Court of Justice
of
the European Union

Report submitted pursuant to Article 3(2) of Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council amending Protocol No 3 on the Statute of the Court of Justice of the European Union

Introduction

On 16 December 2015, the European Union legislature adopted a significant reform of the structure of the Courts of the European Union, deciding to double, in three successive stages, the number of Judges of the General Court and deciding to transfer to the latter, as from 1 September 2016, the jurisdiction to rule at first instance on disputes between the Union and its staff, until then exercised by the Civil Service Tribunal. As stated in recital 5 of Regulation 2015/2422,[1] making use of the possibility, provided for by the Treaties, of increasing the number of Judges of the General Court appeared to be an appropriate measure to reduce, in a short time, both the volume of pending cases and the excessive duration of proceedings before the General Court. The European Parliament and the Council thereby recognised the challenges inherent in the constant increase in the number of cases brought before the Courts of the European Union and their growing complexity, conferring on the General Court the resources necessary for the proper administration of justice.

The European Union legislature intended to ensure effective monitoring of that reform and its effects, both from a budgetary perspective and in relation to organisation, structure and procedure. To that end, the Court of Justice was asked to submit two reports to the European Parliament, the Council and the Commission: an initial report, no later than 26 December 2017, on possible changes in the distribution of jurisdiction between the Court of Justice and the General Court in relation to questions referred for a preliminary ruling; a second report, three years later, on the operation of the General Court and, in particular, on its efficiency, the necessity and effectiveness of doubling the number of Members, the use

[1] Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union (OJ L 341 of 24 December 2015, p. 14)

and effectiveness of the resources allocated and the further establishment of specialised chambers or the introduction of other structural changes.[2]

The present document is designed to respond to the first of those requests. This document examines all the parameters to be taken into consideration in any discussion of a possible transfer to the General Court of partial jurisdiction to give preliminary rulings, after first setting out the legal context and the background to this discussion.

Legal context and background

As the Court has stated on several occasions in its case-law and in the regular dialogue that it maintains with the courts and tribunals of the Member States, the reference for a preliminary ruling is the 'keystone' of the European Union's judicial system.[3] It is the mechanism by which the uniform interpretation and application of EU law can be achieved *via* the reference, by the courts and tribunals of the Member States, of questions concerning the interpretation of EU law or the validity of acts adopted by the institutions, bodies, offices or agencies of the European Union.[4] While those courts and tribunals initially made relatively limited use of it, the situation has now radically changed: the national courts and tribunals no longer hesitate to bring before the Court requests for preliminary rulings that are ever more numerous and that relate to ever more diverse areas of law.[5]

Stated in principle in Article 19(3)(b) of the Treaty on European Union and set out in greater detail in Article 267 of the Treaty on the Functioning of the European Union, the jurisdiction to give preliminary rulings is exercised, currently, exclusively by the Court of Justice.

The possibility of allocating some references for a preliminary ruling to the General Court is not new. Suggested almost 20 years ago, against the background of a significant increase in the workload of the two courts associated with the start of the third phase of the Economic

[2] See, in that regard, Article 3 of the cited regulation, which adds that the reports should be accompanied, where appropriate, by legislative requests necessary for the amendment of the Statute.

[3] Opinion 2/13 (Accession of the Union to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraph 176.

[4] It may be added that that objective is also emphasised in documents drawn up for those courts and tribunals, since it is mentioned in the first paragraph of the Recommendations to courts and national tribunals, in relation to the initiation of preliminary ruling proceedings (OJ, C 439 of 25 November 2016).

[5] See, in that regard, the judicial statistics published in the Institution's Annual Activity Reports and the table annexed to this report, in relation to cases brought in the first ten months of 2017. Of 628 new cases, no less than 455 cases were preliminary ruling cases, which represents more than 72% of all cases brought before the Court of Justice in that period. For a number of years questions referred for a preliminary ruling have represented between two thirds and three quarters of the cases brought before the Court of Justice.

and Monetary Union and the recent entry into force of the Treaty of Amsterdam, and within the framework of preparations for an unprecedented enlargement of the Union, that possibility was expressly raised, in the documents and contributions of the Court of Justice and of the General Court prepared for the inter-governmental conference, as one of the possible routes to take to avoid the overloading of the courts, in addition to measures such as the transfer to the General Court of new categories of direct actions, the creation of judicial review chambers or the filtering of appeals.[6] The idea was formally reflected in the texts, since the first subparagraph of Article 256(3) of the Treaty on the Functioning of the European Union reads: 'The General Court shall have jurisdiction to hear and determine questions referred for a preliminary ruling, under Article 267, in specific areas laid down by the Statute'.[7] If it were to be required, an amendment of the latter text could therefore make it possible for partial jurisdiction to give preliminary rulings to be allocated to the General Court.

To date, however, that possibility has never been used. In the years which followed the entry into force of the Treaty of Nice, on 1 February 2003, priority was given to the creation of the Civil Service Tribunal and to the transfer, to the General Court, of all actions for annulment and actions for failure to act until then allocated to the Court, with the exception of some categories of inter-institutional actions or actions brought by a Member States against acts of the EU legislature. References for a preliminary ruling remained within the exclusive jurisdiction of the Court of Justice which, since then, has adopted a number of significant amendments to its Rules of Procedure – and a number of measures of internal organisation – which have had a considerable effect both on the number of cases closed by the Court but also on the average length of time for dealing with cases, which was one of the major concerns that gave rise to the abovementioned discussions on the future structure of the Courts of the European Union.

The background to the request by the legislature which gives rise to the present report differs radically from that which prevailed at the beginning of this century. While the average length of time for dealing with references for preliminary rulings reached 25.5 months in 2003, that period was established at 15 months in 2016, which, taking into account the procedural and language constraints applicable to dealing with that category of cases, undoubtedly constitutes a period quite close to the irreducible minimum. That shortening of time frames has taken place in parallel to a very significant increase in the number of requests for a preliminary ruling sent to the Court, more than would be in

[6] See in that regard the discussion paper on the 'future of the judicial system of the European Union', sent to the Council in May 1999, and the contribution sent by the Court of Justice and the General Court, a year later (April 2000), to the inter-governmental conference.

[7] See Article 225 EC, reproduced, *mutatis mutandis*, as the present Article 256(3) TFEU.

proportion to the increase in the number of Member States (and Judges of the Court). While, in 2003, 210 requests were sent to the Court by the courts and tribunals of the 15 States which then constituted the European Union, in 2016 no fewer than 470 requests were sent by the courts and tribunals of 28 Member States, in other words more than two times the number of references for a preliminary ruling made 13 years earlier and no less than two-thirds of all the cases brought before the Court in the course of that year. That upward trend, which a reading of the most recent judicial statistics[8] confirms, and which, in all probability, is likely to be maintained in the light of the intensified activity of the EU legislature and, in particular, the establishment of the European Public Prosecutor's Office,[9] therefore necessarily calls for a thorough review of how that category of cases can optimally be dealt with and may revive the question of whether a partial transfer of jurisdiction to give preliminary rulings to the General Court is appropriate.

Advantages and disadvantages of the allocation to the General Court of some references for a preliminary ruling

At the outset, and from a strictly quantitative perspective, it is obvious that the effect of a transfer, to the General Court, of jurisdiction to hear and determine questions referred for a preliminary ruling in specific areas laid down by the Statute cannot do other than automatically alleviate the workload of the Court. It might be considered that such a transfer would not affect the capacity of the General Court to deal with its own cases since that court now has available to it staff who enable it not only to absorb the stock of pending cases, but also to deal effectively with all the cases brought before it.[10]

However, it is necessary to take into consideration the fact that the reform of the structure of the courts is still underway and has not yet produced all its effects, against the background, in the General Court as well, of a substantial increase in the number of new cases and pending cases.[11] Moreover, the transfer envisaged is not without disadvantages.

[8] See the figures in the annex to this report.

[9] See in that regard Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (OJ 2017 L 283, p. 1).

[10] When these lines were written, the General Court had 46 Judges. One judge, following the first phase of the reform of the courts' structure voted for in 2015, was still to be appointed, while the third phase of that reform was to lead to the addition of nine further judges on 1 September 2019, to bring the total number of judges of the General Court to 56 (though that number has to be adjusted to 54 in the event of the departure of the United Kingdom from the European Union).

[11] In the first ten months of this year, no fewer than 799 new cases had been brought before the General Court and the number of pending cases before that court had risen, on 31 October 2017, to 1535 cases.

The first issue that a transfer to the General Court of some references for a preliminary ruling raises is what 'specific areas' to allocate to it. At first sight, the task appears relatively straightforward in that it involves identifying technical areas rather close to the subjects of litigation before the General Court, giving rise to longstanding and settled case-law, and representing for the Court a 'bulk' body of litigation. In that regard, one can think of questions relating to customs or tariffs or those within the scope of social security or indirect taxation. The Court could thus refocus on areas that might be called 'essential', such as EU citizenship, the area of freedom, security and justice, the internal market or economic and monetary integration.

The reality is, however, much more complicated. The requests for a preliminary ruling are liable to 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, connected with the author of the request for a preliminary ruling or its subject matter, which cannot but call for a decision of principle from the Court of Justice alone.[12] A transfer, even in part, of jurisdiction to give preliminary rulings to the General Court would therefore make it necessary to envisage specific measures for the implementation of Article 256(3) of the Treaty on the Functioning of the European Union in order to avoid the risk of diverging approaches in dealing with such questions, which would undermine legal certainty and the trust that the national courts and tribunals and litigants place in the Institution.

The risks of divergence are also attributable to the fact that the organisation of the General Court has been, from the beginning, designed to deal with direct actions, brought by natural or legal persons, Member States or the EU institutions, and not references for a preliminary ruling coming from national courts and tribunals. How those two categories of cases are dealt with is fundamentally different, in that one of the distinctive features of references for a preliminary ruling is the involvement of a very large number of parties and the use of all the official languages in the course of the procedure. In addition, the authority of the judgments of the Court in preliminary rulings particularly derives from the fact that each case is examined by all the Judges and Advocates General before it is sent to a formation of the Court according to the level of difficulties raised.

[12] That is true, for example, of many references for a preliminary ruling made in the area of taxation. It is not uncommon that requests for a preliminary ruling on the interpretation of specific provisions of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347 of 11 December 2006, p. 1) or of Directive 77/388/EEC, which it repealed, encompass questions on concepts as fundamental as abuse of rights. One might mention, by way of example, the case Åkerberg Fransson (C-617/10, EU:C:2013:105), which basically was a case relating to value added tax, but which led the Court to deliver a landmark judgment on the scope of the Charter of Fundamental Rights of the European Union.

It is true that the authors of the Treaty made provision for certain safeguards. Article 256(3) of the Treaty on the Functioning of the European Union provides, first, for the possibility that the General Court may decline to hear a case brought before it where it considers that the case requires a decision of principle likely to affect the unity or consistency of EU law. That article also provides for a 'review' procedure, consisting in the possibility of the Court reviewing the decisions given by the General Court on questions referred for a preliminary ruling, under the conditions and within the limits laid down by the Statute. However, some problems cannot be ignored.

The reference of a case to the Court might occur only at a relatively advanced stage of the procedure, when the full complexity, or constitutional aspect, of a case emerges, with the result that the duration of the procedure might be significantly prolonged because of the fact that the case is successively examined by two distinct courts. That prolongation might therefore have the consequence that national courts and tribunals would be hesitant in sending references to the General Court, even when they were confronted with a real problem of interpretation or of the validity of EU law. The predictable duration of the preliminary ruling procedure before the Court of Justice is for the national courts an essential factor in so far as the preliminary ruling is an adjunct to the national procedure.

Nor does review by the Court of any preliminary ruling judgments by the General Court appear to be capable of eliminating the disadvantages of a transfer. Notwithstanding the improvements made to the progress of the review procedure by the Court's new Rules of Procedure, which entered into force on 1 November 2012, it must be recalled that the initiation of that procedure is subject to quite strict conditions, since it can be undertaken, under the conditions and within the limits laid down by the Statute, only where there is 'a serious risk of the unity or consistency of Union law being affected'. Unless the purpose of that procedure were to be wholly distorted and all decisions given by the General Court in preliminary ruling cases were to be reviewed – though such an approach would wholly nullify the potential benefits of a partial transfer of jurisdiction to give preliminary rulings to the General Court, both in terms of alleviating the workload of the Court and in terms of the effectiveness of and length of time required for dealing with requests for a preliminary ruling –, the review procedure therefore does not provide an effective remedy to the possibility that there might be divergent approaches in the case-law of the Court of Justice and the General Court.[13]

Conclusion

[13] It is essential to bear in mind that the decisions given in preliminary ruling cases have a general authority of *res interpretata*, which goes beyond the confines of the proceedings that gave rise to a reference to the EU judicature.

Even though answers to the above questions may doubtless be found, it is clear that the issues are fundamental and that the introduction of adequate mechanisms to ensure that the reference for a preliminary ruling retains its role as the 'keystone' of the judicial system of the European Union is an extremely delicate undertaking.

At a time when requests for a preliminary ruling brought before the Court are dealt with expeditiously and when the dialogue engaged with the courts and tribunals of the Member States had never been as intense as it is now, it does not appear to be appropriate, at this time, to effect a transfer to the General Court of jurisdiction in relation to such requests. That applies, *a fortiori*, in the current situation where there is an increase in the number of cases brought before the General Court and that court is compelled to re-organise itself and to adjust its working methods.

In such circumstances, the Court considers that there is no need, at this time, to propose an amendment of its Statute in order to transfer to the General Court part of the jurisdiction that the Court exercises in preliminary ruling cases.

It is necessary however to be very clear on this fundamental matter: this should not at all be understood as a definitive position on the question of the distribution of jurisdiction to give preliminary rulings between the Court of Justice and the General Court. The Court considers however that a partial transfer of that jurisdiction to the General Court cannot be contemplated until other measures have been adopted.

On the one hand, the Court continues to pay close attention to the increasing number of requests for a preliminary ruling and to the period of time required to deal with them. The possibility of a future transfer of jurisdiction, in preliminary ruling cases, cannot be ruled out, in certain specific areas, if the number and complexity of requests for a preliminary ruling submitted to the Court were to be such that the proper administration of justice required it. In such circumstances, it would be necessary to undertake an amendment of the Rules of Procedure of the General Court in order to set out detailed rules for dealing with cases, adapted to the nature and the specific features of references for a preliminary ruling and in order to forestall, as far as possible, the abovementioned risks of divergent case-law.

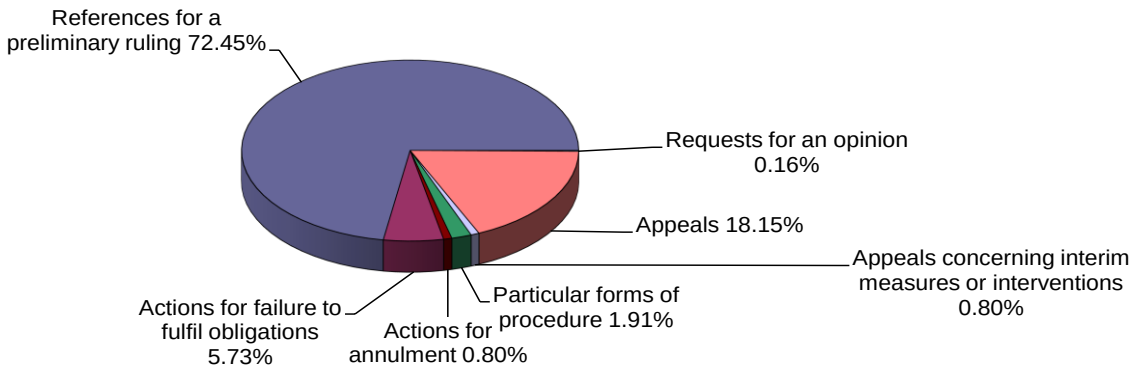
On the other hand, against the background to the reform of the structure of the courts of the European Union, the Court of Justice and the General Court have been compelled to review all the areas of jurisdiction that they currently exercise in order to examine whether, irrespective of whether there is to be any alteration in the distribution of jurisdiction with respect to questions referred for a preliminary ruling, other alterations might be made to that distribution, in particular with regard to dealing with direct actions and, so far as concerns the Court of Justice, dealing with appeals. Discussions on those issues are well

advanced and will in all probability lead, in 2018, to the submission of proposals which should encompass both amendment of the Statute of the Court of Justice of the European Union and amendment of the Rules of Procedure of the two courts.

Annex : Overview of cases brought before the Court of Justice between 1 January and 31 October 2017

New cases – Nature of the action (2017)

from 01/01/2017 to 31/10/2017



Nature of the action	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Total
References for a preliminary ruling	36	43	43	44	85	52	46	42	28	36	455
Actions for annulment		1	1		1			1		1	5
Actions for failure to fulfil obligations		2	3	4	3	6	6	4	4	4	36
Appeals	12	12	8	16	11	9	12	13	18	3	114
Appeals concerning interim measures or interventions				2			1		2		5
Sub-total	**48**	**58**	**55**	**66**	**100**	**67**	**65**	**60**	**52**	**44**	**615**
Requests for an opinion									1		1
Particular forms of procedure		1	2			4	3	2			12
Sub-total		**1**	**2**			**4**	**3**	**2**	**1**		**13**
Total	**48**	**59**	**57**	**66**	**100**	**71**	**68**	**62**	**53**	**44**	**628**