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THE UPCOMING REFORM OF THE JUDICIAL SYSTEM OF THE EUROPEAN UNION

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Abstract | The Court of Justice of the European Union («CJEU») has requested an amendment to its statute in order to cope with the challenges resulting from an ever-increasing workload. The aim is to redefine the jurisdiction of the EU courts with a view to allow them to continue to carry out, within reasonable time limits, the task assigned to them by the drafters of the Treaties in Article 19(1) TUE, namely to ensure that «in the interpretation and application of the Treaties the law is observed». The reform concretely envisages a partial transfer of interpretative powers to the General Court («GC»), combined with the CJEU's power to deal itself with cases of particular relevance. Furthermore, the possibility of lodging an appeal before the CJEU shall be restricted if legal review has already taken place in the first instance by the boards of appeal of EU agencies. A number of safeguards shall prevent a situation, in which the sharing of workload by two separate judicial bodies might have a negative effect on the uniformity and consistency of the case-law.

Keywords: Court of Justice of the European Union, General Court, judicial workload, jurisdictional redefinition, case-law consistency.

I. Introduction

The first paragraph of Article 281 TFEU provides that the Statute of the CJEU shall be laid down in a separate Protocol[2]. Pursuant to the second paragraph of Article 281 TFEU, the Statute may be amended by the European Parliament and the Council acting in accordance with the ordinary legislative procedure (with the exception of Title I and Article 64 of the Statute). This is done through the adoption of a regulation, as defined in Article 288 TFEU. Both co-legislators decide either at the request of the CJEU after consulting the Commission or on a proposal from the Commission after consulting the CJEU. The reform, which shall be discussed in this paper, has been initiated by the CJEU itself. The request contains an explanation

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[2] This is Protocol (N° 3) on the Statute of the Court of Justice of the European Union.

of the reform, which provides valuable insight into the CJEU's considerations[3]. In the meantime, the Commission has been consulted and it should be noted that, in its opinion of 10 March 2023, this institution expressed its support for the reform plan[4]. In addition, on 9 May 2023, the Presidents of both EU courts and the Deputy Director-General were heard by the Committee on Legal Affairs of the European Parliament at a meeting, during which several reform issues were discussed. Nevertheless, a number of outstanding questions remain as to the legality and the expediency of this reform. After an introductory overview of the main regulatory aspects, this paper will examine two key aspects of the reform: **(III.)** the transfer to the GC of jurisdiction to hear and determine questions referred for preliminary rulings and **(IV.)** the mechanism for the determination of whether an appeal is allowed to proceed before the CJEU. First of all, however, it is necessary to examine the circumstances which gave rise to that reform. It will also address considerations that may have played a role in this reform.

II. Factors requiring a reform of the judicial system of the EU

The CJEU, as a judicial body, is characterised by the fact that, unlike most national courts, it performs several functions simultaneously. It is inter alia a constitutional, labour, civil, administrative, social, asylum and criminal court. This is due to, on the one hand, the continuous extension of the EU's legislative powers to new policy areas and, on the other hand, the CJEU's monopoly on the interpretation of EU law. The geographical expansion of the EU through the accession of new Member States has also led to an increase in cooperation between the CJEU and national courts in recent years, with an increase in the number of cases. It should also be borne in mind that the EU is an integration system with 24 official languages, which recognises the right of every individual to use his or her mother tongue in proceedings before the CJEU. Given the limited human and material resources available to the CJEU, it cannot be excluded that these circumstances may have adverse effects, such as the length of proceedings. However, given that the CJEU has explicitly recognised the right to a reasonable time in its case-law[5], such a development would not be desirable. The EU has attempted to counteract these developments by not only allocating financial and human resources to the CJEU, but also by creating subsidiary bodies endowed with their own powers. Examples include the GC and the Civil Service Tribunal («CST»), now incorporated into the GC. One advantage of this outsourcing was not only a fair distribution of the workload, but also the promotion of specialisation within the EU courts. In general, the extension of the EU's legislative powers has made it necessary to create specialised subsidiary bodies capable of dealing with very specific technical questions.

An important reform of the EU's judicial system has taken place with the progressive increase of the number of judges of the GC (currently doubling the number of Member States), as efficiency gains have been demonstrated. The significant reduction of the backlog of cases pending before the GC now opens up new possibilities to relieve the burden on the CJEU in the long term. It should be borne in mind that a transfer of the jurisdiction to deal with requests for a preliminary ruling in certain areas necessarily implies a certain loss of control. In order to preserve the role of the CJEU as the supreme instance within the EU judiciary and to guarantee the uniformity of interpretation of EU law, it is necessary to ensure that this transfer of powers is only ad hoc and that the CJEU retains its right to assume responsibility if this appears necessary. A transfer of the jurisdiction to deliver preliminary rulings seems particularly useful in areas where case-law has already been established, where the CJEU has laid down the basic principles and it is only necessary to apply them to specific cases. A right to assume responsibility makes it possible to identify situations in cases in which a further development of those principles is required. In view of the fact that an early detection (ex ante control) of those situations may not always be easy, especially as sensitive legal

[3] The document is available on the website of the CJEU: https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-12/demande_transfert_ddp_tribunal_en.pdf

[4] See Commission opinion of 10 March 2023 on the draft amendment to Protocol N° 3 on the Statute of the Court of Justice of the European Union, presented by the Court of Justice on 30 November 2022, COM(2023) 135 final.

[5] Kühn, W.M., "Responsabilidad extra contractual de la Unión Europea: Violación por parte de su Tribunal de Justicia del derecho fundamental a una duración razonable del proceso", *Revista de la Secretaría del Tribunal Permanente de Revisión*, 2018, N° 12, p. 169-199.

issues very often only become apparent once a case has been examined in detail, the right to assume responsibility would ideally have to be complemented by a procedure allowing the CJEU to take up a case at a later stage (ex post control). The question arises as to who should exercise this right to assume responsibility within the CJEU.

Moreover, in order to relieve the burden on the CJEU, it seems appropriate to restrict the right to appeal in cases in which the CJEU acts as a court of appeal vis-à-vis the GC where a judicial review has already been carried out by several instances. In such a scenario, it may be assumed that the facts of a case have been exhaustively clarified and that all the essential points of law have been assessed. A judicial review by several instances took place, for example, at the time when the CST dealt with specific issues of civil service law as court of first instance, while the GC acted as a court of appeal[6]. A similar structure of legal review currently exists between the boards of appeal, which are located in several EU agencies, and the GC. However, as was the case at the time of the CST, it is necessary that decisions taken by the GC as court of appeal can, if necessary, be subject to legal review by the CJEU. However, it should be borne in mind that the CJEU would not actually be relieved of its workload if it were obliged to apply the same standards as the court of appeal. Instead, it seems reasonable to provide for such a possibility of legal review only where there is a risk to the unity, consistency and development of EU law, since only then would the risk of potential deviation from the case-law of the CJEU be countered. Such a legal review could be carried out either ex officio or at the request of the parties to the proceedings. In the first case, the First Advocate General could be given the power to encourage such a review, as is currently the case with regard to decisions of the GC on appeals against the decisions of the specialised courts[7]. Such a right of initiative on the part of the First Advocate General, in the exercise of a role that could be described as a «guardian of EU law», would also be conceivable with regard to preliminary rulings of the GC, provided that such competence is conferred on the latter.

As will be shown in what follows, the considerations set out above appear to have been taken into account in the design of the new architecture of the EU judicial system, since certain aspects of the reform clearly reflect the concern of the CJEU not to obtain relief at the expense of the consistency of the case-law or the effectiveness of the legal protection of individuals.

III. Transfer of the jurisdiction to give preliminary rulings under Article 267 TFEU in specific areas defined in the Statute

1. The risks to the consistency of the case-law

The transfer of the jurisdiction to give preliminary rulings under Article 267 TFEU in specific areas laid down in the Statute is not surprising in itself, especially as this possibility is already expressly provided for in the third paragraph of Article 254 TFEU. It is rather surprising that the CJEU has agreed to relinquish this competence more than 20 years after the entry into force of the Treaty of Nice. It should be recalled that the Intergovernmental Conference which led to the signing of the Treaty of Nice on 20 February 2001 decided to amend Article 225 TEC in order to confer on the GC jurisdiction to give preliminary rulings under Article 234 EC. However, it must be assumed that the CJEU had reasonable grounds for not doing so at that time, primarily the fear of sacrificing the uniformity of the case-law and, ultimately, the unity of the EU legal order. The CJEU appears to have been in a similar situation to that at the time of the discussion on the possible establishment of specialised courts dealing with certain matters under Article 257 TFEU.

In that regard, it should be noted that, although the transfer of interpretative powers is at the heart of the reform, it also comprises the power, enshrined in Article 267(1) lit. b) TFEU, to give preliminary rulings on the validity and interpretation of acts of the institutions, bodies, offices or agencies of the EU. In this respect, the following explanations also apply by analogy to this competence. An interesting development in the architecture of the EU judicial system is thus emerging, since the CJEU has repeatedly pointed

[6] Lenaerts, K./Maselis, I./Kathleen, G., *EU Procedural Law*, Oxford 2014, paragraph 2.44, p. 36.

[7] See the second subparagraph of Article 256(2) TFEU in conjunction with Article 62 of the Statute of the CJEU.

out in its case-law that it has exclusive jurisdiction in this area, which it justified on the grounds of the need to preserve the coherence of the system of judicial protection and the unity of the EU legal order[8].

There are areas of law that, although formally speaking, may well be distinguished from each other, such as trademarks and copyrights, they nevertheless share common aspects as part of the overarching area of intellectual property rights. In view of the fact that those areas are essentially governed by the same common principles of law, the interpretation of the principles in question may simultaneously affect various areas of law. A division of competences between several jurisdictions that does not take this fact into account may ultimately create problems. While, for example, the GC has jurisdiction to hear actions for annulment in trademark disputes, the CJEU retains jurisdiction to give preliminary rulings on the interpretation of the EU Trademark Regulation[9], the Trademark Directive[10] and the Copyright Directive[11]. The risk of a conflicting interpretation of the principles or horizontal aspects of intellectual property law cannot therefore be completely ruled out. It can be assumed that those considerations might have precluded the establishment of a specialised court for the specific area of trade mark law. Similar problems would arise if the CJEU were to share the monopoly of interpretation with the GC. For this reason, the transfer of jurisdiction for preliminary rulings should be carefully planned.

2. There is no general but only a partial transfer of competences limited to specific areas

Consequently, according to the CJEU's proposal, there shall be no general but only a partial transfer of powers limited to specific areas. The areas in which the GC may exercise powers of interpretation in preliminary ruling proceedings are the common system of value added tax («VAT»), excise duties, the Customs Code and the tariff classification of goods in the Combined Nomenclature, compensation and assistance to passengers and the scheme for greenhouse gas emission allowance trading. The Statute shall be amended in order to incorporate a provision, namely the first paragraph of Article 50b, which lists the specific areas referred to above. In its request for amendment of the Statute, the CJEU states that these areas are clearly defined and sufficiently separable from other areas covered by EU law. The criterion of sufficient demarcation from other areas governed by EU law, applied by the CJEU, aims at preventing issues about the precise scope of the questions referred by the national courts and, ultimately, about the jurisdiction of the GC to deal with these questions. This indicates that the authors of the reform were aware of the abovementioned risks to the consistency of case-law and wished to minimise them as far as possible.

Another reason stated in the proposal is that the areas defined are governed by a limited number of secondary legislation and rarely lead to judgments of principle. Finally, the CJEU points out that these areas have led to extensive case-law, which should significantly limit the risks of divergences in the case-law. Indeed, it should be noted that the common system of VAT leaves less scope for questions of interpretation, not least because of the adoption by the EU legislature of ever more detailed rules. As regards the tariff classification of goods in the Combined Nomenclature, it should be mentioned that the questions referred by the national courts are rather «practical» and do not usually raise abstract legal questions. Their legal complexity is relatively low, which in the practice of the CJEU means that, as a rule, the respective cases are assigned to chambers of only three judges. In most cases, there is no need to convene a hearing or to request the Advocate General's Opinion. Moreover, these cases rather concern very concrete and specific situations, which rarely permit the application of the case-law to other circumstances. However, these facts should not lead to the erroneous assumption that the cases in question do not create work. On the contrary, they form part of the requests for a preliminary ruling to which the CJEU is obliged to respond. A transfer of powers to the GC would therefore in any event reduce the workload of the CJEU. Another positive effect

[8] See CJEU judgment of 28 March 2017, Rosneft (C-72/15, EU:C:2017:236, paras. 78 to 81).

[9] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (OJ L 130, 17.5.2019, p. 92).

[10] Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ L 154, 16.6.2017, p. 1).

[11] Directive (EU) 2015/2436 of the European Parliament and of the Council of 16. December 2015 to approximate the laws of the Member States relating to trade marks (OJ L 336, 23.12.2015, p. 1).

would be that the CJEU could focus on much more important legal questions that may be relevant to a large number of similar cases.

The inclusion of all cases concerning compensation and assistance to passengers seems equally useful, as requests for a preliminary ruling are usually limited to the interpretation of a single legal act, namely Regulation (EC) N° 261/2004[12] and Regulation (EU) 2021/782 respectively[13]. In view of the fact that the compatibility with higher-ranking EU law of the main rules contained in that regulation is deemed to have already been clarified in the case-law[14], it is not to be expected that future requests for a preliminary ruling will raise questions of law challenging the fundamental existence of those rules. Exceptions apart, the main purpose of the references made by national courts is currently to interpret the provisions of that regulation in the light of the specific circumstances of the case. This has given rise to a case-by-case approach. In that regard, it must be borne in mind that, although the situations are likely to vary from one case to another, the case-law of the CJEU in this area is already so extensive that this judicial institution increasingly avails itself of the possibility of adopting a decision by reasoned order pursuant to Article 99 of the Rules of Procedure, since the answer to the question referred for a preliminary ruling may be clearly deduced from the existing case-law. Against that background, the GC should indeed be able to rely on both the general principles of law, which characterise the respective specific area, and the related case-law in order to give an appropriate answer to the questions referred to it.

3. A single competent instance responsible for receiving requests for a preliminary ruling

Legal certainty would not be served if national courts were required to identify each time the EU court that actually has jurisdiction to rule on their requests for a preliminary ruling. Although the definition of specific areas considerably facilitates the task, it should be borne in mind that references for a preliminary ruling may raise a large number of legal questions that can be attributed to several specific areas. In this respect, it cannot be ruled out that a decision by the CJEU itself will be necessary, even though a question formally falls within one of the areas mentioned above. It must also be borne in mind that a reference to a EU court lacking jurisdiction, combined with the necessary referral to the competent court, whether by the referring national court itself or by the respective EU court, would be time-consuming and hardly compatible with the principle that the duration of proceedings must be reasonable. In this respect, it is to be welcomed that the reform proposal foresees an approach whereby the CJEU acts as the sole competent instance to receive requests for a preliminary ruling (English: «*one stop shop*»; French: «*guichet unique*»). This mitigates potential conflicts of jurisdiction and ensures that the substantively competent court is entrusted with the case without undue delay.

It should be noted that the CJEU does not in any way interpret this competence as an expression of the power to decide, at its own discretion, which cases it is dealing with itself and which it assigns to the GC. In its request, the CJEU expressly states that criteria such as the «appropriateness» or the «importance of the questions referred for a preliminary ruling» are, in principle, irrelevant at this stage of the proceedings. Instead, the CJEU emphasises the principle of limited powers, relying on Article 256(3) TFEU, which, in its view, does not confer on the GC jurisdiction to give preliminary rulings on questions that do not fall within one or more of the specific areas laid down in the first paragraph of Article 50b of the Statute. In other words, the CJEU sees Article 256(3) TFEU as a rule laid down by the EU legislature which makes jurisdiction dependent solely on the substantive classification of the cases and, consequently, does not confer any discretion on the EU courts. This interpretation is correct and consistent with the clear wording of the said provision. It is worth noting that the CJEU also appears to interpret this provision in the sense of an exception to its general jurisdiction to give preliminary rulings, which must be interpreted strictly.

[12] Regulation (EC) N° 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) N° 295/91 (OJ L 46, 17.2.2004, p. 1).

[13] Regulation (EU) 2021/782 of the European Parliament and of the Council of 29 April 2021 on rail passengers' rights and obligations (OJ L 172, 17.5.2021, p. 1).

[14] Judgment of 23 October 2012, Nelson and Others (Joined Cases C-581/10 and C-629/10, EU:C:2012:657).

Accordingly, the CJEU assumes that only a request for a preliminary ruling that relates exclusively to one or more of the specific areas in question should be automatically assigned to the GC. On the other hand, where a request relates both to one or more of the areas defined in the first paragraph of Article 50b of the Statute and to areas not covered by that provision, it is dealt with by the CJEU itself. The new second paragraph of Article 50b of the Statute expressly mentions the first mentioned scenario, although detailed rules governing the attribution of jurisdiction must still be specified in the Rules of Procedure, to be amended for that purpose. For the sake of completeness, it should be recalled in this context that, in accordance with Article 253 TFEU, the Rules of Procedure are adopted by the CJEU, with the approval of the Council alone being required. Unlike the adoption of the Statute, the Parliament's involvement is not foreseen, which seems to be a reason why the Parliament has so far shown such a high level of interest in the reform[15].

The allocation of cases shall take place at an early stage of the proceedings, namely at the moment when the President of the CJEU usually designates the Judge-Rapporteur. Both the First Advocate General and the Vice-President shall be allowed to express their views on any allocation to the GC. If there are doubts as to the delimitation of powers, in particular with regard to the existence of circumstances that preclude an allocation to the GC – for example because the legal issues raised go beyond the specific areas mentioned above – the issue shall be addressed at the General Assembly (French: «*Réunion Générale*») of the members of the CJEU, which takes a final decision on jurisdiction. This information stems from reports of the hearing at the European Parliament's Committee on Legal Affairs, but not from the request of the CJEU itself[16]. Although the principle of the right to a judge assigned by law does not have the same prominence in the EU judicial system as in some national legal systems, as it is for example the case of the fundamental right enshrined in the second sentence of Article 101(1) of the German Basic Law[17], it would be desirable, in the interest of transparency, for this approach to be laid down somewhere. If not in the Statute itself, then at least in the Rules of Procedure.

The second and third subparagraph of Article 256(3) TFEU provide that the GC may refer a case to the CJEU for a ruling if it considers that «the case requires a decision of principle likely to affect the unity or consistency of EU law». A review by the CJEU is also possible «where there is a serious risk of the unity or consistency of EU law being affected». Whilst the Treaties themselves do not contain any more specific provisions in this regard, the CJEU rightly points out in its request that such a review should be carried out only «in exceptional cases» in view of the need for a final decision, since the submission of a request for a preliminary ruling has the effect of suspending the proceedings pending before the referring court. In other words, in the interest of the expeditious conduct of the procedure and not least legal certainty, it is necessary for the CJEU to exercise its right to assume responsibility – with the delays that such action entails for the proceedings – solely in order to achieve a higher objective, namely the protection of the EU legal system.

In its opinion of 10 March 2023, the Commission puts forward a number of proposals that the author believes should be seriously considered. First of all, these proposals aim at a more precise delimitation of jurisdiction between the EU courts. In so far as the reform foresees the GC's jurisdiction to hear and determine requests for a preliminary ruling that «come exclusively within one or several of the specific areas», this condition should be clarified to the effect that such jurisdiction must also cover related questions of interpretation of provisions of primary law, general principles of law or of the Charter of fundamental rights of the EU. Otherwise, it would have to be assumed that the CJEU has automatically jurisdiction as soon as these questions are raised. In view of the fact that in practice it is not uncommon that constitutional questions arise in addition to problems of interpretation, realistically speaking, such a scenario would

[15] See the opinion of the European Parliament's Committee on Legal Affairs on the proposed reform, report of 13 January 2022, 2022/0906(COD).

[16] See Iglesias Sánchez, S., Insight: "Moving forward towards the Preliminary Ruling's Reform: Hearing before the Legal Affairs Committee of the European Parliament", *EU Law Live*, online article of 22 May 2023.

[17] See Rönnau, T./Hoffmann, A., „Vertrauen ist gut, Kontrolle ist besser: Das Prinzip des gesetzlichen Richters am EuGH", *Zeitschrift für Internationale Strafrechtsdogmatik*, 2018, N° 7-8, p. 233.

hardly lead to a relief of the CJEU's workload. An authentic reduction in workload can only be achieved if the GC is given the necessary autonomy to also rule on these related questions. The author agrees with the Commission that this should also apply to questions concerning the interpretation of EU law (in the specific areas) in the light of public international law. Such a situation should not, in principle, preclude the jurisdiction of the GC.

The author agrees as well with the Commission's view that requests for a preliminary ruling raising questions which, as such, do not concern the interpretation of an act falling within one of those specific areas, but which concern, for example, provisions of primary law, general principles of law or the Charter, should remain within the jurisdiction of the CJEU, even if the legal framework of the main proceedings falls within one of those specific areas. This can be justified by the role of the CJEU as a constitutional court within the EU judicial system. In the interest of the unity and consistency of the EU legal order, the handling of cases relating exclusively to constitutional matters should be reserved to this judicial institution. If a case has been assigned to the GC, even though it justifies a referral to the CJEU, it is entirely free to request a referral to the CJEU on its own motion.

However, since the provisions of the Statute, which the CJEU proposes to amend, do not explicitly regulate these aspects, consideration should be given to supplementing the Rules of Procedure with the necessary provisions. As the Commission rightly points out, the inclusion of an interpretative guidance in the recitals of the regulation to be adopted would considerably facilitate the practical application of those provisions. Indeed, good legislative technique of the political institutions of the EU tends to aim at a situation in which the recitals provide a useful background to the provisions of a legal text[18]. The concerns expressed by the European Parliament's Committee on Legal Affairs show that the question of delimitation of competences still needs to be clarified.

4. Procedural guarantees essential for ensuring that the CJEU and the GC deal with requests for a preliminary ruling in the same manner

In view of the fact that the transfer of interpretative powers to the GC is essentially intended to contribute to the relief of the CJEU's workload, there is no objective reason why requests for a preliminary ruling should be treated differently by the GC from the previous practice of the CJEU. Therefore, provision should be made to ensure that, firstly, parties to the proceedings are treated equally and, secondly, that the GC can fulfil its tasks in accordance with the new requirements. The aim is to ensure the interpretation of EU law while preserving the unity of the legal order, irrespective of whether the CJEU or the GC is called upon to rule on a request for a preliminary ruling.

The proposed measures include the designation of special chambers to deal with the cases assigned to them. They are intended to treat requests for a preliminary ruling made in the specific areas laid down in the first paragraph of Article 50b of the Statute. Detailed rules are to be laid down in the Rules of Procedure. As a result, the CJEU expects to achieve enhanced consistency in the treatment of references for a preliminary ruling. This measure has the additional effect of promoting the specialisation of judges, which in principle increases the quality of the case-law. This is necessary precisely because these areas are very specific, materially delimited and require particular expertise and experience. The CJEU takes advantage of an established practice at the GC that foresees the designation of chambers for the purpose of dealing with civil service and intellectual property cases.

Proceedings before the GC may in principle also foresee the involvement of an Advocate General, even though this possibility has so far been hardly used in practice. Unlike the CJEU, there are no members of the GC who exercise this function on a permanent and exclusive basis. On the contrary, if necessary, one of the members of the judiciary will be specifically selected for taking over that role in a specific procedure[19]. As was stated at the hearing before the European Parliament's Committee on Legal Affairs, this

[18] See Opinion of Advocate General Szpunar of 12 March 2019, Planet49 (C-673/17, EU:C:2019:246, paragraph 71).
[19] See Articles 30 and 31(2) of the Rules of Procedure of the GC.

practice shall continue, subject to the condition that the appointed Advocates General perform this function for a period of three years. Since there is nothing in this sense stated in the request submitted by the CJEU, it is to be expected that such provisions will be found in the Rules of Procedure. With the adoption of interpretative powers, it is expected that the number of pending cases will increase significantly, including the frequency with which the GC will have to deal with new legal questions.

It is therefore to be welcomed that the second sentence of the third paragraph of Article 50b of the Statute expressly provides for the appointment of an Advocate General in accordance with the detailed rules to be laid down in the Rules of Procedure. In line with his traditional role, the Advocate General offers the possibility of an additional, in-depth analysis of the case in question, from a practical and dogmatic point of view, hereby delivering a basis for the further development of the case-law. However, similar to the CJEU, the appointment of an Advocate General will not be necessary in every case, but only in those cases that raise new questions of law. It is also to be expected that the Advocate General at the GC will also be allowed to limit his Opinion to certain questions referred for a preliminary ruling (so-called *«conclusions ciblées»* in French; translatable in English as «*focused/targeted Opinion*») in order to focus on the analysis of the most relevant legal issues. Overall, it is to be expected that the CJEU's decades of experience will decisively shape the future role of the Advocate General at the GC. The inclusion of the Advocate General in the reform of the EU judicial system must be regarded as an important sign of recognition of his contribution to the evolution of the case-law.

Moreover, the CJEU's request provides for an amendment of Article 50 of the Statute, which would allow the GC to sit in a medium-sized formation, between the chambers of five judges and the Grand Chamber of 15 judges. The questions referred to the GC for a preliminary ruling are not intended to be decided by the Grand Chamber of the GC, since cases that require a decision of principle and normally fall within the jurisdiction of the Grand Chamber are, in accordance with the second subparagraph of Article 256(3) TFEU, to be referred to the CJEU. The request also points out that an assignment to the Grand Chamber of the GC would have as a consequence that judges who are not members of the chambers designated for that purpose would participate in preliminary ruling proceedings, a scenario that would undermine the objective of establishing a jurisdiction specialised in certain areas of law with all the advantages associated with it. Article 50(3) of the Statute clarifies that the composition of the chambers and the circumstances and conditions under which the GC shall sit in those different formations is governed by the Rules of Procedure of the GC. In other words, the organisational autonomy of the GC is largely preserved and restricted only to the extent necessary to ensure cooperation with the CJEU with regard to the handling of requests for a preliminary ruling.

IV. Extension of the mechanism for the determination of whether an appeal is allowed to proceed

Another focus of the reform is the mechanism for the determination of whether an appeal is allowed to proceed. It should be recalled in this context that this mechanism was introduced in 2019 with the aim of addressing the problem of the increasing number of cases. At that time, the reform proposal was based on the observation that a significant part of the appeals lodged had to be dismissed as manifestly inadmissible or unfounded, even though the cases in question had already been subject twice to legal review, first by the independent boards of appeal of EU agencies and then by the GC. In the light of the fact that it was considered necessary to deal with the resources of the CJEU as carefully as possible, it was decided to allow a third legal review only exceptionally, namely in cases where the appellant has convincingly demonstrated that the decision of the GC is vitiated by a serious error of law which may affect future cases. The CJEU has obviously been inspired by the judicial systems of the Member States, which often make the admissibility of an appeal before a higher instance subject to the fulfilment of certain conditions, such as the requirement that the case be «essentially important» or the contested judicial decision «deviating from

the case-law of the supreme courts»[20]. In such cases, the judicial systems of the Member States provide that a decision of the highest court is necessary in order to provide legal clarity.

Since then, in accordance with Article 170a of the Rules of Procedure, the appellant has been required to attach to his appeal a request that the appeal be allowed to proceed, setting out the «issue that is significant with regard to the unity, consistency or development of Union law» raised by the appeal and which must contain all the information necessary to enable the CJEU to rule on that request. In the absence of such a request, the Vice-President of the CJEU shall declare the appeal inadmissible. It should be noted that the request in question must not exceed 7 pages, which requires the appellant to identify as precisely as possible the error of law that, in his view, poses a risk to the unity, consistency or development of EU law. So far, these strict requirements have been considered to have been met in only a few cases[21], which may discourage potential appellants. However, it should be noted that the case-law that has arisen to date gradually clarifies the legal criteria necessary for an appeal to be allowed to proceed[22]. It is therefore safe to say that, with these proceedings, the CJEU is only at the beginning of a development, the end of which is not yet foreseeable. The material requirement laid down in Article 58a of the Statute («significant issue with respect to the unity, consistency or development of EU law») did not exist before the introduction of the mechanism for the determination of whether an appeal is allowed to proceed. It is true that it is similar to the criteria laid down in Article 256(2) TFEU for the review of decisions of the GC taken in the context of decisions of the former SCT («where there is a serious risk of the unity or consistency of EU law being affected»)[23]. However, it should be noted that the wording of Article 58a of the Statute appears to be broader. The CJEU has not yet ruled on the connection between the two provisions.

In view of the need to preserve the functioning of the CJEU, it is a right move to restrict the possibility of lodging an appeal, especially as sufficient legal protection is guaranteed by the boards of appeal and the GC. Such an approach undoubtedly means enhancing the role of the boards of appeal within the EU's judicial system, which the author has explained in another article[24]. As stated in Article 58a of the Statute, the mechanism of admission of appeals concerns judgments or orders of the GC related to decisions of independent boards of appeal of the following offices, bodies and agencies of the EU: the European Union Intellectual Property Office; the Community Plant Variety Office; the European Chemicals Agency; the European Union Aviation Safety Agency. In addition, this mechanism applies to appeals against judgments or orders of the GC concerning a decision of an independent board of appeal set up after 1 May 2019 within any other EU office, body or agency and to be seized before an action can be brought before the GC. However, this provision disregards the fact that, on 1 May 2019, there were already other EU bodies, offices or agencies, which also had an independent board of appeal, but were not included in the list of EU bodies, offices or agencies referred to in the first paragraph of Article 58a of the Statute. In its request, the CJEU mentions the European Union Agency for Railways, the European Banking Authority, the European Securities and Markets Authority and the European Union Agency for the Cooperation of Energy Regulators. The reform aims to fill this gap by including these agencies in this list.

Finally, the CJEU proposes to extend the scope of that mechanism to appeals against decisions of the GC concerning the performance of a contract concluded by or on behalf of the EU and containing an arbitration clause, within the meaning of Article 272 TFEU. The CJEU justifies this proposal on the ground that

[20] See, for example, the grounds for authorising the appeal on a point of law in German administrative procedure (§132 VWGO).

[21] See orders of the CJEU of 10 December 2021, EUIPO v The KaiKai Company Jaeger Wichmann (C-382/21 P, EU:C:2021:1050), of 7 April 2022, Indo European Foods Ltd (C-801/21 P, EU:C:2022:295) and of 11 July 2023, EUIPO/Neoperl (C-93/23 P, EU:C:2023:601).

[22] Oró Martínez, C., "The filtering of appeal by the Court of Justice: Taking stock of the first two orders allowing an appeal to proceed", *EU Law Live*, N° 112, edition of 17 September 2022, p. 11.

[23] Kühn, W.M., „Das Überprüfungsverfahren vor dem Gerichtshof der Europäischen Gemeinschaften: Überblick und Analyse", *Zeitschrift für Europarecht*, 2010, N° 1, p. 4-14.

[24] Kühn, W.M., "The phenomenon of Agencification in the administration of the European Union", *Ukrainian Journal of Constitutional Law*, 2020, N° 4, p. 45-67.

appeals in this area cannot, in principle, raise an issue that is significant with regard to the unity, consistency or development of EU law, since it usually concerns only the application of the national law to which the arbitration clause refers, and not the application of EU law. This part of the reform is peculiar and different from the aspects discussed above, since it is not based on the consideration that an appeal shall not be allowed because there has already been a two-fold review of legality. In other words, the CJEU acknowledges that a one-off examination is sufficient. As very few comments from the Commission and the European Parliament's Committee on Legal Affairs have so far been heard, which could serve as a basis for further investigation, it remains to be seen what changes the legislative process will bring about.

V. Conclusion and outlook

The reform of the judicial system sought by the CJEU in the form of the transfer to the GC of jurisdiction to hear and determine questions referred for preliminary rulings and the mechanism for the determination of whether an appeal is allowed to proceed before the CJEU should not be surprising. Indeed, this reform started many years ago when the corresponding legal bases were created in the Treaties. The doubling of the number of judges and the consequent reduction of the backlog of pending cases has freed up capacity at the GC, allowing it to assume part of the responsibility for dealing with requests for a preliminary ruling. For the sake of consistency, it is necessary to ensure that proceedings before both EU courts are conducted in the same manner. Furthermore, the above-mentioned mechanism needs to be «calibrated» so that the CJEU can take corrective action in cases where it appears justified. The amendments proposed by the CJEU to its Statute seem at least to pursue these objectives. The views expressed by the Commission and the Parliament indicate that the reform proposals are unanimously welcomed. However, it should be noted that some provisions need to be clarified, hopefully still in the legislative process. Although it is apparent from the previous hearings of the Presidents of the EU courts that there seem to be solutions to many of the issues raised, they do not yet appear to have been codified in the proposed amendments. Much seems to be awaiting a provision in the Rules of Procedure itself. However, legal certainty requires that legal practitioners be informed as detailed as possible of the various aspects of the procedure.

References

Bibliography:

1. Iglesias Sánchez, S., Insight: «Moving forward towards the Preliminary Rulings Reform: Hearing before the Legal Affairs Committee of the European Parliament», EU Law Live, online article of 22 May 2023.
2. Kühn, W.M., «Das Überprüfungsverfahren vor dem Gerichtshof der Europäischen Gemeinschaften: Überblick und Analyse», Zeitschrift für Europarecht, 2010, № 1, p. 4-14.
3. Kühn, W.M., «Responsabilidad extra contractual de la Unión Europea: Violación por parte de su Tribunal de Justicia del derecho fundamental a una duración razonable del proceso», Revista de la Secretaría del Tribunal Permanente de Revisión, 2018, № 12, p. 169-199.
4. Kühn, W.M., «The phenomenon of Agencification in the administration of the European Union», Ukrainian Journal of Constitutional Law, 2020, № 4, p. 45-67.
5. Lenaerts, K./ Maselis, I./ Kathleen, G., EU Procedural Law, Oxford 2014, paragraph 2.44, p. 36.
6. Oró Martínez, C., «The filtering of appeal by the Court of Justice: Taking stock of the first two orders allowing an appeal to proceed», EU Law Live, № 112, edition of 17 September 2022, p. 11.
7. Rönnau, T./Hoffmann, A., «Vertrauen ist gut, Kontrolle ist besser: Das Prinzip des gesetzlichen Richters am EuGH», Zeitschrift für Internationale Strafrechtsdogmatik, 2018, № 7-8, p. 233.

List of legal documents:

8. Articles 30 and 31(2) of the Rules of Procedure of the GC.
9. CJEU judgment of 28 March 2017, Rosneft (C-72/15, EU:C:2017:236, paras. 78 to 81).
10. Commission opinion of 10 March 2023 on the draft amendment to Protocol № 3 on the Statute of the Court of Justice of the European Union, presented by the Court of Justice on 30 November 2022, COM(2023) 135 final.
11. Directive (EU) 2015/2436 of the European Parliament and of the Council of 16. December 2015 to approximate the laws of the Member States relating to trade marks (OJ L 336, 23.12.2015, p. 1).

12. Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (OJ L 130, 17.5.2019, p. 92).
13. Judgment of 23 October 2012, Nelson and Others (Joined Cases C-581/10 and C-629/10, EU:C:2012:657).
14. Opinion of Advocate General Szpunar of 12 March 2019, Planet49 (C-673/17, EU:C:2019:246, paragraph 71).
15. Opinion of the European Parliaments Committee on Legal Affairs on the proposed reform, report of 13 January 2022, 2022/0906(COD).
16. Orders of the CJEU of 10 December 2021, EUIPO v The KaiKai Company Jaeger Wichmann (C-382/21 P, EU:C:2021:1050), of 7 April 2022, Indo European Foods Ltd (C-801/21 P, EU:C:2022:295) and of 11 July 2023, EUIPO/Neoperl (C-93/23 P, EU:C:2023:601).
17. Regulation (EC) № 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) № 295/91 (OJ L 46, 17.2.2004, p. 1).
18. Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ L 154, 16.6.2017, p. 1).
19. Regulation (EU) 2021/782 of the European Parliament and of the Council of 29 April 2021 on rail passengers rights and obligations (OJ L 172, 17.5.2021, p. 1).
20. 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. URL: https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-12/demande_transfert_ddp_tribunal_en.pdf.
21. Second subparagraph of Article 256(2) TFEU in conjunction with Article 62 of the Statute of the CJEU.
22. This is Protocol (№ 3) on the Statute of the Court of Justice of the European Union.