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CCBE comments on the functioning of the General Court

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I: GENERAL INTRODUCTION

The Council of Bars and Law Societies of Europe (CCBE) represents the Bars and Law Societies of 45 countries, and through them more than one million European lawyers. The CCBE is recognised as the voice of the European legal profession and in this regard the CCBE represents European bars and law societies in their common interests before European and other international institutions. It regularly acts as a liaison between its members and the European institutions, international organisations, and other legal organisations around the world.

With this paper the CCBE intends to offer its contribution to the ongoing debate on the Reform of the judicial framework of the Court of Justice of the European Union decided in 2015 by the European Parliament and of the Council, as the Court of Justice prepares to draw up the report on the functioning of the General Court envisaged in Article 3 of Regulation (EU, Euratom) No. 2015/2422.

The comments below concern the efficiency of the General Court's performance after the doubling of the number of its Judges, the necessity and effectiveness of this increase, the use and effectiveness of the resources required by the Reform, and the issue whether the establishment of specialised chambers and/or other structural changes may be deemed necessary at this stage.

II: ASSESSMENT OF THE REFORM'S IMPACT ON THE GENERAL COURT'S PRODUCTIVITY ON THE BASIS OF TWO PERFORMANCE INDICATORS: DURATION OF THE PROCEEDINGS AND NUMBER OF COMPLETED CASES

The CCBE has consistently argued that, to make access to justice a reality for litigants in Europe, cases before the General Court ("GC") must be determined in an appreciably shorter period than the GC has on average been able to achieve, notably in complex economic law matters involving infringements of the EU competition or State aid rules, where the length of the proceedings often exceeds three or four years, in many instances without being justified by the circumstances of the case. The CCBE's other primordial concern has been with the overall experience of litigants seeking justice before the Union Courts, and most acutely with the substantive quality of the judicial process and the judgments rendered, at all levels of the European judiciary. The temptation for courts with problems of delay is to try to limit access to justice, to reduce the intensity of review of administrative decisions and to be increasingly formalistic in the application of procedural rules. The necessary shortening of time for GC judgments should, however, be achieved without a reduction in the quality of justice.

In any event, it would be a mistake to look at only one aspect of the functioning of the Court because other issues go to the heart of the quality of justice being rendered in the EU – issues such as the method of selection of EU Judges by Member States; the intensity of the review exercised by the GC

over decisions of EU Institutions; the quality of hearings; and active case management as used to good effect in certain Member State courts. For that reason, in addition to dealing with the immediate issue of the excessive duration of the proceedings, the CCBE also continues to advocate a thorough and independent review by representatives of all stakeholders of how the Union Courts can deliver impartial, high quality justice in the coming years.

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As stated in the Preamble of Regulation (EU) No. 2015/2422,[1] one of the main objectives of the Reform was to reduce the average duration of proceedings before the GC, which in the early 2010's was perceived as too long and incompatible with the principle of a sound administration of justice, as well as in breach of the fundamental right to effective judicial protection.[2] Accordingly, in the course of the legislative procedure leading to the adoption of Regulation (EU) No. 2015/2422, the net additional financial cost of the reform – which was estimated by the Legislator at € 13.5 million per year when fully implemented, *i.e.*, approx. 3.4 % of the total budget of the Court of Justice of the EU (the "ECJ") -- [3] was favourably compared to the risk borne by the European Union, represented by the ECJ, to pay litigants – most often companies involved in competition law matters[4] -- monetary amounts as compensation for the damages sustained by them as a result of the GC's breach of the obligation to adjudicate within a reasonable time.[5]

However, it is well known that the very existence of the shortcomings – including the increasing workload and backlog of the GC, and the increasing duration of its proceedings – which, in the view of the ECJ and the Council, the Reform was aimed at remedying, was strongly disputed in the public

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1 Recitals 1 to 5 read: "*As a consequence of the progressive expansion of its jurisdiction since its creation, the number of cases before the General Court is now constantly increasing. // At present, the duration of proceedings does not appear to be acceptable from the point of view of litigants, particularly in the light of the requirements set out in Article 47 of the Charter of Fundamental Rights of the European Union and in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms // The situation in which the General Court finds itself has causes relating, inter alia, to the increase in the number and variety of legal acts of the institutions, bodies, offices and agencies of the Union, as well as to the volume and complexity of the cases brought before the General Court, particularly in the areas of competition, State aid and intellectual property. // The option of setting up specialised courts as provided for in Article 257 of the Treaty on the Functioning of the European Union (TFEU) has not been taken up. // Consequently, suitable measures of an organisational, structural and procedural nature, including, in particular, an increase in the number of Judges, should be taken to address this situation. Making use of the possibility provided for by the Treaties of increasing the number of Judges of the General Court 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*".

2 The second main objective of the Reform was to enable the GC to face an increasing workload. According to the then-available figures, the number of new cases arriving per year before the GC had increased from fewer than 600 prior to 2010, to 912 in 2014, resulting in an unprecedented 1270 pending cases at the end of November 2015. Moreover, such a rapid pace of increase in the caseload was expected to continue, following the recent broadening of EU competences likely to give rise to further litigation, for example in the banking sector: Council of the EU press release, *Court of Justice of the EU: Council adopts reform of General Court* (Dec. 3, 2015).

3 European Court of Auditors (ECA), *Performance review of case management at the Court of Justice of the European Union* (2017; the "ECA Report"), § 10.

4 C. Breuvart-C. Kye, "Gascogne, Kendrion, *and* ASPLA*: Little Relief from the Slow Wheels of Justice*", J. Eur. Comp. L. & Prac., vol. 10/3 (Mar. 2019), p. 159.

5 See *Court of Justice of the EU: Council adopts reform of General*, as per note 2 above: "*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 judgment and will allow the EU's first instance jurisdiction to fulfil its functions within the time limits and the quality standards which European citizens and companies are entitled to expect in a Union based on the rule of law*".

debate.[6] In particular, the average duration of proceedings (all cases disposed of by way of judgment or order|) fell from 26.7 months in 2011 to 20.6 months in 2015 (approx. - 23%), plausibly as a result of certain internal restructuring measures implemented in the years 2011-2015[7], as shown by the following table:[8]

Table 1.3. Workload of the General Court (2011–2018)

	2011	2012	2013	2014	2015	2016	2017	2018
New cases	722	617	790	912	831	974	917	834
Completed cases	714	688	702	814	987	755	895	1009
Pending cases	1308	1237	1325	1423	1267	1486	1508	1333
Duration*	26.7	24.8	26.9	23.4	20.6	18.7	16.3	20
Number of judges at year end	27	27	28	28	40	47	47	47

*Months and tenths of months.
Source: CJEU Statistics of Judicial Activity, available at https://curia.europa.eu/jcms/jcms/Jo2_7032/en/

N.B.: in reality, the correct number of judges at year end for 2015 was still 28, and for 2016 it was 44.[9] *Moreover, the correct number of judges at year end was 46 for 2017 (*i.e.*,"*the first full year which put the new organisation of the General Court to the test*"*[10]*) and 45 for 2018. Seven further judges entered*

[6] Trenchant criticism of the lack of a proper impact assessment and questioning of the figures provided by the ECJ on the number of outstanding cases pending before the GC and their average duration was expressed by Mr. Marinho e Pinto, the Rapporteur of the European Parliament's Legal Affairs Committee: see Draft recommendation for second reading on the Council position at first reading with a view to the adoption of a regulation of the European Parliament and of the Council amending Protocol No 3 on the Statute of the Court of Justice of the European Union (09375/1/2015 – C80166/2015 – 2011/0901B(COD)). Mr. Marinho e Pinto suggested an alternative reform package, providing for the appointment of a maximum of 12 additional Judges, on condition that "*the Court of Justice furnishes detailed evidence showing it to be objectively necessary in the light of the trend in the caseload for the General Court in 2015*": *id.*, amendment No. 13. See also M. Abenhaïm, *Epilogue, at last, on the reform of the General Court* (26 Jan. 2016), http://kluwercompetitionlawblog.com/2016/01/26/epilogueatlastonthereformofthegeneralcourt/.

[7] See F. Dehousse, *THE REFORM OF THE EU COURTS (II) - Abandoning the Management Approach by Doubling the General Court*, Egmont Paper (Mar. 2016), pp. 8 and 62. According to the author, a Judge at the GC from October 2003 to September 2016: "*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*", so much so that "*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*". The significant organizational and procedural actions taken by the GC since 2011 to enhance the efficiency of case handling and the reporting thereon are discussed at the length in the ECA Report. To name just one: "*The General Court has developed and used analyses of data and reports to encourage the respect of general time-frames set out for some of the key steps of case management, and to reduce the average time spent on cases. In addition to the IT tool Suivi des Affaires, the General Court introduced, in 2011, a "*Tableau de Productivité*" and a table of cumulative delays which is sent to each Judge on a three monthly basis. The details of this report are discussed on a quarterly basis between the President and the Presidents of the Chambers to identify in which steps of the procedure further efforts are needed. // In addition to this report, there are tools which are used as a measure of performance again every three months. These consist of a memorandum of cases showing analyses of prolongations, a list of cases having "significant" prolongations and specific email reminders sent to the individual Judges listing the cases with prolongation under their responsibility. The detailed information at the level of individual Judges has increased transparency, raised awareness and promoted a more timely treatment of cases*": ECA Report, §§ 57 and 58.

[8] A. Arnull, *The Many Ages of the Court of Justice of the European Union* (EUI Working Paper AEL 2020/02), p. 25.

[9] In the context of the reform's first phase, 11 (not 12) new Judges entered into office at the formal sittings held on April 13, June 8 and September 19, 2016; and five (not seven, the number of the former Judges of the Civil Service Tribunal, the "CST") new Judges entered into office at the formal sitting held on 19 September 2016.

[10] Annual Report 2017 – Judicial Activity, p. 138.

into office in 2019, increasing the number at year end to 52[11]*. The present number (50) results from the withdrawal of the UK from the EU, which had the effect of bringing to an end the mandate of the British judge since January 31, 2020, at midnight, as well as from the exemption of one of the two Latvian judges from sitting as a Judge, granted by the ECJ with effect as of 25 February 2020.*

It is noteworthy that also the number of cases completed – which is in the CCBE's view another relevant parameter for measuring the GC's productivity – showed a positive trend in the years 2011-2015 (987 completed cases in 2015, up from 714 (+38%)). Please note that a similar, albeit less pronounced, trend can be observed by adding up to the figure for the GC, the number of cases completed by the CST before its dissolution and the transfer of its jurisdiction to the GC on September 1, 2016, resulting in a total number of completed cases in 2015 of 1,139, up from 880 in 2011 (+29%)).[12]

In order to extract some preliminary indications on the impact of the Reform on the GC's productivity,[13] the data for the years 2011-2015 must be compared with those for the years 2016-2019 (2016 being the first year in which the new organisation of the GC brought about by the first two phases of the Reform started to bear fruit). The average duration of proceedings in those four years was as follows:[14]

2016	2017	2018	2019
18.7	16.3	20	16.9

Therefore, the average duration of proceedings fell by approx. – 18%, from 20.6 months in 2015, when the GC counted 28 Judges, to 16.9 months in 2019, with 45 Judges in office (and 52 Judges for the last quarter of the year).

Moreover, looking at the number of cases completed, the total 2015 figure for the GC and the Civil Service Tribunal (CST) (1,139 cases completed, with 35 Judges in total) compares to a meagre 874 for 2019 (- 23%, despite the GC's larger composition (+10/17 more judges)). Therefore, despite the understandable attempt by the GC to present these developments in the most favourable light,[15] we submit that the alleged increase in its productivity brought about by the Reform (less cases completed by a higher number of Judges delivering their output in a shorter time) is doubtful to say the least, all the more so judging by the ambitious expectations of the proponents of the Reform.

Please note that – unlike in the case of the past accessions of new Member States to the Community/Union (in 1995, 2004, 2007 and 2013), in which the increase in the number of the CFI/GC Judges was accompanied, to a limited extent, by an increase in the number of new cases, and of the stock of cases – the Reform has not brought about any increase in the number of new cases, so the

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11 They took office took at a formal sitting held on 26 September 2019.

12 Annual Report 2015 – Judicial Activity, p. 201 (General Activity of the Civil Service Tribunal - New Cases, Completed Cases, Cases Pending (2011–15)). The CST was generally recognised as having proven to be an effective, cost-efficient solution for employment disputes involving EU civil servants. The average duration of proceedings in staff cases increased from 13 months in 2015 to 15.2 months in 2019.

13 Given that the final stage of the Reform was implemented only in September 2019, 2020 will be the first full year in which the Court will operate with a number of Judges (almost) double, and thus it will be possible to assess the full impact of the Reform on its judicial activity only in the next years.

14 Annual Report 2019 – Judicial Activity, p. 291.

15 "*[I]n spite of the challenges created by the implementation of the final stage of the reform and the partial renewal of the Court, the Court has achieved satisfactory results. Statistically, the number of cases lodged (939) and the number of cases closed (874) are, having regard to the fact that a large number of connected cases were lodged at the end of the year, balanced overall, with 1 398 cases pending. That satisfactory situation is reflected in the time taken to deal with cases, which continues to fall. In fact, the duration of the proceedings in cases determined by judgment and by order was 17 months in 2019, by comparison with 20 months in 2018 and around 26 months during the first years of the last decade*.": *id.*, p. 196.

increasing stock (the number of pending cases went up from 1,267 in 2015 to 1,398 in 2019, with a peak of 1,508 in 2017) must have different causes.

According to the GC's President, Mr. van der Woude:

We expect to reduce the average length of proceedings even more. I fear, however, that it will be difficult to bring the duration sustainably down under 24 months in complex economic cases.[16] *The exchange of written pleadings, the organisation of the hearing, translations and, last but not least, judicial reflection take time. It is worth pointing out that the duration of proceedings also depends to a significant extent on the behaviour of the parties, in particular concerning the scope of their confidentiality claims.*[17]

No details have been provided, in the Annual Report or other public documents, on the efficiency improvements to the processing of cases through which the GC plans to further reduce the duration of proceedings. In this respect, the CCBE, while generally endorsing the proposals for further improvement of case management submitted by the European Court of Auditors,[18] offers the following considerations:

1. A reduction in the duration of the proceedings might result from a more proactive use of the measures of organization of procedure, in particular the GC's power to "*summon the parties to meetings*" (see Article 89(3)(e) RP). To the extent that the Judge Rapporteur is able to keep track of the proceedings and study the case from a very early stage, the practice – which at present is rather unsystematic and erratic – of organizing a case management meeting (even a virtual one in videoconference) between at least the Judge Rapporteur and the parties, ideally already after the first round of written pleadings, may provide a useful opportunity to discuss in a flexible and informal manner the relevant points already identified, of substance or procedure (e.g., admissibility of the application, confidentiality of documents). Indeed, at such meetings the Court or Judge Rapporteur may put questions directly to the parties, including on the arguments developed in their respective written pleadings and their implications, without the delays and the complications associated with formal written requests for information, and give indications on the Court's preliminary views on the case, which may influence the parties' respective strategy going forward (e.g., by inducing them to focus only on the most important issues identified, in the second round of written pleadings and/or at the hearing).

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16 The average duration of proceedings in 2019 was 27 months in competition cases and 26.4 months in State aid cases.

17 M. van der Woude, *The Reform of the General Court for a Better and Faster Judicial Review (Interview)*, Concurrences No. 2-2020, p. 16, at p. 17.

18 See ECA Report as per note 3 above, § 98: "*In order to improve case management, the CJEU should consider:*

(A) Measuring performance on a case by case basis by reference to a tailored time-frame, taking account of the actual resources employed. This would inform management of both problem cases and elements of good practice, and could be used to drive further efficiency gains.

(B) Continuing the improvements made in terms of reporting on performance by moving toward the development of a system of reporting on the specific numbers of cases meeting expected time-frames rather than average length of types of cases. It would permit more detailed reporting on results, thereby enhancing the CJEU accountability. This is particular pertinent in view of the new resources made available in the context of the reform.

(C) Implementation of a policy allowing for a more flexible allocation of existing référendaires to help mitigate problems arising from factors related to the management of resources or organizational issues (unavailability of référendaires, workload of Judges, Advocates-General and their référendaires, re-assignment of cases due to the end of the Judges' mandate).

(D) Further raising the awareness of the Member States and the Council of the importance of the timely nomination and appointment of Judges.

(E) Completing the cost-benefit analysis of the impact (organisational, budgetary and in terms of case duration) of a change of the current practice in the General Court to use languages other than French for deliberation.

(F) The possibility of implementing a fully integrated IT system to support case management".

2. The legal translation service, which is responsible for translating over 1,100,000 pages per year and is shared between the two jurisdictions, is believed by many observers to be a substantial bottleneck in the context of GC proceedings, particularly with regard to the availability of the translation into French of the last procedural document at the end of the written procedure (which triggers the start of the indicative deadline for the preliminary report to be drawn by the Judge Rapporteur), and of the draft judgment from French into the language of the case (if different) and in certain other languages.

   The CCBE suggests that the institution's translators and the external lawyer-linguists should be strictly instructed to make use to the largest possible extent of the existing neural machine translation technology – such as the Commission's eTranslation system, which provides machine translation for Commission DGs, but also for the other institutions and the Member States (public bodies) – to obtain in a short time a good working output, to be refined through human supervision and assessment, leading to a significant time saving.

3. In the same vein, the Judge Rapporteur should be allowed -- especially in complex economic cases, such as State aid and competition cases -- to draft the Report for the hearing, under her/his responsibility, directly in English or in the language of the case (if different), of which (s)he has full professional proficiency. Since the time required to translate the report for the hearing systemically delays fixing the date of the oral hearing in cases where the language of the case is not French, this managerial innovation, which in the CCBE's view would be already compliant with the Rules of Procedure (RP), would contribute to reducing the length of the proceedings, while allowing the Judge Rapporteur to draw up longer and more elaborate Reports, to the benefit of the parties and the public (since these documents would undergo only neural machine translation into French).

III: THREE OR FIVE JUDGE CHAMBERS AND SPECIALISED CHAMBERS

Background

By way of background, for nearly 20 years the EU Institutions and the Member States Governments have been seeking a way to improve the speed and the quality of the decisions made by the GC in order to meet the ever increasing number of cases brought before the GC, especially in specialist areas such as Trade Mark and Staff appeals.[19]

The substantive debate turned largely on whether it would be more efficient (and effective) to increase the number of Judges appointed by the Member States or to establish specialist courts, for example, for Trade Mark appeals from OHIM favoured by many and permitted by Article 257 TFEU, as well as the treatment of staff cases following the transfer of the jurisdiction of the CST to the General Court in 2016.[20]

[19] See House of Lords European Committee Justice, Institutions and Consumer Protection: Follow-up Inquiry into the Workload of the Court of Justice of the European Union Report (Oral and Written Evidence, 2013) – see for example, evidence of Professor Arnull (p. 1), the CCBE (p. 13), Judge Nicholas Forwood (p. 39) and Law Society of England and Wales (p. 57); and see the ECJ's "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" in the form of its reply to a letter dated 3 September 2014, where it set out the proposal that was ultimately adopted as Article 48 of the Statute.

[20] See Protocol No 3 on the Statute of the ECJ, Title IVa, Article 62c on Specialised Courts and Annex I to the Statute, which was effectively repealed by Regulation (EU, Euratom) 2016/1192 of the European Parliament and of the Council of 6 July 2106.

In the ECJ's "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" in the form of its reply to Italy's letter dated 3 September 2014, the ECJ drew attention to differences of approach between the ECJ and the GC:

"This proposal [what is now Article 48 of the Statute with the parallel transfer of the CST to the GC] has been discussed internally, first of all with the President and the Vice-President of the General Court and the President of the CST. It was subsequently approved by the general meeting of the Court of Justice, and the plenary meeting of the CST expressed itself to be in favour of the proposal, whereas the plenary meeting of the General Court stated its preference for the establishment of a specialised trade mark court and for the status quo to be maintained as regards the CST…" (emphasis added)[21]

Increase in number of General Court Judges

The budgetary challenges were exacerbated by the Financial Crisis, and the proposals for specialised courts supported by many did not succeed. The Council decided to amend Article 48 of the Statute of the Court to increase the number of GC judges to two judges per Member State as from 1 September 2019, making a total of 54 judges post Brexit on 31 January 2020.[22] This decision was made on the legal basis of Article 254 first paragraph TFEU which requires the number of judges of the GC to be determined by the Statute of the Court and of Article 281 TFEU that requires the Statute to be laid down in a separate Protocol (Article 281 paragraph 1) which may be amended in accordance with the ordinary procedure, allowing for a weighted qualified majority vote in the Council (Article 281 paragraph 2).

The judges are actually appointed by the Governments of the Member States on a unanimous basis under Article 254 second paragraph TFEU. The judges selected by each Member State have to be vetted by the special committee established under Article 255 TFEU (the "Committee"). The Opinion of the Committee is not legally binding, but to date the Member States have not appointed any of the judges who received an unfavourable opinion, according to the Committee's latest report published in January 2020, which therefore includes all 54 GC judges.[23] In principle, there is no requirement for specialism looked for by the Committee, which recognises the positive aspects of generalists. However, a specialisation in a field such as competition law may be noted by the Committee as a positive indication. [24]

With the number of ECJ Advocates General being increased from nine to eleven in 2011 and the transfer of the preliminary ruling jurisdiction to the GC as permitted by the TFEU not being activated by the ECJ, the question arises as to how best to structure the GC to maximise its efficiency and effectiveness following the appointment of 54 judges in total, bearing in mind that appointment is not dependent on any specialist qualifications and judicial training is available where desired.[25]

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21 See the ECJ's "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" in the form of its reply to a letter dated 3 September 2014, p. 3 penultimate paragraph.

22 Article 48 of Protocol No 3 on the Statute of the ECJ, as amended by Article 1 (2) of Regulation (EU, Euratom) 2015/2422 of the European Parliament and the Council of the European Union (OJ 2015 L341/4, 24.12.2015), provides that the GC shall consist of: "(a) 40 judges as from 25 December 2015; (b) 47 judges from 1 September 2016; (c) two judges per Member State as from 1 September 2019."

23 See Sixth Activity Report of the panel provided for by Article 255 of the TFEU (16 Jan. 2020), at Section 1.6, p. 10: Conclusions on the panel's work since its creation in 2010. This notes that of the 190 opinions delivered since the Committee started work in 2010, 21 have been unfavourable, all 21 unfavourable opinions relating to the 101 candidates for a first term of office (or 20.8%), none relating to candidates for renewal office

24 *Ibid.*

25 Article 3(1) of Regulation (EU, Euratom) 2015/2422 is the legal basis and sets out the scope of the present review since it requires the ECJ by 26 December 2020:

ECJ Statute

Article 50 of the Statute provides that the General Court shall sit in chambers of three or five judges (first paragraph), that the composition of the chambers and the assignment of cases to them shall be governed by the RP, and for the possibility of sitting as a full court or as a single judge (second paragraph) or as a Grand Chamber under certain conditions to be specified in the RP (third paragraph).

Rules of Procedure of the General Court

The Curia website makes available a Consolidated Version of the RP of 4 March 2015 as last amended on 11 July 2018.[26] Relevant provisions governing the "Presidency of the General Court" and "Chambers and Formations of the Court" as well as "Assignment and Reassignment of cases" (etc.) are set out in Title 1 Organisation of the General Court, Chapter 2 (Articles 9 to 12) and Chapter 3 Section 1. Constitution of the chambers and composition of the formations of the Court (Articles 13 to17) as well as Chapter 4 Assignment and Reassignment of cases etc. (in particular, Article 25 on Assignment Criteria), respectively.[27]

In particular, Article 13 RP provides that the GC shall set up chambers sitting with three and with five Judges (paragraph 1), decide on a proposal from the President of the GC which Judges shall be attached to the chambers (paragraph 2) and publish these decisions in the Official Journal (paragraph 3).

Again, Article 25(1) provides that the GC shall lay down criteria by which cases are to be allocated among the chambers and may make one or more chambers responsible for hearing and determining cases in specific matters. Article 25(2) requires the decision to be published in the Official Journal.

Composition of chambers and assignment of cases

In accordance with Article 25 RP, the GC at its plenum on 4 October 2019 amended its earlier decision relating to the criteria for the assignment of cases to chambers adopted on 3 July 2019, replacing paragraphs 2 and 3.[28] As a result the criteria for the assignment of cases to chambers are as follows:

"1. Cases shall be assigned to Chambers of three Judges as soon as possible after the application has been lodged and without prejudice to any subsequent application of Article 28 of the Rules of Procedure.

2. Civil service cases, that is cases brought pursuant to Article 270 TFEU and, where appropriate, Article 50a of the Protocol on the Statute of the Court of Justice of the European Union, shall be allocated to the four Chambers specifically designated for that purpose in the decision on the assignment of Judges to Chambers in turn, in accordance with the date on which those cases are registered at the Registry.

3. Cases concerning intellectual property rights referred to in Title IV of the Rules of Procedure shall be allocated to the six Chambers specifically designated for that purpose in the decision on the

"to draw up a report, using an external consultant, for the European Parliament, the Council and the Commission 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 [54] Judges, the use and effectiveness of resources and the further establishment of specialised chambers and/or other structural changes."

[26] OJ 2015 L 105/1, 4.3.2015, as amended on 11 July 2018 (OJ 2018 L 240/68, 11.7.2018).

[27] *Ibid*., and see GC's RP, Arts. 9 to 29, pp. 13-21.

[28] OJ 2019 C 246/2, 22.7.2019.

assignment of Judges to Chambers in turn, in accordance with the date on which those cases are registered at the Registry.

4. Cases other than those referred to in paragraphs 2 and 3 shall be allocated to the Chambers in turn, in accordance with the date on which they are registered at the Registry, following two separate rotas:

   - for cases concerning application of the competition rules applicable to undertakings, the rules on State aid and the rules on trade protection measures,
   - for all other cases.

5. The President of the General Court may derogate from the rotas outlined in paragraphs 2, 3 and 4 in order to take account of a connection between cases or with a view to ensuring an even spread of the workload.

6. In the light of the decision of the General Court, taken at its plenum on 19 June 2019, on the conduct of the activity of the General Court from 1 to 26 September 2019 (OJ 2019 C 238, p. 2), providing that the decision of the General Court of 11 May 2016 on the criteria for the assignment of cases to Chambers (OJ 2016 C 296, p. 2) will continue to apply between 1 and 26 September 2019, the criteria for the assignment of cases to chambers set out above shall be laid down for the period from 27 September 2019 to 31 August 2022."

   Similarly, on 11 March 2020, the GC composed of 50 judges, following Ms Labucka's exemption from sitting as a judge from 25 February 2020, decided on a proposal from the President submitted pursuant to Article 13(2) RP, to amend the decision on the formation of chambers of 30 September 2019, as amended, and the decision on the assignment of judges to chambers of 4 October 2019, as amended, in respect of the period from 11 March 2020 to 31 August 2022 in accordance with the new compositions of the ten chambers set out in the Official Journal.[29]

   Of particular relevance to the debate on specialist chambers, the GC's decision taken on the proposal of President Marc van der Woude, on 20 March 2020 confirmed the following aspects of its decision of 4 October 2019:

   "The First, Fourth, Seventh and Eighth Chambers shall be responsible for cases brought pursuant to Article 270 TFEU and, where appropriate, Article 50a of the Protocol on the Statute of the Court of Justice of the European Union, and the Second, Third, Fifth, Sixth, Ninth and Tenth Chambers shall be responsible for cases concerning intellectual property rights referred to in Title IV of the Rules of Procedure.

   The General Court also decided the following:

   - the President and the Vice-President shall not be attached permanently to a Chamber;
   - in the course of each judicial year, the Vice-President shall sit in each of the ten Chambers sitting with five Judges, on the basis of one case per Chamber in the following order:

[29] See General Court Decision (2020/C 114/02) on formation of Chambers and assignment of Judges to Chambers, OJ 2020 C 114/2, 6.4.2020.

- the first case referred back, by decision of the General Court, to an extended Chamber sitting with five Judges of the First Chamber, the Second Chamber, the Third Chamber, the Fourth Chamber and the Fifth Chamber;
- the third case referred back, by decision of the General Court, to an extended Chamber sitting with five Judges of the Sixth Chamber, the Seventh Chamber, the Eighth Chamber, the Ninth Chamber and the Tenth Chamber."[30]

Issues relating to Composition of chambers and assignment to specialist chambers

While there is no controversy regarding the GC sitting in chambers of five as well as three judges when the quality of the judgment in a particular case will be enhanced in the light of its characteristics, two key questions remain.

First, whether chambers should begin with three judges and be increased to five through case management by the President of the Chamber or vice versa and be constituted as five judge chambers open to reduction to three judges when justified by judicial economy.

Second, whether there should be specialist chambers constituted, as permitted by Article 25(1) RP, at the outset. This is particularly relevant in areas such as Intellectual Property, staff cases, and some of the other main areas with significant volumes of cases (over 50 per year) which would include at present State aid, Trade Protection, Merger Control and what the European Commission calls Antitrust competition cases.

The CCBE is concerned that the ECJ and the GC do not appear to share the same approach to chambers despite agreeing that the efficiency and effectiveness of the GC can be enhanced through the appropriate use of chambers.

The ECJ's approach

The CCBE understands that the ECJ wishes the GC to be the EU law Court with sufficient standing to establish its judgments as the main authorities in particular areas of law and be considered to be the EU Administrative Law Court. This would allow the ECJ to be the EU Constitutional and Supreme Court with the ultimate role of ensuring the uniform interpretation of EU law through the Preliminary Reference procedure and an appeal process limited to hearing cases on appeal from the GC only in cases of major significance for the EU legal system.

For this reason, the ECJ appears to favour the use of five judge chambers in certain specialist areas with some of the judges appointed to a specific chamber being a specialist, but not necessarily all of them in order to maintain the overall generalist nature of the ECJ. Through case management, the President of the Specialist chamber can reduce the number of judges to three if the case is thought not to justify the involvement of five judges. In this way, the ECJ believes that the quality of the GC judgments will be enhanced, and more effective, as well as more quickly decided, and more efficient, even in complex cases involving detailed consideration of facts and economic analysis.

The ECJ's approach was reflected in the reasoning for its proposal to double the number of GC judges that it set out in its Response to the invitation from the Italian Presidency of the Council in the latter's letter of 3 September 2014:

"…

[30] Ibid.

- To reduce the length of proceedings before the General Court, and thus also the risks of the European Union being held in breach of the reasonable time principle;
- To simplify the judicial framework of the European Union, and to promote the consistency of the case-law;
- To have greater flexibility in dealing with cases, since the General Court will be able, in the interests of the proper administration of justice, to assign a greater or lesser number of Judges to one or more Chambers, depending on changes in the caseload, or to make certain Chambers responsible for hearing and determining cases falling within certain subject areas;…"[31]

The GC's approach

On the other hand, the CCBE understands that the GC takes a different approach, albeit with the same policy objectives in mind. The GC prefers to maintain a uniform starting point of three judge chambers and the appointment to specialist chambers only on an ad hoc basis. However, it is not entirely clear how far this apparent debate goes since the GC has opted for certain specialist chambers, albeit starting with three rather than five judges, at the outset. Its latest decisions are not entirely consistent with the CCBE's latest understanding of the GC's position on the allocation of cases to specialist chambers, since these decisions cover cases from IP and staff to competition, state aid and trade protection cases, continuing past GC practice.

The current position of the GC is reflected in a recent interview of President Marc van der Woude where he said in the first two answers to the first question by Jean-Francois Bellis on changes to the structure of the Court:

"First, we sought to promote interaction among the judges. We now have ten chambers of five judges each (soon two chambers will be composed of six judges). In these chambers, incoming cases are discussed collectively from a procedural point of view. This collective approach ensures that judges are better informed about each other's cases and facilitates the referral of a case to an extended formation of five judges.

Second, we decided to introduce a degree of specialisation to promote expertise and consistency of the case law. Six chambers are now dealing with intellectual property cases, whereas four others deal with staff cases. For the moment, all other cases are allocated to all chambers…" (emphasis added)[32]

The allocation of cases to specific chambers or Judges under the RP could be a task of the Vice-President of the GC who is now very much involved in case management (with the President).[33] In this way, it appears that the GC believes it can maintain the use of generalist judges in specialist areas of EU law by appointing additional judges to a three judge chamber who have a particular specialism without constituting any five judge chambers as specialist at the outset. This would have the virtue of maximum flexibility from the availability of 54 judges which in turn would enhance the effectiveness as well as the efficiency of the GC judgments, resulting in fewer incentives for parties to appeal GC decisions to the ECJ. However, as already mentioned, it is not clear that the GC disagrees with the ECJ about specialist chambers rather than simply the number of judges allocated to them at the outset.

The position of the CCBE

The CCBE recognises the virtues of each of the two approaches taken to the use of chambers as part of the GC's structure, following the increase in judges to 54, in order to enhance the effectiveness as well as the efficiency of GC judgments. However, on balance the CCBE submits that the essential

31 See above, footnote 21, at p. 4, Section "Reasoning" under the heading 1.Main Advantages.
32 See above, footnote 17.
33 Ibid, third answer to first question.

objective of improving the quality, and not just the speed, of the GC judgments, favours the adoption of specialist five judge chambers in areas such as State aid, competition law, merger control and trade defense measures. Other areas should be considered depending on the volume of cases involved, including REACH and Sanctions. With good case management, the constitution of such chambers at the outset should not interfere with the overall flexibility of how the judges allocated to them are used, regardless of whether they are generalists or have a specialism. In fact, each judge has the opportunity to take advantage of judicial training which should perhaps be made obligatory for newly appointed judges, as in many national jurisdictions.

The key question for the CCBE, therefore, is how best to improve the standing of the GC and its judgments though the way the new judges are deployed and the judicial appointment process. In particular, the Committee needs to continue to play its key role in giving negative opinions to the Member States where their judicial candidates are inappropriate. It is suggested that this process could be made more effective if greater resources were allocated to the work of the Committee.

IV: CONSISTENCY AND QUALITY OF JUDICIAL DECISIONS

Consistency

Consistency of case law is a prerequisite of legal certainty. Considerations of legal certainty and predictability are inherent to the rule of law.[34] Conflicting court decisions can create legal uncertainty. Consistency of judicial decisions is essential for public confidence in the courts and the perception of fairness and justice. It also contributes to equality of citizens before the law and the individual's right to a fair trial.[35]

As of 31 December 2019, the GC was composed of 52 members (currently 50: see above, page 4),[36] marking the third phase of its reform set out in Regulation 2015/222.[37]

The implementation of this reform is recent and it is difficult to appreciate its impact at this early stage.

Nevertheless, the CCBE wants to raise the concern that a large number of judges may lead to a higher risk of discrepancies in judgments and case law on substance, as well as regarding the handling of procedural questions. This risk is also more present in the CCBE's view when there is too high a number of judges rotating and when judges serve at the court only for a limited time.

On substance, this risk is enhanced if a larger number of judges and chambers deal with cases in a particular area of the law.

In this respect, the CCBE welcomes the GC's decision to have a specific number of chambers dealing with civil service cases and cases relating to intellectual property rights.[38] Indeed, it is felt that a smaller number of judges dealing with cases in such specialised chambers will increase the consistency of the case law in these areas.

However, there are other areas of EU law in relation to which a large number of cases is introduced before the GC,[39] notably competition law and state aid cases. In addition, this area of the law presents

[34] Consultative Council of European Judges (CCJE), Opinion N° 20(2017), "The role of Courts with respect to the uniform application of the law", p. 2.

[35] *Id.*

[36] Annual Report 2019, p. 195.

[37] Regulation (EU, Euratom) 2015/2422 of the European Parliament and the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union.

[38] GC, Criteria for the assignment of cases to Chambers, 2019/C 372/02, OJ 2019 C 372/2.

[39] See Annual Report 2019, p. 286.

a high level of complexity and technicity. Therefore, in the CCBE's view, it is an area of EU law for which a similar type of arrangement involving treatment by a limited number of chambers and judges would be useful. The President of the GC seems to recognize this while at the same time pointing to the fact that the judges of the GC are generalists and that the allocation of connected cases to the same judge ensures already a form of specialization.[40] The CCBE respectfully submits that the fact of judges being selected as generalists could also be applied for the intellectual property law area. Nevertheless, a specialization of chambers was introduced for this area of the law. Also, the attribution of related cases to the same judge has a far more limited scope.

The CCBE also submits that the use of court-appointed experts could be considered in some complex cases.[41]

Regarding procedure, the CCBE particularly wishes to draw the attention to some perceived inconsistencies in the handling of certain procedural questions. Although these matters are not apparent from judgments, they are an important factor for applicants and contribute to an overall sentiment of fairness.

For instance, the CCBE notes a perception that the way in which procedural questions such as the extension of filing deadlines in accordance with the GC's RP or the regularisation of procedural documents exceeding the page limits specified in the GC's Practice Rules are dealt with varies between chambers and reporting judges. In addition, there is a perception that these specific rules may sometimes be interpreted to the benefit of the institutions when compared to the treatment of private applicants.

In addition, the CCBE notes concerns regarding the designation and treatment of cases designated as pilot cases and related cases and the motivation of such decisions for which procedures between chambers appear to vary.

The CCBE understands that there are no general rules on the treatment of these procedural aspects at this stage. It would welcome harmonisation of rules across chambers as well as, to the extent possible, more clarity on their application towards applicants.

As far as case allocation is concerned, it is felt that the allocation of cases involving essential or new questions of an area of EU law, or where existing case law is credibly questioned, should be allocated to extended formations. In this respect, the CCBE welcomes the fact that, due to its additional resources, the GC is now hearing more cases in extended formations.[42] Judgments from extended formations indeed increase the authority of the case law and can be an appropriate reference for later judgments. The more frequent use of the Grand chamber would of course also be a positive development in this respect.

The CCBE welcomes the fact that the President and Vice-President will be more actively involved in judicial work, which may contribute to more consistency. It particularly notes the active role played by the Vice-President of the GC in the functioning of the chambers. The CCBE understands that the Vice-President notably sits in one case per judicial year in each chamber sitting with five judges. From its recent exchange of views with the GC, the CCBE understands that the Vice-President also takes an active role in reviewing preliminary reports. Although the independence of the chambers is of course

[40] See above, footnote 17.

[41] The CCBE notes that the President of the General Court is open to consider this (see above, footnote 17).

[42] See above, footnote 17 (mentioning the treatment of 60 cases per year in extended formations compared to 10 per year in the early 2010s).

crucial, the CCBE considers it useful for the Vice-President to have this possibility of a comprehensive overview of the work of different chambers.

Finally, adequate reporting on case law is also important for coherence. The CCBE is fully aware of the crucial role played by the powerful and up-to-date database on the case law of the ECJ and the GC. Although evolution of the case law is of course necessary and welcomed, consistent referrals to the core case law and cases handled in extended formations are seen by the CCBE as a useful tool for ensuring coherence. In addition, the CCBE wishes to underline the importance of the availability of translations of GC decisions. Some orders or judgments (even important ones) of the GC are not always being translated into all languages (including English), which may have an effect on the parties' reasoning presented before the GC and, ultimately, its decision-making.

In the end, enhancing consistency of case law contributes to reducing the number of appeals against GC decisions in the CCBE's view. Although there are of course a large variety of reasons which may bring parties to launching an appeal, areas of the law for which the case law seems not to be settled or perceived procedural unfairness may play a role in that decision. It is essential that through the appeals procedure, the ECJ continues to play its role of ultimate guarantor of the consistency and coherence of EU law (see below).

Quality of judicial decisions

Quality and consistency of case law are closely linked.

Consistency is more easily achieved (and perceived) through judgments presenting thorough and well-constructed reasoning. The quality of judgments is enhanced when reference can be made to a consistent body of case law.

Most of the reflections and suggestions mentioned above regarding consistency therefore equally apply regarding the quality of judgments.

A high number of judges at the GC is indeed not sufficient by itself to ensure the high quality of the case law. First, as mentioned above, the selection of judges by the Committee obviously offers guarantees in this respect. The CCBE considers it essential that Member States take possible unfavourable opinions of the Committee into account and welcomes the fact mentioned above that this is the case in practice.

Appropriate knowledge and experience in areas of EU law relevant to the work of the GC are relevant selection criteria in the CCBE's view next to, of course, independence and impartiality of a judge, which are of course essential factors.

Nevertheless, judges newly arrived and their cabinets may face considerable challenges. Judges may only be familiar with certain types of areas of the law from their previous experience. New judges may also face linguistic challenges, which may be a particular hurdle in voluminous or technical cases, especially since the GC also deals with the facts and cases may involve complex economic analysis and facts. As for consistency, too frequent judge rotations and short-term appointments may be a negative factor to ensure high quality decision-making.

Second, the CCBE wishes to stress the importance of continuous learning. Indeed, as for private practitioners, continuous education and exchanges on the evolution of the case law are highly beneficial. The CCBE considers that there is also a need for continuous training of judges and *référendaires* in non-legal matters relevant to the work of the GC, such as in economics for competition law matters.

Third, the CCBE considers that the use of specialised chambers with judges possibly having previous experience in a particular field of law may also lead to judicial decisions of higher quality. The use of experts may also contribute to a better understanding of complex matters.

Fourth, the more frequent use of extended formations is also helpful in this respect since they allow for a broader exchange of views and therefore generally for a more thorough analysis. As a matter of principle, the recourse to extended formations may result in a more careful consideration of all the relevant issues of the case.

Transparency: bringing the Court closer to the citizens

To the extent that the quality of judicial decisions can be understood as encompassing judicial service delivery, and more generally, all aspects that are relevant for the good functioning of a justice system, the CCBE would see great benefit in developing the e-Curia application into a full electronic case docket system.[43]

This, coupled with offline accessibility of video/audio files of — at least the most important — hearings in the language in which they are held (no interpretation required), and case management meetings by video-conferencing, would certainly advance the perception of high quality judicial decision-making.

An effective right of appeal against the decisions of the General Court contributes to ensuring their quality and consistency

Like consistency, the quality of decision-making at the GC obviously has an impact on the number of appeals lodged. Indeed, well-constructed and thoroughly argued judgments may reduce the parties' reasons for appeal. For instance, parties having the impression that there is an error in a GC's decision may be inclined to appeal although such error may not be a sufficient ground for an appeal on a point of law.

Statistics show that the number of appeals introduced against decisions of the GC is increasing: 30% of decisions open to challenge were appealed in 2019 (70% in competition cases and 44% in State aid cases) and a steady increase is notable over the last five years.[44]

The number of appeals introduced constitutes an organisational challenge for the ECJ given the parallel, steady increase in preliminary ruling cases,[45] the primary task on which it wishes to concentrate.

The CCBE recognises that recently introduced procedural measures to reduce the number of appeals by introducing a filter mechanism by virtue of which the ECJ decides whether an appeal should be allowed to proceed in cases which have already been considered twice[46] may lead to a better administration of justice. It allows the ECJ to only do a "third review" of cases for which there is a serious risk of the unity or consistency of Union law being affected.

The CCBE is fully aware of the fact that the role of the ECJ is to focus on the unity, coherence and development of EU law. Therefore, appeals of GC decisions must be limited to points of law and the purpose of the appeal procedure is not to re-argue a case before the ECJ. The CCBE acknowledges also

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43 See Contribution by Mr. R. Pelicarić, Vice-President of the CCBE, to the colloquium "*Le Tribunal de l'Union européenne à l'ère du numérique*", 25 September 2019, Report of the colloquium, p. 161.

44 See Annual Report 2019, p. 299. One must note, however, that the number of appeals dismissed also increased significantly in 2019.

45 *Id.*, p. 165.

46 See Article 62 of the Statute of the Court.

that there are cases where the discussion of the point of law does not require an oral hearing before the ECJ.

Nevertheless, the CCBE considers it essential that the ECJ remains, to the extent possible, aware of case law developments at the GC, so as to be able to monitor and review the quality of rulings at first instance. In addition, access to justice and the parties' right to effective judicial review must be respected.

Hence, the introduction of further filtering mechanisms to those already introduced in April 2019 or a too strict interpretation of admissibility criteria for appeals would compromise the right of effective judicial review and the role of the ECJ as a guarantor of the unity of EU law. The overly strict interpretation of procedural requirements could compromise appellant's right to a fair trial and effective judicial review. Curtailing the right to a hearing should not be based on efficiency considerations only.

To conclude, continued efforts to increase the consistency and quality of the GC's decision-making are expected to have a positive impact on the percentage of decisions appealed in the medium and long term. However, the CCBE respectfully submits that the availability of an effective and fair judicial review mechanism on points of law with respect to GC judgments remains essential for the unity of EU law and for the consistency and quality of future judicial decisions of the GC.