

Where do we stand on the reform of the EU's Court System? On a reform as short-sighted as the attempts to force through its adoption | Verfassungsblog

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1. Background

To 'reinforce the efficiency of justice at EU level', the Court of Justice of the EU suggested in 2011 the appointment of 12 extra judges at its lower instance court, the General Court (GC), before eventually requesting a total of 9 new judges in 2013. However, following persistent disagreements between the Member States on how to rotate the appointments between themselves, this request was removed from [a package of reforms to the Statute of the CJEU aimed at tackling the growing workload](#). The Court of Justice eventually proposed in October 2014 to double the number of judges working at the GC, from 28 (one for Member State) to 56 (two per Member State). To reduce the economic burden, which would ensue from the proposed reform, it also recommended abolishing the Civil Service Tribunal (CST) and 'upgrading' its 7 judges to the General Court.

In a [previous post](#), we questioned both the diagnosis and the solutions proposed by the CJEU. We offered the view that the 'real challenge facing the Court today is more qualitative than quantitative in nature' and called for 'a broader reflection in the context of a more evidence-based and inclusive framework.'

In a [follow-up post](#), our colleague Steve Peers argued that the lack of a proper discussion on the merits of the reform and attempts to silence critics would most likely damage the Court's authority. He further suggested a compromise solution which would consist of the EP agreeing to the Court's proposal with a sunset clause, according to which the new extra GC judges would serve one term only at the end of which a full impact assessment of whether the need for extra judges is required.

To pre-empt any suspicion of potential conflicts of interest in an EU 'ecosystem' which is not characterised by watertight bulkheads between the legislative and judicial branches, we would now be tempted to propose the adoption of an additional clause. In other words, the actors involved in the adoption of the Court's proposal, who would be eligible to be among the new judges (e.g. MEPs, European Parliament and Council officials), would commit not to take up those positions.

No actor involved in the ongoing legislative process has however shown any visible interest in discussing clauses of this nature. Indeed, for all intent and purposes, the Court's proposal to double the number of GC judges and abolish the CST has secured the quasi-unanimous support of the Council, with only the UK voting against it on the grounds that the new proposal is not a proportionate way to deal with the GC's backlog (Belgium and the Netherlands also abstained). Interestingly, the UK Minister for Europe [stated](#) last March that '[o]ther 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.'

Be that as it may, the Council's position, which was [formally adopted on 23 June](#), unreservedly accepts the CJEU's diagnosis and solutions, and is now currently examined by the European Parliament.

In this post, we outline the serious concerns recently voiced by the European Parliament's Rapporteur, [Mr Antonio Marinho e Pinto](#), before outlining our own concerns with respect to how the debate (or lack thereof) is being conducted at the European Parliament.

1. The Rapporteur's Case Against the CJEU's Proposal

In the [explanatory statement](#), which follows the text of the [draft European Parliament legislative resolution on the Council position at first reading](#), the Rapporteur makes clear his strong opposition to the proposal to double the number of GC judges and offers a number of solid arguments in support of this view. These arguments are summarised below.

The Rapporteur first expresses doubts about why 28 new judges and the abolition of the CST are suddenly required when the Court of Justice itself suggested in 2013 that 9 new GC judges were sufficient to address the steady increase in the number of cases before the GC over the years.

Secondly, the CJEU's proposal is presented as showing 'deep contempt for European taxpayers' money' and amounting to a frivolous increase in spending at a time of widespread austerity and a general commitment by EU institutions to reduce employee numbers by around 5 %.

Thirdly, the proposal defended by the CJEU would undermine the prestige of the CJEU itself by suggesting that we should appoint judges in the same way that EU commissioners are appointed. It is further suggested that the priority should instead be to reform the appointment system of EU judges with the view of appointing them for a longer but single term of nine years (as opposed to a renewable term of 6-year) and ensuring more equal gender representation on the bench.

Fourthly, the report argues that the amended request by the CJEU to amend its Statute via a simple letter addressed to the Italian Presidency of the Council was put forward in October 2014 is in breach of relevant procedural rules. Notwithstanding the doubtful appropriateness of presenting an amended proposal via a mere letter, the report stresses that a new legislative procedure ought to have been initiated as what is being now discussed (the appointment of 28 new judges and the abolition of an existing EU court) is of a significantly different nature.

Fifthly, the lack of any impact assessment, which never materialised despite the CJEU's previous commitment to undertake one, combined with the lack of consultation of relevant institutions (for instance, the European Commission's opinion was prepared when the proposal was to increase the number of GC judges by 12), suggests that this reform has been rushed through with no attention being paid to ensuring both internal and external transparency and due regard to relevant procedural obligations.

Sixthly, the EU Treaties provide for the creation of specialist courts and therefore rather than abolishing the CST – in the absence of any legal basis for doing so – the possibility of creating new specialist courts, in particular for trademarks and patents, should be explored. Judicial reform should not in any event be devised on the basis of the Council's inability to make judicial appointments and 'force reality to adapt to [the Council's] ossified ways of working.'

Seventhly, the issue of compensation for possible delays with GC decisions is dismissed as 'pure smoke and mirrors', as the Strasbourg Court itself 'takes the view that the right to compensation for delays in justice arises only when there is a delay of more than five years', which is far from being the situation at the GC.

Last but not least, it is submitted that 'the figures provided by the CJEU on the outstanding GC cases and the average duration of these cases are contradicted 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.' (This issue alone should call in our view closer scrutiny and a genuine public debate on the proposed reform).

1. The Rapporteur's Proposal

In the light of the reasons set out above, the rapporteur suggests to reject the CJEU's proposal and to consider instead the adoption of an alternative reform package, which would consist of the following elements:

- The appointment of more staff at the Registry and in the translation services;
- The appointment of 19 more legal secretaries (référéndaires);
- The appointment of up to 12 new judges at the GC but only 'if the Court of Justice furnishes detailed

evidence showing it to be objectively necessary in the light of the trend in the caseload for the General Court in 2015’;

- The setting up of a committee of experts to analyse the advantages and disadvantages of creating a new court specialising in trademarks, patents and intellectual property.
- The establishment by Parliament and the Council of a joint committee of experts to analyse the overall workings of the CJEU and make suggestions to improve its functioning and legitimacy by looking for instance into the recruitment of judges through open tender from amongst law professors of repute and judges from the high courts of each Member State; the appointment of each judge for a single term of nine years only; new rules to guarantee gender parity in the recruitment of judges;
- The 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.

1. Procedural concerns

Rather than explaining why the diagnosis and set of solutions suggested above seem to us a more promising avenue than the solutions put forward by the CJEU and supported by the Council, we shall use this post to express a number of concerns with respect to how the ongoing legislative procedure is conducted.

First of all, we regret the lack of any rigorous and open data collection on the root causes justifying this reform as well as the absence of any prospective analysis of its impact (see e.g. [here](#) and [here](#)).

Secondly, we observe that the CJEU appears to be engaged in a subtle yet unorthodox lobbying process (as recently reported in the press [here](#)). This raises a number of questions with respect to the Court’s understanding of the principle of institutional balance and that of loyal cooperation. It would appear more appropriate for the Court – the guardian of the EU legal order – to confine its [joint](#) advocacy to the public domain rather than seeking to be directly involved in the legislative process via informal ‘quadrilogue’ meetings. Thus, one would expect the Court to systematically inform the public when its members visit other EU institutions to discuss pending legislative matters and, to say the least, report on the outcome of any such discussions.

But is not only the Court’s behaviour that raises concerns. The European Parliament’s action also calls for attention. In particular its JURI committee responsible for the dossier owes the public an explanation for a number of procedural glitches that have characterised the parliamentary discussion of the reform, including those listed below:

- Why was Pinto’s report presented on 15 September to the JURI Committee by an MEP belonging not only to another political group but also coming from Luxembourg, the very country which hosts the CJEU and stands to benefit most from any additional resources granted to it?
- Was the now temporary appointment of the MEP from Luxembourg as Rapporteur the outcome of a foiled attempt to dismiss Pinto in violation of the Parliament’s procedural rules and conventions as reported [here](#)?
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The absence of any translated version of the Annexes is particularly prejudicial to a well-informed parliamentary debate. The MEPs – whose amendments are expected by 23 September – are deprived of the opportunity to consult a GC document, which, according to the rapporteur, might question the need for the proposed reform by offering facts and figures contradicting those presented by the CJEU.

When analysed together, the sum of these elements suggests a pattern of procedural irregularities whose only aim seems to be the speedy adoption of the reform. More troublingly, it may also be construed as a joint

advocacy strategy designed to systematically eliminate any opportunity for a public, well informed and evidence-based debate.

When it comes to a reform carrying constitutional implications and having at its centre the operation of the 'supreme court of the land', one might expect more attention to be paid not only to the merits but also to the forms.

1. Conclusions

The proposal, which is now being examined by the European Parliament, bears little resemblance to the 2011 proposal on the basis of which the current legislative process was initiated. This calls into serious question not only the procedural legality but also the legitimacy of the whole reform process.

We are not surprised to see strong institutional and individual support for the Court's proposal within the EU's legal epistemic community. Don't we – lawyers – all have more to win than to lose from the multiplication of top judicial posts?

Be that as it may, we suspect that should this reform go through (as it appears likely), damaging evidence might yet come to light and the authority and legitimacy of relevant EU institutions will be further undermined at a time where they have little to spare.

This is why the strategy that has accompanied and will eventually secure the adoption of such reform may be said to be as short-sighted as the reform itself.

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