50 *CMLRev.* 1 (2013), p. 1–12, on which the present notes are largely based.

shift in the number of preliminary references from almost half to two-thirds of the total number of cases before the Court of Justice.[3] At the same time, in the General Court, relatively new areas of litigation, such as counter-terrorism measures, market authorizations, and access to documents, continue to give rise to growth of the case load, and its core business – heavy groups and single cases in the areas of competition, state aid and anti-dumping – does not show any sign of decreasing.

§2. THE COURT OF JUSTICE

Interestingly, as a result of simplifying procedures and rigorous case management, the Court of Justice has succeeded over the past years in cutting back the length of proceedings in ordinary preliminary references to roughly 16 months on average, which is quite a performance considering the delays of well over 20 months not so many years ago. Also, the Court has successfully introduced an urgent preliminary procedure, in particular for cases where a party in the main proceedings would be in custody.[4] This may explain why the proposed changes for the Court itself have remained limited to internal organizational measures, such as the introduction of a Vice-President and an adaptation of the configuration of the Grand Chamber.

The provisions of the new Article 9a of the Statute provide that the Vice-President, equally elected for three years, shall assist the President in accordance with the conditions laid down in the Rules of Procedure and take his place when the President is prevented, or the office is vacant. Following Article 10 of the new Rules of Procedure, the Vice-President takes the President's place, at his request, in matters of representation and in his responsibilities to ensure the proper functioning of the services of the Court. As far as the President's judicial duties are concerned, a separate decision of the Court specifies that the Vice-President takes over the President's duties in proceedings for interim relief.[5] The first Vice-President, Judge Koen Lenaerts, was elected on 9 October 2012 following the tri-annual partial renewal of the Court.

A new statutory provision purports to enlarge the Grand Chamber of the Court from 13 to 15 judges.[6] The Grand Chamber deals *grosso modo* with 30% of the more important cases concerning issues of principle. It is composed of the President and the Vice-President as well as three of the Presidents of the chambers of five judges following a fixed rotation scheme; to this core are added 10 more judges, also on the basis of a rotation scheme. This complex schedule allows for more judges than before to participate

3 In 2011, there were 423 preliminary references on 688 incoming cases.

4 Implementing the new Article 267 (4) TFEU, Articles 107 to 109 of the new Rules of Procedure, [2012] OJ L 265/1.

5 Decision of the Court of 23 October 2012 concerning the judicial functions of the Vice-President of the Court, [2012] OJ L 300/47.

6 Article 16 (2) (new) of the Statute.

in the work of the Grand Chamber. However, this also gives rise to a greater caseload for individual judges. It should be borne in mind in this context that the whole Court only sits very rarely.[7]

§3. THE GENERAL COURT

By virtue of the new Article 47 of the Statute the introduction of a vice-president has been extended to the General Court, with effect from the next partial renewal of the General Court in September 2013. One may wonder in the present situation, in what way the tasks and conditions of the General Court are different from those of the Court of Justice, copying a solution adopted for the Court of Justice into the General Court really corresponds to its needs. It may well be for instance that ensuring coherence in a court that for reasons of expediency and efficiency operates predominantly in eight chambers of three judges covering very divergent areas of jurisdiction requires intense efforts of coordination better served by a three-person presidential team.

The second element of the proposals, concerning the General Court, is an enlargement of 12 additional judges.[8] As early as January 2010, the General Court, in a document submitted to the Court of Justice, drew attention to rising numbers of pending cases and to an unacceptably increasing length of proceedings, in particular to the core areas of its caseload such as competition and state aid cases.[9] It concluded that a structural and gradually growing backlog in the closing of cases required a structural solution. Its favoured solution would be the creation of a specialized court under Article 257 TFEU, more particularly for Community trademark and other intellectual property cases, which account for around 30% of the caseload.

The Court of Justice, however, which represents the institution in its role as the initiator of amendments to the Statute under Article 281 TFEU, took a different approach. It proposed to enlarge the General Court with 12 additional judges. Article 19 TEU fixes 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 open the possibility of further extending the number of judges in the General Court. In the Court's view,

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7 Compare for example, Case C-370/12 *Pringle*, Judgment of 27 November 2012, not yet reported, in the ESM case.

8 Compare with Council Documents 8786/11 and 8787/11 of 7 April 2011 in Interinstitutional Files 2011/0901(COD) and 2011/0902(COD).

9 Compare the annual report of 2011: 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, this was not sufficiently to keep pace with the incoming case load: the number of pending cases rose from 1154 in 2007 to 1308 in 2011. For the first time in many years the number of cases decided in 2012 (688) exceeded the number of incoming cases (585), bringing down the number of pending cases to around 1200. More importantly, however, the average length of proceedings, in particular in competition cases, continues to exceed four years.

extending the number of judges in the General Court is more effective than establishing a separate specialized court, because trademark cases would be transferred to a specialized court: they do not cause a problem, as they are repetitive and may thus be dealt with swiftly. Furthermore, increasing the number of judges would be an urgent and a flexible remedy. The Court also took the view that coherence pleads in favour of more judges in the General Court, while reserving appellate jurisdiction and preliminary reference jurisdiction for the Court of Justice. The advantages of specialization could, according to the Court's explanation, also be achieved through the creation of specialized chambers within the General Court.

The Commission and the European Parliament support the Court's proposal. In its opinion 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 concerns the heart of the current debate on the appropriate architecture of the institution. Some argue that, in particular, with a view to specific and voluminous classes of action, the Treaty of Nice has introduced the possibility to establish specialized courts of first instance, whereas an enlargement of the number of judges in the General Court rather corresponds to an overall increase of the number of cases in the General Court.[10] Admittedly, it may be useful to concentrate incidentally on certain categories of cases in one or two chambers to counter sudden flows of incoming cases in new areas of jurisdiction, as has been done in the former Court of First Instance. However, the creation of specialized chambers in a court of general jurisdiction may create serious problems of management of coherence, which as such is already a weak spot in international courts.

Apparently, such considerations have not been the prevailing elements leading to a deadlock in the negotiations on the enlargement of the General Court. For the designation of the additional judges, the Commission suggested two extremely complex alternative formulae, one of which is based on strict equality of the Member States, and the other providing for separate selection of judges for specialized chambers, although in both cases following rotation schemes. Apparently this was unacceptable to most delegations in Council negotiations. As some of the bigger Member States insisted on having a permanent post among the 12 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 until new rules of procedure for the General Court have been adopted.[11]

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10 Compare S. 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* (February 2011), p. 4–7.

11 Press release 17439/12 of the Council of the EU of 11 December 2012, www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/genaff/134235.pdf (last visited 16 January 2013).

§4. THE CIVIL SERVICE TRIBUNAL

The statutory change proposed and adopted for the Civil Service Tribunal (CST) relates to its reduced membership of only seven judges. Each instance of unavailability of one of the judges for a prolonged period of time has immediate consequences for its operation and production. Therefore it was proposed and decided to create a list of three temporary judges in order to be able to fill the gap whenever it might occur.[12] The temporary judges are recruited from among former members of any of the three branches of the Court, who are in a position to keep themselves at the disposal of the CST, for a renewable period of four years. The President of the CST may call upon a temporary judge in the order of the list if a judge of the CST is on medical grounds unavailable for a period likely to be at least three months.[13] Otherwise, the Civil Service Tribunal appears to be a successfully operating specialized court as foreseen by the Treaty of Nice.[14] 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.

§5. OUTLOOK

In these circumstances, the outlook for the General Court and its clients does not appear to be particularly promising. However, perhaps at this stage two observations are in order. First, it is apparent from the statistics that the notorious bottlenecks are the large groups of voluminous and complex cartel cases and state aid cases. Indeed, cartel and state aid cases are comparatively 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. While reviewing the rules of procedure, further exploration with party representatives of instruments to reduce and focus the debate in court on one or two essential issues of the case at hand, as is provided for accelerated proceedings, would seem to be an unavoidable approach. Also, a swift step towards absorption of the backlog may consist of the creation of a pool of specialized legal assistants to the judges in order to intervene more specifically in the bottleneck areas.

12 Article 1, point 7 of Regulation (EU, Euratom) No. 741/2012, adding a corresponding paragraph to Article 62 (c) of the Statute.

13 Article 1 of Implementing Regulation (EU, Euratom) No. 979/2012 of the European Parliament and the Council of 25 October 2012 relating to temporary judges of the European Union Civil Service Tribunal, [2012] OJ L 303/83.

14 House of Lords EU Committee, 'The Workload of the Court of Justice of the European Union', *HL Paper* 128, §55, see also H. Krämer, 'The European Union Civil Service Tribunal: A new Community Court examined after four years of operation', 46 *CMLRev.* 6 (2009), p. 1873–1913 and P. Mahoney, *Human Rights Law Journal* (2011).

Secondly, it would appear to be of paramount importance to modify the existing practice of six-year mandates and renewal of half of the courts every three years. The impracticalities of the present system in the cost of efficiency and productivity of the courts have been demonstrated convincingly elsewhere.[15] Indeed, considerable production time is lost on the initial orientation of newly appointed judges at the beginning, and on the 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. Not only in view of the protection of independence and impartiality, but also for the Court's productivity, it would be highly appropriate for the Member States to reach an agreement to the effect that, at least in the General Court and the Civil Service Tribunal, two six-year mandates become normal practice. Such modification does not need to wait for an amendment to the Treaties, but may be implemented by way of a gentleman's agreement under the current provisions.

15 Compare J. Malenovsky, 'Les éléments constitutifs du mandat des juges de la Cour de justice à l'épreuve du temps: l'iceberg commence à fondre', *Il diritto dell'Unione Europea* (2011), p. 801–836; F. Dehousse, 'The Reform of the EU Courts, The need of a Management Approach', *Egmont Paper* 53 (December 2011), www.egmontinstitute.be/paperegm/ep53.pdf (last visited 16 January 2013), para. 3.1.