



**TEPSA**

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EGMONT

**THE REFORM OF THE EU COURTS**  
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**THE NEED OF A MANAGEMENT APPROACH**

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*In memory of Peter F. Drucker, who brought so much to so many in the understanding of management, and of John J. Goossens, a friend and mentor in business.*

In 2010, the Lisbon Treaty entered into force, including some substantial changes concerning the EU courts<sup>1</sup>. Meanwhile, their workload is progressively increasing. Specifically, the General Court's backlog has become quite substantial<sup>2</sup>. In 2011, the Court of Justice has presented an important proposal regarding this problem. It aims at adding 12 new judges (and consequently cabinets) to the General Court. The Commission has given its support and proposed some complex modalities concerning the appointment of judges.

Such a reform of the General Court will have systemic consequences for the EU courts' system. If the present proposals of the Court of Justice and the Commission are implemented in 2012, the General Court will have gone from 15 to 39 judges in only eight years. They thus require an analysis of the long term implications. Before that, they require an analysis of the productivity aspects. These have been barely debated until now. However, in the midst of a financial crisis, the legislative authorities may have legitimate questions about the budget impact. This paper aims at bringing some modest comments (this is a new and complex topic) regarding the managerial and financial aspects of the available options.

One will find here a brief description of the new context (§ 1), and of the possible objectives of a reform (§ 2), some examples of productivity reforms that could increase production with very limited costs (§ 3), and finally a more detailed evaluation of the two possible structural reforms (§ 4), i.e. adding 12 new judges to the General Court or creating an Intellectual Property Court, limited in a first phase to a specific domain of trademarks and designs. From a management point of view, reforms must indeed be divided into two categories. Some of them are not too difficult to implement and require no huge regulatory changes or additional means (the "productivity solutions"). Others, on the contrary, require such changes and additional means (the "structural solutions").

In synthesis, the structural measures appear rather costly (especially the 12 new cabinets) and should be considered as last resort ones. On the other hand, other measures, with very little costs, could have a strong positive impact on the General Court's productivity. Furthermore, an immediate structural reform would go against fundamental principles of management (and strategy). Before pumping more resources in a system, it is useful to analyze in depth where the existing problems come from. If a plane flies low because there are numerous leaks in the motor, one can always push much more kerosene in the motor but this is rarely seen as the optimal way to improve performance. Plugging first the leaks is widely seen as more economical. Furthermore, it is always dangerous to make immediate structural reforms with a long term impact under the pressure of urgency. Finally, in the case of a sudden rise of judicial activity in the next years (which is the working hypothesis of the debated proposals), the neglect of the productivity measures could lead to an explosion of costs.

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<sup>1</sup> The author is judge at the Court of Justice of the European Union (General Court), and professor (in abeyance) at the University of Liège. This comment is strictly personal.

<sup>2</sup> The Treaty terminology remains difficult. The Court of Justice of the European Union (CJEU) is the judicial institution of the EU. It consists of the Court of Justice (CJ), the General Court (GC) and the Civil Service Tribunal (CST). The judges benefit from a cabinet. Their cabinet consists of 7 persons in the CJ, 5 persons in the GC, and 2 in the CST.

In the present hard times especially, each of us has to do his/her utmost to get more bangs from the taxpayer's bucks. This is possible here, but it means that all parties involved (General Court's judges and personnel, Court of Justice, Member States, budgetary authorities, and legal counsels) have to accept some limited efforts.

This modest contribution pays tribute to Peter Drucker, for whom the author must confess a long, deep and always growing admiration. Drucker's books were seminal not only in the diffusion of the science of management, but also in the reflection on the connections between management and different evolutions of society. He should be mandatory reading in the present changing EU environment. Most probably, his conclusion in this debate would have been a brilliant and synthetic "*it's the people, stupid !*"

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### **4. THE STRUCTURAL SOLUTIONS AND THEIR EVALUATION**

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  - b) the difficult consistency of an enlarged General Court with specialized chambers
  - c) the increased instability of an enlarged General Court
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- 4.2. The smaller costs of a specialized court
- 4.3. The slightly greater adaptability a specialized court
- 4.4. The greater long term coherence of a specialized court

## 1. SOME NEW CHALLENGES

During the last 20 years, from the Maastricht Treaty onwards, the areas of EU cooperation have undergone a tremendous expansion. This is bound to have fundamental consequences for the structure of the Court of Justice of the European Union (CJEU). These consequences have not been studied at length until now, since they were not immediate<sup>3</sup>.

It is essential to understand the multiple changes of the EU courts' environment. As P. Drucker emphasized, "public-service institutions find it far more difficult to innovate than even the most 'bureaucratic' company. The 'existing' seems to be even more of an obstacle. To be sure, every service institution likes to get bigger. In the absence of a profit test, size is the one criterion of success for a service institution, and growth a goal in itself. And then, of course, there is always so much more that needs to be done. But stopping what has 'always been done' and doing something new are equally anathema to service institutions, or at least excruciatingly painful to them. Most innovations in public-service institutions are imposed on them either by outsiders or by catastrophe."<sup>4</sup>

So, "the only way in which an institution—whether a government, a university, a business, a labor union, an army—can maintain *continuity* is by building systematic, organized innovation into its very structure. Institutions, systems, policies, eventually outlive themselves, as do products, processes, and services. They do it when they accomplish their objectives, and they do it when they fail to accomplish their objectives. Innovation and entrepreneurship are thus needed in society as much as in the economy, in public service institutions as much as in business."<sup>5</sup>

### 1.1. A new Treaty

The Lisbon Treaty has simplified the ordinary decision process of the EU in different ways. It has enlarged the scope of qualified majority voting, and also marginally reduced the qualified majority floor. It has suppressed the third pillar and submitted all internal security matters (immigration, asylum, police and justice cooperation) to the ordinary legislative procedure. Finally, it has strongly strengthened the protection of fundamental rights in the EU law system. The Charter of Fundamental Rights is now expressly part of the system and the EU has to adhere to the ECHR. Naturally, treaties require time to be implemented. However, logically, the combination of these changes should increase the judicial workload.

Apart from these changes, the Lisbon Treaty has also set up a panel "in order to give an opinion on candidates' suitability to perform the duties of Judge and Advocate-General of the Court of Justice and the General Court before the governments of the Member States make

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<sup>3</sup> Many interesting pieces of information about the present situation can be found in the report of the House of Lords EU committee : The workload of the Court of Justice of the European Union, HL Paper 128, 2011.

All documents concerning the legislative procedure can be found on the web site of the Council of the EU. There have been four documents from the Court of Justice until now. The draft amendments to the statute of the CJEU were presented in March 2011 (Doc. 8787/11). An assessment of the financial impact was presented the next month (Doc. 8787/11, Add. 1). Further information was sent in July 2011 (Doc. 12719/11) and in November 2011 (Doc. 12719/11). One opinion was given by the Commission [COM (2011) 596].

<sup>4</sup> P. DRUCKER, Innovation and entrepreneurship, 1985.

<sup>5</sup> P. DRUCKER, Managing in a time of great change, 1995.

the appointments” (so called “article 255 committee”)<sup>6</sup>. In 2010 and 2011, this panel adopted three negative opinions regarding three candidates for the General Court. The creation of this panel is an important change in the appointment process. One of the (many) difficulties of the present context is that this new system is still in an evolutionary phase, concerning for example the extent of its standard of control and the weight of its opinions.

## **1.2. A bunch of new EU legislations**

The volume of EU law is regularly expanding with the adoption of new legislative measures. Since 2004, for example, the REACH regulation has largely transferred the authorization of all chemical products to the EU level. This has engendered a lot of administrative activity. In 2009, a whole new legislative framework was adopted to fight climate change. Here too, the level of integration has risen. The third energy package has précised the EU rules and created a new agency. The fifth electronic communications package did the same in the field of telecommunications. In 2011, a set of legislative instruments have established a new framework for financial regulation. Notably, three financial regulation authorities were created and granted substantial decision powers. Their decisions could thus be challenged before the EU courts – either by way of direct action or preliminary rulings. Different directives have also established new rules in the field of immigration.

The scope and the depth of the EU competence areas are thus expanding on a very regular basis. The specialization of EU law has increased. Mastering the whole of the EU competence areas becomes more difficult. The number of judgments is permanently higher. Such evolutions will most likely increase the workload, and also have strong implications for the judicial function.

## **1.3. An enlarged Union**

Since 2004, 12 new countries have adhered to the EU. Generally, however, it takes a few years for the workload to rise due to cases brought by a new member State. As happened before, the 2004-2007 enlargements have brought immediately important new means, through the cabinets (from 15 to 27 cabinets in both the CJ and the GC)<sup>7</sup>. In a first period, the number of cases increased rather moderately. Progressively, as we shall see, it is increasing.

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<sup>6</sup> See Decision 2010/125/UE of the Council (OJ 2010, L 50/20).

The panel has already produced a first – and most interesting – activity report : Rapport d'activité du comité prévu par l'article 255 du traité sur le fonctionnement de l'Union européenne (Doc. Council, 6509/11, 17.2.2011). [http://register.consilium.europa.eu/servlet/driver?lang=FR&ssf=DATE\\_DOCUMENT+DESC&fc=REGAISFR&srm=25&md=400&typ=Simple&cmsid=638&ff\\_COTE\\_DOCUMENT=&ff\\_TITRE=&ff\\_FT\\_TEXT=article+255+trait%C3%A9+&ff\\_SOUS\\_COTE\\_MATIERE=COUR&dd\\_DATE\\_REUNION=&single\\_comparator=&single\\_date=&from\\_date=&to\\_date=&rc=5&nr=22&page=Detail](http://register.consilium.europa.eu/servlet/driver?lang=FR&ssf=DATE_DOCUMENT+DESC&fc=REGAISFR&srm=25&md=400&typ=Simple&cmsid=638&ff_COTE_DOCUMENT=&ff_TITRE=&ff_FT_TEXT=article+255+trait%C3%A9+&ff_SOUS_COTE_MATIERE=COUR&dd_DATE_REUNION=&single_comparator=&single_date=&from_date=&to_date=&rc=5&nr=22&page=Detail) (accessed 17/11/2011).

<sup>7</sup> Prof. D. Chalmers described thus rightly – and poetically – the post 2004 period as “a honeymoon period of extra resources with little extra workload that will shortly end.” (House of Lords written evidence [WE 1], p. 16). One needs to precise however that the Court had not “an 80 % increase in personnel”. This remark is valid only for the judges’ cabinets, but not necessarily for the rest of the services. This is an essential nuance, for the institution’s budget and management, especially in the field of translation.

#### **1.4. A progressive increase of cases**

As a matter of fact, in the Court of Justice, the number of new cases went from 537 in 2006 to 631 in 2010. In the General Court, it went from 432 to 636. The increase was thus not as high until now as the cabinets' increase provoked by the enlargement. A part of this increase is linked to the enlargement of the EU, another one to the growth of the EU competence areas.

#### **1.5. A growing backlog in the General Court**

During the last five years, a backlog has grown in the General Court. This backlog is a real threat. It goes against the rule of reasonable time<sup>8</sup>. It also imposes very long periods of uncertainty to people and business.

One must underline, in this context, the difference between the backlog and the stock. It is normal that the Court has a stock (meaning the cases which are building up and then are dealt with). At the end of 2010, the backlog comprised around 500 cases. Obviously, some cases have been waiting quite long to be treated. So, in 2009 and 2010, the average length of the proceedings reached 46 months for a competition case and 41 months for a public aid case. This indicates, by the way, that the backlog has a qualitative dimension. Most old cases are heavy cases, requiring quite a volume of work.

It is difficult to evaluate the different causes of this situation. Many factors seem to contribute. Some of them are of a structural nature. The use of 23 languages in very long procedures takes time. The General Court's role, unlike the Court of Justice's, is not limited to legal matters but covers also factual matters, which can be quite heavy, for example in cases about competition or new products' authorizations. The procedural constraints imposed by actions brought by natural and legal persons against the institutions, can also be heavier. Other factors, as we shall see later, are linked to a limited productivity of human resources.

#### **1.6. Increasing budgetary constraints**

These evolutions place the CJEU, and especially the General Court, in a more difficult situation. After the 2004 and 2007 enlargements, as we have seen, the growth of personnel has been more substantial in the cabinets than in the administrative services. Particularly, the doubling of the number of official languages has not been properly taken into consideration. Consequently, some decisions have already been taken in the three courts to reduce the need of translations. In the General Court, for example, some judgments and orders are not translated any more, except in the procedure's language.

If it goes on, the increase of the number of cases will thus create budgetary tensions. The CJEU is placed in a particular situation. It must deal with increases of activity that it does not control.

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<sup>8</sup> See Case C-385/07 P *Der Grüne Punkt* [2009] ECR I-6155. This principle is expressed not only in Article 47 of the Charter of Fundamental Rights but also in Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

## **2. THE POSSIBLE OBJECTIVES OF A REFORM**

### **2.1. The consequences of some fundamental choices**

In that context, some fundamental choices, taken in the first European Treaties, and later in their implementation measures, create administrative constraints and costs. Since the creation of the European Communities, for example, European judges have a mandate of six years, possibly renewed. This system relies on quite understandable motives, but has important implications. Firstly, there is a permanent triennial renewal in each court, concerning 50 % of the judges. Each transition weights on the productivity. Each triennial renewal tends to slow the speed of the proceedings in all chambers concerned. It also creates questioning among the cabinets' staff about its fate. Secondly, each anticipated departure has the same effect (additionally)<sup>9</sup>. These costs are now increased by the new complexity of the appointment process<sup>10</sup>. Consequently, judges who only fulfil one mandate, and even sometimes less, weight on the courts' productivity. Thirdly, judges and personnel need to possess already some substantial experience in European matters, otherwise they weight heavily on the courts' global productivity<sup>11</sup>. Another essential choice was to allow proceedings in all the languages of the European Union. Consequently, the proceedings' length becomes substantially longer, due to translation requirements, and the costs heavier.

It is not meant here to question these choices. However, one must realize that they generate important administrative constraints, and that the new context has made these constraints substantially heavier. It is thus interesting to reflect on the possible ways to minimize these costs, especially if there is an important growth of judicial activity in the next decades. A serious reflection about productivity is required, and it has a lot of implications.

### **2.2. Efficiency : quantity, quality and speed**

Efficiency is very important in the justice world, as in all public services. However, it is very difficult to measure. The quantity of decisions adopted (judgments or orders) is a parameter. However, such numbers do give absolutely no indication about the complexity of the cases. There is also the impact of series (joined cases) on the numbers. Some of them are quite easy to deal with, others much less so. Finally, one must also take into consideration that the judicial function at the European level is fundamentally a collegial one. So, it remains to be determined how much everybody contributed to the decision process.

Furthermore, quantity is certainly not everything, and quality is also an important parameter. As Einstein brilliantly synthesized, "everything that can be counted does not necessarily counts ; everything that counts cannot necessarily be counted". It can even be pleaded that, at the European level, considering the decisions' impact on the daily life of 500 millions people,

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<sup>9</sup> During the last months of his/her mandate, a judge is inevitably less productive – and so is his/her chamber. The opening of any new oral procedure is suspended to the arrival of a replacement.

<sup>10</sup> Each time the « article 255 committee » has adopted a negative opinion on one candidate since 2010, months of activity have been lost in transition. The appointment process should be streamlined to prevent the repetition of such losses.

<sup>11</sup> The vision of the new appointment panel created by the Lisbon Treaty is slightly different on this point : see First activity report, 2011, p. 9. We shall see there are objective reasons to introduce differences between the Court of Justice and the General Court (§ 3.2).



quality is essential. However, quality is still more difficult to evaluate than quantity. Finally, speed is also a parameter. According to a famous maxim, “justice delayed is justice denied”. This is as true for cases related to fundamental individual rights as it is for business, where the evolution of markets and technologies can make a late judgement absolutely irrelevant.

So efficiency requires to find a balance between quality, quantity and speed, and this is quite difficult. All this must not deter from using quantity, and thus statistics, as a first basis of a productivity analysis. Management by results must certainly not represent everything in a court of law, but on the other side it must at least represent something. Experience shows that late judgments do not benefit from an added quality. Statistics must be however used with a large pinch of salt, meaning carefulness and mix with other parameters to provide a correct evaluation of the judicial activity.

### **2.3. Costs**

Costs form a particular aspect of efficiency. Until now, they have not caught much attention, but this will most likely change in the future. The difficulty will be to balance costs requirements with the need for quality and the need for speed. It will not be easy at all, since an important part of the costs comes from the fundamental choices mentioned above (§ 2.1).

### **2.4. Adaptability**

The EU remains in an evolutionary phase. Changes will happen in the next decades. Its decision process remains quite complex regarding the reform of the institutions. Consequently a high premium should be attached to the adaptability of any new measure.

### **2.5. Long term coherence**

Finally, any systemic reform should not be decided without examining what has been proposed by the Courts, and analyzed by various committees, since the negotiation of the Maastricht Treaty. There have been many variations, and sometimes contradictions, during these 20 years<sup>12</sup>.

Considering the difficulty of creating new organs and processes, it would be better if the proposed measures in 2011 were adopted with a long term perspective, based on different hypotheses for the future. This could simplify strongly the work of the legislative authorities in the next decade.

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<sup>12</sup> In the IGC of 2000, for example, the CJ proposed to allow in the new Treaty the transfer of some preliminary rulings to the GC (Contribution of the Court and the CFI, 25 febr. 2000, p. 5). The CG defended the increase of the number of judges (Cour de Justice et tribunal de première instance, L’avenir du système juridictionnel de l’Union européenne, may 1999, p. 27).

### § 3. THE PRODUCTIVITY SOLUTIONS

Many things have changed in the EU during the last 25 years. Treaties have been regularly revised. EU legislations have grown in number, in scope and in detail. EU law has steadily become a specialized area, and even splintered into a growing number of sub-specialized areas. The length and number of judgments have increased. Information and Communication Technologies (ICT) instruments have expanded considerably. The Court of Justice of the European Union has become a much larger institution, of more than 2000 persons. However the institution's management has largely remained the same.

Growth, as we know, is always a huge challenge. "Success always obsoletes the very behaviour that achieved it. (...) A success that has outlived its usefulness may, in the end, be more damaging than failure."<sup>13</sup> "Any organization, whether biological or social, needs to change its basic structure if it significantly changes its size. Any organization that doubles or triples in size needs to be *restructured*. Similarly, any organization, whether a business, a nonprofit, or a government agency, needs to rethink itself once it is more than forty or fifty years old. It has outgrown its policies and its rules of behaviour."<sup>14</sup> Specifically, in the CJEU, some established practices have become progressively inadequate.

Firstly, there is very little protection of the institution's human capital. "The most valuable asset of a 21<sup>st</sup>-century institution, whether business or nonbusiness, will be its knowledge workers and their productivity"<sup>15</sup>. "The critical feature of a knowledge workforce is that knowledge workers are not 'labor', they are capital. And what is decisive in the performance of capital is not what capital costs. (...) What's critical is the productivity of capital"<sup>16</sup>. The human capital is absolutely essential. In the CJEU, for various reasons, sometimes old, as we shall see, the loss of human capital happens on a regular basis, in the judges' cabinets. The General Court suffers particularly from this problem.

Furthermore, one could wonder whether the traditional appointment process takes sufficiently into consideration the growing specialization of EU law, which requires an increased experience level. "The yield from the human resource really determines the organization's performance. And that's decided by the basic people decisions: whom we hire and whom we fire, where we place people, and whom we promote"<sup>17</sup>. In the General Court, any member of personnel who has rarely dealt in the past with various EU decisions (legislative, executive or judicial) concerning competition, agriculture, structural funds, budgets, access to documents, contracts, trademarks inevitably requires a substantially longer learning curve.

A second problem comes from the insufficiency of management by results. "Altogether focusing resources on results is the best and most effective cost control. Cost, after all, does not exist by itself. It is always incurred – in intent at least – for the sake of a result. What matters therefore is not the absolute cost level but the ratio efforts and their results."<sup>18</sup> Due to

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<sup>13</sup> P. DRUCKER, *Management : tasks, responsibilities*, practice, 1973, chap. 7 and 14.

<sup>14</sup> P. DRUCKER, *Managing in a time of great change*, Reinventing government, 1995.

<sup>15</sup> P. DRUCKER, *Management challenges for the 21st century*, 2000, introduction part. 5.

<sup>16</sup> P. DRUCKER, *Managing in the next society*, They are not employees, they are people, 2002.

<sup>17</sup> P. DRUCKER, *Managing the non profit organisation*, 2002, part 4(1).

<sup>18</sup> P. DRUCKER, *Managing for results*, 1964, chapter V.

various reasons again, it sometimes happens that the productivity per personnel unit in the CJEU varies from three to one<sup>19</sup>.

A third problem comes from the absence of perception of the different roles of the Court of Justice and the General Court. As Drucker emphasized, “work on knowledge-worker productivity therefore begins with asking the knowledge workers themselves : what is the task ?”<sup>20</sup>. Here, it could be considered that the specificities of the General Court’s work have not been sufficiently analyzed until now.

In the author’s opinion, taking these elements into consideration would allow the legislative authorities to bring a little bit more stability, more incentives, and thus a greater efficiency in the General Court’s activities without a substantial increase of resources.

### **3.1. The improvement of the General Court’s stability**

#### **a) the problem**

The first organisational difficulty in the General Court comes from the high turnover of judges, though this has not been discussed in the legislative process until now. For a new observer it is quite striking. The average length of a judge’s stay in the General Court is now a little bit less than six years (it has decreased in the last decade). Furthermore, more or less 50 % of the judges have been appointed outside the normal triennial renewal procedure. Some judges have resigned, others have not been reappointed, some have reached the retirement age, and some have left for Court of Justice. The General Court is thus in permanent reorganization<sup>21</sup>, and regularly looks like the waiting room of an airport, with permanent new arrivals, departures, announcements... and delays<sup>22</sup>.

Considering the General Court’s role, this constitutes a fundamental handicap. Numbers sometimes speak loudly. Having a permanent renewal of 50 % of all members and 100 % of all chambers on a three years basis, when the heaviest cases may require four years for various incompressible constraints, is definitely not a recipe for efficiency. This situation prevents a lot of judges from using the experience accumulated. It provokes the regular

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<sup>19</sup> For the GC, this has been evoked by the CCBE (Council of Bars and Law Societies of Europe) in the House of Lords (at the level of chambers) : House of Lords oral evidence [WE 9], pp. 25 and 28.

<sup>20</sup> Knowledge-worker productivity : the biggest challenge, *California Management Review*, XLI :2 (1999), 79-94.

<sup>21</sup> Interestingly, this has been emphasized about the Court of Justice by some of its members in front of the House of Lords (The workload of the Court of Justice of the European Union, HL Paper 128, April 2011, § 83). The difficulty is in fact bigger for the General Court, since the length of its proceedings is longer.

<sup>22</sup> Just when the draft of this text was finished, a judge of the GC presented his resignation, due to exceptional political circumstances in his country. As well informed observers have immediately indicated, this will inevitably provoke the transfer of numerous heavy cases, the reopening of various hearings, and the designation of new judges in many cases. Furthermore, these problems could be compounded by some new departures to the Court of Justice during 2012 (see MLex comment, 16 nov. 2011, Monti’s choice of EU judge for Italian government spells uncertainty for CISAC appeals).

Once again, the problem has everything to see with the absence of stability, and nothing with the absence of specialization. One sees here a chamber formed in 2010, reorganized one time in 2011, possibly a second time in 2012, and most probably a third time in 2013 with the triennial renewal (each time with possible collateral effects on other chambers). The mentioned cases could additionally be attributed three times to a different judge.

transfer of heavy cases between cabinets, their reopening and the loss of previous work<sup>23</sup>. It concentrates the workload on some of the most stable cabinets. Finally, and crucially, since all cabinets' members depend on the mandate of the judges, it engenders a general instability of personnel. It has been estimated that the average length of a legal secretary ("référénaire") is five years. So, permanently, new people enter and begin to build a basic knowledge while others leave with their built knowledge to use it elsewhere. No wonder the average productivity level remains limited.

From this point of view, the transfer of a judge from the General Court to the Court of Justice represents the most damaging event. When a judge goes back home, (s)he goes back alone. When (s)he leaves for the Court, (s)he generally leaves with the whole team. During the last decade, the General Court has thus become sometimes some kind of training ground for the Court of Justice, losing regularly a strong volume of accumulated experience.

Of course, renewals present also advantages. They bring fresh ideas and experiences, for example. Nevertheless, in the balance between stability and renewal, the present system errs clearly too much on the side of renewal and not enough on the side of stability. Any proposition must imperatively take this into consideration. So the first result of a management approach reveals immediately the great difficulty of the topic. An important part of the weak productivity can be connected to the way the Member States use the appointment process.

#### b) some possible solutions

- Considering the need for stability, Member States and candidates should for example begin any appointment process in the General Court with a *perspective* of two mandates.
- For the same reason, the Member States could prevent any transfer of judges between the General Court and the Court of Justice during a period of 10 years (otherwise the General Court remains a training ground for some judges and legal secretaries of the Court of Justice).
- If Member States want a better performance, they must accept constraints when performance is delivered. They could for example commit themselves to reappoint judges in the General Court once, if the judge's cabinet presents a record after 6 years at least at the average productivity level (see § 3.2)<sup>24</sup>.
- The transfer of cabinets' collaborators between the three courts of the CJEU should be allowed only after a minimal activity period of 6 years for administrative personnel, and 8 years for legal secretaries (and thus 10 years for the judges).

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<sup>23</sup> A case often mentioned is the ICI case (see House of Lords written evidence [WE 1], pp. 9-10). Most interestingly, this case was reallocated two times between judges and three times between chambers. Many people however keep on calling for more specialization and not for more stability.

<sup>24</sup> This would introduce a restriction in the appointment process, but the Court of Justice's proposition, with the Commission's precisions, would produce in fact a similar result, since it would restrict the ability of the Member States to renew some judges.

### 3.2. Better incentives for judges

#### a) the problem

One important fallacy of the present reform debate resides in the absence of distinction between the Court of Justice and the General Court. The differences between the two courts appear huge. The Court of Justice is dealing with constitutional questions and preliminary legal questions from national judges. The General Court is dealing with most direct actions against the acts of the European authorities and has to control numerous and complex facts. The workload is comparatively heavier, as the House of Lords has emphasized after the CCBE. “In large competition cases... five, seven or ten applicants may be challenging a decision of the Commission of 600 pages or more, and the file may consist of 20 000 pages”<sup>25</sup>.

A second (general) problem lies in the lack of accountability. “Quis custodiet ipsos custodes?”<sup>26</sup> “Management – and not only in the business enterprise – has to be accountable for performance. (...) Managers have not yet faced up to the fact that they represent power – and power has to be accountable, has to be legitimate”<sup>27</sup>. “Managing others is most effectively done by example rather than by preaching or policy. (...) If the example is lacking, the most moving sermon and the wisest policy rarely work.”<sup>28</sup>

#### b) some possible solutions

- The need for a substantial experience in EU law is in fact greater in the General Court, since it deals quasi exclusively with this area, with a lot of technical elements and facts, when the Court of Justice covers also the national legal systems, and limits itself to the legal questions. This should be taken into consideration during the appointment process.
- The article 255 committee already indicated that it could review control the activity of sitting judges<sup>29</sup>. This should be explored. For example, all judges at the end of their mandate should present an activity report, indicating the number of settled cases and of backlog cases<sup>30</sup>. The committee could thus convoke any candidate for a renewal with a backlog 20 % greater than the average. A dialog could thus help to determine the causes of such a situation (which can be extremely different according to the context<sup>31</sup>).

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<sup>25</sup> The workload of the Court of Justice of the European Union, HL Paper 128, April 2011, § 45 and Q 71).

This statement needs to be understood quite precisely. It does not mean that the work at the General Court is more important (it is not). It does not mean that the work at the General Court is legally more complex (it is not). It just means that the control of numerous and complex facts requires more hours per case.

<sup>26</sup> JUVENAL, Satires, VI.

<sup>27</sup> P. DRUCKER, The new realities, 1989, chap. 15.

<sup>28</sup> P. DRUCKER, The changing world of the executive, 1985, p. 1.

<sup>29</sup> Article 255 committee, First activity report, 2011, p. 3.

<sup>30</sup> This activity report should be submitted to the concerned national government and to the article 255 committee. It would of course exclusively cover the management aspects of the work.

<sup>31</sup> When backlog cases are transferred from one cabinet to another one, for example, the new cabinet will have to bear this responsibility during one, two or sometimes three years.

### 3.3. Better incentives for legal secretaries

#### a) the problem

A curious omission in the various analyses about the situation of the EU courts concerns the cabinet personnel's<sup>32</sup>. Most analyses evaluate the average length of a legal secretary's mandate to five years. As we have seen, this is quite a limited length, considering that there is already a huge turnover of judges. Furthermore, this leaves little margin to use accumulated experience to improve the productivity.

This source of weakness is compounded in the General Court by two factors. Firstly, legal secretaries may easily be tempted by a transfer to the Court of justice, where collaborators enjoy a slightly better pay for a slightly average reduced workload. Secondly, legal secretaries in the General Court are more easily recycled into the specialized lawyers' offices, considering the role of the General Court in competition law.

Legal secretaries are well paid, and deservedly when they are productive since their job is difficult. Furthermore, their contract can always be cancelled in a three month's period. However, besides money, there are few perspectives for them. "Knowledge workers know when they can leave. They have both the mobility and confidence. This means they have to be treated and managed as volunteers... The first thing such people want to know is what the company is trying to do and where it is going. Next, they are interested in personal achievement and personal responsibility – which means they have to be put into the right job. Knowledge workers expect continuous learning and continuous training. Above all, they want respect...for the area of their knowledge"<sup>33</sup>. Basically, "all organizations say routinely 'People are our greatest asset'. Yet few practise what they preach, let alone truly believe it."<sup>34</sup> In the CJEU, on one side, there are no ways to reward exceptional performance. On the other side, the recognition of legal secretaries is quite limited, as training and minimal security. This is probably not the best context to generate a long term commitment to the institution.

It could also be said that a single pay level is a limited instrument for an institution in permanent need of more or less 200 legal secretaries. Considering the growing specialization of EU law, and also of the EU judicial function, the hiring and training of younger personnel could also be contemplated.

#### b) some possible solutions

- At this level, too, there is a need to find a better balance between renewal and stability. Without creating new public servants, the idea would be to create a slightly more stable hard core of collaborators, chosen on the basis of their excellent and durable

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<sup>32</sup> Commentaries about this topic remain quite rare. See for example GRASS, *Les ressources humaines à la Cour de justice*, in *Le droit à l'épreuve de l'homme - Mélanges Philippe Léger*, Pedone, 2006, pp. 69-78 ; JOHANSSON, *The role and importance of legal secretaries: sometimes underrated, legal secretaries (or référendaires) in fact play a vital role in helping to shape EU*, in *Competition law insight*, Vol. 6 (2007), issue 7, p. 11-13 ; DEMETRIOU, *The role of référendaires at the European Court*, *The EC tax journal*, Vol. 7 (2003/4), issue 1, p. 1-5 ; GERVASONI, *Des référendaires et de la magistrature communautaire*, in *L'Etat souverain dans le monde d'aujourd'hui – Mélanges J.P. Puissechet*, Pedone, 2008, pp. 105-116.

<sup>33</sup> P. DRUCKER, *Managing the next society*, 2002.

<sup>34</sup> P. DRUCKER, *Managing in a time of great change*, 1995.

performances. It would be useful to create a limited number of senior legal secretaries, not necessarily better paid but with a more stable status (6 years, renewable), contractually linked to the General Court, and not to a particular judge. It would allow a longer exit period, and a greater writing freedom.

- On the other side, it would be interesting to create a junior status, requiring limited experience, which would allow the hiring of young recruits, who could be trained for later possible promotion.
- Information about candidates should be centralized in each court, with a serious internal and indicative evaluation process. This would allow the court to propose immediately operational candidates to new judges when they arrive.
- All pay differences between the legal secretaries in the CJ and the GC should be abandoned.

### **3.4. Better incentives for parties to control costs**

#### a) the problem

For various reasons, mentioned above, the EU judicial process is often a long, complex and costly one. Any difficulty provoked during this process is thus bound to create delays and costs. This does not prevent many parties from disrespecting the practice directions to parties. For example, in 2010, nearly 50 % of applications in the General Court did not respect the practice directions. Moreover, nearly 40 % required one or even sometimes two regularizations. This engenders not only costs, but also delays. Here, again, the General Court is more exposed. The files are heavier. The General Court has to deal with all direct actions brought by natural or legal persons against acts of the institutions.

#### b) some possible solutions

- A new category of procedural costs could be created. Whenever a party does not respect the practice directions, it should bear the additional administrative costs provoked by this violation. Some flat fees would be established for the most common violations. The Courts could increase them for the most serious ones.
- More generally, a reflection should be launched about the participation of enterprises to the costs of justice<sup>35</sup>. A Court fee should be fixed for some cases, ensuring a right balance between the principle of fair access to justice and an adequate contribution of the parties for the costs incurred by the Court, recognizing the economic benefits for the parties involved<sup>36</sup>.

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<sup>35</sup> Revealing, the elimination of the backlog in the CST “appears to be partly the result of the... introduction of a costs disincentive, whereby the person who loses the litigation pays all the costs” (The workload of the Court of Justice of the European Union, HL Paper 128, April 2011, § 55).

<sup>36</sup> Most interestingly, such a mechanism has already been integrated in the draft agreement for a Unified Patent Court (Council EU n° 15539/11, art. 18).

### **3.5. More personnel**

The addition of new legal secretaries has been proposed by Committee on Legal Affairs of the European Parliament as a first measure to fight the General Court's backlog. Interestingly, this option had initially been supported neither by the Court of Justice, nor by the General Court.

However, this solution is certainly less costly than the structural ones. It could also deliver a much quicker result regarding the General Court's backlog. It is the most flexible. The advantage of a pool would be to allow the use of the new personnel units in the most productive teams, to accelerate the liquidation of the backlog. Finally, in case the backlog finally disappears, the resources can be easily reduced (this will most certainly not happen with the structural measures, and especially the 12 new cabinets). Finally, provided it is accompanied by some other productivity incentives mentioned above, such a measure could create a strong stream of change<sup>37</sup>.

### **3.6. The creation of a specialized trademark and designs court inside the OHIM**

Applicants for trademarks have become incredibly protected citizens. They benefit from a double administrative decision at the OHIM<sup>38</sup>, can lay an application in front of the General Court, and still have an appeal right in front of the Court of Justice. Enterprises receiving a 300 million Euros cartel fine, or Member States obliged to reimburse 100 million Euros subsidies do not benefit from the same protection.

A quite simple way to reduce the workload of the General Court without incurring any additional costs would be to transform the second administrative level in the Office into a specialized Court<sup>39</sup>. This could be easily financed by the OHIM, since it possesses now financial reserves of more than 400 million Euros<sup>40</sup>.

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<sup>37</sup> A small parallel increase in the registrar's resources will also be needed, to deal with the additional workload provoked by the elimination of the backlog.

<sup>38</sup> To be precise : Office for Harmonization in the Internal Market (Trade Marks and Designs)

<sup>39</sup> This option has also been suggested by former Advocate General Jacobs in the House of Lords : House of Lords oral evidence [WE 3], Q 82.

<sup>40</sup> This option will still be more efficient if it is combined with a measure concerning some enterprises' participation to the costs of justice (see § 3.4).



#### 4. THE STRUCTURAL SOLUTIONS AND THEIR EVALUATION

Though the productivity solutions appear as a priority, it remains necessary to compare the efficiency of the possible two structural solutions : the addition of 12 new cabinets to the General Court, or the creation of a specialized court, limited in a first phase to a specific domain of trademarks and designs. The first solution has been officially proposed by the Court of Justice and supported by the Commission. The second one has been defended by the General Court<sup>41</sup>. FD

In that context, the Court of Justice's proposal is a hybrid one. It proposes the addition of 12 new cabinets to the General Court, but also a partial specialization of this Court<sup>42</sup>. This hybrid approach is also supported by the Commission<sup>43</sup>. (It is noteworthy to remember that until now the General Court has never been formally consulted about the technical aspects of this solution.) The Court of Justice and the Commission indicate that this would promote efficiency. For the Court of Justice, this approach seems also strongly justified by the need to control all appeal procedures<sup>44</sup>. It invokes some "risks in relation to the very consistency of EU law"<sup>45</sup>. The Court of Justice makes a structural link between the appeals and the preliminary rulings<sup>46</sup>. This line of reasoning is quite general and categorical, and thus can have a huge strategic consequence for the future. All procedures being linked, and all appeals

<sup>41</sup> For a comparative legal analysis of these options, see LOUIS, La 'réforme' du statut de la Cour, *CDE*, 2011, pp. 1-9.

<sup>42</sup> "It is essential that [an increase in the number of judges] be accompanied at the same time by reflection on how to make the best use of all the General Court's resources, perhaps through specialisation by certain chambers and flexible management of case allocation" (Proposal of the Court of Justice, Doc. 8787/11, p. 10).

<sup>43</sup> "Some subject-matter specialisation by several General Court chambers would thus appear to be necessary to ensure more efficient and rapid handling of cases, while preserving the necessary flexibility so as to adapt to emerging types of disputes. While it is for the General Court to set down the details of such specialisation in its Rules of Procedure, the principle should be enshrined in the Statute itself to guarantee permanence." (§§ 36-37).

As we shall see, the Commission defended a completely opposite analysis in 2007, when the creation of a competition court was debated.

<sup>44</sup> « It is highly desirable that a single court – the Court of Justice – should ensure the uniform interpretation of the relevant texts, whether by means of a preliminary ruling or in the context of an appeal. It is all the more essential that that principle be observed since not every important legal issue concerning trade mark law has yet been determined, and the field of intellectual property interacts closely with other matters within the jurisdiction of the Court of Justice, such as the free movement of goods or consumer protection » (Further information from the Court of Justice, Doc. 12719/11, p. 5).

It is useful to indicate here that the case-law concerned here is very specific, factual, and deals only with a few provisions covering trademarks and designs. The connection with other general matters is consequently very limited. Interestingly, this was already the conclusion of the House of Lords in 2007, supported at the time by the European Commission (House of Lords, *An EU competition court*, HL Paper 75, April 2007, §§ 165-173).

<sup>45</sup> "It is necessary to underline the risks in relation to the very consistency of European Union law, particularly in an area such as that of intellectual property, that may be associated with the creation of a specialised court in the field of intellectual property. As the Court observed in its draft amendments to the Statute, there are in fact a number of facets to trade mark litigation. It includes, on the one hand, challenges before the General Court and, if necessary, before the Court of Justice, regarding intellectual property rights under Community law and, on the other, challenges before national courts which can refer questions to the Court of Justice for a preliminary ruling on the interpretation or validity of relevant regulations, directives or international agreements" (Further information from the Court of Justice, Doc. 12719/11, p. 5).

<sup>46</sup> "Since those cases form, in reality, a single block, it is highly desirable that a single court – the Court of Justice – should ensure the uniform interpretation of the relevant texts, whether by means of a preliminary ruling or in the context of an appeal. It is all the more essential that that principle be observed since not every important legal issue concerning trade mark law has yet been determined, and the field of intellectual property interacts closely with other matters within the jurisdiction of the Court of Justice, such as the free movement of goods or consumer protection" (Further information from the Court of Justice, Doc. 12719/11, p. 5).

not covered by the Court of Justice creating risks of consistency, one can thus wonder when in fact any transfer of attributions between these Courts can still be possible. The final interrogation then becomes what will happen with the three-tiers system established by the Nice Treaty.

In that context, the experience of the Civil Service Tribunal (CST) is essential. One can make (and makes) many speeches about specialized courts in theory, but the CST provides the only real experiment of a specialized court of the EU until now<sup>47</sup>. Here too, a few basic management principles apply. “Commit early on quality. Grow slowly. Diversify your expertise. Short term can be terminal. Don’t let structures run the operation. Think flexibility.”<sup>48</sup>

#### **4.1. The greater efficiency of a specialized court**

##### a) the positive results of the CST experience

The evaluation of efficiency requires the taking into consideration of quality (here the consistency of the case-law), quantity and speed. From the point of view of quality, nobody seems to consider that the transfer of public servants’ cases from the GC to the CST has provoked any loss – on the contrary. From the point of view of quantity, it can be said that the GC’s backlog has progressively been eliminated by the CST. The productivity per head is also much higher in the CST (as explained below § 4.2, this has an important impact on costs). From the point of view of speed, finally, the average length of procedure is clearly shorter in the CST than in the GC. No wonder everybody, from the President of the Court of Justice to the House of Lords, presents the CST as a “success story”<sup>49</sup>.

This is not very difficult to understand. The creation of a specialized court allows to harvest the real benefits of specialization. Firstly, recruitment can be more focused. This concerns not only judges, but also legal secretaries and administrative personnel. One could add that, at the EU level, the judges’ recruitment is more targeted. Furthermore, procedural rules, functioning, training can be adapted to the specific domain of specialization.

A recent development, however, could limit the comparative value of the specialized court option. It concerns the appointment process of judges. It seems that the latest renewal of the CST reflects a will of the Member States not to renew any member any more<sup>50</sup>. If the Member States intend to prohibit henceforth the renewal of any judge after six years, they will reduce most likely the level of performance.

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<sup>47</sup> See the very enlightening and realistic comment of P. MAHONEY, *The Civil Service Tribunal : the benefits and drawbacks of a specialized judicial body*, 31/1 Human Rights Law Journal 11-15 (2011) ; and H. KRAEMER, *The European Union Civil Service Tribunal : a new Community Court examined after four years of operation*, 46 Common Market Law Review 1873-1913 (2009).

<sup>48</sup> M.H. McCORMACK, *What they don’t teach you at Harvard Business School*, 1984, chap. 11 and 12.

<sup>49</sup> “The report on the Tribunal is a very positive one” (V. SKOURIS, 5th anniversary of the CST, 31/1 Human Rights Law Journal 3) ; “The CST is a success story” (House of Lords EU committee : The workload of the Court of Justice of the European Union, HL Paper 128, 2011, § 55). If this is the case, it would probably be very useful to deploy more efforts to repeat this success story.

<sup>50</sup> Two members were candidates for a renewal, including the President, and they were not renewed in 2011. If the Member States repeat this approach in 2014, three more members will have to leave, including the new President. This is hardly the best recipe for performance and quality.

## b) the reduced consistency of an enlarged General Court with specialized chambers

Establishing specialized chambers in the General Court is something very different from establishing a specialized court. It is necessary to remember that the General Court essentially works in chambers of three judges. As the House of Lords already mentioned in 2007, the specialization of judges can lead to problems of representation<sup>51</sup>. It can also generate important problems for the judgments' quality, because the role of the reporting judge is much heavier in the GC than in the CJ<sup>52</sup>. Finally, it can also provoke oppositions from the point of view of *juge légal* or *gesetzlicher Richter*<sup>53</sup>. These consistency problems, though already evoked in previous debates, have not been examined until now. (Incidentally, one of the advantages of a specialized court in trademarks and designs would be to avoid them.)

The Court of Justice's solution, as we have seen, is motivated by its preoccupation to protect consistency by keeping all appeals in its attributions. There are quite different opinions about the fundamental nature of questions raised by the specific domain of trademarks and designs which is concerned. Anyway, even if there is a real difficulty, a much better solution could be to propose a revision of the Nice Treaty on this specific point. (The Court of Justice as a matter of fact already proposed this in 1995)<sup>54</sup>. Such an approach requires however to answer a fundamental question about the future (see § 4.4).

## c) the reduced stability of an enlarged General Court

The propositions of the Court of Justice and the Commission do not offer any hope to reduce the present instability in the General Court<sup>55</sup>. On the contrary, they risk aggravating it. They introduce a lot of fixed terms in the General Court, which can hardly be seen as a factor of stability, either for the judges or the personnel.

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<sup>51</sup> This was already mentioned by the House of Lords in 2007, « the creation of... specialist chambers within the CFI is not an attractive option. (...) Even if extra judges were appointed, the majority of Member States would no longer have judges sitting on competition cases. This is unlikely to be acceptable to Member States. » (An EU competition court, HL Paper 75, April 2007, §§ 122 and 201).

<sup>52</sup> Here, too, there are important differences between the Court of Justice and the General Court. In the Court of Justice, whoever the reporting judge may be, all important cases go to the great chamber. The situation is very different in the General Court. The huge majority of cases are dealt with by chambers of three judges, and the weight of the reporting judge is thus much greater. Any specialization can thus lead to a very different representation of legal cultures, and less coherence, if there are no protection mechanisms. From this point of view, the parties could begin to observe with the greatest interest who the specialized judges in trade policy, public aids, agricultural subsidies or transparency will be. As was emphasized by the CCBE, "chambers of 3 are particularly problematic because of the lack of checks and balances. They put a lot of power in the hands of individual judges and there is less room for wider deliberation." (House of Lords oral evidence [WE 9], p. 18). This statement is still more valid for the GC than for the CJ.

<sup>53</sup> See about this the debate in the House of Lords in 2007 : House of Lords, An EU competition court, HL Paper 75, April 2007, § 116.

<sup>54</sup> Report for the IGC, May 1995, p. 8.

<sup>55</sup> In its opinion, the Commission has foreseen a possible obstacle, but could not find the proper solution (one wonders whether it exists) and thus introduced a caveat. « A certain [emphasis added] amount of stability in terms of the composition of the General Court must be guaranteed by maintaining *as far as can be* the possibilities of renewing the terms of judges. Given the technical nature of the subjects handled by the General Court and the increased need for specialisation there, it is important that the judges who have worked efficiently can possibly have their terms renewed. If the increase from 27 judges to 39 were to undermine this possibility, then this reform should be seriously reconsidered." (§ 45).

Nothing is foreseen in the case of a mandate's interruption, though this new regime could precisely engender some anticipated exit strategies, for judges or members of personnel. The huge turnover is thus bound to increase, creating sometimes mandates for two or three remaining years of very limited productivity. Without corrections, such situations could sometimes offer more perspectives for judicial tourism than for judicial performance.

#### d) the new difficulties for personnel's management in an enlarged General Court

The propositions of the Court of Justice and the Commission also mention nothing about the requirements of personnel's management. From this point of view, if the judge's specialization is permanent, this introduces a lot of inflexibility. If it is not permanent, (which seems the working hypothesis), it introduces a lot of additional instability. In this case, are judges for example meant to change collaborators each time they change specialization ? The proposed solution appears thus as more theoretical than practical, looking good on paper but susceptible to drift quickly into a managerial mess.

Generally, though this reality still seems hard to accept, it should be emphasized here that the cabinets form the essential production unit, not the judges. "The leaders who work most effectively never say 'I'. And that's not because they have trained themselves not to say 'I'. They don't think 'I'. They think 'we'; they think 'team'. They understand their job to be to make the team function."<sup>56</sup> Consequently, all propositions that do not take the team's needs into consideration are *ipso facto* incomplete.

#### e) productivity in an enlarged General Court

For various reasons, specialized chambers in the General Court would bring at the best much less productivity increase than expected. Firstly, as we have seen with the CST, specialized judges can bring increased productivity if the appointment process of judges and legal secretaries takes this specialization into consideration. No one has indicated yet how this could be possible inside the General Court<sup>57</sup>. Secondly, there is already an informal occasional specialization in the attribution of cases to the chambers<sup>58</sup>. Thirdly, the specialization of judges can easily lead to an increased disparity of the cabinets' workload. At the worse, without the proper modalities, the proposed specialization could in fact provide negative productivity incentives. Consequently, there seem to be essential elements missing in the debated proposals.

## **4.2. The smaller costs of a specialized court**

As far as costs are concerned, the situation appears very clear. In a 2010 analysis, P. Mahoney indicated that, per legal secretary, "the productivity of the CST compares more than favourably ; over the period between 2007 and 2009, for example, the CST could be said to be 3.2 times more productive than the GC and 2.9 more productive than the CJ"<sup>59</sup>. There is a

<sup>56</sup> P. DRUCKER, Management : tasks, responsibility, practice, 1973, chap. 18.

<sup>57</sup> Here too, the Commission has seen the problem and explored the possibility in its opinion. It proposed the appointment of specialized judges as a second option. This however does not eliminate all difficulties.

<sup>58</sup> This was already explained in a quite explicit comment of President Vesterdorf in the House of Lords in 2007 : House of Lords, An EU competition court, HL Paper 75, April 2007, § 117 and Q 426.

<sup>59</sup> P. MAHONEY, The Civil Service Tribunal : the benefits and drawbacks of a specialized judicial body, 31/1 Human Rights Law Journal 11-15 (2011).

huge difference in the productivity per personnel unit of the three EU courts (pppu)<sup>60</sup>. The 2010 numbers indicate a productivity ratio of 1,97 for the Court of justice, 2,99 for the General Court, and 5,61 for the Civil Service Tribunal. So it takes nearly three times as much personnel to settle a case in the general courts than in the specialized one.

Furthermore, not only the productivity per personnel unit is substantially higher, but the costs per unit are slightly lower, which is a second benefit. The CST is thus not only a success story regarding the diminution of the backlog or the length of the proceedings, but also from the budgetary point of view. The costs criterion favours very clearly the creation of specialized courts, and this should be considered as an essential sign for the long term<sup>61</sup>. Should the judicial activity increase strongly, the path of enlarging the General Court could provoke an explosion of costs. Hence the necessity to explore as much as possible the potentialities of specialized courts.

### **4.3. The slightly greater adaptability a specialized court**

Clearly, since both reforms are structural, both implicate some rigidity. The creation of a specialized court implicates a new court, and thus a permanent structure. If the number of applications decreases, the structure would become less productive. This risk seems quite limited, however, since the pressure to integrate the law of intellectual property in Europe is not going to diminish, as the sole domain of patents indicates. However, even if the level of activity decreases, it is always possible to reduce the number of judges, or to increase the attributions of a specialized court<sup>62</sup>.

On the other side, the propositions of the Court and the Commission present the addition of 12 additional cabinets to the GC as a more flexible solution. Again, in theory, it may seem right ; it is quite simple not to renew some judges in case they are not necessary any more. In practice, however, it is a completely different matter, as all people involved in institutional negotiations know. Wherever there is a balance of representation, it is always extremely difficult to abandon it.

Furthermore, specialized chambers in the General Court could reduce its adaptability. This had – quite paradoxically – already been emphasized by the Commission in 2007. “The more specialised chambers you have, the less flexibility you have in turning the cases to a chamber or to another”<sup>63</sup>.

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<sup>60</sup> The Pppu is the ratio between the number of closed cases and the cabinets’ personnel (judges or advocate generals and their collaborators). Cabinets consist of eight persons in the CJ, six persons in the GC, and three persons in the CST. Adjustments have been made for the presidents’ personnel. All data come from the available reports of activity of the CJEU and its budgets.

<sup>61</sup> It is sometimes invoked that the creation of a specialized court entails more administrative outlays due to the creation of a new registrar. This is not correct. The growing number of applications must always be dealt with by new members of personnel, wherever it happens. New jobs will have to be created anyway, either in a specialized court or in the extended General Court.

Furthermore, at least as a transitory measure, the registrar of the CST could be used for a new specialized court. This could accelerate the launching of the specialized court.

<sup>62</sup> The attributions of the CST could thus be extended, for example, to other areas of the administrative activity of the institutions, quite restricted and where the case law is well established, like public tenders or contractual liability. The very limited attributions of a trademarks and designs court could be extended to other aspects of these topics, or to other topics of intellectual property.

<sup>63</sup> Declaration of the Director General of the Legal Service, House of Lords, An EU competition court, HL Paper 75, April 2007, § 119.

#### 4.4. The greater long term coherence of a specialized court

All actors involved, including the citizens, would be better served by the definition of a long term strategy, taking into consideration all relevant future constraints. The last thing we need is a reform that will need a serious reform in a few years, and which will have blocked some options meanwhile. “Wisdom consists of the anticipation of consequences” (N. Cousins).

Firstly, the number of cases should go on rising in the future. The CJ and the GC will thus have more work. The number of the judges in the CJ has been blocked by the Treaties. Thus sooner or later the CJ will need to make new transfers of cases to the GC. The first strategic interrogation turns around that. What is the maximum level of cases that the CJ can accept ? When this level will be reached, what must be transferred to the General Court ? From its present proposition, one could deduce that the Court of Justice intends to keep both all prejudicial rulings and all appeals in its exclusive area of competence<sup>64</sup>. However, this is a fundamental change of approach, which goes against the vision of the Nice Treaty. Furthermore, at the end, it does simply not seem feasible<sup>65</sup>.

Secondly, if the workload of the GC increases, it will become necessary to create, when possible, some specialized courts. In that context, the trademarks and designs domain offers a unique opportunity to prepare the future. The legal domain is circumscribed. The systematic implications are very limited. The case-law is widely settled. Most clearly, new intellectual property litigation will have to be dealt with in the next decades (patents, copyrights especially in the information society). Here comes the second strategic question. If the creation of a specialized court is not envisaged here, when will it be ?<sup>66</sup>

All this confirms strongly the wisdom of the Nice Treaty vision for the European courts’ system : a CJ concentrated on constitutional litigation, with a limited appeal faculty controlling the essential legal problems, a GC as an adjustment mechanism, dealing with the general flow of individual applications and some growing segments of activity, and some specialized courts aiming at the highest productivity in specific segments of activity characterized by well established legal principles. From the management point of view, and from the point of view of costs, this three tiers system makes a lot of sense.

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<sup>64</sup> Among other consequences, enlarging the General Court increases the Court of Justice’s workload through the growth of appeals.

<sup>65</sup> There are other possible paths, but at the end something always needs to be transferred. See for example LENAERTS, *La réorganisation de l’architecture juridictionnelle de l’Union européenne : quel angle d’approche adopter ?*, in M. DONY et E. BRIBOSIA dirs., *L’avenir du système juridictionnel de l’Union européenne*, ULB, 2002, pp. 49-64 ; FORWOOD, *The Court of first instance its development and future role in the legal architecture of the European Union*, in *Continuity and change in EU law – Essays in honor of Sir Francis Jacobs*, 2008, pp. 34-47.

<sup>66</sup> As Advocate General Jacobs indicated, « if we are looking at specialised tribunals, we are really looking at areas where there is a European body taking a series of decisions that have to be open to challenge before a tribunal. If the nature of the subject matter is appropriate – it is a sufficiently specialised area ; it is distinct from other areas of EU law ; it can be isolated and identified ; and if there is a sufficient number of cases in that area” House of Lords oral evidence [WE 3], p. 60).

## TEN PRELIMINARY CONCLUSIONS

- The functioning of the EU courts is based on elements which have become partly outdated in a new working environment. Many elements of this environment have changed. If one wants to improve performance, this must be taken into consideration.
- In that framework, the CJEU could certainly benefit from a better preservation of its human capital, a greater role for management by results, and the recognition of the specificities of the General Court's work. All propositions regarding the General Court should take these priorities into consideration. Some of the presently debated proposals do not, and could as a matter of fact worsen in some aspects the present situation.
- Strong improvements could be made through the strengthening of the General Court's stability, and the creation of better incentives for judges, personnel and parties. They would require very limited additional means, but imply that all actors involved (Member States' governments, General Court's judges and personnel, Court of Justice, budgetary authorities, and legal counsels) accept some changes.
- Particularly, the greatest thing that the Member States could do for the General Court is to commit themselves to condition any renewal to a minimal level of performance and to renew once all judges whose cabinets reach an average level. This will create much more stability and performance incentives for everyone, will have an instantaneous effect, and will not request any outlay. Member States must be aware that the appointment process needs anyway some kind of streamlining after the entry into force of the Lisbon Treaty, to minimize the costs provoked by various delays.
- If productivity solutions are not introduced beforehand, both structural solutions, and especially the creation of new cabinets in the General Court, are bound to increase average costs. Unlike the multiplication of bread and fish, there are few miracles to expect from a simple multiplication of judges. The structural solutions should thus be considered as subsidiary options.
- In the present situation, there is an urgency linked to the backlog. The General Court certainly needs a limited amount of additional personnel (legal secretaries and registrar agents) to deal with the existing backlog. This is the simplest, quickest, cheapest, and most flexible instrument to deal with the problems (especially if it is combined with some additional productivity measures).
- If a specialized court is created in the field of trademarks and designs (and later in other domains), the need of a minimal stability should equally be taken into consideration in the judges' appointment process.
- The system always runs the risk of a sudden eruption of judicial activity in a new EU domain. There is thus a need for contingency planning (even if this scenario has not yet materialized). From this point of view, the proposition to add new cabinets to the General Court must be kept in mind. It needs however further study, to prevent some dangerous negative consequences.

- Any structural solution would benefit highly from a preliminary systemic reflection. One cannot take such a fundamental decision without defining first a strategic perspective. This requires to define what the ceiling of activity of the Court of Justice is, and what should be done when it will be reached. These are the two strategic questions. At the end, the Court itself will become overloaded, and a redefinition of its attributions will be needed. The time to think about this is now.
- In synthesis, a management approach would allow to deal with the present backlog of the General Court while strongly minimizing the costs. It would rely on (a) productivity solutions to improve slightly the Court personnel's stability on a condition of performance ; (b) additional personnel to be allocated to the most productive teams ; (c) the creation of a specialized Trademark and Designs Court, preferably in the framework of OHIM, and (d) the addition of new cabinets to the General Court if all previous solutions fail and modalities have been found to protect the Court's stability.