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Potential challenges and benefits arising from a delegation of some References for Preliminary Ruling to the General Court

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XVI. ročník SVOČ Autor: Michal Černý

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Michal Černý

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List of abbreviations

CFI – Court of First Instance

Court *or* Court of Justice – Court of Justice of the European Union

EU – European Union

Request – Request submitted by the Court of Justice pursuant to the second paragraph of Article 281 of the Treaty on the Functioning of the European Union, with a view to amending Protocol No 3 on the Statute of the Court of Justice of the European Union

Statute – the Statute of the Court of Justice of the European Union

TFEU – Treaty on the Functioning of the European Union

Treaties – the Treaty on European Union and the Treaty on the Functioning of the European Union

Content

1 Introduction

Since the Treaty of Nice, there has been a relatively simple way to delegate part of the jurisdiction over the preliminary ruling proceedings before the General Court. For ages, this option was considered rather theoretical and unlikely to come into force. Even in the last few years, authors, who prepared commentaries on the Treaties, were very sceptical that such a reform might come any time soon. The main arguments were repetitive – the current procedure is fast enough, and the Court of Justice does not want any amendment in this area.[1] As we can see now, they have been mistaken, at least in one of the arguments.

Still, it took a very long time until the Court of Justice changed its position regarding the preliminary ruling proceedings. There are multiple reasons why such a delegation did not happen sooner. These start with the fear of losing unity and consistency of EU law and end with organisational problems and issues of a purely personal nature.

The pressure arising from the constantly increasing number of cases brought to the EU judicial bodies led to a Request issued by the Court of Justice itself, which proposes delegating part of the jurisdiction over preliminary references to the General Court. Such a step is not, in my opinion, that widely surprising. The judicial architecture of the EU is not sustainable in the long run considering the enlargements of the Union as well as an increasing number of areas which are in exclusive or shared competence between the EU and the member states.

The Court of Justice sets out parameters according to which it chose the areas of law that shall be delegated to the General Court when it comes to preliminary reference rulings. Those parameters basically are the areas which (i) must be identifiable and sufficiently separable, (ii) raise only a few questions of principle, (iii) has a *"substantial body of case law",* and (iv) are often subject to preliminary references for the measure to have an actual effect.[2]

[1] KELLERBAUER, Manuel, Marcus KLAMERT a Jonathan TOMKIN. The EU treaties and the charter of fundamental rights: a commentary. New York, NY: Oxford University Press, 2019, 1 online resource, p. 1765–1766, ISBN 0-19-251341-9, and
TOMÁŠEK, Michal and Václav ŠMEJKAL. Smlouva o fungování EU ; Smlouva o EU ; Listina základních práv EU: komentář. Praha: Wolters Kluwer, 2022, xxxiii, p. 870–871, 22 cm. ISBN 978-80-7676-508-5.
[2] Request submitted by the Court of Justice pursuant to the second paragraph of Article 281 of the Treaty on the Functioning of the European Union, with a view to amending Protocol No 3 on the Statute of the Court of Justice of the European Union, p. 4

Based on the abovementioned criteria, five areas of law have been chosen: (i) the common system of value-added tax, (ii) excise duties, (iii) the Customs Code and the tariff classification of goods under the Combined Nomenclature, (iv) compensation and assistance to passengers, and (v) the scheme for greenhouse gas emission allowance trading.[3]

The sole delegation of some preliminary references to the General Court brings, however, several issues or concerns which are foreseen by the community since the ratification of the Treaty of Nice. These mainly consist of the fact that defining a specific area of law might be problematic since the legal issues are usually complex; the division between two autonomous bodies might bring inconsistency in the interpretation of EU law; and the question of whether the General Court shall specialise in the predefined areas of law and what would be the consequences.

The potential reform does not bring sole challenges and issues; however, it is expected to solve some current issues as well. The Court of Justice is indeed overwhelmed, and the probability of a future decrease in cases is relatively low. In this context accustomed principle shall be mentioned: *justice delayed is justice denied*. This principle has been mentioned for years, and the EU judiciary is no exception to it.[4] Moreover, delegating primarily technical areas of law can open a way to more erudite judgments taking in mind the technical concept rather than sole legal text with no solid connection to real-life challenges. Concurrently, the partial separation of powers over the preliminary references may also make the ball rolling when it comes to the whole reform of the judicial architecture of the Union.

All the abovementioned aspects will be detailly analysed in this paper. I will try to tackle the most relevant points raised since the Treaty of Nice ratification while putting my own perspective on the issues. Overall, I will also try to provide an answer to the question of whether the whole amendment is reasonable or not. Finally, I will present my own theoretical vision of the development of the EU's judiciary architecture, which contains an overall and quite revolutionary limitation of preliminary ruling proceedings while keeping the importance of the Court of Justice in terms of the interpretation of EU law.

[3] Ibid., p. 4
[4] DE BÚRCA, G. (Gráinne) and Joseph WEILER. ACADEMY OF EUROPEAN LAW. The European court of justice. Oxford: Oxford University Press, 2001, XXVI, 233 p. ISBN 0-19-924601-7, p. 215–226

2 Challenges arising from the delegation of jurisdiction over the preliminary ruling procedure

As I have previously mentioned, several issues are repeatedly commented on by various authors considering the possible positives and negatives of the reform. Although only time will reveal the actual answers, in the event of such an amendment, it is essential to draw attention to these challenges in advance. In this chapter, I will try to separate the issues mentioned and analyse all the relevant arguments.

2.1 The complexity of legal issues and the problem of defining separated areas of law

The complexity issue arises from the fact that legal cases do not usually stay within artificially set boundaries. It is a piece of general legal knowledge, and it is not usually disputed. Thus, the argument reminding us of the difficulties arising from the abovementioned principle has sometimes been mentioned when the idea of proposing "*specific areas*" was raised in the past.[5]

The advocate general Ruiz-Jarabo Colomer commented on the issue by saying that *"The risk of confusion is not avoided by the fact that Article 225 states that the Court of First Instance is to be given jurisdiction to give preliminary rulings in 'specific matters', since any jurist knows that 'different matters' share common categories, institutions and legal principles, so that the possibility of disagreements does not disappear. The preliminary-ruling procedure seeks to protect the law, in the manner of a court of cassation, and there must be only one court of cassation in each legal order."*[6]

In addition, an analysis that examined numerous decisions of the Court of Justice concluded that even minor and insignificant judgments may tackle the issue of *survival of Community legal order*, in current terminology, the legal order of the Union.[7]

[5] MENGOZZI, Paolo. The Judicial System of the European Community And Its Recent Evolution. The law and practice of international courts and tribunals [online]. The Netherlands: BRILL, 2006, 5(1), 125-132. ISSN 1569-1853.
[6] Opinion of Advocate general, Ruiz-Jarabo Colomer delivered on 28 June 2001, De Coster (C-17/00, ECR I-9445), p. 74.
[7] LASSER, Mitchel de S.-O.-L'E. Judicial deliberations: a comparative analysis of judicial transparency and legitimacy. Oxford: Oxford University Press, 2009, 1 online resource 382 p.. ISBN 0-19-170671-X., p. 293

Moreover, such a line of interpretation is present even in the General Court case-law[8], which could potentially mean that the General Court would tend to delegate these cases back to the Court of Justice, causing complete dysfunctionality of the system.[9]

To deal with the concern at hand, it will be crucial for the Court to find a way how to divide cases between itself and the General Court transparently.[10] While it might seem challenging initially, there are a few ways to fulfil such a goal.

One solution might be leaving such a determination to national courts, and it could seem logical at this stage. Based on the assumption that we should have trust in the judiciary of member states, it could seem reasonable to leave the decision to them. However, in such a scenario, the preliminary rulings proceedings would, in a way, lose the reason it was created in the first place – to leave the interpretation power solely to the Court of Justice. By letting the member state courts decide, which EU body will deal with their case, we would equip the member states with a strong interpretative power, which does not seem, under the current judicial architecture, as a reasonable move.

The Court's solution, therefore, preserves the system whereby preliminary references are submitted directly to the Court, which then distributes them between itself and the General Court. The academic community has already discussed this method in the past and it seems reasonable. Even nowadays, the Court must determine if a particular case will require an Opinion of an Advocate General; therefore, at the same time, the Court can decide who will answer to the reference for preliminary rulings.[11] Detailed procedures might be incorporated into the Statute or Procedural rules of the Court of Justice, keeping the process as transparent as reasonably possible. That is in line with the Request of the Court of Justice, which proposed to enact *"detailed rules set out in its Rules of Procedure"*.[12]

One might argue that in the proposed scenario, not many questions regarding the interpretation of who shall decide will be raised. The opposite, however, might be true. It

[8] Ibid. p. 294
[9] The possibility to refer the case back to Court of Justice is proposed in the Request. See Request, p. 6
[10] AMALFITANO, Chiara. The future of preliminary rulings in the EU judicial system, EU Law Live [online], ISSN 2695-9593, p. 4–5
[11] ĆAPETA, Tamara. EU judiciary in need of reform? Research Handbook on EU Institutional Law [online]. United Kingdom: Edward Elgar Publishing, 2016, 263-288. ISBN 1782544739, p. 285
[12] Request, p. 5–6

would be foolish to think that after years of creative interpretation, the Court of Justice would suddenly follow a by-law without any theological enrichment. I would not even consider such a course of action as beneficial. It could be contra-productive to set too detailed rules, which will ignore the possible modifications and originalities which might be brought by practice. Therefore, a combination of wisely detailed formulation of Rules of Procedure and case law that will appear over the years seems like a potentially successful and stable solution to the issue of jurisdiction.

I suppose the procedure described above shall dissolve any concerns arising from the definition of specific areas of law. Naturally, practice can reveal some controversies or dysfunctionalities as it has already happened in the past; however, if this change was ever meant to be passed, this way seems the most feasible from the options at hand.

2.2 The threat to the unity and consistency of the case-law

2.2.1 Unity and consistency when two courts are in power

The issue of limited or even no consistency has been raised on numerous occasions in the history of the EU judiciary. In the 1980s Court of First Instance (today's General Court) was established, and some authors are still sceptical about the real consequences when it comes to the unity and consistency of this revolutionary amendment.

For instance, Tamara Ćapeta expressed the view that *"[s]plitting the jurisdiction of the then only Court deciding in plenary sessions on all issues that arose before it between the two institutions meant opening the path for an increasing lack of uniformity in the case law. It also meant that the CoJ permanently lost its monopoly in the interpretation of EU law, notwithstanding the possibility of appeal to the CoJ against the judgments of the CFI/GC. The creation of the CFI did not, however, solve the problem of the backlog and the excessive duration of proceedings."*[13]

Since then, the Court of Justice was often criticised for not being consistent even when dealing with these cases itself.[14] In the course of time, other concerns appeared when the

[13] ĆAPETA, 2016, Op. Cit., p. 266
[14] LASSER, 2009, Op. Cit., p. 287;
VAN EECHOUD, M. Along the road to uniformity: diverse readings of the Court of Justice judgments on copyright works. JIPITEC [online]. 2012, 3(1), 60-80. ISSN 2190-3387.; and
JACOBS, Matthias, Matthias MÜNDER a Barbara RICHTER. Subject matter specialization of European union jurisdiction in the preliminary rulings procedure. German law journal [online]. Toronto: Cambridge University Press, 2019, 20(8), 1214-1231. ISSN 2071-8322., p. 1215–1216

reorganisation led to transferring a majority of decisions of the Court of Justice from the full court to chambers.[15] Back then, the Court of Justice also questioned the guarantee of uniformity if the jurisdiction over the preliminary reference proceedings would be passed to the General Court.[16]

In this environment, a partial transfer of jurisdiction to a lower court has been now proposed. Thus, it is no surprise that the voices questioning the preservation of the unity and consistency of the EU case law began to reappear. Loud calls and critiques are coming from various authors, mainly questioning the transfer itself or pointing out the lack of adequate appellate power, which would partially counterbalance the damages made.

For instance, Daniel Sarmiento expressed his concerns with regard to the organisation of the General Court: *"…no matter how well the General Court handles this new task, there are structural difficulties ahead that deserve being addressed. First, in a jurisdiction with nine five-judge chambers and a tendency to solve cases in chambers of three judges, there is a considerable risk of lack of consistency. This has already been mentioned (Part IV.A.1 above) but it is relatively mitigated by the role of an effective appeal system. However, no appeals are in sight for judgments of the General Court in preliminary reference procedures. Areas of highly technical expertise, such as VAT or customs law, could be answered in very different ways by different chambers."*[17]

Another author, P.J.G. Kapteyn, raises a similar point without any further detailed reasoning by arguing that the delegation of some references for a preliminary ruling *"raises the question how to prevent discrepancies between the case law of the CFI and that of the Court of Justice."*[18]

While nearly everyone is raising caution for the potential inconsistency of the case law after the amendment, barely anyone provides some empirical data or at least examples from the current practice. Naturally, all the decisions, which have been annulled by the

[15] Report of the Court of Justice on certain aspects of the application of the treaty on European Union (Luxembourg, May 1995), para. 13
[16] ĆAPETA, 2016, Op. Cit., p. 270–271
[17] SARMIENTO, Daniel. The Reform of the General Court: An Exercise in Minimalist (but Radical) Institutional Reform. The Cambridge yearbook of European legal studies [online]. Cambridge, UK: Cambridge University Press, 2017, 19, 236-251. ISSN 1528-8870, p. 248
[18] KAPTEYN, P.J.G. Reflections on the Future of the Judicial System of the European Union after Nice. Yearbook of European Law [online]. Oxford: Oxford University Press, 2001, 20(1), 173-190. ISSN 0263-3264, p. 180

Court of Justice and remanded back to the General Court for further proceedings, might provide an example since there is no such option for the preliminary ruling procedure. These cases are, however, usually new legal problems which do not threaten the unity and consistency of EU law as a whole. The fact that the Court has a different opinion on a specific issue than the General Court does not necessarily mean that such a decision is ultimately correct and the only possible solution. I am not arguing in the sense that the development of case law will not change in the future as a consequence of the delegation of jurisdiction over the preliminary ruling procedure; yet I do argue that such a change does not have to necessarily endanger the unity and consistency of the EU law.

There is no doubt that judges appointed by member states have to demonstrate high professional abilities, even beyond those provided by the Treaties.[19] The requirements to be appointed to the Court of Justice or the General Court are almost identical, ensuring the high proficiency of judges sitting at both judicial bodies of the Union. The only difference is the requirement for a professional qualification, which is, however, very similar. To the Court of Justice, solely judges with the qualification to be appointed to the *highest* judicial office of a member state can apply, while in the case of the General Court, a qualification to be appointed "only" to a *high* judicial office is sufficient. In my view, this does not represent incentive, which would be powerful enough to question the erudition of the judges of the General Court; on the contrary, more trust in this judicial body would be beneficial for the whole judicial architecture due to reasons I will further analyse in the last part of this paper.

Moreover, in the proposed scenario Court of Justice keeps its superior power when it comes to a decision about which court will be dealing with every single preliminary reference; in other words, which cases will be delegated to the General Court as described in the previous section. This element is a crucial difference when it comes to comparison with the direct actions, which are taken directly before the General Court. Thus, if some essential precedential issue arises from some preliminary ruling, the Court of Justice will simply not delegate such a case. This procedure limits the risk of serious endangerment to a bare minimum.

[19] See Art. 19 of the Treaty on European Union and Art. 253 and 254 of the Treaty on the Functioning of the European Union

Despite the fact that this is the first time when the General Court would be empowered practically with a word of the last instance, I see no cause for serious concern in this case. Even if my thesis was mistaken, the areas proposed for transfer of jurisdiction should not be severely controversial. The Court of Justice was precisely choosing these areas to prevent any inconvenience for itself, which would conceivably arise if the chosen areas raised questions of principle on a regular basis. In fact, many of those cases are solved in the chambers of three judges with no Opinion of the Advocate General.[20] This composition cannot be justifiably described as more legitimate or even more erudite. As I mentioned before – one of the keys is to stop seeing the General Court as the Court of First Instance. The name change did not have only symbolic meaning; the old name did not make sense anymore; this is the way the General Court shall be approached nowadays.

2.2.2 What will be the role of the review procedure, and how will it perform its role?

The review procedure is described in the Statute and has its basis in the Treaties.[21] It has already been used historically, during the time when the Civil Service Tribunal was in service. Back then, the review procedure was somewhat controversial and criticised by the professional community.[22] Even the Court used the review procedure as one of the arguments, before the Civil Service Tribunal ceased to exist, to terminate its existence.[23] As controversial as it was, the wording of the Statute did not and is not proposed to change in this part; thus, the review procedure retains the same form today as it did during the existence of the Civil Service Tribunal. Nevertheless, it still remains the last safeguard protecting of unity and consistency of the case law.

The nature of the review procedure is relatively simple. This process could be compared to a restricted appeal to the Supreme Court or a constitutional complaint to the Constitutional Court; the comparison to the constitutional complaint is probably more apt. The reason for that is that the only legal ground to trigger the review procedure is *"a serious risk of the unity or consistency of Union law being affected."*[24] There is no other possible way to start this kind of proceeding than claiming on this ground. That could be

[20] SARMIENTO, 2017, Op. Cit., p. 247
[21] See Art. 62–62b of the Statute of the Court of Justice of the European Union and Art. of the Treaty on the Functioning of the European Union
[22] See KAPTEYN, 2001, Op. Cit., p. 181
[23] SARMIENTO, 2017, Op. Cit., p. 248
[24] Art. 62 of the Statute of the Court of Justice of the European Union

compared to the relatively narrow jurisdiction of Supreme Courts or Constitutional Courts. The reason I am making this comparison is simple – the General Court is not losing its last instance power, which will receive if the Court's Request is granted. Solely in the case, there will be a severe threat to the unity or consistency of the EU law – basically constitutional condition – the review procedure will be relevant.

Concurrently, the only person with standing to initiate the review procedure is the First Advocate General, and he or she has one month to decide whether he or she will or will not initiate the review proceedings, and the Court of Justice has another month to decide if the case should be reviewed.[25] Once it should, the Court of Justice would, in the urgent procedure[26], substitute the answer or answers given by the General Court.[27] Therefore, the principle of appeal is used.

The First Advocate General is chosen for the period of one year and is appointed by the Court of Justice after all Advocate Generals are heard. Tamara Ćapeta proposed, but with respect to the Civil Service Tribunal, to increase the number of persons who would have the standing to initiate the review procedure. Namely, she mentioned the General Courts itself and potentially the parties.[28] This solution could have seemed reasonable in connection to the Civil Service Tribunal. Back then, the review procedure represented proceeding similar to the one which is usually used on a national level when parties appeal to a Supreme Court. In the current scenario, however, the Court would review a decision based on which a different decision in different jurisdiction has already been issued. In other words, it would pass a judgment which would influence another judgment passed out of the jurisdiction of the EU judiciary.

Considering the difference, the idea of empowering judges of the General Court still seems reasonable and could be put into discussion if there is a will to amend the review procedure. The idea of empowering parties, on the contrary, does not work for preliminary rulings at all. The reason is simple – it would be an empty highway to obstructions and possibly could cause unreasonable delay to certain proceedings. While

[25] Ibid.
[26] Ibid. Art. 62a
[27] Ibid. Art. 62b
[28] ĆAPETA, 2016, Op. Cit., p. 286

those are mere considerations, I will further analyse the situation if the review procedure stays in its current form.

The review procedure is definitely something that could be seen positively in a way that it provides the needed safety break, which can the Court of Justice activate once the General Court becomes too proactive or shows signs of another undesirable trend when it comes to the established case law. Even though I claim throughout this paper that we should put more trust in the General Court in general, in the current judicial architecture, this safety break represents an important institute since the Court of Justice must remain the court with the last word – at least until the judicial system will be reformed.

Accepting the theoretical aspects mentioned above, there are still three notable practical questions: Will the system work with a relatively high caseload, which will be potentially delegated to the General Court? Will this step not have a too negative impact on the length of the preliminary ruling proceedings? And how will the *serious risk of unity or consistency* be interpreted?

As to the first question, it shall be noted that the review procedure has not been tested in the past on such a large caseload, which is expected to come if the delegation is approved in the proposed form. Moreover, these reviews will potentially appear from all the proposed areas, which might make the whole review procedure even more challenging to handle.[29] Daniel Sarmiento commented on this issue in the sense that *"[n]o matter how well the General Court will perform its role in handing preliminary rulings, the Court of Justice will have to make a determination on every single judgment rendered by the General Court. As is known, the review procedure is instigated by a proposal of the First Advocate General. The way in which this has worked is not public, but we know that the decision to review a General Court judgment is a collective effort that involves the First Advocate General and a chamber of the Court of Justice. These resources will have to be mobilised on each and every preliminary ruling handed by the General Court. In the end, if the transfer is intended to alleviate the Court of Justice's over- burdened docket, there is a risk that the review procedure brings the burden back through the back door."*[30] That breaks down the problem almost perfectly. All the concerns mentioned will have to be solved by the internal organisation of the Court, if not by an amendment of the Statute.

[29] SARMIENTO, 2017, Op. Cit., p. 249
[30] Ibid.

Without a reliable solution, the review procedure might become just an unpredictable tool which is not used wisely – once it is needed – but rather only when there is time to use it. That situation would basically eliminate the major benefit – the control of unity and consistency.

The second issue might be the time consumption of the procedure. According to the Statute, the Advocate General has one month to decide if he or she will or will not file a motion to the review. Once the motion is filed, the Court of Justice has another month to decide if it will or will not initiate a review procedure.[31] This process creates one month surely, and two months potentially, delay in the effectiveness of the General Court judgment. In other words, the answers of the General Court will be "usable" by the domestic court after one or two months, even in a situation when no review will actually be processed and delivered. Considering the fact that the main argument for the reform proposed is speeding up the preliminary ruling procedure, this solution seems downright ironic.

Lastly, how will the Court and the First Advocate General interpret *serious* risk to unity and consistency? This is rather a theoretical question, which could be, however, important when it comes to the determination of the role of the review procedure. The inspiration could naturally be taken from the practice used in the past, which is sometimes suggested.[32] Considering the importance of the reform at hand, I do not believe this will be the path the Court will take. I am almost convinced that the Court will want to create a new case law for the "preliminary ruling review", and it is probably the right way. Even though the review procedure is the same in its basics, its importance is relatively high, and any sensitive approach shall be welcomed considering the different nature of the preliminary ruling procedure. The Court of Justice will have a challenge ahead of itself as the case law might be one of the critical things to make the whole review procedure relevant and constructive.

Despite the fact that the review procedure, by its nature, seems like a reasonable compromise between a full appellate system and no possible way to appeal at all, many challenges considering this topic are in front of all involved bodies. Only the practice will

[31] Art. 62 of the Statute of the Court of Justice of the European Union
[32] SÁNCHEZ, Sara Iglesias. Preliminary Rulings before the General Court Crossing the last frontier of the reform of the EU judicial system?, EU Law Live [online], 2022, ISSN 2695-9593, p. 14

show how the whole system will actually work in the environment governed by activated Art. 256(3) TFEU. At the same time, all relevant bodies should keep their eyes open and do as much as possible to prepare a functional system if the Request is heard. Many doubts have been raised with respect to the consistency and unity of the EU law after the division of competencies between the two functioning bodies. The review procedure might be an effective solution but does not have to be necessarily. The concerns raised are of serious nature, and a light-hearted approach might result in significant complications not only in the consistency of case law but also in the trust in the whole European Union's judicial system.

2.2.3 Advocate Generals at the General Court

One of the proposed partial solutions for the threat to unity and consistency is also an extension of the jurisdiction of Advocate Generals to the General Court. The Court claims that it *"will contribute to the strength of the analysis carried out by that court, given that each case will benefit, here as well, from twofold consideration, as the examination of the case file by the Advocate General designated might usefully supplement, qualify or enrich the analysis carried out by the Judge-Rapporteur in his or her preliminary report."*[33]

While this step is more or less unprecedented since the General Court rarely used the assistance of Advocate Generals as foreseen by Article 49 of the Statute,[34] it seems like a reasonable solution with respect to the fact that Opinions of Advocate Generals often provide more complex views than the final judgements. Also, an Opinion of an independent body might remind the chambers of potentially overseen aspects, which would otherwise lead to inconsistent decisions.

I consider this proposal of the Court of Justice reasonable. The current importance of preliminary rulings is high, and the competence of Advocate Generals might eliminate the threat of inconsistency in the judgments, at least in some cases. Any such proposal that does not carry numerous negative consequences shall be considered beneficial and thus be supported.

[33] See Request, p. 7
[34] SÁNCHEZ, 2022, Op. Cit., p. 12

2.3 General Court as a specialised court for the delegated areas

The Court of Justice reminded the relevant bodies that during the last years, the General Court doubled the number of its judges, started to decide certain cases in the chamber composed of five judges and became specialised in some areas, which, according to the Court, means that *"[t]hose developments place the General Court in a good position to be able to hear and determine not only a larger number of cases, 7 but also new cases which do not come solely within the jurisdiction that it has enjoyed until now."*[35] As doubtful as this whole argument may sound, the specialisation in the EU judiciary has always been controversial. Considering the arguments of the Court, it may seem that the Court suggests that more specialisations shall occur at the General Court internally, which brings even more controversy to the Request as a whole.

The specialisation itself can actually bring several benefits to the functionality of the whole system, and it is probably also the reason why the Court mentioned the specialisation in its Request. Firstly, some authors argue that specialisation could bring more legal certainty as well as consistency due to *systematic development in a given area of law*.[36] This opinion is undisputedly one of a highly controversial nature, and it will be further addressed. Secondly, the specialisation can lead to an increase in productivity and result in higher efficiency of the process, which potentially makes the ability to produce judgments in a shorter period of time.[37] This aspect could potentially be widely beneficial and support the amendment's purpose. Thirdly, judges' reasoning could be more coherent and understandable, further supporting legal certainty. Simultaneously, the specialisation can lead to more cases decided consensually, which would prevent striking out several passages from the final judgments, again leading to more coherent and understandable decisions.[38] Lastly, the judges of specialised bodies or chambers tend to be more sensitive to the consequences of certain judgments than judges of generalist courts.[39]

While all these benefits might seem attractive and justify the issuance of the Request, there are many voices criticising and denying any more radical development in favour of

[35] Request, p. 3
[36] JACOBS, MÜNDER, RICHTER, 2019, Op. Cit., p. 1222
[37] Ibid. p. 1223; and
DEHOUSSE, Franklin. Reform of the EU Courts (II): Abandoning the Management Approach by Doubling the General Court. Egmont Institute, 2016, p. 60
[38] JACOBS, MÜNDER, RICHTER, 2019, Op. Cit., p. 1222
[39] Ibid. p. 1223

advanced specialisation. The first contra argument directly opposes the first argument in favour stated in the previous paragraph. It is argued that any specialisation and division of the deciding bodies will lead to inconsistency when it comes to the whole legal system.[40] In the current clash of opinions, giving a single and correct answer to conclude the discussion appears challenging. However, it is necessary to recall at this point that the world of law and legal issues is widely interconnected. For me personally, it is hardly imaginable that the full consistency between all relevant areas of law will be preserved in the situation when specialised and narrow-focused chambers have a word in it.

Moreover, such a solution might actually lead to severe internal disagreements between the chambers, which is undoubtedly something that shall be prevented. Matthias Jacobs, Matthias Münder and Barbara Richter argue that this "*disadvantage can be made manageable, in part, through the way specialization is set up, and especially through the choice of judges."*[41] From my perspective, this idea seems somewhat naive. We have seen several "arguments", for example, between the Court of Justice and the Italian Constitutional Court[42] in the past. However, while this inter-judicial discussion usually leads to a fruitful conclusion, this seems to be a completely different situation. Such a discussion inside one of the European Union's judicial institutions might seem as productive only until the intensity crosses an imaginary threshold. Discussion is productive, but constant conflict is not. The threat to consistency has been tacked in the previous chapter, and apparently, it represents serious concern when it comes to the Request. For these reasons, any such concern should be treated with the utmost seriousness.

The second grievous concern raised is the compatibility of specialised chambers with the current state of judicial architecture of the European courts. Political decisions still play a primary role; thus, many appointments are still made, led by solely a strong political will.[43] At the same time, the General Court is designed to be and expected to be generalist.[44] These more or less technical obstacles might be deciding as well. The Request does not aim to change the judicial system entirely, and even specialisation does

[40] ĆAPETA, 2016, Op. Cit., p. 286
[41] JACOBS, MÜNDER, RICHTER, 2019, Op. Cit., p. 1223
[42] See for example Judgment of 8 September 2015, Taricco and Others (C-105/14, EU:C:2015:555), known as *Taricco II* and the judicial dialog between the CJEU and the Italian Constitutional Court.
[43] SARMIENTO, 2017, Op. Cit., p. 243
[44] DEHOUSSE, 2016, Op. Cit., p. 60

not necessarily have to lead to such a conclusion. However, the sole existence of the possibility might lead to serious political conflicts; therefore, it shall be considered a potential threat and a concern with respect to the amendment.

The influence and tangible effect of specialisation are still very uncertain and unknown. Throughout all the criticism, it seems almost unavoidable that some kind of specialisation will have to be proposed, even with respect to the highly technical nature of branches of law, which the European courts have to deal with. Simultaneously, the discussion before making any amendment shall surely cover the abovementioned concerns. Apart from many others, one of the topics could also be the possibility of reincarnation of specialised courts, as are enshrined in the Treaties[45] or similar institutions in an amended form.

3 Benefits arising from the delegation of the jurisdiction over the preliminary ruling procedure

Naturally, the Request was not made to cause only problems and establish numerous academic discussions between the experts on EU law. The issue of specialisation and possibly more erudite judgments has been discussed in the previous chapter since this topic is rather controversial and thus depends on an assessment of future practice. This part will consist of the substantial benefit – the potential increase in celerity with which the cases are dealt with.

The average time for the Court of Justice to answer a reference for a preliminary ruling in 2022 was 17.3 months.[46] This period seems protracted considering the fact that it is only part of the whole proceeding, which takes place before some domestic court. When a preliminary reference was sent to the Court of Justice last year, the domestic court could have expected that in one and a half years, there would be no progress in its case. Such a long time does not seem in accordance with the principle mentioned in the introduction of this paper: *justice delayed is justice denied.* I believe it is generally agreed that such a long term gives no motivation to the domestic courts to issue a reference for a preliminary ruling, let alone to propose such a step by the parties themselves.

In this sense, the number of preliminary rulings referred by various member states provides an exciting field for consideration. For an unspecified reason, the number of

[45] See Art. 257 and 256(1, 2) of the Treaty on the Functioning of the European Union
[46] Request, p. 3

preliminary references seems to be higher from the member states, which are long-term members of the Union or Communities, respectively.[47] One of the possible explanations could be that the "traditional" members got used to referring for preliminary rulings and thus are not discouraged by the long duration of proceedings before the Court of Justice, while the "younger" member states, lacking any preliminary reference tradition, are discouraged effectively. Even though this is a bare speculation with no empirical evidence, if it was true, the positive impact of the proposed amendment could be much higher and much more beneficial than the Court or anybody else expects.

Historically the time the Court of Justice needed to deal with its cases varied drastically. In 2003 it reached 26 months.[48] Contrariwise, in the 1970s, the interval was somewhere around six months.[49] Naturally, the caseload back then – no matter if in the 1970s or in the 2000s – and now is not comparable. However, these numbers show that the length of any procedure, even before the European judicial bodies, is reducible and manageable. While I disagree with the Court when it comes to the evaluation of the situation in 2015,[50] I agree with the Court that the situation, when it takes more than 17 months to deal with preliminary references, must be solved, and it must be solved effectively and expeditiously.

The Court provided statistics since 2016 considering the number of cases before itself and the percentage of the preliminary references that came from potentially delegated areas.[51] While the total number of cases seems to slowly grow, which can justifiably reason the slightly slowing tendency in solving the preliminary references (15 months in 2015, 17.3 months in 2022), the number of preliminary references seems relatively stable. These statistics are, paradoxically, raising the question of why actually the Court of Justice decided to submit the Request now.

I will leave the previous question unanswered. Nonetheless, it shall be noted that the current length of the proceedings does not provide sufficient protection for the rights and

[47] LEIJON, Karin. National courts and preliminary references: supporting legal integration, protecting national autonomy or balancing conflicting demands?. West European politics [online]. London: Routledge, 2021, 44(3), 510-530. ISSN 0140-2382., p. 530
[48] BOBEK, Michal. The Court of Justice of the European Union. The Oxford Handbook of European Union Law [online]. Oxford University Press, 2015. ISBN 9780199672646., p. 160
[49] KURCZ, Bartlomiej. Treaty of Nice and the reform of the judicial architecture of the European Union. The Polish quarterly of international affairs [online]. 2000, 9(4), 26-47. ISSN 1230-4999., p. 29
[50] See Request, p. 3 – The court claims that the situation now is *very different* in comparison to 2015.
[51] See annexes to the Request

fundamental principles, which should represent the basics of any legal system in Europe, including the one of the European Union. As the amendment would lower the number of preliminary references before the Court of Justice by approximately 20%[52], it can be reasonably expected that preliminary references will be answered faster if the Request is heard by the European Parliament and the Council of the European Union.

Lastly, it is worth mentioning that in the case that the proposed measure will bring the desired effect, it could be the metaphorical sparkle that could potentially start more discussions regarding the future of the EU's judicial architecture. The importance of the EU judiciary has always been high, but it seems to increase with every year and every month. The reform will be inevitable at some point, and the question is if this will be now or later.

4 Conclusion

The reform requested by the Court of Justice is undisputedly one of those which are controversial by their nature. Some controversy is undoubtedly in order. After all, one of the most significant institutes in the history of the EU judiciary, which shaped the legal system into its present form by notoriously known judgments such as *Costa v. ENEL*, *Internationale Handelsgesellschaft,* and many others, shall finally be amended, and the absolute monopoly of the Court of Justice should soon be over.

Apart from that, many challenges stand before all the European judicial bodies, not only those of the European Union but also the national ones. While the Court of Justice and the General Court will have to deal with the definitions of the chosen branches of law, the threats to unity and consistency, the possible specialisations, and also many other issues that will arise, the domestic courts should learn to ask preliminary questions, if they have the opportunity to do so. If nothing else, it would be the only real test of whether the new system is working smoothly and efficiently to meet the expectations the Court has placed on it.

As demonstrated throughout the analysis; despite the fact that there are real threats that should be discussed and closely monitored during the time, it does not seem that any of those would be severe and unsolvable. If everyone involved makes a reasonable effort to

[52] See annex 3 to the Request

make this renewed system work, I believe that the threats can be limited to an acceptable minimum.

The benefit, on the other hand, seems to be only one. It maybe is. However, the duration of any judicial proceedings should always be taken seriously and with great weight. We have to remember that it is one of the fundamental principles. Medical treatment also cannot be delayed, so why should the law be?

The law and legal system can never stop evolving. If they did so, they would lose a colossal part of their contribution to society. Based on the analyses delivered, I am wholly concerned that the Request submitted by the Court is reasonable and shall be supported. The proposed changes are, however, of a solemn nature, and every amendment must be detailly discussed and passed in a form which will negatively affect the European legal system as little as possible.

5 A future vision of judiciary architecture in the European Union

Finally, I will describe, relatively briefly, my vision, where the EU judiciary should aim, and the potential reforms that would lead to a system design capable of dealing with widening competencies and increasing demand for the rulings issued by EU courts. In certain aspects, my vision corresponds to the one of J. H. H. Weiler's published in 2001,[53] as it inspired me in certain aspects. I will divide my thesis into two parts.

5.1 Competences of judicial bodies

I do not believe that the judiciary can maintain its current form. The competencies of judicial bodies will indeed have to evolve. Even though radical amendments could represent a solution, I tried to stick to a certain degree to the current text of the Treaties, recognising the difficulty of possible complex reform.

Firstly, the role of the Court of Justice should change. The relatively low number of judges is not sustainable in the scenario in which the caseload is rising. Considering the low amount of preliminary ruling references currently coming from the "newer" members, the increase is, however, expected and desirable. Therefore, the Court of Justice should

[53] DE BÚRCA, WEILER., 2001, Op. Cit., p. 215–226

move towards a model of a notional Constitutional Court of the Union[54]. Naturally, this is not meant stricto sensu. Its role will still differ due to the unique composition of the Union and the fact that despite the dreams of some experts, the European Union is still not a federation and does not seem to head in that direction any time soon.

I can imagine, however, that the Court of Justice will keep its role only with respect to the fundaments of the European Union, meaning, for example, the Treaties. The Court of Justice would no longer interpret the secondary law. It potentially would only review decisions of the General Court if it tried to change the interpretation of specific Treaty provisions, if it threatened the rights arising from the Charter of Fundamental Rights of the European Union or if it tried to overrule some fundamentally established case-law. In this sense, I see the constitutional role of the Court in the future.

Contrariwise, the Court of Justice shall keep jurisdiction over deciding disputes between member states. It is vital that such disputes are decided by the most respected body, which is represented by judges from every member state equally. These disputes are indeed often widely political, and delegation could lead to severe problems in the political field.

Secondly, the General Court shall be trusted with much more responsibility than today. Its construction has much more potential to evolve than the one of the Court of Justice. While I do not believe that it should be entirely composed of specialised chambers since I think that the judicial body this important should remain generalist, I am convinced that the General Court should take the role of the notional Supreme Court of the Union. It should be granted the authority to decide all preliminary references and all appeals that are and will be sent to the EU judicial bodies. Its word should be final and enjoy great authority. Only rarely could the decisions be overruled by the fundamental appeal or complaint made to the Court of Justice. In my perspective, General Court should become the centre of the Union's high judiciary.

The consequence of the proposed idea might be the overloading of the General Court. Therefore, I would propose to leave the strict rule of one member state equals to two

[54] For more visions considering the Court of Justice as the Constitutional Court see:
CIMPOERU, Dan. The Interpretation Function of the European Judge - Basis for Preliminary Rulings. Acta Universitatis Danubius. Juridica [online]. Danubius University Press, 2013, 9(2), 14-24. ISSN 1844-8062; and
SARMIENTO, 2017, Op. Cit., p. 249–251

judges. I would propose to choose judges of the General Court more from the whole EU's pool while keeping *at least* one judge from each member state. Even though I am aware that, politically, this would be very controversial, I believe it would represent a fair balance between equality and functionality.

Thirdly, I would renew the functionality of specialised courts as understood by Article 257 TFEU. It could provide a compromise between the generalist highest court (the General Court) and the need for specialisation in areas such as intellectual property law, competition law or any other field according to what is necessary. These "lower" courts would provide an erudite review of the decisions of the Commission or other EU offices, taking into account the real impacts while keeping the chance for the General Court to avoid chamber specialisation, which always was and always will be controversial.

5.2 Appeals and preliminary ruling procedure

Besides the organisational and competency reforms, I would also revise the whole system of preliminary references. Once again, and for the last time, I repeat that *justice delayed is justice denied.* The preliminary ruling procedure, as it exists nowadays, significantly slows domestic proceedings, discouraging courts from referring them and the parties from proposing to the court to refer them. Even though increasing the celerity of dealing with preliminary ruling procedures might seem like a partial solution, I believe they should be eliminated entirely except for courts of the last instance.

The argument of unity and interpretational monopoly is usually raised with respect to the preliminary references. I am convinced that unity can be ensured even by an appellate system, leaving the idea of interpretational monopoly. The domestic courts must be granted more trust with respect to the interpretation of EU law. At the end of the day, they are still obliged to consider EU law as part of their own domestic legal order.

In my perspective, the preliminary references, as we know them now, should be substituted with a possibility to call a "European Appeal", meaning that once a binding decision is issued by the domestic courts and the only appellate body is the Supreme Court, there should also be a possibility to appeal directly to the General Court, which would have the same jurisdiction as any Court of cassation. It does not mean that domestic Supreme Courts would lose their role; on the contrary, they would still deal with all legal questions arising from the disputes and should, as the only bodies, have the jurisdiction

to issue references for a preliminary ruling to the General Court to start a judicial discussion about some legal question. Exclusively in the situation when a party would like to appeal based solely on EU law, it should have a possibility to appeal directly to the General Court. It would lower the number of cases that might be effectively solved by the domestic courts and speed up the first- and second-instance procedures.

In my opinion, these changes would lead to higher efficiency when it comes to dealing with preliminary references and other proceedings. The common law world, which is based on precedents, also does not include preliminary reference procedure and does not report any broad issues with the interpretation and unity of their legal system. I am not stating that the whole idea of preliminary references is wrong; however, I am concerned that when it delays the issuance of a final decision, it still does not fulfil its role, and it *denies justice* through the time it takes to decide.

To conclude, my vision above provides a simplified view of certain topics, which would undisputedly need deep academic discussion. In view of the fact that this thesis is not the core of this paper, its purpose is instead to stir up discussions on the subject and pinpoint some severe holes in the functionality of the whole EU judiciary.

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