Editorial

Judicial Reform and Reasonable Delay

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On 28 March 2011 the Court of Justice proposed, on the basis Article 281 of the Treaty on the Functioning of the EU (TFEU), to amend its statute. This proposal deals with all three jurisdictions that constitute the Court of Justice. The proposal concerning the Court of Justice is intended, in essence, to adapt its governance by amending the rules relating to the composition of the Grand Chamber and to establish the office of Vice-President of the Court of Justice.

The proposal concerning the General Court aims to appoint twelve additional judges. The Court of Justice considers that this increase in capacity is required to deal with the increasing work load of the General Court. This work load had lead to a considerable backlog and has increased the average duration of proceedings. This increase has affected in particular State aid and competition cases in which the average duration is, respectively, 42 months and 56 months in cases leading to a final judgment. As the Court ruled in the Grüne Punkt case (C-385/07 P, 2009, ECR I-6155) lengthy proceedings can be incompatible with the principle of reasonable delay as guaranteed by Article 47 of the Charter of Fundamental Rights, but also Article 6(1) of the European Convention of Human Rights and Fundamental Freedoms. As the Court acknowledges, this latter aspect could place the European Union in a delicate position at a time when its accession to that convention is being negotiated.

The proposal of the Court of Justice concerning the increase of the capacity of the General Court has received positive opinions from the European Commission and the competent Committee of the European Parliament, but is still being discussed in the Council's working groups. These discussions have raised various questions concerning, *inter alia*, the costs of the proposal, the need for such reform, the existence of alternatives and, finally, the appointment procedure for the twelve additional judges. Apart from the costs of the proposal which the Court of Justice estimates at €13.6 million per annum and which have not yet been assessed in the budgetary committees, the key issue seems to concern the appointment procedure. In its opinion, the Commission proposes a rotation procedure, which is not particularly helpful. In so far as I am able to understand it, the Commission proposed that half of the judges at the General Court should be reappointed or renewed every three years, thus creating permanent instability in the jurisdiction. Member States further complicated the appointment issue. Large Member States, such as Germany and France, seem to insist that large Member States should be entitled to one additional judge at the General Court and that the remaining posts should rotate among the smaller States on the basis of a system comparable to that underlying the appointment of advocates general at the Court of Justice. Smaller Member States are not charmed by such ideas.

It is unclear where these discussions will lead. The risk of a deadlock cannot be excluded, especially when the costs of the proposed operation will be subject to budgetary scrutiny. Nor is it certain that the increase in the number of judges will suffice by itself to tackle the backlog. The procedural rules of the General Court and in particular the existing case allocation rules may have to be revised to ensure that old cases are reassigned from the judges facing heavy workloads to the new judges or to judges with spare capacity. The case allocation system currently foreseen by Article 9(2) of the rules of procedure of the Court of Justice could serve as an example to optimise the use of judicial resources at the General Court. Whatever the answers to all these questions may be, the hard fact remains that something needs to be done to reduce the length of proceedings at the General Court.

In this uncertain context, it may be useful to explore other avenues that could serve as alternatives or supplementary measures to the proposal of the Court of Justice. As I will explain below these alternatives should not only focus on increasing the production capacity of the General Court, but can also be found 'upstream in the judicial production process'. A reduction of incoming cases could free existing capacity. Limiting this

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inflow is obviously a delicate issue because it could be at odds with the principle of effective judicial protection. Even so, judicial protection exists in varying degrees. Some cases require more protection than others. For the reasons set out below, I submit that the present level of protection in some cases brought before the General Court could be revised so as to free production capacity for cases that require more judicial attention, such as competition cases and other cases that come within the ambit of Article 47 of the Charter.

First, I have difficulties in understanding the reasons which led the Union legislator to consider that the degree of administrative and judicial review in trade mark cases should exceed the level of protection granted to companies fined in competition cases or to individuals exposed to economic sanctions. Trade mark opposition cases may lead to five different levels of review: (i) the initial examination of the registration request; (ii) subsequent review by the opposition division; followed (iii) by an appeal to OHIM's board of appeal; and (iv) full judicial review by the General Court; as well as (v) an appeal on points of law to the Court of Justice. By contrast, companies involved in competition cases only enjoy three levels of protection, one offered by the prosecuting authority itself, another by Article 263 TFEU before the General Court and, finally, by an appeal on points of law to the Court of Justice. This difference in intensity of administrative and judicial review is even more difficult to understand, if one considers that trade mark law is about granting rights whereas competition law is about prohibitions and sanctions.

Another puzzling issue concerns the reasons why trade mark cases are brought before the General Court. It is true that the relatively intensive review process within OHIM itself acts as an important filter: only 10 per cent of the decisions of the OHIM's appeal board are challenged before the General Court. It is also correct that the success rate of filing an appeal before the General Court is relatively high (approximately 20–24 per cent). Even so, one may question the merits of many cases that are currently filed in Luxembourg. Intuitively and subject to research into this issue, my guess is that at least a third of the appeals in trade mark cases are simply filed in Luxembourg as a last attempt to amortise the investment ('sunk costs') already made for the OHIM proceedings in Alicante. There is indeed no downside to bringing a trade mark case before the General Court. Applicants can only win and not lose. After having paid the OHIM registration fee (minimum of €900 and an additional €150 per additional product class) and/or the costs of preparing the submissions related to the trade mark registration or opposition, the incremental cost of recycling these submissions into the format of a Court application is minimal. Mostly, applicants do not insist on a second round of written pleadings. Nor do they require an oral hearing. Finally, even if the General Court rejects the application and condemns the applicant to the costs of the proceedings, the OHIM only claims travel expenses.

If trade mark cases are relatively riskless for the applicants, there are certainly costly to society. They account for approximately 30 per cent of incoming cases and clog up the General Court's production capacity. Processing trade mark applications takes time and distracts the court's production capacity from its core business which includes competition law work. I therefore suggest that the Parliament and Council amend Article 65 of Regulation 207/2009 by including a new paragraph imposing the payment of a registration fee for filing cases before the General Court. The amount of the fee should be sufficiently high to discourage frivolous applicants and could be set by the Implementing Regulation foreseen in Article 162 of the Regulation 207/2009. Subject to further study, I would guess that an amount between two and three thousand euro should be enough to obtain this chilling effect.

Admittedly, requiring the payment of a registration fee derogates from the principle, laid down in Article 90 of the rules of procedure of the General Court, that proceedings before this Court shall be free of charge. This payment could also be seen as an obstacle to access to justice. Although I am sympathetic to such objections, I would like to underline the specific nature of trade mark law. As I already said above, this law aims at granting rights to trade mark holders. Nearly all other cases brought before the General Court relate to administrative action that affects the legal position of individuals, companies, and States, in the form of regulatory measures, administrative authorisations, tort, or sanctions. It seems to me that there is a fundamental difference between obtaining benefits, on the one hand, and the protection against administrative action or inaction, on the other hand. Moreover, possible objections to paying for court access could be alleviated if the proceeds of the registration fee were to be used to finance legal aid within the meaning of Article 94 of the rules of procedure.

Second, the case law on the application of Regulation 1049/2001 on access to documents is rapidly evolving. Although this jurisprudence only accounts for 3–4 per cent of the inflow of the General Court, it is relatively labour intensive, especially in cases where the applicant

has requested access to numerous documents. Often the General Court must order the defending institution to produce the requested documents in order to assess for itself whether they can be disclosed to the applicant. Obviously, an independent party should have the final say on the accessibility of public documents.

One may wonder, however, why the Parliament and Council decided that there should be two independent parties, the Ombudsman and the General Court, dealing with the same issue. It seems to me that the Ombudsman, as the person directly controlling the proper functioning of the European administration, is best placed to assess whether or not a particular document should be disclosed. It could be envisaged that the procedure before the Ombudsman is transformed into a precondition for any court action so as to ensure that this procedure has a comparable filtering function as the procedure before OHIM's board of appeal in trademark cases or as the administrative review phase in staff cases. This would require an amendment of Article 8 of Regulation 1049/2001 specifying that the institution concerned must redefine its position on the basis of the findings of the Ombudsman and that only this position constitutes the final decision that can challenged before the General Court.

Third, the institutions should abstain from conferring jurisdiction, pursuant to Article 272 TFEU to the Court of Justice in contractual matters. It is true that the amount of incoming contractual cases is relatively limited (approximately 1–2 per cent of the total, depending on the years). Even so, judicial review in contractual matters can be complex and time consuming. Moreover, I submit that the General Court is first and foremost an administrative review court and that the civil courts of the Member State, whose laws apply to the contract, are better placed to deal with contractual issues than an administrative review court.

Fourth, the Commission should be more conscious of the impact of future legislation on the work load of the Court of Justice before it submits proposals to the Parliament and Council. It is quite surprising to note that its elaborate impact assessment mechanisms, including the 2009 guidelines, do not address that question. In my view, the legislator should be properly briefed about the consequences legislation may have on the Court's capacity. Judicial review has a cost which the legislator should take into account in its assessment of the expediency of further regulatory measures and of the degree of administrative and judicial review that is required to ensure adequate protection.

The combination of these four measures concerns approximately a third of the incoming cases of the General Court: in 2011 723 cases where filed, of which 219 were trade mark cases, 5 contractual cases, and 21 access to document cases. Assuming that the effect of these measures would reduce this inflow by 30–50 per cent (approximately 70–120 cases), the General Court would be able to deal with the back log, because its output (714 cases in 2011) would significantly exceed its input. Obviously, these figures are only guesstimates. The proposals show, nevertheless, that input related measures may be considered as reasonable alternatives or complementary action to the more complex and contentious measures aimed at increasing the General Court's production capacity. In any event, they deserve further attention. All avenues leading to reasonable delay should be explored.

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