

## THINKING JUSTICE OUTSIDE THE DOCK: A CRITICAL ASSESSMENT OF THE REFORM OF THE EU’S COURT SYSTEM

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### Abstract

*The 2015 reform of the EU’s court system will go down in history as the most radical transformation of the EU judicial architecture since the establishment of the General Court in 1989. It entails not only the doubling of the number of General Court judges but also the dissolution of the Civil Service Tribunal. This article offers a critical assessment of these two major, structural changes, by focusing on both the process by which they were adopted and its overall merits. After providing a detailed examination of its tortuous legislative history and highlighting its unique underlying procedural feature – with the Court itself initiating the reform process –, this article identifies and systematises the major reform’s shortcomings. It criticises both the diagnosis underpinning the reform and the cure administered. It concludes by presenting this reform process as a missed opportunity to address, in a more holistic manner, the pressing non-docket related challenges faced by the EU judicial system and, in particular, to reform a governance structure which is no longer fit for purpose considering the massive transformation of the EU judicial branch since the Court of Justice was first established in 1951.*

### 1. Introduction

Perhaps for the first time in its history, the Court of Justice of the EU (hereinafter: CJEU)<sup>1</sup> has faced criticism, not because of any particular ruling or the orientation of its case law but because of a legislative proposal it initiated<sup>2</sup> in the name of reinforcing ‘the efficiency of justice at EU level in a sustainable manner’.<sup>3</sup> Although it might appear rather unorthodox, Article 281 TFEU entrusts the Court of Justice

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<sup>1</sup> According to Article 19 TEU, the term ‘Court of Justice of the European Union is to be understood as including ‘the Court of Justice, the General Court and specialised courts.’

<sup>2</sup> CJEU President, Draft Amendments to the Statute of the Court of Justice of the European Union and to Annex I thereto, enclosed in Letter to the President of the European Parliament and to the President of the Council of the EU, 28 March 2011, Interinstitutional file: 2011/0901 (COD).

<sup>3</sup> CJEU, Reform of the EU’s Court System, Press release No 44/15, 28 April 2015.

with the authority to propose amendments to its Statute, which the European Parliament and the Council may adopt in accordance with the ordinary legislative procedure, after consultation of the Commission.<sup>4</sup> This prerogative can be seen as the expression of a broader yet largely understudied phenomenon: the emergence of ‘judicial self-government’ of the EU judicial system.<sup>5</sup> That meant, in the present instance, that the Court of Justice, by acting on behalf of the whole CJEU, could fulfil a legislative role as regards the revision of the Statute, thus playing a leading role when it comes to the reshaping of the EU’s judicial architecture.

As for the legislative proposal originally put forward in March 2011, which is at the heart of the present contribution, it initially suggested the adoption of a number of amendments to the Statute of the CJEU in relation to each of its (then) three branches: the Court of Justice (hereinafter: CJ); General Court (hereinafter: GC) and the Civil Service Tribunal (hereinafter: CST). The legislative process regarding relatively minor organisational changes relating to the CJ, GC and CST was promptly concluded.<sup>6</sup> Much more controversial was the ‘structural’ proposal to increase the number of GC judges.<sup>7</sup> Following a long and difficult gestation, the European Parliament and the Council finally agreed in 2015 that the overall number of GC judges should be fixed at 56.<sup>8</sup> To offset the ensuing cost of such a reform, they also agreed to dissolve the CST by September 2016.<sup>9</sup>

The adoption of Regulation 2015/2422 has been presented by the newly elected President of the CJEU, Judge Koen Lenaerts, as a reform which ‘will enable the institution, by virtue of the number of judges of the General Court being doubled in a three-stage process extending until 2019, to continue to fulfil its task in the interests of European litigants, while meeting the objectives of quality and efficiency of justice.’<sup>10</sup> No one would object to the noble aim of improving the EU judicial structure in order to better serve litigants. Yet, as we shall attempt to demonstrate, the doubling in size of GC judges and the parallel dissolution of the CST are not only

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<sup>4</sup> Article 281 TFEU.

<sup>5</sup> T. Dumbrovský, B. Petkova, M. Van Der Sluis, ‘Judicial Appointments: The Article 255 TFEU Advisory Panel and Selection Procedures in the Member States,’ 51 *Common Market Law Review* (2014), 481; V. Skouris, ‘The Evolution of the Judicial Architecture of the European Union and its Procedural Implications,’ in K. Bradley, N. Travers, and A. Whelan (Ed.), *Of Courts and Constitutions* (Hart Publishing, 2014), 10; A. Alemanno, ‘How Transparent Is Transparent Enough? Balancing Access to Information Against Privacy in European Judicial Selection’ in M. Bobek (Ed.), *Selecting Europe’s Judges* (Oxford University Press, 2014).

<sup>6</sup> See Regulation (EU, Euratom) No 741/2012 of the European Parliament and of the Council of 11 August 2012 amending the Protocol on the Statute of the Court of Justice of the European Union and Annex I thereto [2012] OJ L 228/1. For a brief overview, see A. Meij, ‘Amending the Statute of the EU Courts’ (2013) 20(1) *Maastricht Journal of European and Comparative Law* 127.

<sup>7</sup> For an overview of the reform of the court, including a detailed assessment of the academic and media criticism surrounding the proposal to increase the number of GC judges and further references, see F. Dehousse with B. Marsicola, *The Reform of the EU Courts (II). Abandoning the Management Approach by Doubling the General Court*, Egmont Paper 83, March 2016, p. 41 et seq.

<sup>8</sup> Regulation (EU, Euratom) No 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 [2015] OJ L 341/14.

<sup>9</sup> *Ibid.* The dissolution of the EU CST was subsequently organised by Regulation (EU, Euratom) No 2016/1192 of the European Parliament and of the Council of 6 July 2016 on the transfer to the General Court of jurisdiction at first instance in disputes between the European Union and its servants [2016] OJ L 200/137.

<sup>10</sup> CJEU, Foreword, *Annual Report 2015. Judicial Activity* (CJEU, 2016), pp. 4-5.

inadequate to attain these objectives, they also fail to address the real challenges facing the EU judicial system today.<sup>11</sup>

After providing a detailed examination of how Regulation 2015/2422 came into being and the controversies surrounding its adoption (Section 2), this article identifies and systematises the major shortcomings of the reform (Section 3). In particular, it offers a critique of the solutions advocated by the CJ and adopted by the EU's co-legislators by focusing on the following crucial aspects: the process leading to their adoption, which has been characterised in particular by a lack of transparency and interest in evidence gathering; their questionable compliance with EU primary law and, last but not least, their arguable disproportionate nature considering the seemingly erroneous diagnosis of the problems faced by the GC and the existence of more appropriate and cost-effective solutions. Looking beyond the GC, the reform of the EU's court system displays a lack of critical self-reflection by the CJ, which is difficult to justify when one compares, as we did, the situation of the GC with the situation of the CJ itself (Section 4). Finally, this reform may be said to represent a missed opportunity to address in a more holistic manner the pressing non-quantitative challenges faced by the CJEU and, in particular, to reform a governance structure which, in our view, is no longer fit for purpose considering the massive transformation of the EU judicial branch since the CJ was first established in 1951<sup>12</sup> (Section 5).

A caveat regarding the scope of this article is required: we do not aim here to propose an alternative, comprehensive reform blueprint.<sup>13</sup> Rather, we aim to explain why Regulation 2015/2422 is not only ill-advised considering our alternative diagnosis of the challenges faced by the CJEU, but also exemplifies how any significant structural reform of the EU's judicial architecture ought not to be conducted.

## 2. Reform of the EU's Court System

The following analysis of the reform of the EU's court system solely focuses on its two most contentious aspects: the CJ's proposal to increase the number of GC judges, which was revisited twice during the context of the legislative process, and the subsequent proposal made in October 2014 to abolish the CST by transferring first-instance cases relating to the EU civil service to the GC. A brief overview of the

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<sup>11</sup> It would be well known to the readers of this Review that the GC – initially known as the EU's Court of First Instance – was established in 1989 with the aim of helping the CJ cope with its increasing workload. The GC subsequently faced a similar issue in the late 1990s, which led to the establishment of the first EU specialised court in 2005: Known as the EU Civil Service Tribunal (CST), its jurisdiction was exclusively limited to disputes between the EU and its civil servants. Unlike the CJ and the GC where the number of judges is equal to the number of Member States (following the adoption of Regulation 2015/2422, the GC will eventually consist of two judges per Member State), the CST consisted of 7 judges before its dissolution in September 2016.

<sup>12</sup> Before the establishment of the CFI in 1989, the CJEU consisted of a single court of 19 members (13 judges and 6 Advocates General), supported by 593 officials. In 2015, the CJEU consisted of three courts with a total of 74 members (7 CST judges, 28 GC judges, 28 CJ judges and 11 Advocates General), supported by 2,125 officials: CJEU, *Annual Report 2015. Management Report* (CJEU, 2016), p. 97.

<sup>13</sup> For a number of suggestions requiring no Treaty change we previously made, see A. Alemanno and L. Pech, 'Reform of the EU's Court System: Why a more accountable – not a larger – Court is the way forward', *EU Law Analysis*, 17 June 2015: <<http://eulawanalysis.blogspot.co.uk/2015/06/reform-of-eus-court-system-why-more.html>>. We aim to further explore these suggestions in a future contribution.

alternative diagnosis and solutions offered by a number of GC judges during the legislative process completes the analysis.

## 2.1 *Genesis and Content of the Reform*

The review of the content and process by which Regulation 2015/2422 was adopted begins with an examination of the CJ's diagnosis, which initially prompted it to require, in March 2011, the appointment of twelve, not twenty-eight, new GC judges. The CJ's subsequent revised requests and the opposition they faced are then analysed. Finally, a brief outline of Regulation 2015/2422 follows.

### 2.1.1 The Court of Justice's Diagnosis and Initial Proposal

The *casus belli*, which prompted the CJ to first suggest an increase in the number of GC judges, was the steady increase in the number of new cases brought before the GC (from 398 in 2000 to 636 in 2010<sup>14</sup>); the stock of cases awaiting to be decided (from 787 in 2000, to 1,300 in 2010, a figure which the CJ later expected to rise to 1,600 in 2015<sup>15</sup>); and finally, the growing number of actions for damages against the EU due to the excessive length of proceedings before the GC on the basis of Article 47 of the EU Charter, which guarantees a right to have cases heard within a reasonable time.<sup>16</sup>

The steady increase in the number of cases brought before the GC – a trend which, as will be shown in Section 3 came to a significant halt in 2015<sup>17</sup> – cannot be easily explained by a single, dominant factor. Several factors may instead be identified: (a) the progressive expansion of the GC's jurisdiction since its establishment in 1989; (b) the increase in litigation following the accession of new member states; (c) the litigation linked to the expansion of EU competences since the Single European Act and the increase in the number and variety of EU acts; and (d) the growth of litigation in traditional areas such as EU cartel cases, state aids, trade remedies, trademark applications but also in relative new areas such as EU's 'smart sanctions' adopted in the area of common foreign and security policy.<sup>18</sup>

While increasing workload is not in itself a new phenomenon – and has indeed been a recurrent problem for both the CJ and the GC<sup>19</sup> – the latter's growing workload has

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<sup>14</sup> See CJEU President, Draft Amendments to the Statute of the CJEU and to Annex I thereto, op. cit., p. 5.

<sup>15</sup> The figure of 1,600 pending cases was put forward by the CJ itself: See Council of the EU, Response of the Court of Justice to the Presidency's invitation to present new proposals on the procedures for increasing the number of Judges at the General Court of the European Union, Brussels, 17 October 2014, 14448/14, p. 3. In its response, the CJ also indicated that it expected the number of new cases brought before the GC to exceed 1,000 in 2014. As shown above, the actual figure was 912. A detailed analysis of judicial activity figures will be given infra in Sections 2.2 and 3.2.2.

<sup>16</sup> See CJEU President, Draft Amendments to the Statute of the CJEU and to Annex I thereto, op. cit., p. 4. The CJ's increasing emphasis on the importance of the principle that a case should be dealt with within a reasonable time will be analysed in Section 3.2.2.

<sup>17</sup> See CJEU, Foreword, *Annual Report 2015. Judicial Activity* (CJEU, 2016), p. 165.

<sup>18</sup> European Parliament, Report on the draft regulation of the European Parliament and of the Council amending the Protocol on the Statute of the Court of Justice of the European Union by increasing the number of Judges at the General Court (02074/2011 – C7-0126/2012 – 2011/0901B(COD)), Committee on Legal Affairs Rapporteur: Alexandra Thein, Explanatory statement, para 2.

<sup>19</sup> See e.g. House of Lords, *The Workload of the Court of Justice of the European Union*, 14<sup>th</sup> Report, 2010-11 Session, HL Paper 128.

been constantly presented by the CJ as particularly worrying and a key justification for increasing the number of GC judges.<sup>20</sup> In addition to a number of simplification measures of a procedural nature relating to the CJ itself – the subject-matter of Regulation No 741/2012 – the CJ proposed in March 2011 to deal with the GC’s backlog by increasing the number of GC judges by twelve. In its proposal, the CJ also highlighted the excessive duration of proceedings for State aid cases and other competition cases, which was then 43.5 months and 56 months respectively.<sup>21</sup> This raised, according to the CJ, issues with respect to Article 47 of the EU Charter of Fundamental Rights, but also Article 6 of the European Convention on Human Rights, an issue which could place the EU ‘in a delicate position at a time when its accession to that convention is being negotiated.’<sup>22</sup>

By recommending the appointment of twelve additional GC judges, the CJ rejected the establishment of an additional specialised court in the field of intellectual property,<sup>23</sup> a solution which, as it would later emerge, had the clear favour of the GC itself.<sup>24</sup> The CJ’s opposition arguably sat in defiance with the letter if not spirit of Article 257 TFEU, which specifically provides for the establishment of such specialised courts. The CJ relied instead on Articles 19(2) TEU and 254 TFEU<sup>25</sup> to justify an increase in the number of GC judges on four main grounds: effectiveness; urgency; flexibility and consistency.<sup>26</sup> In a nutshell, the CJ first alleged that the establishment of a specialised IP court was unlikely to be effective as more complex trademark cases would have to continue to be reviewed by the GC and appeals directed at judgments decided by any new specialised court before the GC would increase. Secondly, the urgency of the situation called for a swift solution, thus ruling out a new specialised tribunal, which would need two years to become operational. Thirdly, the addition of 12 judges would allow for the allocation of judges to the most pressing areas, which may well vary over time (the CJ did not however explain why 12 judges were required rather than, say, 6 or 9). Furthermore, it would provide a ‘reversible’ solution, unlike the creation of a new court, the dismantlement of which was succinctly described as ‘more difficult’.<sup>27</sup> Finally, a more abstract concern was put forward in favour of the CJ’s solution: the preservation of the consistency of EU law.

In addition to its opposition to specialised court, it is worth noting that the CJ also rejected the possibility of conferring on the GC any responsibility for dealing with

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<sup>20</sup> See however Section 2.2 *infra* for the claim that 80% of the GC’s backlog had in fact been liquidated as of March 2015.

<sup>21</sup> CJEU, Draft amendments to the statute of the CJEU and to Annex I thereto, *op. cit.*, pp. 3-4.

<sup>22</sup> *Ibid.*, p. 4. As is well known, the CJ has since held in Opinion 2/13 of 18 December 2014 that the draft EU-ECHR accession agreement is not compatible with EU law.

<sup>23</sup> No other area of law is mentioned notwithstanding some repeated calls in favour of a specialised EU patent court and/or an EU competition law court. See e.g. House of Lords, *The Community patent and the patent system in Europe*, 26<sup>th</sup> Report, 1997-98 Session, HL Paper 115; *An EU Competition Court*, 15<sup>th</sup> Report, Session 2006-07, HL Paper 75. See also European Commission, Proposal for a Council Decision conferring jurisdiction on the Court of Justice in disputes relating to the Community Patent, COM(2003) 827 Final, 23 December 2003.

<sup>24</sup> GC, Procès-verbal de la conférence plénière extraordinaire du Tribunal du 17 septembre 2014, Conf. plénière 13/14 (on file with the authors).

<sup>25</sup> Art. 19(2) TEU provides that the GC ‘shall include at least one judge per Member State’ while Art. 254 TFEU allows for the number of GC judges to be determined by the Statute of the CJEU.

<sup>26</sup> CJEU, Draft amendments to the statute of the CJEU and to Annex I thereto, *op. cit.*, p. 7.

<sup>27</sup> *Ibid.*, p. 8.

questions referred for a preliminary ruling, notwithstanding this possibility being explicitly foreseen in the TFEU.<sup>28</sup> The CJ did so on practical as well as normative grounds. In other words, the CJ argued that it had no issue coping with its workload and that the loss of its monopoly over preliminary rulings would endanger the consistency of EU law, confuse national courts and discourage them from making use of this procedure. One should however note in passing that the CJ has since changed its mind on this issue.<sup>29</sup>

Finally, and significantly, the proposals relating to the GC put forward by the CJ on 28 March 2011 did not suggest, explicitly or implicitly, the abolition of the CST. On the contrary, the CJ used the argument that it would be difficult to dismantle a new specialised tribunal as this would be, as noted above, a more flexible and reversible solution.

### 2.1.2 The Court's New Proposals

Both the Commission and the European Parliament welcomed the CJ's initial proposal. For the Commission, the CJ's initiative was to be welcomed as both the nature and the volume of litigation before the EU courts had changed radically in recent years, mainly because of the development of EU law in new areas and the increase in the number of Member States.<sup>30</sup> With respect to the twelve additional GC judges, the Commission recommended that national governments work out nomination arrangements that would 'ensure the nomination of the most suitable people who are best qualified for carrying out the tasks concerned.'<sup>31</sup>

The European Parliament similarly applauded the proposal.<sup>32</sup> The European Parliament's rapporteur – then Alexandra Thein – suggested however that the additional judges be appointed not on the basis of their nationality but solely on the basis of their professional and personal suitability, and requested the Council to promptly and positively respond to this proposal in order to avoid harming the efficiency of the EU judiciary 'through further procrastination' on the issue of the selection method to be used regarding the requested new GC judges.<sup>33</sup>

Regrettably, the Council did not heed the European Parliament's rapporteur's advice, mainly because of a disagreement among national governments with respect to the selection criteria.<sup>34</sup> In 2013, faced with a deadlocked Council, President Skouris

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<sup>28</sup> Article 256(3) TFEU: '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...'

<sup>29</sup> See CJEU, Reform of the EU's Court System, Press release No 44/15, 28 April 2015, p. 2: 'The reinforcement of the General Court would allow some competence of the Court potentially to be transferred from the Court of Justice to the General Court.'

<sup>30</sup> Commission Opinion of 30 September 2011 on the requests for the amendment of the Statute of the CJEU, presented by the Court, COM(2011) 596 final, para. 8.

<sup>31</sup> *Ibid.*, para. 45.

<sup>32</sup> See European Parliament, Report on the draft regulation of the European Parliament and of the Council amending the Protocol on the Statute of the Court of Justice of the European Union by increasing the number of Judges at the General Court (02074/2011 – C7-0126/2012 – 2011/0901B(COD)), A7-0252/2013, Committee on Legal Affairs, Rapporteur: Alexandra Thein, 10 July 2013.

<sup>33</sup> Explanatory statement, *ibid.*, section 10.

<sup>34</sup> According to the British Minister for Europe cited in House of Commons, European Scrutiny Committee, 'Increasing the number of judges at the General Court', 18 March 2015, para. 13.9, the

decided to lower its request from twelve to nine new judges while recalling the CJ's preference for a 'method of appointment based on the twin criteria of professional competence and stability of tenure', taking due regard of the 'need for a certain geographical balance in making those appointments'.<sup>35</sup>

This more modest and sensible request proved similarly unsuccessful at bridging the gap between those Member States 'in favour of a system of appointment based on merit ... and those in favour of equal rotation'.<sup>36</sup> National governments however continued to disagree on how to select the additional judges.<sup>37</sup> This led the Italian presidency of the Council in September 2014 to ask the CJ to make 'new proposals' in order to facilitate the task of securing an agreement within the Council.<sup>38</sup> The CJ obliged the following month and made two proposals in order to 'achieve a rapid and substantial reduction both in the duration of proceedings before [the GC] and in the backlog of pending cases':<sup>39</sup> (1) To raise the number of judges to two per Member State in three stages; and (2) To abolish the CST and transfer its cases to the GC.

These two new proposals were presented as a structural and long-term solution in the interests of litigants as they would enable the GC 'to cope with the increase in its workload that is to be anticipated'. Yet the suggested abolition of the CST caused much surprise, the President of the CJ himself having previously referred to this specialised court as one which had performed its function extremely well,<sup>40</sup> an opinion widely shared in EU legal circles and beyond.<sup>41</sup> To fully understand the decision to abolish the CST, one has to contextualise it within the broader politics surrounding the reform of the EU's court system. The primary reason for the CST's abolition seems to have been indeed one of political convenience: it enabled the CJ to argue that the doubling of the number of GC judges would generate 'inevitable yet moderate costs'.<sup>42</sup> The planned abolition of the CST presented another practical

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proposal to increase by 12 the number of GC judges failed because 'while the UK, some other Member States, the European Parliament and the Court itself have argued historically that it is the professional quality of these judges that matters the most, other Member States have refused to accept any system that would not guarantee 'equal representation' of Member States over time.'

<sup>35</sup> Letter from Mr Vassilios Skouris, President of the CJEU dated 10 December 2013 to Mr Dimitris Kourkoulas, Greek State Secretary for Foreign Affairs, Annex entitled 'Reply to the invitation from the future Greek Presidency of the Council to submit a proposal concerning the method of appointment of additional judges at the General Court', Council of the EU, 20 December 2013, document no 18107/1/3.

<sup>36</sup> Letter from Mr Sotiropoulos, Permanent Representative of Greece to the EU, to Mr Skouris, CJEU President, 10 April 2014 (on file with the authors).

<sup>37</sup> The last unsuccessful attempt to find a way out of this conundrum seems to have been made in COREPER on 14 March 2014. For an instructive analysis of the failed negotiations in the Council regarding the different selection models for the additional GC judges which were discussed therein, see D. Hadroušek and M. Smolek, 'Solving the European Union's General Court' (2015) *E.L. Rev.* 188, p. 192 et seq.

<sup>38</sup> See CJEU, *Response to the invitation from the Italian Presidency of the Council to present new proposals in order to facilitate the task of securing agreement within the Council on the procedures for increasing the number of Judges at the General Court*, Council Document no. 14448/14, 17 October 2014, Interinstitutional file 2011/0901B (COD).

<sup>39</sup> *Ibid.*, pp. 3-4.

<sup>40</sup> See Address by V. Skouris, Proceedings of the Colloquium organised on the occasion of the 5th Anniversary of the CST in *Human Rights Law Journal*, 30 June 2011, Vol. 31(1), pp. 2-3.

<sup>41</sup> See e.g. House of Lords, *The Workload of the Court of Justice of the European Union*, op. cit., para. 56: 'The CST is a success story and the Committee has no concerns regarding its ability to manage its case-load.'

<sup>42</sup> CJEU, *Response to the invitation from the Italian Presidency...*, op. cit., p. 8. According to the Court, the total cost of the reform, in a normal year of operation after the third and final phase (when the GC

advantage: it would end the deadlock over the two CST slots, which had been left vacant since September 2014 due to persistent disagreement among Member States about how the principle of rotation should be implemented.<sup>43</sup>

### 2.1.3 Opposition to the Court of Justice’s New Reform Package

Most national governments ultimately supported the CJ’s request to double the number of GC judges and abolish the CST,<sup>44</sup> with only one country voting against the proposal (the UK) and two countries abstaining (Belgium and the Netherlands).<sup>45</sup> The British government did not indeed consider the CJ’s ‘new proposals to be a proportionate way to address’ the GC’s backlog and found it ‘extremely disappointing that more proportionate alternative solutions’ were not properly considered.’<sup>46</sup> In a letter to the European Scrutiny Committee of the House of Commons, the British Minister for Europe further claimed that ‘other Member States also expressed doubts that this was the best way to address this problem, or that all these judges are actually needed. Nevertheless, after four years of negotiations, many Member States and the EU institutions have concluded that this is the least bad proposal on the table, and that it will break the deadlock and improve the capacity of the General Court.’<sup>47</sup>

This line of reasoning left Mr Pinto, the new European Parliament’s rapporteur, unconvinced.<sup>48</sup> In addition to raising a number of procedural concerns and

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has doubled in size), should be €22.9m per year. The Court later agreed that the last set of appointments to be made in 2019 should not entail any additional administrative costs, i.e., no recruitment of additional legal secretaries and assistants. See Statement of Council’s reasons: Position (EU) No 11/2015 of the Council at first reading with the view to the adoption of a Regulation of the European Parliament and of the Council amending Protocol No 3 on the Statute of the CJEU [2015] OJ C 239/17, para. 10. According to the Council, the cost of the reform would now amount to yearly additional costs of €13.5m ‘in net figures at cruise speed’ to be compared to the initial proposal to recruit 12 new judges, which was evaluated at €11.2m per year (para. 15). This leads the Council to conclude that taking into account ‘the cost of non-reform, these costs appear to be modest and justified’.

<sup>43</sup> See CJEU, *Response to the invitation from the Italian Presidency...*, op. cit., p. 3: ‘The negative impact of this impasse on the proper functioning of the CST is already becoming evident, as the uncertainty regarding its composition is clearly not conducive to efficient case-management.’

<sup>44</sup> See Position (EU) No 11/2015 of the Council at first reading with a view to the adoption of a Regulation of the European Parliament and of the Council amending Protocol No 3 on the Statute of the Court of Justice, Adopted by the Council on 23 June 2015 [2015] OJ C 239/14.

<sup>45</sup> Council of the EU, Draft Position of the Council at first reading with a view to the adoption of a Regulation of the European Parliament and the Council amending Protocol No 3 on the Statute of the Court of Justice of the European Union (first reading), Document no 10043/15, 19 June 2015. In a statement, the Belgium government explained its abstention on the ground that more appropriate solutions existed to deal with the backlog of cases before the GC. The German government also made a declaration in which it stressed its concern to ‘ensure cost effectiveness of the reform and to minimise its budgetary impact’, welcomed ‘the Court’s commitment to appoint no further legal secretaries or support staff during the third phase in September 2019’ and suggested the introduction of court fees. See Council of the EU, Document no 10043/15, ADD 1, 19 June 2015, p. 2.

<sup>46</sup> British Minister for Europe (Mr David Lidington) cited in House of Commons, European Scrutiny Committee, ‘Increasing the number of judges at the General Court’, 37th Report HC 219 xxxvi (2014-15), chapter 13 (18 March 2015), para. 13.15.

<sup>47</sup> Ibid. Unfortunately, given the opaque nature of the negotiations surrounding this file within the Council, we were unable to obtain more information about the negotiation stance of each national government.

<sup>48</sup> See Explanatory statement in European Parliament, Recommendation for Second Reading on the Council position at first reading with a view to the adoption of a regulation of the European Parliament and of the Council amending Protocol No 3 on the Statute of the Court of Justice of the European



questioning the legality of the CJ's proposal to abolish the CST, the rapporteur described the request to double the number of GC judges as a frivolous expense while also regretting that judicial reform seems, in this instance, to be devised on the basis of the Council's inability to make judicial appointments based on merits.<sup>49</sup> He therefore recommended the rejection of the CJ's proposal as endorsed by the Council.

Despite the rapporteur's strong criticism and the opposition of the ALDE group,<sup>50</sup> the proposal had the clear support of the two main parties within the European Parliament. Other political groups, like the Greens, eventually supported the reform as they were presented with no alternative: either the doubling of the number of GC's members or no reform whatsoever.<sup>51</sup> The Council having agreed a number of relatively minor amendments put forward by the European Parliament via informal *quadrilogue* meetings,<sup>52</sup> the Court's proposals to increase the number of GC judges and abolish the CST were adopted at second reading by the European Parliament on 28 October 2015 and by the Council on 3 December 2015. After a long and divisive gestation, Regulation 2015/2422 entered into force on 25 December 2015.<sup>53</sup>

#### 2.1.4 Brief Outline of Regulation 2015/2422

Regulation 2015/2422 brought about a number of amendments to Protocol No 3 on the Statute of the CJEU.<sup>54</sup> The doubling of GC judges is confirmed but the previously envisaged dates were reviewed as follows:

Stage 1: Twelve additional judges to be appointed as from 25 December 2015;

Stage 2: Seven additional judges to be transferred from the existing CST as from 1 September 2016 (with first instance jurisdiction in EU civil service cases to be transferred to the GC<sup>55</sup>);

Stage 3: Final nine judges to be appointed as from 1 September 2019.

At the time of writing, eleven of the twelve 'stage 1' additional GC judges have taken office: seven took office on 12 April 2016 (five of whom with terms of office shorter than five months so as to take into account the need of partial renewal of the GC

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Union (09375/1/2015 – C8-0166/2015 – 2011/0901B(COD)), Committee on Legal Affairs Rapporteur: António Marinho e Pinto, A8-0296/2015, 14 October 2015.

<sup>49</sup> See Explanatory statement, *ibid.*, paras 3 and 6.

<sup>50</sup> See ALDE, ECJ reform: Increasing the number of judges of the General Court by 28 is absolutely unnecessary, Press Release, 29 October 2015: <<http://pr.euractiv.com/pr/ecj-reform-increasing-number-judges-general-court-28-absolutely-unnecessary-alde-regrets-member>>

<sup>51</sup> Authors' interview with two Green MEPs and MEP Julia Reda (Pirate Party).

<sup>52</sup> One may for instance mention the amendments submitted by members of the JURI Committee to improve gender balance in the GC and require the production of a report to assess the impact of the reform within five years of its entry into force. See European Parliament, 'Plans to increase number of judges at General Court backed by Legal Affairs MEPs', Press release, 8 October 2015, Ref: 20151008IPR96739. The emphasis on gender balance is to be welcomed but it remains difficult to understand why this requirement was not made compulsory for the whole CJEU.

<sup>53</sup> Regulation 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 [2015] OJ L 341/14.

<sup>54</sup> See consolidated version of the TEU and TFEU [2016] OJ C 202/01.

<sup>55</sup> Recital 9 of Regulation 2015/2422.

every three years);<sup>56</sup> three on 8 June 2016<sup>57</sup> and the eleventh one in September 2016.<sup>58</sup> With respect to stage 2 of the reform, the governments of the EU member states appointed five of the seven expected new judges on 7 September 2016.<sup>59</sup>

Two new potentially significant aspects, which were not initially envisaged by the CJ and the Council, have been included on the basis of parliamentary amendments:

- (a) By 26 December 2017, the CJ is expected to draw up a report on ‘possible changes to the distribution of competence for preliminary rulings’, which may be accompanied, where appropriate, by legislative requests;<sup>60</sup>
- (b) By 26 December 2020, the CJ is expected to draw up a report, ‘using an external consultant’, focusing on the efficiency of the GC as well as ‘the necessity and effectiveness of the increase to 56 judges, the use and effectiveness of resources and the further establishment of specialised chambers and/or other structural changes’.<sup>61</sup>

Both reports are due to be submitted to the European Parliament, the Council and the Commission.

To sum up, it took no less than 58 months from the date of the first proposal submitted by the CJ to the adoption of Regulation 2015/2422. As the Regulation also assumes the future dissolution of the CST (and reintegration of its caseload within the GC), a structural reform which, as previously noted, was not envisaged in 2011, an additional regulation to implement this aspect of the reform was promptly considered and adopted on 6 July 2016.<sup>62</sup> From an original request of 12 additional GC judges, the GC is now set to welcome an additional 28 judges by 2019. Moreover, while the original proposal and its subsequent alterations did not foresee any structural changes relating to the jurisdiction of the CJ itself, a press release announced in April 2015 that some of the CJ competences might for the first time be potentially transferred to the GC.<sup>63</sup> The CJ’s analysis of the problems faced by the GC as well as the solutions which ended up being adopted have however been met with scepticism and criticism, not least from members of the GC itself.

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<sup>56</sup> The term of office of these new five judges ended on 31 August 2016, whereas the other two new CG judges have been appointed for the period from 13 April 2016 to 31 August 2019. In addition, the Council was finally able to agree how to fill out the two vacancies at the CST, with the two new CST judges to remain in post until such time the CST jurisdiction is transferred to the GC. See CJEU, *Entry into office of new Judges at the General Court of the European Union and the European Union Civil Service Tribunal*, Press release no 38/16, 12 April 2016.

<sup>57</sup> CJEU, *Entry into office of new Judges at the General Court*, Press release no 59/16, 8 June 2016. The mandate of these three additional GC judges will end on 31 August 2019.

<sup>58</sup> Council of the EU, ‘EU General Court: further judges appointed’, Press release 496/16, 7 September 2016.

<sup>59</sup> *Ibid.*

<sup>60</sup> Art. 3(2) of Regulation 2015/2422.

<sup>61</sup> Art. 3(1) of Regulation 2015/2422. The number of 56 judges assumes that no EU Member State will withdraw from the EU and that no new country will join the EU by the end of 2020.

<sup>62</sup> By a request of 17 November 2015, the CJEU proposed the adoption of a new regulation to dissolve the CST and transfer to the GC jurisdiction at first instance in EU civil service disputes. The proposed new regulation was adopted on 6 July 2016: See Regulation 2016/1192 of the European Parliament and of the Council on the transfer to the General Court of jurisdiction at first instance in disputes between the European Union and its servants [2016] OJ L 200/137.

<sup>63</sup> CJEU, *Reform of the EU’s Court System*, Press release No 44/15, 28 April 2015, p. 2.

## 2.2 *Alternative Diagnosis and Solutions Originating from the GC*

The GC never acknowledged, during the pre-legislative phase, the existence of any workload ‘crisis’, a problem which was however repeatedly put forward by the CJ to justify its proposal to increase the number of GC judges. In a letter to the Italian presidency of the Council on 9 December 2014, Marc Jaeger, the President of the GC, after deploring the lack of formal consultation of the GC by the CJ, questioned both the diagnosis and the solutions laid down in the CJ’s proposal made in October 2014. He stressed the existence of ‘more appropriate, more effective and less costly’ methods to strengthen the GC such as a mere increase in the number of legal assistants and the resources allocated to the registry.<sup>64</sup> This letter was however disregarded by the Council on two main grounds: (i) it was supposedly unclear ‘whether this opinion was approved by all Members of the General Court’; (ii) internal debates in the GC and CJ regarding legislative proposals to be submitted on the basis of Article 281 TFEU must be considered ‘internal questions of both institutions in the exercise of their own competence’.<sup>65</sup>

The European Parliament’s rapporteur – Mr Pinto – provided members of the GC critical of the planned reform with the opportunity to publicly raise their concerns by inviting them to address the Legal Affairs (JURI) Committee of the Parliament on 28 April 2015.<sup>66</sup> Four GC judges acting in a personal capacity – Judges Berardis, Collins, Dehousse and Pelikanova – answered the rapporteur’s invitation. Their written submissions – the oral proceedings do not appear to have been officially recorded – offer a robust critique of the CJ’s proposal, which they described as ‘yesterday’s solution for yesterday’s problem’.<sup>67</sup> Their critique essentially rests on the argument that the CJ had confused *stock* with *backlog* of cases, which led it to fail to take into account the GC’s decreasing stock of cases and increased productivity. On the basis of their assessment of the GC’s ‘real’ backlog, the four judges concluded that there was no longer any urgency in remodelling the GC and creating ‘a Mexican army of new judges, supported by a reduced number of qualified personnel, which will inevitably lead to a serious reduction in the productivity per personnel unit’.<sup>68</sup> Instead, they called for a ‘meaningful and deep impact assessment to be carried out’,<sup>69</sup> and the consideration of less costly and actually reversible measures such as targeted increases of support personnel in cabinets and at the registry.

The statistics used by the CJ to justify its revised proposal will be subject to further

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<sup>64</sup> The full text of the letter (in French) is available at <<http://www.europaforum.public.lu/fr/actualites/2015/04/cjue-reforme/lettre-marc-jaeger-pr-it-141209.pdf>>. This letter led the President of the CJ to accuse the President of the GC in a letter dated 4 February 2015 to show contempt for the institutional rules laid down in Article 281 TFEU. For further analysis and references, see Dehousse, *The Reform of the EU Courts (II)*, op. cit., pp. 34-35.

<sup>65</sup> Question for written answer to the Council by M-C Boutonnet (NI) and G Lebreton (NI), 8 April 2015, reply received on 27 July 2015, P-005528-15.

<sup>66</sup> See E. Maurice, ‘EU court rebels denounce ‘wasteful’ hiring of new judges’, *EUObserver*, 29 April 2015.

<sup>67</sup> Berardis, Collins, Dehousse and Pelikanova, ‘Doubling the General Court’s Judges: Why progressive, reversible and more economical solutions are far better’, Submission to the European Parliament’s rapporteurs, 4 April 2015, p. 2 (document available on [www.idmarch.org](http://www.idmarch.org))

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*, p. 3.

analysis. Suffice it to say, at this stage, that the GC's judicial statistics for 2015 and the first six months of 2016 defies the narrative of urgency told by the CJ.

### **3. Procedural and Substantive Critique of Regulation 2015/2422**

Before highlighting what we believe to be the unaddressed and more decisive problems faced by the CJEU, this section offers an overview of what constitutes, in our opinion, the main procedural and substantive shortcomings of the reform of the EU's court system embodied in Regulation 2015/2422.

#### *3.1 Procedural Critique*

##### *3.1.1 The lack of any meaningful impact study*

Given the radical nature of the structural changes advocated by the CJ in October 2014, both from an institutional and financial perspective, one might have expected the Court and the co-legislators to undertake an holistic analysis of the problems faced by all of the EU courts (CST, GC but also the CJ itself). On this basis, a study assessing the short, medium and long-term impact of the reform could have been produced and circulated prior to its adoption rather than having one produced *ex post* by 26 December 2020 to decide *inter alia* if the reform was necessary in the first place.

According to Mr Pinto, the CJ did initially commit to provide an impact assessment study but it never materialised.<sup>70</sup> Prior to the publication of his draft recommendation in September 2015, the rapporteur asked the Council to comment on the lack of any cross-cutting impact study or *ex ante* assessment of the budgetary repercussions of this reform by the CJ and asked the Council whether it would welcome subjecting the CJEU to a review by the European Commission for the Efficiency of Justice (CEPEJ) or a similar review process.<sup>71</sup>

With respect to the lack of an impact study, the Council's answer may leave one underwhelmed: It exclusively emphasises the rise in the number of pending cases without mentioning the parallel increase in the number of judgments issued by the GC, before pointing out that 'the necessity of an in-depth reform of the General Court has been demonstrated and explained in detail and repeatedly by the Court of Justice to both branches of the legislative authority, both in writing and orally.'<sup>72</sup> The Council does not however provide any references to make clear which document or oral submission would in fact offer these detailed explanations. The 'reasoning' offered by the CJ on 13 October 2014 is 5-page long and it would be unreasonable to describe it as a detailed demonstration. This is nonetheless the reason offered by the Council to reject the additional idea of subjecting the CJEU to 'a study similar to that carried out by the CEPEJ'.

Subsequently, the European Parliament urged 'the Court of Justice to request an external peer review in order to be provided with external instruments to identify

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<sup>70</sup> Explanatory statement in European Parliament, Recommendation for Second Reading on the Council position at first reading ..., *op. cit.*, para. 5.

<sup>71</sup> António Marinho e Pinto (ALDE), Question for written answer to the Council, 6 February 2015, P-002022-15.

<sup>72</sup> Council, Reply to Parliamentary Question P-002022-15, 27 July 2015.

possible solutions to the problems raised by the Court of Justice<sup>73</sup> such as backlog and productivity. To the best of our knowledge, this suggestion was not followed through. This is not however the first time that independent and external views have been not been sought when it comes to reviewing the functioning of the CJEU. The CJ was indeed subject to a review twice – in 2000<sup>74</sup> and in 2003<sup>75</sup> – but in both instances, the Court’s main stakeholders were not significantly represented, nor were the views of independent experts actively sought out. One may contrast the CJEU’s apparent reluctance to engage in a broad, transparent and inclusive reflection process with the approach adopted by the Council of Europe when it looked into the long-term future of the system of the European Convention on Human Rights.<sup>76</sup> One may regret in this respect that the CJ did not heed the recommendation made by Mr Pinto to establish ‘a joint committee of experts to analyse the overall workings of the CJEU and make suggestions to improve its functioning and legitimacy.’<sup>77</sup>

With respect to the budgetary repercussions of the reform, the Council has claimed they ‘have been analysed in depth by the Court of Justice in its paper of 14 November 2014, in addition to its initial financial information sent on 14 April 2011’.<sup>78</sup> There are several problems with this answer to the parliamentary question raised by Mr Pinto on 6 February 2015. Firstly, the ‘in depth’ document of 14 November 2014 was not publicly available at the time of the Council’s reply as it was only available as an annex to a Council document whose circulation was then limited.<sup>79</sup> In addition, the CJ’s budgetary document cannot be reasonably described as

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<sup>73</sup> European Parliament resolution of 29 April 2015 with observations forming an integral part of the decision on discharge in respect of the implementation of the general budget of the European Union for the financial year 2013, Section IV – Court of Justice (2014/2080(DEC)), para. 11.

<sup>74</sup> See Report by the Working Party on the Future of the European Communities’ Court System, January 2000, 59p. The ‘Due Report’, named after the Chairman of the Working Party, a former President of the CJ, is available at [http://ec.europa.eu/dgs/legal\\_service/pdf/due\\_en.pdf](http://ec.europa.eu/dgs/legal_service/pdf/due_en.pdf). In addition to its Chairman, the Working Party consisted of two former judges of the CJ, one former AG at the CJ and President of the CFI, one former AG and Judge at the CJ and finally, one lawyer and one national public prosecutor. In other words, a total of 5 former EU judges out of a membership of 7.

<sup>75</sup> European Convention, *Final report of the discussion circle on the Court of Justice*, CONV 636/03, 25 March 2003. Antonio Vitorino, then European Commissioner responsible for Justice and Home Affairs, chaired this ‘discussion circle’. While this group included 19 members with a variety of backgrounds, it only heard evidence from Mr Rodriguez Iglesias, then President of the CJ, Mr Vesterdorf, then President of the CFI, and a delegation from the Council of the Bars and Law Societies of the EU.

<sup>76</sup> See Council of Europe (CDDH), *CDDH Report on the long-term future of the system of the European Convention on Human Rights*, CCDH(2015)R84, 11 December 2015. Chapter III of this report discusses issues such as caseload, the quality of judges, the quality, cogency and consistency of the case law and possible solutions to address any problematical issues within and outside the framework of the existing structures. Having conducted a comparative assessment of how reforms of the ECtHR and the CJEU have been conducted during the last two decades, EU GC judge Dehousse offers the conclusion that the Council of Europe has reformed the ECtHR in a more democratic, inclusive, and transparent manner: F. Dehousse with B. Marsicola, ‘The Reform of the EU Courts (III). The Brilliant Alternative Approach of the European Court of Human Rights’ (2016) *Egmont Paper* 86, p. 68 et seq.

<sup>77</sup> Explanatory statement in European Parliament, Recommendation for Second Reading on the Council position at first reading..., op. cit., recommendation no 4.

<sup>78</sup> Council, Reply to Parliamentary Question P-002022-15, 27 July 2015.

<sup>79</sup> Council, ‘Reform of the General Court of the European Union - Way forward’, Document 16576/14, 8 December 2014, Annex I: Financial information concerning the proposal of the CJEU for the strengthening of the GC. This document was not accessible to the public as of January 2016. To a large extent, this did not matter considering that it reflected financial information already published by the CJEU in October 2014 in its Response to the invitation from the Italian presidency, op. cit.

comprehensive as it has less than two pages dedicated to the cost of reform, which it evaluates at €18.5m net per year by 2019. As for the document of 14 April 2011, it is 6-pages long and it only assessed the budgetary impact of the then suggested appointment of 12 new judges, not the suppression of the CST and the appointment of 21 new judges.<sup>80</sup> It had meanwhile become doubtful that the previous statement by the CJ whereby ‘[t]he 12 Judges and their Chambers can be accommodated on a long-term basis in the buildings known as the Annexes (currently being renovated)’ was factually correct,<sup>81</sup> but this aspect is left unmentioned by the Council. In any event, and to the best of our knowledge, no independent audit of the financial impact of the structural changes requested by the CJ has ever been undertaken. This means that the figures mentioned by the Council in a reply to another parliamentary question,<sup>82</sup> in particular the claim that ‘the cost of each additional judge, including support staff, will not be EUR 1 million ... but roughly EUR 483 000 per year at cruise speed’,<sup>83</sup> have not been independently verified. As for ‘the cost of the non-reform’ mentioned by the Council, the Council does not quantify it or give any further explanation as to what this may mean.<sup>84</sup>

Overall, the failure of the CJEU to produce a meaningful impact study and the rather superficial if not selective nature of the Council’s replies to parliamentary questions are deeply regrettable. Indeed, members of the European Parliament were simply not offered an adequate level of information, which would have enabled them to perform their functions effectively.

### 3.1.2 The lack of a transparent and informed debate

Article 281 TFEU provides that the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may amend the provisions of the Statute of the CJEU, with the exception of Title I and Article 64, either at the request of the CJ and after consultation of the Commission, or on a proposal from the Commission and after consultation of the CJ. The rather unorthodox possibility laid down in EU primary law, which allowed in this instance the judicial branch to initiate the legislative process with the view of securing additional resources for itself, is sufficiently unconventional to be used with care. This should be especially so post Lisbon Treaty considering the new possibility to amend the Statute of the CJEU under the ordinary legislative procedure whereas pre Lisbon Treaty, the rules governing amendments of the Treaties applied, which would have therefore prevented the

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<sup>80</sup> Financial statement: Creation of 12 additional judges at the General Court of the European Union, Annex I available in Council document 8787/11 ADD 1, 2 May 2011.

<sup>81</sup> During the course of 2015, it emerged that the Luxembourg government had agreed to build a third tower for the CJEU for a maximum total of €168m to be paid back by the CJEU by 2036: N. Chauty, ‘168 millions pour une nouvelle tour au Kirchberg’, *L’essentiel*, 30 April 2015: <http://www.lessentiel.lu/fr/news/luxembourg/story/24803881>. This new building should be completed in 2019, which will coincide with the final phase in the ongoing enlargement of the GC.

<sup>82</sup> Jozo Radoš (ALDE), Question for written answer to the Council, Subject: More Judges for the Court of Justice: impact assessment, 13 May 2015, E-007778/2015.

<sup>83</sup> Council, Reply to Parliamentary question E-007778/2015, 16 September 2015.

<sup>84</sup> *Ibid.* See also Statement of Council’s reasons, para. 15: ‘The Council’s position at first reading thus represents an increase of the overall cost of the reform by 20 % compared to the 2011 proposal, while at the same time the number of new cases per year at the General Court increased by 43 %. Taking into account also the cost of non-reform, these costs appear to be modest and justified.’

adoption of Regulation 2015/2422 considering the opposition of the UK to the changes advocated by the CJ.

However, it is less the fact that Regulation 2015/2422 is the outcome of a process initiated by the CJ than the lack of transparency regarding the CJ's interactions with other EU legislative actors which may appear problematic.<sup>85</sup> Judge Dehousse referred to these interactions as 'lobbying' and argued that this type of participation to a legislative process 'falls outside the normal duties of a court'.<sup>86</sup> The CJ's interactions with the EU's co-legislators may however be seen as a logical consequence of Article 281 TFEU, which entrusts the CJEU with the authority to propose how to reform its own judicial architecture.<sup>87</sup> Looking beyond the reform of the EU's court system, it would seem useful to reflect on the appropriateness of this provision that may leave no choice to the CJ but to promote the legislative proposal it has initiated. In our opinion, the CJ should aim to confine its joint advocacy to the public domain rather than seeking to be directly involved in the legislative process via informal meetings with key institutional actors. It would also seem advisable for the Court to systematically inform the public when its members visit other EU institutions to discuss pending legislative matters relating to the Court itself and report on the outcome of any such discussions.

This lack of transparency was further compounded by the Council's attempts to progress the adoption of the GC's reform via a 'quadrilogue' format even before it adopted its position at first reading on 23 June 2015:

During the first semester of 2015, the Presidency has been trying to enter into informal discussions with the European Parliament's Legal Affairs Committee in a quadrilogue format, with the participation of the Court of Justice and the Commission, with a view to achieving an 'early second reading agreement' on the reform, whereby the Council would adopt its position at first reading on the basis of a pre-negotiated text which the European Parliament could then approve ... However, these efforts have not been crowned by success.<sup>88</sup>

Trilogues are sufficiently problematical from a transparency and democratic point of view that the CJ should have refrained from agreeing to participate in informal negotiations regarding a contentious reform in a format which is hard to reconcile with the democratic requirements which flow from Title II of the TEU, and which the European Ombudsman has rightly criticised.<sup>89</sup> The Court itself has recognised that 'the possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights.'<sup>90</sup>

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<sup>85</sup> For some concrete examples, see e.g. D. Robinson, 'ECJ Fight Club: EU's top judge complains about MEP', *Financial Times*, 30 June 2015; D. Seytre, 'Justice européenne: La Cour, une institution dans la tourmente', *Le Jeudi*, 16 September 2015.

<sup>86</sup> Dehousse with Marsicola, *The Reform of the EU Courts (II)*..., op. cit., p. 67.

<sup>87</sup> Article 281 TFEU provides that the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may amend the provisions of the Statute of the CJEU, with the exception of Title I and Article 64, either at the request of the CJ and after consultation of the Commission, or on a proposal from the Commission and after consultation of the CJ.

<sup>88</sup> Statement of Council's reasons, op. cit., para. 5.

<sup>89</sup> See Decision of the European Ombudsman setting out proposals following her strategic inquiry OI/8/2015/JAS concerning the transparency of Trilogues, 12 July 2016.

<sup>90</sup> *Sweden and Turco v Council*, Joined cases C-39/05 P and C-52/05 P, EU:C:2008:374, para 46.

The Court's legislative role and the Council's attempt to force a quadrilogue are not the only sources of legitimate concerns. The way this dossier was dealt with by the European Parliament, in particular its JURI committee, may leave one puzzled. A number of procedural glitches have indeed characterised the parliamentary discussion of the reform. One may for instance highlight the absence of any translation of the Explanatory Report (originally written in Portuguese) on the day the rapporteur's draft recommendation and suggested amendments were to be debated on 15 September 2015 and the absence of any translation as well as public circulation of the documentation and correspondence (i.e. 'Annexes') mentioned at the very end of the Explanatory Report.<sup>91</sup> The absence of any timely translated version of the Annexes was particularly prejudicial to a well-informed parliamentary debate as the MEPs were for instance deprived of the opportunity to consult a GC document, which, according to the rapporteur, offered facts and figures contradicting those presented by the CJ to the Parliament.<sup>92</sup> This extremely serious claim should have been subject to a proper evidence-based parliamentary discussion, which, regrettably, never took place. Instead, the debate was rushed. To give but a single example, the JURI Committee was due to vote on 13 October 2015 on the draft regulation and discuss amendments the previous week on 8 October. It was however decided on that day, against the recommendation of the rapporteur, to advance the vote thus leaving no time for compromise amendments to be considered, not to mention the fact that translated versions of the amendments were only made available to members of the Committee the day before.<sup>93</sup>

When it comes to a significant structural reform having at its centre the operation of the 'supreme court of the land', one would have expected EU institutions to pay more attention not only to the merits but also to the forms. A final procedural aspect worth examining concerns the respect of essential procedural requirements.

### 3.1.3 An unorthodox interpretation of essential procedural requirements

The 'new proposal' designed to break the Council's blockage over the appointment of twelve new GC judges, was presented by the CJ on 13 October 2014, after the European Parliament had formally adopted on 15 April 2014 the Court's initial proposal. The Council formally accepted the Court's *new* proposal at first reading on 23 June 2015. However, the compulsory opinion of the Commission, required *before* the European Parliament and the Council may amend the Statute of the CJEU, was issued on 30 September 2011, on the basis of the Court's initial proposal which made no mention whatsoever of any eventual abolition of the CST.

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<sup>91</sup> We did request access to the 'annexes' mentioned in the explanatory statement but in its reply to this request the European Parliament claimed that no annex was ever 'officially tabled by the rapporteur, as requested under Rule 116(2) of Parliament Rules of Procedure, and therefore the Parliament does not hold it.'

<sup>92</sup> Explanatory statement in European Parliament, Recommendation for Second Reading on the Council position at first reading, *op. cit.*, para. 7.

<sup>93</sup> This analysis is based on the recording of the extraordinary meeting of the JURI Committee of 8 October 2015, which is available at: <http://www.europarl.europa.eu/ep-live/en/committees/video?event=20151008-0900-COMMITTEE-JURI>. See also A. Collins (currently a judge at the GC), Keynote Speech to the European Circuit of the Bar Annual Conference 'Cross-Border Justice in the EU and the Impact of Brexit', Dublin, Ireland, 30 September 2016, pp. 8-9: <http://www.europeancircuit.com/wp-content/uploads/2016/11/Judge-Collins-speech-PDF-new.pdf>



This chronology raises a number of issues. The new proposal from the CJ in October 2014 was made on the basis of a mere letter addressed to the Italian Presidency of the Council, which, according to the Parliament's rapporteur, 'is not the appropriate procedure for formalising a legislative initiative.'<sup>94</sup> This view was shared by the European Scrutiny of the House of Commons, which noted on 18 March 2015 that the CJ's 2014 response to a request from the Greek Presidency to present new proposals on increasing the number of Judges at the GC, 'as such, does not represent a formal legislative proposal' which 'has yet to be published'.<sup>95</sup>

Notwithstanding these aspects, one may argue that a new legislative procedure ought to have been initiated. Indeed, what the CJ proposed in October 2014 (i.e., the appointment of 21 new GC judges and the abolition of an existing EU court, with the CST judges to be transferred to the GC) was materially different from what had been initially requested by the CJ in 2011 (i.e., the appointment of 12 new GC judges), a request which had already secured the support of the European Parliament's Committee on Legal Affairs in 2013.<sup>96</sup> A new opinion of the Commission should have therefore been issued.<sup>97</sup>

A possible counter-argument may however be offered: while formally described in several official documents as a 'new proposal,' the 2014 text may be said to merely constitute an informal suggestion to the co-legislators. This would appear to be the understanding of the Council which noted in its statement of reasons that the CJ merely 'suggested on 13 October 2014 that the co-legislators amend it so as to double the number of judges at the General Court in three stages'.<sup>98</sup> The Commission adopted a similar stance in a reply to a parliamentary question and further claimed that it did not have to adopt a new formal opinion since 'this letter does not constitute a legislative proposal'.<sup>99</sup>

Regulation 2015/2422 itself refers to 'the request of the Court of Justice' in the singular. It does not however make clear which request it is referring to, the initial one from 2011 or the 'new proposal' from 2014, unless the EU legislature considers, oddly, that the two proposals are one and the same. Article 281 TFEU does use the singular; this lends additional support to the view that a new legislative procedure

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<sup>94</sup> Explanatory statement in European Parliament, Recommendation for Second Reading on the Council position at first reading ..., op. cit., para. 4.

<sup>95</sup> European Scrutiny Committee, 'Increasing the number of judges at the General Court', Thirty-seventh Report HC 219 xxxvi (2014-15), chapter 13 (18 March 2015), para 13.3. This led the Committee to require the British government to submit a detailed explanatory memorandum 'on the formal legislative proposal to amend the Court's Statute when that is published', para 13.4.

<sup>96</sup> See Report on the draft regulation of the European Parliament and of the Council amending the Protocol on the Statute of the Court of Justice of the European Union by increasing the number of Judges at the General Court (02074/2011 – C7-0126/2012 – 2011/0901B(COD)), Committee on Legal Affairs/Rapporteur: Alexandra Thein, A7-0252/2013, 10 July 2013.

<sup>97</sup> This procedural defect cannot be said to have been regularised via the adoption of another opinion by the Commission on 12 November 2015 after an agreement had been found between the Council and the Parliament as this opinion had a different aim than the opinion issued in 2011. See Opinion of the Commission pursuant to Article 294(7)(c) of the TFEU on the European Parliament's amendments to the Council's position, COM(2015) 569 final, 12 November 2015. In this 1-page Opinion, the Commission merely indicates that it accepts all the amendments adopted by the Parliament.

<sup>98</sup> Statement of Council's reasons, op. cit., para. 3.

<sup>99</sup> Question for written answer to the Commission by António Marinho e Pinto (ALDE), E-004583-15, 23 March 2015, reply given on 17 July 2015.

should have been initiated following the CJ's new proposal in October 2014.

The procedural legality of Regulation 2015/2422 is further doubtful with respect to the involvement of national parliaments. According to Article 2 of the Protocol on the role of national parliaments in the EU, the Council shall forward draft legislative acts originating from the CJ to national Parliaments. The Regulation does state that the draft legislative act had been transmitted to the national parliaments but gives no date. We can however confirm that the CJ's legislative proposal of 28 March 2011 was the only one forwarded to the national parliaments,<sup>100</sup> a proposal which did not provide for the dissolution of the CST. In our view, the failure to forward the 'new proposal' put forward in 2014 undermines the legitimacy if not the procedural legality of Regulation 2015/22.

### 3.2 *Substantive critique*

Besides the many procedural issues tainting its adoption, the compatibility of Regulation 2015/2422 with Article 257 TFEU has also been questioned. Another source of controversy, which will be analysed below, concerns the statistics provided by the CJ to the EU's co-legislators.

#### 3.2.1 Compatibility with Article 257 TFEU

Regulation 2015/2422 makes no reference to either Article 19(1) TEU (the CJEU shall include the CJ, the GC and specialised courts) and makes only one brief reference to Article 257 TFEU, the provision which enables the European Parliament and the Council to establish specialised courts to hear and determine at first instance certain classes of action or proceeding brought in specific areas.

For the European Parliament's rapporteur, while these provisions of EU primary law empower the EU legislature to create specialised courts, they do not necessarily empower it to abolish an existing one.<sup>101</sup> This issue was also raised by EU trade unions. For instance, the *Union Syndicale Fédérale* stressed the 'absence of any legal basis in the Treaty for the abolition of a specialised court'.<sup>102</sup> One may also note in passing that the then Vice-President of the Court, Koen Lenaerts, stated extrajudicially that 'the EU Treaties provide for two potential solutions but do not decide between them: new specialised courts or additional judges at the EGC.'<sup>103</sup> He made then no mention of a possible corollary: the abolition of an already established

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<sup>100</sup> Letter from Mr H. Legal, Director-General of the Council to Mr A. Marinho E Pinto, 2 July 2015 (on file with the authors). In this letter, Mr Legal attempts to defend the failure to formally communicate the 'new proposal' put forward by the CJ in 2014 by explaining that 'the outcome of the meeting of the Council at which its position at first reading was adopted was forwarded directly to national parliaments on 24 June 2015' and that 'draft budget of the EU containing the necessary appropriations for the implementation of the proposed reform in 2016 was forwarded to national Parliaments on 25 June 2015'.

<sup>101</sup> Explanatory statement in European Parliament, Recommendation for Second Reading on the Council position at first reading..., op. cit., para. 6.

<sup>102</sup> *Union Syndicale Fédérale*, Resolution on the recasting of the EU's judicial framework and the planned abolition of the Civil Service Tribunal adopted at the Dubrovnik Congress, 1-3 May 2015, point 4.

<sup>103</sup> Keynote address in CCBE, Proceedings of the Conference 'EU Courts – Looking Forward', Brussels, 28 April 2014, pp. 7-8.

tribunal.

Regulation 2015/2422 itself sidesteps the issue by merely stating in a recital that ‘the option of setting up specialised courts as provided for in Article 257 [TFEU] has not been taken up’.<sup>104</sup> Since the CST is not explicitly mentioned in the Treaties and was established by a piece of secondary legislation, one may reasonably presume, on the basis of the principle of congruent forms (principle of ‘parallélisme des formes’), that a similar piece of secondary legislation may abolish the CST. This is in essence the position of President Juncker who, in a reply to the parliamentary question asking the Commission to clarify what is the legal basis for the abolition of the CST, offered this one-line answer: ‘The legislator is entitled, on the basis of Article 257 TFEU, to amend or repeal the decision establishing the European Union Civil Service Tribunal.’<sup>105</sup>

It remains however that the Masters of the Treaties, when agreeing to insert this option into EU primary law via the Nice Treaty, indicated a preference for the establishment of new specialised courts, then known as ‘judicial panels’, and explicitly urged for the speedy establishment of what became known as the CST.<sup>106</sup> Viewed in this light, Regulation 2015/2422 appears to operate a disguised constitutional reform of the EU’s judiciary in breach of the ‘spirit of the Treaties’ to paraphrase *Costa v Enel*.<sup>107</sup> This is why it was not unreasonable for EU trade unions to view Regulation 2015/2422 as a rewriting of Article 257 TFEU through legislative means.<sup>108</sup>

### 3.2.2 The rising backlog that wasn’t?

During the legislative process, the European Parliament’s rapporteur claimed that ‘the figures provided by the CJEU on the outstanding GC cases and the average duration of these cases are *contradicted* [our emphasis] by the figures provided by the President and by the GC judges during their hearing before the Legal Affairs Committee in Strasbourg, at the invitation of the rapporteur.’<sup>109</sup>

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<sup>104</sup> Recital 4.

<sup>105</sup> Question for written answer to the Commission by António Marinho e Pinto (ALDE), E-004583-15, 23 March 2015, reply given on 17 July 2015.

<sup>106</sup> See Treaty of Nice [2001] OJ C 80/1, Declaration on Article 225a of the Treaty establishing the European Community: ‘The Conference asks the Court of Justice and the Commission to prepare as swiftly as possible a draft decision establishing a judicial panel which has jurisdiction to deliver judgments at first instance on disputes between the Community and its servants.’ Another Declaration on what was then Article 229a of the Treaty establishing the European Community also reserved the possibility of setting up a judicial panel to deal with litigation relating to Community industrial property rights.

<sup>107</sup> In an interview with a Luxembourg newspaper, the newly elected president of the CJEU, Judge Lenaerts, has described the reform as ‘a return to the GC pre Nice Treaty’ (‘un retour au type de tribunal d’avant le traité de Nice’). One may however question whether a regulation is the appropriate vehicle to operate such a constitutional ‘return’.

<sup>108</sup> Mr Skouris, then President of the CJ, is alleged to have expressly denounced Article 257 TFEU as ‘a bad Treaty provision’ during the legislative process. See Dehousse with Marsicola, *The Reform of the EU Courts (II)*..., op. cit., p. 32.

<sup>109</sup> Explanatory statement in European Parliament, Recommendation for Second Reading on the Council position at first reading..., op. cit., para. 7.

These four judges did not deny that the number of cases brought before the GC had increased. They did however deplore institutional attempts to prevent the communication of ‘uncensored information to the legislative authorities’.<sup>110</sup> More importantly, they claimed that the CJ did not take due account of the fact that the GC was able to close 814 cases in 2014, a new record attributable in no small measure to the recruitment of nine additional *référéndaires*.<sup>111</sup> They also highlighted that, at the time of the parliamentary hearing in April 2015, the GC was already closing more cases than the new cases were coming in and did so without any additional judges. This meant that ‘many chambers already have a caseload below their capacity’.<sup>112</sup> As for the duration of proceedings, it was stressed that an average time of 24 months – from date of filing – to decide a case once ‘account is taken of the requirements and constraints of a procedure with written and oral phases, the use of various languages and the corresponding need for translation’ is ‘normal and reasonable’.<sup>113</sup> Finally, they pointed out that only the cases exceeding this ‘normal’ time framework should be considered as constituting the backlog, as opposed to all cases pending before the Court. This meant that only 135 cases filed in the period 2008-2012 could then be regarded as backlog as of 23 April 2015, a dramatic improvement of the previous situation. The GC judges furthermore justified the previously rising backlog as the result of two circumstantial factors over which the GC could not have any control: the prolonged absence of a few GC judges due to illness and the delay by Member States in nominating successors of departing judges.<sup>114</sup>

The 2015 Annual Report, published in April 2016, that is, a few weeks after Regulation 2015/2422 was adopted, essentially vindicated the views expressed by the reform’s opponents.<sup>115</sup> As can be seen from the table below,<sup>116</sup> which is based on official judicial figures, the number of pending cases and cases brought before the GC decreased significantly in 2015 while the number of closed cases has never been so high.<sup>117</sup>

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<sup>110</sup> Berardis et al., ‘Doubling the General Court’s Judges’, op. cit., p. 1.

<sup>111</sup> This information was provided to Mr Pinto, the European Parliament’s Rapporteur, in a 2-page document entitled ‘Some Truths about the workload of the General Court of the European Union’ (on file with the authors).

<sup>112</sup> Ibid., para. 9.

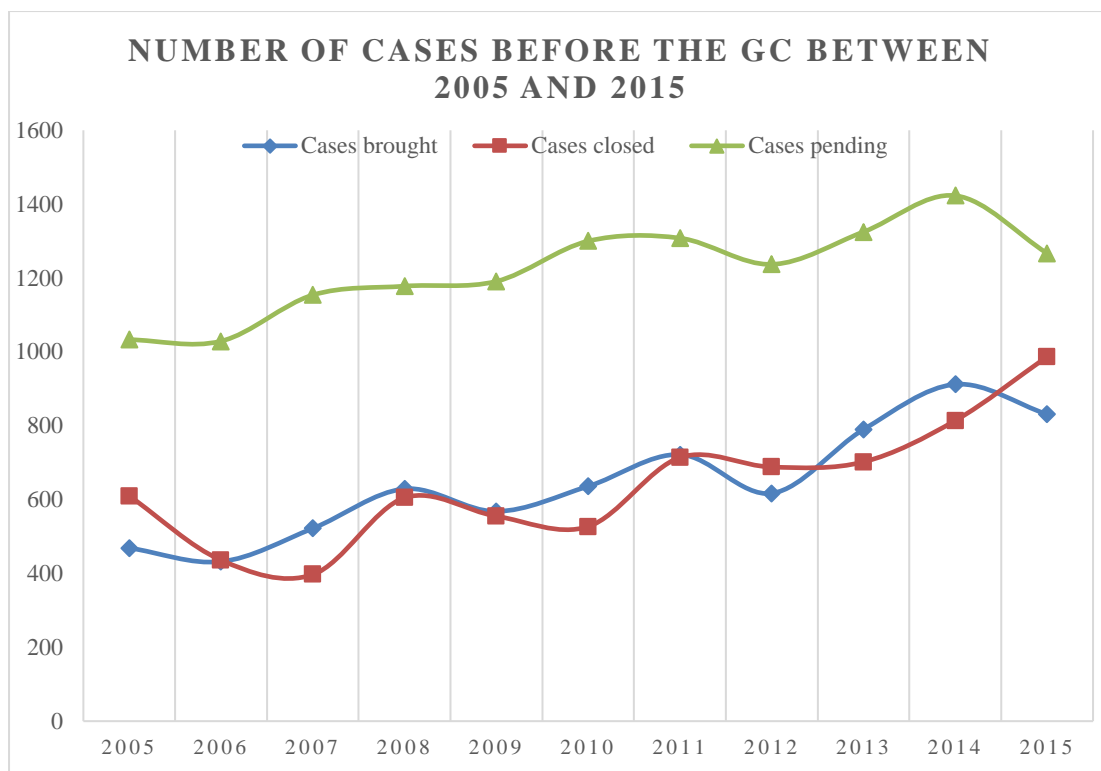
<sup>113</sup> Ibid., para. 3.

<sup>114</sup> Ibid., para. 7.

<sup>115</sup> CJEU, *Annual Report 2015 Judicial Activity*, op. cit., p. 165.

<sup>116</sup> This table was compiled by the students enrolled in the HEC-NYU EU Public Interest Clinic (Hannah Marek, David Goldblatt and Thibaut Roisin) acting under the supervision of Alberto Alemanno and Laurent Pech, on the basis of the CJEU’s judicial activity annual reports: <<http://www.thegoodlobby.eu/reform-at-the-cjeu>>. Their research on the reform of the EU’s court system was subsequently featured in J. Kanter, ‘Costly Compromises Stir Fury With the European Union’, *The New York Times*, 17 June 2016: <<http://nyti.ms/28KUe8S>> and N. Hirst, ‘Judges ‘pray’ for cases as European court expands’, *Politico Europe*, 14 June 2016: <http://www.politico.eu/article/judges-pray-for-cases-european-general-court-expands-bored-backlog-clearing-reform/>

<sup>117</sup> To quote Marc Jaeger, President of the GC, these figures show ‘an increase in the number of cases completed of nearly 90% since 2010’ and ‘a decrease of more than 10%’ in one year regarding the number of cases pending before it, CJEU, *Annual Report 2015 Judicial Activity*, op. cit., p. 104.



Several points can be made: Firstly, it is not yet possible to decide with certainty whether the decrease in the number of cases before the GC should be understood as a permanent rather provisional downturn. That being said, Recital 1 of Regulation 2015/2422, which refers to a ‘constantly increasing’ number of cases before the GC, was factually inaccurate at the time of the adoption of Regulation 2015/2422, and it is difficult to understand how the European Commission could continue to make factually incorrect statements in 2016 regarding the GC’s backlog in order to justify the dissolution of the CST.<sup>118</sup> The difference of analysis between the CJ and the critical voices originating from the GC appears to stem from different methodologies. As noted by Judge Dehousse, the CJ decided to take ‘into consideration all possible delays’ whereas the GC judges ‘examined delays from the perspective of the workload of the cabinets’ and which allegedly showed that the GC ‘backlog was on the point of disappearing’ in 2015.<sup>119</sup>

When one compares the judicial statistics published in the CJEU’s annual reports with the estimates provided by the CJ during the course of the legislative process, we can see that the CJ’s estimates have proved to be unduly pessimistic as far as the GC is concerned. For instance, the CJ’s 2014 estimates on the basis of the figures available to it on 1 November 2014<sup>120</sup> were much higher for both cases brought (950 instead of

<sup>118</sup> In its Opinion on the proposal for a regulation on the transfer to the GC of the EU of jurisdiction at first instance in disputes between the Union and its servants, published on 22 February 2016, the Commission stated that ‘this proposal is the necessary extension of the reform of the General Court recently decided upon by the EU legislature in order to respond to the challenge of the increase in litigation before that court’, COM(2016) 81 final, para 2. This is however inaccurate for the year 2015 and, based on current trends, will most likely prove incorrect again for the year 2016.

<sup>119</sup> Dehousse with Marsicola, *The Reform of the EU Courts (II)*, op. cit., p. 48.

<sup>120</sup> See CJEU, Financial information concerning the proposal of the CJEU for the strengthening of the GC, 14 November 2014, available in Council, ‘Reform of the General Court of the European Union - Way forward’, Document 16576/14, 8 December 2014, Annex I, p. 8.

912) and pending (1500 instead of 1267) but lower for cases closed (750 when in fact 814 cases were closed in 2014). The prediction by the CJ that the figure of pending cases before the GC would ‘shortly rise to 1600’<sup>121</sup> in 2015 proved similarly significantly off target.

<b>General Court</b>	<b>2014</b> CJ’s estimates of GC’s judicial activity / actual figures	<b>2015</b> CJ’s estimates of GC’s judicial activity / actual figures
New cases	950 / 912	No estimate given by CJ in the context of the legislative process
Completed cases	750 / 814	Idem
Cases pending	1500 / 1423	1600 / 1267

Initial figures for the first six months of 2016 we obtained from the GC’s registry further suggest that the problems highlighted by the CJ in October 2014 may have already been addressed by the GC before a single additional judge was appointed:

<b>General Court</b>	<b>2014</b>	<b>2015</b>	<b>2016 (as of 30 June)</b>
New cases	912	831	373
Completed cases	814	987	389
Cases pending	1423	1267	1251

Provisional figures for the first semester of 2016 also indicate a reduction in the number of new cases, and assuming the same level of productivity as the year before, it could be that the number of pending cases would have continued to decrease without the need for any new GC judges. A more forensic analysis of the 1251 cases pending before the GC at the date of 1 July 2016 further reveals that only 320 pending cases are waiting to be worked on, which suggests a perfectly manageable backlog of cases for twenty eight judges and their *référéndaires*.

Assuming that the GC continues to be able to dispose of close to 1,000 cases per year, as it did in 2015 with 28 judges, and the number of new applications remains at around 800, there is likely to be virtually no backlog left by the time the GC consists of 56 judges in 2019. All things being equal, this could then result in approximately a bit less than 15 cases per year per judge acting as rapporteur in 2020. The planned reduction in the number of *référéndaires* per judge in 2019 – a concession agreed by the CJ to bring down the overall cost of the reform – as well as the internal reorganisation of the GC to accommodate new judges and the transfer of CST case law may well however, and rather ironically, lead to an overall decrease in productivity per personnel unit in the GC, which would not have happened had the GC been left ‘unreformed’.

One final element relating to the *Gascogne* line of cases<sup>122</sup> is worth mentioning, as there are indications the CJ might have changed its views regarding the allegedly

<sup>121</sup> CJEU, Response to the invitation from the Italian Presidency of the Council..., op. cit., p. 3. This document also indicates that the number of new cases before the GC ‘will probably reach 1000 in 2014’, which once again proved significantly off target. The actual number for 2014 was 790.

<sup>122</sup> Case C-40/12P, *Gascogne Sack Deutschland GmbH v. European Commission*, EU:C:2013:768; Case C-58/12P, *Gascogne v. European Commission*, EU:C:2013:770; Case C-50/12P, *Kendrion v. European Commission*, EU:C:2013:771. Subsequently, in Case C-580/12P, *Guardian Industries Corp. and Guardian Europe Sàrl v European Commission*, EU:C:2014:2363, the CJ held rather unorthodoxly that it may hold the GC in breach of Article 47 EUCFR ‘without there being any need for the parties to

serious and urgent nature of the problems linked to the duration of proceedings in the GC.<sup>123</sup> As previously noted, the CJ, *acting in its legislative capacity* under Article 281 TFEU, raised the issue of compensation on the basis of Article 47 EUCFR for the applicants who had suffered from excessive delays before the GC<sup>124</sup> to justify its proposal to double the number of GC judges. But this issue only came to the fore because the CJ, this time *acting in its judicial capacity*, ruled in 2013 that separate applications for compensation of losses sustained by reason of delay in proceedings before the GC were to be brought before the GC, that is, rather strangely, the very court responsible for the excessive delays in the first place and which allegedly was already struggling with its backlog.

In 2016, this time *acting as a defendant* on behalf of the EU in one of the first actions for damages brought on the basis of its previous 2013 judgment,<sup>125</sup> the CJEU has however described the previous delays in the GC as perfectly reasonable considering the complexity of the proceedings.<sup>126</sup> The irony of this defence is that it brings the CJ close to the position of Mr Pinto who, during the legislative process, harshly criticised the CJ for misrepresenting ECHR case law regarding possible compensation for the excessive duration of judicial proceedings and using a smoke-and-mirror strategy as regards the issue of compensation for possible delays with GC decisions.<sup>127</sup> Be that as it may, the timing of the *Gascogne* line of cases conveniently offered the CJ an additional justification to convince the EU's co-legislators of both the urgency of its reform and the relatively minor cost of the reform (€28m) when viewed in the light of the potential cost of the then pending claims for damages (€26.8m). One may however be forgiven for concluding that the CJ, *acting in its judicial capacity*, might have compounded the very problem that it had raised, *acting in its legislative capacity*, to convince the Parliament and Council to back its reform package.

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adduce evidence in that regard' when 'it is clear ... that the General Court breached, in a sufficiently serious manner, its obligation to adjudicate on the case within a reasonable time', para. 20. In this instance, proceedings amounting to almost four years and seven months were held not to 'be justified by any of the circumstances specific to the case which gave rise to the present dispute', para. 20.

<sup>123</sup> See GC, *Rapport d'audience* in Case T-577/14, *Gascogne Sack Deutschland GmbH and Gascogne v EU* (on file with the authors). In its capacity as a defendant on behalf of the EU in Case T-577/14, the CJEU claimed that the principle of having judgment given within a reasonable period was not breached in Cases T-72/06 and T-79/06 as the duration of the relevant proceedings could be justified by the circumstance of each of these two cases. Rather unexpectedly, the six-year term limit of EU judges and the long-term sickness of one judge are also put forward to justify the duration of the proceedings before the GC (para 23). The CJEU, again acting as a defendant, further requested that the two firms' claim for damages for up to €3.9m should be rejected and that they should be granted instead a maximum of €5,000 as compensation for the immaterial losses allegedly resulting from a failure on the part of the GC to comply with the obligation to give a ruling within a reasonable period.

<sup>124</sup> In its initial 2011 proposal, the CJ only made a brief reference to Case C-385/07 P *Der Grüne Punkt* [2009] ECR I-6155 and mentioned pending claims for damages of close to €20m: CJEU President, Draft Amendments to the Statute of the CJEU and to Annex I thereto, op. cit., p. 4. The CJ more strongly emphasised the issue during the course of the legislative process and noted in 2015 that "[i]n one year there have already been five actions for damages brought before the General Court in which the total amount of damages claimed has amounted to €26.8 million": CJEU, Reform of the EU's Court System, Press release No 44/15, 28 April 2015, p. 1.

<sup>125</sup> See GC, *Rapport d'audience* in Case T-577/14 analysed above in fn 123.

<sup>126</sup> *Ibid.*, para. 23.

<sup>127</sup> Explanatory statement in European Parliament, Recommendation for Second Reading on the Council position at first reading..., op. cit., para. 8. Judge Dehousse has also described the emphasis on the amount of the compensation claimed by different companies as a 'childish argument': Dehousse with Marsicola, *The Reform of the EU Courts (II)*, op. cit., p. 27, fn 51.

### 3.2.3 A shifting and unconvincing ex post rationale

In a series of interviews, the new President of the CJ offered a mix of new reasons for the doubling in size of the GC and the dissolution of the CST. The new primary justification is centred on the idea that the additional GC judges would enable the allocation of a larger number of cases, in particular the most important, to 5-judge chambers rather than 3-judge chambers.<sup>128</sup> In his view, this is bound to lead to better quality judgments and, in turn, further enhance the legitimacy of the GC's decision.<sup>129</sup> Another secondary justification is the alleged simplification of the EU's court structure via the move to a two-tier structure following the transfer of CST cases to the GC.<sup>130</sup> Additional justifications were subsequently provided: the increased number of GC judges should help speed up the processing of cases and may also help the GC to be ready when the EU enters into a new field such as banking policy, which, it was alleged, should automatically lead to more litigation ending up in Luxembourg.<sup>131</sup> As for Marc Jaeger, the President of the GC, who initially opposed the CJ's reform proposal, he has recently explained that while the number of new and pending cases is down, the GC's 'workload is constantly increasing' but no evidence has been offered to back up this claim.<sup>132</sup>

A few remarks can be offered with respect to the new rationale offered by President Lenaerts. Firstly, it relies on two key justifications – the alleged correlation between a higher number of judges and the quality of the case law and the institutional simplification that would result from the dissolution of the CST – which were not addressed during the legislative process.<sup>133</sup> Secondly, the notion of quality in this context appears rather open-ended. If quality refers to the coherence of the case law, then one may find it difficult to understand why the CJ exclusively focuses on the GC's output when academic scholarship and national judges have raised the issue in relation to its own case law.<sup>134</sup> This ex post emphasis on quality also necessarily implies that there may have been an issue with the 'quality' of the GC's output in the past. Yet this was neither directly raised nor evidenced by the CJ during the legislative process. Should such an alleged problem be a genuine one, one would also

<sup>128</sup> In 2015, 89,77% of the completed cases by the GC were dealt with by 3-judge chambers, with only 1,11% dealt with by 5-judge chambers. See CJEU, *Annual Report 2015. Judicial Activity*, op. cit., p. 172.

<sup>129</sup> K. Lenaerts, 'J'assume pleinement cette réforme', Entretien avec *Le Jeudi*, 28 janvier-3 février 2016, p. 11; K. Lenaerts, 'Faire la balance entre règles européennes et sensibilité nationales', Entretien avec *Le Monde*, 4 février 2016.

<sup>130</sup> Ibid.

<sup>131</sup> P. Teffer, 'Court of Justice defends doubling number of judges', *EUObserver*, 6 April 2016.

<sup>132</sup> Ibid.

<sup>133</sup> To the best of our knowledge, only the Council made a brief, unsubstantiated reference to the simplification of the EU's judicial architecture and the promotion of the consistency of the case-law which the reform would allegedly help achieve: Statement of Council's reasons, op. cit., para. 8.

<sup>134</sup> For academic scholarship, see e.g. Lorna Woods, "Consistency in the chambers of the ECJ: A case study on the free movement of goods" (2012) 31(3) *Civil Justice Quarterly*, p. 339; N. Nic Shuibhne, *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice* (Oxford: OUP, 2013). For an example of criticism coming from a national judge, see Lord Neuberger, President of the UK Supreme Court, Justice Innovation Programme Lecture for the Northern Ireland Assembly Committee for Justice, 3 March 2016, para. 37: 'The [EU] system only has one judgment to read in every case, but their judgments are not infrequently internally inconsistent, and occasionally evade the legal question actually raised in order to arrive at a mutually acceptable product.' For similar criticism aimed at the CJ but originating from practitioners: M. Taddia, 'European Justice: Union Problems', *Law Society Gazette*, 7 September 2015.



expect the CJ to overrule GC rulings on appeal more often than it currently does.<sup>135</sup> Thirdly, our interviews with judges and *référéndaires*, combined with anecdotal evidence, suggest that the move towards more cases assigned to 5-judge chambers is most likely to slow down rather than expedite the decision-making process at the GC. Judge Collins, writing extra-judicially, argued that ‘the idea that we need more judges to hear cases by larger formation is not borne out of fact’ whereas ‘five judges take longer to make a decision than three judges’.<sup>136</sup> The argument drawn on the simplification of the EU judicial architecture appears similarly unconvincing when examined more closely. Indeed, a two-tier court system is not inherently easier to understand than a three-tier system. If the idea were however to make the EU’s court system more efficient from the point of view of litigants and less expensive from the point of view of taxpayers, it would ‘have been far simpler to transfer jurisdiction to hear appeals against the decisions of the CST’ from the GC to the CJ, ‘rather than to double the size of the former.’<sup>137</sup>

Could it be therefore that the announced move towards 5-judge chambers is motivated by a different and less noble reason, that is, the very limited number of new cases to be assigned to the additional, incoming GC judges? The rather dramatic decrease in the number of cartel cases has led some commentators to observe that ‘once the court’s backlog has been reduced and there are fewer appeals being filed, the extra judges may find themselves underemployed in the Grand Duchy’.<sup>138</sup> This may well explain the rather unusual call from the President of the CJ for more cartel cases to be submitted to the GC as companies could now expect to see their applications dealt with by a more ‘deeply committed’ bench,<sup>139</sup> which should in turn give the GC ‘the same “status and prestige” as the High Court of Justice of England and Wales’.<sup>140</sup> This notion of ‘deep commitment’ is however as ambiguous, if not more, than the notion of ‘quality’. Evidence is yet to be offered which would demonstrate that a 5-judge chamber is inherently more ‘committed’ than a 3-judge chamber. In the longer term, one may finally note that the President of the CJ did not exclude the transfer of new competences to the GC, this time, not to enhance the quality of its case law, but rather to help the CJ itself cope with its caseload.<sup>141</sup> This leads us to another questionable aspect of the reform of the EU’s court structure: the near-complete absence of any serious reflection on the daily operation, and in particular, the caseload challenge faced by the CJ itself.

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<sup>135</sup> See CJEU, *2015 Annual Report. Judicial Activity*, op. cit., p. 182.

<sup>136</sup> Judge Anthony Collins cited by M. Eccles, ‘Five-judge chambers at General Court may slow decision making, EU judge says’, *MLex Market Insight*, 14 March 2016.

<sup>137</sup> Dehousse with Marsicola, *The Reform of the EU Courts (II)*, op. cit., p. 49.

<sup>138</sup> K. Lunders and M. Newman, ‘Comment: Bottleneck eases at EU court, as new judges prepare to arrive’, *MLex Market Insight*, 9 February 2016 and more recently N. Hirst, ‘Judges ‘pray’ for cases as European court expands’, *Politico*, 14 June 2016 where it is pointed out that ‘senior judges responsible for distributing cases among their colleagues are struggling to find appeals to hand over to the new judges’.

<sup>139</sup> ‘There will “almost automatically” be more competition cases, Lenaerts said, once litigants realize that they can “go through the judicial process [and] it will be done within a reasonable time, through a court that is fully engaged, with a bench of five judge’: M. Newman, ‘EU court revamp will spark more antitrust appeals to ‘deeply committed’ bench, Lenaerts says’, *MLex Market Insight*, 17 June 2016.

<sup>140</sup> *Ibid.*

<sup>141</sup> M. Newman, ‘Lower EU court could field national questions, interpret law, says Lenaerts’, *MLex Market Insight*, 20 June 2016.

#### 4. *La Grande absente*: the Court of Justice

Given the scale and ambition pursued by the last, on-going reorganisation of the EU's court system, one might have reasonably expected its highest Court to take this opportunity to also reform itself. Yet there is only one provision – added at the initiative of the European Parliament – that might impact the operation of the CJ itself, as it requires it to reflect on 'possible changes to the distribution of competence for preliminary rulings' by 26 December 2017.<sup>142</sup> The fact that the CJ did not deem this issue worth considering either in 2011 or 2014 is rather symptomatic of an institution that has shown little inclination for self-reflection when it comes to its own challenges and eventual shortcomings. While the CJ has historically been highly critical of the situation with respect to the GC's backlog, productivity and the duration of proceedings, the CJ's record is hardly satisfactory on these three fronts, and that despite its own assessment to the contrary.<sup>143</sup> More critically and disappointingly, the CJ failed to seize this reform, the first undertaken post Lisbon Treaty, as an opportunity to modernise its own internal governance so as to align it to its new institutional, administrative, and socio-economic and political contexts.<sup>144</sup>

##### 4.1 *Beyond the institutional narrative*

This section provides an overview of the workload, productivity, duration of proceedings as well as resources mobilised by the CJ. In so doing, it compares the CJ's performance with that of the GC, taking into due account the different roles the two courts play within the EU's judicial architecture.

While the number of cases brought before the CJ has remained relatively constant (from 631 in 2010 to 713 in 2015) by comparison to the GC, which experienced a more significant surge in the past few years (from 636 in 2010 to 831 in 2015), it is worth noting that the number of cases completed by the GC has spectacularly increased as well (527 cases completed in 2010 for 987 cases completed in 2015, a completion rate increase of 87.3% in four years), together with its overall productivity.<sup>145</sup> By comparison, the CJ brought 616 cases to a close in 2015 (down from more than 700 in 2014 and 2013),<sup>146</sup> which remains a lower completion rate than the GC's. It is also one that derives from a smaller base of cases brought before it.

	<b>2011 GC/CJ</b>	<b>2012 GC/CJ</b>	<b>2013 GC/CJ</b>	<b>2014 GC/CJ</b>	<b>2015 GC/CJ</b>	<b>2016 (as of 30 June) GC/CJ</b>
New cases	722/688	617/632	790/699	912/622	831/713	373/366

<sup>142</sup> Art. 3(2) of Regulation 2015/2422.

<sup>143</sup> See e.g. CJEU, Draft amendments to the statute of the CJEU and to Annex I thereto, *op. cit.*, p. 1: 'The situation in the Court of Justice is currently satisfactory.'

<sup>144</sup> After the Nice Treaty, the GC has evolved into what can be regarded as the general administrative law court of the EU, which enjoys general jurisdiction, subject only to the limited exceptions over the acts – and failures to act – of all of the EU institutions. See e.g. N. Forwood, 'The Court of First Instance, its Development, and Future Role in the Legal Architecture of the European Union' in A. Arnall et al (eds), *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs* (OUP, 2008), p. 34. For a broader overview of the external contextual factors which have shaped the evolution and achievements of the CJEU, see R. Kelemen, 'The Court of Justice of the European Union in the Twenty-First Century' (2016) 79 *Law and Contemporary Problems* 117.

<sup>145</sup> CJEU, *Annual Report 2015. Judicial Activity*, *op. cit.*, p. 165.

<sup>146</sup> *Ibid.*, p. 75.

Completed cases	714/638	688/595	702/701	814/719	987/616	389/351
Cases pending	1308/849	1237/886	1325/884	1423/787	1267/884	1251/899

More generally speaking, and as stated in the CJEU's own press release issued in March 2015,<sup>147</sup> the official statistics show productivity gains (i.e. the ratio between the number of closed cases and staff per judge) of more than 50% since 2008 for the GC when one used the statistics concerning judicial activity in 2014 as a point of comparison. As suggested by some members of the GC, these gains are most likely directly linked to the many changes made to the GC's working methods, such as the abolition of the requirement to translate all judgments into every EU language, the reduction in size of the hearing report, the possibility to decide cases without hearings, and a moderate increase in its human resources (i.e., the appointment of 9 additional *référéndaires* assigned to each of its chambers).<sup>149</sup>

These measures would appear to have significantly contributed to a significant decline in the GC's backlog in 2015. This conclusion can be inferred from the constant increase of the number of cases lodged in front of the GC until 2015, which excludes that the productivity gains may have instead stemmed from a drop of incoming cases. Notwithstanding the issue of productivity, it remains difficult to justify, in our opinion, the adoption of a reform solely focusing on the GC at a time where the number of cases brought before the CJ passed 'the symbolic threshold of 700 cases'<sup>152</sup> for the first time.

With respect to the duration of proceedings, one must first credit the CJ for having reduced the average duration of preliminary rulings proceedings from 25.5 months in 2003 to 16.3 months in 2010 and to a record low of 15 months in 2014.<sup>154</sup> However, since the GC does not hear preliminary rulings but primarily deals with direct actions, using preliminary rulings data as a point of comparison with the GC is not appropriate when seeking to appraise judicial efficiency. This appears all the more true when one considers that the CJ predominantly deals with preliminary references<sup>155</sup> and to a lesser extent, direct actions.<sup>156</sup> This typology of cases saves it from the more demanding fact-checking types of cases such as competition cases, which the GC has to hear. If one only takes direct actions as a point of comparison, which is a more meaningful indicator, the CJ did not do significantly 'better' than the GC with an average of 20 months versus an average of 23.4 months in 2014. It is also important to point out that the length of proceedings has never been so short in the GC's history,<sup>157</sup> with an average of 20.6 months in 2015.<sup>158</sup> It is furthermore likely that the

<sup>147</sup> CJEU, Statistics concerning judicial activity in 2014, Press release No 27/15, 3 March 2015, p. 2.

<sup>149</sup> See Berardis et al, 'Doubling the General Court's Judges', op. cit., p. 3 and Dehousse, *The Reform of the EU Courts (II)*, op. cit., p. 50.

<sup>152</sup> K. Lenaerts, 'Foreword' in CJEU, *Annual Report 2015. Judicial Activity*, op. cit., p. 4.

<sup>154</sup> In 2015, this average went slightly up to 15.6 months. See CJEU, *2015 Annual Report. Judicial Activity*, op. cit., p. 88.

<sup>155</sup> References for preliminary rulings represent the largest proportion of new cases brought to the CJ (61,15% in 2015), *ibid.*, p. 76.

<sup>156</sup> Moreover, when it comes its competence on appeal, the CJ has the jurisdiction to review appeals limited to points of law in rulings and orders of the GC. Likewise, the CJ also enjoyed the jurisdiction to review decisions made by the CST in the framework of the re-examination procedure.

<sup>157</sup> See Berardis et al, 'Doubling the General Court's Judges', op. cit., p. 3.

Commission's new policy of full settlement in cartel cases will lead to a dramatic reduction in the number of this type of cases being brought before the GC, with the consequence that a significant reduction in the average duration of proceedings is to be expected in 2016 and beyond.<sup>159</sup>

In the light of the analysis and figures above, one may wonder therefore why the CJ's reform proposals since 2011 almost exclusively focused on the GC and failed to consider its own workload challenge. At the very least, the rising number of preliminary rulings (141 in 1990; 249 in 2004; 436 in 2015) could have been considered as an area ripe for change. This issue, which represents 'a very serious challenge for a court already working at full capacity,<sup>160</sup> had indeed been identified as a problem worth considering by former members of the Court writing extra judicially.<sup>161</sup> Acting in a legislative capacity, the CJ did not however deem this issue worth considering being of the view that it found itself in a 'satisfactory' situation.<sup>162</sup>

#### 4.2. *The limits and unintended consequences of a statistic-driven reform*

The narrative surrounding the reform of the EU's court system, which has its roots (as well as its boundaries) in the perceived urgency of tackling of what was presented as an inexorably increasing caseload at GC level,<sup>163</sup> is emblematic of a particular statistic-driven, and often mechanical, vision of the administration of justice. Under this, approach, justice is supposed to be rendered when it is delivered in a timely fashion, an approach Joseph Weiler neatly described as the 'quantitative matrix of clearing cases'.<sup>165</sup> By putting a premium on efficiency and speedy handling over other values typifying the quality of the judicial process, both endogenous (such as collegiality, stability in composition of the GC, inclusiveness of decision-making, etc.) and exogenous (such as access to justice, legal predictability and coherence), this approach has become – as epitomised by the present reform – the privileged if not exclusive lens through which the priorities and needs of the EU's judicial system are assessed. This is true notwithstanding the ex post emphasis on the need to enhance the 'quality' of the GC's judicial output by President Lenaerts. As a result, it is through this narrow, input-output metric that human resources have been mobilised within the

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<sup>158</sup> See CJEU, *Annual Report 2015. Judicial Activity*, p. 173 (this figure includes appeals). The CJ also saw a significant reduction in the average duration of proceedings in direct action cases with an average of 17.6 months in 2015, a further reduction which has been helped by a significant decrease in the number of direct actions brought before it over the past few years (from 81 in 2011 to 48 in 2015).

<sup>159</sup> See Berardis et al, 'Doubling the General Court's Judges', op. cit., p. 3. The duration of proceedings in competition cases is by far the highest with an average duration of 47.8 months when other types of direct actions heard by the GC oscillate between 17.4 months (state aid) and 20.9 ('other direct actions').

<sup>160</sup> F. Jacobs, 'The Court of Justice in the Twenty-First Century: Challenges Ahead for the Judicial System?' in CJEU, *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-Law* (Springer/Asser Press, 2013), p. 51.

<sup>161</sup> See D. Edward, 'Reform of Article 234 procedure: the limits of the possible' in O'Keefe and Bavasso (eds), *Judicial Review in European Union Law* (Kluwer, 2000), p. 119; Forwood, 'The Court of First Instance', op. cit., p. 46. See also the diagnosis offered by an astute observer of the CJEU, J. Weiler, Editorial 'A Faustian Deal', (2016) 14(2) *ICON* 321, at p. 323: '[F]rom an understaffed GC we are moving to a bloated GC. By contrast, the caseload pressure on the European Court of Justice is once again showing stress with a growing number of preliminary references.'

<sup>162</sup> See CJEU, Draft amendments to the statute of the CJEU and to Annex I thereto, op. cit., p. 1.

<sup>163</sup> See the first recital of Regulation 2015/2422 which refers to the constant increase in the number of cases brought before the GC.

<sup>165</sup> J. Weiler, op. cit.

CJEU, working methods designed and success measured among the members of the three jurisdictions making the EU judicial system. This approach is exemplified by the one-size-fits-all model applied by the Court when determining its default operational format: one judge and one *référéndaire* per case regardless of the case's complexity, the variable amount of resources which may be required for a speedy and efficient treatment, or to deal with other unforeseen vicissitudes. This cannot be a sound default approach when considering, for instance, that a GC's file is on average four times more voluminous than a CJ's file.<sup>166</sup>

The Court reform failed to address the shortcomings of the one-size-fits-all approach. Furthermore, several unintended consequences stemming from the reform, some of which are already visible, are likely to undermine the GC's functioning and suggest that it was inaccurate to assume that more resources necessarily equate with higher and better judicial output.

Firstly, the ongoing process of doubling the number of GC judges is set to inevitably lead to a reduction of productivity per personnel unit of that court. The transfer of cases from the CST to the GC is unlikely to counter such a trend. One can indeed reasonably expect GC members to receive in average no more than three cases from the stock of 160-170 cases which used to be decided by the CST. In other words, unless the caseload of the GC increases significantly, which does not seem likely, by 2019, the 56 GC judges may end up having a very limited portfolio of assigned cases. Indeed, when the first batch of 'extra' judges joined the GC in Spring 2016, the Registrar strived to put together their kick-off portfolio of 20 cases each ready to be judged.<sup>169</sup>

Secondly, the implementation of Regulation 2015/2422 is likely to transform the GC into a 'work in progress' institution for a considerable period of time. The President of the GC himself has recognised that the implementation of Regulation 2015/2422 and of Regulation 2016/1196 'will require detailed consideration in 2016 of the Court's structure, organisation and operation, in order to establish the new bases for EU administrative justice at first instance.'<sup>172</sup> One may therefore expect a rather long period of organisational instability, which is bound to affect the judges' productivity. Indeed, as noted by one of its former judges, the GC was able to significantly improve its productivity in 2014 in large part because of 'an improvement in the stability of its composition'.<sup>173</sup>

Thirdly, the reorganisation of the GC is set to require the mobilisation of more resources than originally expected. The doubling of the number of judges does not indeed only entail the salary and operational costs of the extra judges but, in times of budgetary constraints at EU and national levels, it may also require extra resources to

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<sup>166</sup> Dehousse, *The Reform of the EU Courts (II)*, op. cit., p. 53. As noted by Dehousse, this does not mean 'that the case involves more important legal issues, but that it requires more work in order to be adjudicated upon', *ibid.*, pp. 53-54.

<sup>169</sup> Authors' interview with a member of the GC in June 2016. The same occurred in September 2016 when the second wave of judges received in average around 17 cases each. Authors' interview with a member of the GC in September 2016.

<sup>172</sup> CJEU, *Annual Report 2015. Judicial Activity*, op. cit., p. 104.

<sup>173</sup> Dehousse, *The Reform of the EU Courts (II)*, op. cit., p. 47.

ensure the speedy setting up of their new cabinets and their progressive integration to the Court.

The unintended consequences described above could have been foreseen and eventually mitigated had a proper and evidence-based impact assessment of the CJ's successive proposals been undertaken. The CJ's 'docket-obsessed' reform approach, which typically reflects the 'tunnel vision' bias denounced by US Justice Breyer many years ago,<sup>174</sup> seems in part connected to the result of the exceptional legislative power that has been conferred upon the Court when proposing the rules governing its own future operation. This 'tunnel vision' bias would have been most likely prevented had the right of legislative initiative remained exclusively in the hands of the Commission, upon consultation of the Court itself. It is not by accident that no equivalent of such right of legislative initiative has been bestowed upon national courts of last instance.<sup>175</sup> This is why a fundamental revision of Article 281 TFEU should be envisaged or, alternatively, the CJ should be required to exercise its legislative power in a manner that would avoid a repetition of the many procedural deficiencies the adoption of Regulation 2015/2422 has revealed.<sup>176</sup> Within and underneath this controversial reform lies deeper and unresolved challenges, which are connected to the overall governance structure of the CJEU.

## **5. Looking beyond the quantitative matrix of clearing cases: the CJEU's governance challenge**

The CJEU has changed considerably since its inception in 1951, but its most significant transformation occurred during the last decade when the EU welcomed thirteen new countries. This entailed a dramatic increase in the number of personnel employed by the Court,<sup>177</sup> which has largely been driven by the recognition of twelve additional official languages.<sup>178</sup> This has in turn led to a dramatic increase in the Court's budget from €250m in 2004 to €378m in 2016, the latter budget representing a 5.9% increase from the CJEU's 2015 budget.<sup>179</sup> Approximately 75% of the CJEU's annual budget goes into expenditures related to its 2125 employees.<sup>180</sup> When examined from this perspective, one may view the process which led to the adoption of Regulation 2015/2422 as a failed opportunity for the CJ to self-reflect not only on

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<sup>174</sup> S. Breyer, *Breaking the Vicious Circle* (Harvard University Press, 1993), p. 11: 'Tunnel vision ... arises when an agency so organizes or subdivides its tasks that each employee's individual conscientious performance effectively carries single-minded pursuit of a single goal too far, to the point where it brings about more harm than good'.

<sup>175</sup> Dehousse, *The Reform of the EU Courts (II)*, op. cit., p. 6.

<sup>176</sup> We for instance support the many useful suggestions made by Dehousse, *ibid.*, pp. 65-66 such as the need for all documents emanating from the CJ to be approved by the CJ's general meeting, catalogued in a specific register, and be accessible to the public on an identifiable area of its web site; the prohibition of the use of undated, unregistered and unsigned documents by the CJ in the course of a legislative procedure; the production of serious impact assessments or the consultation of stakeholders and independent experts on the basis of an inclusive and transparent process.

<sup>177</sup> Before 2004, when the EU had 15 Member States, the CJEU employed approximately 800 employees. In 2015, the CJEU employed 2,125 staff. See CJEU, *2015 Annual Report. Management Report* (CJEU, 2016), p. 97.

<sup>178</sup> The increased in the number of pages of translation to be produced has, for instance, increased from 394,090 pages when the EU consisted of 15 Member States to 1,074,808 today. See CJEU, *ibid.*, p. 18.

<sup>179</sup> See Budget of the CJEU and breakdown of appropriations, available at <[http://curia.europa.eu/jcms/jcms/Jo2\\_13983/direction-budget-et-comptabilite](http://curia.europa.eu/jcms/jcms/Jo2_13983/direction-budget-et-comptabilite)>

<sup>180</sup> See CJEU, *2015 Annual Report. Management Report*, op. cit., p. 75.

the most immediate quantitative challenges it faces, but also on the more profound qualitative challenges of its governance. As exemplified by the open conflict between the CJ and the GC during the legislative process leading to the adoption of Regulation 2015/2422, one may argue that the CJEU lacks a clearly defined governance structure and that the time has come for the CJ to revise how it exercises its administrative prerogatives in relation to the GC.

### 5.1 *The CJEU's current governance structure*

Due to its polysemic nature, the term ‘Court of Justice’, as employed in the Treaties and Statute, may be used to refer either to the umbrella organisation encompassing the three jurisdictions or specifically to the EU’s highest court. The Treaties and the Statute, while providing in detail for the judicial relationship between the three levels of courts within the institution of the Court of Justice, are silent on their administrative relationship. Indeed, unlike other EU institutions, the Treaties do not provide provisions relating to the governance of the Court.<sup>181</sup> In particular, the Treaties are silent when it comes to the rules governing its administration as well as its presidency<sup>182</sup>. Despite this omission, the Court has been empowered by the same Treaties with the authority to propose amendments to the statute of the CJEU under Article 281 TFEU; to request the creation of specialised chambers attached to the GC on the basis of Article 257 TFEU as well as the right of initiative in relation to the operating rules and membership of the so-called 255 Committee.

As a result of the lack of clear indications regarding the administrative authority over the EU’s judicial architecture, the exercise of all these prerogatives has been centralised over time in the hands of the sole President of the CJ acting on behalf of the whole institution. Several provisions in the Statute of the Court and Rules of Procedure favoured this reading. For instance, under Article 9 of the CJ’s Rules of Procedure, the President is said to represent the Court and must ensure inter alia the proper functioning of the services of the Court. Moreover, according to the Statute, the conditions under which officials and other servants of the CJEU render their services to the GC and CST respectively to enable them to function are determined by common accord by the CJ President, on the one hand, and the GC and CST Presidents, on the other.<sup>183</sup> Finally, all officials employed by the CJEU, also those attached to the GC and CST, respond to the Registrar of the Court who in turn acts under the authority of the President of the relevant jurisdiction.<sup>184</sup>

As a result, the three Luxembourg courts’ administrative bodies are under the control of the CJ Registrar, who ensures the direction of all departments,<sup>185</sup> under the authority of the President.<sup>186</sup> This position of prominence of the CJ over all administrative services is reflected in the organisation (*organigramme*) of the CJEU’s

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<sup>181</sup> The other exception is the European Court of Auditors. See on this point Forwood, ‘The Court of First Instance’, op. cit., p. 46.

<sup>182</sup> By contrast, several provisions of the TEU govern the modalities of designation of the presidents of the European Parliament, European Council, the Council and of the Commission. Those provisions are further operationalised by the TFEU, which also provide some instructions in relation to the governance of the ECB.

<sup>183</sup> See Article 52 of the Statute and Article 6 of Annex I to the Statute.

<sup>184</sup> See Articles 12, 52 of the Statute and Article 6 of Annex I to the Statute.

<sup>185</sup> With the exception of the internal audit department, which is directly attached to the President.

<sup>186</sup> Articles 10, 12 and 52 of the CJEU Statute.

departments.<sup>187</sup> What is striking is how little has changed since the establishment of the institution in 1951: the administration of the CJ de facto overlaps with that of the CJEU. As a result, the CJ President is essentially in control of all departments of the CJ, GC and CST and in a position to determine the allocation of resources among the three institutions.

## 5.2 *The CJEU as a centralised administration*

This section examines how the CJ has been exercising its administrative prerogatives in relation to the other jurisdictions, the GC and the CST, over time.

### 5.2.1 Cooperation or hierarchy?

The exercise of the administrative powers entrusted to the CJ, in particular to its Presidents, has historically been concentrated within the weekly meeting (*réunion générale*) of the member of the CJ. Besides the exercise of its budgetary powers, the *réunion générale* is not subject to any form of scrutiny.<sup>188</sup> Under the CJ's Rules of Procedure, it is expressly established that decisions concerning administrative issues are discussed and taken at the general meeting in which all court members take part.<sup>189</sup> However, as this does not entail the participation of the other instances making up the CJEU, there is no guarantee that those decisions (in relation to issues such as the allocation of resources,<sup>190</sup> the proposal for an amendment of the Statute, or the rules of procedure<sup>191</sup>) will represent the position of the constituent units of the whole institution. While there is undoubtedly a hierarchy between, on the one hand, the Court of Justice and, on the other hand, the General Court and the Civil Service Tribunal,<sup>192</sup> the modalities under which these institutional relations take place occur in a legal vacuum.<sup>193</sup> This vacuum has been filled up over time by an internal decision-making practice reflecting an unwritten convention whereby the CJ's members can take major decisions, without consulting more than half of the CJEU's members (i.e. GC plus CST members).<sup>194</sup>

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<sup>187</sup> The organisation of the departments shows that all the departments of the Court are attached to the Registrar of the Court of Justice. See the diagram available on the CJEU's website: <[http://curia.europa.eu/jcms/jcms/Jo2\\_7001/en](http://curia.europa.eu/jcms/jcms/Jo2_7001/en)>

<sup>188</sup> For further analysis, see Alemanno and Stefan, 'Openness at the Court of Justice of the European Union: Toppling a taboo' (2014) 51 *Common Market Law Review* 94.

<sup>189</sup> See Article 25 of the Rules of Procedure of the CJ: 'Decisions concerning administrative issues or the action to be taken upon the proposals contained in the preliminary report referred to in Article 59 of these Rules shall be taken by the Court at the general meeting in which all the Judges and Advocates General shall take part and have a vote. The Registrar shall be present, unless the Court decides to the contrary'.

<sup>190</sup> One cannot exclude further tensions to arise between the CJ and the GC when additional resources allocated to the CJEU in relation to the reform of the GC become available.

<sup>191</sup> In addition to determining its own Rules of procedure, the Court is also ascribed – according to Articles 254 and 257 TFEU – to give consent to the rules of procedure of the other jurisdictions.

<sup>192</sup> See e.g. Articles 12, 52 of the Statute.

<sup>193</sup> On this point, former judge Forwood wrote extra judicially that 'the administration of groups of courts at a particular level is generally best executed with the active participation of the Judges of the courts in question, rather than of the Judges of some other level of courts. That is particularly true in respect of an institution such as the Court of Justice, where – unlike the situation in many national judicial systems – most of the Judges at the highest level have never acted as Judges at the lower levels of the judicial pyramid'. Forwood, 'The Court of First Instance', *op. cit.*, pp. 46-47.

<sup>194</sup> *Ibid.*



This is possibly the weakest governance aspect in the EU's judicial architecture. It may also be viewed as a source of misunderstandings and frictions during the last reform but over the last decade. The possibility for the CJ, and in particular its sole President, to take important decisions without meaningfully engaging the GC and the CST does not simply raise the issue of the representative nature of the CJEU's administrative decisions in the light of this personalisation of power via the office of the President of the CJ, it also raises the issue of their legitimacy.

Notwithstanding its duty to consult other instances, evidence suggests that the CJ is the one that determines de facto the exercise of all of the CJEU's prerogatives.<sup>195</sup> Be that as it may, the CJ's failure to consult the GC before issuing its 2014-revised legislative proposal, whereas a clear majority of the GC judges were against the proposal to double their numbers,<sup>196</sup> could only but lead some GC judges to express their grievances in public.<sup>197</sup> Moreover, when it comes to the allocation of resources among the various Court's instances, it is apparent that given the greater workload of the GC than that of the CJ, the Registrar of the former should count on more employees than the latter. Unfortunately, both Registrars seem to be employing about the same number of staff, that is, around 50 staff.<sup>198</sup> Other examples may be given: the compensation of the CJ's *référendaires* (which is higher than for those working for GC and CST judges), access to the Research and Documentation service (requests by other instances require approval by the CJ President or Registrar), and to Translation Service (the CJ is the only one which can impose deadlines). Being the institution in charge of allocating the resources among its components, the CJ seems to have been unable to resist the temptation to systematically grant itself a more favourable treatment by comparison to its sister courts.

### 5.2.2 The CJEU's multiple hats: administration, jurisdiction and legislator

The existing concentration of all of the CJEU's prerogatives of a legislative and administrative nature in the hands of the President and the *réunion générale* raises an even greater issue. The weekly, general meeting convening all the members of the CJ and its Registrar is an eminently judicial – not administrative – body. Its chief task is to examine and discuss pending cases and, in particular, to adopt decisions upon the proposals contained in the preliminary report established by the Judge Rapporteur. This working document is completed once the written phase and it typically contains a set of recommendations about how to handle the subsequent instruction of the case.<sup>199</sup> The *reunion générale* provides the first (and generally the last) opportunity for most members to discuss the importance of a case, notably the most important ones, thus determining the future evolution of the CJ's case law.

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<sup>195</sup> Within the CJ itself, a further concentration of powers has been organised to the benefit of its President. In this context, one may note that there are no terms limits. The Rules of Procedure of the CJ only provides for the President of the Court to be elected every three years (Art. 8).

<sup>196</sup> Authors' Interview with GC Judge, June 2016.

<sup>197</sup> See Berardis et al, 'Doubling the General Court's Judges', op. cit., p. 7.

<sup>198</sup> Interview with CJEU official, June 2016.

<sup>199</sup> A preliminary report typically contains a proposal for the formation to which the case should be assigned, various recommendations regarding the necessity to organise a preparatory inquiry or other preparatory measures, regarding whether to dispense with a hearing or, at the CJ, an opinion of the Advocate General. See Article 59 of the CJ's Rules of Procedure.

Against this backdrop one may wonder whether the weekly general meeting is the right forum to centralise all CJEU's judicial, administrative, and legislative prerogatives. It would seem unrealistic to expect from anyone not only to take full charge of their assigned cases but also pay due attention to those assigned to other judges while keeping on top of the CJ's general administrative matters. As such, there is a real danger that the CJ's general meeting becomes, when administrative matters ought to be decided, a mere rubberstamping instance where decisions proposed by the Court's President are promptly adopted without much oversight. To put it concisely, even if judges were interested in exercising genuine oversight over the exercise of administrative responsibilities by the President, there is little incentive for doing so when the President's office is responsible for the allocation of cases among members.<sup>200</sup>

### 5.2.3 The conflict of interest inherent in the CJEU's structure

There is another problematic yet overlooked dimension of the CJEU's existing governance structure. By systematically merging the exercise of all CJEU's prerogatives in one unique forum, the *réunion générale* fails to guarantee a functional separation between the Court-administration and the Court-jurisdiction.<sup>201</sup> Yet this functional separation is crucial when it comes to avoiding conflict of interests stemming from the centralisation of all of CJEU's prerogatives in its highest jurisdictional instance. Today, in areas ranging from civil service litigation, public procurement to access to documents, the CJEU is expected to rule on the lawfulness of its own behaviour. This situation is bound to put the CJEU in direct conflict with the Strasbourg Court's case law relating to Article 6 ECHR<sup>202</sup> and with its own case law regarding the appearance of independence.<sup>203</sup> This unhealthy situation has rightfully led the European Parliament to adopt a resolution recommending that the institution 'be reorganised in such a way as to make a clearer separation between legal and administrative functions, thus bringing the setup more closely in line with Article 6 of the European Convention on Human Rights so that judges no longer run the risk of having to rule on appeals against acts in which their authorities have been directly involved.'<sup>204</sup> The recent *Gascogne* line of cases<sup>205</sup> brought once again to the fore the inherent conflict the CJEU finds itself in when it is called to play three different roles at the same time: that of the controlling authority over the judge in a case brought against it; that of administrative authority with a budgetary interest in the admissibility exception and, eventually, that of the jurisdiction which is expected to rule on the appeal that it lodged. An additional area is particularly problematic, that of disciplinary action as in those instances the CJEU is called upon to play both the role of the prosecutor and that of the judge.<sup>206</sup> Under Article 6 ECHR, however, an

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<sup>200</sup> Article 15 of the CJ's Rules of Procedure.

<sup>201</sup> This is required for instance by Article 15(3) TFEU that distinguishes between administrative tasks (the 'court administration') – which are subject to the general rules of transparency – and non-administrative tasks (the 'court jurisdiction') – to which the transparency requirements do not apply.

<sup>202</sup> ECtHR, *Procola v Luxembourg*, 28 September 1995, para 45.

<sup>203</sup> Case C-506/04 *Wilson v Ordre des avocats du barreau du Luxembourg*, EU:C:2006:587, paras 49-52.

<sup>204</sup> European Parliament resolution of 29 April 2015 with observations forming an integral part of the decision on discharge in respect of the implementation of the general budget of the European Union for the financial year 2013, Section IV – Court of Justice (2014/2080(DEC)), para. 10.

<sup>205</sup> See *supra* Section 3.2.2.

<sup>206</sup> Staff Regulation, Article 22 and Annex IX.

independent authority must undertake disciplinary procedures and enable the censured member of the Court to lodge an appeal against the decision.<sup>207</sup>

Last but not least, given the concentration of the power to allocate resources in the CJ, both the GC and the CST find themselves in a situation of constant ontological dependence with the CJ. As stated by former judge Forwood writing extra judicially:

‘the role of the CFI will in practice be determined by the willingness of the ECJ to take the decisions necessary to enable the Court of Justice, as an institution, to evolve in order better to deal with the challenges of today and tomorrow’.<sup>208</sup>

Indeed, today the CJ may influence not only the working modalities of its lower courts but also, as epitomised by the decision to dissolve the CST, their survival. This situation may lead the CJ to retaliate against any act or expression of dissent (or seen as such) by members of the other courts. As an illustration, you may imagine that the President of the CJ could retaliate against the GC by blocking all requests for additional funding for office equipment, supplies, travel expenses, chauffeurs, etc. While we do not intend to suggest this ever happened, any such retaliation would however conflict directly with Article 22 of the Council of Europe Recommendation on judges’ independence, efficiency and responsibilities<sup>209</sup>, and which provides that ‘in their decision making judges should be independent and impartial and able to act without any restriction, improper influence, pressure, threat or interference, direct or indirect, from any authority, including authorities internal to the judiciary’. The same provision further adds that ‘hierarchical judicial organisation should not undermine individual independence’.

In light of the analysis above, one may regret that the CJ did not take the opportunity of the first post Lisbon legislative process it initiated to seriously consider its overall governance structure and address more fundamental challenges than the issue of the then increasing number of cases pending before the GC. In particular, the concentration of all of the CJEU’s prerogatives in the hands of the President of the CJ as well as the use of *réunion générale* to take decisions whereas it does not require the active involvement of more than half of the CJEU’s members need, in our opinion, to be reviewed as they are bound to produce sub-optimal outcomes when it comes to allocating resources among its courts. It is furthermore a recipe for prompting frustration and undermining a sense of joint ownership over the key decisions determining the action of the institution and, as a result, their acceptance. Finally, this concentration of prerogatives is also set to lend itself to serious criticism when it comes to the impartiality of the CJEU in handling cases affecting its own interests (e.g. *Gascogne* line of cases) and disciplinary actions against its own members. Inevitably, this situation is potentially capable of undermining the credibility of the CJEU’s judgments dealing with the principles of good administration and judicial independence. It is therefore particularly regrettable that the CJEU failed to seize this reform as an opportunity to recognise and address the many challenges this article has (hopefully) contributed to identify.

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<sup>207</sup> ECtHR, *Harabin v Slovakia*, 20 November 2012, paras 130-142.

<sup>208</sup> Forwood, ‘The Court of First Instance’, op. cit., p. 47.

<sup>209</sup> Council of Europe, Recommendation CM/Rec (2010)12 of the Committee of Ministers on judges: independence, efficiency and responsibilities.

## 6. Conclusion

The reform of the EU's court system proposed by the CJ and adopted by the EU's co-legislators, with the full support of the Commission, is questionable for two main reasons. Firstly, the reform may be said to be disproportionate, when viewed in light of its declared objectives, and yet inadequate when assessed in the light of overall and more fundamental governance challenges facing the EU's judicial system as a whole. This should have been the starting point for any serious reflection on how best to reform the judicial structure of the CJEU on the basis of the many suggestions which have been made over the years to improve its internal decision-making as well as the clarity, coherence and predictability of its judicial output or, more broadly, its authority and legitimacy.<sup>210</sup>

Instead, the CJ, on the basis of an in-house and rudimentary assessment of the problems faced by the CJEU in 2011, came up with what is in our opinion an excessively narrow and reductionist diagnosis, an unfortunate but perhaps inevitable outcome in the absence of any involvement of external stakeholders and independent experts in this reflection process.<sup>211</sup> Secondly, even if one were to accept that the CJ did not face any challenge in discharging its mission and that there was indeed a serious and urgent need to solely remedy the GC's alleged backlog and the apparently excessive duration of its proceedings, it is difficult not to see the solutions embodied in the reform – the doubling on the GC in a three-stage process extending until 2019 and the dissolution of the CST in 2016 – as the least proportionate and cost-effective options available to the EU's co-legislators. In its original proposal, the CJ had put forward a more proportionate and easily reversible solution: the appointment of 12 GC judges, a change that would have not affected the operation of the CST. However, given the national governments' inability to agree on any other reform that one that would guarantee each of them an extra judge, the CJEU agreed to propose the appointment of 28 extra GC judges regardless of the objective needs of the EU's judicial branch. The politics of the reform further led the CJ to propose the dissolution of the CST, not because this specialised chamber was not working well, but because it

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<sup>210</sup> With respect to the CJEU's internal functioning, one may for instance refer to the EU Ombudsman's request for more transparency and accountability via new whistleblowing rules (see Case OI/1/2014/PMC, 26 February 2015) and the European Parliament's request for the release of clear information on all external activities undertaken by each judge and resources used in conjunction with the judges' external activities (see European Parliament resolution of 28 April 2016 with observations forming an integral part of the decision on discharge in respect of the implementation of the general budget of the EU for the financial year 2014, Section IV – Court of Justice (2015/2157(DEC), para. 12). With respect to the quality of the CJEU's judicial output, many have called for the introduction of dissenting opinions, as it would most likely oblige the CJ to offer more clearly and comprehensively reasoned judgments. For an overview of the issue, see e.g. J. Azizi, 'Unveiling the EU Courts' Internal Decision-making Process: A Case for Dissenting Opinions?' (2011) *ERA-Forum* 49-68. As regards the legitimacy and authority of the CJEU, one may recall the suggestions made by Pinto MEP to recruit 'judges through open tender from amongst law professors of repute and judges from the high courts of each Member State' or to appoint 'each judge for a single term of nine years only' on the basis of rules which would better guarantee gender parity in the recruitment of judges but also in the allocation of senior roles within the CJEU. We aim to address these issues and offer a blueprint for reform in a future article.

<sup>211</sup> See by contrast the highly inclusive process and the use of independent external experts as well as ad hoc experts by the Council of Europe in relating to the drafting of the CDDH Report on the long-term future of the system of the European Convention on Human Rights, CCDH(2015)R84, 11 December 2015.

allowed for the cost of the CJ's overall reform proposal to remain politically acceptable for countries such as Germany.<sup>212</sup>

In our opinion, the alternative reform package put forward by the European Parliament's rapporteur, consisting of the appointment of more staff at the Registry and in the translation services as well as the appointment of 19 more *référéndaires*, would have satisfactorily addressed the problems identified by the CJ at an even lower cost. The changes brought about by this proposal would also have been easier to reverse as soon as the number of pending cases before the GC had been cleared.<sup>213</sup> The suggestion to organise an independent monitoring of the EU courts by the European Committee for the Efficiency of Justice (CEPEJ) on the same terms as the courts of the Member States of the Council of Europe should also have been pursued.<sup>214</sup> The solutions defended by the European Parliament's rapporteur were however rejected by the European Parliament, and in particular its Committee on Legal Affairs, without the Parliament however undertaking a meaningful assessment of the CJ's diagnosis and various proposals. It was instead agreed to postpone the assessment of the necessity and effectiveness of the reform upon its implementation.<sup>215</sup>

The question today is whether the CJEU will be able to use the implementation of the reform to, first, mitigate its unintended consequences and, second, introduce a wider set of more sensible solutions addressing the many unanswered issues and recurrent problems identified in this article and elsewhere. In other words, one may only hope that this 'somewhat clumsy reform'<sup>216</sup> of the EU's court system will, for instance, encourage the CJ 'to finally let go of its most cherished article of faith, namely that it alone is the appropriate body which can and should receive preliminary references and issue preliminary rulings.'<sup>217</sup> This is however only one of many remaining challenges that the CJEU ought to address taking into account the interests of litigants and EU taxpayers. Given today's mounting dissatisfaction with the EU, whether justified or not, any significant institutional reform ought to be handled with particular care so as to strengthen rather than undermine the legitimacy of the EU as a whole.

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<sup>212</sup> See e.g. Declaration by Germany in Council, 'Draft Position of the Council at first reading...', 10043/15, ADD 1, 19 June 2015: 'Germany is concerned to ensure cost effectiveness of the reform and to minimise its budgetary impact'.

<sup>213</sup> Explanatory statement in European Parliament, Recommendation for Second Reading on the Council position at first reading, *op. cit.*, recommendation no 3.

<sup>214</sup> The Council's counter-argument that this cannot be contemplated in the absence of EU membership of the Council of Europe is not a convincing one. One may note in this respect the Commission's commitment to EU participation in the Council of Europe Group of States against Corruption (GRECO), made in 2012 (Communication COM(2012)0604 final. While the details for such participation have yet to be finalised, it suggests that the Council's emphasis on the lack of EU membership to reject the idea of availing of CEPEJ's expertise is not well founded.

<sup>215</sup> See Article 3(1) of Regulation 2015/2422, which provides that the CJ 'shall draw up a report, using an external consultant' by 26 December 2020 to examine inter alia the 'necessity and effectiveness of the increase to 56 judges'. Some have also regretted the limited and ill-informed nature of the parliamentary debate in this context. See Collins (currently a judge at the GC), Keynote Speech to the European Circuit of the Bar Annual Conference, *op. cit.*, p. 10.

<sup>216</sup> Weiler, Editorial, *op. cit.*

<sup>217</sup> *Ibid.*