THE REFORM OF THE EU COURTS (II)

ABANDONING THE MANAGEMENT APPROACH BY DOUBLING THE GENERAL COURT

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Abandoning the Management Approach by Doubling the General Court

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In homage to Vlad Constantinesco, Professor at the University of Strasbourg, PhD mentor and friend, with whom I had many long talks along the Inn about the meaning of separation of powers in Occidental systems, and to the late Louis Henkin, Professor at the Columbia University, who taught me brilliantly a long time ago the emptiness of law without conscience.

Table of Contents

EXECUTIVE SUMMARY

- The proposal to enlarge the General Court was the first legislative initiative taken by the Court of Justice of the European Union (CJEU) in the framework of the Lisbon Treaty and the first occasion on which the European Parliament participated in such a procedure. It has wrought a massive change in the entire judicial system of the EU. It is extremely important to draw the correct institutional lessons for the future.
- The Court of Justice's 2014 proposal changed fundamentally the EU courts system. Doubling the number of members of the General Court and abolishing the Civil Service Tribunal will have multiple consequences for the process of the appointment of judges, the geographic basis of their recruitment, the management of personnel of the CJEU and the appellate process. These changes make the absence of impact assessment and wide consultation process more shocking.
- The Member States' inability to agree on anything but a simple multiplication of judges made the appointment of judges in specialized courts more difficult, thus providing an excuse for their abolition, despite such specialized courts providing a more quality oriented, productive, and economical outcome. It also provoked a doubling of the General Court which was manifestly excessive.
- The special legislative procedure has been especially long and hard fought, both within the CJEU and between the CJEU and some members of the European Parliament. It would be wise to prevent similar circumstances happening in the future. A reflection should be also opened on the constraints that apply to the CJEU when it initiates a legislative proposal.
- The position of the Council and the Parliament has sometimes been contradictory. Both institutions sometimes sought to prevent a thorough analysis of the backlog and the solutions available for its resolution rather than facilitate it.
- This procedure has revealed once again the inability of the Member States to compromise on appointments in the EU institutions. Their inability is not limited to judicial appointments (as previously revealed before by the excessive growth of the Commission, for example). This weakness has become a clear source of useless spending, and risks now contaminating the EU judicial system.
- Rejecting the use of specialized courts in the EU judicial system is a fundamental strategic choice. It strengthens the Member States' role in the appointment of judges. It also secures for once and for all the principle of equal representation of the Member States in the EU Courts.
- Rejecting recourse to specialized courts will not help in establishing an EU court for a truly integrated patent. Whilst patent specialists seek the appointment of specialized judges this will no longer be a realistic option.

- The legislative procedure was not only about increasing the number of judges. It also concerned the organization of the General Court. The Court of Justice, the Council, the Parliament and the Commission all pushed strongly for some change in the system for the attribution of cases to judges in the General Court. This calls for further reflection to protect the EU courts' organisational independence.
- This legislative procedure also invites a general reflection on the exceptional legislative power that has been conferred upon the Court of Justice. One searches in vain to find an equivalent in the Member States. Supreme Courts do not enjoy a right of legislative initiative, let alone a quasi-monopoly over it. The events of the last four years tend to show that serious consideration ought to be given to the withdrawal of this exorbitant prerogative. Should it be retained, its exercise should be subject to serious constraints.
- Finally, the doubling of the General Court is an example of a purely mechanical vision of the management of public service reform. In general, the benefits of such an approach are strongly overestimated and its costs strongly underestimated. This has created the paradoxical situation where national judicial systems are subject to budgetary cuts and demands for higher productivity whilst the EU judicial system is supplied with huge additional resources without any clear vision as to how they might be put to good use. Such an approach is not to be recommended for the future.

INTRODUCTION

The Lisbon Treaty introduced numerous changes in the constitutional status of the judicial arm of the European Union. In 2011, the Court of Justice launched its first legislative initiative in this framework. The initiation of this procedure was thus something novel. As it has turned out, it has contained many surprises for both those involved and those observing it.

After four and a half years of negotiations, what was adopted at the end had very little resemblance to what had been proposed at the start. What was presented as (and arguably was) a change of a technical character metamorphosed into a change of a constitutional order. Regulation 2015/2422 transformed a judicial system designed for three layers into one with merely two. The possibility of recourse to specialized courts envisaged in the Treaty of Lisbon has, for all practical purposes, been abandoned. Equality of the Member States in the appointment of judges has become the keystone of the system, the independent appointment process for the nomination of judges having been abolished. To achieve this, the number of judges at the General Court is doubled, without providing for any additional personnel resources and even the possibility that they will be reduced. All this was done without any substantive analysis of the long term implications for any of the four institutions involved in the legislative process.

The debate surrounding this legislative proposal, particularly the Court of Justice's third proposal in 2014, also provoked a lot of surprises and tensions. They appeared first between the Court of Justice and the General Court. This conflict concerned both the substance of the reform and the manner in which it came to be proposed by the Court of Justice. It drove the institution to what has been described by some journalists as "the war of the judges", or "House of Courts"[1]. The Court was even compared to the satirical TV show *Fawlty Towers*, and the Court's president with the show's rather obsessive and clumsy character *Basil*[2].

Tensions also arose between the Court of Justice and the European Parliament. This has also been described as "a war between the EP rapporteur and the President of the Court"[3]. Various MEPs drafted parliamentary questions on the topic, not always receiving the clearest of replies. Some of the Court of Justice's judges embarked on

1 Politico, 28 April 2015; C. Schmidt, "House of Courts de soap bij het EU-hof", Trouw, 3 May 2015.

2 S. Peers, "Don't mention the extra judges!" When CJEU reform turns into farce", 3 July 2015. (http://eulawanalysis.blogspot.lu/2015/07/dont-mention-extra-judges-when-cjeu.html)

3 Politico, 28 April 2015.
See D. Seytre, "Si tu ne me donnes pas les juges », Le Jeudi, 19 March 2015. This is the only in depth interview which the Rapporteur gave about his approach. The important role of "Le Jeudi" as a source of information must be emphasised. Whilst in this debate, journalists notably M. Newman, J. Quatremer and D. Robinson have brought crucial items of information to public attention, D. Seytre's chroniques in "Le jeudi" remain the most regular and detailed source for many items.

a lobbying campaign in the European Parliament. In the course of this legislative process, documents containing information originating in the Court of Justice but without having any official status were circulated. Many letters were exchanged, often published in the press.

Contradictions appeared in the Council's position. Initially doubting the need for any increase in the number of judges, Member States enthusiastically endorsed a huge one, just at the time when the need for any increase had become less obvious. The European Parliament adopted the reform without taking some of the normal precautions in the legislative process, such as the adoption of an impact assessment or carrying out a serious costs/benefits analysis of the possible solutions offered. Indeed the main political groups were extremely eager to avoid any serious impact assessment,[4] and the President of the European Parliament seemed keener on accelerating the procedure as much as possible. Nor was this constitutional change brought to the attention of the national parliaments. Finally, a number of legal uncertainties emerged.

Meanwhile, behind the deep fog of these political negotiations, the General Court implemented important managerial reforms, as this author first recommended in 2011[5]. This progressively led to an impressive rise in the number of cases closed. The backlog began to diminish in 2014, and diminished drastically in 2015[6]. So did the length of proceedings[7]. There are strong reasons to believe that much more cannot be done[8]. In any case, the "urgency" which was invoked by all EU institutions and Member States when they approved the doubling of the General Court in 2015 had clearly disappeared. As a matter of fact, at the end of 2015 various press articles indicated that it had become difficult to find work for the existing judges, even prior to the arrival of 12 of their new 28 colleagues[9].

It is difficult to assess the long term implications of all this. There is no precedent in the history of the EU, since prior to the entry into force of the Lisbon Treaty there was no comparable legislative procedure over the EU judicial system. There is also no precedent in the Member States, since no national supreme court has ever been

4 D. Seytre, La Cour et les socialistes, Le Jeudi, 15 octobre 2015.

5 See F. Dehousse (with M. Rouland), The Reform of the EU Courts: The Need of a Management Approach, Tepsa, Egmont Paper No. 53, December 2011. To prevent repetitions, many references will be made to the information provided in this paper, hereafter "The reform of the EU courts I".

6 The number of applications was 617 in 2012, 790 in 2013, 912 in 2014, and 831 in 2015. The number of closed cases was 688 in 2012, 702 in 2013, 814 in 2014, and 987 in 2015. Consequently, there was a very substantial reduction of the backlog and the stock in 2015, thanks to a very limited increase of personnel.

7 For example the average length of proceedings fell from 26,9 months in 2013 to 23,4 months in 2014 and to 20,6 in 2015.

8 As indicated by Judge van der Woude of the General Court, "when considering the length of proceedings, it should also be borne in mind that it is almost impossible to bring the duration of proceedings to below 24 months due to the length of the written proceedings, procedural measures and translations." (M. van der Woude, In favour of effective judicial protection: A reminder of the 1988 objectives, Concurrences, 4/2014, p. 1).

9 D. Seytre, "Une insulte à l'intelligence", Le Jeudi, 4 novembre 2015; M. Newman, EU' General Court sees 'dramatic drop' in new case, judge says; Mlex, 30 September 2015.

granted the right of legislative initiative, let alone a quasi-monopoly. The progress and outcome of this debate is thus extremely interesting for the development of European public law and the operation of the principle of the separation of powers. It has also brought to light many fundamental aspects of the functioning of the Court of Justice that were previously unknown. Beyond that, this legislative debate additionally offers some interesting lessons concerning the whole EU institutional system, and generally public service reform in times of budgetary constraints.

It is in this perspective that this article seeks to describe the evolution of the Court of Justice's legislative proposal, refers to many useful documents that were made public, and formulates questions for future debate. In a first part, after evoking the Treaty framework (§ 1), the article examines the three successive proposals made by the Court of Justice (§ 2 to 4). It will then draw some lessons for judicial (§ 5) and legislative management (§ 6)[10].

Franklin DEHOUSSE
With the collaboration of Benedetta MARSICOLA[11]

[10] In November 2015, the Court of Justice presented a second legislative request to abolish the Civil Service Tribunal. This proposal will not be covered here. It contains transitory provisions which provide
- continuity in the procedure applicable to civil service litigation for so long as new specific procedural measures have been adopted. In the event of a case being transferred to the General Court after the oral part of the procedure has been closed, that part of the procedure will be reopened;
- that the General Court remains competent to hear appeals against the Civil Service Tribunal of which it has been seized as of 31 August 2016 or which are brought after that date. Where the General Court sets aside a judgment of the Civil Service Tribunal but is unable to rule on the application, it shall refer the case to a chamber of the General Court other than that which ruled on the appeal;
- as a consequence, all other appeals should be filed in the Court of Justice.

In addition, it introduces two new provisions in the Statute of the Court. One is of a technical nature and is required in order to make sure that all EU organs fall within the jurisdiction of the GC insofar as concerns civil service litigation. The other provides that all provisions as regards the jurisdiction, composition, organization and procedure of specialized courts should be contained in an annex to the Statute.

[11] F. Dehousse is professor (on sabbatical in abeyance) at the University of Liège, and judge at the General Court. Benedetta Marsicola is legal assistant in the General Court. This article is written in a strictly personal capacity. Documents are up to date as of 28 February 2016.

1. THE NEW LISBON TREATY FRAMEWORK

Article 281 of the Treaty on the Functioning of the European Union (TFEU), provides that the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may amend the provisions of the Statute of the Court of Justice (protocol n° 3 to the TFEU)[12], with certain exceptions. They may do so at the request of the Court of Justice and after consultation of the Commission, or on a proposal from the Commission after consultation of the Court of Justice[13].

The Court of Justice already had the capacity to make such a request under Article 245 TEC (Nice Treaty) and Article 188 TEC (Maastricht Treaty). However under those procedures the Statute of the Court had to be amended under the same rules as those governing amendments of the Treaties. Thus the European Parliament had no say and the Member States had to act unanimously. Post Lisbon the European Parliament is involved in the same way as any other ordinary legislative procedure, and the Council can act by a qualified majority only. Moreover, under the Nice/Maastricht procedure, all Member States could submit amendments. Post Lisbon the Court of Justice and the Commission enjoy a monopoly over the right of initiative.

The Lisbon Treaty also strengthened the three level judicial structure of the European Union[14]. The Nice Treaty had evoked the possibility of creating specialized chambers attached to the General Court. The Lisbon Treaty expressly conceives of establishing specialized courts. There were many reasons for this step as specialized courts were regarded as providing greater productivity, lower costs, a more focussed system for the appointment of judges and greater coherence of the jurisprudence. These reasons were confirmed by experience. The only specialised court is the Civil Service Tribunal (CST) instituted in 2004.[15] As emphasized by the President of the Court of Justice in 2010 at the fifth anniversary of the creation of the CST "It therefore comes as no surprise that today, after it has been in existence for five years and has disposed of some 500 cases, the report on the Tribunal is a very positive one".[16]

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12 OJ 2012, C326.

13 The architecture of the EU judicial institution, set in Article 19 of the Treaty on European Union (TUE), following the very European tradition of confusing names, provides that the Court of Justice of the European Union (CJEU) – the Institution – includes various jurisdictions: the Court of Justice (CJ), the General Court (GC) and specialised courts.

14 For more comments, see for example J.V. Louis, Le Traité de Lisbonne, JTDE 2007, pp. 289-298; R. Barents, The Court of Justice after the Treaty of Lisbon, Common Market Law Review 2010, volume 47, issue 3, pp. 709/728; S. Van der Jeught, Le Traité de Lisbonne et la Cour de justice de l'Union européenne, Journal de droit européen, 2009, n° 164, pp 297-303; D. Ruiz-Jarabo Colomer, La Cour de justice de l'Union européenne après le Traité de Lisbonne, Gazette du Palais, 19 juin 2008, n°171, pp. 23 et seq.; A. Arnull, The European Court of Justice after Lisbon, in The Treaty of Lisbon and the future of European law and policy. 2012, p. 34-54, K. Lenaerts, Challenges facing the European Court of Justice after the Treaty of Lisbon, Revista română de drept european. 3 (2010), p. 19-37.

15 Council Decision of 2 November 2004 establishing the European Union Civil Service Tribunal (2004/752/EC, Euratom), OJ, L 9.11.2004, p.7.

16 The Civil Service Tribunal (CST) 2005 – 2010, Proceedings of the Colloquium organised on the occasion of the 5th Anniversary of the CST, Luxembourg, 1 October 2010, Human Rights Law Journal, 30 June 2011 Vol. 31 No. 1.

2. THE 2011 PROPOSAL

2.1. The Court's first proposal: 12 new judges in the General Court

2.1.1. The March 2011 proposal

On 28 March 2011, the Court of Justice submitted to the Council and the Parliament a set of amendments to the Statute of the Court of Justice.[17] They concerned the three EU courts. They aimed to (a) modify the rules relating to the composition of the Grand Chamber and to establish the office of Vice-President of the Court of Justice, (b) provide for the possibility of attaching temporary judges to the specialized courts in order to substitute those judges that may be absent for a long time; and (c) add 12 new judges to the General Court[18]. This paper focusses on the proposal to increase the number of judges of the General Court[19].

The explanatory note to the proposal[20] described the reasons underlying it. For several years the number of cases ruled by the GC had been lower than the number of cases filed. This created a constant rise in the number of pending cases. It had also led to an increase in the duration of proceedings before the GC, in particular in certain classes of action which required a considerable amount of factual information to be taken into account. This development threatened the right of litigants to have their cases ruled within a reasonable time, infringing Article 6, paragraph 1 of the European Convention on Human Rights and Article 47 of the Charter of Fundamental Rights. The increase in the GC's workload was linked to the devolution to it of jurisdiction over certain classes of actions, to the 2004 and 2007 accessions to the EU, to the increase in the number and variety of legislative and regulatory acts of the EU institutions, bodies, offices and agencies, and to the increase in trademark litigation. It was considered that the number of applications would increase in the future.

According to the explanatory note, the measures already taken and the creation of the CST had not enabled the GC to reduce its backlog[21]. It was thus necessary to resort to one of the two possibilities offered by the Treaties: either to apply Article 257 TFEU and establish a new specialized court, namely covering intellectual

17 Interinstitutional file 2011/0901 (COD)

18 The legislative procedure which led to the adoption of Regulation 741/2012 is referenced with the interinstitutional file number 2011/0901A (COD), while the membership of the General Court procedure is named 2011/0901B (COD).

19 The other proposals, following a split in the legislative procedure, were adopted in Regulation 741/2012, which also provides for the election of a Vice-president in the Court of Justice and the General Court. (OJ, L 228/1)

20 See Council document 8787/11.

21 The entire legislative procedure has been marked by endless confusion between a backlog of cases and the stock of cases. On this point, see The reform of the EU courts I, pp. 13-14, and the 2015 controversy described in § 5.1.1.

property matters or to increase the number of judges of the GC, the latter possibility provided by Article 19 TEU. The Court of Justice considered that the latter solution was clearly preferable to the former on the grounds of (a) effectiveness, (b) urgency, (c) flexibility and (d) consistency.

As regards **effectiveness**, the Court pointed out that eliminating the caseload associated with trademarks would not alleviate the burden on the GC as the most complex cases would remain before it. Moreover, the GC would be required to deal with an increasing number of appeals against the decisions of such a specialized court, not to mention the possibility of being given jurisdiction to hear preliminary rulings in the intellectual property field. The Court of Justice affirmed that account should be taken of the fact that, due to the limited number of judges in a specialized court, the absence of any of one or more of them would create serious difficulties in its functioning. It also argued that, in organizational terms, it would be easier to integrate new judges into an existing structure than to create a new one. Thus appointing additional judges to the GC would be a faster solution and therefore a more appropriate response to the **urgency** of the situation [this in 2011...].

According to the Court of Justice another advantage of its proposed solution was its **flexibility** (in terms of the allocation of resources to where they are most needed) and its **reversibility**. The Court pointed out that it would be more difficult to dismantle a new court once it had come into operation [which is what is about to happen] than to reduce the number of judges by providing that certain posts lapse upon the expiry of the relevant terms of office [but it seems difficult to reverse a decision to appoint 2 judges per Member States, unless one returns to 1].

As for the **consistency** of EU law, the Court of Justice emphasised that any creation of a specialized trademark court also implied a transfer of the related preliminary ruling proceedings to the GC as provided by Article 256, paragraph 3, TFEU. However, such a transfer should only be done in exceptional circumstances; would possibly have negative repercussions on other areas, such as the law of the internal market, and would be likely to create confusion in the Member States. Moreover, the Court of Justice made the point that, were a specialized court to be put in place, trade mark applications could be subject to six levels of review.

The Court of Justice considered that the GC required 12 new judges. This increase would enable that court to absorb its backlog and facilitate a reorganization of its work by giving priority to complex cases and, possibly, by introducing specialized chambers. The Court provided no further information as to how it reached the conclusion that 12 judges was the appropriate number.

The Court stressed that it was essential that any increase in the number of judges "be accompanied at the same time by reflection on how to make the best use of all the General Court's resources, perhaps through specialization by certain chambers and flexible management of case allocation". Though perhaps unnoticed at the time, the

proposal thus argued against specialization *between* courts but in favour of specialization *within* the General Court.

2.1.2. The April 2011 Financial Analysis

One month after the presentation of the proposal, the assessment of the financial impact of the proposed amendments was presented at the request of the Council. The net budgetary impact of the addition of 12 judges to the GC was estimated at 13 647 000 euros[22].

2.1.3. The July 2011 Explanations

In a letter of 7 July 2011,[23] the Court of Justice provided further information concerning its proposal to increase the number of judges at the General Court. The letter aimed at answering questions that some of the Member States delegations had raised concerning the proposed increase[24].

The Court pointed out that the creation of a specialized intellectual property court was not a solution since the cases in this field tended to be adjudicated upon more easily and quickly, while the major challenge confronting the GC was ruling upon more complex cases in fields such as competition and state aid. It stated that, even after the creation of a specialized court, more than a thousand cases would remain pending before the GC. In addition, the costs of a specialized court would not be commensurate with those of an increase in the number of judges of the GC, since the former "would have to be equipped with a sufficient number of Members and staff for their chambers, as well as a Registry". It underlined once again that the GC would still be competent to hear appeals and that this solution would endanger the consistency of intellectual property law, which would henceforth come under the jurisdiction of three different EU courts. It would rather be desirable that a single court, the Court of Justice, retained jurisdiction to hear appeals and references for preliminary ruling. Finally, the Court underlined the greater flexibility of its proposed solution as well as its capacity of it being implemented more quickly.

Lastly, a letter of the Court's Registrar[25] to the Council dated 7 November 2011 provided further information. In particular, it concluded, first, that the number of

22 Doc. 8787/11 ADD 1

23 Doc. 12719/11

24 Working Party on Court of Justice, see: http://www.consilium.europa.eu/en/council-eu/preparatory-bodies/working-party-court-justice/.
The information is presented to be a clarification of the reasons why, "following a lengthy process of reflection involving the General Court" it was decided that increasing the number of judges would be the best solution. Simultaneously, however, the Court refused to distribute the General Court's reflection document (referenced in note 7 of the proposal) in the Council.

25 Doc. 16904/11.

cases filed had continued to rise; second, that the number of cases ruled had risen considerably, corresponding to 37% increase in productivity;, third, that the number of pending cases continued to rise, notwithstanding the GC's best endeavours. In addition, these figures took no account of applications for expedited procedure and for interim relief. The letter added that the General Court Registry had received 44000 procedural documents in 2011 and that its file cases occupied 505 linear meters.

The letter then explained various steps the GC had taken to cope with its caseload. In particular, it referred to the measures allowing it to rule without an oral procedure in intellectual property cases and to clarify the role of interveners in such cases, and to six working and organisational measures, namely: its organisation into eight chambers of three judges; monitoring of time-limits; the summary nature of Reports for the Hearing; a broad interpretation of the connection criterion in the allocation of cases among judges and new methods of drafting judgments and orders. All these actions, whilst increasing productivity, had proved insufficient.

Concerning the Commission's suggestion (see § 2.2) regarding the specialisation of chambers, the letter said that "it has been declared that specialisation of chambers must not be confused with specialisation of judges". How it is possible to have specialized chambers without specialized judges (since chambers consist of judges) was – and still is – difficult to understand. As seen below, this topic is far more complex than one might expect (see § 5.5).

2.2. The Commission's opinion (September 2011)

2.2.1. A complete approval of the Court's proposal

The Commission adopted its opinion on 30 September 2011.[26] It supported the entirety of the Court's proposal. So far as the amendments concerning the GC were concerned, the Commission considered that increasing the number of judges was the most timely solution, as the creation of a new specialized court would only produce results after a considerable lapse of time. The Commission pointed out that it was difficult to foresee the medium term effects of the establishment of a number of agencies and other developments in secondary legislation. In the light of this an increase in the number of judges was a more flexible solution.

[26] COM (2011) 596 final.

2.2.2. Need for specialization

The Commission added that it would be necessary to introduce further amendments to the Statute. In particular, some form of specialization by chamber was imperative in order to avoid an excessive fragmentation of case law and thus proposed the creation of at least two specialized chambers.

Here one can observe the beginning of a practice that would, alas, be pursued throughout this legislative process. A proposal emerges out of the blue, with important constitutional and managerial impacts and vital consequences for the appointment of judges and personnel. It is strongly supported by people who have no direct experience in the matter, without the benefit of any external consultation, beginning with the court in question, and without conducting any impact assessment (although one might have thought the Commission would know better in that domain). The Commission has relentlessly tried to micromanage some aspects of the General Court's organisation. Since the Commission is also by far the most frequent defendant in cases before the General Court, the content of its legislative positions in this domain requires very close analysis.

2.2.3. Need to protect stability

The Commission stressed the need to determine arrangements for nominating the 12 judges, which would have to be "swift and non-conflicting" (thus immediately identifying the most controversial aspect of the proposal). It pointed out the fundamental objectives to keep in mind when making these arrangements including: to ensure the most suitable and qualified candidates are nominated; to guarantee stability by requiring Member States to renew the mandate of efficient judges and, last but not least, to ensure fair representation for all national legal systems. Having admitted that pursuing all of these objectives simultaneously was far from easy when going from 28 to 40 judges and replacing between 19 and 20 judges every three years, the Commission suggested two possible models. This was the first time that the importance of the stability of the General Court was mentioned in the legislative process.

The first model attempted to ensure equality between Member States and as much stability as possible. The second model aimed at finding a balance between the representation of national systems and specialization by subject matter. To this end, half of the new judges would be selected taking account of their specialization in certain matters. Both systems were, unsurprisingly, rather complex.

2.3. The European Parliament's complex approach

The Presidency gave mandate to the Coreper to initiate negotiations with the European Parliament on the reform proposal on 7 May 2012. The legislative procedure was divided in two parts in order to progress those elements unconnected with the composition of the General Court[27].

On 5 March 2013 the European Parliament presented its Draft Report[28] on the 2011/0901/B(COD) procedure, the rapporteur being Mrs Alexandra Thein. The vote in the Legal Affairs Committee took place on 20 June 2013. The rapporteur handed in her report to the Plenary on 10 July 2013.[29] It provided that the General Court should consist of one Judge per Member State to which 12 additional judges were to be added, appointed regardless of nationality and exclusively by reference to their professional and personal suitability, with the condition that there would be no more than two judges per Member State. The amendments to the Statute tabled in the Report provided that all Member States might submit nominations and that retiring judges could also be candidates. It provided that the panel referred to in Article 255 TFEU should evaluate the candidates and shortlist at least twice as many of the number of Judges to be appointed by common accord of the Member States.

On 12 December 2013 the plenary adopted at first reading the amendments to the proposal as drafted in the Report. However, Mrs Thein proposed that the vote on the draft legislative resolution be postponed in accordance with Rule 57(2) of the EP Rules of procedure,[30] which applies when the Council substantially modifies the proposal for a legislative act. As she explained, she made such a move following a request from the Greek Presidency.[31] As the EP agreed on the postponement, the matter was deemed to have been referred back to the committee responsible for reconsideration.[32]

The longed-for first reading agreement between the Parliament and the Council did not take place.[33] Therefore, on 15 April 2014, the Parliament finally voted its legislative resolution at first reading.[34] It adopted as its position at first reading the text adopted on 12 December 2013.

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27 The Committee on legal affairs of the European Parliament presented its draft report on the fast-going part of the legislative procedure [(2011/0901A (COD)] on 29 November 2011 (PE475.771). The report was tabled for plenary on 5 June 2012; the rapporteur was Alexandra Thein (ALDE). (A7-0185/2012). The Parliament adopted its first/single reading on the first part of the proposed amendments on 5 July 2012 (P_TA(2012)0294). As mentioned above, Regulation 741/2012 was adopted on 11 August 2012.

28 PR\925895EN.doc

29 P7_TA-PROV(2013)0581

30 Available at: http://www.europarl.europa.eu/sipade/rulesleg8/Rulesleg8.EN.pdf.

31 Explanation (DE) available in EP website: http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20131212&secondRef=ITEM-012-01&language=EN&ring=A7-2013-0252.

32 See the Minutes of the meeting: http://www.europarl.europa.eu/sides/getDoc.do?type=PV&reference=20131212&secondRef=ITEM-012-01&language=EN.

33 Doc. 8509/14 (Information note).

34 P7_TA-PROV(2014)0358.

3. THE 2013 COMPROMISE: 9 ADDITIONAL JUDGES

3.1. The 2012 stalemate

A document of 15 October 2012 prepared by the Cyprus presidency,[35] acknowledged that delegations were unable to agree on the impact of the increase of the number of Judges by, respectively, 6, 9, 12 or 15 on the backlog of pending cases and the average duration of proceedings and the budgetary implications of each of these options. Some of its contents require comment.

Firstly, for the presidency, "it follows from the statistical data submitted by the Court that there is a growing gap between the number of new cases brought before the General Court and the number of cases completed" and that "the General Court is not able to handle the cases within the timeframe set by its internal timetables and deadlines". It is pointed out (eventually, the difference between pending cases and backlog was taken into consideration) that the number of pending cases does not correspond, as such, to the backlog. The pending cases were said to offer "a meaningful figure", but it was not explained how.

Secondly, the document presented calculations that had been made without identifying any precise source. These aimed to provide a rough estimation of the impact of the increase of the number of Judges on the General Court's output and on the average duration of proceedings.

Thirdly, costs were estimated for each of the hypotheses concerning the number of judges to be appointed. The document states that although the Commission had requested that the staff of all the institutions be reduced by 5% over a period of five years, the cost of not taking action on the issue of the General Court's backlog should also be taken into account. Delays caused by long proceedings were an obstacle to undertakings' efficient strategic planning. Long proceedings adversely affected legal certainty and, incidentally, the legitimacy of the Union's judicial institutions. In addition, the adverse financial consequences of inefficient justice were likely to cost more than the increase in expenditure. This argument, which the Council's Legal Service thereafter repeated relentlessly, may be depicted as an "immaculate budgetary conception": the more money you spend, the more money you gain.

[35] 14916/12, available at http://www.statewatch.org/news/2012/oct/eu-council-reform-ecj-14916-12.pdf.

3.2. The compromise proposal of 9 additional judges

From the end of 2012, some interesting ideas were introduced in the debate. A press release following the General Affairs Council of 11 December 2012[36] stated that a compromise proposed by the Cyprus presidency would involve "appointing an extra **nine** judges, with a system of designation based on two parallel systems of rotation. The six largest Member States would designate four additional judges, each judge being designated for two successive mandates, while the other Member States would designate five extra judges, each judge being designated for a single mandate. Arrangements would be made for phasing-in of judges and for the eventuality of a seat falling vacant, while the Council would review the issues of efficiency and costs."

However, the presidency concluded that an agreement on the increase on the number of judges had not been possible and that it would revive the discussion once the new Rules of Procedure of the General Court had been adopted (which ultimately occurred on 4 March 2015, entering into force on 1st July 2015).[37]

At a public hearing of the Legal Affairs Committee of the EP on 24 April 2013,[38] the Court of Justice's President Skouris and the EP rapporteur Mrs. Thein, discussed the reform. The debate's main theme was the criteria upon which the additional judges would be appointed. According to the Court's President, too much emphasis had been placed on the criterion of nationality. Three key points, in order of importance, had to be considered. First of all, the criterion of the **competence** of the candidate, understood as his knowledge of EU law, of a number of European languages, and his management skills. Second, the criterion of **stability,** emphasized by the President as paramount for the good functioning of the General Court. It was very important that political reasons would not impede the renewal of a judge's mandate. It was notorious that judges need a certain amount of time to become fully operational once appointed and that they are generally less operational in the last months of their mandate. The third criterion was **geographic balance.**

This was an important and innovative presentation. Whereas the concepts of "stability" and "management" had not appeared once in the 2011 Court's proposal, they had evidently gained in importance in the meantime. During the spring 2014 negotiation concerning modalities for the appointment of 9 additional judges, the Court had devised a clever mechanism to encourage Member States to renew their nationals by allowing them to keep one of the 9 additional positions when they renewed the same judge.

[36] Doc. 17439/12
[37] OJ L 105 of 23.4.2015, p.1
[38] See video at http://www.europarl.europa.eu/ep-live/fr/committees/video?event=20130424-0900-COMMITTEE-JURI.

The draft general budget of the EU, dated 24 June 2014,[39] stated that the discussions within the European Parliament and the Council indicated that the appointment of nine additional Judges at the GC was generally agreed, the final decision being dependent on the arrangements for the appointment and rotation of their judges.

[39] See http://eur-lex.europa.eu/budget/data/DB/2015/en/SEC04.pdf.

4. THE 2014 PROPOSAL: DOUBLING THE NUMBER OF GC JUDGES AND ABOLISHING THE CST

4.1. The proposal

On 13 October 2014, the Court of Justice sent a letter to the Council[40]. It reported that, according to the Greek Presidency, the Council would not assent to any solution involving a number of judges less than the number of Member States. It indicated that the Council had recently encountered substantial difficulties in appointing new judges to the CST[41]. It affirmed that the situation of the GC had deteriorated.

In these circumstances, the Court of Justice proposed to increase the number of judges at the GC to two per Member State, which increase was to be phased in so as to ensure that it took place in parallel with the increase in the number of new cases. In addition, the letter proposed that first instance litigation by EU civil servants be transferred to the GC, thus entailing the dissolution of the CST. It then set down three stages for its implementation. This first would see an increase in the number of judges by twelve in 2015; the second, in 2016, by seven, implying the incorporation of the civil service litigation, with a third stage consisting of the appointment of nine new judges in 2019.

That part of the letter addressing the **reasons** comprehends four sections. The first one bears the title "advantages" and describes the benefits of what is said to be a genuine reform providing structural and lasting responses to the difficulties[42]. The second section concerns the alternative option, provided by the TFEU, of establishing

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40 "Response to the invitation from the Italian Presidency of the Council to present new proposals in order to facilitate the task of securing agreement within the Council on the procedures for increasing the number of Judges at the General Court"Attached to Council document 14448/1/14, available at: http://data.consilium.europa.eu/doc/document/ST-14448-2014-REV-1/en/pdf.

41 As a matter of fact, the Member States had been unable to agree on the candidates proposed by the appointment committee created by Article 3, paragraph 3 of Annex I to Council Decision of 2 November 2004 (2004/752/EC, Euratom), OJ L 333/7 7 of 9.11.2004, p. 7-11.

42 These advantages were:
- to halt the increase in the number of pending cases by disposing of the same number of cases as the number of new cases brought
- to clear the backlog of pending cases (the statement is a very good example of the general confusion, throughout this legislative procedure, between pending cases and backlog. As will be explained later, they are not at all the same)
- to reduce the length of the proceedings thus delivering judgments within a reasonable time
- to promote consistency of case law
- to increase flexibility in the dealing of cases, namely by a workload-sensitive allocation of judges to the chambers, or by creating specialized chambers

In addition to these, in some way developed in the earlier discussions, the following additional alleged advantages of the new proposed structure were identified:
- to simplify the judicial framework of the EU (since there would be no longer 3, but 2 courts)
- to solve the difficulties in the appointment of judges
- to restore to the Court of Justice the power to rule on appeal in civil service cases, making the review procedure and the ad hoc CST Judges redundant.

a specialised court. The document explains why the Court of Justice considers that this did not constitute a viable alternative. Here too, some arguments are novel[43].

Moreover, the document points out that the creation of a plurality of specialised courts would not mitigate the problem of the representation of the Member States, as the latter would still not be in full control of the procedure of appointment due to the role of the committees evaluating the quality of candidates. The importance of this statement is that it shows clearly that the basis for this new proposal is the will of the Member States to take back the power to appoint judges. The third section adds that this solution eliminates the alleged "problem", specific to the CST of the need to appoint judges on the basis of merit and not by reference to their geographical origin. Furthermore, the Member States wanted this to happen soon. It could have been possible to introduce a progressive (and possibly conditional) addition of new judges until 2035, as the Lithuanian presidency had proposed in 2013. However no institution or Member State manifested any interest in this.

At the end of the document one finds an explanation of the estimated **costs** of the proposed reform.[44] The absence of a detailed exposition of the costs seems to reflect the difficulty of explaining how such a massive increase in the cabinets' personnel would have absolutely no impact upon the horizontal administrative services (as the trade unions later pointed out).

The status of this letter was not uncontroversial. Some considered it as containing a new proposal, others a revised one[45]. What is clear is that it was not presented as one or the other in 2014. Such an uncertainty is difficult to accept in an EU legislative procedure, especially one with constitutional consequences. There were also some observations in the European Parliament that this brand new approach, fundamentally different from that presented in 2011, had never been submitted to the national

[43] The arguments against a court specialised in intellectual property matters are repeated (the arguments in favour are not mentioned). Additionally, the specialised tribunals are presented as having structural weaknesses (which mainly consist in the inability of Member States to agree on the repartition of any number of judges less than 28).

[44] According to the Court, the costs of the first stage would amount to EUR 11.6 million in a normal year of operation, whereas an additional EUR 3.4 million would have to be taken into account in the year of establishment. Stage two would cost 2.4 million EUR per year plus EUR 1.3 million in installation expenses. The third stage would add EUR 8.9 million to the Court's budget in a normal year of operation plus another EUR 2.2 million of installation costs (provided the composition of the GC judges' chambers is unaltered). In a normal year of operation, the entire enalegement would thus cost EUR 22.9 million, an increase of 6.6% of the budget of the CJEU and 0.34% of the entire EU budget. To which a total of EUR 6.9 million of installation expenses must be added.

[45] See for example the UK Parliament's European Scrutiny Committee of 18 March 2015, available at: http://www.publications.parliament.uk/pa/cm201415/cmselect/cmeuleg/219-xxxvi/21916.htm
"The Court of Justice, in response to a request from the Greek Presidency to present new proposals on the procedures for increasing the number of General Court judges, presented the current document which was deposited with us on 5 December 2014. It envisages doubling the number of judges at the General Court to 56 in three stages, together with abolishing the Civil Service Tribunal, in order to address its significant backlog of cases. It also provides for a selection mechanism for those additional judges. This would involve amending the Statute of the Court of Justice. However, as the Government was expecting a revised proposal to be circulated, it has not yet submitted an Explanatory Memorandum. In any event, the current document, as such, does not represent a formal legislative proposal: this has yet to be published."

parliaments. The absence of formality of this special legislative procedure, especially since it concerns quasi constitutional topics, can only be deprecated.

4.2. The debate in the Council

The Italian Presidency presented, on 28 November 2014, a document called "Reform of the General Court of the European Union – Possible way forward"[46], which in substance contained the Court's proposal of 13 October 2014. The new proposal was discussed by the Working Party on the Court of justice on 7 November 2014 and at a Coreper lunch on 20 November 2014. It appeared that, while there was substantial support for the proposal, further work was still needed on the legal guarantees for putting into place the three stages of the reform, the budgetary implications, and the effects of the reform on the CJ.

4.2.1. The total primacy of giving each Member State an additional judge

A non-public document, dated 8 December 2014, with the more compelling title of "Reform of the General Court of the European Union – Way forward"[47] was addressed by the Italian presidency to the Coreper. It clearly stated the "it was impossible to overcome differences as to the method of appointment of additional Judges".

On this topic, the documents elaborated by the Legal Service of the Council are extremely curious. Sometimes, as mentioned here, the Council's Legal Service frankly acknowledges that the doubling of the judges is required purely and simply because of the inability of the Member States to agree on a smaller number. On other occasions, various other considerations (some completely new) appear, aiming obviously to provoke the opposite reaction, and to justify the doubling by reference to objective requirements (while never providing any serious analysis of the evolution of the backlog since 2011).

A number of delegations had, quite logically, insisted that the three stages be set down clearly in a legally binding text, which would also clarify the mechanism for the integration of the CST, and that there should be no more than two judges of the same nationality at the same time in the CST and the GC. The Presidency responded that this could be achieved by amending the initial proposal of 28 March 2011. In fact, there has been absolutely no legislative coordination in the Council between the

[46] Doc. 16217/14., available at: http://data.consilium.europa.eu/doc/document/ST-16217-2014-INIT/en/pdf (access to this document was initially restricted).

[47] Doc. 16576/14, available at: http://data.consilium.europa.eu/doc/document/ST-16576-2014-INIT/en/pdf (access to this document was initially restricted).

increase in the number of the GC judges and the abolition of the CST, though the topics are evidently connected.

4.2.2. The inadequacy of the Member States' budgetary approach

As to the budgetary implications of the proposal, the Italian presidency emphasised the (already mentioned) costs of non-reform. In addition, and very surprisingly, it stressed that the proposal would henceforth allow for more cases to be adjudicated upon by chambers of 5 judges or by the Grand Chamber, and for the designation of judges as Advocates General in some cases, thereby increasing the quality of the judgments. All of which elements were advanced, again, without carrying out any impact assessment and without consulting the General Court.

This completely new justification had nothing to do with budgetary considerations. At the end of 2014, the Member States could easily perceive that the General Court had eaten into the backlog without the addition of a single additional judge and this was happening precisely when they were negotiating upon a massive increase in the size of the General Court for purely political reasons. Thus the search for fresh justifications commenced. Without giving any precise explanation, the reform was now expected to address very different problems from that of resolving the General Court's backlog. Ironically, the first likely consequence of some the measures mentioned above would be to increase the length of proceedings – in complete opposition to the reform's main objective.

Furthermore, during the Coreper discussions the possibility of reducing the size of cabinets' staff at the third stage of the reform, thereby implying no additional administrative cost at that stage, began to gather momentum. In order to respond to the doubts expressed by some of the Member States delegations as to whether the proposed increase was the most cost-effective option, the December 2014 document repeated the intention to reduce the number of legal secretaries and assistants per judge at the third stage, with the aim of reducing the costs by about 25%[48]. Thus it was not excluded that, without reducing the number of judges (!), certain adjustments relating to the functioning and the administrative expenditure of the CJEU would have to be made[49]. This statement discloses that the exclusive

[48] In response to the question raised by some of the delegations on whether a GC of 56 would be necessary in 2019, the presidency explained that it is likely that by that year the total number of new cases brought before the GC will be approximately 1200. This would justify the number of 56 judges [21,4 new cases per judge per year (10, 7 per legal secretary if they are two), in 2014 it was 32,5 (10,8 per legal secretary)].

[49] The cost of the reform is presented, confirming that the gross cost of a normal year should be around EUR 22.9 million, with the net costs at EUR 18.5 million, an increase of respectively 6.6% and 6.1% of the annual budget of the Court. It is affirmed that the proposal is the least costly solution. This is hard to believe since the Council secretariat has excluded the possibility of simply increasing the legal secretaries or "lawyer administrators" (exactly what the Court of Justice had done before for itself). Since 2010, this would have been the most adequate and economical response to the urgency of resorbing the backlog (see The reform of the EU courts I, p. 19-20).

objective pursued by the Member States was to appoint more judges, whatever the costs and in disregard of the impact of that change on the General Court's efficiency. (The equal representation of national legal systems was clearly an alibi since they proposed simultaneously to abandon it through specialization).

These adjustments, as we will see, risk modifying completely the impact of the reform. The precise size of the reduction in personnel has remained unexplained until now (and, here again, was taken without conducting any impact assessment or consulting the General Court). Whatever about the clarity of the political objective, there is a remarkable absence of any managerial or administrative logic. A strong reduction in the number of personnel while simultaneously increasing the number of judges could have quite negative consequences for productivity, as evidence by the fact that in 2014 the GC had specifically asked for more personnel, rather than for more judges, as a matter of priority in order to address its backlog.

Sometime later, the press pointed out that Coreper had reached agreement on this proposal after the President of the Court of Justice had made a personal visit to members of the German government. At that time there was a group of 8 Member States in the Council, led by Germany, which had prepared a declaration to cap the increase in the number of judges to 12. According to the rules of the Court of Justice, members who intend to contact official authorities must obtain a preliminary authorization from its general meeting, the rationale for which does not require further elaboration. It was reported that the visit of the President of the Court of Justice, who also happens to be the guardian of judicial deontology, to the German government had not been authorized in advance, but only after the visit. For whatever reason, Germany's position changed soon after that visit[50].

A final section dedicated to the costs of a "non-reform" referred to the claims of four companies that had filed actions for compensation in damages based upon an alleged violation of the right to have their cases adjudicated upon within a reasonable time, which amounted to a total of around EUR 23 billion[51].

[50] All this has been described – and criticized – in detail (with document) by J. Quatremer, La justice européenne au bord de la crise de nerfs, Les coulisses de Bruxelles, 26 avril 2015. See also D. Seytre, Le Jeudi, 23 avril 2015.

[51] On this, see the comments of Judge Collins of the General Court in the European Parliament on 28 April 2015. It is quite striking that such a childish argument was seriously emphasized in the Council secretariat's document. These are mere requests for compensation. A company is free to ask for billions of euros, but this in no way means that such amounts will be awarded. An idea of the amounts that might be awarded can be gleaned from the CJEU's requests for budget credits to cover "inter alia, the fees of lawyers which the institution must pay in consideration for professional services supplied to it or as reimbursement of costs which the institution must bear in implementation of a court order, and damages." [General Budget of the European Union, section IV, Court of Justice, article 2 3 2 – Legal expenses and damages. (2016, 2015 and 2014 versions respectively)]. These sums amounted to EUR 70 000 in 2016, and EUR 20 000 in both 2015 and 2014. The outturn in 2014 was EUR 14.170,00, and in 2013 EUR 17 343,80. The Council Legal Service cannot ignore this reality, since it precisely has to deal with such applications against the Council. Nonetheless, it came back relentlessly with the perspective of a miraculous reform which would pay for itself and could in fact bring back millions of euros to the EU budget.

4.2.3. Effects of the reform on the Court of Justice

On the third aspect, the presidency's December 2014 document stated that the Court of Justice would be able to cope with the increasing number of appeals in the short term and that it could be invited to report on this aspect in 2019 in order to propose such appropriate measures as may be necessary.

One is suddenly confronted by an important consequence of the reform, which had not been previously evoked (except, curiously, by the trade unions). The doubling of the GC's judges and the suppression of the CST would inevitably lead to a rise in the number of appeals to the Court of Justice. Asked about this subject in the Council, the Court's representatives indicated that it would be necessary to introduce a filtering mechanism for these appeals. There has been until now no impact assessment of this suggestion, no costs/benefits analysis and no study as to how it might be done, though it would seem to be an inevitable consequence of the reform, at least in the longer term. This is an important feature of the EU judicial system. It could in fact transform the appeal from an instrument serving the interest of the applicant to an instrument serving only the legal preoccupations of the Court. This is certainly no minor topic, and it deserves a very serious preliminary study[52].

One of the biggest possible problems with the 2014 proposal was that it was never presented as a systemic reform, though it obviously had that characteristic. The Court of Justice, as a legislative actor, preferred to rely upon legislative "salami tactics". The global design of the proposal had never been thought through, though many elements were mentioned at some time or other (to mention a few: dissolution of CST, hostility towards specialized courts, future specialization of the GC, new system for the attribution of cases in the GC, new regime for appeals, new transfers of competence from the CJ to the GC, etc.).

4.2.4. Effects of the reform on the General Court

The Italian Presidency's document of December 2014 largely repeats the justifications for the proposal already disseminated by the Court of Justice. The proposed number of new judges was said to be justified by the significant increase of the number of new cases as compared to the situation in 2011, which led to an increase in the duration of the proceedings and associated economic costs. There is no indica-

[52] This has already been emphasized by Judge van der Woude of the General Court. "It is questionable whether the Court of Justice has the capacity to ensure a two-fold judicial protection in all of the cases to which it is confronted. (…) The Court could be forced to prioritise amongst cases and appeals from the General Court would not necessarily come at the top of its list of priorities." (M. van der Woude, In favour of effective judicial protection: A reminder of the 1988 objectives, Concurrences, 4/2014, pp. 3-4). As he concluded, a strong increase of the General Court's judges thus creates the risk to weaken effective judicial protection.

tion that the trend is going to change in the future; on the contrary, some new types of litigation have the potential to increase the number of cases before the GC[53].

It was said that the proposal would lead to an improvement in the quality of the case law. Here again, new justifications suddenly appear. In particular, the reform would allow for cases to be allocated in a way that takes better account of their importance, to allocate judges to the different chambers according to the caseload in the different areas (all this without any kind of reflection about how chambers function in practice, the requirements of stability and the legal requirement of foreseeability in the attribution of cases). The new courts structure would also reinforce the coherence of the EU judicial system as there would only be two levels of jurisdiction. In response to the remarks of some delegations, the Italian Presidency pointed out that the GC "has provided assurances that it will proceed to a profound review of its internal organization and its Rules of Procedure and submit appropriate proposals in time before the final phase of its enlargement in 2019".

These considerations raise new essential questions. Is it appropriate that the internal functioning of an EU court is defined in a legislative act? And that it stems from the initiative of one of the legislative actors? May the criteria for the attribution of cases to judges be defined by someone outside of the court seized of the cases?

4.2.5. The Council's first position

The essential elements of the reform as set out in the "Way forward" document were agreed upon in principle during a Coreper meeting on 11 December 2014.[54] However, Belgium and Austria made separate statements[55].

On 26 February 2015, the Latvian Presidency sent to the delegations a "four column document" concerning the amendments to the Statute of the Court.[56] The Council published its (Draft) Position at first reading on 12 June 2015,[57] together with a Draft

[53] An annex to the document contains some tables and technical information. First, some figures are presented on the number of case brought, closed and pending at the GC since 2007 – concluding that the increase in the number of cases closed does not enable the GC to prevent the creation of a new backlog (all this in a year when precisely the opposite was appearing).

[54] Doc. 16706/14, p.35

[55] Belgium stated that, in view of the importance of the aim pursued by the reform, it would not oppose it. Nonetheless, it would not support it either, for it thought there were more suitable means to achieve those aims. Moreover it would have been appropriate to provide for an evaluation of the then existing needs before passing to the third stage. Belgium affirmed the right to return to these issues in the light of the position taken by the Parliament in the legislative procedure.
Austria said it joined the compromise put forward by the Latvian Presidency which had now gained support, but, at the same time, expressed its expectation that the General Court will be fully involved in the implementation of this decision in its capacity as the judicial body primarily affected thereby. It also advocated finding a solution to the unresolved issue concerning the method of appointment of judges. Austria also sought an evaluation of the effects of the reform after each of the phases.

[56] Doc. 6663/15.
The columns correspond to the initial proposal; the Parliament's first reading; the agreement reached at Coreper based on the "Way forward" document; and a final one for comments.

[57] Doc. 9375/15.

Statement of the Council's Reasons[58]. The Council position provided that the Court should produce yearly reports and that assessments be made after each stage of the reform, it being understood that the number of judges would in all events remain at two per Member State[59].

The text of the Regulation to be adopted contained 10 recitals and 3 articles. Two elements deserve mention. First, there is an express provision to the effect that the third phase should not entail the appointment of further staff. It is quite bizarre to find such a provision in a regulation. Second, another provision establishes the duration of the terms of office of all of the additional judges; those whose mandate would be shorter – due to the need to replace half of the judges of the GC every three year – should be decided by drawing lots.

The Council first reading of the text of the reform was voted on 23 June, the UK voting against and Belgium and the Netherlands abstaining.[60] Together with the statements of Belgium and Germany, a statement of the Court of Justice was added to the minutes. This statement[61] contains a proposal to present yearly figures of the judicial activity of the GC, including appeals, and to suggest appropriate measures if necessary, as well as an undertaking to assess the situation after the second and third stages of the reform. In addition, the Court recalled having invited the GC to submit, before the swearing-in of the first 12 additional Judges, a proposal concerning the creation of specialized chambers and to align its internal rules on the allocation of cases to those of the Court of Justice. The draft first reading position (the text of the Regulation to be adopted) and the Draft Statement of Reasons were adopted without amendment.

Simultaneously, the Council secretariat circulated a press release (Annex III). This elaborated on the arguments previously submitted by its Legal Service. It contained many inaccuracies about the situation of the General Court, which was presented as being very worrying, while the latest available data from the General Court revealed precisely the contrary. This was later demonstrated by a document from Judge Collins of the General Court, which circulated in the European Parliament (Annex IV).

58 Doc. 9375/15 ADD1.

59 This precision is quite admirable, and reflects again the absolute primacy of doubling the number of judges whatever happens. So, even if all yearly reports and the phase assessments reflect the absence of any need to appoint additional judges, they will be appointed in any event.

60 Doc. 10043/15 ADD1.
The Belgian statement was basically the same as that of 11 December 2014. Germany, on its part, while it welcomed the reforms, said it was concerned to ensure their cost effectiveness and to minimize its significant budgetary impact. In particular, it welcomed the Court's effort to evaluate the GC's situation after each stage and the possibility to make related adjustments, and supported the commitment not to appoint further staff at third stage. Germany also invited the Court of Justice to take all appropriate measures and to give consideration, inter alia, to the possibility of introducing fees for the proceedings before the EU Courts.

61 Doc. 10043/1/15 REV 1 ADD 1.

4.3. The substantial role of the European trade unions

Activities that require the deployment of highly qualified personnel necessarily require that such personnel be properly managed[62]. This requirement is often not clearly discerned and acted upon in traditional and hierarchized structures. During this long debate, the importance of the personnel's opposition to the reform has been totally underestimated, when it has not been completely disregarded. In a rather surprising way, the European trade unions were the first observers to offer substantial comments about the Court of Justice's 2014 proposal. They also played an important role in disseminating detailed information about many topics, beginning with the September 2014 position of the General Court on the future of the EU judicial system (which until then had never been mentioned or distributed in this legislative – and even quasi-constitutional – debate). By doing so they strongly contributed to the transparency of the legislative procedure. The uncertainty surrounding the fate of the personnel of the cabinets of the General Court intensified internal conflicts both between the Court of Justice and the General Court, and between the Court of Justice and the personnel's representatives.

On 1 December 2014, EPSU/CJ, the Court of Justice section of a trade union of the European public service, issued a document titled "No to abolishing the CST – Giving in to a sweeping tide of intergovernmentalism, the Court of Justice is proposing to abolish the Civil Service Tribunal (CST). EPSU/CJ opposes that: The Institution does not need more judges, but more staff!"[63]

For the first time, it was emphasized that the Court of Justice was in fact pushing for a strongly intergovernmental approach. For EPSU/CJ, contrary to what happens in the CJ and GC, where the members depend on nominations by the Member States, the seven judges of the CST are appointed following the assessment of their individual candidatures. A selection committee draws up a list with twice as many candidates as the number of judges to be appointed, the choice being ultimately made by the Council. The document briefly explains that the Council was unable to agree to appoint a number of additional judges lower than the number of Member States. Similar difficulties had prevented the Member States from appointing judges at the CST. EPSU/CJ reproached the CJ for not having criticized the attitude of the Member States. It pointed out the curious fact that the judicial power "appointed by the executive power, which will then conveniently hide behind 'expert opinion'" has the right of legislative initiative[64]. EPSU/CJ also refuted the argument that there were

[62] The Reform of the EU Courts I, p.18-20.

[63] The note was sent to the entire staff of the Court of Justice by email and is available on the EPSU-CJ website: http://epsu-cj.lu/wp-content/uploads/2014/12/2014-11_TFP_tract_EN.pdf.

[64] The note also argued that there was no legal basis for the abolition of the CST, as Article 257 TFUE provides for the establishment of a specialized court, not for its abolition. This reasoning seems somewhat doubtful, since both paths are open for the legislative authorities. On the other hand, there is no legal basis for creating specialized chambers dealing with civil service litigation in the General Court.

no alternatives to the CJ's solution and recalled that the GC had pointed to more efficient and economic alternatives.

EPSU/CJ also emphasized the risk to the quality of the existing caselaw of the CST. According to EPSU/CJ, chambers specialized in civil service litigation that might be created under the reform would "look like a poor relative" within a jurisdiction principally engaged with cases touching on economic and financial matters with high stakes. Moreover GC judges would no longer be appointed by reference to any specialization in the field of civil service law. As for the fate of appeals before the CJ, EPSU/CJ pointed out that measures to dispose of these summarily were already under consideration (increased use of reasoned orders, processing of elements of appeals by the Research and Documentation Directorate, the possible introduction of filtering mechanisms)[65].

EPSU/CJ concluded that any increase in the number of judges would not help speed up the course of proceedings were it not accompanied by an increase in the number of staff in the services, principally translators, an issue that was neglected. Given the reluctance of the Member States to provide such additional resources, the services would be faced with a significant increase in workload without a concomitant increase in human resources.

A revised version of the note was published on the Agora Magazine of March 2015, number 73, signed by M Sklias, EPSU/CJ President.[66] In addition to what is described above, it emphasised the misinterpretation of Article 257 TFEU, which the President of the Court of Justice had expressly denounced as "a bad Treaty provision"[67]. Finally, it pointed out that the reform would lead to a waste of money and that common sense would support the opposite solution to that proposed by the CJ: to increase the number of legal secretaries and staff instead of increasing the number of judges and reducing their staff or, in the alternative, to create a specialized intellectual property court. This was the first occasion on which it was affirmed publically that the Court of Justice had chosen to promote the costliest of the options available.

A Declaration by the Staff Committee[68] of the Court of Justice against the reform, of 5 May 2015 (also available on the intranet site of the Staff Committee) added other elements. It mentioned that the 2004 enlargement had shown that a sharp increase

65 Some elements had already been mentioned in M. van der Woude, In favour of effective judicial protection: A reminder of the 1988 objectives, Concurrences, 4/2014, p. 4.

66 Available at: http://epsu-cj.lu/wp-content/uploads/2015/04/2015-02_TFP_Agora_EN.pdf.

67 This refers to a testimony given by Judge Azizi in his speech on the occasion of his departure from the General Court, where he mentioned what had been said by the CJ's president during a visit in the General Court. For Judge Azizi, it was problematic to hear such criticism from the first representative of the institution charged with the Treaty's correct implementation (see D. Seytre, Le coup d'éclat de Josef Azizi, Le Jeudi, 16 septembre 2013).

68 The Staff Committee is a collegiate body set up under the Staff Regulations (Article 9) and currently composed of 13 members elected by the staff of the Court of Justice, with the function of representing the staff before the institution.

in the number of judges creates organisational problems. Moreover there was a risk that appeals before the Court of Justice would be treated in a rushed fashion through greater recourse to orders, filtering mechanisms etc. Finally, employing more legal secretaries and assistants was a more rapid and flexible measure to deal with current circumstances which could be adapted as required.

The Union Syndicale Fédérale also opposed the reform. It issued a Resolution[69] at its congress in Dubrovnik on 1-3 May 2015. This Resolution put forward a new argument to the effect that the disproportionate increase in the number of judges, together with the reduction of the staff of each judge's chambers, would adversely affect productivity and waste public funds. The Congress invited the EP to reject the proposal and to consider adopting the solution proposed by the General Court in the document "The Future of the Judicial System of the European Union".

On 9 July 2015 the Union Syndicale Fédérale (USF) addressed a letter[70] to the President of the European Parliament, its Legal Affairs Committee and the Presidents of its Political Groups. It expressed its surprise on learning that, after the Council first reading position of June, the EP would be asked to express its position in second reading. This was because there was a huge difference both in quantitative but particularly in qualitative terms between the first proposal as approved by the EP in 2011 and the one now put before it in 2015. The letter stated that it was perfectly clear that the 2015 proposal is a new one, thereby necessitating the initiation of a fresh procedure. USF also found it embarrassing that the Court of Justice had proposed a reform in the teeth of opposition from the court that was directly concerned by the proposal.

As to the budgetary implications, the letter stated that the reform would constitute a waste of public money at a time when the working conditions of the staff of the institution were being degraded. The Court of Justice required additional staff, to be shared across the institution in a proportionate and flexible way. (This was the first time that it was explained that the backlog problem could in fact find its origin in an inadequate distribution of personnel in the institution.) A rapid increase of the Judges/staff ratio would create bottlenecks in the various support services, notably translation. This would give rise to precisely the same difficulties that the reform was supposedly designed to address: the excessive length of procedures.

69 Available at: http://www.google.be/url?url=http://www.unionsyndicale.eu/index.php/fr/us-federale/tisa/doc_download/494-resolution-delegations-usf-congres-dubrovnik-2015&rct=j&frm=1&q=&esrc=s&sa=U&ved=0ahUKEwiM9_CR16HKAhUEaQ8KHUuQBGUQFggfMAI&usg=AFQjCNFwD-6Se_RaYUiJHrcriNeQA-PYchQ.

70 Available at: http://www.google.be/url?url=http://unionsyndicale.eu/index.php/en/us-federale/reform-of-the-court-of-justice/doc_download/476-letter-usf-reformm-cst&rct=j&frm=1&q=&esrc=s&sa=U&ved=0ahUKEwjGjvrJ2aHKAhXD1A4KHQ4bBNoQFggVMAA&usg=AFQjCNGuGMP1pRjBk7ZhsNZWCdnhzCmZAA.

4.4. The debate in the European Parliament

As opposed to 2013, on this occasion the debate in the European Parliament was much more acrid than it had been in the Council. The stakes involved in the third proposal were, of course, much greater (adding 28 judges to the GC, abolition of the CST). The volume of resources required was considerably greater. The proposal's constitutional impact was also much more substantial (creating a judicial system of two layers instead of a three, abandoning the system for the independent appointment of judges). The new rapporteur, Mr. Marinho e Pinto MEP and the Legal Affairs Committee began to ask for additional information repeatedly. Progressively, parliamentary questions began to be tabled.

Finally, thanks to the trade unions, it became known in the Parliament (quite late in the day since until then it had not been indicated in any official document) that the General Court had adopted a position paper. The President of the General Court and a number of its judges were invited to provide additional information. This invitation provoked a huge controversy. Finally, the Court of Justice's management of the legislative process provoked some innovative (and generally negative) comments in the media.

4.4.1. The late appearance of the General Court's opinion

As revealed by the press, in December 2014, the President of the General Court, Judge M. Jaeger sent a letter to the Italian Presidency of the Council. This letter stated in terms that, for the General Court, the doubling of its judges was an inappropriate solution, and that there were more economical ways to liquidate its backlog. ("There are more appropriate, more effective and less onerous means by which to strengthen the General Court and to achieve better and even faster outcome for litigants.")[71].

The dispatch of this letter provoked a very strong reaction from the President of the Court of Justice, Judge V. Skouris. In a letter of February 2015, he affirmed that, since it had not been submitted for his prior authorisation, the transmission by the General Court of its opinion to the Council violated EU Treaties. "As punishment for their insubordination, Skouris has hit the judges in the General Court where it hurts: by reducing their staff. When the final batch of new judges comes in 2019, the General Court will not get a corresponding number of extra clerks or assistants."[72] Thus it appears the Court of Justice's president ratified the budgetary restriction designed

[71] D. Robinson, European Court of Justice doubles number of judges, Financial Times, Brussels blog, 12 April 2015.

[72] All of these elements of information, together with an informal English translation of the documents, were contained in a long article by D. Robinson (The 1st rule of the ECJ fight club…is about to be broken, Financial Times Brussels blog, 27/4/2015).

by the Member States as a means to reduce costs as a deontological sanction for what he perceived as a breach of the rules by the General Court.

This raises many new questions from an institutional perspective. (1°) What is the legal basis for such a sanction? (2°) Does the simple transmission of a simple opinion to the legislative authorities violate the Treaties? (3°) What is the institution's interest in endorsing a budgetary restriction? (4°) What is the managerial logic of approving a reduction of personnel without knowing what the workload will be in 2019? (5°) Does it make sense to increase the number of judges and to decrease the number of their collaborators if the objective of the proposal is to increase production? And, finally, (6°) can one defend the imposition of budgetary restrictions against the personnel in order to sanction an alleged breach of deontological rules by judges?

4.4.2. Some parliamentary questions

A number of parliamentary questions were asked about the "reform" of the General Court.

On 6 February 2015, Mr Marinho e Pinto MEP addressed a question to the Council,[73] whereby he asked why the Court of Justice had not participated in the CEPEJ (European Commission for the Efficiency of Justice) study on the efficiency of justice, pointing out that the Court of Justice had not carried out any cost-cutting impact study or ex-ante assessment of the budgetary repercussions of its legislative proposal.

The Council answered that the CEPEJ was established under the auspices of the Council of Europe, of which the EU is not a member. It stated that the reasons underlying the existence of the backlog of pending cases (again perpetuating the confusion between the two concepts) before the General Court had been analysed in detail, and the Court of Justice had demonstrated and explained repeatedly to both branches of the legislature the necessity for an in-depth reform of the General Court. The Council went on to list the justifications for the proposal.

Mr Marinho e Pinto then addressed a similar question[74] to the Commission, in particular concerning the new part of the proposal entailing the abolition of the CST. He asked whether that institution had been consulted on this new proposal; if it could be confirmed that no ex-ante impact study had been carried out as regards its budgetary and legal consequences; and what was the legal basis for the abolition of the CST, since Article 257 TFEU provides for the creation, and not the abolition, of specialized courts.

[73] P-002022-15
[74] E-004583-15

The Commission replied that since the 2014 document does not constitute a legislative proposal, it did not adopt a new opinion. The issue of the ex-ante assessment should have been addressed to the Court of Justice. Finally, the Commission affirmed that the legislator is entitled, on the basis of Article 257 TFEU, to amend or repeal the decision establishing the CST.

On 5 April 2015, Ms. Marie-Christine Boutonnet MEP and Mr. Gilles Lebreton MEP asked the Council to provide information upon the letter, mentioned at the meeting of the Committee on Legal Affairs on 23 April 2015, in which the General Court had expressed to the Italian Presidency of the Council its opposition to the proposed reform. The Council, after a brief description of the historic background, replied that on 9 December 2014 the President of Coreper received a letter from the President of the GC expressing that court's disagreement with the proposed reform. That letter was said to have been agreed at the GC's plenary conference of 8 December 2014, but there was no indication whether it had been approved by all of the judges present (curiously the Council's Legal Service had raised no such concern with regard to the adoption of the Court's proposal). Reference was made to that letter, of which the delegations were already aware, at the Coreper meeting. The Council added that debates within the institutions are internal questions in the exercise of their competences. Therefore, the Council acted on the basis of the proposal presented by the competent institutions according to Article 281 TFEU.

In its answer to a question from Mr. Louis Michel MEP the Commission stated that Article 257 provides a legal basis to abolish the CST and that it supported the proposal to increase the number of judges based on the reasons set forth in its 2011 opinion. The Council answered a question from Mr. Jozo Rados MEP that the reasons for and assessments behind the increase in the number of judges can be found in its statement of reasons. It added that the cost of each new cabinet at cruising speed would be roughly EUR 483 000 per year and not EUR 1 000 000.

These questions also raised some technical issues. Was the 2014 letter from the CJEU to the Council a revised proposal? Or a new proposal? Should national parliaments been consulted on the doubling of the GC and the abolition of the CST, which had never been mentioned before 2014? It would be important to settle such matters for the future.

4.4.3. The parliamentary invitation to some General Court members

In April 2015, some members of the General Court were invited by members of the Legal Affairs Committee of the European Parliament to assist it in collecting information on the legislative proposal. The President of the General Court was asked to comment on the Court's September 2014 position paper on the future of the EU

judicial system. Four other members were asked as individual experts to explain their public comments about alternative reforms. All five were invited to a discussion with the rapporteurs appointed by the political groups in the Legal Affairs Committee. This was an unusual format in that it was an official meeting at which the full committee did not attend but rather the rapporteurs only, which format appears to have been designed as a result of some form of compromise. This compromise was not, however, deemed satisfactory by some of the parties involved. As revealed at the time by the press (which published different letters), this invitation provoked some strong opposition from inside the Court of Justice.

First, the Court of Justice's President wrote to the President of the Legal Affairs Committee to state that any judge, from any court, even one invited by the Parliament in his/her capacity as an individual expert, had to obtain his prior authorization. Moreover he was adamantly opposed to the presence of any other judge other than the President of the General Court[75].

Second, after having asked to be heard by the Council in December 2014, the President of the General Court sent a letter to the rapporteur, Mr Marinho e Pinto MEP, declining his invitation to address the Legal Affairs Committee. He did so because he had not been invited alone and had not been simultaneously informed that a number of his colleagues had been invited to attend together with him[76].

After the Court of Justice's President had asked to be invited, while simultaneously opposing the invitation of other judges, the President of the Legal Affairs Committee then sent a new invitation to both the President of the Court of justice and the President of the General Court, while leaving in place the invitation to the four other members of the General Court. For this reason, the Court of Justice's President declined to accept this new invitation he had asked for. The President of the General Court, who had refused the earlier invitation, now decided to accept it. On 28 April 2015, the semi-informal hearing took place[77].

[75] Mr Skouris insisted only he, and not the European Parliament, could decide who may testify before the Parliament and that Mr Marinho e Punto's invitation should be ignored. "I hear however that other people in other capacities have been asked to attend the meeting as well, this being likely to fundamentally alter the nature of the meeting. For the moment, I am inclined to consider that your letter supersedes any previous invitation and that it is for me to suggest the presence, if any, of other Members of the Court of Justice and the General Court" (Financial Times, 27/4/2015.)

[76] Ibid.

[77] This meeting has also been covered by EU observer (https://euobserver.com/justice/128508, 29 April 2015).
The four judges invited as individual experts presented a document "Doubling the General Court's judges: why progressive, reversible and more economical solutions are far better*". (https://www.idmarch.org).*

4.4.4. The new debate about the reality of the backlog

On 17 June 2015, the Council approved its final position. On the same day, the EP rapporteur sent a press release (see § 4.4.6.). He also distributed widely a bundle of documents to all CJEU members and personnel. In this bundle were two new documents which purported to describe the state of the GC's backlog. The first purported to emanate from the Court of Justice. However it was undated, unsigned, unnumbered, and lacked any cover letter. According to this document the backlog problem was extremely grave (Annex I). The second document, addressing the same issue, explained that the Court was wide off the mark, that the backlog had been significantly reduced and that the urgency with which the proposal was being pursued was no longer justified (Annex II). At the next meeting of the Legal Affairs Committee, the rapporteur commented that evidently some people were lying in the course of the legislative procedure. Thanks to the press, the origin of these documents was ultimately revealed[78].

The first of these documents was a completely unpublicized document of the Court of Justice, which seems to have been distributed in the European Parliament after the 28 April 2015 hearing. No official information has ever been provided about the source and status of this document. The second document emanated from Judge Berardis of the General Court, who had been asked by the rapporteur to provide a detailed analysis of the contents of the first document. A few weeks later, Judge Berardis was summonsed to appear before a "code of conduct committee convened by the President of the Court of Justice". The precise legal basis of this procedure has neither been indicated nor established. It was not explained either how the communication of statistical data in the framework of a legislative procedure, at the request of an EP rapporteur, could give rise to a deontological problem. The final result of the procedure has remained unknown[79].

[78] "Marinho e Pinto sent two documents to all members of the Court of Justice on June 17. The documents, one of which includes the Court of Justice's logo but no signature, described how the trend of the past seven years has seen an "inexorable increase" in the number of pending cases. This document, which argued for a "structural reform" of the General Court, was sent to Marinho e Pinto. A second document, drafted by General Court Judge Guido Berardis (at the request of the EP's rapporteur), took strongly issue with the court's presentation of the trends, arguing that the backlog must be distinguished from the court's workload. The number of pending cases has remained largely steady in the past five years, rising to 1,293 in 2015 from 1,249 in 2011, the year the court proposed the increase in the number of judges, according to the document. (President Skouris) has asked the court's code-of-conduct committee to look into Berardis's involvement in the second document, which was sent to Marinho e Pinto following the parliamentarian's request for clarifications and the court's figures. Berardis said in a letter to Skouris that he acted in good faith and in the interest of clarifying information on the General Court's activities. In the letter, sent on June 26, he said the court's description of the General Court's situation was "very negative" and based on a "host of inaccuracies." Marinho a Pinto said he wanted to get to the bottom of these conflicting scenarios. "The president has said one thing and the judges at the General Court have said another," he said. "I want to know if someone is telling lies." (M. Newman, European Parliament, Court of Justice presidents meet amid dispute over court overhaul, MLex, 30 June 2015).

[79] See M. Newman, EU judge escapes disciplinary procedure following questions over court-revamp plan, MLex 15 July 2015. "The spokesman said there had been a 'fruitful exchange' of views. 'There is no disciplinary procedure *for the moment* (emphasis added),' he said."

4.4.5. The EP rapporteur's analysis

The rapporteur's analysis was presented for the first time on 17 June 2015, when the Council adopted its first reading. He also circulated a press release, which was distributed in the EU institutions, notably in the CJEU. This provoked a new clash between the rapporteur and the CJ's president. President Skouris wrote a secret letter of complaint about it to the Parliament's President Schultz, which ultimately appeared in the press[80]. According to the press, the Court of Justice's President even asked for the dismissal of the rapporteur[81].

The rapporteur's press release was strongly critical of the proposal. More than the trade unions' position, it was the first detailed counter-argument against the reasons given by the Court for its 2014 proposal[82]. It is thus interesting to make a detailed comparison between their analyses.

> *"Since 2013 the productivity of the General Court has increased remarkably (702 cases closed in 2013 as compared with 814 in 2014). At the same time, the surge in the number of cases filed in the General Court in 2014 has not been repeated in 2015. Thus in 2015 the number of cases pending before the General Court is falling and the average duration of cases before it has been reduced to less than 2 years. It may be observed that, notwithstanding requests by me to clarify the point, the CJEU has consistently refused to identify what is the General Court's stock of cases (i.e. those that it is working on or can work on) as distinct from its backlog (those cases that it ought to be working on but cannot due to want of resources). Nevertheless the backlog that had built up in the General Court by 2011 appears to have been tackled and should have substantially disappeared by the end of this year. It must be pointed out that this improvement has taken place without the addition of a single additional judge. In any event at present the number of cases filed in all of the three courts is falling whilst the number of cases decided by these same courts is increasing.*
>
> *In the light of these largely uncontested figures, which show that the General Court is well on the way to managing its caseload in an acceptable manner, the necessity for adding 28 new judges to the General Court and abolishing the Civil Service Tribunal (which is acknowledged to have functioned well since its establishment in 2005 at the instance of the CJEU) must be questioned very seriously. As such the proposed reform would be a wholly disproportionate response to such challenges as may confront the General Court, involving as it does a very considerable increase in annual expenditure at a time for what continues for many to be one of severe financial crisis.*

[80] D. Robinson, ECJ Fight Club: EU's top judge complains about MEP, FT Brussels Blog, 30 June 2015.
[81] D. Seytre, Un député content de lui, Le Jeudi, 28 mai 2015.
[82] See § 4.1.

Moreover these facts also show there is no urgent need to reform the General Court. This absence of urgency should give the legislature and the people it represents time and space in which to reflect on the nature and structure of a court system fashioned to meet the needs of EU citizens in the 21st Century. This is all the more necessary where what is now being proposed is no less than a radical overhaul of the existing structure as conceived by the Nice Treaty. Indeed many of the consequences of the current proposal remain to be fully explained or even disclosed. For instance the CJEU states that the reform is contingent upon the abolition of the Civil Service Tribunal, yet no details of that proposal have been put to Parliament. The CJEU has indicated that its proposal will lead to limitations upon the right to appeal without providing any detail as to what precisely it has in mind. By way of a press release circulated in late April 2015, the CJEU announced for the first time that the proposal was now justified by plans to transfer jurisdiction to the General Court, again without providing any detail. Parliament is thus being left in the dark as to the how's and whys of the CJEU's proposal.

So far as the General Court may require additional resources to address any perceived difficulties with its performance, experience has shown that targeted increases of personnel at the level of legal secretaries, registry staff and in the translation service (the latter which the CJEU's proposal does not address, notwithstanding that almost 90% of the General Court's judgments must be translated from French), give better results, are cheaper and are reversible, in contrast to the abolition of a court and the nomination of 28 (far more expensive) judges. Moreover, absent any assessment of the impact of this proposal for the operation of the General Court, it is difficult to understand how doubling the number of judges will not reduce, rather than improve, its efficacy and productivity.

In reality the CJEU is asking Parliament to make a huge leap in the dark by adopting what are very costly, radical and irreversible measures without giving any clear lead as to their consequences. Mere declarations about increases in the number of cases filed (which is not consistent with the present trend) or about delays in the duration of proceedings (which have fallen dramatically) are no substitutes for careful analysis, backed up by facts. This is all the more since the appointment of 28 new judges and their cabinets – each costing a €1M per year – in the absence of a clear, objective justification, is in my opinion no more and no less than a mismanagement of public funds at a time of economic stringency, which can only damage the image of the European Union in the eyes of its citizens."

4.4.6. The most contradictory approach of the EP concerning the abolition of the CST

The European Parliament was keenly aware of the technical and budgetary advantages of specialized courts. In its resolution of 29 April 2015 on the decision on the discharge of the Court of Justice's 2013 budget, it noted that "in 2013, the Civil Service Tribunal completed 184 cases, as against 121 in 2012 (i.e. an increase of 52%), thus reducing the number of pending cases by 24 (i.e. a decrease of its backlog by 11%); believes that the elimination of the Civil Service Tribunal is an inadequate solution to face the Council's long lasting blockage"[83].

Additionally, in its amendments on the Court's proposal, the Parliament proposed to re-introduce a number of the features of the appointment process for judges to the CST into the procedure for appointment to the GC. It nevertheless approved the proposal without these amendments, thus going completely in the opposite direction. By so doing it followed the Commission and the Council. In a surprising chorus, all of the EU institutions and Member States involved emphasised thus the benefits of specialization while simultaneously abolishing the only specialized EU court…

4.5. Some new comments in the media

From autumn 2014, leaks from various institutions revealed mounting conflicts both inside and outside the CJEU. They showed opposition between the Court of Justice and the General Court, between the Court of Justice's top managers and the personnel representatives, and between the EP rapporteur and the Court of Justice's President. The Court's 2014 proposal to double the number of General Court judges was clearly far more controversial than its predecessors.

4.5.1. On the Court's proposal

Press comments of the Court's proposal to double the judges of the General Court were mostly negative, probably influenced in part by the press releases of the EP Rapporteur[84]. The 28 April 2014 and 17 June 2015 releases conveyed a clear message. To be fair, it is not easy to justify a strategy when urgency is not evident anymore, an impact assessment has not been made, consultations have not taken place, inflexibility is total, and it involves considerable additional costs.

Typical was D. Hodson's comment about the measure's absence of proportionality. "Doubling the number of judges at a stroke is not the answer during periods of austerity and financial difficulties of Member States. It is the easy solution but not a

[83] OJ L 2015 L 255/118 (§ 8).

[84] For a rare positive comment (on the substance, not the process), see S. Peers's EU Law Analysis blog, 23 November 2014. The title however is very moderately enthusiastic: Politicians 1 – Judicial Architects 0.

justifiable answer. The CJEU should find creative solutions just as family justice systems around Europe have had to do in these past few years. It may find that it is a very good discipline and that out of necessity may well come better arrangements."[85]

D. Hodson's statement is very representative. Since the financial crisis in 2008, national justice departments in all Member States have been subject to drastic cutbacks, reductions in personnel and/or salaries by up to 5, 10 or 20%. In such a context, doubling the membership of a court at the EU level without the strongest of motives was bound to provoke negative comments, both against the Court of Justice and possibly against the entire EU system.

4.5.2. On the Court's management of the proposal

Moreover, the succession of events opened – for the first time in its history – a more general debate about the management of the Court of Justice. In a long blog article, J. Quatremer described for the first time the institution's general management as quite autocratic. According to him, because of a mix of rules and practices, the president of the Court of Justice enjoyed a large degree of unrestrained power. His interventions in the administrative and legislative fields were almost never contested by his colleagues in the Court due in part to his wide discretion in the distribution of judicial cases to judges[86]. By coincidence almost simultaneously the European Parliament voiced a similar concern. In a resolution of 29 April 2015, it recommended "that the institution be reorganised in such a way as to make a clearer separation between legal and administrative functions, thus bringing the setup more closely in line with Article 6 of the European Convention on Human Rights so that judges no longer run the risk of having to rule on appeals against acts in which their authorities have been directly involved"[87].

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85 Available at: http://dev.davidhodson.com/news/how-many-european-judges-does-it-take-to, 7 May 2015.

86 J. Quatremer, La justice européenne au bord de la crise de nerfs, Libération, Coulisses de Bruxelles, 26 avril 2015 (mise à jour 30 avril 2015).

87 The need for a greater separation between functions may also concern the introduction of appeals by the Court of Justice before itself. After the CJ's three judgments of 26 November 2013 in Gascogne Sack Deutschland, (C-40/12 P) Groupe Gascogne (C-58/12 P) and Kendrion (C-50/12 P), applications for compensation of losses allegedly sustained by reason of delays in proceedings before the GC were filed in the GC. (T-577/14 and T-479/14). The CJ pleaded that the action in T-479/14 was inadmissible since the Commission, rather than the Court of Justice, ought to have been impleaded as the defendant. By order of 6 January 2015, the GC rejected this plea, holding that the Court of Justice had been correctly impleaded as defendant. This order was appealed by the CJ in front…of the CJ (C-71/15 P) mainly on the grounds that the principle of good administration of justice and independence and impartiality required that the Commission act as defendant. On 30 October 2015 the CJ (as appellant) declared it would withdraw the appeal, which was struck from the register of the Court of Justice 18 December 2015. It would be preferable, for the sake of plaintiffs, to formalize the introduction of such an exceptional procedure. The abolition of the appeal role of the General Court risks increasing this problem.
On this episode, see for example A.P. van der Mei, Court of Justice of the European Union brings an appeal before the Court of Justice!, 16 April 2015.

D. Sarmiento, in a subtle analysis, concluded that the tensions generated by the proposal were due to the fact that the President of the Court of Justice was trying to impose a constitutional reform by stealth and through an autocratic process[88]. He summarised: "the objection was (and is) not based on the *legality* of the reform, but on the means and procedures used, which, I believe, do not reflect the importance of the measures being taken"[89]. This was also underlined by A. Alemanno and L. Pech. For them, "one may deplore the top-down, not to say authoritarian, approach adopted by the President of the Court, which suggests a deliberate attempt to avoid any meaningful discussion of reasonable alternative proposals, such as the establishment of specialised courts with jurisdiction to hear and determine direct actions in a specific area. The Court of Justice's proposal also marks a shift away from the principle of specialisation – endorsed by the Masters of the Treaties and set to materialise into the creation of subsequent specialised chambers, such as in trademark litigation (representing around 1/3 of the General Court's workload) – towards a generalist jurisdiction made up of two judges per each Member State."[90]

For S. Peers, "there are profound problems with Skouris' approach. First and foremost, his response has become the story (it's also been covered elsewhere). This diverts attention from the pros and cons of the argument for CJEU reform. (...) Secondly, Skouris' angry letters give the impression that the CJEU is an authoritarian institution[91]. The CJEU is a public body, in a political system whose legitimacy is clearly fragile. These attempts to silence dissent surely damage the Court's authority more than the dissent itself would. Anyway, they gave that dissent far more publicity than it would otherwise have had".

S. Peers' blog was also the forum for one fascinating development. As Peers narrates, after the publication of the insightful paper from Alemanno and Pech, the blog "received an anonymous comment which mixed snide personal comments about one of those authors with a reasonable counter-argument against their critique (I don't know whether or not the commenter is linked to the Court). I didn't publish that comment at the time because of the nasty personal comments. After some thought, I have decided to extract the more reasonable part of those comments and present them here, so that we can move back to debating the merits."[92] It is telling

88 Despite our differences (accessed 30 June 2015). The post has since disappeared from the blog. Despite queries and quotes, it has not reappeared.

89 Despite our differences, 15 December 2015.

90 Reform of the EU's Court System: Why a more accountable – not a larger – Court is the way forward (http://europeanlawblog.eu/?p=2802#sthash.v1k63fro.dpuf 30 June 2015).

91 Peers adds: "Certainly, any ordinary employer would not take kindly to public criticism of its policy by its staff. For instance, if (entirely hypothetically) I had objections to the management of the University of Essex, I would not air them in a public forum." This analogy seems inadequate. General Court judges are not members of the staff of the Court of Justice, let alone of its President's staff. Furthermore, the General Court has jurisdiction to decide applications challenging ... administrative and legislative acts of the Court of Justice. A hierarchical relationship between the General Court and the Court of Justice, let alone their respective memberships, is thus unthinkable.

92 "Don't mention the extra judges!" When CJEU reform turns into farce" (accessed 07.12.2015).

that some of the most detailed debate concerning the respective approaches of the two Courts finally took place following an anonymous comment posted on an academic blog.

All this had already been very well synthetized by Peter Drucker a long time ago. Great leaders organize dissent. This is one of the essential differences between participative management and authoritarian management. "Decisions of the kind the executive has to make are not made well by acclamation. They are made well only if based on the clash of conflicting views, the dialogue between different points of view, the choice between different judgments. The first rule in decision making is that one does not make a decision unless there is disagreement. (…) A decision without an alternative is a desperate gambler's throw, no matter how carefully thought through it might be. Above all, disagreement is needed to stimulate the imagination."[93]

M. Abenaim described in a detailed way the comparative merits of adding more judges or more legal secretaries (référendaires). "There was a much easier way out though: adding 28 *référendaires* instead of 28 judges. This would have been the "*most cost-effective*" approach for two reasons. First, in terms of effectiveness, *référendaires* are those whose impact on quantity is the highest because they focus on the most time-consuming tasks: they prepare the work for their judges, under their supervision, and judges decide on that basis. Increasing the number of *référendaires* thus appears as the most evident solution to quantitative issues. Second, in terms of costs, while a whole cabinet costs around EUR 0.82 million per year, a *référendaire* costs a bit more than EUR 100.000 per year, *i.e.*, about eight times less. Increasing the number of *référendaires* would have also been less disruptive for the organization of the General Court. This approach would (also) have required no other transition than the time needed to recruit and appoint the new *référendaires*, a matter of a few months without any impact on pending cases. By way of contrast, the appointment of additional judges requires Member States to propose their candidates, the Article 255 committee to review their suitability for the function and then the Council to appoint them … or restart the whole process"[94]. This was the author's conclusion in 2011. Moreover, the management costs of coordinating 56 judges in a court of generalists have been substantially underestimated.

4.5.3. On the other EU institutions' management of the proposal

Some observers also criticized the Member States' inability to agree on appointments to the CST and on judicial appointments generally. This paralysis was also an important element, and was rightly seen as a symbol of a general inability to manage

[93] P. Drucker, Management: Tasks, Responsibilities, Practice, Harper & Row, 1973, p. 111.

[94] Follow-Up Note on Another Missed Opportunity for the Administration of Justice Across Europe, 16 December 2014.

the institutions in the post-enlargement context. As D. Robinson emphasized, "the fudge over judicial appointments is another example of the EU's apparent inability to adapt its institutions as its membership and responsibilities expand"[95].

This is a very valid observation. In fact, parallels can be drawn between what happened to the General Court and the composition of the European Commission after the conclusion of the Nice Treaty, where the Member States were unable to agree on reducing the size of the Commission[96]. This has led to an obese Commission of 28 members, in which it is impossible to find enough substantive work for every member to carry out[97]. The doubling of the General Court risks now contaminating the EU judicial system with the same disease.

Moreover, the thirst to make appointments so consumed the Member States that their inability to agree on the appointment of new judges to the CST since 2014 metamorphosed suddenly into a wish to appoint three new judges in January 2016. After completely neglecting the interests of the CST by not nominating new members when it was functioning as a court, the Member States decided to nominate new judges just when it had effectively ceased to function as a prelude to its dissolution[98]. The appointment of new judges and the conferral of new rights on individuals at the taxpayer's expense without those individuals being required to exercise any real judicial activity, seems to be an extravagant means of changing the nationality of the new judges to be appointed to the General Court during the second phase of the reform[99].

The absence of analysis in depth on the part of all of the institutions in this debate was also criticized. Obviously, neither the Council nor the Parliament were eager to deepen their analyses. This was especially the case since the preferences of the Council and the Court had some quite expensive consequences. For J. Quatremer, "citizens often wonder how the European Union manages to create complex, costly, and often illegitimate hot air machines. From this point of view, the reform of the Court offers a true lesson in how not to do this"[100].

The President of the European Parliament also made a number of important interventions in the process. The presence of no less than four members of his cabinet during the trilogue in July 2015 was noteworthy. It later emerged that President

95 D. Robinson, European Court of Justice doubles number of judges FT Brussels blog, 12 April 2015.

96 See J.P. Jacqué, Droit institutionnel de l'Union européenne, 7th ed., 2012, pp. 372-376.

97 For a recent illustration, see T. Palmeri, A commissioner's work habits prompt staff upheaval, Politico, 12 October 2015.

98 See Council Docs. 15454/15 and 15467/15.
A written procedure was opened on 8 March 2016 (Council Doc. 6735/16).

99 This only increases the legal uncertainties surrounding the fate of the judges of the CST who will not have finished their mandate at the time of its abolition and are not appointed to the GC. Curiously, this question was not resolved in the proposal to abolish the CST.

100 J. Quatremer, Les coulisses de Bruxelles, "La réforme de la Cour de justice européenne, ou l'art de créer une usine à gaz", 7 April 2015 (updated 13 April 2015).

Schultz had sent an exceptional letter, on 28 May 2015, to the president of the Legal Affairs Committee, Mr. Pavel Svoboda MEP, with a view to accelerating the legislative procedure. The letter very clearly acknowledged that it was unprecedented, and that it did not purport to create a precedent.

A. Alemanno has additionally identified other abnormal developments in the proceedings before the European Parliament. "Why was Pinto's report presented on 15 September to the JURI Committee by a MEP belonging not only to another political group but also coming from Luxembourg[101] the very country which hosts the CJEU and stands to benefit most from any additional resources granted to it? What is the explanation for the absence of any translation of the Explanatory Report (originally written in Portuguese) on the day Pinto's draft recommendation and suggested amendments were to be debated on September 15? Why is the documentation and correspondence (i.e. 'Annexes') mentioned at the very end of the Explanatory Report still not available? The absence of any translated version of the Annexes is particularly prejudicial to a well-informed parliamentary debate. The MEPs – whose amendments are expected by 23 September – are deprived of the opportunity to consult a GC document, which, according to the rapporteur, might question the need for the proposed reform by offering facts and figures contradicting those presented by the CJEU. When analysed together, the sum of these elements suggests a pattern of procedural irregularities whose only aim seems to be the speedy adoption of the reform. More troublingly, it may also be construed as a joint advocacy strategy designed to systematically eliminate any opportunity for a public, well informed and evidence-based debate."[102]

[101] Mrs. Mady Delvaux MEP, of the S&D group.
The same person became later rapporteur of the second proposal, aiming to abolish the CST. As noted by Alemanno, such a permanence in the legislative debate is noteworthy. As explained by D. Seytre (La réforme: passera ou pas?, Le Jeudi, 16 juillet 2015), Luxembourg supported most strongly the increase of judges. One reason had already been mentioned with great enthusiasm by the two EU judges from Luxembourg in 2011: the proposal would represent "hundreds of jobs to be created in Luxembourg" (C. Knoepffler, Toujours plus toujours plus, Le Républicain Lorrain, 3 Avril 2011). The suppression of the CST, the only specialized court, was additionally a strategic objective, since it would prevent the creation of any specialized court outside Luxembourg (especially a trademark court that could have been based in Alicante, near the European Trademarks Office, something that had already been evoked during the negotiation of the Nice Treaty in 2000, when the statute of the CJEU was modified).

[102] A. Alemanno, "Where do we stand on the reform of the EU's Court System? On a reform as short-sighted as the attempts to force through its adoption", 23 September 2015.

5. THE LESSONS FOR JUDICIAL MANAGEMENT

In 2011, a basic managerial analysis could already provide much information about the most appropriate steps required to reform the General Court.[103] Between 2011 and 2015, some of the measures recommended by the author were taken and produced quite impressive results. In that perspective, it is important to assess the impact of those measures that worked and those that did not. This chapter will examine the measures that reduced the backlog (5.1.), some additional measures that could increase productivity (5.2.), and other measures that could be required by reason of doubling the number of judges (5.3 to 5.6).

5.1. Lessons from the reduction of the General Court's backlog

Curiously, even in 2015, there was no clear vision of the extent of the backlog. This was not an easy exercise, since the two concerned courts (the Court of Justice, author of the legislative proposal, and the General Court, object of the proposal) presented strikingly different analyses (5.1.1 to 5.1.2.). This foggy situation is a direct consequence of the absence of a serious analysis of the causes of the backlog, which in 2011 the author had recommended to be carried out. In fact, four essential changes (at least) contributed to the improvement in the situation: the introduction of a serious system of productivity control, the addition of 9 legal secretaries, an improvement in the stability of its composition and the creation of the advisory panel on the appointment of judges provided for by Article 255 TFEU (5.1.3. to 5.1.6.).

5.1.1. The conflict between the Court of Justice and the General Court about the true state of the backlog

A surprising development during the legislative procedure was the existence of a deep, and growing, disagreement between the Court of Justice and the General Court about the true state of the backlog. This is understandable. The Court of Justice sought to double the number of judges without taking the General Court's expressed needs into consideration. It was thus required to prove the necessity for such an enormous increase. Meanwhile the General Court had adopted strong internal

[103] See The Reform of the EU Courts I, part 3.
Unfortunately, there have been very few propositions about a productivity orientated strategy. One, extremely interesting, was however presented by the President of the Article 255 Committee: see J.M. Sauvé, L'avenir des tribunaux de l'Union européenne – L'augmentation de la charge de travail: organisation, désignation et formation des juges, in CCBE, EU courts – Looking forward, 2014, pp. 11-16. Tellingly, some of the measures he suggested have yet to be taken into consideration.

measures and wanted to demonstrate their efficiency. This conflict reached an apex, as we saw, in May 2015 when the CJ distributed to the other institutions an untitled and unsigned document purporting to describe the situation in the General Court. The rapporteur of the Legal Affairs Committee asked Judge Berardis, of the General Court, to assess the document in his individual capacity. In a nutshell, for the CJ, the GC's situation was catastrophic, whilst for the GC judge, it had greatly improved (see § 4.5 and Annexes I and II).

This arose from the huge difference in methodology between the two analyses. On the one hand, the Court took into consideration all possible delays, not only those during the treatment of the case by the judges of the General Court and their cabinets. According to the Court, a deadline of two months afforded to the parties within which to answer questions put by the GC constitutes time taken by the GC to adjudicate on that case. If the parties request an additional period in which to file a pleading due to holidays, this delay is also laid at the door of the GC. The GC is also responsible for the time during which a case is suspended awaiting a judgment of the Court in a connected case. The time taken to review or translate a draft judgment is also added to the time taken by the GC to adjudicate on the matter. However, since neither the judges nor their cabinets can do anything about delays of this nature (other than systematically refusing to extend time for the parties to submit papers, or closing cases without reference to judgments of the Court of Justice), increasing the number of judges is incapable of resolving these problems. As the author already recommended four years ago[104], this shows the need for an in depth analysis of the cause of the backlog before proposing any measure to liquidate it. Otherwise, there is a huge risk that resources will be misapplied.

In contrast in his analysis, Judge Berardis examined delays from the perspective of the workload of the cabinets. He drew the conclusion that judges and their collaborators were working on cases as quickly as they could as a result of which the backlog was on the point of disappearing and the time taken to deliver judgment was diminishing.

The CJEU 2014 Report of Activity showed a substantial improvement in the time taken to adjudicate on cases and the number of cases pending. This improved further in 2015. As mentioned before, at the end of 2015, the GC had closed nearly 1000 cases, a reduction of 160 pending cases, with a greater reduction in the number of old cases. It also appeared that the duration of cases determined by judgment had fallen by 10 months between 2011 and 2015. The GC's success in this regards is confirmed by two other considerations. First, no one has ever rebutted Judge Berardis' document after May 2015. Second, from that time, all involved institutions

[104] The Reform of the EU Courts I, pp. 7-8, 13-14.

felt obliged to find new reasons to justify doubling the number of judges at the General Court, which initiative seems to confirm that the importance of the sole ground advanced until that time, namely the necessity to reduce the backlog and shorten the time for ruling on cases, had seriously declined.

On 28 April 2015, for example, the day when the EP was hearing evidence from some General Court's judges, a Court of Justice press release stated that the doubling of the size of the General Court was also justified by future possible transfers of jurisdiction from the Court of Justice. After nearly four years of legislative debate, this was the first time such a transfer of jurisdiction had been mentioned. Since then the subject matter, modalities and time scale for such a transfer remain unknown[105]. The June 2015 press release of the Council advanced other new arguments[106].

In January 2016, the new President of the Court of Justice, Judge K. Lenaerts, proffered a new justification. For the first time, the reform's objectives were described essentially as to allow the General Court to sit in chambers of five judges rather than three and to concentrate all appeals at the level of the Court of Justice[107]. He referred to those who criticized the reform on the ground that the General Court's inputs were greater than its output as "intellectually dishonest". However these latest justifications had barely been mentioned at any time by the Court in its proposals, from 2011 to 2015. Even the latest, unsigned and unnumbered, document of May 2015 still insisted on need for reform due to the existence of a growing backlog that required urgent attention. As for the second purported justification, as the author already indicated in 2011, it would then have been far simpler to transfer jurisdiction to hear appeals against the decisions of the CST from the General Court to the Court of Justice, rather than to double the size of the former. One can but wonder at the reaction of the European Parliament and the Council had the proposal to increase and later double the size of the General Court been justified from 2011 onwards by reference only to the necessity to enlarge the size of its chambers and to suppress all appeals to the General Court. For the interviewing journalist, "the Court of Justice's president (whom she presented as the true author and ideologue of the reform)… is an inconsequent man", a comment which in any case reflects at least some of the damage sustained to the Court of

[105] Court of Justice Press release No 44/15, 28 April 2015, available at: http://curia.europa.eu/jcms/upload/docs/application/pdf/2015-04/cp150044en.pdf.
[106] See § 4.2.5 and Annex III.
[107] Le Jeudi, 27 janvier 2016.

Justice's image as a result of its 2014 proposal[108].

In fact, the improvement in the backlog had been reported in the press prior to the debates in 2015, but no one in the EU institutions seemed to care[109]. Additionally, it was reported in various press organs at the end of 2015 that there were not many cases to be attributed to the first of the 12 additional judges to arrive (without mentioning the 16 to follow thereafter...)[110].

5.1.2. The need to identify the real causes of the reduction in the backlog

In fact the very clear (though as yet not complete) improvement of the situation of the General Court has, as usual, come about as a result of a number of measures: first, the reduction in size of the report for the hearing, the abolition of the requirement to translate all judgments into every EU official language, the possibility of deciding trademark cases without a hearing, etc. These measures sometimes reduced the workload and sometimes the duration of the proceedings. In order to plan for the future, however, it is necessary to ascertain the principal reasons for the improvement.

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108 « Le président de la Cour de justice européenne, Koen Lenaerts, est un homme inconséquent. D'un côté, il est contre le principe d'une initiative législative donnée à la Cour par le Traité, mais malheureusement, dit-il, elle existe, il fallait l'appliquer pour entamer la réforme du Tribunal. De l'autre côté, il était aussi contre l'architecture d'une Cour à trois degrés de juridiction (cour, tribunal et tribunaux spécialisés), elle aussi prévue par le Traité, mais heureusement, dit-il, elle n'a pas été maintenue dans la réforme, les tribunaux spécialisés ont disparu. (…) Lorsque, sur l'air de «lui, c'est lui et moi, c'est moi», le président Lenaerts laisse entendre que, contrairement à l'ex-président Skouris, il n'était pas aux commandes lors des discussions sur la réforme, il suscite l'incrédulité. Certes, le vice-président de la Cour qu'il était alors a été très discret au plus fort de la bataille au point de disparaître complètement des débats. Plus personne ne conteste aujourd'hui qu'il a été «l'idéologue», le concepteur de cette réforme qu'il dit, d'ailleurs, assumer pleinement.
Cette réforme n'a pas fini de susciter des commentaires. (…) Trouble chez ceux pour qui cette réforme a perdu sa raison initiale – aider le Tribunal à résorber son retard à traiter ses affaires – pour la remplacer par une autre, moins avouable: permettre aux Etats membres d'accroître leur pouvoir sur le tribunal administratif de l'Europe en doublant le nombre de juges. Une «suggestion» du Conseil de l'UE, exécutée de bonne grâce par la Cour dont les juges sont nommés par les Etats membres ». (D. Seytre, Décryptage, Le Jeudi, 11 février 2016).

109 "The case backlog is exaggerated, according to Politico sources. If true the case for doubling the court's size is weakened. While there are 1,423 pending cases, … only 364 are actually gathering dust" (Politico, 28 April 2015).
This was also given some emphasis by J. Quatremer, La réforme de la Cour de justice européenne ou l'art de créer une usine à gaz, 7 avril 2015. He added that "with a thousand cases filed per year (which is already a strong overstatement), each judge will have to deal with only 18 cases per year. This is a quite a cool job."
More precisely, for D. Robinson, "at the start of 2014, extra référendaires – a fancy word for law clerks – were hired by the court. Perhaps unsurprisingly, this helped halve the time it took to make a preliminary report, which accounts for about 40 per cent of the time a case takes, according to internal figures. As a result, the court is currently chomping through the backlog. In 2013, the General Court completed a total of 702 cases. In 2014 – with the extra référendaires – the court finished 814. Since the start of 2015, the court had received 180 cases, and closed 203" (D. Robinson, The multiplying judges of the ECJ, *Financial Times* Brussels blog, 17 April 2015).

110 D. Seytre, "Une insulte à l'intelligence", Le Jeudi, 4 novembre 2015; M. Newman, EU' General Court sees 'dramatic drop' in new case, judge says; Mlex, 30 September 2015.

For example, it has been long said that the General Court began to boost its productivity once it decided to sit in nine chambers rather than in five. Such purely numerical reasoning is doubtful. Before 2007, there were in fact 10 chambers of 3 judges; each president of chamber presided over 2 chambers. This system was a little more hierarchical, and aimed at extracting the best advantage of the most experienced members. This element cannot, of itself, accelerate considerably the treatment of cases.

Some have strongly emphasized the reduction of the report for the hearing. This did not amount to a strong reduction of the workload. Arguments must still be analyzed and synthetized. On the other hand, shortening this document can accelerate the procedure, since it takes less time to translate. The same can be said for abolishing the requirement to translate judgments into all languages as judgments can be delivered without waiting for all such translations. This does not speed up or reduce the workload of the judges and their cabinets. The suppression of hearings in a few trademark cases assists in reducing the time for producing decisions, but this is limited to a number of cases of a relatively modest size and complexity.

Nor has the backlog been reduced due to a reduction in the number of cases filed. On the contrary, the number of applications increased up to 2014, though it fell in 2015. So the reduction of the backlog could have been achieved only by means of a disproportionate increase in the number of judicial decisions, which is what in fact occurred. Moreover, this reduction does not appear to have been obtained through reducing the quality of the judgments delivered. Such a claim has, in any event, never been analyzed, let alone sustained.

5.1.3. The fundamental benefit of a serious system of productivity control

The benefits of a serious system of productivity control had been underlined in a 2011 document of the Council[111]. This system, recommended by the author and applied in the General Court after 2011, is based on the preparation of a number of lists. The first is based on the informal time limits within which members of the General Court are enjoined to circulate case documents. A preliminary report is to be submitted four months after the end of the written procedure and a draft judgement circulated two months after the date of the hearing. The first list thus consists of a chart containing a record of the time taken to prepare these documents where it exceeds these deadlines. The second list sets out all delayed cases in each cabinet and describes the measures taken to eliminate those delays. The third list divides all cases attributed to each judge under three categories: competition, trademarks and others, over a three year period. This allows one to identify any imbalance in the

[111] See Council Doc. 16904/11.

attribution of cases (which imbalances may justify delays in the treatment of cases). The fourth list contains the number of cases closed per quarter and per year by each judge.

The combined effect of these lists was that, for the first time, it was possible for every judge to see exactly where the sources of any delays lay, whether there were objective justifications for such delays and whether measures were being taken to address the problem. Everyone could assess everyone else's workload, thereby dissipating a lot of erroneous presumptions[112]. Transparency and responsibility are simple, but quite powerful instruments.

Of course, such statistical instruments must be used with care[113]. Producing judgments is not akin to producing cans of beef. Firstly, though cases are distributed according to three categories, it is difficult to assess the real level of difficulty of each individual case. Secondly, other factors can intervene to modify the real workload. A series of cases, for example, will present similar difficulties, which make them collectively easier to decide. What looks like a voluminous case may be dismissed as inadmissible. Thirdly, an evaluation of the quality of judgments is impossible: other than perhaps by examining the rate at which they are reversed on appeal. Nonetheless, experience has shown that it is necessary to have a global vision of a court's activity. Statistics do not mirror reality alone, but they are the first instrument by which one may begin to understand it. This is not the full analysis, but its indispensable basis.

5.1.4. The benefit of 9 additional legal secretaries

In 2014, after having suggested this since 2011, the General Court received 9 additional legal secretaries. It was decided to attribute one to each chamber. The measure aimed at prioritising delayed cases. Recruitment was unnecessarily complicated by the uncertainty surrounding the provisional character of this measure. Nonetheless, it proved to be possible to hire experienced personnel, whose assistance clearly contributed to the GC's strong improvement in its 2014 results.

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112 As indicated by the author in 2011, the benefits of a serious management system are unfortunately often as strongly opposed in many courts as they are underestimated, see The Reform of the EU Courts I, p. 13-14.

113 An excellent example of the errors which can arise was provided by J. Quatremer. Though generally a very well informed observer, in a post he stated that: " il y a un vrai problème de productivité au sein du Tribunal: si le président Jaeger a bouclé 55 affaires en 2014, son collègue estonien, Lauri Madise, n'en affiche que 9 à son compteur. Même si elle dépend aussi de la complexité des cas, il est clair qu'il y a un problème de gestion des ressources humaines au sein de la Cour dans son ensemble." « La réforme de la Cour de justice européenne ou l'art de créer une usine à gaz », Libération, Les Coulisses de Bruxelles, 7 avril 2015. That comparison is erroneous. The President rules on applications for interim measures only, whereas ordinary judges decide on full cases. Moreover it was very unfair on Judge Madise, who had only just arrived in the previous October. The distortion is compounded by a production cycle that can take up to three or four years in voluminous cases. Statistics thus share the characteristics of antibiotics that they are necessary, but require very careful handling.

5.1.5. The benefit of greater stability

2014 was the first year since 2008 when no judge of the General Court arrived or left. The composition of the chambers was unchanged, thus absolving any need for transitional measures. This also contributed to the strong improvement in that year.

5.1.6. The benefits of the Art. 255 TFEU advisory panel

Another thing that is rarely mentioned in the context of the increase of productivity is the Art. 255 TFEU advisory panel. Since 2010, most of this committee's work has been spent vetting candidates for the General Court, due to the higher turnover in its composition. In four years the committee delivered 7 negative opinions[114]. At the beginning of 2016, 3 more were delivered[115]. The committee's intervention has also had the effect of clearly improving the quality of the selection process in the Member States.

The Article 255 committee has also provided an additional incentive to assist the functioning of the General Court. In 2011, the author had recommended that it should examine the statistical results of sitting judges presented for renewal[116]. In its first activity report of 2011, the committee announced that it would do precisely that[117]. Transparency and responsibility are simple, but powerful instruments.

5.2. Possible additional productivity measures without additional costs

5.2.1. Better allocation of personnel between the courts

The European Parliament has, quite rightly, begun to explore this topic. It is interesting to note that, on the one side, the cabinets of the judges in the Court of Justice have always been substantially larger than those of the judges in the General Court. The personnel in their respective Registries are more or less of the same size. This is notwithstanding the fact that there is a substantial difference in the nature of the workload of the two registries. According to data provided by eCuria (the CJEU electronic notification system for applications), the average case in the General Court is four times more voluminous than the average Court of Justice case. This does not mean that the case involves more important legal issues, but that it requires

114 Third Activity Report of the Panel Provided for by Article 255 of the Treaty on the Functioning of the European Union, p. 9, available at: http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-02/rapport-c-255-en.pdf.

115 D. Seytre, De nouvelles têtes à la mi-avril, Le Jeudi, 10 mars 2016.

116 The reform of the EU courts I, p. 17.

117 First Activity Report of the Panel Provided for by Article 255 of the Treaty on the Functioning of the European Union, p. 3, http://curia.europa.eu/jcms/jcms/P_64268/

more work in order to be adjudicated upon. This should obviously have received greater consideration when allocating personnel within the institution. The addition of 9 legal secretaries to the GC in 2014 was a first (very timid) recognition of the need for more personnel.

This is all the more so since it is now known, thanks to the trade unions, that the Court has begun to make extensive use of administrative service responsible for research and documentation in the institution to assist it in working on appeals and preliminary references (see § 4.3). In fact, the discrepancy in the allocation of resources between the two courts is consequently still greater than it appears at first sight.

5.2.2. Dynamic exploitation of the new Rules of procedure

The GC new rules of procedure entered into force in 2015. In many ways, they endeavour to simplify and accelerate the treatment of cases. More cases can be adjudged without a hearing, with the consent of the parties (new Art. 106). Trade-mark cases may be decided by a judge sitting alone (new Art. 29, paragraph 1).

5.2.3. Evaluation of legal assistants

Although the General Court has engaged in a collective evaluation of the cabinets' performance since 2010, there is as yet no evaluation of performance of legal secretaries. After the introduction of an evaluation of cabinets' performance, when a cabinet's productivity appears abnormally low, this would look like the adequate next step. In cabinets in difficulty, important production discrepancies sometimes appear and require a more detailed analysis.

5.2.4. Better use of the Registry

Another simple and economical way to improve output would be to enhance the role of the Registry in the treatment of the admissibility of actions. Given the nature of proceedings before the General Court these issues arise substantially more frequently and are more complex than those that arise in cases before the Court of Justice. The Registry could seek to propose standard solutions, with the benefit of offering greater coherence in this field.

Since 2011, the General Court has asked for additional Registry personnel. The Court, as an administrative authority, did not pursue this separately but rather integrated this request into its legislative proposal. This had the consequence of postponing the reduction of the backlog, thereby unfortunately creating an incentive to adopt a heavy structural solution rather than a managerial one.

5.2.5. Possible recourse to judicial fees

A further, simple and economical way to reduce costs would be by levying judicial fees[118]. This might discourage frivolous applications[119]. The Court of Justice finally opened a reflection about this question in 2014, three years after the launch of its legislative proposal. Since then Germany has sponsored a declaration about the topic in the minutes of the Council. Needless to say, it would have been far more advantageous to have examined the options before doubling the General Court, and not afterwards. The opposite approach risks creating an excessive number of new personnel, which could become redundant if the introduction of fees reduces the number of applications.

Any imposition of judicial fees must respect the right to access to justice. Even allowing for this constraint, different possibilities present themselves. For example, charging fees for the introduction of manifestly frivolous applications in the realm of intellectual property might be justified by the fact that such proceedings are a means whereby applicants seek to obtain an economic advantage in the form of an exclusive right.

5.3. Implications of doubling the judges for the management of the General Court

Doubling resources in any system of production is a great challenge. Nothing produces more waste than a huge increase of resources, except for a huge increase in resources that does not correspond to what is required: for instance where the resource doubled (judges) is not necessarily that which ought to have been increased (legal secretaries + Registry personnel). This is accentuated where the resource needed in priority is reduced whilst at the same time the resource that is not needed is increased. So the first thing to do is to assess the **global** resources available to the General Court (judges, legal secretaries, assistants and Registry personnel).

5.3.1. Why doubling was far from the optimal solution

As indicated in 2011, the managerial approach would have implied first to examine all productivity measures, then followed by an incremental increase in personnel numbers, and finally, if required, structural reform. The Court of Justice chose to go directly for the heaviest strategy. The cost of that choice has been compounded by

[118] A possibility already exists to sanction, even moderately, the irregular behaviour of parties that generates unwarranted additional spending for the courts. This possibility is of limited effect and it is not used very often.

[119] See The Reform of the EU Courts I, cit., p. 20; M. van der Woude, Judicial Reform and Reasonable Delay, Journal of European Competition Law and Practice, 2012, pp.123-125.

the Member States' inability to accept any number of new judges below 28 (with the future additional costs consequent upon each subsequent enlargement).

The doubling of the GC will create the largest international court in the world. Doubling the size of a court can be a malediction in disguise. Though there are obvious differences, it suffices to imagine if the same solution was to be implemented in the Commission or in the Parliament. It is far from clear that the output of either institution would improve (notably as regards quality). Some people have sought to make comparisons with very large national first instance courts. Such an analogy is, however, wholly misconceived if not dangerous. An international court is, by definition, very different from a national court. The heterogeneity of its membership is far greater, as is the instability in its composition for a number of obvious reasons. Furthermore, in the EU Courts, members have two (and not simply one) functions to perform. They must adjudicate on cases, but in so doing they reflect their national legal orders. In an unstable and decentralized court of 56 members, an enormous investment in time and energy will be required in order to protect the coherence of its case-law without prejudicing the equality of the legal systems from which its members are drawn. The theoretical benefit of a huge increase of judges will at least be partly lost.

The weakness of this "reform" is that it creates too many top jobs while at the same time promising to reduce the second and third tier of personnel in the cabinets. Judges risk ending up in fact being paid highly to perform tasks that could be as easily (and less expensively) performed by less qualified personnel. This is hardly an efficient – or an economical – strategy.[120] Furthermore, judges are the least stable component of the whole system. Multiplying their number increases the instability of the whole, whereas increasing legal secretaries and registry would have tended to produce the opposite consequence.

Finally, creating a single large General Court concentrates all appeals in the Court of Justice. As a result, as the trade unions indicated, an increasing part of the judicial work of the Court of Justice has been surreptitiously transferred to the Court's administrative services by requiring them to carry out a preliminary analysis of incoming cases. This examination is no longer limited to the preliminary analysis of

[120] For J. Quatremer, this is not the only syndrome of a "Mexican army" in the Court of Justice of the European Union. In another interesting article, he evoked the creation of a director job (the second level in the EU administration) to manage a service of four persons, including two secretaries (J. Quatremer, UE Le super-juge frôle le hors jeu, Les coulisses de Bruxelles, 5 juin 2015). This was done at the direct initiative of the then President of the Court of Justice, without any input from its Registrar. The process also excluded competition from outside the institution. The job was thus deemed sufficiently important to justify a high rank and an exceptional appointment process, but not sufficiently important to be opened up to external candidates. A managerial analysis of this process could be useful. Such problems had already been evoked years ago by D. Seytre (voir Le Jeudi, 21 janvier 2010 et 16 juillet 2015).
Other examples evoked by the journalist also reflect a strong bias in favor of appointing legal secretaries to a lot of high administrative posts. It could be interesting to audit how many examples exist. This could have an impact in the institution's management. The capabilities of a very good legal secretary are not necessarily those of a very good manager, especially in a much bigger institution.

appeals. Different problems arise in this context. One, practical, is the workload of the Court of Justice's judges, who have to digest the work of a great number of collaborators (4 lawyers in the cabinet and those in the administration). Another is a question of principle, since decisions of a judicial character are made by administrators who are officials and therefore under the hierarchical power of the Court's Registrar[121]. Finally, it could seem paradoxical to seek to gather all appeals in the Court of Justice whilst simultaneously trying to reduce the standard of review on appeal or to introduce a filter (unless one accepts, as mentioned before, the reduction of effective judicial protection).

5.3.2. The Court of Justice and the General Court have different missions

It is a recurrent error to believe that the two courts are substantially the same. They are not. The dichotomy between them tends to increase. It is important to understand this, since it implies that it is not the case that what is good for one of them is necessarily good for the other.

The Court of Justice deals basically with issues of law. The General Court deals with issues of law and fact. When these facts comprise the evolution of servers and patents (as in the Microsoft cases), or the entirety of problems linked to the market for semiconductors (as in the Intel case), this can make an ocean of difference. Hence, procedures before the General Court are, by their nature, longer. Files are much heavier. As indicated above, the average General Court file is four times heavier than in the Court of Justice. Judgments describing and adjudicating upon facts are, by their nature, longer than those where the facts are either found elsewhere or do not arise. The internal review and translation of such judgments necessarily requires more time.

The Court of Justice operates in a largely centralized fashion. All cases are considered at the level of the General Meeting and all important cases are sent to the Grand Chamber of 15 judges, which is designed in order to reduce divergences in the interpretation of EU law. In contrast, the General Court is very largely decentralized. All applications are sent directly to chambers of three judges and 95% of them remain there, 5% only being adjudicated upon by chambers consisting of five judges (during the last decade). The risk of divergences in the interpretation of the law is thus greater, although that threat is ameliorated by the right of appeal to the Court against judgments of the General Court. Furthermore the discrepancy in the workload between cases is greater in the General Court. It is consequently more difficult to balance the workload between its members.

[121] For the sake of clarity, it would be much better if all persons dealing with the substance of cases were integrated into the cabinets under the direction of judges and submitted to the same administrative rules. This would additionally allow a much better evaluation of productivity per personnel unit in the institution.

5.3.3. The absolute need to clarify the staffing of the General Court post 2019

As already mentioned, various actors have supported a reduction of the size of judges' cabinets in the third phase of the reform in 2019. Since then this issue has engendered considerable uncertainty over the future composition of the cabinets of the General Court's judges.

Nothing could be better designed to destabilize the functioning of cabinets. It is sometimes considered that jobs are jobs, judges and legal secretaries are interchangeable, and that working for one judge is the same as working for another. Such simplifications only demonstrate a gross ignorance of the management of highly qualified personnel. Highly qualified personnel management is long term management. This requires at least a perspective in the medium term that is at present absent. Maintaining uncertainty during years is certainly not the best way to manage individuals. It obviously complicates recruitments and creates disincentives for the best qualified candidates.

Additionally, legal secretaries perform multifaceted and complex functions, which point seems to have been lost in the budgetary negotiations connected with the legislative proposal. In addition to legal and technical assistance, legal secretaries are also capable of working on voluminous files in the working language of the General Court. They are thus indispensable if the General Court is to continue to function with a single working language. Consequently, adding judges whilst proportionately reducing the number of legal secretaries is a textbook exemplar of an inefficient and costly reform. It is akin to an enterprise that decides to double the size of its fleet of trucks while reducing the volume of petrol. One does not need to be a rocket scientist to conclude that this "reform" will not improve output and performance, although this basic analysis was insufficiently obvious to the institutions who promoted it[122].

Finally, the proposed reduction in the cabinets' personnel may reduce the stability of their composition. It will also increase the individual workload of personnel in the General Court, thus increasing the attraction of working in the Court of Justice, where people are paid more for doing less work[123].

[122] This had already been emphasized in M. van der Woude, In favour of effective judicial protection: A reminder of the 1988 objectives, Concurrences, 4/2014, p. 3

[123] See The Reform of the EU Courts I, p. 18.

5.3.4. The need for a serious reflection about specialization inside the General Court

Supported by the Commission and the Council, the 2011 proposal evoked the question of specialization within the General Court. A lot of misconceptions surround this topic. There are constitutional obstacles. There are managerial obstacles. There is also the illusion that specialization of chambers and judges provides greater productivity and a more coherent case law in an unstable court with permanent renewals. Moreover specialization raises a large number of collateral problems, which have not yet been considered. Again one is struck by the absence of any impact assessment.

From the legal point of view, the TFEU offers two paths to the legislature. It can expand the General Court, which the Treaties define as a generalist jurisdiction (Art. 254, paragraph 1 TFEU). Or it can create specialized courts (Art. 257 TFEU). Both paths are legitimate. However if one respects the basic law of the Union, one cannot combine these options by dividing the constitutionally mandated generalist court into a cluster of specialized courts. The establishment of two generalist courts in the EU system aims to provide an equal representation of national legal systems. This cannot happen if judges from some Member States are automatically excluded from participating in debates concerning fundamental principles in different areas of the law.

Additionally, as already emphasized by Judge van der Woude of the General Court, this creates "a risk of a politicisation of the distribution of judicial portfolios. These issues can be dealt with but only if judicial independence is preserved so that the General Court can organise itself in a flexible manner without external interference. (…) It is important not to pass the issue of the nationality of judges… from the Council to the General Court"[124].

However, this hybrid solution appears to have become hugely attractive in the recent past. In 2011, the Court of Justice's proposal suggested the creation of specialized chambers. The Commission has relentlessly pushed in favour of creating specialized chambers inside the General Court[125]. Especially, it has proposed in 2011 to impose "an adequate number of specialized chambers"[126]. The Court of Justice revived this in 2015 by way of a declaration attached to the minutes of the Council which stated that: "Finally, the Court of Justice recalls that on the occasion of the approval of the revised Rules of Procedure of the General Court in January 2015, it invited the

[124] M. van der Woude, In favour of effective judicial protection: A reminder of the 1988 objectives, Concurrences, 4/2014, p. 3.

[125] This possibly proceeds from a wish to prevent the creation of a specialized competition court. The Commission is well aware that judges specialized in competition matters might increase further the intensity of judicial control of its own decisions. It may also be observed that the Commission has completely reversed its position on this issue between 2007 and 2011 – without proferring the slightest explanation.

[126] Opinion of 30.9.2011, § 37 [COM (2011) 596].

General Court to submit, before the swearing-in of the first twelve additional judges, a proposal regarding the creation of specialized chambers within the General Court and to align its internal rules governing the attribution of cases in the General Court with those that the Court of Justice applies."[127] Later, the European Parliament supported in its amendments the doubling of the General Court, while aiming to maintain the appointment process of the specialized courts. In a 2016 interview, the new President of the Court of Justice K. Lenaerts indicated that the connexions between cases could be very widely interpreted in their attribution to judges, without leading to specialization[128]. This would however in time lead in fact to specialized chambers and judges.

Specialization could lead to increased productivity, provided it is implemented in a definitive and long term manner. However such an approach is precluded both by the existence of a generalist court and the manner in which it is composed. That explains the strong managerial logic behind allowing for specialization... in specialized courts, as foreseen by the Nice Treaty. The paradox of doubling of the General Court is precisely that it generates new obstacles on that path. Furthermore specialization is intimately linked to the system for attributing cases to judges. It is revealing that the Court of Justice, from 2011 to 2015, has consistently linked both topics. This is all the more astonishing when it is quite obvious that none of the institutions evoking specialization have taken even five minutes to reflect upon the consequences its introduction would have for the management of the General Court's personnel.

It is thus fascinating to read Art. 3 § 1 of Regulation 2015/2422. This provision indicates that a report, prepared by an external consultant, will be made on the functioning of the General Court. "In particular, that report shall focus on the efficiency of the General Court, the necessity and effectiveness of the increase to 56 Judges, the use and effectiveness of resources and *the further establishment of specialized chambers* and/or other structural changes." In addition to presuming that the General Court is prepared to establish such chambers, someone from the legislature will doubtless explain how this provision is compatible with the Treaties, especially the need for equal representation of the national legal systems.

5.3.5. The need for a serious reflection about the attribution of cases

Here again constitutional constraints intrude on the fantasies pedalled in certain circles. Operating in the framework of Article 6 ECHR, the jurisprudence of the European Court of Human Rights imposes clear constraints upon the attribution of

[127] Statement by the Court of Justice, annex to Draft Position of the Council at first reading, 10043/1/15 REV1 ADD 1.

[128] Le Jeudi, 27 janvier 2016.

cases to judges. For understandable reasons such attributions must be provided for by law. There must thus be safeguards against the arbitrary exercise of the power of the president of a court to assign or reassign cases to judges[129]. There is little doubt but that this jurisprudence applies – a fortiori – to the EU courts. Thus every year the General Court must publish in the Official Journal its criteria for the attribution of cases. This requirement has been maintained in its new rules of procedure (Art. 25, paragraph 2). At present cases are allocated by reference to three criteria in the following order: reference number of the case, existence of previous related cases (connexity) and workload[130].

The case number is the basic criterion, which enhances transparency and foreseeability. Connexity operates to prevent duplication of work. Thus a series of related cases (in competition or State aid, for example) will be attributed to the same chamber and, more often than not, to the same reporting judge. Approximately 40% of cases are currently attributed by reference to this criterion. Whilst it might be contended that this is a nascent form of specialization, it is temporary, limited in volume, and is grounded upon very concrete functional considerations. Since the operation of this criterion can give rise to considerable imbalances in the workload between cabinets, the third criterion exists to allow that balance to be re-established. A further guarantee is that a decision to attribute cases must be reasoned. The new rules of procedure have introduced the possibility of a reattribution of cases, but again under strict conditions[131].

Many actors have tried to influence the attribution of cases inside the General Court. The Court of Justice has repeatedly attempted to impose its own system for the attribution of cases on the General Court. This system is strongly authoritarian since it confers upon its President a total discretion in the attribution of cases. Until now there has been very little investigation into the compatibility of this system with the jurisprudence of the ECHR, especially applied to the General Court. In any case, the two systems are clearly opposed and, repeatedly, the General Court has endeavoured to maintain its own for various reaons[132]. Nonetheless the secretariat of the Council has come up with the same idea and the Commission has repeated it[133]. The General Court is thus the only court in Europe for which the attribution of cases to

129 See, for example, case DMD Group/Slovakia, judgement of 5 october 2010, application n° 19334/; Case Kontalexis/Greece, Judgment of 31 May 2008, application n° 59000/08, Case of Parlov-Tkalcic v. Croatia, judgment of 22 December 2009, application n° 2481/06.

130 See OJ 2013, C 313/4.

131 See Art. 27 of the new Rules of Procedure (OJ 2015, L 105).

132 Finally, it must be mentioned that the system of discretionary attribution of cases by the President of the Court of Justice to its members has been described as an instrument of a power system. It has been described as creating strong incentives for judges to support the President's decisions in the administrative or the legislative domains (see J. Quatremer, La justice européenne au bord de la crise de nerfs, Libération, Coulisses de Bruxelles, 26 avril 2015 (mise à jour 30 avril 2015)).

133 See the Commission's opinion on the proposal for a regulation of the European Parliament and of the Council on the transfer to the General Court of the European Union of jurisdiction at first instance in disputes between the Union and its servants, COM (2016) 81, § 10.

judges constitutes a regular topic of intervention from external authorities. Worse, it is sometimes done in ways that are not always transparant.

From the viewpoint of the rule of law, it is inacceptable that other institutions or courts seek to determine how a court decides to attribute judicial cases between its members[134]. This flies in the face of the principle of judicial independence. To make matters worse, these pressures emanate from the same institutions and authorities the decisions of which are challenged by citizens in the General Court.

5.4. A great opportunity lost for judicial management

In a nutshell, this debate was conducted without a thorough analysis of the possibilities offered by serious managerial reforms. Member States were initially eager to reject the Court's proposal for budgetary reasons, but radically changed their approach when they were promised one judge each. They then required some reduction in personnel by way of budgetary compensation, the consequences of which was not seriously analysed. It was so decided that the General Court would receive a lot of judges it had not asked for, and would suffer a reduction of the less expensive personnel that it had requested. The four main political groups in the European Parliament then decided to rush this essential constitutional reform through, without conducting an impact assessment or a costs/benefits analysis of the possible solutions, at a time when the urgency of the measure had disappeared since the General Court had in fact got control over its backlog in the meantime.

Since internal reforms in the General Court had considerably reduced the backlog and had reduced the length of proceedings, so much that, by end 2015, the press indicated that a court the size of which was soon to be practically doubled was in fact... looking for files to transfer to its new members[135]. By then it had become crystal clear that the internal measures taken, combined with a small increase in resources (9 additional legal secretaries), had largely sufficed to resolve the problem of the backlog. The very small increase of personnel necessary to obtain this excellent result shows that more important improvements could still have be obtained through new limited and targeted increases of personnel. In place of that, as observers concluded, "once the court's backlog has been reduced and there are fewer appeals being filed, the extra judges may find themselves underemployed in the Grand Duchy."[136] Worse, at the beginning of 2016, the persisting uncertainty about the cabinets' personnel, the arrival of many new judges, the need to restruc-

[134] The General Court's President had already criticized this general tendency in 2014: M. Jaeger, L'avenir des juridictions européennes, in CCBE, EU courts – Looking forward, 2014, p. 44.

[135] M. Newman, EU' general Court sees 'dramatic drop' in new cases, judge says; Mlex, 30 September 2015 (it was then explained that cases should be heard by larger chambers of 5 judges "to occupy the new judges"); D. Seytre, "Une insulte à l'intelligence", Le Jeudi, 4 November 2015.

[136] K. Lunders and M. Newman, Bottleneck eases at EU court, as new judges prepare to arrive, MLex, 9 Febr. 2016.

ture the organization in depth, and multiple replacements of sitting judges, have the effect of destabilizing the entire General Court, thus threatening the good results obtained in the recent past.

In the present context of budgetary constraints, it is of the highest importance that all EU and national institutions endeavour to look as much as possible for productivity solutions, often times based on the clever use of information and communication technologies[137]. In an era of an aging population, heavy public debt and limited increases in productivity, huge increases in personnel, and especially in top personnel, must be limited to what is strictly necessary. Developments in the General Court between 2011 and 2015 reflect the benefits of such a management approach. Unfortunately the legislative debate has gone in precisely the opposite direction. All of the EU institutions involved must draw lessons from this bad experience for the future.

The opposition of all EU institutions to the creation of specialized courts will provoke additional difficulties in the field of patents. During the long search for a truly integrated EU patent, patent specialists have repeatedly (and rightly) requested the establishment of a specialized patent court. The drastic abandonment of this concept will make the creation of such a patent substantially more difficult[138].

Finally, the wise balance conceived by the Court of Justice and inaugurated by the Nice Treaty between generalist and specialized EU courts has also been lost in this saga. EU courts fulfil two different functions: they take judicial decisions whilst guaranteeing some balance between national legal systems. Confronted with the rise of judicial activity, the Nice Treaty retained two generalist courts and envisaged the creation of specialized tribunals under certain conditions. Specialized courts are more productive and less expensive. They allow for the appointment of highly qualified and specialized personnel at all levels[139]. They also allow for a greater adaptability of procedures to meet the needs of identifiable categories of cases. It would

137 See for example P. Dunleavy and L. Carrera, Growing the productivity of government services, Elgar, 2013. Among many modest but useful ICT improvements that could be made, the electronic flow of judicial documents is not complete yet, for example. eCuria, the electronic signification system of the CJEU, does not yet allow a full display of all procedural documents. There also remain three different electronic codes (ECLI) for the jurisprudence (this is rather too much for a single institution, and provokes useless work). The search for productivity is a daily struggle, in big and small things.

138 For more detailed comments, see F. Dehousse, The unified court on patents: The new oxymoron of European law, Egmont Paper n° 60, 2013.

139 For observers such as J. Quatremer, establishing a principle of equal representation of all Member States everywhere in the judicial system is an important political decision. It annihilates all influence of demography in judicial appointments. It also makes a quality recruitment process more difficult, especially in states with very limited populations (see J. Quatremer, La réforme de la Cour de justice européenne, ou l'art de créer une usine à gaz, Les coulisses de Bruxelles, 7 avril 2015 (updated 13 avril 2015)).
This was also emphasized by Judge Forwood (*The General Court as a Competition Tribunal: Still Fit for Purpose?*", Clifford Chance and Brick Court Chambers Lecture, London, 28 October 2015). "Nominating two judges might not be a problem for larger Member States, or Member States that have long been part of the EU, but, as Judge Forwood recently observed: it might be '*hard {…} for many {others} to find appropriately qualified people who are willing to do the job*'" (quoted by M. Abenhaim, Epilogue, at last, on the reform of the General Court, 26 January 2016).

also have been possible to introduce greater stability in their composition. Instead, the EU institutions abandoned this finely balanced system in favour of a more cumbersome and expensive solution, risking an increase in the polarisation of judicial appointments and certainly increasing the intergovernmental character of the EU judicial system. The doubling of the General Court has clearly not been the EU institutions' finest hour.

6. LESSONS FOR THE EXERCISE OF THE COURT'S LEGISLATIVE POWER

6.1. The need for a global, long term, strategy

Over time different goals have been set for the reform of the General Court: reduction of the backlog, reduction of the length of proceedings, bigger chambers, coherence of jurisprudence, new regime of appeals, transfers of additional jurisdiction from the Court of Justice to the General Court. To bring about fundamental reform requires a far clearer vision of its long term objectives. Since the goals changed frequently, the clarity of the design inevitably became far from clear, which may explain the description of the changes as "a leap in the dark" by some observers.

As indicated by the author in 2011, any systemic initiative must begin with a reflection on the Court of Justice. Its size is (rightly) limited by the Treaties. The Court of Justice has adopted the opposite approach, instead concentrating on the courts beneath it in the judicial hierarchy. Consequently, elements directly touching upon the Court of Justice began to surface late in the debate (appeals, transfers of competence) without being adequately addressed.

6.2. The need for greater transparency

In carrying out its legislative role, the Court of Justice has sometimes performed below the standards usually demanded of an actor in a legislative procedure. Legislative procedures must respect specific constraints according to the EU Treaties. At the very least, all documents emanating from the Court should be approved by the Court of Justice's general meeting, catalogued in a specific register, and be accessible to the public on an identifiable area of its web site.

6.3. The need for more formal procedures

Official documents related to any legislative procedure should be adopted by a specific college of the institution by means of reasoned procedure. Decisions by the President of the Court of Justice acting alone do not comply with such standards. This was especially the case with regard to unpublished letters from the President of the Court of Justice to the presidents of other institutions (as disclosed in the European Parliament). In addition, the use of undated, unregistered and unsigned documents by the Court of Justice in the course of a legislative procedure should be prohibited, not least because it generates opaqueness in the legislative process. It is impossible to justify a legislative reform with constitutional consequences on the basis of documents for which no-one wants to take responsibility. Impact assessments

should also be mandatory[140]. Finally, the Treaty should attribute the power to present a legislative proposal to the institution as a whole, and not to one court only.

6.4. The need for a better consultation process

Consultation of interested parties has become a standard feature of all legislative procedures. This is especially the case when the proposals present a structural, or even a quasi-constitutional character. The Court of Justice should apply that same principle when it conducts its legislative initiatives. From this point of view, it is very instructive to make a comparison with the reform process of the European Court for Human Rights during the last decade.

6.5. The need for a general reflection on the legislative role of the Court of Justice

In the light of the recent lengthy and controversial process, it is time to seriously reflect on the provisions of Article 281 TFEU, which provides that the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may amend the provisions of the Statute of the Court of Justice (protocol n° 3 to the TFEU)[141], with the exception of some of its provisions, at the request of the Court of Justice and after consultation of the Commission, or on a proposal from the Commission and after consultation of the Court of Justice

Article 281 was introduced in the Lisbon Treaty without much reflection. It appeared at the time to be in the nature of a simple alteration of procedures from Treaty revision to a legislative procedure. With hindsight, that transfer appears far less simple. At least for some observers, part of the problems that appeared between 2011 and 2015 were provoked by the absence of sufficient procedural constraints and checks and balances, allowing an autocratic system of management to prevail[142]. Whilst this could be remedied, another element has its roots in a structural problem.

In all fairness, for a court involved directly in a legislative process, there are sometimes no good decisions. For example, in the 2011 proposal, the Court did not propose any mechanism whereby the Member States could select 12 judges from among their number. It considered that such a proposal fell outside the scope of its duties, which claim was both right and wrong. For a court, it is of course most unusual to begin to negotiate such a process with the Member States. However, negotiation

[140] The Commission, in principle, has to carry out an impact assessment meeting strict requirements for submission to a specific board for evaluation in respect of all initiatives likely to have significant economic, environmental or social impacts. See Better Regulation Guidelines 2015: http://ec.europa.eu/smart-regulation/guidelines/ug_chap3_en.htm. See also http://ec.europa.eu/smart-regulation/impact/ia_in_other/docs/ii_common_approach_to_ia_en.pdf.

[141] OJ L 228 of 23.08.2015, p.1.

[142] See comments quoted at § 4.5.

is an integral part of the legislative process. This shows the absence of an adequate approach when granting such a legislative role to a court. Additionally, lobbying obviously falls outside the normal duties of a court. However, in 2015, such lobbying took place. The President of the Court visited the President of the Parliament, presumably to press home the benefits of his proposal. Some members of the Court of Justice visited the EPP Group (having obtained the authorization required of the General Meeting)[143]. This raised other questions in the Parliament, amongst which one might include the following: Was the contact with the Parliament's President not also a contact with the S&D Group? What contacts were had with the other groups? If none, why were they ignored? The same question was asked about President Skouris' (subsequently authorised) visit to members of the German Government. Why not visit other Member States? And where does this noria stop? Such visits seem shocking, but they are nonetheless a logical consequence of Article 281. This leads to the conclusion that the provision creates a dangerous confusion of powers that will always generate serious tensions in a system that is purportedly grounded upon the principle of the separation of powers. This seems also globally the analysis of the new Court of Justice's president[144].

The best solution would appear to be to simply repeal the legislative initiative of the Court of Justice. The Court should be able to present requests for legislative change in the limited fields in question, but the Commission would be responsible for taking and thereafter promoting what would have become its proposal[145].

If this best option is not adopted, the second best option would be to impose some serious procedural constraints upon all legislative requests from the Court of Justice. In particular this competence ought to be attributed to the institution as a whole and not one of its constituent courts. Moreover, following the European Parliament's recommendation in its resolution of 29 April 2015, a clear separation should be established within the institution between judicial decisions and administrative or legislative decisions, thereby permitting the possibility of a proper judicial review of the latter. Otherwise, the institution could find itself in a serious mess in adjudicating upon applications relating to legislative acts the Court had sponsored and promoted.

143 See D. Seytre, Justice européenne: La Cour, une institution dans la tourmente?, Le Jeudi, 17 septembre 2015; A. Allemano, Where do we stand on the reform of the EU's Court System? On a reform as short-sighted as the attempts to force through its adoption, 23 September 2015.

144 « En tant que professeur de droit constitutionnel européen, j'attire votre attention sur le fait que ce n'est pas la Cour mais les Etats membres qui ont rédigé l'article 281 du traité sur le fonctionnement de l'UE. La Cour ne l'a jamais demandé, je peux vous le garantir. Ils ont donné cette initiative à la Cour, mais il est tout aussi clair que nous ne sommes pas normalement impliqués dans un tel processus. Ce n'est pas à moi de juger le traité. Il fallait l'appliquer. Je n'aurais pas rédigé cet article de cette manière. Mais c'est dans le traité. Nous avons dû jouer notre rôle même si nous ne sommes peut-être pas idéalement équipés pour le jouer. » (Le Jeudi, 17 janvier 2016).

145 This should be compensated by granting the EU Courts a greater autonomy over their internal organization. Presently, any change of the rules of procedure necessitates a cumbersome process, giving a strong and unhealthy exclusive influence to the Members States in the Council. Moreover this system can occasionally provoke conflicts of interests.

CONCLUSIONS

The proposal to enlarge the General Court was the first legislative initiative taken by the CJEU in the framework of the Lisbon Treaty, and was also the first participation of the European Parliament in such a debate. It has brought about a massive change in the entire judicial system of the EU. For the future, it is extremely important to draw the proper institutional lessons.

- There was a fundamental difference between the Court of Justice's first and second proposals, on the one hand, and the third and final one, on the other. The stakes in the third proposal were far higher. It aimed not only to increase the number of judges (in a more disproportionate way) but also to dissolve a court and to change the three layer EU judicial system into one of two layers. This had collateral consequences for the appointment process, the geographic basis of judges' recruitment, the management of personnel, and the appellate process. The proposal has stimulated opposition in various quarters. It also made the absence of impact assessment and wide consultation process even more shocking.
- The Member States' inability to agree on anything but a simple multiplication of judges aggravated the situation. It made the appointment of judges in specialized courts more difficult, and thus provided an excuse for their abolition, though they were obviously more quality oriented, more productive, and more economical. It also provoked a doubling of the General Court, which was manifestly excessive. This incapacity to compromise on EU appointments is not limited to judicial ones (as revealed before by the excessive growth of the Commission). This weakness has clearly become a source of useless spending by the EU.
- The special legislative procedure has been especially long and hard fought. This is true both inside the CJEU and between the CJEU and some components of the European Parliament. It would be wise to prevent similar circumstances arising in the future.
- The proposal was made without any impact assessment or external consultation. There was nothing resembling the associative process which generally surrounds legislative proposals, especially of a para-constitutional nature, in the EU. Here too, a reflection should be opened on the constraints that apply to the CJEU when it initiates a legislative proposal.
- The position of the other institutions during the negotiation was sometimes surprising. For example, in the first phase, the Commission's 2011 opinion insisted on the need to protect the stability of the General Court. This point was completely forgotten in the second phase. In the first phase, the Council expressed substantial doubts about the need to increase the number of judges.

In the third phase, when the proposal ballooned to 28 additional judges, these doubts paradoxically largely vanished. Nor did the Parliament consider the proposal worthy impact assessment or costs/benefits analysis.

- The effective rejection of recourse to specialized courts in the EU judicial system is a fundamental strategic choice. Firstly, it strengthens the Member States' role in the appointment of judges. The choice of candidates by a committee consisting of specialists is replaced by decision making by the Member States. In this sense, this is a strongly intergovernmental reform. Secondly, the reform establishes in a complete way the principle of equal representation of the Member States in the EU Courts (the committee in charge of the CST had supported informally a balance between big and small Member States). This will have important consequences on the recruitment of EU judges.
- Rejecting recourse to specialist courts will accentuate future difficulties in establishing an EU court for a truly integrated patent. Patent specialists call rightly for the appointment of a specialized court, which will not be possible under the new approach.
- The reform was not only about the increase of the judges' number. It also concerned the organization of the General Court. The Court of Justice pushed strongly in the Council for some specialization inside the General Court and also for a system of the discretionary attribution of cases to judges. So did the Member States and the Commission. However none of these actors saw fit to consult the General Court as to how it might wish to manage its internal affairs. This calls for further reflection about the need to protect the organisational independence of the EU courts.
- The specialization of the General Court raises another specific question in that framework. Contrary to the Court of Justice, the General Court functions in a decentralized way with chambers of three judges constituting the basic formation of judgment. In such a framework, specialization by one national judge can have a strong impact on the outcome of cases. The same could be said about the discretionary attribution of cases by the President to the judges. Here, too, the Court of Justice and the General Court are organized very differently. Such a discretionary attribution may have a strong impact on the result of proceedings. Additionally, would such a non-transparent and opaque system for the attribution of cases comply with the standards imposed by the European Court of Human Rights regarding the right to a fair trial?
- This legislative procedure invites a general reflection on the very exceptional legislative role that has been conferred upon the Court of Justice. From a public law viewpoint, one searches in vain to find an equivalent accumulation of power in the Member States. Supreme Courts do not enjoy a right of legislative initiative, let alone a quasi-monopoly over it. The events of the last four years tend to

show that serious consideration ought to be given to the withdrawal of this exorbitant prerogative. Should it be retained, its exercise must be subject to specific constraint.

- Finally, the doubling of the General Court is not in fact a "reform". On the contrary, it is a great example of a purely mechanical vision of public service reform. In general, the benefits of such an approach are strongly overestimated, and its costs strongly underestimated. In fact neither the EU institutions, nor the Member States, nor even many other interested parties, opened a reflection in depth about the real functioning of the EU courts, or the efficiency and costs of the possible reforms. This is a saddening conclusion (especially for the author), but this is a fact. This has brought the EU judiciary to a most paradoxical situation since all judicial national systems have simultaneously followed the opposite approach due to budgetary cuts and the search for higher productivity. The approach followed for the EU courts is not to be recommended for the future. One can only hope that, in the next decades, all of the EU institutions involved will pay more attention to the long term benefits of productivity measures (and specialized courts) – thereby fully respecting the quality of justice, recruitment of staff, productivity of judges and, finally, the not unreasonable expectation that public funds should be put to use only after the most careful consideration.

ANNEX I

UNDATED, UNSIGNED AND UNREGISTERED PAPER FROM THE COURT OF JUSTICE SENT TO THE EUROPEAN PARLIAMENT AND THE COUNCIL

REFORM OF THE GENERAL COURT

SUPPLEMENTARY INFORMATION CONCERNING QUESTIONS RAISED DURING DISCUSSIONS IN THE LEGAL AFFAIRS COMMITTEE OF THE EUROPEAN PARLIAMENT

Figures and trends of the last few years, as expressed in the consecutive annual reports, confirm that a structural reform of the General Court is necessary.

The General Court has taken advantage of the stability of its composition and the work of the additional référendaires that the General Court obtained in 2014.

Six facts show, however, that this improvement has reached its limits:

1. The trend of the last seven years[146]

The trend shows that the number of new cases has grown steadily. Except for 2012, the amount of new cases has always been higher than completed cases, therefore making the amount of pending cases rise inexorably[147]. 2014 has been an exceptional year for the General Court as regards the increase of new cases, which will be reflected in 2016 when all those cases will have reached the end of the written procedure.

2. The situation regarding pending cases

The global amount of pending cases was 1393 at the end of March 2015. The situation can not be regarded as satisfactory, since it entails many complex and sensitive cases. It is important to note the following statistics:

– The number of pending cases for which the written procedure is closed and that have not been treated is 428. 135 of those cases were filed in the 2008-2012 period.
– The number of old pending cases in some areas considered as sensitive by Member States, Institutions and businesses is worrying: at the end of March 2015 there were 112 cases pending in competition matters, among them some lodged

[146] Measured by three-year averages of new cases: in 2007: 474; in 2008: 528; in 2009: 573; in 2010: 611; in 2011: 642; in 2012: 658; in 2013: 710; in 2014: 773.

[147] Three-year averages of pending cases: in 2007, 1072; in 2008, 1120; in 2009, 1174; in 2010: 1223; in 2011: 1266; in 2013: 1290; in 2014:1328.

in 2010 and 2011[148]; 233 state aid cases were also pending, among them some lodged in 2011[149]; agriculture (EAGGF): 60 pending cases, among them some pending since 2010 and 2011[150]; restrictive measures: 106 pending cases, among them some lodged in 2012[151].

– No chamber has had or has a caseload below its capacity[152].

3. The duration of proceedings

It is not possible to consider that the duration of proceedings is satisfactory and meets the expectations that litigants are entitled to demand of a Union court. If the average duration of proceedings was 23.4 months in 2014, it is of utmost importance to keep in mind that those figures represent an average of cases of varying complexity and to look at the figures regarding the length of average proceedings of cases in sensitive areas such as state aid (32.5 months in 2014) and competition cases (45.8 months in 2014).

Examples of the length of proceedings in some of the important judgments in those two fields in 2014 include the following:

Judgments of 14 March 2014 in Cementos Portland Valderrivas v. Commission (T-296/11), Buzzi Unicem v. Commission (T-297/11): **33.6 months**; Judgment of 27 February 2014 in InnoLux v. Commission (T-91/11): **36.73 months**; Judgment of 6 February 2014 in AC-Treuhand v. Commission (T-27/10): **49 months**; Judgment of 27 March 2014 in Saint-Gobain Glass France v. Commission (T-56/09 and T-73/09): **62.27 months**; Judgment of 12 June 2014, Intel v. Commission (T-286/09): **59.53 months**; Judgment of 17 July 2014, Westfälisch-Lippischer Sparkassen- und Giroverband v. Commission (T-457/09): **56.9 months**; Judgment of 7 November 2014, Autogrill España v. Commission (14/05/2010): **54.6 months**; Judgment of 11 July 2014, DTS Distribuidora de Televisión Digital v. Commission (T-533/10): **44.16 months**; Judgment of 25 March 2015, Slovenská pošta a.s. v. Commission (T-556/08): **75 months**.

4. The proportion of cases completed by a chamber of 3 judges

In 2007, the General Court modified its operation and working methods in order to increase its efficiency. Since then, most cases[153] have been completed by a chamber

148 A few examples: T-9/11 and 12 other cases in the Airfreight cartel, first case lodged on 6 January 2011; T-47/10 and one other in the Heat stabilizer Cartel, first case lodged on 27 January 2011; T-389/10 and 20 others, Prestressing steel Cartel, first case lodged on 13 September 2010; T-486/11 Antitrust case concerning Orange Polska pending since 2 September 2011.

149 A couple of examples: T-674/11 TV2 Danmark and T-479/11 France.

150 A few examples: T-3/11 Portugal v. Commission, T-516/10 France v. Commission, T-44/11 Italy v. Commission.

151 For example, T-163/12 Ternavsky v Council

152 At the end of 2014, the caseload of the chambers had increased compared to the figures of the end of 2013.

153 Between 2008 and 2014, only 85 cases out of 4605 were completed by a chamber of an extended composition (5 or more judges). In 2014, only 2% of cases were completed by chambers of 5 judges. In the last seven years, only two cases have been completed by the Grand Chamber (13 judges).

of 3 judges, whatever the importance or the sensitivity of the case, leading to a risk of less consistency in the case law and more legal uncertainty for litigants. This situation cannot be seen as satisfactory, given the fact that the General Court is the only EU jurisdiction that decides on fact and law in such cases.

5. The effect of translation on the length of proceedings

In 2014, on average, translation of the parties' submissions took 1.4 months (2.1 months for state aid cases, 1.8 months for competition cases) and the translation of the judgments themselves took 1.8 months (1.8 months for state aid cases, 3.7 months for competition cases). This is the absolutely minimum both for the Court of Justice and for the General Court. Thus the translation has no negative impact on the overall length of proceedings.

6. The Civil Service Tribunal

The problems at the General Court are also having an impact elsewhere in the EU's legal structure. The Civil Service Tribunal currently has more than 100 cases suspended pending the outcome of appeals before the General Court, some of these appeals date back to 2013. Given that the total number of pending cases before the Civil Service Tribunal is 242, this court can only work on half of its pending cases, a number which is well below the capacity of a court composed of seven judges.

ANNEX II

COMMENT FROM JUDGE G. BERARDIS FOR THE EUROPEAN PARLIAMENT REQUESTED BY THE RAPPORTEUR (JUNE 2015)

1. THE TRENDS OF THE LAST SEVEN YEARS

A. "The amount of pending cases rise inexorably"

Pending cases as of March 31 2015

2010:	1300	–	78 suspended	= 1222
2011:	1308	–	59 suspended	= 1249
2012:	1237	–	68 suspended	= 1169
2013:	1325	–	71 suspended	= 1254
2014:	1423	–	131 suspended	= 1292
2015:	1393	–	100 suspended	= 1293
22.05.15:	1376	–	105 suspended	= 1271

- Developments during the last 5 years show that there has been no "inexorable increase" in the number of pending cases, the number of which has remained more or less constant.
- With 1249 pending cases in 2011, the year of the proposal to increase the number of judges by 12 (later by 9 in 2014) and 1293 pending cases in 2015, it is difficult to understand why the Court considered it appropriate to ask the Council to double the number of judges in 2014…
- The relationship between cases filed and closed is of only relative value, since *WORKLOAD* must be distinguished from *BACKLOG* by reference to an average time of +/- 24 months (regarded as acceptable and accepted in fact) for the treatment of a case from the moment it is filed until the conclusion of the case by judgment or otherwise.
- Note the inverse relationship between cases filed and closed as of 22 May 2015 since, as of that date, in 2015 the General Court had closed 312 cases as compared with 265 cases filed.

B. "2014 has been an exceptional year for the General Court as regards the increase of new cases, which will be reflected in 2016 when all those cases will have reached the end of the written procedure"

The Court omits to say that, if 912 new cases were lodged in 2014:

– Close to 200 of them were divided into groups of cases with significant similarities: 57 (attacking the same State aid measure), 51 (attacking the same State Aid

regime), 22 (restrictive measures – Syria), 18 (restrictive measures – Iran), 14 (restrictive measures – Ukraine), 9 (restrictive measures –Russia), 13 (attacking the same dumping decision), 7 (attacking the same dumping decision). Each group of these cases was usually attributed to a single Reporting Judge.

– In 2014 the General Court closed 814 cases.
– As of 18 May 2015, +/-230 of the 912 affaires filed in 2014 had already been closed.
– The Court appears to have overlooked the fact that, as in its own case, all cases are dealt with and progress in parallel, each at their own rhythm and taking into account the conduct of the proceedings, procedural steps, translations etc…

2. THE SITUATION AS REGARDS PENDING CASES

B. "The global amount of pending cases was 1393 at the end of March 15"

- As of 22 May 2015 this figure stands at 1271, not counting cases that are suspended. Divided by 28 judges, it works out at an average portfolio of 45 cases per judge, which is manageable.

C. "The number of pending cases for which the written procedure is closed, and that have not been treated, is 428"

- The origin of this figure is difficult to understand. It seems the Court refers to all pending cases where the written procedure has been closed and which are therefore ready to be worked on. It should, however, be pointed out that the great majority of these cases are already in the course of being worked upon. Most of these cases were filed in 2014 and are therefore being treated within the accepted time for dealing with cases. 50 of these cases were filed in 2013 and only 10 prior to 2013. Moreover this abstract figure takes no account of the procedural steps that may intervene in numerous cases (in 94 cases as of 31.03.2015). The Court cannot seriously claim that a case in which the written procedure has just come to an end must be ruled on the following day, on pain of it being otherwise being considered as "untreated".

- Of itself, the figure is meaningless given the normal average of 24 months to close a case and the application of the internal deadlines at each stage of the procedure.

C. "135 of those cases were filed in the 2008-2012 period"

- It is entirely incorrect to say that 135 old cases have not yet been examined:
  – As of 22.05.2015, there are 127 of such cases,of which
  – 101 are, for all practical purposes,closed since the relevant judgements and orders are being proof read and translated, which process does not involve judges and their cabinets.

– 26 are being worked on, the delay in treatment of which is due to various reasons (suspension, procedural steps, etc). By all indications they will be closed at the end of 2015/beginning 2016.

D. "The number of old pending cases in some areas considered as sensitive by Member States, Institutions and businesses, is worrying"

- The overall figures mentioned include ALL cases, including those filed between 1 January and 31 March 2015 and those filed in 2013 and 2014, the treatment of which is being carried out within the average period of +/-24 months.
- As for competition cases, the 110 cases to which reference is made, which also includes a number of groups of cases, are twice less numerous as compared to 2012 (when they amounted to 217).
- The references (see the footnotes to pages 3 to 6) to the oldest cases in the field of competition law, state aid, agriculture, restrictive measures, etc., are wide of the mark:

T-47/10:	delivery of judgment scheduled for 15.07.2015
T-389/10 + 20 others:	draft judgments adopted and in translation
T-486/11:	oral hearing on 26.06.2015
T-674/11:	oral hearing on 15.01.2015, draft judgment at proof reading
T-3/11:	delivery of judgment scheduled for 16.06.2015
T-516/10:	delivery of judgement scheduled for 2.07.2015
T-44/11:	delivery of judgement scheduled for 2.07.2015
T-163/12:	judgement delivered on 12.05.2015
T-9/11 + 12 others:	all oral hearings completed in May 2015
T-479/11:	in hand after the procedure had been suspended.

Whilst it is true that the treatment of these cases has taken a certain amount of time, that is essentially a problem of the past and is connected with delays in the nomination of certain judges, the absence of a full complement of judges in certain chambers etc. Since then, there has been a constant reduction in the average duration of the procedure and there are no longer similar delays in the treatment of new cases.

E. "No chamber has had or has a caseload below its capacity"

- At the request of judges who had exhausted their caseload, since 2014 the President of the General Court has reattributed cases (see the last note on this issue of 20.05.2015).

3. THE DURATION OF PROCEEDINGS

The statements and figures contained in the Court's text do not hold up to scrutiny:

- No-one claims that the figure of 23.4 months for duration of a procedure in 2014 (20.4 months in 2015!) is other than an average! It is completely normal for an intellectual property case to last for 12 months and for a very complicated cartel case in the field of competition law to take far longer, particularly since, in most cases, the latter consists of a group of cases that require treatment in parallel.
- Aside from the fact that they are limited in number, the specific cases mentioned above are all extremely complicated and/or their treatment has been delayed for different reasons, notably due to the fact that, during a certain period, the General Court operated with less than a full complement of its members. Since 2013, the General Court is fully staffed, it has an additional judge (the judge of Croatian nationality), it has had the benefit of the work of an additional 9 référendaires and it has carried out a series of internal reforms that have begun to bear fruit significantly. Moreover the new Rules of Procedure will yet save more time.
- Again, this is an issue of the past: the current position is completely different and the future outlook is positive. The Commission's new policy of "full settlement" in cartel cases has had a particularly important impact in reducing the number of these cases being brought before the General Court.

4. THE PROPORTION OF CASES COMPLETED BY A CHAMBER OF 3 JUDGES

"Since 2007 … most cases have been completed by a chamber of 3 judges … leading to a risk of less consistency in the case law and more legal uncertainty for litigants"

This statement is utterly groundless. It should be pointed out that, save for appeals in staff cases, the General Court delivers decisions at first instance. These can thus be appealed against to the Court which has the last word as to their quality.

In that regard, it may be observed that, since 2007, the percentage of General Court decisions appealed against has varied from between 20% in 2014 to 30% in 2011. As appears from the table below, in the period 2010 – 2014, the percentage of these appeals dismissed or struck out has varied at between 78% and 85%:

	2010	**2011**	**2012**	**2013**	**2014**
Number of appeals	88	124	129	160	158
Number of appeals dismissed/struck out	77	109	113	140	130

5. THE EFFECT OF TRANSLATION ON THE LENGTH OF PROCEEDINGS

"The translation has no negative impact on the overall length of proceedings"

This statement is one-quarter true.

It takes account of the time required to translate a judgment or order only. It does not take account of the time to translate pleadings and the report for the hearing, which systemically delays fixing the date of the oral hearing in cases where the language of the case is other than the General Court's internal working language.

- Delays in translation have a considerable impact on the length of proceedings. In the more complicated cases (competition, state aid), which are more voluminous and take longer to complete, several months can be absorbed in translation.
- Moreover, one cannot over look the average of two months taken to read and to proof judgments, which can be greater in complex cases (thus in part explaining the additional time required to deliver judgment in them).
- Taken together, the time required by readers, correctors and translators in the most difficult of cases can be very considerable and can amount to more than 6 months in the average competition case.

6. THE CIVIL SERVICE TRIBUNAL

"The Civil Service Tribunal currently has more than 100 cases suspended pending the outcome of appeals before the General Court"

- This presentation is particularly deceitful.

  As of 20 May 2015, 36 appeals against decisions of the Civil Service Tribunal are pending before the General Court:
  - 7 date from 2013 and their treatment is at a very advanced stage (for 3 of them the date of delivery of judgment has already been fixed);
  - 21 date from 2014: for 9 of them the written procedure is yet to finish or has just done so, 4 are at the draft judgment stage.
- In 2014 the average time taken to rule on an appeal was 12.8 months.

The conclusion that, as a result of these appeals, the CST can work on only half of its cases, which is "well below the capacity of a 7 judge court", is made in bad faith. Moreover one cannot see how the Court, which in 2014 took an average of 14.5 months to adjudicate on appeals, could assume that adjudicating on staff cases would be any faster particularly since, in 2016, it will acquire that jurisdiction should the proposal to double the number of judges in the General Court be implemented.

ANNEX III

PRESS RELEASE OF THE COUNCIL SECRETARIAT (JUNE 2015)

EUROPEAN COURT OF JUSTICE: COUNCIL BACKS REFORM OF GENERAL COURT

On 23 June 2015, the Council backed a proposal to reform the General Court, aimed at enabling it to face an increasing workload and ensuring that legal redress in the EU is guaranteed within a reasonable time.

The General Court is one of three courts of the European Court of Justice, the other two being the Court of Justice itself and the Civil Service Tribunal. The General Court is the court of first and last resort for the majority of decisions taken by the Commission and other EU organs, in all areas where the European Union holds competences.

Accelerated increase of caseload

According to the latest figures, the number of new cases arriving per year before the General Court increased from fewer than 600 prior to 2010 to 912 in 2014, resulting in an unprecedented 1393 pending cases at the end of March 2015. This **rapid pace of increase in the General Court's caseload** is likely to continue. For example, following the completion of the Banking Union, a new number of new cases related to the banking sector are now reaching the General Court. The strengthening of the General Court will enable the European Union to meet these new challenges.

The large and increasing number of pending cases **prevents the General Court from delivering judgements within a reasonable time.** The average time to deliver judgments in the most economically sensitive cases is between four and five years, while the average length generally considered acceptable is around one year. Article 47 of the Charter of Fundamental Rights provides for the right to receive a judgement within a reasonable period of time.

Reform measures

The reform proposal backed by the Council provides for a progressive increase in the number of judges at the General Court and for the merging of the Civil Service Tribunal with the General Court. In 2015, the number of judges would increase by 12. In 2016, the seven posts of judges from the Civil Service Tribunal would be transferred to the General Court to which nine further judges would be attributed in 2019. In total, this means 21 additional judges at the end of the process. This increase in the number of judges will also allow the General Court to have chambers of five judges rather than three judges to address the cases which justify it.

Reform costs

Thanks to the efforts made by the Court, increasing the number of judges by 21 and merging the Civil Service Tribunal with the General Court would cost €13.5 million per year. These costs compare favourably with the €26.8 million claimed in several actions for damages due to the delay in judgement.

ANNEX IV

COMMENTS ON THE COUNCIL'S PRESS RELEASE FROM JUDGE A. COLLINS FOR THE EUROPEAN PARLIAMENT

A REBUTTAL OF THE GSC'S Q&A ON THE DOUBLING OF THE GENERAL COURT

On June 23 2015 the General Secretariat of the Council (GSC) published a "Q&A on the reform of the General Court". This is a rebuttal of its contents.

Why is a reform of the General Court needed?

GSC: "Because the General Court is faced with a rapidly increasing caseload which prevents it from delivering judgements within a reasonable time. The number of new cases per year increased from less than 600 until 2010 to 912 in 2014, resulting in an unprecedented number of pending cases of 1393 at the end of March 2015."

To end September 2015, 619 cases were filed in the General Court, compared with 757 cases filed to end September 2014. The number of pending cases at end September 2015 is 1338, less than the "unprecedented number" cited at end March 2015. In any event almost half of these cases are not ready to be worked on. Between January and September 2015 the General Court closed 704 cases, as compared to 559 in the same period in 2014. Far from "rapidly increasing", the General Court's caseload is falling whilst year on year it closes a record number of cases.

What is the average time for the General Court to deliver a judgement?

GSC: "It takes the General Court currently on average two years to issue a judgement. This is twice as long as what is generally considered permissible. It is worth to note that article 47 of the Charter of Fundamental Rights provides for the right to receive a judgement within a reasonable period of time.

On the most economically sensitive cases (state aid and competition cases), the average time to deliver judgments is even between four and five years. This causes many difficulties to litigants, especially businesses, since they must keep aside important financial resources pending a judgement. This has obvious consequences for growth and jobs. As an example, fines amounting to more than €7 billion are currently challenged in cases pending before the General Court."

Absolutely nothing in the Charter of Fundamental Rights, the jurisprudence of the Court of Justice or the European Court of Human Rights supports the extraordinary claim that the General Court's average of two years to deliver written judgments "is twice as long as what is generally considered permissible." On average it takes 8.7 months to complete the written procedure and 3.4 months to prepare judgments

once the General Court has agreed upon them. It is thus impossible to see how this target could ever be met. Moreover the average time to deliver judgment in "economically sensitive cases" is closer to three, not "between four and five" years, which time continues to fall.

What is the precise content of the reform the General Court?

GSC: "The reform consists in an increase of the number of judges by 21 in two steps and the merger of the Civil Service Tribunal with the General Court. In 2015 the number of judges would be increased by 12. In 2016, the seven posts of judges from the Civil Service Tribunal would be transferred to the General Court by a merger of the two courts. In 2019, the number of judges would increase by nine, bringing the total number of judges to 56."

The legislative proposal doubles the number of judges of the General Court from 28 to 56. It is legally impossible to "merge" the Civil Service Tribunal into the General Court without an amendment of the Treaties, not least because the qualifications and the method of appointment of judges of the General Court differ from those for the judges of the Civil Service Court. Moreover the total cost of employing a judge of the General Court is substantially greater than that of a judge at the Civil Service Tribunal, as the European Parliament's resolution of 29 April 2015 on the discharge of the budget recognised.

Why to increase the number of judges? Would it not be sufficient to increase the number of legal secretaries?

GSC: "The number of legal secretaries has already been increased in 2014 by nine which helped to improve the productivity of the General Court. However, this measure has reached its limits. In fact only judges have the right to participate in the deliberations and to deliver judgements. To increase the number of judges would also allow the General Court to dedicate to the cases the attention they deserve by providing for the possibility to deliberate in chambers of five judges rather than of three."

By any definition an increase in the number of legal secretaries by 9 (i.e. one for every three judges, which the GSC admits improved the General Court's productivity) cannot have "reached its limits" since that could happen only had that number had been increased by 28 (i.e. one for each judge). Moreover the General Court itself is of the opinion that an increase in the number of legal secretaries is a more proportionate and appropriate measure than doubling the number of its judges. The time and resources needed to prepare cases of a fact intensive and technical character for hearing and deliberation is far greater than the time required to hear and rule upon them. Finally, the General Court may deliberate in chambers of five judges, but usually considers it unnecessary to do so.

Is the increase of the number of judges not excessively costly?

GSC: "The costs of the reform would be rather limited and in fact constitute good value for money. Thanks to the efforts made by the Court, the planned increase in the number of judges and the merger of the Civil Service Tribunal with the General Court would cost €13.5 million per year. This is only €2.3 million or 21% more compared to an increase of the number of judges by 12, which has already been agreed by the European Parliament. It is worth noting that the caseload increased by 43% from 2010 to 2014. The costs of the planned reform also compare favourably with the €26.8 million claimed in several actions for damages due to the delay in judgement. "

A judge of the General Court and his/her staff cost the taxpayer approximately €1M per annum. The cost of doubling the number of judges at the General Court will thus amount to in or around €28M each year. Allowing a generous €8M for savings from the suppression of the Civil Service Tribunal, yields a figure of €20M. Moreover these figures take no account of recruiting additional staff other than those directly working for the judges (e.g. translators). The so called financial benefits are strongly exaggerated, based as they are on the size of the claims, not the amounts that might be awarded. The case law of the European Court of Human Rights shows that the size of such awards is likely to be a small fraction of the sum to which the GSC refers.

Could the problem of the increasing caseload not be addressed by creating specialized courts?

GSC: "The creation of specialized courts would not constitute a viable alternative, for a number of reasons. Specialized courts are not flexible: if the number of cases increases substantially, the court is likely to be unable to cope with them. Specialized courts would also increase the risk of inconsistency of EU law since there would always be three courts that might be seized of similar issues: one by way of the preliminary ruling procedure (Court of Justice), one by way of an appeal (General Court) and one by way of direct actions (the specialised court). Specialized courts also add complexity. Finally, specialized courts would be unnecessarily costly: each requires a President and his or her Cabinet, a registry and other fixed costs. "

To date the EU has only one specialized court: the Civil Service Tribunal. It costs less to run and is more productive, per labour unit employed, than either the General Court or the Court of Justice. The risk of inconsistent case law has not materialized during the 10 years of the Civil Service Tribunal's existence. The Treaties conceived of specialized courts to deal with large numbers of similar type cases. Since the number of trademark cases received by the General Court is increasing in absolute and relative terms, they are ripe for such treatment. In any event, since it was repeatedly asserted that the only proposal under discussion was to double the number of judges, it is reasonable to assume that there the alternative of creating specialized courts was not examined.

Isn't the increase of the number of judges by 21 just the consequence of member states' inability to agree on where additional 12 judges would come from?

GSC: "It is right that in early 2011 the President of the European Court of Justice made a proposal to increase the number of judges by 12. It is also right that talks among member states on the appointment method were inconclusive. However, since this first proposal has been made the caseload increased significantly. Between 2010 and 2014, when the second proposal was made, the number of new cases increased by 43%. Due to this recent accelerated increase in the caseload an increase of the number of judges by 12 would in any case have requested a new increase of the number of judges by 2020 at the latest. The reform of the General Court as backed by the Council offers a sustainable solution for current and foreseeable future challenges."

Between 2010 and 2015 the number of cases filed at the General Court increased by 29%. During the same period the number of cases ruled by the General Court increased by 78%. In the same time the average time to deliver judgment has fallen by 10 months, from 35 to 25. There is no basis for the assertion that the legislative proposal is necessitated by an increase in the case load of the General Court or its inability to handle that increase.

In 2011, the Court of Justice asked the Legislator for 12 new judges. In 2013, it reduced its request to 9. There is now no objective basis to ask for 28, particularly since the backlog has almost disappeared. The fact remains that, on 10 April 2014, the Greek Presidency wrote to the Court of Justice stating that "…any solution which would necessitate a choice between candidates for a number of posts which is lower than the number of member states will most likely face the same difficulties as the present proposal." The true reason for doubling the membership of the General Court thus seems to be obvious, although the GSC's press release seems reluctant to address it.