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JUDICIAL REFORM AND THE EUROPEAN COURT: NOT A NUMBERS GAME

Kieran Bradley

A. PROLOGUE

1. JUDICIAL REFORM: A TRAP FOR THE UNWARY

Far from being 'technical' or in some sense politically neutral, judicial reform,[1] and the design of the structure and functioning of the courts generally, are matters of the highest sensitivity everywhere the rule of law holds sway. It is not a 'normal' policy matter, where a parliamentary majority or general popular support is a sufficient guarantee that a reform-minded government will carry the day. This is a consideration which regularly trips up the unwary. Thus, for example, within months of winning the greatest electoral landslide in US history, the most highly regarded president of the twentieth century, Franklin D Roosevelt, suffered a stinging defeat in his attempt to pack the Supreme Court.[2] This defeat came notwithstanding the fact that the 'Men in Black'[3] had been the greatest single obstacle to the implementation of Roosevelt's New Deal package of economic recovery measures after the Great Depression. On a somewhat lesser scale, the insouciance of the Blair government in announcing the replacement of the judicial House of Lords with a Supreme Court, and the abolition of the office of Lord Chancellor, at a press conference, and without consulting the higher judiciary in advance, was met with a storm of indignation and objection which delayed the passage of the relevant legislation by several months.[4] Within the European Union, judicial reforms enacted in certain Member States have been subjected to the censure of the Court of Justice, and provoked a political crisis of potentially membership-threatening proportions.[5]

[1] Only structural changes shall be examined, though of course reforms of an organizational character can also have an important impact on a court's functioning; on the variety of sources of judicial reform, see M-P Granger and E Guinchard, 'Introduction: The Does and Don'ts of Judicial Reform in the European Union' in E Guinchard and M-P Granger, *The New EU Judiciary: An Analysis of Current Judicial Reforms*' (Wolters Kluwer, 2018) 1, 6.

[2] See, eg, J Shesol, *Supreme Power* (WW Norton, 2011); for an overview of judicial reform in the United States, see J Crowe, *Building the Judiciary* (Princeton University Press, 2012). In April 2021, President Biden established a commission to examine Supreme Court reform, including possibly an increase in the number of Justices.

[3] This a less damning tag for the Supreme Court than that devised by one of its members, Oliver Wendell Holmes, 'nine scorpions in a bottle'.

[4] See, eg, P Fitzgerald, 'Constitutional Crisis over the proposed Supreme Court for the United Kingdom' (2014) 18 Temple Int'l and Comp LJ 233.

[5] See, eg, Case C-619/18 *Commission v Poland* EU:C:2019:531, and more generally W Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press, 2019). Poland is not the only Member State whose judicial reforms have been questioned.

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While the topics of the operation and reform of the Court of Justice of the European Union may not reach the same level of political acuity, they are nonetheless both sensitive and difficult subjects. The reference by a future president of the Court,[6] Lord MacKenzie Stuart, appearing before a House of Lords committee, to 'questions as non-political as the operation of the Court' might be seen as either wishful thinking or, more probably, a tongue-in-cheek comment for a political forum.[7]

2. WORKLOAD CONCERNS OF THE COURT OF JUSTICE

The Court has been concerned by the growth in its case load, as measured by the number of cases referred to it, for nigh on half a century.[8] In this context, it is no easy matter accurately to evaluate the Court's workload. In particular, raw statistics on the number of new cases initiated or resolved in a given year, or the total number of cases pending, are a somewhat crude metric. Not all of the cases of which the Court is seized come to judgment on the merits; some are dismissed by reasoned order as inadmissible or manifestly unfounded, or, in the case of preliminary rulings, on the grounds that the questions have already been answered in the case law or that the answer admits of no reasonable doubt.[9] Even cases dismissed by order, however, require careful consideration, and the expenditure of considerable resources, such as translation and administrative processing, by the members and services of the Court. Cases concerning the same or parallel legal questions may be joined, and thus dealt with in a single judgment or order, which is why the number of decisions taken in a given year does not correspond to the number of cases concluded. What statistics fail to grasp, however, is the sometimes enormous disparity in complexity between cases, whether because of their factual background or the difficulty and/or novelty of the legal issues raised.[10]

In order to cope with this situation, the Union's judicial architecture has been fundamentally reformed twice in the last twenty years, with the second reform in effect cancelling out in large part the first; in each case, the Court itself had contributed directly and significantly to the debate on the particular reforms. Whatever the merits of the respective reforms themselves, such a volte-face in the matter of the design of the Union's judicial architecture raises the question of whether the reform process is capable of providing the optimal outcome, rather than being, as some contend, a somewhat hit-and-miss reaction to factual developments and political stances.

As befits a book on the evolution of EU law, the present chapter starts with a short history of reform at the Court of Justice (Sections B to D). This is followed by an outline of recent reforms to each court (Sections E and F), an examination of the specificities of the

[6] For convenience, 'the Court' refers indifferently to the Court of Justice or the institution as a whole, unless the contrary is clear from the context.

[7] House of Lords Select Committee on the European Communities, *European Court of Justice*, 23rd report Session 1979–80, (28 November 1978) question 271, p 75.

[8] Other aspects of the Union's judicial architecture have also given rise to concern, but for reasons of space cannot be not dealt with in the present chapter.

[9] Respectively Arts 53(2) and 99 Rules of Procedure of the Court of Justice.

[10] For an attempt to identify 'complexity factors', see Court of Auditors, *Performance Review of case management at the Court of Justice of the European Union* (EU Publications Office, 2017) n 48 at 40.

preliminary ruling procedure (Section G), a proposal for reforming that procedure (Section H), and some concluding remarks (Section I).

B. FIRST STEPS: FROM PARIS TO ROME

1. THE ECSC COURT OF JUSTICE

The Court was born as the 'Court of Justice of the European Coal and Steel Community' established by the Treaty of Paris.[11] The only formal qualifications for appointment as a member of that Court were independence and competence beyond doubt; some of the judges were thus selected on the basis of their experience in political and economic life, rather than their legal acumen. Unsurprisingly, given the relatively limited scope of the Treaty and of the legal acts required to implement it, no provision was made for the establishment of other courts, whether Community or national in character. The Court's Statute was laid down in a protocol to the Treaty itself; substantive judicial reform would have required the application of the then standard Treaty revision procedure of intergovernmental conference and Member State ratification.[12] The ECSC Treaty did provide, however, for a modicum of flexibility as regards the number of judges, which could be increased, on a proposal of the Court, by the Council acting unanimously.[13] This Treaty thus already established two of the principal features of reform of the Union judiciary, that is, concern with the numerical composition of the Court and indirectly the Court's workload, and Court's right of initiative in this regard.

2. THE COURT OF JUSTICE OF THE EUROPEAN DEFENCE AND POLITICAL COMMUNITIES

Even before the ECSC Court had opened its doors, in the 'unsuitable but sumptuously decorated quarters' it had provisionally been allocated in Luxembourg,[14] plans were being hatched for a radical transformation of the Community judicature. The most developed blueprint was that conceived for the ill-starred European Defence Community (EDC). It is worth mentioning not only because it got as far as being set out in a Treaty, signed by the governments of the six Member States of the ECSC on 27 May 1952, but because it was designed to deal with a large volume of cases concerning either Community law, or mixed Community and national law, well beyond the capacity of the sole ESCS Court of Justice.

The Treaty retained the ECSC Court of Justice, conferring on it heads of jurisdiction similar to those of the earlier Treaty. It would also have created 'regional sections', presided by a judge of the Court of Justice, sitting along with four judges of the nationality of the receiving

[11] See D Valentine, *The Court of Justice of the European Coal and Steel Community* (Martinus Nijhoff, 1955); C Pennera, 'The Beginnings of the Court of Justice and its Role as a Driving Force in European Integration' (1995) 1 Journal of European Integration History 111.

[12] Art 96 ECSC.

[13] Art 32, 4th para, ECSC.

[14] Pennera (n 11) 117; the Court's offices were located, somewhat inappropriately for such a forward-looking institution, in a museum in the municipal park, while its hearings were held in an administrative building overlooking the picturesque Place d'Armes, a prime tourist destination in Luxembourg.

state, to hear appeals from 'local Indemnity Commissions', which were in effect specialized Community courts competent to hear damages claims against the Community. A limited right of appeal lay to the Court of Justice, which also had exclusive jurisdiction in disputes between the Community and the Member States or 'territorial collectivities of these States', such as the German *Länder*.[15]

Though certain disputes were reserved to the Court of Justice,[16] the trial of criminal offences alleged to have been committed by soldiers of the European army could have been tried either by 'European tribunals of national composition which shall be subordinated to a regional section of the Court as regards final appeal' or, where this solution was rejected 'for constitutional or practical reasons', by 'national tribunals acting by delegation of the Community'.[17] The organization of the tribunals was to be regulated by the national legislation of the Member States concerned, though such legislation was to be 'applied as European law with regard to European tribunals' (sic).[18]

The ECSC and EDC Treaties were to be complemented by a Treaty establishing the European Political Community. The judicial powers of the three Communities were to be vested in a single Court of Justice, comprising up to fifteen judges; as this was not a multiple of the number of Member States, the 'European Executive Council', which was the equivalent of the Commission, was empowered to select judges from lists of up to three candidates provided by each of the Member States, and (optionally) the respective national groups of the Permanent Court of Arbitration.[19] The term of office was set at nine rather than six years, though the mandate was renewable.[20] This radical vision of the Court of Justice died a death when the French Assemblée nationale rejected the EDC Treaty on 30 August 1954.

3. THE TREATIES OF ROME

The first act of judicial reform in the history of the Union which actually came into force was the merger of the ECSC Court of Justice with the courts of the EEC and Euratom, by means of the 1957 Convention on Common Institutions.[21] Members of the Court were to 'possess the qualifications required for appointment to the highest judicial offices in their ... countries or [be a] jurisconsult of recognised competence'. Judge Serrarens, who was a trade unionist rather than a lawyer, was able to finish out his term of office, as all the judgments in 1958 were in ECSC matters which had commenced in 1957 or, in case of the *Meroni* litigation, in 1956. The Convention also moved the provisions governing the Advocates General, which had previously been consigned to a passing mention in the Statute of the ECSC Court,[22] to the body of the Treaties, and defined their functions in the same terms as those set out in the second paragraph of Article 252 TFEU. The 1957 Treaties maintained

15 Arts 13–16 Jurisdictional Protocol to EDC.
16 Art 22(1) Jurisdictional Protocol.
17 Art 22(2) Jurisdictional Protocol.
18 Art 23 Jurisdictional Protocol.
19 Art 38(1) EDC.
20 Art 38(3) EDC.
21 Art 4(2)(a) Convention on Certain Institutions Common to the European Communities, signed at the same time as the Treaties of Rome.
22 Art 10 of the Statute provided simply that '[t]he Court shall be assisted by two Advocates General and a Registrar'; apparently, the first Advocates General were appointed by the Court, not the Member States (Valentine (n 11) 4).

the Court's prerogative of requesting an increase in the number of its members; any other measure of judicial reform would have required the application of the full Treaty revision procedure.[23] With effect from Danish, Irish, and UK accession in January 1973, the number of judges and Advocates General was each increased by two, and the extra judge who had been appointed to ensure an uneven number of judges in the Court was appointed an Advocate General.[24]

C. FROM ROME TO AMSTERDAM

1. THE 'INTERINSTITUTIONAL STAFF TRIBUNAL'

The Court's concerns with its increasing workload were first raised in a letter from its President, Robert Lecourt, to his opposite number in the Council in July 1974.[25] The increase in the number of new cases initiated the previous year, from 82 to 192, had indeed been dramatic, and the number was expected to increase further as a result of the recent accession of three new Member States, including the UK, a large Member State with a different and unfamiliar legal system.[26] The Court proposed that the Council establish an 'administrative tribunal' to decide on staff cases at first instance, by inserting the necessary provisions in the Staff Regulations of the Community institutions; this would have avoided the formal Treaty amendment procedure, which was then considered excessively difficult to operate. In the absence of a Commission proposal, the Council was, of course, unable to comply. It did, however, amend Article 165 EEC to allow the Court to hear preliminary ruling requests in chambers, rather than being obliged to refer such proceedings to its plenary formation, now consisting of nine judges.[27] In so doing, the Council relied on an uncharacteristically adventurous interpretation of the last paragraph of this provision which, on its face, only allowed the Council to 'make the necessary adjustments' to the remainder of this article as were necessitated by an increase in the number of judges of the Court, which the Court had not in fact requested.

The Commission formally submitted a proposal for an Administrative Tribunal for staff disputes of the European Communities in September 1978.[28] The full-time members of this Tribunal were to be appointed, and its rules of procedure were to be laid down, by the Court, to which it would be 'attached' for administrative and budgetary purposes. The Tribunal would not, however, have been a fully judicial entity, as only the President and Vice-President were required to be independent persons with legal training ('jurisconsults of recognised competence'), while the other two 'judges' and two 'alternate judges'[29] were to be selected by the administrations of the institutions and their staff committees from

[23] Respectively Arts 165, 4th para, and 166, 3rd para, EEC.
[24] Judge Trabucchi, who was the first in a long line of members of the Court or General Court, including six of Italian nationality, to also serve as Advocate General.
[25] An invaluable source of information on reform initiatives up to and including the establishment of the CFI is T Kennedy, 'The Court of First Instance: the Essential Minimum' (1989) 14 ELRev 7.
[26] As well as three separate jurisdictions, respectively covering England and Wales, Scotland, and Northern Ireland.
[27] Council Decision 74/584/EEC, Euratom, ECSC [1974] OJ L318/22.
[28] [1978] OJ C225/6.
[29] The Vice-President and alternate judges were expected to replace the President or a permanent judge respectively in case of absence.

amongst the staff of the institutions. The proposal also provided for the possibility of the Tribunal's arranging a form of conciliation procedure between the parties. Apparently on the grounds that it preferred proper judicial consideration at first instance, France opposed the proposal, which was never adopted.

2. 'MORE JUDGES FOR MORE CASES, PLEASE?' 'NO'

The doubling of new cases from 1972 to 1973 was only the start of underlying trend that saw the number of new cases hit 268 in 1978.[30] The long-awaited Community Patent Convention had been signed in December 1975, and was expected to generate a considerable, though unquantified, volume of litigation for the Court.[31] A convention on trade marks was being considered, while the 1968 Brussels Convention on various private international law matters[32] had just entered into force for the Member States which had acceded to the Communities in 1973. This time the Court did propose an increase in the number of judges, from nine to twelve, and of Advocates General from four to six.[33] In the longer term, the Court suggested that the number of judges should be seventeen by 1984, that is, after the addition of new judges which would accompany the expected accession of Greece, Portugal, and Spain, and that the number of Advocates General should be half the number of judges. Conscious that this might prove to be a palliative measure rather than a proper remedy, the Court mooted the possibility 'that certain categories of case [excluding preliminary references and those involving Member States and institutions] might in future be the subject of an arrangement similar to that at present envisaged for staff cases'.[34]

On this occasion, '[t]here was no support [in the Council] for agreeing an immediate increase in size of the Court but because of general sympathy with the Court's difficulties in handling its workload the Council requested more detailed proposals'.[35] In March 1981, the Council increased the number of judges by one, in view of 'the increase in the workload of the Court of Justice',[36] and in order to ensure the plenary formation of the Court had an uneven number of judges. The college of Advocates General was increased from four to five.[37]

3. ESTABLISHING THE COURT OF FIRST INSTANCE

If the Court's attempts at prompting judicial reform in the decade from 1974 were a relative failure, its 1985 initiative for the establishment of a court of first instance was a dazzling

30 Though the numbers fluctuated in an apparently random fashion. In 1979, no fewer than 1322 new cases were lodged, 88 per cent of which were complaints by staff concerning the weighting of their emoluments; the resolution of ten pilot cases allowed the Court in time to strike most of these actions from the Register (G Slynn et al, *The Role and Future of the European Court of Justice* (BIICL, 1996) 25).

31 Convention for the European Patent for the Common Market [1976] OJ L17/1.

32 Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters [1972] OJ L299/32.

33 Court memorandum of 21 July 1978, cited by Kennedy (n 25) 11.

34 Kennedy (n 25) 11.

35 House of Lords (n 7) [4], [6].

36 Council Decision 81/208/Euratom, ESCS, EEC increasing the number of Judges at the Court of Justice [1981] OJ L100/20.

37 Kennedy (n 25) 12.

success. The intergovernmental conference which opened on 9 September 1985 was primarily concerned with reform of the political institutions; the Commission did even not advert to the Court's difficulties in its opinion on the convening of the conference.[38]

This time the Court pulled out all the stops. First a letter to the Council presidency, which happened to be held by Luxembourg (the Court's host Member State and a traditional ally), drew attention once again to its workload situation.[39] Next, when invited to submit specific proposals to the intergovernmental conference, the Court replied within a week, attaching the draft of new Treaty articles to allow the Council to establish a court of first instance. These were duly incorporated in the Single Act. Without waiting for the new Treaty to come into force, the Court prepared a preliminary draft of the Council decision, complete with proposed additions to the Court Statute, and proposed amendments to its Rules of Procedure. Shortly after the Single European Act did, finally, enter into force, the Court submitted its official 'request' that the Council establish the Court of First Instance (CFI), thereby bringing both the European Parliament and the Commission in on the act.

Based on an estimated workload of 150 cases per year,[40] the Court proposed the CFI have seven judges. Amongst Parliament's amendments was an increase in the number of judges to twelve, being the number of Member States and the number of judges in the Court of Justice. The Commission also opted for twelve, the number the Council finally chose. Whether through foresight or oversight, the Court had not proposed any system or mechanism for choosing the seven Member States which would have the honour of nominating a judge to the CFI. Writing extra-judicially shortly after the CFI had been established, the President of the Court of Justice wryly observed that '[i]n a Community of twelve, the otherwise lucky number of seven would of course have given rise to nearly insolvable political problems and it was to be expected that the Council would end up with a composition of twelve members'.[41]

The new Article 168a EEC empowered the Council to establish a court with jurisdiction in 'certain classes of action or proceedings brought by natural or legal persons' which it duly did in October 1988.[42] Although workload concerns were uppermost in the minds of the Treaty authors and the legislature, by providing for a two-tier structure of judicial review the establishment of the CFI was also intended 'to improve the judicial protection of individual interests',[43] in particular in disputes whose resolution depends to a significant extent on the establishment of the facts. While the material jurisdiction of the new court was limited to litigation on private sector competition matters, staff disputes, and certain disputes under the Coal and Steel Community Treaty, this was soon extended to challenges to decisions on trade protection. The General Court now exercises jurisdiction in all but a selected handful of direct actions which are reserved to the Court of Justice.[44]

38 COM(85) 445 final.

39 Having breached the psychological barrier of 250 new cases for the first time in 1978, the figures for successive years were in or around the 300 mark, though reaching 433 new cases in 1985.

40 The assumption was that each CJEU judge could handle approximately twenty cases per year as reporting judge; fifteen years later, the same calculation produced a seven-member Civil Service Tribunal.

41 O Due, 'The Court of First Instance' (1989) 8 YEL 1, 2.

42 Council Decision 88/591/ECSC, EEC, Euratom, 1988] OJ L319/1.

43 ibid recital 4 in the preamble.

44 Art 51 Statute of the CJEU; the exceptions are essentially inter-institutional disputes, and Member State challenges to legislative action or inaction, and to Commission decisions regarding compliance with infringement judgments. Numerically, these cases currently represent a tiny proportion of the Court's annual workload.

4. THE TREATY OF MAASTRICHT

Judicial reform was not on the agenda of the 1990 intergovernmental conference which drafted the Treaty of Maastricht either, possibly because the CFI had at that stage barely set up shop, and the Member States may have considered that the overload problem of the Court had been resolved. The only judicial reforms adopted were the granting to the Court of added flexibility to decide to hear cases in chambers rather than in plenary formation, and the extension of the CFI's potential jurisdiction to include direct actions at first instance by and against Member States and Community institutions.[45] That said, the enlargement of the material scope of the Community's activities, the establishment of the European Central Bank, and the generalization of the principle of subsidiarity were all considered as potentially adding to the Court's workload in new and difficult areas. One commentator suggested that 'the fundamental failure of the Treaty to review the Communities institutional legal order threatens the continued high esteem in which [the Courts and that] legal order are held'.[46]

The Court's report on '[c]ertain aspects of the application of the Treaty on European Union' of May 1995, which was presented in preparation for the next intergovernmental conference, provides a useful *tour d'horizon* of the Court's view of its own role in the Union, and its possible evolution in the coming years.[47] While prefacing its remarks with a reference to its duty of judicial reserve, the Court took a strong stand in principle against any limitation of the right of national courts, at whatever level, to refer questions under the preliminary ruling procedure. This would 'deprive individuals of effective judicial protection and undermine the unity of the case-law', which in turn could 'give rise to distortions of competition between economic operators, thus jeopardizing equality of opportunity as between those operators and consequently the proper functioning of the internal market'.[48] Nor would any transfer of preliminary ruling jurisdiction to the CFI be appropriate, as it could lead to 'unacceptable procedural delays and … raise problems as to the authority of judgments given in first instance and as to the identification of the parties entitled to lodge an appeal'. Designing criteria for a division of jurisdiction between the two courts would also be exceedingly difficult. While the Court concluded that the existing allocation of tasks between the courts was satisfactory, it acknowledged that if the extension of the Union's tasks were to lead to an increase in the volume of litigation, 'in the longer run, it [might] be desirable for the Chambers of the [CFI] to become specialized or perhaps for new specialized Community courts to be established'.[49]

On the sensitive matter of its composition in the perspective of enlargement of the Union, the Court famously warned that a large influx of new judges 'might mean that the plenary session of the Court would cross the invisible boundary between a collegiate court and a deliberative assembly'. It was, however, at pains to acknowledge that 'the presence of members from all the national legal systems on the Court is undoubtedly conducive to [the]

[45] Art 165, 2nd para, and Art 168a(1) EEC, as amended.
[46] A Arnull, 'The Court of Justice after Maastricht' in D O'Keeffe and P Twomey (eds), *Legal Issues of the Maastricht Treaty* (Chancery, 1994) 179.
[47] <https://www.cvce.eu/content/publication/2003/4/2/3644862f-2e8f-4170-9616-e573a41b61c5/publishable_en.pdf>.
[48] ibid [11].
[49] ibid [15].

harmonious development of Community case-law … [and] enhances the legitimacy of the Court'.[50]

The Court showed a certain flexibility as regards the term of office of members. While the current system was considered to have worked satisfactorily, the Court said it would not object to a longer, non-renewable term of office, which 'would provide an even firmer basis for the independence of its members and would strengthen the continuity of its case-law'. As regards the appointment procedure, the Court set its face firmly against the idea of hearings of candidate members by a committee of the European Parliament, as this could pose a risk to the 'discretion incumbent on persons whose independence must … be beyond doubt and … prejudge[] positions they might have to adopt … in the exercise of their judicial function'.[51]

On this occasion, the CFI submitted its own paper on its experiences with the application of the Maastricht Treaty. It issued a warning that with the number of trade mark cases likely to reach 400 per year by 1997, to say nothing of actions concerning other forms of intellectual and industrial property, the turnaround time for its cases could increase. Perhaps seeing these as in some sense a threat to its own position, the CFI strongly opposed any proposal to establish specialized courts, which would in its view be expensive and pose a threat to the unity and consistency of Union law.[52] The CFI accepted the principle of parliamentary participation in the initial appointment procedure, in order to verify that candidates had the requisite Treaty qualifications, though rejecting such participation for reappointments, as this would be tantamount to a political review of the exercise by the judge of her judicial functions. It did not propose any modification to the six-year renewable term of office, but underlined that renewal of judges' mandates ensured 'continuity in the exercise of the judicial function required by the nature of the litigation which [it] had to deal with'.

5. 'JUGE UNIQUE, JUGE INIQUE'?

By early 1997, and despite a reinforcement in personnel with the addition of three new 'accession' judges in January 1995, the workload of the CFI was already causing concern.[53] The Conseil des barreaux européens (Council of Bars and Law Societies of Europe, CCBE) calculated that 'if the CFI did nothing else but work to clear the present backlog of pending cases, this could, at least on the basis of past performance, take between three and five years'.[54] The Court proposed that the CFI be allowed to decide in a single-judge formation for cases 'where neither the legal or factual difficulty … nor their importance nor any special circumstances justify [their] being heard by three Judges'.[55] Notwithstanding the relative modesty of this reform, the significant material restrictions and safeguards on its use, and the plausible comparison with the organization of the judiciary in at least some of the Member States, many in the legal community objected that it would 'undermine to

[50] ibid [16].
[51] ibid [17].
[52] Contribution of the Court of First Instance for the Purposes of the 1996 Intergovernmental Conference, 17 May 1995, Luxembourg.
[53] The heading of this section is not in any way a value judgment by the author, but an adage in French law.
[54] Submission to the House of Lords Select Committee on the European Communities, 25th Report 1997–1998, *The Court of First Instance: Single Judge* (HL Paper 114, 1998).
[55] Court of Justice, February 1997, reproduced in House of Lords (n 54).

an unacceptable degree the collegiate character of the CFI' and its 'multi-judge (and thus multi-national) nature'. Its pluralism was seen as a means of 'depersonalising' and 'denationalising' the CFI, 'thus increasing public acceptability of its judgments'.[56] Even as regards staff cases, that most internal category of disputes, it was argued that all international administrative tribunals charged with resolving staff disputes sit in chambers of three or five judges.[57] While giving the proposal a green light, the competent committee of the House of Lords added presciently, '[b]ut in the long run, the CFI needs more Judges … [i]t will not be sufficient to wait until the accession of new Member States'.[58]

The Council accepted the Court's proposal.[59] It remains to be seen whether the various restrictions on recourse to the single judge facility have rendered it almost nugatory,[60] or whether it is the General Court which hesitates, or does not need, to resort to this particular judicial formation. In the last five years for which statistics are available, cases disposed of by a single judge represented approximately 0.5 per cent of the cases decided by that Court.

6. THE TREATY OF AMSTERDAM

The Treaty of Amsterdam[61] did not reform any part of the Community's jurisdictional architecture. At the same time as the Treaty conferred new competences on the Union, a number of provisions sought to restrict the potential increase in the Court's workload. Thus, for example, the possibility to request preliminary rulings on the interpretation of the new Title IV of the EC Treaty, on 'Visas, asylum, immigration and other policies related to the free movement of persons' was restricted to courts of final instance. On one view, 'Member States were justifiably concerned about the possibility that the Court would be inundated by references in the large number of immigration and asylum cases which come before national courts'.[62]

For preliminary rulings on police and judicial cooperation in criminal matters under the then 'Third Pillar', Court jurisdiction was optional; Member States could, moreover, choose to reserve the right to make references to its courts of last instance, or open it to all of its courts and tribunals. The Court's jurisdiction under this head was also restricted *ratione materiae*, precluding any review of 'the validity or proportionality of operations carried out by the police or other law enforcement services or [actions] with regard to the maintenance of law and order and the safeguarding of internal security'. One commentator took the view that these provisions 'seem[] iniquitous: both provisions are designed to weaken judicial scrutiny, both pose a serious threat to the uniform application of the law in the Member States to which they apply … [i]t seems perverse to limit in this way the jurisdiction of the institution which is best placed to ensure that those principles are respected'.[63]

56 House of Lords (n 54) [36].
57 J-C Piris (speaking in a personal capacity), Intervention devant la Commission juridique du Parlement européen le 28 avril 1998, section 1) 2 (copy on file with the author).
58 House of Lords (n 54) [98].
59 Council Decision 1999/291/EC, ECSC, Euratom [1999] OJ L114/52; see now Art 29 Rules of Procedure of the General Court.
60 The appeal judgment in Case C-171/00 P *Libéros v Commission* EU:C:2002:17 is usually seen as restricting the possibility of recourse to the single judge.
61 Signed on 2 October 1997, entered into force on 1 May 1999.
62 A Arnull, 'Taming the Beast? The Treaty of Amsterdam and the Court of Justice' in D O'Keeffe and P Twomey (eds), *Legal Issues of the Amsterdam Treaty* (Hart Publishing, 1999) 109, 116.
63 ibid 118.

7. MANAGING INTELLECTUAL PROPERTY CASES

On 10 May 1999, the Court of Justice and CFI submitted to the Council a number of proposals on the management of intellectual property cases.[64] The covering letter notes the urgency of the measures proposed; both the functioning of the institution and the credibility of the new Community trade mark were at stake.[65] The Court acknowledged the difficulty of forecasting the exact number of cases to be expected, but estimated nonetheless that 'some 200 to 400 decisions … will be the subject of an action before the Court of First Instance', with about one quarter likely to come to the Court of Justice on appeal.[66] It noted that even accounting for mass claims, 'the number of cases pending at the end of 1998 represented approximately 230% of the annual average of decisions given'.[67]

The Court therefore proposed that six posts of judge be created at the CFI, allowing it to create two new chambers; that said, the Court warned, '[t]hose additional judges are a minimum … the current fifteen judges … are hardly adequate for the average number of cases currently being brought before the [CFI] in its existing areas of jurisdiction'. In the meantime, along with some extra staff in the translation service and the CFI registry, the Court requested the budgetary posts necessary for the creation of a task force of *référendaires* with special expertise in intellectual property law to help the judges handle litigation in this area and prevent the build-up of a backlog in pending cases. On the other hand, the idea, mooted by the CFI in 1990, of appointing 'assistant rapporteurs' was dismissed. While, then as now, this possibility is foreseen in the Court's Statute, such a judicial officer 'would occupy an intermediate position between [*référendaires*] and judges' and could create 'a confusion of roles … without a prospect of an increase in effectiveness'.[68]

The Court should in principle have been knocking at an open door; in adopting the trade mark Regulation in December 1993, the Council had acknowledged that the appeals procedure it provided could create a new and voluminous case load for the CFI and declared its readiness to examine any proposals the Court should make in this regard. This proved not to be the case, or, rather, the door rapidly jammed, when the Member State governments were unable to decide which of them would have to make do with a single CFI judge, while six of their number would have been able to boast a second judge.

D. FROM NICE TO LISBON

1. THE TREATY OF NICE

While the Treaty of Nice was intended to deal primarily with 'Amsterdam left-overs' as regards the design of the political institutions,[69] the intergovernmental conference of 2000 was nonetheless made aware of 'the need for radical reforms of the judicial system of the

[64] EU Council Doc 8198/99, Proposals submitted by the Court of Justice and the Court of First Instance with regard to the new intellectual property cases, Brussels, 10 May 1999.
[65] ibid 1, 7.
[66] ibid 5.
[67] ibid 9.
[68] ibid 12; Art 13 CJEU Statute.
[69] K Bradley, 'Institutional Design in the Treaty of Nice' (2001) 38 CMLRev 1095.

[Union]. This in itself [was] a new and important development.'[70] Though they were the subject of extensive preparation both within and outside the Court, including the establishment by the Commission of a working party of 'wise persons' under the chairmanship of Ole Due, former President of the Court of Justice,[71] the reforms of the Nice Treaty were not considered either radical or particularly innovative. Certainly, the CFI was recognized as a judicial entity separate from the Court of Justice, rather than being a mere creature of legislation 'attached' to the higher court, a step which was described as 'the most important amendment introduced by the Nice Treaty'.[72] The possibility of amending the Court Statute by legislation was extended to embrace the entire Statute (now unified in a single instrument, rather than being separate for each Community), excepting only the provisions on the status of members of the Court and the Court's language regime; as a result, the Council voting requirement in this area was modified from unanimity to a qualified majority. However, the reforms that grabbed the headlines were two:

- The conferral on the CFI of jurisdiction 'to hear and determine questions referred for a preliminary ruling . . . in specific areas', and
- The competence conferred on the Council to establish 'judicial panels to hear and determine at first instance certain classes of action or proceeding brought in specific areas'.

In each case, the reform depended on the identification of 'specific areas' which would be carved out of the jurisdiction respectively of the Court of Justice and the CFI. The Due Report had proposed as criteria 'cases [which] are brought in large numbers, or [whose] link to Community law is only indirect, or [which] require highly specialised judges to deal with them, or because any other general-interest consideration requires' special treatment. Candidate areas included intellectual property (trade marks, design rights, plant variety rights, patents), 'very specific areas of private international law', judicial cooperation in civil and criminal matters, and even, depending on the evolution of the volume of such litigation before the CFI, private sector competition disputes.[73] A review procedure, to be initiated by the Court of Justice itself, would ensure that the highest court could intervene to ensure appeal judgments and preliminary rulings of the CFI did not affect 'the unity or consistency of Union law'.[74]

For the 'judicial panels', there was a very obvious candidate area, which had previously been identified when the CFI was set up more than a decade before, that is, disputes between the Union institutions and their staff. Though the Court and CFI had simply resuscitated the 1978 proposal for an inter-institutional administrative tribunal, the Due Report favoured a judicial body.[75] Article 225a EC established the judicial character of such 'panels',

[70] O Due, 'The Working Party Report' in A Dashwood and A Johnson (eds), *The Future of the Judicial System of the European Union* (Hart Publishing, 2001) 87, 94.

[71] Report of the Working Party on the Future of the European Communities' Court System (European Commission, January 2000, the 'Due Report').

[72] O Due, 'Looking Backwards and Forwards' in H. Hijmans et al (eds), *La Cour de justice des Communautés européennes 1952–2002: Bilan et Perspectives* (Bruylant, 2004) 25, 33.

[73] Due Report (n 71) section II.C, 29–35.

[74] Art 256(2) and (3) TFEU; the most recent, and possibly last, application of the review procedure is in Joined Cases C-542/18 RX-II and C-543/18 RX-II *Council v Simpson* and *Commission v HG* EU:C:2020:232.

[75] Due Report (n 71) 30.

by requiring that the members 'possess the ability required for appointment to judicial office'. The intergovernmental conference urged the institutions to establish a staff litigation panel 'as swiftly as possible'.[76]

2. THE CIVIL SERVICE TRIBUNAL

The European Union Civil Service Tribunal (CST) was duly established in October 2005, and assumed responsibility for hearing at first instance disputes between the institutions (offices, agencies, etc) and their staff, former staff, family members, and other persons who come within the four corners of the staff regulations.[77] The number of judges was set at seven, based on an estimation of its likely workload of around 150 cases per year. The modest size of the CST necessarily entailed some form of selection of judges; the Council opted for a procedure based on an open call for expressions of interest and a selection committee comprising national judges, former members of the Court and CFI, and outstanding lawyers. The committee's task was to present the Council with a shortlist of suitable candidates with at least twice as many names as posts available. In appointing the Tribunal judges, the Council was charged with 'ensur[ing] a balanced composition ... on as broad a geographical basis as possible among nationals of the Member States and with respect to the national legal systems represented' (sic).[78] Rather than presenting a shortlist in alphabetical order, the first selection committee drew up a list of candidates in order of merit; by happy chance, the first seven candidates included four from the six largest Member States. Though palpably irritated by what it saw as the usurpation of its political discretion to select the judges,[79] the Council duly appointed the first seven persons on the list.

CST judges were appointed for a renewable six-year term of office. Three of the original seven judges, chosen by lot, were only appointed for three years; the Council had no difficulty in reappointing the three judges concerned for a further six-year term in 2008. Not so in 2011, when the Council split between partisans of renewing the mandates of two of the sitting judges, in the interests of stability and productivity, and those who favoured implementing a rotation system to comply with the criterion of geographical balance. After some four months of wrangling, the Council appointed three new judges, but the difficulties arising from a unanimity requirement were exposed to public gaze, and would play a part in the next round of judicial reform.

3. THE TREATY OF LISBON

By the time the European Convention had finished its work on what was in effect the blueprint for the Treaty of Lisbon in summer 2003, the implementation of the Nice reforms was barely under way; the Commission only submitted its proposals for the first two specialized

[76] Declaration No 16 to the Final Act of the Nice Treaty 'on Article 225a of the EC Treaty'.
[77] W Hackenberg, 'The Civil Service Tribunal of the European Union: A Model to Follow as a Specialised Court?' in Guinchard and Granger (n 1) 161.
[78] Art 3(1) Annex I to the Court Statute, now repealed.
[79] L Sevón, 'The Procedure for Selection of Members of the Civil Service Tribunal: A Pioneer Experience' (2011) 31 Human Rights Law Journal 5, 8.

courts later in the same year.[80] As a result, the reforms effected by the Lisbon Treaty were few and putatively rather modest. The judicial institution was re-named 'Court of Justice of the European Union', comprising the 'Court of Justice', the 'General Court', and any 'specialised courts'. This terminological revision was at best a qualified success. The former CFI now has different designations in different languages, while the former 'judicial panel' responsible for civil service disputes was born and died a 'Tribunal'.

More significantly, the power to propose modifications to the Court's Statute was conferred on 'the Court of Justice', rather than on the institution as a whole.[81] It is clear from the text of the Draft Treaty establishing a Constitution for Europe that this was not the intention of the Convention; while such a power was vested in 'the Court of Justice', in the terminology of the draft Constitution this referred to the institution, rather than one of its constituent parts.[82]

The new Article 255 TEU set up a panel 'to give an opinion on candidates' suitability' for appointment to the Court of Justice or General Court. The panel comprises seven sitting members of national supreme courts, former members of the Court of Justice or General Court, and/or 'lawyers of recognised competence'; one is nominated by the European Parliament, the remaining six by the President of the Court of Justice. While its opinions are formally not binding, in eleven years no member has ever been appointed to the CJEU in the face of a negative assessment from the panel. If such a creature were recognized in the Union's legal order, the binding character of the panel's assessment of candidates would be a constitutional convention.

E. REFORM OF THE GENERAL COURT

1. THE 2011 INITIATIVE

In March 2011, the Court of Justice submitted a request that the number of judges in the General Court be increased by twelve.[83] At the end of 2010, the number of cases pending before the General Court was 1300, while the number of cases it had decided that year was 527, and the number of new cases introduced was 636. The average duration of proceedings in state aid cases was 42.5 months and in other competition cases 56 months; at the same time, several claims in damages were then pending against the institution for the General Court's failure to resolve proceedings within a reasonable time in breach of Article 47 of the Charter.[84]

The Court was careful to outline some of the reasons for the increase in the General Court's workload—transfer of jurisdiction from the Court of Justice, the accessions of 2004 and 2007, the increase in the volume of Union legal acts open to challenge—as well as potential future sources of additional work, such as review of regulatory acts and restrictive

[80] Proposals for the establishment of a civil service tribunal and a patent court, respectively, COM(2003) 705, and COM(2003) 828.
[81] Art 281, 2nd para, TFEU.
[82] Arts 28 and III-289, 2nd para, CT.
[83] Court of Justice, Draft Amendments to the Statute of the Court of Justice of the European Union, 28 March 2011, available as Council document 8787/11, 7 April 2011.
[84] See, eg, the 'plastic bags' litigation, Case C-40/12 P *Gascogne Sack* EU:C:2013:768 and Cases C-138/17 P and C-146/17 P *European Union and Commission v Gascogne Sack Deutschland* EU:C:2018:1013.

measures against individuals, and treating claims based on the Charter of Fundamental Rights. While acknowledging that the General Court had taken internal measures to deal with the situation, the Court concluded that '[w]hatever it does, the General Court is unable to deal with the volume of cases lodged every year, still less absorb the accumulated backlog'.

The Court justified its preference for an increase in the number of judges over the establishment of a new specialist court for intellectual property matters,[85] on four grounds:

- *effectiveness*: intellectual property cases were not the major problem, and the General Court would still be left with an increasing number of complex cases, such as disputes on competition law, as well as a possibly voluminous appeal jurisdiction from decisions of any such court;
- *consistency*: trade mark cases 'require the uniform interpretation—preferably by a single court—of certain concepts', and conferring jurisdiction in these cases on a specialist court could have negative repercussions on other areas of law, such as the free movement of goods;
- *flexibility*: supplementary capacity would enable the General Court to deal with an influx of new cases, whatever the subject matter; moreover, an increase in the number of judges could be reversed, whereas 'it would be decidedly more difficult to dismantle a new court once it had come into operation';
- *urgency*: establishing a new court 'would probably slow down the handling of cases over a period of approximately two years', whereas appointing new judges would have 'an almost immediate effect'.

Though the Court did not spell it out in terms, an extra twelve judges, using the '20 cases per reporting judge per year' calculation, should in principle have allowed the General Court to liquidate comfortably the 1300 pending cases over a six-year period, even allowing for a modest annual increase in the number of new cases it had to deal with.[86]

With the benefit of hindsight, not all of the Court's reasoning appears to be particularly robust. Five years passed before the first stage of the 'urgent' reform became operational, the CST was decidedly not difficult to abolish, barely an inconvenience, and if jurisdiction in trade mark disputes were to be dealt with by a single court as the Court suggested, then arguably the General Court, armed with preliminary ruling jurisdiction, would be the obvious candidate. That said, the Court's assessment that supplementary judges would allow the General Court to deploy its resources where the difficulties arise, and that a trade mark court would not solve the problem of the duration of competition proceedings, is more convincing.

Modified by reducing the number of supplementary judges to nine, the Court's request 'was welcomed by the Commission, agreed in principle by the Council and approved by the Parliament'.[87] That did not stop the proposed reform running into the sands on the question of the distribution of posts of judge amongst the Member States, just like the 1999 request for supplementary judges to handle intellectual property cases.

[85] The preference of the General Court itself for such a new court was acknowledged in a footnote.
[86] 12 x 20 x 6 = 1440, though, as noted before, simple arithmetic is not always a good guide to judicial realities.
[87] CJEU, press release no 44/15, 28 April 2015.

'Invited' by the Council to present 'new proposals in order to facilitate the task of securing agreement within the Council', the Court duly proposed the doubling of the number of judges at the General Court, the transfer to it of jurisdiction in staff matters, and the abolition of the CST.[88] What was seen in some quarters as the Court's capitulation to the strong arm tactics of the Council, and its espousing of an expensive and somewhat disruptive reform, led to a very public disagreement between the Court and the General Court. In particular, some members of the General Court challenged the necessity for any structural reform, arguing that 'the backlog of cases that provided one of the two principal justifications for the [2011 initiative] ha[d] disappeared'.[89]

2. THE 2015–2019 REFORMS

On 16 December 2015, Parliament and the Council amended the Court Statute to double the number of judges of the General Court in three phases, ostensibly starting on Christmas Day 2015 with the addition of an extra twelve judges, and ending on 1 September 2019 when the General Court would comprise 'two judges per Member State'. The preamble to Regulation 2015/2422 justifies this measure by reference to the increase in the number of cases before the General Court, outlines the reason for this increase, and notes that '[a]t 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 of Article 47' of the EU Charter of Fundamental Rights. Noting simply that '[t]he option of setting up specialised courts . . . has not been taken up', the Regulation affirms that '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'.

Though fixing the number of judges, the substantive provisions of the Regulation neither impose a nationality requirement for appointment to the General Court, nor cap the number of judges who can be appointed from any one Member State; according to the preamble, however, it is 'understood that at no point in time can there be more than two Judges . . . appointed upon a proposal by the same Member State'.[90] The preamble notes that the appointment of the last nine judges in September 2019 'should not entail the recruitment of additional legal secretaries or other support staff', but that the equality of treatment of the judges in this regard would be guaranteed by 'efficient use of existing human resources'. In a nod to diversity beyond mere nationality, the preamble underlines the importance of gender balance and in effect invites the Member States to appoint one woman and one man judge when appointing two members at once, though this invitation has not been universally taken up in practice.

The Regulation presaged, but did not effect, the transfer of first instance jurisdiction in staff matters, and of the 'seven posts of Judges', to the newly enlarged General Court. Regulation 2016/1192 repealed the 2004 Council Decision establishing the CST and Annex

[88] <https://curia.europa.eu/jcms/upload/docs/application/pdf/2015-05/8-en-reponse-274.pdf>.

[89] A Collins, The General Court: Enlargement or Reform?, speech at King's College, London, 11 March 2016, 6; see generally A Alemanno and L Pech, 'Thinking Justice outside the Docket: A Critical Assessment of the Reform of the EU's Court System' (2017) 54 CMLRev 129; D Dero-Bugny and A Cartier-Bresson (eds), *Les réformes de la Cour de justice: Bilan et perspectives* (Bruylant, 2020); Granger and Guinchard (n 1).

[90] Regulation 2015/2422 [2015] OJ L314/14, preamble [6].

I to the Court Statute, conferred jurisdiction in staff disputes on the General Court, and laid down the necessary transitional arrangements.[91] The CST was abolished with effect from 31 August 2016.

The legislature imposed two review requirements with firm deadlines on the Court. Within two years, the Court was to report back to the political institutions 'on possible changes to the distribution of competence for preliminary rulings under Article 267 TFEU … accompanied, where appropriate, by legislative requests'. In its report of 14 December 2017, the Court noted that the average duration of preliminary references was at fifteen months, which, given the procedural and language constraints inherent in the treatment of such cases, was 'quite close to the irreducible minimum'.[92] Having also outlined various difficulties to which a transfer of jurisdiction to the General Court would give rise, the Court concluded that no such transfer would be appropriate, though it promised to keep the situation under close surveillance.

A second, even more eagerly awaited, report was published by the Court in late 2020. The report, drawn up with input from two national judges, 'focus[ed] on the efficiency of the General Court, the necessity and effectiveness of the increase to [54] Judges, the use and effectiveness of resources and the further establishment of specialised chambers and/or other structural changes'; the Court adjudged that it was too soon to reach 'definitive conclusions' on these matters.[93]

F. REFORM OF THE COURT OF JUSTICE

Though not a direct follow-up to the Court's report of December 2017, on 28 March 2018 the Court of Justice requested yet more reforms. Of these, the most significant was the proposed transfer of infringement jurisdiction, including as regards state aid decisions, to the General Court. In the result, this reform was postponed until after the December 2020 report on the functioning of the enlarged General Court. By way of preamble, Regulation 2019/629 notes that '[r]eferences for a preliminary ruling constitute the keystone of the judicial system of the Union and are dealt with expeditiously', and that no transfer of jurisdiction to deal with such cases was then necessary.[94] Instead, the Regulation transferred back to the Court of Justice jurisdiction in annulment actions by Member States in the context of the enforcement procedure of Article 260(2) and 260(3) TFEU. In deciding such actions, the General Court could in effect find itself ruling on the liability of the Member State to financial sanctions, a matter which would be reserved to the Court of Justice even if basic infringement jurisdiction were transferred to the General Court. Moreover, the possibility of appeals against both the initial infringement judgment and that in the annulment action against the Commission's findings regarding Member State compliance could lead to excessively long judicial proceedings.

91 [2016] OJ L200/137.

92 Report submitted pursuant to Art 3(2) Regulation (EU, Euratom) 2015/2422, Luxembourg, <https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-01/en_2018-01-12_08-43-52_183.pdf> .

93 Regulation 2015/2422 (n 90) Art 3(1); https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-12/tra-doc-en-div-t-0000-2020-202009736-05_02.pdf.

94 Regulation 2019/629 [2019] OJ L111/1.

The other reform effected by Regulation 2019/629 is the establishment of a filter system for the treatment by the Court of Justice of certain categories of appeals. Where a dispute has already been considered by an independent board of appeal of a Union agency or office prior to being referred to the General Court, the Court of Justice will allow an appeal against the ruling of the General Court to proceed 'wholly or in part, only where it raises an issue that is significant with respect to the unity, consistency or development of Union law'. The Regulation provides a list of the agencies and offices concerned, though stipulating that the filter mechanism would also apply to cases heard by any other independent board of appeal set up after 1 May 2019, when the Regulation came into force. The decision on whether or not to proceed with such an appeal is taken *ex parte*; unless it is to proceed, the appeal is not even notified to the respondent.

G. PRELIMINARY RULINGS: IS THERE A PROBLEM?

1. DURATION OF PROCEEDINGS

> The Court of Justice is obliged to conduct its deliberations with such dispatch that it is unable to apply to cases the thorough consideration necessary for it to give a useful reply to the questions referred.

Arnull? Rasmussen? Weiler?

No, this is a paraphrase of the prognosis offered by the Court of Justice and the CFI in their joint submission on *The Future of the Judicial System of the European Union*,[95] rather than a comment from a critic of the Court or the preliminary ruling regime. True, the Court's analysis was subject to the proviso '[i]f current trends continue without any reform of the machinery for dealing with [references for preliminary rulings]'. In fact, the machinery for dealing with references is the same now as it was in 1999. The option of devolving preliminary ruling jurisdiction to the General Court 'in specific areas' has not been taken up, and has been ruled out for the foreseeable future as unnecessary by the legislature.[96] It should be noted, however, that the legislature was merely repeating the conclusions of the Court itself in its 2017 review of the division of jurisdiction between it and the General Court, which was based on the statistics for the first ten months of 2017.

The 'current trends' referred to were 'the constant growth in the number of references for preliminary rulings'. This condition has been amply fulfilled; from 264 requests in 1998, the figure on which the Court had based its 1999 prognosis, the volume of new requests for a preliminary ruling had risen to 641 in 2019, an increase of 243 per cent, while the total number of new cases has risen from 485 to 966, an increase of 199 per cent. The Court also predicted in its submission of May 1999 that in these circumstances the proceedings in preliminary rulings cases would become more protracted. This has not proven to be so; on the contrary, the Court has managed to bring the average duration of proceedings down from 21.4 months (1998) to 15.5 months (2019). The average figure has hovered between 15 and

[95] Court of Justice, May 1999, <http://www.alanuzelac.from.hr/Pdf/eu-postdip/Buducnost%20suda%20Europskih%20zajednica%20-%20ave.pdf>.

[96] Regulation 2019/629 (n 94) preamble [3].

16.3 months for the last decade, after reaching a rather alarming 25.5 months in 2003, just before the accession of another ten Member States and the influx of new references that accession would entail.

That said, like most of the statistics bandied about in the judicial reform debate, the average duration does not tell the full story. Adopting reasoned orders that the answer to a request has already been provided in the case law or admits of no reasonable doubt, has a useful downward effect on the calculation of the average duration.[97] Since 2010, the Court has applied an urgent procedure to certain categories of preliminary ruling request, the so-called 'PPU' (*procédure préjudicielle d'urgence*), and occasionally applies an expedited procedure to such requests too. While the temporal priority accorded these proceedings may affect the management of other cases, treating even a handful of such requests per annum[98] may also flatter the average.[99] On the other hand, the Court very properly leaves out of the calculation of the average requests which are manifestly inadmissible or in respect of which it has no jurisdiction, also dealt with by reasoned order.[100]

2. POSSIBLE FUTURE TRENDS

The numbers do not tell the whole story of the extent of the Court's workload either. Clearly, successive enlargements of the Union, the massive expansion of its regulatory activity, and 'the growing awareness of [EU] law by lawyers', all contribute to the increase in the volume of preliminary requests from national courts.[101] While each of these on its own adds to the volume of preliminary references, they interact with each other to generate exponential rather than linear growth; thus, for example, every new Member State which joins the Union has a greater mass of Union law to absorb than those which joined before, and the surge of publicity generated by accession may, indeed should, increase the awareness of EU law amongst lawyers in the acceding state. The characteristics of Union law, as defined by the Court, also contribute significantly to this workload: the direct effect of Treaty provisions, the primacy of Union law, the requirement to interpret national law in conformity with Union law, state responsibility for failure properly to apply Union law, and in general the role of national courts as ' "ordinary" courts within the European Union legal order'.[102]

This is true too of the Court's interpretation of Article 267 TFUE. In *Foto-Frost*, it added a gloss requiring all national courts who harbour a reasonable doubt about the validity of a Union act to refer the matter under Article 267 TFEU, while in *CILFIT* its admission of the *acte clair* doctrine permitting courts of final instance to escape the absolute character of their duty to make a reference is hedged about with such strict and, in the view of

[97] Art 99(2) Court of Justice Rules of Procedure. The Court adopted seventy such orders in preliminary rulings proceedings in 2019, out of the 528 decisions closing the procedure: Annual Report of the Court of Justice of the European Union for 2019 (Luxembourg 2020) Annex VIII, 166.

[98] Eleven requests for the application of the PPU were granted in 2019, and three expedited procedures were applied, though the Court's annual report does not indicate how many, if any, of these latter were preliminary rulings.

[99] The Court's quest for rapidity may on occasion be thwarted by extraneous factors beyond its control; in Case C-585/18 *A.K.* EU:C:2019:982, eg, the conclusion of the proceedings, which had been granted expedited consideration, was delayed by the necessity to reopen the oral hearing at the request of the government concerned.

[100] Art 53(2) Court of Justice Rules of Procedure; eighty-three orders in 2019, Annual Report 2019 (n 97).

[101] P Craig, 'The Jurisdiction of the Community Courts Reconsidered' in G De Búrca and J Weiler (eds), *The European Court of Justice* (Oxford University Press, 2001) 177, 184.

[102] Opinion 1/09 *European Patent Court* EU:C:2011:123, para 80.

some, unrealistic conditions as to ensure recourse to this possibility should remain a rare occurrence.[103]

The primary function of the Court in preliminary ruling proceedings is to provide an interpretation of a provision, or provisions, of Union law. It is inherent in this exercise that one interpretation may lead to a multitude of further questions, as lawyers, administrators, and judges are pressed to apply that interpretation by analogy to other factual situations, which are similar or even not so similar. The spate of requests concerning the application of the principle of equal pay for equal work following *Defrenne II*, or Union citizenship after, say, *Ruiz Zambrano*, illustrate the point, though examples could be found in almost any area of Union law.[104] Over time this particular multiplier effect alone would generate a significant volume of work for the Court, in the unlikely event that the Union legislature were to cease its activity completely.

3. *FESTINA LENTE*

The duration of the handling of preliminary ruling requests, and legal proceedings in general, is not just a matter of celerity. Judges must have the necessary time to come to a fully considered decision: '[t]he year has so many days, the day has so many hours, the Court has so many judges, the judges have so many cases . . . time to think, to reflect, to deliberate[,] is the most scarce resource of the Institution . . . Justice delayed is justice denied, but so is hurried justice'.[105]

It would be foolhardy to be dogmatic about the work capacity of an individual judge at the Court of Justice, or of the judges collectively. That said, even with the assistance of numerous *référendaires* and the highly efficient back-up staff of the Court, this capacity is not infinite. When the Court expressed concern at its workload in 1974, the number of cases per judge as reporting judge per year was just over twenty. At the time of the Court's optimistic assessment in 2017, each ordinary judge[106] had an average of twenty-six cases as reporting judge per year, of which eighteen were requests for preliminary rulings. On the basis of the figures for the end of 2019, the judges will each have an average of thirty-nine cases as reporting judge per year, of which twenty-five will be requests for a preliminary ruling. Moreover, the 'cases as reporting judge per year' metric provides at best a very incomplete picture of a judge's workload; each will participate in the deliberations of the Grand Chamber in around twenty-five cases per year, to say nothing of the dozens of cases they will participate in as part of a chamber of three or five judges. Spare a thought too for the Advocates General: while they no longer provide a formal Opinion in each case, on the basis of the 2019 figures they must each examine an average of around ninety cases per year, firstly in order to advise the Court on whether an Opinion is merited or not, and then provide Opinions in about half of them.

[103] Respectively Case 314/85 *Foto-Frost* EU:C:1987:452 and Case 283/81 *CILFIT* EU:C:1982:335; in Case C-561/91, *Consorzio Italian Management* (pending), the Court may revisit the *CILFIT* criteria (see Opinion of AG Bobek, 13 April 2021).

[104] Respectively Case 43/75 *Defrenne* EU:C:1976:56 and Case C-34/09 *Ruiz Zambrano* EU:C:2011:124.

[105] J Weiler, 'Epilogue: The Judicial Après Nice' in de Búrca and Weiler (n 101) 215, 220.

[106] Given the extent of their other duties, the President and Vice-President do not assume the functions of reporting judge, though both participate in cases before the Grand Chamber and Full Court, and as need be in other chambers.

If the Court was relatively at ease with an average case load of twenty-six cases per judge as reporting judge per year, it may be less so if this figure were to rise to forty or fifty or more in the coming years, a rise which the system does nothing to prevent. Let us admit for the sake of argument that there is, or will be, or at least could be, a problem in the foreseeable future.

H. PRELIMINARY RULINGS: IS THERE A SOLUTION?

1. DEVOLUTION TO THE GENERAL COURT OF PRELIMINARY RULING JURISDICTION

From the very foundation of the CFI, the Court of Justice has been reluctant to countenance the conferral of preliminary ruling jurisdiction on the lower court. The following reasons were given in the Court's 1995 paper:

— Conferral would entail unacceptable procedural delays in case of an appeal;
— The authority of first instance judgments would be problematic, as would the identification of those entitled to present an appeal from a preliminary ruling;
— Jurisdiction for preliminary rulings could not be allocated on the basis of predetermined criteria in function of the subject matter or the level of the referring national court, as this would undermine the consistency of the case law, while a flexible case-by-case allocation would contravene the principle of the lawful judge.[107]

By 1999, the Court was somewhat more emollient, suggesting 'the idea of such a transfer [of jurisdiction] should not be rejected out of hand'. Its reservations then were more practical in character, that a devolution of jurisdiction would add to the workload of the lower court at a time when 'it will itself have to contend with an influx of direct actions far exceeding the limits of its … capacity'; indeed, the same month the Court had requested an extra six CFI judges for trade mark cases. In any case, a 'machinery for referrals and/or appeals' would have to be devised to ensure 'that the most important questions always come before the Court of Justice in the end'.[108]

The starting point of the Due Report was that 'it should basically still be the Court of Justice which gives preliminary rulings, at least while the development of the Union so permits'.[109] It only admitted the principle that the CFI could be vested with preliminary ruling jurisdiction for requests from 'national courts specialising in certain areas of … "special" litigation (such as trade mark infringement cases)'.[110]

The French delegation to the 2000 Intergovernmental Conference went somewhat further, advocating the transfer to the CFI of jurisdiction in areas which were to be 'precisely defined and limited in number [such as] those which fall within the CFI's jurisdiction as a court of first instance in annulment proceedings. The areas thus transferred would thus

[107] Court of Justice (n 47).
[108] Court of Justice (n 95) Ch IV, section 3(iii), 27.
[109] Due Report (n 71).
[110] ibid 36.

constitute spheres of jurisdiction ... covering both direct actions and references for preliminary rulings.'[111] To ensure the consistency of Community law, the delegation proposed that the right of appeal from such CFI judgments be limited to the Commission or the Member States, or that the lower court be allowed to refer cases involving a 'fundamental point of Union law' to the Court of Justice, or giving the Court of Justice sight of all requests for preliminary rulings, even those within the remit of the CFI.

The Treaty of Nice adopted a position close in many respects to the French delegation without, however, providing any indication of the material scope of the jurisdiction which could be transferred to the (now) General Court, leaving the identification of 'specific areas' to the legislature, and in the first instance to the Court of Justice.[112]

The difficulty of corralling off such areas was again invoked by the Court recently as a reason for not transferring preliminary ruling jurisdiction. A request may 'concern at the same time both technical areas and the interpretation of fundamental provisions of the Treaties or of legislation. Conversely, requests that appear to be anodyne or technical may raise questions of principle or of a cross-cutting nature ... which cannot but call for a decision of principle from the Court of Justice alone.' Diverging approaches would 'undermine legal certainty and the trust that the national courts and tribunals and litigants place in the institution'.[113] The Court also noted that the review procedure and the possibility of the General Court's referring a request to the Court of Justice were an incomplete solution to any divergences. For good measure, the Court referred to the fact that, while it was dealing expeditiously with references received, the General Court was obliged to reorganize itself to cope with an ever-increasing number of direct actions and judges.

If the Court was at pains to underline that this was not its definitive position on the distribution of jurisdiction, it is difficult to know whether its remark was anything more than an olive branch extended to the General Court after the bruising encounters between the two courts on the 2015–2019 reforms. Even if 'the number and complexity of requests ... were such that the proper administration of justice required' a transfer of jurisdiction, the Court would still be left with the fundamental problem of ensuring the uniform application of Union law if both courts were competent to provide preliminary rulings.

2. IS A LITTLE BIT OF NON-UNIFORMITY ALL RIGHT?

The *raison d'être* of the preliminary ruling procedure is to ensure the uniform application of Union law; given that approximately 70 per cent of the cases decided by the Court of Justice are preliminary rulings, to quite a large extent this procedure is also the *raison d'être* of the Court. So how much of its *raison d'être* should the Court surrender?

It may be that a certain number of 'requests for a preliminary ruling are of the "turkey tail or nightdresses" character'.[114] Yet every request may hold within it the germ of a question

[111] IGC 2000: Contribution from the French delegation on reform of the judicial system of the European Union, CONFER 4726/00, Brussels, 27 March 2000, 10, 11.

[112] Or the Commission, though to date the Commission tends to leave politically sensitive initiatives in this area to the Court.

[113] Court of Justice 2017 (n 2) 5.

[114] Craig (n 101) 183.

of principle which can only be finally resolved by the Union judicature, concerning the distribution of power between the Union and the Member States, or that between the Union judicature and the national courts. This is true even of customs law; *Van Gend en Loos*, for example, arose from a dispute on the customs classification of urea-formaldehyde, *Foto-Frost* from a challenge to the post-clearance recovery of unpaid dues.[115] The Court itself pointed out that taxation, another area of jurisdiction occasionally mooted as a candidate for devolution to the General Court of preliminary ruling jurisdiction, 'may encompass questions on concepts as fundamental as abuse of rights', and referred to *Åkerberg Fransson* which caused such a stir in certain quarters.[116]

It has been suggested that the Court's position on the necessity for uniformity in Union law is overstated, and that uniformity may be less necessary in some areas of law than others: 'the more fundamental is the issue to be resolved, the greater is the need to recognise some diversity, in part reflecting legal, social, and cultural diversity in Europe'.[117] The European Court of Human Rights, it was pointed out, recognizes a 'margin of appreciation . . . which, precisely in the area of fundamental rights, provides for some flexibility in the application of the Convention'. The author proposes that national courts be invited to suggest an answer to the questions posed, which the Court could approve *sub silentio*.

As against this, it could be argued that divergences in the area of the internal market, or transport policy, or environmental protection regulation, for example, could translate into distortions of conditions of competition, or those in the area of social security or recognition of qualifications, into hindrances to the free movement of persons. The same is true of most areas of Union law; even as regards freedom, security, and justice, singled out as an area where the requirement of uniformity would be less pressing, divergences in the application of the Framework Decision on the European Arrest Warrant, for example, could lead to a breakdown in the mutual trust between the Member States which is so pivotal to the functioning of the system.[118] There is the world of difference between divergences allowed by the Treaty, *à la* Article 36 TFEU, or sanctioned by the Court to deal sensibly with exceptional circumstances, *à la Aranyosi and Căldăraru*, for example,[119] and divergences which would develop because of differences of approach between the Court of Justice and the General Court. There are enough divergences between the Member States in their application of Union law in practice without allowing others to develop because of the fragmentation of jurisdiction at the level of the Union judiciary. Moreover, the Court's quest for uniformity in the application of Union law does have a more or less explicit Treaty foundation in the first paragraph of Article 18 TFEU, which prohibits 'any discrimination on grounds of nationality' '[w]ithin the scope of application of the Treaties'.

115 Case 26/62 *Van Gend en Loos* EU:C:1963:1; Case 314/85 *Foto-Frost* (n 3).

116 Court of Justice 2017 (n 92); Case C-617/10 EU:C:2013:105.

117 FG Jacobs, 'The Court of Justice in the Twenty-First Century: Challenges Ahead for the Judicial System?' in A Rosas et al (eds), *The Court of Justice and the Construction of Europe: Analyses and Perspectives of Sixty Years of Case-law* (TCM Asser Press, 2013) 49, 55.

118 ibid; for the possible impact of Brexit on mutual trust, see Case C-327/18 PPU *Minister for Justice and Equality v RO* EU:C:2018:733, and K Bradley, 'Disintegration through Law: Brexit, Article 50, and the Court' in C Kilpatrick and J Scott (eds), *Contemporary Challenges to EU Legality* (OUP, 2021) 123, 153–158.

119 Case C-216/18 PPU EU:C:2018:586, [43].

3. RETHINKING DEVOLUTION OF PRELIMINARY RULING JURISDICTION

Taking a holistic view of the problems facing the Union judicature, Albors-Llorens argues that the risks of conferring preliminary ruling jurisdiction on the General Court are outweighed by those of maintaining the status quo, and in particular that of an ever-lengthening duration of the treatment of these cases: 'the General Court is today an experienced and successful court … and … there is no reason to doubt its ability to interpret EU law in a manner that does not threaten its uniform application'.[120] She also points to the two safeguard clauses of Article 256(3) TFEU, that is, the possibility for the General Court to refer a case to the Court of Justice where its resolution requires 'a decision of principle likely to affect the unity or consistency of Union law', and the review procedure, and suggests that these might be complemented by 'mechanisms of cooperation between the two courts … to bolster such a uniform interpretation'.[121] She proposes different possibilities for devolving jurisdiction on the General Court, modifying the Treaty as need be: preliminary references on validity, and/or references from the lower national courts only, that is, those against whose decisions there is a judicial remedy in national law.

The Court's reservations regarding the conferral of preliminary ruling jurisdiction on the lower court are, however, systemic, rather than being based on an assessment of the General Court's ability to carry out its judicial functions. The 'success' of the General Court is hardly open to doubt; in the period 2015 to 2019, only three out of every twenty appeals to the Court were upheld in whole or in part.

It is the character of the preliminary ruling procedure, and legal impact of the Court's ruling, which are different to those of direct actions which make up the General Court's current workload. In direct actions, either the contested act is annulled, or the damages claim is upheld, or it is not; while this will of course require a certain effort of interpretation, direct actions generally revolve around the application to the particular facts of well-known criteria of validity or liability. Moreover, the vast majority of Union acts being challenged are administrative, or at most regulatory, rather than legislative, and the General Court's judgment would therefore normally only affect a limited number of subjects, that is, the addressees of the act, those who can demonstrate direct and individual concern or, in the case of immediately applicable regulatory acts, direct concern. Preliminary rulings, on the other hand, for the most part raise questions of the interpretation of provisions of Union law; while the gamut of possible outcomes is not infinite, it is much wider than a binary choice such as that between valid and invalid, or upholding or rejecting a damages claim. It follows that the risks of the two Union courts coming to different, but equally plausible, interpretations of the same provision are much greater, particularly in a system not governed by a formal doctrine of judicial precedent.[122] Divergences would therefore arise not because of any failings on the part of the General Court, but because of the indeterminacy of legal rules, and the independence of thought judges are professionally obliged to apply to

[120] A Albers-Llorens, 'The Court of Justice in the Aftermath of Judicial Reform' in Guinchard and Granger (n 1) 123, 136.

[121] ibid 137.

[122] K Bradley, 'Vertical Precedent at the European Court of Justice: When Push Comes to Shove' in K Bradley et al (eds), *Of Courts and Constitutions:* Liber Amicorum *in Honour of Nial Fennelly* (Hart Publishing, 2014) 47.

the exercise of their functions, combined with the loss of control by the Court of Justice, or at least its reduction to the narrow ambit of the review procedure, over consistency.

Splitting jurisdiction between the Court of Justice and General Court according to the level of the referring court could similarly give rise to different, plausible interpretations of the same provision. It could be argued that it is better that there be a single answer provided with reasonable dispatch than a variety of answers provided over a longer, and less predictable, time frame.

Nor would the conferral on the General Court of jurisdiction for questions of validity, as has been suggested, be entirely problem-free either, apart from the fact that this would have at best a rather limited effect on the case load of the Court. In the context of the preliminary ruling procedure, the Union acts whose validity is challenged are often legislative in character, as these can rarely be challenged directly. Given the interests at stake, and the number of heavyweight parties concerned (Union institutions and Member States), it would be anomalous that there would be no possibility of an appeal from a General Court ruling on the validity of legislation, when this possibility is open in respect of rulings on the validity of administrative decisions, including some which only affect the interests of a single person, such as most staff disputes or challenges to restrictive measures. Even if there were the possibility of a review or an appeal, the uncertainty regarding the validity of a normative act, particularly one declared invalid by the General Court, awaiting the final outcome of the procedure would be undesirable.

The safeguards of Article 256(3) TFEU as presently drafted do not provide a sufficient bulwark against divergences in the interpretation or rulings on validity of Union law by the Union Courts. It is not enough that a preliminary ruling of the General Court be wrong for a review procedure to be initiated; it must, moreover, pose 'a serious risk [to] the unity or consistency of Union law'. With a view to bolstering the authority of General Court preliminary rulings, this procedure is predicated on the notion that a little bit of lack of uniformity is fine. Interpreted narrowly, as the Court has done in the framework of appeal judgments of the General Court in staff matters,[123] the review system would inevitably allow divergences between rulings of the two courts to develop; unlike its decisions in staff matters, the General Court's rulings would have an authority *erga omnes* throughout the Union. Interpreted widely, the Court could end up reviewing a significant proportion of the preliminary rulings of the General Court, which would rather undermine the utility of devolving this jurisdiction in the first place.

Certainly in theory, the General Court might cede references liberally to the Court and inter-court methods of cooperation might be devised. That this is a realistic possibility is open to doubt; many courts and judges tend to treat cases which come their way as if these were part of their birth right. Relinquishing jurisdiction to another court does not always come easily; this is so regardless of the fact that respect for the division of jurisdiction operated by the Treaty is 'a fundamental requirement of the [Union's] legal order'.[124] Moreover, while possible, cooperation does not always sit well in practice within what is a fundamentally hierarchical system.

[123] In over a dozen years of General Court appeal judgments, the Court applied the review procedure just five times; for an explanation of the Court's thinking, see the decision refusing a review in Case C-17/11 RX *Petrilli* [2011] ECR I-00299 (no ECLI available).

[124] See, eg, Case C-417/14 RX-II *Missir Mamachi di Lusignano v Commission* EU:C:2015:588, [57].

Albors-Llorens correctly suggests that 'the recent process of judicial reform ... might have lacked the perspective of the plight of the *entire* judicial institution'.[125] If this is so, then transferring all or part of the burgeoning volume of preliminary references would have the effect of passing on the problem rather than resolving it, at a time when the number of direct actions the General Court has to deal with is also flourishing. While it may only be a temporary state of affairs, as of the end of 2019 the General Court had not in fact managed to reduce the number of cases pending before it. In 2016, the General Court benefited from an influx of no fewer than sixteen new judges, including a number of both former judges of the CST and *référendaires* who were well familiar with the functioning of the institution, and were presumably operational more or less immediately on appointment; they were joined by two more judges in 2017, making a total of forty-six. Meanwhile, the extra work caused by the transfer of staff cases is very limited.[126] Yet by the end of 2019, the number of pending cases was 1398, almost a hundred more than the 1300 pending at the end of 2010 which set the alarm bells ringing. Of course, this figure includes a certain number of cases which are not ready to be heard and decided, and reflects in particular the very large number of new cases initiated in 2019, rather than any failing on the part of the General Court. Be that as it may, now may not be a particularly propitious moment to lumber it with a new, and very particular, form of procedure, even 'in specific fields'.

4. REGIONAL OR NATIONAL EUROPEAN UNION COURTS

The notion of establishing other courts, at the regional and/or national level, with jurisdiction to rule on disputes on Union law has both ancient and modern precedents. As noted above, the European Defence Community Treaty envisaged a complex judicial architecture, complete with specialized, regional, and mixed Community-national courts, as well as the Court of Justice; in more recent times, the Agreement on a Unified Patent Court provides for a court of first instance with local, regional, and central divisions, a court of appeal, and the possibility of references for a preliminary ruling to the Court of Justice.[127]

The idea also has very respectable academic credentials. As far back as 1990, Jacqué and Weiler proposed a system of regional Union courts, one per three or four Member States, with jurisdiction for both preliminary rulings and direct actions, and various mechanisms to ensure the Court of Justice could be seized of a dispute in certain circumstances.[128] The former President of the Court, Rodríguez Iglesias, suggested in 2013 that, in the long term, a system of decentralized Union courts per Member State on a federal model might be the only efficient solution if the number of preliminary ruling requests were to exceed the capacity of the Court.[129]

That said, in the present state of Union law, it seems difficult to avoid the conclusion that these proposals are still somewhat ahead of their time. On the basis of the number of

[125] Arbor-Llorens (n 120) 133.

[126] From (re)assuming jurisdiction until the end of 2019, the General Court has never received more than ninety-three new staff cases in a given year, just over half the number initiated at the CST in 2012.

[127] [2013] OJ C175/1.

[128] J-P Jacqué and JHH Weiler, 'On the Road to European Union—A New Judicial Architecture: An Agenda for the Intergovernmental Conference' (1990) 27 CMLRev 185.

[129] 'L'évolution de l'architecture juridictionnel de l'Union européenne' in Rosas et al (n 117) 37, 48.

references made per Member State over the last five years, only four Member States regularly make a sufficiently large number of references to justify the establishment of a multi-member Union court on their territory; several others only make five or fewer references per year, and the numbers of references per Member State fluctuate very considerably from year to year. While regional courts might seem a more promising avenue, recent experience shows that in regard to reform of the Union judicature, the Member States give equality of treatment priority over rational design and economy of means; if they are unwilling to countenance not having a second General Court judge, even temporarily, it seems unlikely they would vote themselves out of a Union court. In any case, it is clear that a system of regional Union courts would lead to divergences in the application of Union law, for the reasons adumbrated above; the greater the number of such courts, the greater the risk of such divergences arising, a risk which the political authorities do not appear to be ready to take.

5. HOW TO MAINTAIN THE UNIFORM APPLICATION OF UNION LAW (WITH A COURT OF TWENTY-SEVEN JUDGES)

If the Treaty solution of a division of jurisdiction is unacceptable or may be unworkable, in the long run another solution must be found to manage the influx of preliminary ruling requests.

One option which was briefly considered by the Court in the run-up to the Nice Treaty was that of requiring national courts to give judgment before any reference can be made; it would then fall to the parties to request such a reference 'for a ruling on those points of [Union] law in respect of which that party contests the validity of the judgment given'. The Court would decide whether or not it was necessary to intervene to provide a ruling on the Union law question; almost wistfully, the Court describes the advantages of such a system: '[i]t would enable the Court to give its ruling on the reference in full knowledge of the national context, both factual and legal, in which the points of [Union] law raised in the case in question fall to be interpreted'.[130]

Then comes the big 'But'; such an arrangement would replace judicial cooperation by a hierarchical system, where the parties would decide whether a reference should be made, and where the national court would be obliged to revise its previous judgment to bring it into line with the ruling of the Court of Justice: '[f]rom the point of view of national procedural law, this aspect of the system would doubtless raise problems which could not easily be resolved'. The Court was also concerned that a party might be more inclined than a court would be to seek a ruling from Luxembourg 'if only to defer enforcement of the judgment'. Nonetheless, concluded the Court, 'there is much to be said for a more thorough examination of such a mechanism and of the ways of implementing it'.[131]

In adopting the Lisbon Treaty, the Member States explicitly acknowledged the central role of national courts in the application of Union law, by requiring Member States to 'provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'.[132] Shortly after, the Court of Justice recognized that national courts are 'the "ordinary"

[130] Court of Justice (n 95).
[131] ibid [26]–[27].
[132] Art 19(1), 2nd subpara, TEU.

courts of the European Union legal order', and rejected a proposed international agreement on the ground that it would have deprived national courts of their Treaty-ordained functions in a particular area of Union law.[133] If national courts are the 'ordinary courts' of the Union legal order, than arguably it is time that they be treated as such as regards the application of Union law, rather than assuming they are unable to decide questions of Union law, encouraged to request guidance from Luxembourg at every turn.

Not only would it allow the Court to determine the number and material content of the questions it rules on, but a system of 'EU appeals' would be more compatible with the right of effective judicial protection than the current somewhat ambiguous situation of preliminary rulings as a means of ensuring such protection. In *Unión de Pequeños Agricoltores*, the Court held that a party pleading the invalidity of a normative act they were unable to challenge directly could 'ask' the national court to make a reference, which request the court would be obliged to accept under *Foto-Frost*.[134] But what if the national court takes the view that the act is valid, or if the party's case rests on a particular interpretation of a provision of Union law rather than a claim of invalidity, and the court decides not to make a reference? In either of those scenarios, the party relying on Union law would be obliged to pursue an appeal, possibly as far as the highest national competent court, in order to get a ruling on Union law, which is precisely one of the arguments traditionally relied upon against any restriction of the right of national courts to make preliminary references. Under an EU appeal system, the ordinary courts of the Union legal order would apply an ordinary procedure.

It would also put the burden of deciding whether or not a ruling of the Court of Justice is required where it belongs, on the parties, rather than on the court itself. A party before a national court may prefer a rapid resolution of his claim, even if this is wholly or partly unfavourable, to one which is only settled a year or more later, and possibly at significantly greater expense owing to a detour via the Court of Justice. The uniform application of Union law is likely to be a rather low priority for the vast majority of private litigants before the national courts.

An EU appeal system would shift one part of the workload from the recipient to the source of that workload, that is, the referring courts. As it is, before making a reference, a national court is obliged to apprise itself of both the material questions of Union law and the scope of its duties under Article 267 TFEU; for some such courts at least, it should be a short step to making a judgment finding in favour of one party or another. Such a system would, moreover, avoid the current arrangement whereby the Court of Justice decides at first and final instance on Union law questions, which has been described as 'in principle a very unsatisfactory situation in itself constituting a violation of a fundamental principle of justice'.[135]

In examining this proposal in 1999, the Court invoked potential problems of national procedural law. The existence, scope, and possible solution of any such problems are well outside the ambit of the present chapter. That said, it should not be beyond the wit of man to design an efficient EU appeal procedure to replace the current preliminary ruling procedure, and which would allow the Court to decide rapidly whether or not to hear the appeal,

[133] Opinion 1/09 (n 102) [80], [89].
[134] Case C-50/00 P *Unión de Pequeños Agricoltores v Council* EU:C:2002:462, [40]; Case 314/85 *Foto-Frost* (n 103).
[135] Weiler (n 105) 220.

for example, on the basis of an application for leave to appeal. The appellant could be required to show that hearing the appeal would be justified in the interests of the unity, the consistency or the development of Union law, like an appellant from certain General Court appeal decisions. The application, and any reply to the application, could be subject to stringent and enforceable rules as to content, length, and presentation; if appropriate, the parties could also be required to provide a translation of their submissions into French, the working language of the Court, notably where an appeal decision is claimed to be urgent. In any case, it should be recalled that the preliminary ruling procedure, which is rather less familiar for most courts than that of an appeal, is itself something of an intrusion on national procedures.[136] Moreover, as regards the question(s) of Union law, the judgment against which such an appeal would lie would be in the nature of an interim ruling, a technique known in most legal systems, which could then be varied in accordance with the ruling of the Court of Justice.

In commenting on the Court's 1999 paper, the Bar European Group of the UK argued that an appeal system would deprive the Court of Justice of the filter operated by the national courts, and that it would itself have to understand the national proceedings.[137] The fact remains that the absence of a Court filter has led, or is likely to lead, to congestion in the preliminary ruling procedure, as well as a significant waste of resources, in dealing with requests which should really not have been made.[138]

The question arises as to whether the system of EU appeals should apply to national courts of last instance, which are already required to make references under Article 267 TFEU, subject to the doctrine in *CILFIT* and its progeny.[139] As the notion that there should be an 'appeal' from such courts might meet resistance for both legal and political reasons, the current preliminary ruling system should be maintained for such courts. The system would thus be hierarchical as regards the courts covered by the second paragraph of this provision, but remain cooperative as regards supreme courts.

A second exception should obtain where a lower national court is plausibly invited to hold a Union act invalid. Rather than create legal uncertainty by upholding such a claim, the national court would apply the traditional preliminary ruling procedure, in accordance with *Foto-Frost*.[140] Where the court rejects the claim of invalidity, an EU appeal would lie.

Certainly such a system would allow divergences between rulings of national courts, or between those of the national courts and the Court of Justice, to subsist as long as no EU appeal is taken; such divergences would, however, be of limited territorial effect, and if the point at issue is sufficiently significant, it would almost certainly be the subject of an appeal from one national court or another. In the last resort, the Commission may be able to take infringement proceedings against the Member State concerned. On a more positive note, such divergences could provide an incentive for transboundary cooperation between national legal orders, as lawyers look to other jurisdictions for arguments to boost their cause.

136 See generally A Wallerman, 'Towards an EU Law Doctrine on the Exercise of Discretion in National Courts? The Member States' Self-Imposed Limits on National Procedural Autonomy' (2016) 53 CMLRev 339.

137 Comments of the Bar European Group of the United Kingdom on the Position Paper of the Court of Justice of the European Communities, October 1999, 36, 37.

138 Art 99 Rules of Procedure of the Court of Justice; see above, text to (n 9).

139 A Kornezov, 'The New Format of the Acte Clair Doctrine and its Consequences' (2016) 53 CMLRev 1317; see also n 103

140 (n 103).

I. EPILOGUE

The recent history of the reform of the European Court shows that the Union's judicial architecture is delicate and highly interconnected, like something out of chaos theory. The Council's incapacity to appoint judges to the CST in its latter years, for example, was relied on as part of the justification for doubling the membership of the General Court, and indirectly for abolishing the CST; ironically, this incapacity arose in large part because unanimity was required for appointments,[141] while a qualified majority was enough to abolish the CST. The increase in activity of the General Court has had a knock-on effect on the number of appeals to the Court, so that a form of filter mechanism has had to be instituted there for certain categories of appeal. The Court's distaste for the review procedure, for the design and operation of which the General Court can take no responsibility, comforts its reluctance to see preliminary ruling jurisdiction devolved to the lower court.

To compound the problem, judicial reform is often expensive and costs precede benefits, sometimes by a matter of years.[142] It is therefore important not to wait for problems to become critical before the necessary decisions are taken and implemented. Judging is not algebra, and adding extra judges, or new courts, brings problems of its own, notably in ensuring consistency in the case law and a possible glut of appeals. It is therefore important to ensure that the real source of difficulty is properly identified in good time, and that the reforms are designed to tackle those difficulties, rather than other political problems which happen to have arisen.

The political authorities of the Union have not always followed up diligently on proposals for judicial reforms, even when these were visibly pressing, or implemented the mechanisms they had put in place. The Commission dragged its heels in proposing a staff tribunal in the mid-1970s, the Council refused the Court's request for more judges in 1979, in 1999 and in 2012, preferring instead to double the size of the General Court on the latter occasion. Only the creation of the CFI, and possibly, albeit on a more limited scale, the establishment of the CST, could be counted as unqualified successes.[143] Even then, after Nice, the only category of cases whose treatment was radically reformed was staff disputes which, at an average of fewer than 100 per year comprise less than 7 per cent of the institution's workload. If you only tackle 7 per cent of the problem, you should not be surprised when it refuses to go away. The Court's frustration with the performance of the other institutions as regards judicial reform was captured in 1995 by the then President of the Court, Gil Carlos Rodríguez Iglesias: 'when there is discussion on the future of the European Union, the Court of Justice is usually forgotten by all but those who are hostile to it'.[144]

The preponderant role played by the Court of Justice in initiating judicial reform is also far from being an unmitigated good, as has been recognized by its current President.[145] Certainly, the Treaties originally conferred a limited power of initiative on the Court as

[141] A qualified majority is sufficient for the appointment of the members of the Commission, which some might consider an even more important function than that of a judge of a specialized court.

[142] F van Dijk and H Dumbrava, 'Judiciary in Times of Scarcity: Retrenchment and Reform' (2013) 5(1) International Journal for Court Administration 1, 10.

[143] On the latter, see, eg, House of Lords European Union Committee, The Workload of the European Court of Justice, 14th Report, Session 2010–11, [56].

[144] The Judicial System of the European Community at the Present Stage of the European Union, speech to the United Kingdom Association for European Law, London, 16 November 1995, on file with the author.

[145] K Lenaerts, *J'assume pleinement cette réforme*, interview with *Le Jeudi*, 28 January 2016.

regards its own composition, and the political nous and efficiency it demonstrated in proposing and designing the CFI were rewarded by its being granted a monopoly of initiative for modifications to its Statute, now shared with the Commission.[146] As a result, the Court of Justice may be at once initiator, interested party, and body responsible for judicial review of any reforms adopted, including their implementation.[147] Any challenge to the doubling of the membership of the General Court, for example, would have been heard by the body which proposed it, albeit that the Court was rather pressurized into doing so by the obduracy of the Council. The Court's moral authority is engaged when it participates in political decision-making which concerns its own functioning, and could also suffer if its participation were to leave it open to criticism in the court of public opinion.

The Court of Justice of the European Union has been undergoing a process of stop-start judicial reform since the mid-1980s, the results of which in recent times have been highly contested. The Conference on the Future of Europe presents an opportunity to put a thoroughgoing reform of the preliminary ruling procedure on the table, and for the Court to avoid, as it seems to want to, the partial devolution of this jurisdiction to the General Court. At the same time, the Conference may wish to reflect on whether a more open process, which facilitates the participation of a much wider group of stakeholders, might not produce a set of reforms which are economical, simple to implement, and capable of standing the test of time.[148]

[146] Art 188 EEC, in force with different numbering from 1987 to 2003.

[147] On implementation, see the *Simpson* review (n 74) and the *Sharpston* litigation, Cases T-180/20, T-184/20, T-550/20, Orders of 6 October 2020, EU:T:2020:473, EU:T:2020:474 and EU:T:2020:475 (appeals pending, Cases C-684/20 P and C-685/20 P).

[148] See generally, H Rasmussen, 'Remedying the Crumbling EC Judicial System' (2000) 37 CMLRev 1071.