The General Court: enlargement or reform?

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Legal Context of Enlargement

The legislative procedure the Court of Justice commenced in 2011 by way of a request under Article 281 of the Treaty on the Functioning of the European Union (TFEU) to amend the Statute of the Court of Justice to allow for 12, later 9 and ultimately 28 additional judges of the General Court, ended on 16 December 2015 by the adoption of Regulation 2015/2422. It was the culmination of the first occasion on which the Court of Justice invoked the ordinary legislative procedure to amend its Statute: that is, to submit a proposal with a view to its adoption by a qualified majority in the Council and a simple majority in the Parliament.

Background and Purpose of Enlargement

As is usually the case, the Regulation’s recitals seek to describe the background to, and reasons for, its enactment. The first recital observes that there has been a constant increase in the number of cases before the General Court due

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to the progressive expansion of its jurisdiction since its establishment. According to the second recital, the length of proceedings before the General Court is excessive and risks offending Article 47 of the Charter of Fundamental Rights of the European Union and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. That this situation has come about is explained by the increase in the number and variety of legal acts of the Union’s institutions, bodies, offices and agencies, and the number and complexity of cases before the General Court, particularly in the fields of competition, State aid and intellectual property.³ The fourth recital of the Regulation rejects the option of establishing specialised courts under Article 257 of the TFEU in favour of the solution advanced by the fifth recital: the adoption of “suitable measures of an organisational, structural and procedural nature”, the most important of which is to increase the number of judges, as this “would allow for a reduction within a short time of both the volume of pending cases and the excessive duration of proceedings before the General Court.”

It follows from these recitals that the rationale for doubling the number of judges at the General Court under Article 254 of the TFEU and to spurn the option of establishing specialised courts, was in order to reduce both the backlog of cases, and the duration of proceedings, before the General Court. By doing so, the Union Legislature accepted the justifications offered by the

³ Regulation, Third recital
Court of Justice for both its proposal of 28 March 2001\(^4\) (seeking the appointment of 12 additional judges to the General Court) and that of 13 October 2014 (seeking the appointment of 28 such judges), which were grounded exclusively upon such considerations. The Court of Justice’s second document emphasised the urgent need to freeze, then to clear, a backlog of pending cases and to reduce the duration of proceedings in the General Court. Such other justifications as were mentioned, such as the need to simplify the EU’s judicial system, to introduce more flexibility in adjudicating upon cases and to do away with the necessity to resolve the various difficulties the Member States had themselves created in the process for the appointment of judges to the Civil Service Tribunal, were presented as secondary considerations, if even that.

Moreover, in a press release issued on 28 April 2015\(^5\) (by coincidence the same day on which the President of the General Court and four of his colleagues, including the author, gave evidence to members of the European Parliament’s Legal Affairs Committee of the EP at their request on the Court of Justice’s proposal of 13 October 2014), the Court reiterated these reasons, describing a “dramatic increase of cases before it [which] appears to be structural and is expected to continue.”; stating that “the General Court is not able to cope, in a sustainable and efficient manner, with the number and increased complexity of cases...”; adding that “the length of time taken to process complex cases,... has

\(^4\) "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" Interinstitutional file 2011/0901 (COD)

become particularly high” together with a reference to claims for damages totalling €28.8M. This Press Release also made, for the very first time in the legislative procedure, a Delphic reference to “[t]he reinforcement of the General Court … allow[ing] some competences of the Court potentially to be transferred from the Court of Justice to the General Court.”

In the light of the foregoing it is somewhat disconcerting to find that the President of the Court of Justice, Judge Koen Lenaerts, claims that the essential purpose of enlarging the General Court is to ensure that important cases would be heard by at least five judges and that the EU legal system would be simplified as the Court of Justice would henceforth hear all appeals from the General Court. This appears to be at odds with the documentation the Court of Justice tendered in support of its proposal throughout the legislative procedure. In a remarkable statement, Judge Lenaerts added that “…. ceux qui ont dit qu’il n’y avait pas de problème au Tribunal parce que l’output dépasse l’input sont intellectuellement malhonnêtes.” […. those who said there was no problem with the General Court because output outstripped input are intellectually dishonest.] One is left to speculate about the intellectual honesty of those members of the Court of Justice who advocated doubling the membership of the General Court on grounds almost exclusively referable to the latter’s alleged incapacity to address its workload in a timely manner.

“….suitable measures … to address this situation”

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6 Interview with Ms. Dominique Seytre, Le Jeudi, 28 January 2016.
Prior to December 2015 a number of “suitable measures of an organisational, structural and procedural nature” had been taken to address issues of productivity and delay. Four of these can be fairly described as having had a substantial impact on the work of the General Court.

The first is the operation of Article 255 TFEU Panel, the opinions of which have helped to ensure a minimum standard of appointments to the General Court. Second, the General Court has gone through a period of unusual stability in its membership, there having been one change only in its composition since October 2013. Third, despite having requested extra manpower since 2011, in 2014 the General Court obtained the services of an additional nine legal secretaries, each of whom was allocated to work for one of its nine chambers. Fourth, the General Court introduced monitoring mechanisms which allowed judges to see at a glance how they, their colleagues and the entire court were performing from a purely statistical perspective. Combined with the hard work and dedication of the judges and their staff, these measures created an atmosphere of confidence in which individual and collective efforts to improve productivity and reduce delay were appreciated.

The results of these suitable measures speak for themselves. The number of cases filed in the General Court in 2013 was 790, in 2014 912 and in 2015 831. The number of cases closed rose steadily from 702 in 2013 to 814 in 2014 and 987 in 2015. The average duration of proceedings fell from 26.9 months in 2013 to 23.4 months in 2014 and to 20.6 in 2015. Since 2011 the average duration of cases closed by a written judgment fell by over a quarter, from 34.6
to 25.7 months. The effect of other measures, notably the adoption of new Rules of Procedure, which came into force on 1 July 2015, has yet to be fully felt. As a result, and contrary to some of the exaggerations advanced during the legislative procedure, the backlog of cases that provided one of two principal justifications for the legislative proposal has disappeared. Whilst there is room for improvement in reducing the duration of proceedings, the trend is unmistakably downward. And all of this before a single additional judge has been sworn in! It is thus somewhat unfortunate that inadequate time was afforded to allow “suitable measures”, such as those described above, to bear fruit before the legislature chose to double the number of judges at the General Court. Moreover in the light of these facts it is astonishing that, as late as 3 December 2015, the Council published a press release\(^7\) containing the headings “Accelerated increase of caseload” and “Increasing duration of proceedings”.

*Implementing Regulation 2015/2442 - Appointment of Judges*

The Regulation envisages the number of Judges at the General Court being doubled by affording to every Member State the possibility to appoint two of its nationals.\(^8\) The “urgent necessity” to reduce the backlog of pending cases required that 12 additional judges take office upon the entry into force of the Regulation,\(^9\) *i.e.* on Christmas Day 2015.\(^10\) A further 7 vacancies are to be filled

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\(^8\) Regulation, sixth recital.

\(^9\) Regulation, eighth recital.

\(^10\) Regulation, Art. 4.
upon the dissolution of the Civil Service Tribunal currently scheduled to take place in September 2016.\textsuperscript{11} The balance of nine judges is to take up office in September 2019.\textsuperscript{12}

This timetable has, in practice, proved somewhat ambitious. An Inter-Governmental Conference has been convened for 23 March 2016 to decide on two sets of nominations; eight in the context of the partial renewal of the membership of General Court which would take place in the normal course of events in September 2016, and seven for the additional posts consequent upon the first stage of General Court’s enlargement.\textsuperscript{13} Nominations are outstanding from five Member States for the balance of the posts to be filled immediately.

The nomination process in respect of the seven posts to be transferred from the Civil Service Tribunal in September 2016 has also encountered some apparently unanticipated obstacles. On 7 January 2016, less than two weeks after the Regulation entered into force, the General Secretariat of the Council circulated a document\textsuperscript{14} which proposed that, for a seven month period between 1 February and 1 September 2016, the current President of the CST, Judge Sean Van Raepenbusch, together with two other individuals, Mr. Joao Sant’anna (of Portuguese nationality) and Mr. Alexander Kornezov (of Bulgarian nationality), be appointed as judges of the Civil Service Tribunal: by way of an

\textsuperscript{11} Regulation, ninth recital.

\textsuperscript{12} Regulation, tenth recital.

\textsuperscript{13} Nationals of Lithuania, Luxembourg, Greece, Poland, Cyprus, Hungary and Spain.

\textsuperscript{14} 15467/15 JUR 809 COUR 67
“A” item on the CoRePer agenda. These individuals were proposed by reference to their appearance on a shortlist established on 7 May 2014 by the selection committee for judges of the Civil Service Tribunal\(^{15}\) and accordingly none of them had been nominated by his Member State of origin. The wisdom of expending not inconsiderable sums of public money on making appointments for such a brief period being questionable it is far from surprising that certain Member States raised objections to this proposal.

The General Secretariat of the Council circulated a fresh document dated March 8 2016\(^{16}\) wherein it proposed that the aforesaid individuals be appointed as judges of the Civil Service Tribunal for a period of five months from 1 April 2016. Moreover this last document proposed that the current President of the Civil Service Tribunal be appointed with effect from 1 October 2014.\(^{17}\) In reality the justification for paying salaries and other emoluments to a number of individuals in order to do very little, if anything, for almost half a year is to facilitate the division of posts between the Member States. A failure to adopt the proposal could mean that Germany and Spain, rather than Portugal and Bulgaria, would have the right to nominate an additional judge to the General Court in 2016. There must be, and I believe there is, a more responsible way of spending taxpayers’ money, particularly since the current state of the General Court’s caseload is such that it has no urgent need of


\(^{16}\) 6735/16 JUR 99 COUR 17

\(^{17}\) This may be linked to the impact of certain changes to the emoluments of high-level office holders who take up office from 29 February 2016: see Council Regulation 2016/300 of 29 February 2016 determining the emoluments of EU high-level public office holders (O.J. L 58, p. 1).
seven more judges in September 2016 additional to the twelve it is supposed to receive before then. Indeed the sudden arrival of a large number of new judges, at present 25 out of the 47 that are to be in office in September 2016, is unlikely to improve the General Court’s productivity in the short term.

Implementing Regulation 2015/2442 - the General Court

Since its principal aims have been largely accomplished or are on their way to being attained, it might be asked whether the enlargement of the General Court serves any useful purpose. It is due perhaps to a combination of its improved performance and the constant fall in the number of cases filed in the General Court since December 2014 that the promoters of the doubling of its membership have sought to discover new justifications for their project, which were not advanced during the legislative procedure. Since the Regulation entered into force, both the current President of the Court of Justice, and the European Commission,\(^\text{18}\) have sought to justify the enlargement of the General Court on the ground that it will be able to hear more cases in larger formations. During my 2 ½ years tenure I have never once heard anyone suggest that a case not be sent to an enlarged formation by reason of a want of judges or resources. In reality the great majority of cases before the General Court are apt to be heard and adjudicated upon by three judges. There is no evidence that this approach reduces the quality of the General Court’s judgments, against which there is a right of appeal to the Court of Justice. With the exception of 2014, where the figure fell to 20%, the percentage of cases

\(^{18}\) Commission Opinion on the draft Regulation of the European Parliament and the Council relating to the transfer to the General Court of jurisdiction to rule, at first instance, on litigation between the Union and its staff. Brussels 22 February 2016 COM(2016) 81 final.
appealed has remained remarkably stable at around 28% during the past decade. Moreover the percentage of successful appeals in whole or in part is low, running at approximately 12.5% of all cases appealed between 2010 and 2013, increasing to 18% in 2014. In any event, an increase in the absolute output of the General Court will lead to an increase in the number of appeals before the Court of Justice. When added to appeals in staff cases, currently ruled by the General Court, it raises the question, which the legislative procedure did not address, as to how precisely the Court intends to meet the challenge of adjudicating upon such an increased number of appeals. Since the exercise of an effective right of appeal is of critical importance to litigants, notably as regards actions contesting decisions imposing fines in competition matters, this issue requires further public debate.

The General Court has embarked on a collective reflection on its reorganisation in the light of the enlargement. It has decided that, as of September next, judges will be assigned to chambers of 5 members, instead of as at present being assigned to chambers of 3 judges with the possibility of the cases being heard by a chamber of 5. As a consequence 5 judges will discuss each case before deciding whether it is to be heard by 3, 5 or a judge sitting alone (the Rules of Procedure now allow trademark cases to be heard in this manner).\textsuperscript{19} Whilst this may lead to more cases being heard by all the members of a chamber, it may be observed that the tenor of our discussions was that chambers of 3 judges will continue as the basic unit for deciding cases. Moreover each chamber of 5 will be made up of two chambers of 3, with a

\textsuperscript{19} Example of S Gervasoni
fixed composition consisting of the President of the chamber and two other judges. As a consequence although the number of cases heard by 5 judges will increase, it is unlikely that it will become the norm. It should be observed in passing that an increased recourse to chambers of 5 judges will inevitably result in slowing down the decision making process, thereby undermining one of the two justifications for the enlargement.

The passing reference in the Court’s Press Release of 28 April 2015 to a possible transfer of jurisdiction to hear some preliminary rulings appears to have inspired Article 3.2 of the Regulation. This provides that the Court of Justice must, by 26 December 2017, draw up a report for the European Parliament, the Council and the Commission on such a transfer, together with any appropriate legislative requests. The considerable legal and practical obstacles involved in dividing up responsibility to hear and determine references (not least amongst them the identification and isolation of subject matter at an early stage and the question of appeals) have not yet been the subject of formal discussions between the Court of Justice and the General Court.

In any case no one can predict with any precision the future flow of work at the EU Courts. Dire predictions of the General Court being engulfed by REACH cases failed to materialise, whilst the burden of work generated from actions challenging restrictive measures turned out to be greater than anticipated. Suggestions for an expanded ambit for the European Asylum Support Office

could possibly flood the General Court with applications, whilst the new banking regulation system could place considerable demands on the requirement to deliver speedy judgments.

Thus although the number of cases filed in the General Court has been falling since January 2015, let us assume for present purposes that those who sought to justify the enlargement of the General Court by reference to a steady increase in its caseload are correct and that the steady growth in the number of cases filed at the General Court observed up to end 2014 will one day resume. It is in that context that it is very difficult to comprehend the thinking behind the tenth recital of Regulation. This represents that the arrival of nine additional judges in 2019 should not lead to the recruitment of additional legal secretaries or other support staff. What is even more difficult to understand is that this suggestion appears to have emanated from the Court of Justice in order to meet Member State concerns as to the cost of the enlargement. Moreover, notwithstanding that the recital represents that “[i]nternal re-organisation measures within the institution should make sure that efficient use is made of existing human resources, which should be equal for all Judges,” the former President of the Court, Judge Vasilios Skouris, in a memorandum addressed to the President of the General Court, stated that he was no longer bound to redeploy staff within the institution in order to make up for the reduction in the number of legal secretaries for judges arriving in 2019.\(^{21}\)

Despite clear evidence to the contrary in 2014/5, throughout the legislative

\(^{21}\) The memorandum appears to disclose that this decision was a punishment for the General Court expressing its opposition to the legislative proposal in a letter it sent to the Italian Presidency in December 2014: see D. Robinson “The 1st rule of the ECJ fight club...is about to be broken”, Financial Times Brussels Blog, 27 April 2015.
procedure the Court of Justice observed that increasing the number of legal secretaries would not provide a solution to the backlog. Yet no-one, not even the Court of Justice, has ever suggested that three legal secretaries per judge is excessive. Indeed, it is understood that the Court of Justice is contemplating an upgrade of the salaries of the legal administrators attached to each judge, thus approximating them to a fourth legal secretary.

Again one is struck by a patent contradiction in the Regulation. A sustained increase in the number of cases filed in the General Court, together with a reduction in the number of its legal secretaries, would seem to render illusory any transfer of jurisdiction to hear references for preliminary ruling to the General Court under Article 3.2 of the Regulation.

Although it will be a considerable challenge to ensure that a court consisting of 47, later 56, judges, at least half of whom will have not been previously acquainted with the workings of the General Court, will not slip back into recreating a backlog, there are reasons to believe that it can be avoided by a combination of the current working atmosphere and diligent management by the President, Vice President and the 9 Presidents of Chambers, on whose shoulders a particularly onerous responsibility will be placed. It will be a greater challenge to use the additional resources to reduce further the duration of proceedings. A substantial increase in recourse to chambers of 5 judges will not speed up the deliberative process. Any system using a reporting judge has a natural bottleneck, notably in heavier cases such as in competition law and state aid. Some ingenuity will be required if the duration of such cases
is to be reduced significantly. With fewer cases per judge there ought to be more scope for the use of active case management: however that will not significantly reduce the time taken to rule on cases where the issues are clear from the outset. The suggestion of having two reporting judges in such cases is not necessarily guaranteed to speed up the process and could lead to further delays. Removing the burden of other cases from the reporting judge where s/he is assigned a particularly heavy case might help by freeing up the entire resources of his/her cabinet to work on a single case, but would require careful management so as not to disrupt the work of other judges excessively and also respect the principle of the juge légal.

Given that the Regulation bizarrely declines to envisage the expenditure of an additional penny for support services such as translation, thereby creating the potential for further delays in the event output increases, another suggestion to save time may be to allow reporting judges to work in English on cases pleaded in that language. In 2015 42.5% of cases pending before the General Court were pleaded in English, compared to 14.9% in German, 12% in Spanish and 11.1% in French. Even if the percentage of cases pleaded in French will rise with the transfer of cases pending before the Civil Service Tribunal, English will remain far and away the most popular language with litigants before the General Court. Moreover since the time taken to adjudicate on cases is reduced where no translations are required, one could anticipate that, in the event of such a change, more cases would be argued in English since as matters stand many, if not indeed the majority, of such cases are pleaded by lawyers who are not non-mother tongue Anglophones.
In her insightful paper, "The Faceless Court", Ms. Angela Zhang observes that while the legal origin of legal secretaries in the Court of Justice is not too far removed from what one might expect to find in a jurisdiction that uses French as its working language, what she describes as the "French" legal system, and notably French nationals, are in a dominant position in the General Court (respectively 72% and 38%, as compared with 60% and 23% in the Court of Justice). Thus allowing English to be a working language where it is the language of the case might have the positive consequence of broadening the pool from which the General Court’s legal secretaries can be recruited.

A Constitutional Issue

Enlarging the General Court does not alter its character as a court of first instance, established by Article 19.1 of the TEU and Article 256 of the TFEU to hear certain classes of actions, and whose members are persons drawn from each Member State who possess the ability required for appointment to high judicial office. Article 256 TFEU envisages the appointment of judges who are capable of dealing with any of the matters over which the General Court has jurisdiction, thus constituting "the High Court of the Union." In practice one might anticipate that persons appointed to the General Court would have some expertise in public law. Experience of EU public law is, in most Member States, particularly those of a small and medium size, itself a speciality.

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22 King’s College, London, 4 August 2015.

23 TEU Art. 19.2

24 Interview of President Koen Lenaerts with Ms. Dominique Seytre, Le Jeudi, 28 January 2016.
Article 257 TFEU envisages the establishment of specialised courts attached to the General Court to hear certain classes of action, composed of specialists in the relevant field. On this occasion the Union legislature decided not to proceed with this second option.\textsuperscript{25} Indeed, by suppressing the Civil Service Tribunal it appears to have mothballed, if not indeed abandoned, its use in the foreseeable future.

One of many remarkable features of the legislative procedure was the rejection of recourse to specialised courts whilst simultaneous attempting to force the General Court to introduce specialised chambers.

In its Opinion of 30 September 2011\textsuperscript{26} approving the Court’s proposal to increase the number of General Court judges by 12, the Commission pulled the rabbit of specialised chambers out of the hat without consulting interested parties or carrying out an impact assessment. It is important to point out in this context that since the Commission is the General Court’s single most important client, and since the General Court rules at first instance on the legality and correctness of its decisions, it is far from being a disinterested party in this debate. One might have thought that the Court of Justice, solicitous to protect its own independence from the executive, would have expressed the view that the issue of specialised chambers was an internal matter for the General Court. However at the Council Meeting of 23 June 2015 which approved the first reading of what was to become Regulation 2015/2422, the

\textsuperscript{25} Regulation, recital 4.

\textsuperscript{26} COM (2011) 596 final.
Court of Justice caused to have had appended to the minutes a statement\textsuperscript{27} in which it recalled having invited the General Court to submit, before swearing in the first 12 additional judges, a proposal to create specialized châmbers and to align its rules on the allocation of cases to those followed by the Court of Justice.\textsuperscript{28} Whilst the recitals to the Regulation are silent on the point, Article 3.1, in describing the report on the functioning of the General Court which it is envisaged will be submitted before Christmas 2020 (i.e. after the full complement of additional judges has been sworn in), refers, \textit{inter alia}, to "the further establishment of specialised chambers and/or other structural changes".\textsuperscript{29}

The General Court has had the opportunity to reflect on these suggestions in the context of considering adaptations consequent upon its imminent enlargement. After a very full debate, its Plenary Conference recently decided, by a substantial majority, to retain its current system for the allocation of cases, thereby declining to create specialised chambers. The arguments which led it to this conclusion were a combination of the constitutional, since the Treaties do not envisage the General Court as either a specialised court or as an assembly of specialists; and the practical: the General Court, consisting of judges from 28 Member States, cannot be compared with national courts; since appointments are limited in duration specialisation might have to be for an entire mandate for it be of any real benefit; would specialised legal secretaries remain with a judge who changed specialisation or would they transfer to

\textsuperscript{27} Doc. 10043/1/15 REV 1 ADD 1
\textsuperscript{28} i.e. at the discretion of the President of the Court.
\textsuperscript{29} My emphasis.
another judge who was about to commence a new specialisation; would judges be selected for specialisation in the event they were not specialists in that area, etc. In any event, from the perspective of the General Court, that debate is now firmly closed for the foreseeable future.

It may also be of interest that the Commission appears to have taken a welcome step away from its earlier advocacy in favour of specialised chambers. In its Opinion on the transfer to the General Court of jurisdiction to rule on staff cases at first instance, it observed that the enlargement of the General Court could lead to a reflection on the possibilities to adapt the rules and practices governing the attribution of cases to create "synergies thématiques" by taking account of the material links between cases, whilst allowing such rules and practices to be adjusted in the light of the future evolution of litigation. The General Court is reflecting upon how its rules for the allocation of cases can be made more transparent, dynamic and fit for purpose. It is nonetheless important to point out that allocating cases by reason of material links between cases not only has limits but was originally conceived by the General Court not as a form of specialisation but rather as a mechanism to enable it to develop an approach in new areas of law. Thus when a number of cases arrived touching upon an area of law that the General Court had not previously encountered, they would be sent to a single reporting Judge to enable him/her develop a coherent approach to the issues raised therein, such cases being thereafter distributed amongst members of the General Court.
Conclusion

Article 19.1 of the TEU states that the Court of Justice, of which the General Court is part, "shall ensure that in the interpretation and application of the Treaties the law is observed." Whatever about past difficulties, the General Court can be proud of its record in discharging these duties in the recent past. The confidence that accompanies such a steady achievement is a reminder to the General Court of the necessity to make such changes as may be required to adapt to its enlargement, without embarking upon a nebulous and counter-productive reform.