GENERAL DEVELOPMENT

JULY 16, 2024

Op-Ed: “The (new) role of the Advocate General at the General Court”

Jonathan Wildemeersch

This contribution is part of the EU Law Live Symposium on the 2024 Reform of the Statute of tthe Court of Justice of the EU. Previous Op-Eds were authored by Takis Tridimas , Kieran Bradley, Dominik Düsterhaus and Corinna Wissels & Tom Boekestein. More Op-Eds on this topic will be published soon on EU Law Live.

The core of the reform resulting from the Regulation of the European Parliament and of the Council of 11 April 2024 amending Protocol No 3 on the Statute of the Court of Justice of the European Union (hereinafter referred to as the ‘Regulation’) is, by all means, the transfer of part of the jurisdiction for preliminary rulings to the General Court. This transfer brings an incidental but truly revolutionary change in the practice of the General Court: the obligation to designate an Advocate General in each preliminary ruling case to be dealt with by that court.

Anyone who is familiar with proceedings before the General Court knows that, unlike the Court of Justice, the former does not have Advocates General among its members. According to Article 254 TFEU, the Statute of the Court of Justice of the European Union (hereinafter referred to as the 'Statute') may nevertheless provide for the General Court to be assisted by Advocates General. However, until the entry into force of the Regulation, Article 49 of the Statute simply provides that 'The Members of the General Court may be called upon to perform the task of Advocate General' in respect of a particular case.

Interestingly, that possibility was only used at the beginning of the General Court's existence, in the early 1990s (judgements of 24 November 1991, T-1/89 to T-3/89, of 17 December 1991, T-4/89 and T-6/89 to T-8/89, of 10 March 1991, T-9/89 to T-15/91). However, in the Court of Justice's request of 30 November 2023, its generalisation to the preliminary ruling procedure is presented as one of the three procedural guarantees to be offered to national courts and to the parties to the main proceedings, the Member States and the institutions. This measure is likely to ensure a uniform approach in the treatment of references for preliminary rulings by the Court of Justice and the General Court. The other guarantees to that purpose are the allocation of such references to the specially designated chambers and the possibility for the General Court to sit in an intermediate-sized formation, i.e. between the chambers of 5 judges and the Grand Chamber composed of 15 judges.

What might have initially seemed like a minor aspect of the change of the competence of the General Court, has eventually become a major element of the reform. Whereas the request of the Court of Justice suggested to simply indicate the designation of the Advocates General in a recital 9 and under (3) of the new Article 50b of the Statute dedicated to the preliminary rulings of the General Court,

the Regulation dealt with it in more meticulous way – it is now the subject of a detailed recital and a new article in its own right.

Strengthened in the course of the legislative process, both recital 19 of the Regulation and the future Article 49a of the Statute state that the General Court shall be assisted by one or more Advocates General in dealing with requests for a preliminary ruling transmitted to it. Moreover, the Judges of the General Court will elect from among their number the members who will perform the duties of an Advocate General. Those Judges will not sit in preliminary ruling cases during the period in which they perform those duties and they will belong to other Chambers that the one to which the case has been assigned. The Judges elected to perform the function of Advocate General will do so for a term of three years, renewable once only.

Regarding the role of the Advocate General, Article 49(2) of the Statute (unchanged) defines it in terms identical to those of Article 252(2) of the TFEU: 'It shall be the duty of the Advocate General, acting with complete impartiality and independence, to make, in open court, reasoned submissions' on certain cases that require his or her intervention, i.e. cases that raise a new point of law. That provision is an application of Article 20(5) of the Statute that states that if 'the case raises no new point of law, the Court may decide, after hearing the Advocate General, that the case shall be determined without a submission from the Advocate General'. This provision was made applicable to the General Court by Article 53(1) of the Statute. Therefore, not all the cases are adjudicated upon with Advocate General's Opinion.

This limitation is expressly envisaged in the Court of Justice's request of 30 November 2023. On the other hand, in any case, the appointment of an Advocate General 'will contribute to

the strength of the analysis carried out by that court, given that each case will benefit [as at the Court] from twofold consideration, as the examination of the case file by the Advocate General designated might usefully supplement, qualify or enrich the analysis carried out by the Judge-Rapporteur in his or her preliminary report'.

Those are the limits of this 'guarantee' and its usefulness.

Indeed, as already explained, the appointment of an Advocate General for preliminary ruling cases demonstrates a concern to overcome any reluctance to the reform on the part of the Member States. This obligation, which was presented from the outset as a 'guarantee' to ensure that preliminary ruling cases before the Court of Justice and the General Court will be dealt with in the same way, has been largely clarified in the course of the legislative process. However, it seems rather surprising to require the designation of an Advocate General for matters which have already given rise, in the words of recital 6 of the Regulation, 'to a substantial body of case-law of the Court of Justice which is capable of guiding the General Court in the exercise of its jurisdiction to give preliminary rulings' while the Advocate General is, in principle, called upon to deliver opinions only in cases raising a new question of law.

It is true that this criterion of the new question of law is not the only one that leads to an Advocate General's Opinion. The complexity of the legal problem, the desirability of a reversal or a choice between two lines of case-law, the 'political' sensitivity of the question asked, all these criteria govern, at the very least informally, the decision to have the Opinion of an Advocate General. One may nevertheless wonder which of the preliminary ruling cases referred to the General Court will require an Advocate General's Opinion. It is conceivable that, initially, the task of the Advocates General might be to summarise this 'substantial body of

case-law' in order to make it easier for judges unfamiliar with these matters to assimilate it. However, does such a task require the election of several Advocates General – the number of which is not specified in the Regulation or, more surprisingly, in the General Court's Rules of Procedure as amended following the adoption of the Regulation?

Quite apart from these issues, a more fundamental difficulty relates to the 'dual personality' of the Judges called upon to play the role of Advocate General. The intellectual exercise is not the same, which explains why the General Court quickly abandoned this possibility in the past. Will the Judges/Advocates General manage to extricate themselves from their decision-making role in order to take a step back, which is necessary for a critical analysis? Will they be able to propose a possible reversal of case-law if needed?

While the integration of a new competence is undoubtedly a new challenge for the General Court, the institutionalisation of a hitherto unknown role is equally so.

** The opinions expressed in this article are purely personal to the author and in no way commit the institutions in which he works*

Jonathan Wildemeersch is Professor at the EU Legal Institute, University of Liège (Belgium) and Référendaire at the ECJ