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EDITORIAL COMMENTS

Delivering justice: small and bigger steps at the ECJ

European Union Committee rings a warning bell

On 6 April 2011, the House of Lords European Union Committee published a report entitled "The Workload of the Court of Justice of the European Union".[1] The situation at the General Court is the most alarming. According to the Committee, this Court is clearly struggling to manage its existing and ever increasing workload. Although there is still much which can be achieved at internal level and through better case management, the problems at the General Court call for "structural solutions". The Committee is not in favour of one of the proposed options, which is the creation of another specialist tribunal (i.e. a Trade Mark Tribunal) following the example of Civil Service Tribunal. Instead, they recommend an increase in the number of judges at the General Court. The Committee recognizes the cost implications, but argues that "… if the Member States are serious about addressing the General Court's workload problems this reform represents the best and most flexible long-term solution."[2]

While, for the time being, the Court of Justice is performing remarkably well,[3] the Committee expects that there will soon be a crisis in the workload there. There is a constantly upward trend in the number of references for preliminary rulings, not least due to the recent accessions. As the Committee puts it: "… the window of opportunity has closed within which the Court of Justice was able to avoid longer delays because the increase in its membership preceded an expected increase in its workload."[4] Another factor of importance is the expansion of the Court's jurisdiction in the Area of Freedom, Security and Justice introduced by the Lisbon Treaty. Nevertheless, as far as the Court of

1. <www.publications.parliament.uk/pa/ld201011/ldselect/ldeucom/128/128.pdf>
2. Point 136 of the Report.
3. The Committee notes reasonable stability in the number of new cases (between 500 and 600 per annum), completed cases (same numbers) and cases pending (about 750). In recent years the Court of Justice considerably increased its productivity, reduced its workload and cut its turnaround times. Cf. points 34–37 of the Report. The latest Annual Report of the Court of Justice of the EU (available at <www.curia.eu>) confirms this positive trend: in 2010, the Court completed 522 cases; 631 new cases were brought. The average time taken to deal with direct actions and appeals was 16.7 months and 14.3 months respectively and the average duration of the preliminary ruling proceedings was 16.1 months.
4. Point 41 of the Report.

Justice is concerned, the Committee does not propose structural changes: the most far-reaching change it proposes is the increase in the number of advocates general. The Treaty on the Functioning of the EU already offers a basis for such a change.[5]

Proposal by the Court of Justice

It may seem as though the Court of Justice meets every whim of the House of Lords Committee. On 28 March 2011, the Court submitted to the European Parliament and to the Council a number of draft amendments to the Statute of the Court of Justice. Note that this is for the very first time that the amendments of the Statute are to be decided in "the ordinary legislative procedure".[6] On 25 May 2011, another proposal was submitted to the Council: a recast of the Rules of Procedure of the Court of Justice. Under Article 253 TFEU an amendment of those Rules has to be approved by the Council.[7] Obviously, the publication of the Report by the House of Lords and the submission of the two proposals by the Court of Justice are sheer coincidence. The proposals were preceded by several months of careful preparations. Yet, both actions – the House of Lords Report and the proposals of the Court – reflect the same concern, namely how to safeguard a timely and efficient delivery of justice, without sacrificing quality.

The most far-reaching but also most controversial proposal made by the Court of Justice – not least in financial terms – is that of increasing the number of judges at the General Court from 27 to 39. This is possible, ever since the Nice Treaty, under what is now Article 19(2) TEU. Another similarly rather sensitive proposal concerns the position of the presidents of five-judge chambers. The proposal foresees that they should no longer sit *ex officio* in the Grand Chamber. That permanent membership was also introduced at the time of the Nice Treaty and it was envisaged as a guarantee for a high degree of overall consistency in the Court's rulings. An important objective of the Court's proposal is to increase the efficiency of the Court. If the presidents of chambers are freed from their "permanent duty" in the Grand Chamber, they could concentrate better on the running of their respective five-judge chambers, which at present deal with more then 50 percent of the Court's cases.

This change would be accompanied by an increase in the size of the Grand Chamber from 13 to 15 judges and the creation of the position of Vice-

5. According to Art. 252 TFEU such an increase is possible if, upon a request by the Court, the Member States unanimously agree to do so.

6. Cf. Art. 281 TFEU.

7. Both proposals have been published at <curia.europa.eu/jcms/jcms/Jo2_7031/>.

President, who should support the President. The latter, due to the enlargement of the EU to 27 Member States and the still growing size of the institution, is also facing an ever increasing workload. The new composition of the Grand Chamber, with the permanent membership of the President and Vice-president, is deemed sufficient to ensure the consistency of the case law.[8]

A recast of the Rules of Procedure

Next to these mainly organizational but certainly not minor changes, which all require an amendment of the Statute, there is a comprehensive proposal for amending the Rules of Procedure. The aim of this proposal is basically twofold. In the first place, its objective is a thorough modernization of the Court's Rules of Procedure which originally date from the early 1950s, by changing the structure of the Rules and by making a clean sweep. Various rules which are outdated or not applied have been withdrawn and others, which are too detailed, have been abridged or simplified. Codification of existing procedural practices that derive from case law or are laid down in other (secondary law) instruments should also contribute to further clarification of the rules applying to procedures before the Court. For instance, information to be included in a national court's order for reference, which is currently contained in the Court's information note on references by national courts for preliminary rulings, is specified in the draft Rules in Article 95. Article 96 partly codifies the Court's current practice of granting anonymous treatment, i.e. either at the referring court's request, or on application by the parties. Moreover, the anonymous treatment is similarly extended to cases where the Court decides to grant such treatment of its own motion.

As to the new structure, it must be pointed out that since 1953 the Rules have been amended various times, the last major amendment dating from 1991, but they still reflect the Court's role as an administrative court carrying out judicial review in respect of the activities of the institutions. In particular after the creation of the General Court in 1988 the case load started to change and nowadays over 50 percent of the cases submitted to the Court is made up of references for a preliminary ruling submitted to the Court by national courts of 27 Member States and dealing with a rich mixture of different subjects. The proposed new rules give the references for a preliminary ruling their proper

8. Another reason for increasing the number of judges in the Grand Chamber is that it reflects better the principle of equality between judges in a Court of 27 and it guarantees to a larger extent the input of various legal systems in the work of the Court. The "ordinary judges" now sit in approximately one third of the cases decided by the Grand Chamber, while, under the proposed change it will be a half.

place in the Rules of Procedure, coming after provisions on the organization of the court and provisions that are common to all proceedings but before the respective titles on direct actions, appeals, reviews of General Court decisions, Opinions on proposed international agreements and other procedures. Within the last category one finds special provisions for the handling of a request under Article 269 TFEU, i.e. the legality review by the Court of acts adopted under Article 7 TEU (clear risk of a serious breach by a Member State of respect for human dignity, freedom, democracy, equality, the rule of law and human rights).

A second objective of the amendments is to improve the efficiency of proceedings before the Court. Seen against the backdrop of the concerns of the House of Lords EU Committee set out above, the proposal should certainly not be underestimated, even if, when taken individually, the procedural changes may seem discreet. The most salient issues in the proposal – insofar as discreet proposals can be salient – are the following:

– The obligation for the Court to produce a report for the hearing has been removed from the Rules of Procedure. In fact, this is already the case in accelerated and urgent procedures; under the current practice, the report has become already a "rapport squelettique".
– A number of measures should enable the Court to handle oral hearings with more flexibility. While under the current rules the Court is obliged to accede to reasoned requests for a hearing, in the future it may decide not to hold a hearing if, in its view, all the parties have had sufficient opportunity to make their positions known. Such a decision is taken upon a proposal from the reporting judge and having heard the Advocate General. Moreover, where several similar cases are pending, the Court may decide to hold a single common hearing, even where the nature of the proceedings differs from case to case. This is a codification of an already existing practice.
– More room for manoeuvre for the Court to dispose of cases by reasoned order. The proposed Article 100 provides that where a question referred to the Court for a preliminary ruling is i) identical to a question on which the Court has already ruled, ii) where the reply to such a question may be clearly deduced from existing case law or iii) where there is no reasonable doubt about the answer to the question, the Court may, at any time, after hearing the Advocate General, decide to rule by reasoned order. Under the current system, the Court is obliged, in the third situation, to inform the court which made the reference and to offer the parties an opportunity to submit any written observations. Furthermore, in cases where the Court has already ruled on one or more points of law identical to those raised by an appeal and

considers the appeal to be clearly well founded, it may declare so by reasoned order. Currently this is only possible where an appeal is rejected.

– The application of accelerated procedures, both in preliminary ruling cases and in direct actions, should in exceptional circumstances be decided by the president on his/her own motion. Currently a request from the referring court or from the applicant or the defendant respectively is a prerequisite.
– The Court is empowered to adopt a decision setting the conditions under which the translation of excessively long pleadings and observations may be limited to the essential passages of those documents. This new power, not to be exercised immediately, should enable the Court to act quickly wherever this may prove necessary, for instance where the written pleadings or observations are unreasonably long.
– A number of possible measures should enable the Court to speed up or streamline the written phase of the proceedings. For instance, under the proposed rules, the President may specify the matters which the reply or rejoinder should focus and he/she may limit the number of pages of those pleadings. Moreover, requests to lodge a reply and rejoinder must be "duly reasoned".
– The ten-day period of grace based on considerations of distance is abolished since postal communication is nowadays replaced by modern technology.[9] In relation to this topic another initiative which will improve the speed and efficiency of proceedings should be mentioned, namely the establishment of *e-curia*, a system of electronic exchange of documents. Parties who agree to do so may accept service of documents from and lodge them at the Court Registry via a secure website. An exchange of paper versions will no longer take place.[10]
– Under the proposed Article 101(3), in cases where the date on which a judgment is to be given has already been announced, that judgment will be delivered. This will also happen in situations where the request for a preliminary ruling has been withdrawn after the notice of the date of delivery. An important consideration behind this proposal is the fact that a number of similar cases may have been stayed, either by the Court itself or, more often, national courts pending the forthcoming judgment. In particular in national courts sometimes a large number of cases may be "waiting". The need to start a fresh procedure will unreasonably delay the progress of these cases.

9. This change requires an amendment of the Statute, cf. Art. 45.

10. The necessary amendments to the Rules of Procedure were approved by the Council on 13 May 2011.

Time to move on?

The new proposals fit the approach followed by the ECJ over the last decade making use of the opportunities created by the Nice Treaty. With not very spectacular but nevertheless effective measures, the Court's efficiency in dealing with cases has improved considerably from 2004 onwards. A combination of reforms in the Court's working methods and the use of the various procedural instruments at its disposal to accelerate the handling of cases clearly bears fruit. The question is indeed for how long this type of – as such very praiseworthy – measures will suffice. The House of Lords EU Committee's expectation of an imminent crisis in the workload at the Court may be too pessimistic, but the fact remains that the European judicial branch is facing an old dilemma: increasing workload in terms of quantity and complexity on the one hand and, on the other hand, the need to have a judicial system which ensures unity of the law, which is transparent, comprehensible and accessible to the public and in which justice is dispensed without unacceptable delay. The problem, which is at the end of the day a shared problem of both the Court of Justice and the General Court, is by no means new and the possible reforms to the judicial structure in the EU have generated a wealth of literature, reports, proposals and other documents, ranging from highly focused or partial improvements to completely new blueprints. The above-mentioned Report of the House of Lords EU Committee, for instance, pays attention to a number of proposals that have been made and discussed in the past, such as the partial transfer of jurisdiction in preliminary rulings to the General Court, the issue of filtering references and the so-called green light system.[11] Some of the documents and publications do address much broader issues of structural reform, like setting up a system of regional or otherwise decentralized courts. These regional courts may be responsible for handling preliminary references coming from a certain region, or they may be specialized courts according to subject matter. In any case, it would seem that, by now, all the possible options for reform and their respective pros and cons have been on the table several times.[12] On the one hand, despite all the efforts, and all the small or bigger steps, a big leap

11. I.e. the national court requesting the preliminary ruling would be encouraged to state its own answer to the interpretation of EU law. Next, on completion of the round of written observations, the Court of Justice would decide whether to give that answer a "green light".

12. One of the oldest but also one of the best known suggestions for reform is probably that of Jacqué and Weiler, "On the Road to European Union: A New Judicial Architecture", 27 CML Rev. (1990), 185. Two other still topical documents that can be mentioned are "The Future of the Judicial System of the European Union – Proposals and Reflections" (prepared by the ECJ/CFI), May 1999, and the Report by the Working Party on the Future of the European Communities' Court System (report of the so-called Due Committee), January 2000.

seems inescapable. It is only a matter of time. On the other hand, all this being said, the fact is that in the short run a number of measures, both at the Court of Justice and, in particular, at the General Court, must be taken. Although longer term reflections may seem advisable, they should not draw attention away from the short term needs.