



EUROPEAN UNION COMMITTEE JUSTICE AND INSTITUTIONS SUB-COMMITTEE

INQUIRY INTO THE WORKLOAD OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

WRITTEN EVIDENCE

CONTENTS

Memorandum by the Bar European Group and the Bar's European Committee (WE 12).....	2
Memorandum by the CBI (WE 1).....	7
Memorandum by Professor Damian Chalmers, Head of European Institute, London School of Economics and Political Science (WE 5).....	16
Memorandum by the Court of Justice of the European Union (CJEU) (WE 13)	21
Memorandum by the European Circuit of the Bar of England & Wales (WE 6)	31
Memorandum by the Faculty of Advocates (WE 7)	32
Memorandum by the EU Committee of the Law Society of England and Wales (WE 8).....	37
Memorandum by William Robinson, Sir William Dale Visiting Fellow, Institute of Advanced Legal Studies, London (WE 14).....	41
Memorandum by Professor Takis Tridimas (WE 11).....	43

Memorandum by the Bar European Group and the Bar's European Committee (WE 12)

1. The European Committee of the Bar Council draws much of its membership from the Specialist Bar Associations (SBAs) representing specific practice areas at the Bar. In preparing a response to this important inquiry, the Committee looked in particular, to the Bar European Group (BEG), the SBA comprised mainly of practitioners and students with a particular interest in European Union law. These are the very practitioners most frequently involved in cases before the Luxembourg Courts and can thus draw on their direct experience and expertise. The European Committee and the BEG are grateful for the opportunity to comment on the questions raised by the Justice and Institutions Sub-Committee of the European Union Committee of the House of Lords. We respond to the questions raised below.
2. The response below was developed by a sub-committee of the BEG, and the points made are the personal views of the three members of the sub-committee rather than a formal view offered by BEG as a whole. We have also seen a response prepared by the Bar's European Circuit and do not propose to reiterate the helpful points that the Circuit has made.
3. Our responses will concentrate mainly on references for a preliminary ruling, pursuant to Article 267 TFEU, rather than on direct actions. Such references go to the Court of Justice of the European Union ('ECJ').
4. The procedure for direct actions is more streamlined and (outside of the specific context of State Aid and Competition cases) generally more efficient. Those actions are usually brought before the General Court of the European Union ('GCEU'). Nonetheless, a large number of direct actions are in practice often brought by UK practitioners based in Brussels, so the impact on our membership has been less pronounced.

(1) What are the significant issues highlighted by the statistics relating to the past and current workload of the Court of Justice, the General Court and the Civil Service Tribunal?

5. Although the statistics show an improvement overall in the length of time taken to dispose of cases, lengthy delays are still experienced in the course of references from the UK's domestic courts. Furthermore, the statistics presented do not necessarily represent an accurate picture, since the practice of domestic courts in certain jurisdictions is to make a number of references to the ECJ on the same point, but with each case then being assigned a separate reference number. This may give an impression that the number of cases determined in a given period is higher than the

reality. It will not, of course, have an impact on the average length of time for disposing of a reference provided that the references are viewed individually.

6. The ECJ's workload has increased somewhat over the years. More significantly, the translation requirements increased substantially with the accession of a further twelve Member States in the period from 1 May 2004. All of the relevant public documents of the Court have to be translated into each of the official languages of the Union. This places a significant administrative burden on the Court. It also means that measures put in place to try and speed up procedures before the Court have not been effective in reducing the delays.

(2) Are the turnaround times for disposal of cases comparable to other courts of equivalent standing?

7. In our experience, the turnaround times for hearings before the ECJ are quicker than those applicable before the European Court of Human Rights in Strasbourg, but slower than those in the UK's Supreme Court. This is undoubtedly partly a function of the absence of a need to translate the key documents before the Supreme Court; but also a function of the lighter docket that the Supreme Court enjoys.

(3) Are the turnaround times for disposal of cases acceptable to litigants?

8. This depends on the strategy of the litigant. Those litigants wishing to "park" a difficult case for strategic reasons derive satisfaction from obtaining an Order for reference. Those seeking a quick resolution of their legal dispute are usually unimpressed with the time estimate given for an actual or potential reference to the ECJ.
9. We also have some concerns that the ECJ's own procedures are not necessarily adept at dealing with any unusual features that arise in individual cases. In Football Association Premier League Ltd v. QC Leisure [2008] EWHC 1411 (Ch), for example, Kitchin J made an order for reference that was then followed by an application by various interested parties to intervene ([2008] EWHC 2897 (Ch)). The application to intervene was permitted by Kitchin J. He considered that the interveners should be permitted to take part in the written and oral procedure before the ECJ in the referred case. The ECJ, however, disagreed. But it took the ECJ over a year to communicate its decision that the interveners would not be recognised as parties in its procedure.
10. While the ECJ does have an Urgent preliminary ruling procedure (PPU), its scope of application is limited to matters arising in the area of freedom, security and justice.
11. We believe that the length of time required for a reference to be completed has contributed to a growing tendency among the UK courts to deal with EU matters

themselves without the benefit of a reference. Such an approach is not, however, possible, in those cases where a litigant is challenging the validity of an EU measure (unless the case is clearly ill-founded).

(4) What considerations, both from the recent changes brought about by the Treaty of Lisbon and otherwise, are likely to affect the workloads of these courts and to what extent?

12. The substantive areas over which the ECJ now has jurisdiction have increased significantly. Moreover, the new areas of competence, including in the fields of justice and home affairs (criminal law, visas and asylum issues etc.) are by their nature likely to produce more cases involving a risk of loss of liberty or other pressing issue than was the case previously. We may thus expect to see a rise in the number of requests by national courts for the use of the PPU procedure, potentially leading to a greater backlog of "normal" cases.
13. The Treaty also extended the option to bring a reference to the ECJ for a preliminary ruling to all national courts, and not only the court of final appeal, which is obliged to do so. That in and of itself is likely to increase the volume of cases.
14. In addition, it is possible that the direct incorporation of the European Charter of Fundamental Rights will increase the number of references from certain jurisdictions. We do not, however, anticipate a significant increase in the number of references from the United Kingdom in Charter cases given the overlap with other protection for fundamental rights already present in this jurisdiction.

(5) Will accession by the EU to the ECHR affect the working of these courts?

15. The EU's proposed accession to the European Convention on Human Rights raises difficult questions of coordination and compatibility between the Strasbourg and Luxembourg Courts. While their jurisprudence on human rights is broadly similar, there are areas where the case law diverges. These issues will need to be resolved by the EU team negotiating the terms of accession with the Council of Europe. In particular, thought will need to be given as to whether the right of individual petition to be conferred on EU citizens will include a right to challenge decisions of the ECJ directly before the Strasbourg Court.

(6) What are the significant challenges and impediments to the courts in handling their workload effectively and expeditiously?

16. The interpretation requirements identified above are both the biggest challenge and the most significant impediment to effective docket control. We do not consider that the new procedures introduced by the ECJ to speed matters up have been particularly effective, although we acknowledge that the ECJ is capable of reaching a

very quick decision where the urgency of the case demands it. Not many cases, however, have justified that level of urgency.

17. We are aware that there has been criticism in some quarters of the quality of certain of the more recent judgments of the ECJ, particularly in specialist areas. A recent judgment from the Chancery division (where the Judge was in fact sympathetic to and “fluent in” EU law) nonetheless stated that: “Discerning shifts of emphasis in successive decisions of the ECJ sometimes resembles the finer points of Kremlinology at the height of the Cold War.” Other less erudite comments which are critical of the ECJ’s standard of reasoning in its case law have been known to come from English judges.
18. We have also heard the view expressed that the Court should have a specialist “tax” judge, for example. This view has garnered support through criticism of a recent judgment of the ECJ in Case C-337/08 X Holdings BV v. Staatssecretaris van Financiën [2010] ECR I-0000, ECJ. When the reference went back to the Netherlands referring Court, the Advocate General in the Hoge Raad indicated that the ECJ had misunderstood the applicable Netherlands law. There has been academic criticism of this and in particular of the ECJ’s refusal to re-open its own procedure following the delivery of the ECJ Advocate General’s opinion: see “What if the ECJ gets national law wrong?” (2010) 9 H&I 28.
19. This experience is to a certain extent borne out by the decision of the Court of Appeal in The test Claimants in the FII Litigation v. HMRC [2010] EWCA Civ 103, CA. The Court of Appeal has decided to refer an issue back to the ECJ so that it can clarify a ruling it gave on an earlier reference in the same proceedings. At [59] of the first instance judgment, Henderson J recorded his view that “I cannot escape the impression that at this critical point the ECJ must have misunderstood the argument being advanced for the UK government.” While a majority of the Court of Appeal did not share this analysis, there was sufficient doubt on the matter to persuade the Court of Appeal to make a second reference.

(7) Are there any bottlenecks in the processes of these courts?

20. The major problem here is translation. For as long as there is a requirement for the relevant Court pleadings and judgments to be translated into every EU official language, this bottleneck is unlikely to ease. The Court has sought to minimise the time required for translation through the adoption of certain stock paragraphs or phrases in its judgments which can then be taken directly from previous translations. We are not convinced this necessarily contributes to the quality of the judgments, but it does aid consistency.

(8) What measures would improve the working of the courts, bearing in mind the limited possibility of Treaty change?

21. The EU should select four or five official languages into which every document should be translated and then require translation into a different language only where the origin or interest in the case demanded it. While we accept that this will be politically controversial, we believe the nettle should be grasped.

(9) What could the Institutions and Member States do to help the Courts dispose of cases more expeditiously?

22. See response to question (8). Undoubtedly as the judiciaries of some of the newer Member States grow in confidence, the number of references from those countries will decline. We are not in favour of a regionalised Court of Appeals system (as adopted, for example, in the United States) because of the risk of inconsistent judgments between different “blocs” of countries. This would be most obvious in the contrasting approaches between common law and civil law systems. There would be a concomitant risk to the cohesion of EU law as an autonomous set of principles.
23. We nonetheless believe that some real thought has to be given as to how sensibly to streamline ECJ procedures. We would suggest consideration be given to the following points:
- a. Making creative use of chambers that use a limited number of languages;
 - b. Staggering submissions from the parties to a reference, so that observations from the parties, any Member State whose law is in issue and the Commission are published first, before other Member States make their written observations. This would remove the need for certain Member States to intervene and would reduce the need for such lengthy observations to be submitted by Member States;
 - c. Better accelerated procedures for those cases which require expedition but cannot be said to be truly urgent;
 - d. Judicial training is a priority for the EU under the Stockholm Programme Action Plan in the area of Freedom, Security and Justice over the next five years. The EU institutions are looking to promote on-going training of judges and the legal professions, through courses, exchange programmes; exchange of best practice and other initiatives. National judges at all levels are likely to be invited to take part in these programmes, both to teach and to learn, and we believe that it would be mutually beneficial for such programmes to involve the judges of the ECJ and GCEU, not least in the areas of law over which those courts are newly competent.

October 2010

Memorandum by the CBI (WE 1)

INTRODUCTION

1. The CBI¹ appreciates the invitation of the Committee to respond to its inquiry and is pleased to make the following submissions, which will be confined to the operation of the General Court. We suggest however that the proposed improvements in respect of the working language of the Court could also improve the turnaround of cases before the ECJ.
2. The Committee will be aware of the CBI's interest in this topic from the CBI's proposal for an EU Competition Court which was the subject of the Committee's report in April 2007.
3. The CBI's proposal four years ago derived from the need for the faster handling of cases, in particular merger appeals, before the CFI which has now become the General Court. The Committee took the view that the time was not ripe for a new Competition Court and recommended instead a number of other actions to improve the turnaround of the court's case-load.
4. This is an extremely important issue for business as shown by a letter from BUSINESSEUROPE to President Barroso² concerning access to justice. The letter made clear that the legal uncertainty created by delays had not only a direct effect on the companies concerned but an indirect effect on their shareholders and a ripple effect on the whole economic system.
5. The letter referred to this Committee's report and recommendations for reform and urged the Commission to deal with the unmet need for reform. It made the point that effective judicial remedies underpin the whole structure of the Community and must be put in proper working order. Since that letter there have been no major reforms and the problems have become more acute.
6. We would also refer to the Committee's previous conclusion³ that:

¹ The CBI is the UK's leading business organisation, speaking for some 240,000 businesses that together employ around a third of the private sector workforce. With offices across the UK as well as representation in Brussels, Washington, Beijing and Delhi the CBI communicates the British business voice around the world.

² Letter of 5 September 2007 from Mr. Ernest-Antoine Seillière, President of BUSINESSEUROPE

³ An EU Competition Court – HL Paper 75- 23 April 2007 – at paragraph 16

“Delay strikes at the effectiveness of judicial review and draws attention to the power of the Commission as an investigating and decision taking body. ...A satisfactory and speedy appellate process is therefore important in ensuring accountability and controls to maintain appropriate standards, and in maintaining fairness and encouraging confidence in the system.”

EVIDENCE OF THE CONTINUING PROBLEM

7. As is evident from the introduction to the Committee’s inquiry, this problem has not gone away and continues to be a major concern for business. The statistics of the General Court show that:

- around 75% of the pending cases before the Court are directly relevant to business⁴
- the number of intellectual property cases (which we understand to be nearly all trademark appeals) has risen by 80% over the past five years, from 197 to 355 cases
- the number of pending competition cases has risen by 82% over the past five years, from 134 cases to 244. This category represents 21% by number but, according to the evidence of former CFI President Vesterdorf, over 30% of the Court’s workload
- the time taken to complete competition cases, which is included in other actions, has increased by nearly 30%, from 25.6 months to 33.1 months. This will also include merger appeals, which the Committee agreed with the CBI should be completed if possible within 6 months. The record shows that 78% of appeals to the General Court since 2005 have taken more than 24 months to resolve, with almost 50% taking more than 36 months.

⁴ Cases involving commercial policy, company law, competition, freedom to provide services, intellectual property and State aid.

ARE THE TURNAROUND TIMES ACCEPTABLE TO LITIGANTS?

8. The CBI has previously given evidence to the Committee on the importance of the rapid clearance of merger appeals, which we believe has been accepted by the Committee. We anticipate as firms emerge from the recession there will be increasing moves to restructure and consolidate, leading to further pressure on the workload of the General Court.
9. An average turnaround time of 33.1 months for competition cases is unacceptable to companies and fully justifies the concerns raised with President Barroso. The principles decided in these cases are of enormous significance and have a major impact on substantive issues such as the licensing of technology, but also on procedural matters and rights of defence. 33 months may be contrasted with the urgency with which judicial review of administrative decisions are treated in the UK.
10. DG Competition has introduced new fining guidelines in cartel cases and has greatly increased the level of fines, reaching a figure of €1 Bn. As these huge fines are imposed at the end of a purely administrative procedure it is vital for European business that there is recourse to timely judicial review.
11. Companies that are subject to these fines must either lodge the full amount of the fine or post a bond to cover it. Either option imposes costs on the company and the longer the appeal process, the higher the cost.
12. The recent case of ICI v European Commission⁵, which it is to be hoped is wholly exceptional, illustrates the delays which can occur in the appeal process. :

20 March 2001 – appeal lodged

4 May 2001 – case allocated to the Fourth Chamber and a Judge-Rapporteur appointed

6 October 2003 – case reallocated to the First Chamber

⁵ Case T-66/01 Judgment of the General Court (Sixth Chamber) 25 June 2010

19 October 2004 – case reallocated to the Fourth Chamber

22 June 2006 – new Judge-Rapporteur appointed following retirement of previous one

8 November 2007 – case reallocated to Sixth Chamber

13 February 2008 – new Judge designated to complete the Chamber

26 & 27 June 2008 – hearing before the Court

25 June 2010 – Court judgment

13. In its judgement, the Court reduced ICI's fine to €8m. However, not only did ICI have to wait an unacceptably long time for the Court's adjudication but incurred considerable bank costs in renewing the bank guarantee for the original fine of €10m.
14. We make no comment on the merits of the case but it provides a clear, if extreme, example of the delays that can occur in the in the management of proceedings before the General Court and the impact on a company. It clearly underlines the need for more robust case management. There is nothing in the General Court's procedural rules or practices to prevent such delays occurring in the future.

SIGNIFICANT CHALLENGES AND IMPEDIMENTS TO THE HANDLING OF THE COURT'S WORKLOAD

15. The significant challenges faced by the Court in managing its workload may be summarised as: increases in jurisdiction, increases in the volume of cases and procedural impediments.
16. The CFI was originally set up to relieve the ECJ from the burdens of dealing with fact-intensive competition and staff cases Over time its jurisdiction has expanded to cover:

- all actions brought by private parties against EU institutions
- actions brought by Member States against the Commission
- actions brought by Member States against the Council relating to acts adopted in the field of State Aid, “dumping” and acts by which it exercises implementing powers
- actions relating to Community trademarks and registered designs
- actions brought against decisions of the Community Plant Variety Office or of the European Chemicals Agency

17. Although staff cases are now handled by the Civil Service Tribunal, the General Court will still have a role to play in staff cases as it will hear appeals from that Tribunal.

18. Registered Community designs have been in existence since 2003 and already there have been over 500 decisions at OHIM. 145 have been appealed and three of these have been appealed to the General Court in 2010. This workload can be expected to further increase.

19. The expansion in jurisdiction has also been accompanied by an increase in the number of cases, not least as a consequence of the increase in the number of EU Member States, imposing a further burden on the Court’s resources. The increase in the volume of cases is shown by the statistics of the Court: new cases have increased by 32% over the past four years, from 432 in 2006 to 568 in 2010. Worryingly, the statistics also show that fewer cases were completed than were brought.

20. The increase in the Court’s workload seems set to continue, not least as a result of the imposition of ever larger administrative fines in cartel cases, which companies will have a strong interest in appealing.

21. The main procedural impediment to speedier disposal of cases, which was highlighted by evidence during the Committee’s hearings on the EU Competition Court, is the need to translate all the documents in the case. The Committee was told that the translation of the judgment itself could add six months to the duration of an appeal.

MEASURES TO IMPROVE THE WORKING OF THE GENERAL COURT

22. We consider these fall under two headings: procedural improvements and structural improvements.

Procedural improvements

Case allocation

23. The Committee heard evidence from the CCBE that anti-dumping cases, for example, were allocated to all the different Chambers at the Court, rather than to specialist judges. The Committee chairman expressed astonishment and commented that cases should go to Chambers where the relevant expertise lay.⁶ As the CCBE commented, having cases decided by a specialised judge in an area helps not only to get better decisions but also to speed up the decision-making.

Adapting the working language rules

24. Sir Christopher Bellamy, former judge of the CFI, gave evidence to the Committee that given the volume of cases in English, being able to work in English would produce substantial savings in time⁷. The Committee found that it was not a stipulation of the Treaty, the Statute or of any Rules or other legislative instrument that French is the working language of the Court or that there should only be one working language⁸.

25. The Courts are flexible in allowing the parties to select the language of the case, which is the language for pleadings and the Hearing. However as the Court's working language is French, everything in the file, such as all the pleadings, correspondence and transcripts but not the evidence, is always translated into French. This happens even if all the judges are perfectly familiar with the language of the case. This translation effort leads to months of delay at the start of cases as all appeal documents must be translated before the procedure within the General Court

⁶ Q.99 of the Committee's Report at page 23 of the Evidence

⁷ Committee's Report at paragraph 59

⁸ Committee's Report at paragraph 62

commences. In addition translated documents have to be checked carefully by the judges for accuracy.

26. We should point out too that the judges, particularly those from the new Member States, are often more familiar with English than they are with French. English is the language of many cases, not only those brought by English claimants. We suggest therefore that the Court should permit the use of English as an alternative language in proceedings before the Court, in particular where English is the language of the case. We believe this would achieve major savings in time and resources.

Language in an expedited procedure

27. Adopting a suggestion made to the Committee by Sir Peter Roth⁹ we propose that where the Judges constituting the Chamber hearing a fast track case so decide, the documents should not need to be translated out of the language of the case. This would mean that any complainant seeking to intervene in the appeal would be required to use the language in the Form CO.

28. This would mean that in an expedited procedure in a merger appeal the language used in a Form CO, would where possible be the Court's working language of the case.

Intervener in a merger appeal

29. If a third party challenges a merger but does not apply for the fast-track, the merging parties should have the right to request an expedited procedure, which should normally be granted.

Robust case management

30. We believe the ICI case demonstrates the need for more robust case management in the General Court. This is supported by the evidence given by a number of witnesses previously to the Committee¹⁰. There are good examples of case management and these need to be followed as best practice. We acknowledge that case management

⁹ Committee's Report at paragraph 132

¹⁰ Committee Report – paragraph 135 and following

is more actively practised in English courts but the Court should seek to address cultural obstacles to improving its procedures.

31. Proposals that the Court might consider are setting a public timetable for the proceedings and seeking to narrow appeal issues to those that appear most meritorious.

Structural improvements

32. More than ten years ago when the EU courts were facing a major problem of handling an increasing workload a Working Party recommended to the Commission that three judicial panels of the General Court should be established¹¹. The first of these should handle staff cases, which has now been implemented, the second should handle trademark cases and the third should handle competition cases.
33. The Committee in its Report concluded that a Trademark Tribunal should take precedence over any Competition Court, saying that the transfer of trademark cases could lead to a marked decrease in the workload of the Court. It encouraged the Commission to give urgent consideration to this suggestion.
34. The consideration of this proposal is no less urgent today than it was over three years ago and the CBI strongly supports it. We acknowledge that this structural reform is more easily achievable than setting up a Competition Court and should therefore take precedence.
35. The Committee heard evidence both from the Commission and former CFI President Vesterdorf¹² that trademark cases are more routine and were a good candidate to be offloaded to a new panel. This was an area of the law that was clearly distinguishable and the cases could be contained and sent to a new court.
36. In an interview in October 2007¹³, this was supported by a statement of President Jaeger of the General Court, that trademarks could be moved to a separate court more easily. The Court's statistics clearly demonstrate the potential of such a move to free the bottlenecks which are slowing proceedings. Over 20% of cases before the Court are trademark appeals from the OHIM in Alicante.

¹¹ Report on the future of the European Communities' Court System – January 2000

¹² Committee Report – Question 375 at page 90 of the Evidence

¹³ Bloomberg 11 October 2007

37. We propose that these trademark appeals should be transferred to a new IP Tribunal, which would be a judicial panel of the General Court. The legal issues which arise on these appeals are much narrower than appeals from the courts of Member States. They all relate to the grounds for refusal or cancellation of registration where the law is generally settled. The appeals often turn on questions of fact or procedure or general issues of fairness.
38. Preliminary references from the Member States on trademarks are most likely to relate to the interpretation of Directives and may well involve broader issues of law such as those relating to comparative advertising. For this reason we propose that these should continue to be made to the ECJ.

CONCLUSION

39. The need for reform is recognised and acknowledged by the Court and the Commission. The delays in cases before the Court are growing and show no signs of diminishing. They are having a considerable impact on business and ultimately on the EU economy.
40. The remedies have been identified and debated. What is now needed is a political will to implement both a structural reform in the shape of a new IP Tribunal, together with procedural reforms of the General Court.
41. We propose that this new judicial panel of the General Court should be an “IP Tribunal” rather than a Trademark Tribunal, which was previously recommended by the Committee. This is in recognition of the expected appeals of registered Community design decisions of the OHIM.
42. We would support a merit based system for the recruitment of judges to this IP Tribunal, as we understand took place for the Civil Service Tribunal.¹⁴

23 September 2010

¹⁴ Committee Report – paragraph 96 – reference to lawyers “having the most suitable high-level experience”.

Memorandum by Professor Damian Chalmers, Head of European Institute, London School of Economics and Political Science (WE 5)

I. Introduction

The current statistics of the Court of Justice show that since the 2004 enlargement there has been a relative stability in the work load of the Court of Justice. Since 2005, the completed cases has gone up slightly whilst the reservoir of pending cases has remained constant. Defenders of the status quo would also point out that the duration of proceedings has declined by about 30% during that period.

This is something of a false picture. On the one hand, with the appointment of twelve new judges, the Court has had an 80% increase in personnel. This has not yet been fully reflected by an increase in its docket as neither the effects of the 2004 nor the 2007 enlargements have yet filtered through. First, with regard to Article 258 TFEU infringement proceedings, all Member States acceding to the Union had to be in compliance with EU law and infringement actions were only likely to be brought for EU legislation adopted after enlargement which had either not been complied with or transposed. The result is that of the 636 cases heard by the Court between 1 January 2005 and 31 December 2009 only 24 involved the new Member States. This will change, of course, over time. Secondly, almost all the new Member States suffer from large delays within their own judicial systems. This entailed that there would be no litigation being heard by their domestic courts for a little while and consequently almost no references from those courts in their first few years of accession. This is now changing as the docket in 2010 reflects with additional references from those States. The Court has benefitted, therefore, from a honeymoon period of extra resources with little extra workload that will shortly end.

The other effect likely to add to workloads are the effects of the Lisbon Treaty, most notably the end of the restrictions on national courts referring in the area of freedom, security and justice. Criminal, immigration and asylum law are fields of intense judicial activity, and, therefore, susceptible to greater use of the reference procedure. The situation is accentuated, however, by two other factors. The first is that references currently cover a

relatively small fraction of EU law for the simple reason that only a small portion of it is litigated whereas the rest tends to be regulation and rarely come before the courts. In 2004 research I carried out, I found that 47% of the references received by the Court between 1998 and 2003 concerned three fields: the economic freedoms, VAT and agriculture.¹⁵ Of these, the economic freedoms are rooted in the Treaty, VAT litigation tends to concern a single instrument, the Sixth VAT Directive, and agriculture is a small sector of our political economy. There is, consequently, a risk that this will amplify the consequences of the removal of the fetter on the reference procedure. For it is not just one new field to a list of many that is being referred but should rather be seen as a dramatic expansion of the fields that have a propensity for reference: the most dramatic expansion in the history of the Treaties. The second, of course, is that these new fields are likely to have priority in the Court's work as the Lisbon Treaty (Article 267(4) TFEU) has imposed a duty on it to give priority to cases where a party is in detention.

My concern, therefore, is that there is likely to be a significant deterioration in the situation and this leads to the worsening of a number of problems.

II Justice Delayed Justice Denied

This is certainly the most frequent criticism of the current bottlenecking. Account has to be taken, moreover, not just of the delay before the Court of Justice but, in the case of preliminary references, of the delays involved within the domestic system both prior to and subsequent to the ruling. This has, however, a number of further complicating effects. It benefits litigants who can withstand delay. The reference becomes a litigation strategy whereby a party can seek a reference, knowing full well that the other party has not the resources to wait a further two years and incur extra judicial costs. This was, of course, used most notoriously in the Sunday trading litigation whereby traders with a very weak substantial case were able to bring local authorities to their knees through seeking a reference and then seeking a cross-injunction in damages.¹⁶ It also affects the type of litigant who seeks a reference. As a consequence of the delay, there is little incentive for litigants

¹⁵ D. Chalmers, 'Judicial Authority and the Constitutional Treaty' (2005) *I-CON* 448, 455-456

¹⁶ R. Rawlings, 'The Euro-law Game: Some Deductions from a Saga' (1993) 20 *Journal of Law & Society* 309

who are seeking financial compensation. It is too long-winded and cumbersome. Instead, two other types of litigants emerge. One is that who engages in 'judicial politics'. Litigants' primary motivation is to seek a change in the law that they cannot get through domestic representative institutions by obtaining an interpretation of EU law that trumps domestic law.¹⁷ The other is fiscal or regulatory politics. Large undertakings have a long-standing relationship with fiscal or regulatory authorities and it appears the reference procedure is deployed as part of that on-going struggle between them and the authorities. In admittedly old research carried out in 1998 found that these two categories accounted for over 66% of the references from the United Kingdom in the period 1994-1998.¹⁸

III. Over-use of the Chamber System

A further problem posed by the status quo is the pressure it has placed on the Court of Justice to decide as many cases as quickly as possible. This has led to over-use of the Chamber system. In 2009, 33.54% of cases were heard by Chambers of 3 cases and 57.17% by Chambers of 5 judges – combined over 90%. 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. There are particular concerns where there are a number of judges inexperienced in EU law from States with no long tradition or where there are strong national concerns about judicial activism. Indeed, it could be queried why Chambers of 3 are being used at all. If it is just for technical or trivial matters, as originally envisaged, there is a question as to whether the Court should be deciding it at all. If it is significant, it should not be left in the hands of just three judges.

IV 'Legal Pollution'

¹⁷ K. Alter, *Establishing the supremacy of European Law: the making of an international rule of law in Europe* (2001 OUP, Oxford).

¹⁸ D. Chalmers, 'The Much Ado about Judicial Politics in the United Kingdom: A Statistical Analysis of Reported Decisions of United Kingdom Courts Invoking EU Law 1973-1998', *Jean Monnet Working Paper 1/00*
<http://centers.law.nyu.edu/jeanmonnet/papers/00/000101.html>

A point raised back in 1990 was the issue of 'legal pollution'.¹⁹ The Court of Justice decides far more cases than senior domestic courts. It gave 377 judgments in 2009. Whilst courts of cassation give high number of judgments, domestic constitutional courts typically give 50-60. If the point of the Court is to vision EU law, it is not clear whether this judicial detail is helpful. It forces the court to work under strong time constraints leading to procedural short cuts in some instances. It also leads to judicial micro-management with too much case law given for national systems to digest and reflect upon the consequences. Finally, it does not generate legal certainty. A paradox of high levels of case law, as seen by that on Article 34 TFEU, is that they generate new litigation as parties test the limits of prior judgments which addressed a particular set of factual circumstances and thus each judgment inevitably open up new uncertainties with regard to scenarios that are slightly different.

V Exacerbation of Litigant Bias within the Docket

An unfortunate feature of the preliminary reference procedure is that it creates 'one way' traffic. Parties seeking a reference almost invariably seek an expansion of EU law. The economic freedoms should thus, be interpreted to incorporate some new scenario or EU equal opportunities legislation should be interpreted to prohibit a particular form of discrimination which is not yet outlawed. This is because, there are, traditionally very few incentives for parties to seek a reference to row back EU law. They will be arguing against the precedent of the Court of Justice. The costs and uncertainties of the reference will be considerable. They will not obtain all the benefits from any retrenchment as these will be more generalised. Parties seeking retrenchment tend therefore to settle whereas those favouring expansion will be more likely to seek a reference for reasons outlined earlier.

This creates a bias in the Court's docket. Even if it accedes to expansionist requests only 20% of the time (and remember it is usually faced with a 50:50 scenario between two litigants where one is arguing for and the other against expansion of particular provision), a period of accretion will occur where it is associated with the expansion of EU law.

¹⁹ J-P. Jacqué & J. Weiler, 'On the Road to European Union – a New Judicial Architecture: an Agenda for the Intergovernmental Conference' (1990) 27 *CMLRev* 185

The current structure exacerbates this both by providing the structural incentives for this bias but also by inducing the Court to decide so many judgments with so few internal constraints. This leads to the risk of over-reach and the perception of an institution that is overly integrationist.

VI Suggestions for Reform

Regional courts set up for groups of Member States have significant budgetary implications. It is not clear, furthermore, that they would not replicate the problems above. The most positive suggestion was put forward by Advocate General Jacobs in *Wiener* where he suggested that a greater role should be found for national courts to decide matters by themselves with reference only for significant matters.²⁰ It would refine this. I would suggest references should be confined to the following circumstances.

- If both parties are British there should be a strong presumption against reference. It is not clear why the Court of Justice should be deciding disputes that involve only British nationals other than in exceptional circumstances. Currently over half of the references arriving at the Court involve disputes where both parties are domestic.
- References should only be made on issues of pressing concern. This would be where the law is genuinely unclear and this is giving rise to considerable difficulty or the current state of law raises strong policy concerns. The national judge would be required to make a prima facie case before referring (which could be appealed as it would be a point of law) and the case would have to be stronger where both litigants were British.

As it currently stands, I appreciate it is not possible for such a test to be implemented with regard to courts which fall under Article 267(3) TFEU. These make up a small proportion of the references, however.

²⁰ Case C-338/95 *Wiener v Hauptzollamt Emmerich* [1997] ECR I-6495.

I would add, furthermore, that I do not see that these reforms, which could be made without Treaty amendment, create systemic problems for EU law, in particular by contributing to the undermining of its uniformity. In the first place, most EU law has not been subject to the reference procedure and advocates of this argument have to explain how this latter law has been able to survive without being referred. In the second place, Article 267 TFEU is explicitly not a policing mechanism, so cannot be used to secure uniform application of EU law. Finally, as mentioned earlier, the repeated deployment of the Court of Justice resources on the same set of provisions or on provisions affecting a concentrated but narrow range of parties (most of its agriculture and tax case law) does not strike me as an effective manner to vision a legal order for half a billion people. It would be better advised giving less judgments on issues of broader concern: something that senior domestic courts are used to doing.

24 September 2010

Memorandum by the Court of Justice of the European Union (CJEU) (WE 13)

- 1 The Court of Justice of the European Union (CJEU) would stress that requests by national Parliaments to carry out an inquiry into the working of the institution are rare, though it is of course aware of the House of Lords Committees' long tradition in this regard²¹. In a spirit of openness and loyalty, the CJEU is naturally willing to co-operate in such an initiative. However, due to the priority that must be given to its judicial activity, the CJEU is confident that the Committee will understand that the present written evidence confines itself to a concise statement.
 - I. **What are the significant issues highlighted by the statistics relating to the past and current workload of the Court of Justice, the General Court and the Civil Service Tribunal?**
- 2 At the outset, it should be mentioned that detailed statistics regarding the judicial activity of the CJEU are published in the Court's Annual Report (published in spring of the following year) and that they are also available on the Court's website.

²¹ Since the Committee's Report on the *European Court of Justice*, 17th Report (1978-79), HL 101, there have been no fewer than five such reports, the latest being *An EU Competition Court*, 15th Report (2006-7), HL 75.

a) *Court of Justice*

- 3 As to the Court of Justice (CoJ), these statistics show that there is a notable increase in newly lodged cases, that these cases cover as they did in the past all areas of Union law and that the number of pending cases could be stabilized on a rather low level since 2005.
- 4 Whereas 503 new cases were lodged in 2000, their number rose to 561 in 2003, dropped temporarily to 474 in 2005 and reached the number of 592 in 2008. For 2009, the respective figure is 561 and it is very likely that in 2010 there will be significantly more than 600 new cases. There is also an upward trend in the number of references for a preliminary ruling (302 such references were submitted to the Court in 2009, which is the highest number ever reached, and by 15 October 2010 there were already 311 such references for 2010 – an increase by 45 % compared to the same period in 2009). In effect, with the 2004 and 2007 enlargements of the European Union (almost doubling the number of Member States) the number of national courts that might want or might have to make a reference for a preliminary ruling has considerably increased.
- 5 The statistics also show that the cases decided by the CoJ continue to cover all areas of Union law. The introduction of new Union competences might however bring about certain shifts, as it is the case for the area of freedom, security and justice. Also, uncertainty about the applicable rules in the absence of sufficiently precise legislation may trigger more numerous and more complex references for preliminary rulings, for instance in the area of direct taxation.
- 6 The number of pending cases amounted to 873 in 2000, rose until the year 2003 (974 pending cases at the end of that year) and could be considerably reduced since then: their number went down to 740 in 2005 and remained stable since then (741 at the end of the year 2009).

b) *General Court*

- 7 The recent evolution of the workload of the General Court (GC) is characterised by three main tendencies.
- 8 First, a sustained increase in the number of new cases, which has become even greater since 2007: 398 cases were lodged in 2000, 522 in 2007, 629 in 2008 and 568 in 2009. The 2010 figures confirm this trend, with 491 new cases lodged until 30 September. An analysis of three-year averages shows, from 2000 to 2009, a steady increase of some 50 %, and this despite the transfer of civil service cases to the Civil Service Tribunal (CST) since 2005. The breakdown by type of cases reveals that the most significant increase concerns intellectual property cases, principally trade marks (from 98 new cases in 2005 to 207 in 2009), but all main areas have shown steady growth.
- 9 The causes of the growth in the number of cases are several:
- the transfers of competence from the CoJ, since 2004, of most cases brought by Member States²² (resulting from Art. 51 of the Statute of the CJEU);

²² 56 cases were lodged by Member States in 2007, 36 in 2008 and 32 in 2009. In total, 276 cases have been lodged by Member States between 1 June 2004 and 1 October 2010.

- the enhanced legislative and executive activity of the European institutions, and its numerous agencies, resulting in a growth in number of contestable acts;
- the growing number of decisions of the Boards of Appeal of the Office for Harmonization in the Internal Market (trade marks and designs)²³.
- the accession of ten new Member States in 2004 and two more in 2007, which results in an important number of new potential litigants; the effects of those accessions have not however, at least as yet, produced an equivalent volume of cases as for the “older” Member States.

- 10 Second, cases lodged with the GC concern fields of law of an increasingly diverse nature. Due to the enlargement of the Union competences, as well as new legislation in traditional areas, contested acts relate to an ever wider range of matters, which implies investment in understanding of new subject areas (e.g., most recently, cases arising from the activities of European Chemicals Agency, cases relating to plant protection products and cases stemming from the emissions trading system for greenhouse gas allowances).
- 11 Third, cases are becoming more complex from a procedural point of view, due to numerous types of incidents (among others: objections of inadmissibility, applications for intervention, requests for confidential treatment, lodging of unsolicited documents)²⁴, all of which have the effect of slowing down the handling of the case, and also more voluminous (the exceptions being intellectual property cases and appeals against decisions of the CST, which are subject to specific rules of procedure providing for a simplified procedure)²⁵.
- 12 These three factors, as well as others, have resulted in an unprecedented number of pending cases (787 in 2000, 1293 on 30 September 2010), despite important efforts made in order to raise the output of completed cases (343 in 2000, 397 in 2007, 605 in 2008, 555 in 2009 and 389 on 30 September 2010).

c) *Civil Service Tribunal*

- 13 Since 2008, a reversal in the trend of growth in staff-case litigation can be observed. It may be speculated that the rule that the unsuccessful party is to pay the costs, which came into force on 1 November 2007, has played at least some part in this development. Thus, 111 and 113 new applications were lodged in 2008 and 2009, as compared with 148 in 2006 and 157 in 2007.

²³ 1076 decisions were adopted by the Boards of Appeal in 2004, 1864 in 2009.

²⁴ It should be noted, in this regard, that, on average, more than a hundred procedural documents have been registered per case in competition (101) and State aid (112) cases disposed of by judgment in 2009.

²⁵ In the 185 competition cases in which the written procedure was closed between 1 January 2007 and 31 December 2009, the average volume per case of the written submissions amounts to 1036 pages (of which 186 were written pleadings as such, and 850 of annexes).

II. Are the turnaround times for disposal of cases comparable to other courts of equivalent standing? Are the turnaround times for disposal of cases acceptable to litigants?

a) Court of Justice

- 14 The average duration of proceedings has considerably improved over the last years, as is most apparent for the turnaround times for references for a preliminary ruling (= the most important type of cases brought before the CoJ). Whereas, in 2003, it took on average 25.5 months to decide references for a preliminary ruling, the duration of those proceedings went down to 20,4 months in 2005 and could be further reduced to 17.1 months in 2009 (16.7 months on 30 September 2010). In 2009, the average time taken to deal with direct actions and appeals was 17.1 months and 15.4 months respectively (as compared to 21.3 months and 20.9 months in 2005).
- 15 In addition to the reforms in its working methods that have been undertaken in recent years, the improvement in the Court's efficiency in dealing with cases is also due to the increased use of the various procedural instruments at its disposal to expedite the handling of certain cases (the urgent preliminary ruling procedure, priority treatment, the accelerated or expedited procedure, the simplified procedure and the possibility of giving judgment without an opinion of the Advocate General).
- 16 In order to be able to make useful comments on whether the above-mentioned turnaround times for disposal of cases are comparable to other courts of similar standing one would have to determine courts of similar standing first. Considering that the CoJ is the EU's highest court, one might think of Supreme Courts in the Member States. However, the linguistic regime with 23 possible languages as well as the need to translate a substantial amount of text at various moments in the proceedings make such comparisons difficult. Turning to an international court such as the European Court of Human Rights, it appears that the situation in Strasbourg is special as well since, on the one hand, that court only deals with fundamental rights enshrined in the ECHR and, on the other hand, every individual, after having exhausted all local remedies, can lodge a complaint in Strasbourg. At any rate, turnaround times in Strasbourg are considerably longer than those mentioned above.
- 17 Finally, as regards the question whether the turnaround times in Luxembourg are acceptable to litigants, this again is a question for which the CoJ is not best placed to give an answer. This being said, it may nevertheless be pointed out that the considerable shortening of the duration of proceedings before the CoJ has been much welcomed by the political institutions of the EU as well as in professional/academic circles.

b) General Court

- 18 Even though the overall average duration of proceedings might appear to be at an acceptable level (27.2 months in 2009, 26.0 months from 1 January to 30 September 2010), it should be noted that:
- i) the duration of proceedings has globally undergone a progressive lengthening since 2003, of approximately 6 months;
- ii) depending on the subject matter of the cases, important variations can be observed as to the turnaround times for disposal of cases.

Thus, in 2010 (until 30 September), a more precise picture of the duration of proceedings presents itself as follows:

- intellectual property cases: 20.5 months;
- appeals against the decisions of the CST: 17.1 months;
- other actions: 31.0 months. Within this category (which includes competition and State aids cases), the turnaround times in cases disposed of by judgment (excluding orders) amounts to 43.3 months.

- 19 The GC has received sporadic comments from litigants, in the context of specific cases, as to the excessive duration of proceedings and has systematically made the best efforts to take them into consideration and to react accordingly²⁶. The GC is also aware that the CCBE has sent a letter to the Permanent Representations of the Member States, the Council, the Parliament and the Commission, concerning delays within the GC, and inviting the adoption of measures to improve the situation.
- 20 Whilst the GC is fully conscious that improvements are urgently needed as concerns the turnaround times for disposal of cases, and endeavours to reach this objective through internal measures, it is determined that this should not result in lowering its in-depth analysis or in attenuating its control over sometimes complex legal, economic or factual assessments, which is required by the very nature of the cases lodged before it and the mission which is entrusted to it by the Treaties²⁷.
- 21 Finally, it is suggested that the drawing of comparisons with the duration of proceedings in other courts of equivalent standing should be done with caution. Indeed, three fundamental characteristics of the jurisdiction make it peculiar in such a way that it is difficult to identify a similar court, which could be used as a comparable reference.
- 22 First, as just mentioned, the Rules of Procedure of the GC (Art. 35) provide that the language of the case, which is chosen by the applicant (with some very limited exceptions set out in Art. 35, paragraph 2), shall be one of the 23 official languages of the European Union. This initial choice by the applicant, which determines the language of the complete procedure, both written and oral, is an important element of access to justice for the European citizen. However, sometimes, a series of cases may generate the use of five or more different languages in the procedure, of which the chamber has often not sufficient

²⁶ In addition, cases which objectively need a prompt decision can benefit from adapted procedural provisions, i.e. the expedited procedure (Art. 76a of the Rules of Procedure – since its entry into force in February 2001, this procedure has been granted in 30 cases, with an average duration of proceedings of 9.6 months).

²⁷ In this regard, it should be noted that, in a small number of appeals lodged before the CoJ against judgments of the GC, parties have raised pleas founded upon an infringement of the fundamental right to have the case dealt with within a reasonable time. Except for two cases (C-185/95 P, *Baustahlgewebe v Commission*, [1998] ECR I-8417, and C-385/07 P, *Der Grüne Punkt - Duales System Deutschland v Commission*, [2009] ECR I-6155), these pleas have been rejected upon the consideration that the duration of proceedings could be explained by the complexity of the case, the number of undertakings that brought actions against the contested decision, which necessitated a parallel examination of those different actions, the proportion of the facts forming the basis of the contested decision that was disputed, by the thorough investigation of the case carried out by the GC, and by the language constraints imposed by its Rules of Procedure.

command. Translations of the written pleadings (and, where necessary, parts of their annexes) must thus be made by the translation service of the CJEU. This situation fundamentally differentiates the GC, and the CJEU as a whole, from other international courts, and in particular the European Court of Human Rights (see Art. 34 of the Rules of Procedure of the ECHR)²⁸.

- 23 Second, the GC combines a particular variety of competences (intellectual property, competition, administrative litigation, contractual liability, appeals in civil service cases) usually conferred upon separate courts in national judicial systems. Therefore, if a comparison were to be made between the GC and national courts, one would need to distinguish according to each of these fields of competence. While such a study would undoubtedly be of interest, it would require significant research which the GC could not carry out within the delay for presentation of the present written evidence²⁹.
- 24 Third, cases lodged before the GC are, by reason of their very nature, of a multinational character, which has an incidence on their complexity, their volume and the importance of the interests at stake. The duration of proceedings before the GC should also be seen in the context of both the duration of the administrative proceedings preceding the adoption of the contested decisions, and the length and legal complexity of these decisions, from which derives the diversity of pleas raised by applicants.

c) *Civil Service Tribunal*

- 25 The average duration of proceedings was of 15.1 months in 2009, 17 months in 2008 and 13.2 months in 2007 (no account being taken of stays of proceedings).
- 26 An average duration of proceedings of 15.1 months (in 2009) is probably not regarded as unacceptable by litigants before the CST³⁰. Nonetheless, such an average duration could, we believe, be lowered if the right conditions were fulfilled.
- 27 Courts of equivalent standing are administrative or employment courts of the Member States, as well as internal tribunals in other international organisations. The average duration of proceedings before the CST would appear to be comparable to what is found in these courts, as far as the CST is aware.

²⁸ Statistics concerning the turnaround times for disposal of cases before the ECHR can be found at http://www.echr.coe.int/NR/rdonlyres/89A5AF7D-83D4-4A7B-8B91-6F4FA11AE51D/0/Analysis_of_statistics2009.pdf.

²⁹ Relevant elements may be found on the website of the European Commission for the Efficiency of Justice (CEPEJ): http://www.coe.int/t/dghl/cooperation/cepej/default_en.asp.

³⁰ The average duration of proceedings in staff cases was longer when the Court of First Instance had first-instance jurisdiction for this category of cases.

III. What considerations, both from the recent changes brought about by the Treaty of Lisbon and otherwise, are likely to affect the workloads of these court and to what extent?

a) Court of Justice

- 28 Both the Treaty of Lisbon as well the ongoing process of European integration will affect the workload of the CoJ.
- 29 Since the entry into force of the Treaty of Lisbon, the jurisdiction of the CoJ extends to the law of the European Union, unless the Treaties provide otherwise. Thus, the CoJ is conferred general jurisdiction to give preliminary rulings in the area of freedom, security and justice, as a result of the disappearance of the ‘pillar’ structure and the repeal by the Treaty of Lisbon of Articles 35 EU and 68 EC which imposed restrictions on its jurisdiction.
- 30 First, as regards police and judicial cooperation in criminal matters, the jurisdiction of the CoJ to give preliminary rulings has become obligatory and is no longer subject to a declaration by each Member State recognising that jurisdiction and specifying the national courts that may request a preliminary ruling. Transitional provisions nevertheless provide that that full jurisdiction will not apply until five years after the entry into force of the Treaty of Lisbon.
- 31 Second, as regards visas, asylum, immigration and other policies related to free movement of persons (in particular, judicial cooperation in civil matters, recognition and enforcement of judgments), any national court or tribunal – no longer just the higher courts – can now request preliminary rulings, and the Court has jurisdiction to rule on measures taken on grounds of public policy in connection with cross-border controls.
- 32 Although the pillar concept disappeared with the Treaty of Lisbon, the common foreign and security policy (CFSP), under Title V of the EU Treaty, remains subject to special rules and specific procedures. Accordingly, the CoJ does not have jurisdiction to monitor provisions relating to that policy or acts adopted on the basis of those provisions, subject to two exceptions, namely (1) the Court has jurisdiction to monitor the delimitation of the Union’s competences and the CFSP, the implementation of which must not affect the exercise of the Union’s competences or the powers of the institutions in respect of the exercise of the exclusive and shared competences of the Union; and (2) it has jurisdiction over actions for annulment brought against decisions providing for restrictive measures against natural or legal persons adopted by the Council in connection, for example, with combating terrorism.
- 33 The Treaty of Lisbon also contains significant amendments concerning proceedings before the Courts of the European Union. These amendments include the easing of the conditions for the admissibility of actions brought by individuals against regulatory acts of the institutions, bodies, offices and agencies of the European Union. Whilst this Treaty change will mostly affect the GC (see hereunder), it will also have an impact on the CoJ, which has jurisdiction to rule on appeals brought against GC decisions.
- 34 Furthermore, the Treaty of Lisbon strengthens the system of pecuniary sanctions (lump sum and/or penalty payment) in the event of non-compliance with a judgment establishing a failure to fulfil obligations. In particular, where a Member State fails to notify national measures transposing a directive to the Commission, it is now possible for the CoJ to

impose pecuniary sanctions at the stage of delivery of the initial judgment establishing a failure to fulfil obligations.

b) *General Court*

- 35 The entry into force of the Lisbon Treaty will almost certainly have a significant impact on the workload of the GC.
- 36 First, the extension of the European Union's competences and the reform of certain decision-making processes³¹ will probably lead to the adoption of new and/or additional contestable acts.
- 37 Second, the new jurisdiction to rule on direct proceedings in the fields of Common Foreign and Security Policy Police and Judicial Cooperation in Criminal Matters³², as well as the relaxing of the admissibility conditions of actions for annulment, mentioned above, will predominantly affect the GC, which is the first instance jurisdiction of the Union generally competent over direct actions. In particular, under new Art. 263 TFEU, natural or legal persons may now bring proceedings against a regulatory act if they are directly affected by it and it does not entail implementing measures. Consequently, they no longer have to show that they are individually concerned by an act of this type. This must, to an appreciable extent, lead to an increased number of admissible actions for annulment of many generally applicable measures, as well as to the bringing of new actions aiming at exploring the limits and potentialities of the rewording of this fundamental provision.
- 38 Third, the new binding character of the Charter of Fundamental Rights is expected to encourage applicants to raise pleas based on alleged violation of fundamental rights; this will in turn require evolution of the case-law, and is bound to have a further impact on the nature and the complexity of the litigation brought before the GC.
- 39 Among other factors which are likely to affect the workload of the GC, particular attention should also be paid to the direct litigation flowing from the creation of new European bodies, offices and agencies, whose acts are explicitly contestable before the General Court according to Art. 263 TFEU.
- 40 In this regard, it should be noted that the REACH Regulation³³ confers jurisdiction upon the GC to rule on actions brought against i) decisions of the Board of Appeal of the European Chemicals Agency (ECHA), ii) other ECHA decisions where no appeal before the Board of Appeal is admitted by the Regulation, and iii) decisions concerning applications for authorisation adopted by the Commission. At this stage, while no precise estimate is available as to the number of these various kinds of contestable decisions, in particular

³¹ For an analysis of the extent of these changes, see the 10th Report of Session 2007–08 of the House of Lords European Union Committee “The Treaty of Lisbon: an impact assessment”.

³² With the exception provided for in Art. 276 TFEU.

³³ Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC.

decisions described under ii) above, the 2010 ECHA Working Program indicates that, as a start, the Board of Appeal is expected to adopt around 100 decisions/year. In addition, actions brought against these decisions are likely to raise novel legal as well as technically complex questions.

c) *Civil Service Tribunal*

- 41 Changes brought about by the Treaty of Lisbon will have a very limited impact on the workload of the CST.

IV. Will accession by the EU to the ECHR affect the working of these courts?

- 42 The CJEU already respects and applies the rights laid down by the ECHR. Thus, the accession by the EU to the ECHR, of which the modalities are still to be defined, is not in itself thought likely significantly to affect the working of the CoJ, the GC and the CST. However, as with the Charter of Fundamental Rights, it is likely that this accession will legitimately encourage litigants to make the most of this new context.

V. What are the significant challenges and impediments to the courts in handling their workload effectively and expeditiously? Are there any bottlenecks in the processes of these courts?

- 43 The major challenge of the CJEU consists in facing the growth of new cases through an enhanced productivity without altering the quality of its case-law, or weakening the standards of judicial control. Both procedural and working method reforms, as well as monitoring instruments, have been implemented to this end. Having put the accent on judicial productivity, any further pressure would risk the quality and the coherence of the case-law being impaired.
- 44 As regards the GC, the effects of these measures, albeit significant, have not until now proved sufficient to prevent the increase in backlog, due notably to the growth in numbers of incoming cases in both new and traditional areas.
- 45 The backlog of pending cases manifests itself principally in a bottleneck at the end of the written procedure. It occurs regularly in the GC that, because of an overload of cases ready to be dealt with, the Judge rapporteur cannot examine the file and prepare the oral proceedings as soon as the written procedure is closed since he must normally give priority to even older cases. The same phenomenon (the “waiting room effects” as described by AG Geelhoed in his conclusions in Cases C-403/04 P and C-405/04 P), though attenuated, is observed after the end of the oral procedure.

VI. What measures would improve the working of the courts, bearing in mind the limited possibility of Treaty changes? What could the Institutions and Member States do to help the courts dispose of cases more expeditiously?

- 46 In view of the ever increasing number of cases brought as well as the more and more complex nature of these cases, both as regards the substantive law issues as the procedural questions raised, it would be very helpful for the CoJ to enjoy more autonomy as to the Rules of Procedure it has to apply. That would allow the CoJ to handle cases with more flexibility and in a way that is likely to be better adapted to the specific nature of each case. While maintaining the predictability of the outcome of procedural matters, this would

permit to make the most of the case-management instruments provided for in the Rules of Procedure. Also, such an evolution would be likely to help dispose of cases expeditiously.

- 47 The recent difficulties encountered with the partial replacement of the GC has also demonstrated that, in the interests of the proper organisation and efficient operation of the courts, the appointments of judges should be made at as early a stage as possible and, accordingly, the Governments should present their proposals as soon as possible. Uncertainty over the appointment, or renewal, of judges has a direct effect on the scheduling of hearings and the handling of cases, not only in relation to cases assigned to judges whose terms of office are about to expire, but also in relation to cases assigned to the other members of the Chamber of which those judges are members. The stability, or otherwise, of the courts' composition has a significant impact on their efficiency³⁴.
- 48 Even if the efficiency of the judicial work can still be marginally enhanced, it is highly doubtful whether that could suffice to contain the growth of new cases, let alone enable a significant reduction in the considerable backlog of cases currently pending before the GC. Therefore, structural remedies such as either the increase of the number of judges at the GC through an amendment of Art. 48 of the Statute of the CJEU, or the creation of a specialised court under the provision of Art. 257 TFEU (potentially in the field of intellectual property), are perspectives that need to be envisaged. Both measures could be adopted in accordance with the ordinary legislative procedure, by virtue of respectively Art. 281, second paragraph, TFEU and Art. 257, first paragraph, TFEU. Both measures would also entail expenditures which would have to be borne by the EU budget.
- 49 Attention may also be drawn upon the fact that it would be appropriate for the legislative and budgetary authorities of the European Union to carry out more systematic impact assessment studies of new legal instruments on the EU courts, prior to their adoption (so as to avoid, for instance, the unpredictable impact on the workload of the GC of the entry into force of the REACH Regulation and the creation of the ECHA).
- 50 Finally, as far as the CST is concerned, it is observed that the EU institutions could endeavour to exploit better internal processes of mediation and friendly settlement of disputes before they crystallise into legal cases, which would contribute to reducing the number of applications lodged before the CST. Likewise, in relation to cases brought before the CST, a greater willingness by the institutions to reach a friendly settlement on the basis of considerations other than strictly legal considerations would expedite the processing of cases and reduce the cost thereof for the public purse.

28 October 2010

³⁴ As already underlined by the President of the CJEU and the President of the GC in their recent letters to the Council, available at the Council's register (<http://www.consilium.europa.eu/showPage.aspx?id=549&lang=EN>).

Memorandum by the European Circuit of the Bar of England & Wales (WE 6)

1. By email dated 29 July 2010, the European Circuit of the Bar of England & Wales [“the European Circuit”] was invited to respond to the above-mentioned call for evidence.
2. The said call for evidence set out the areas which the Justice and Institutions Sub-Committee would investigate and set out particular points on which it invited views. This response will be drafted in such a way as to address those matters set out in the said call for evidence which are within the author’s experience and/or competence. In this regard, it will not deal with matters pertaining to the Civil Service Tribunal.
3. The fundamental relevant problem of delay, which affects both the Court of Justice and the General Court, is that they are both victims to an extent of their success. Too many cases are being brought before both courts, which are unable to cope with the ever-increasing workload. This is largely due to the fact that the courts operate under rules which are clearly not fit for purpose.
4. There have been amendments to those rules over the years, but these can be characterised as tinkering at the edges and have proved in the main ineffective insofar as delay is concerned.
5. By way of analogy, the courts at present seek to operate a Rolls Royce with a Trabant motor. To continue the analogy, either the motor must be upgraded – difficult to imagine in these straightened economic times – or the car should be changed.
6. That change can happen without affecting the quality of justice delivered. One potential solution would be for the courts – or at least the Court of Justice *qua* final court – to operate a docket control system, as can be seen in other jurisdictions, such as the United Kingdom and the United States. Although this would mean that not every case involving a point of EU law would be referred, it would also mean that overall the turnaround times would be likely to improve.
7. Another solution would be for the translation rules to be restricted, so that not all proceedings had to be translated into all EU languages. Any restriction of the present regime would be likely to give rise to political tensions, but nonetheless the matter should be discussed.
8. A further possible solution, which could link in with the restricted language regime, would be to operate regional courts. There could for example be a North West Europe court whose working languages were English, French and German. Equivalent regional courts could operate for the Mediterranean area, Scandinavia and Eastern Europe. Judges in those regional courts would come from the countries concerned. This would

not only free up the Court of Justice to deal with appeals from the General Court, but it would also bring the operation of EU law closer to its citizens.

9. Insofar as concerns the General Court, there is little doubt but that a separate trade mark court would be sensible. The creation of the Civil Service Tribunal clearly assisted the General Court in relation to its workload.
10. Although it is difficult as an outsider to judge, it may well be that the need for the courts to come to unanimous judgments further delays matters. The ability to dissent, which is known in many jurisdictions around the world, should accordingly be discussed.
11. Although in proceedings emanating from the courts in England & Wales, most of the delays can be linked to the procedure and/or operational working of the Court of Justice, certain domestic changes might assist. One such change would be for better co-ordination once a court has decided to refer a question to the Court of Justice. At present, there can be long delays between that decision and the matter actually arriving in Luxembourg.
12. It is clear that the present position is untenable. There are numerous examples of courts in this jurisdiction deciding not to refer because of the delay that would otherwise arise. That is bad for the administration of justice in an EU context. The present position is likely to deteriorate with the Court of Justice's increased jurisdiction post Lisbon Treaty. The example of the Administrative Court in England & Wales is telling – a vast increase in work has led to certain matters which are not deemed urgent – ie non immigration, asylum and terrorism cases - being held back for unacceptable periods.
13. The problem of excessive workload is therefore not unique to the Court of Justice and the General Court. It is nonetheless a matter which requires urgent attention. The European Circuit of the Bar of England & Wales is accordingly very pleased that the Committee has decided to investigate the issue.
14. The author would more than content to discuss the matters raised in this response, or indeed other related matters, by way of oral evidence to the Committee.

24 September 2010

Memorandum by the Faculty of Advocates (WE 7)

Introduction

Between 1973 and 2009, there were 476 new references to the Court of Justice for a preliminary ruling from the United Kingdom. Of these, only a handful originated from

Scotland.³⁵ There may be a number of reasons for the paucity of references from Scottish courts.

- The nature of many EU law issues tends to concern technical or regulatory matters arising in litigation involving national companies and/or contracts under English law. Such litigations, even where they concern Scottish interests, are generally pursued in the English courts.
- Few major companies are domiciled in Scotland.
- The costs of, and delays in, a reference to the Court of Justice are a disincentive. To these are often added the cost and delay of an appeal to the Inner House of the Court of Session, if the EU issues are not referred by the first instance court in Scotland (which courts have very rarely made a direct reference for a preliminary ruling).
- At least until recently, practitioners in Scotland have been relatively unfamiliar with EU law and litigation, initially through a lack of training, but exacerbated by the lack of Scottish cases in this area.

It might therefore be argued that for Scotland the problem is not merely the workload of the Court of Justice, but also that there are too few references. In a country affected by so many EU laws, such as agricultural, environmental and procurement law, and in which the Scottish Parliament and the Scottish Ministers lack the power to act inconsistently with EU law³⁶, it should be a matter of notice that EU law and references to the Court of Justice are so rarely found in the Scottish law reports. Though the Court of Justice is busier than ever, the increasing workload is not caused by Scottish litigants.

I. What are the significant issues highlighted by the statistics relating to the past and current workload of the Court of Justice, the General Court and the Civil Service Tribunal?

- It is clear that there continues to be a steady increase in new cases, particularly applications for preliminary references, and appeals.
- The figures for infringements in Table I I may suggest that there is scope for more infringement actions to come from the newer member states, where the current

³⁵ The precise number is uncertain, but it is believed to be seven.

³⁶ See e.g. sections 29(2)(d) and 57(2) of the Scotland Act 1998.

awareness of EU law and procedure may be lower than in states that have been members for many years.

- It is clear that the new competences of the Court of Justice, which are likely to increase further in the coming years, have not yet shown up in the statistics.

2. Are the turnaround times for disposal of cases comparable to other courts of equivalent standing?

- The statistics show that a reference for a preliminary ruling takes almost 18 months from receipt of the reference to judgment. Some weeks are likely to be added to that procedure in the domestic court, preparing the reference at the beginning, and applying the judgment of the Court of Justice at the end.
- For a Scottish litigant, this is considerably longer than an appeal to the new Supreme Court, which can now be expected to be completed within a year. From a short consideration of recent decisions in the United States of America, it appears that the time delay in Luxembourg may be comparable to that before the US Supreme Court.
- It should also be noted that in recent years appeals from the Outer House of the Court of Session and the Sheriff Court, to the Inner House of the Court of Session, have been considerably delayed – sometimes taking 18 months from appeal to judgment.³⁷

3. Are the turnaround times for disposal of cases acceptable to litigants?

- No. The time taken for such a reference is central to litigants' attitudes in many cases, and can be a strong deterrent against seeking a preliminary ruling.
- It may cause parties to try to find ways of avoiding the EU issue.
- In certain areas of law such as the Common Agricultural Policy, where ongoing relationships are concerned, it may be that by the time the Court of Justice has given judgment, the EU law has moved on and parties are dealing with each other under an amended regime. Where law reform is being discussed at the time parties are considering a reference procedure, this may also affect their views.

³⁷ See *Anderson v United Kingdom* (European Court of Human Rights; app. no. 19859/04; 9th February 2010) for a recent decision of the Strasbourg court holding delays in the Court of Session to be a violation of Article 6 rights to the determination of civil rights and obligations within a reasonable time.

- The new competence of the Court of Justice in certain police and criminal matters, may highlight the need for urgency when criminal sanctions or imprisonment may be involved.

4. What considerations, both from the recent changes brought about by the Treaty of Lisbon and otherwise, are likely to affect the workloads of these courts and to what extent?

- It is clearly possible that the entry into force of the Treaty of Lisbon on 1st December 2009 will affect the court's workload, given the court's new general jurisdiction to give preliminary rulings in the area of freedom, security and justice, and the removal of other restrictions on jurisdiction.
- The Charter of Fundamental Rights of the European Union has become a binding legislative instrument, with the same legal value as the various EU Treaties. This may be expected to increase the number of references in which fundamental rights are articulated and may increase the total number of references.³⁸
- With several relatively new accession states, and an increasing awareness of EU law there and in less recently joined states, an increase in references from such states seems likely.

5. Will accession by the EU to the ECHR affect the working of these courts?

- Yes. Although ECHR rights were previously recognised by the Court of Justice, their status is reinforced by express recognition in the EU Treaty that they constitute general principles of EU law. It is unclear what effect accession to the ECHR will have over and above that recognition. But it is to be expected that fundamental rights including those derived from the ECHR will be raised as an issue more often before the court. Moreover, the express recognition of fundamental rights, when combined with the court's new jurisdiction in certain police and criminal matters, seems likely to make fundamental rights more popular as an argument.

6. What are the significant challenges and impediments to the courts in handling their workload effectively and expeditiously?

³⁸ Despite the United Kingdom Protocol to the Charter, the Government has recently made clear that the fundamental rights in the Charter can be relied on as against the United Kingdom: see *The Queen on the application of NS v The Secretary of State for the Home Department* [2010] EWCA Civ 990.

- We understand that the heavy burden of translation can be one cause of the time taken to prepare cases and move them to judgment. It may be that this could be tackled by reducing the scope of translation in certain cases, or perhaps by the use of new technology.

7. Are there any bottlenecks in the processes of these courts?

- Translation services have been referred to above.
- The wait for the Advocate General's Opinion (where it is produced) can delay the case. The Court of Justice is now more amenable to dispensing with this step in the procedure, and it might be that this could be extended.
- More efficient use of the oral hearing procedure might be effected if the Court made parties aware in advance of the hearing date, of any specific points of interest on which they wished to be addressed.

8. What measures would improve the working of the courts, bearing in mind the limited possibility of Treaty change?

- See above, for reference to translation, Advocate General's opinions, and prior notice of key issues for the oral hearing stage.
- While the Court of Justice has introduced rules for the use of urgent procedures, it appears that these are little used. It may be that their use would not only improve justice, particularly in urgent cases or at an interim stage, but might encourage early settlement of some litigations.

9. What could the Institutions and Member States do to help the Courts dispose of cases more expeditiously?

- If the role of the domestic courts is included within this question, it may be observed that cases will be more appropriately and speedily disposed of where the referring court has produced a clearly drafted and appropriate reference, on the basis of established facts.

September 2010

Memorandum by the EU Committee of the Law Society of England and Wales (WE 8)

1. This written evidence has been prepared by the EU Committee of the Law Society of England and Wales (the Society). The Society is the representative body of over 120,000 solicitors in England and Wales. The Society negotiates on behalf of the profession and makes representations towards regulators and government in both the domestic and European arena.
2. The Society welcomes the House of Lords' inquiry into the working of the Court of Justice of the European Union. It notes that the call for evidence refers to the latest annual report of the Court, which shows that the volume of cases remains high and the rate of disposal of cases is insufficient to make serious reductions in the turnaround time for litigation.
3. The Society agrees that it is important to consider the detrimental effect that delay can have in terms of access to justice. The potential delay in a piece of litigation may dissuade parties from agreeing to make a preliminary reference to the Court. If the domestic court does decide to do so, it creates a hiatus in the development of domestic jurisprudence that can last for years. Evidence submitted by other parties to this inquiry sets out in more detail the economic and business impacts caused by the length of proceedings.
4. On the other hand, while the Society appreciates that the inquiry will not examine the substance of judgments, previous moves to improve on the delay in delivering judgments have led to inconsistencies in the Court's rulings, and the Society urges the Sub-Committee to ensure that any proposals to improve the functioning of the Court are not to the detriment of the quality or consistency of its rulings.
5. The members of the Society's EU Committee and its other specialist committees have extensive experience of appearing before the Court. The Council of Bars and Law Societies (CCBE) has also submitted recommendations to the Court relating to reform of the rules of procedure. The Society contributed to this work through its membership of the UK delegation to the CCBE. Some of the recommendations made are restated here.

General remarks

6. The inquiry asks what are the significant challenges and impediments to the EU Courts in handling their workload effectively and expeditiously. There are a number of issues and these are set out below along with recommendations for improvement. As regards delays, the majority of the recommendations are directed at the General Court which has a very serious judicial backlog – in contrast the Court of Justice has been able to catch up and to improve the time taken to deal with cases.
7. For the reasons which follow below, it is not believed that the General Court will significantly improve the rate of disposal of the backlog of cases without structural measures being taken by Member States.

Language regime

8. The Society appreciates fully the sensitive nature of discussing the language regime of the Court and any change to it. Indeed the ability to litigate in all official EU languages and the availability of judgments and rulings in all official EU languages is an essential aspect of access to justice, which should not be put into question. As a preface to the following comments, the Society notes its belief that more needs to be done to train UK lawyers in foreign languages to a high-level of fluency. This will lead to a better level of representation working within the EU institutions and could also help to alleviate some of the problems outlined below.
9. The Society considers, however, that the maintenance of a monolingual regime for the work of the Court, and the resultant need for translations, does present one of the factors that militate against the swift delivery of justice (and, as explained below, against the delivery of justice itself). It is understood that almost 90% of cases before the Court are brought in a language other than French. While a judgment may even have been drafted in the language of the case or of the parties, justice is further delayed when the judgment's delivery depends on subsequent translation. As one of the main translation bottlenecks takes place at the end of the procedure when the judgment has to be drafted in French, with additional proof reading and cross-checking delays, has the time not come for the judgment to be drafted in the language of the case, even if it still has to be translated?
10. If the Court wishes to make substantial improvements to its workings, a more efficient language regime could be considered. The Society feels that this is particularly so in relation to cases handled under the expedited procedure. The use of a single language in such a case could be agreed between the parties and the judges hearing the matter, taking into account the need to ensure access to justice for the parties involved. Alternatively the number of working languages of the Court could be increased to allow the use of a language other than French where this is understood by all the parties and by the Members of the division or the chamber hearing the case.
11. A related concern arises from the translation by the Court of the written pleadings of non-institutional parties. These are not submitted to the parties so as to allow them to make sure they are correct. This compares unfavourably with the fact that the EU institutions prepare their own translations. The parties should therefore be provided with the French translations of the pleadings, as done either by the Court or by the EU institutions, and be allowed to draw to the attention of the Court any differences between the French version and the original version.

Composition and structure of the Courts

12. A second general element concerns the composition of the Courts. The Treaties provide for new tribunals to be created. Given the volume of intellectual property and competition law cases (mainly appeals from the Office of Harmonisation in the Internal Market (OHIM) in relation to trade marks, and the Commission respectively) before the General Court in particular, structural changes could be considered. The creation of more specialist tribunals (such as exists for staff cases) could well alleviate much of the burden of cases before the Court. In particular a tribunal to hear the appeals against decisions of the OHIM would be a very useful first step. In a similar vein, competition and State aid cases could also be allocated to a specialist tribunal.

13. To a lesser extent the allocation of cases to chambers with particular specialism within the existing Courts could also have this effect. Whilst the Society understands that this already takes place to a certain extent, the Society considers that this practice should be extended. It is suggested that the General Court could conduct an early review of the case documents when determining which chamber should be assigned a particular case. That said, trade mark cases in the General Court were originally allocated to a specialist chamber but that was unpopular among the judges and the cases are now shared out among all judges. The Sub-Committee may wish to enquire of the General Court the reasons why a specialist chamber was abandoned.
14. It would be useful for the Sub-Committee to consider, as well, whether there are factors external to the Court that impact on its workload. In its 2005 EU Better Law Making Charter, the Society recommended that the European Commission and the other EU institutions should undertake an access to justice impact assessment when considering new legislative proposals.³⁹ This should ensure that a proper assessment is made of the avenues of redress required by the legislation, the potential litigation that could stem from it and the resources that might be needed to accommodate this. This holds true for the Commission's proposals as well as amendments made to the text subsequently by Parliament and Council.
15. The poor application of better law-making principles by Member States when implementing EU directives and the failure to discuss or coordinate these intended measures with the Commission and other Member States does nothing to improve the quality of legislation or legal certainty.
16. In addition, in matters of EU criminal justice, the Society understands that the extension of the Court's jurisdiction to rule on certain issues including the validity and interpretation of decisions, framework decisions, and conventions (when Member States have agreed to this) has created an additional workload for the Court, for example in regard to the European Arrest Warrant. The possible future extension of the Court's jurisdiction in criminal matters and new legislative proposals, such as the European Investigation Order, leaves open the possibility that the volume of preliminary references could further increase.

Detailed remarks

Transparency

17. The Society considers that there should be greater transparency relating to access to case files, both for parties and observers to the case and the public, including eventually full online access to all court documents and pleadings (as in the US Supreme Court). For the public, while the "Curia" database on the Court's website sets out a certain amount of information, much information - particularly relating to the early stages of the case - can only be gleaned by direct contact (frequently by the use of personal contacts) with the Court Registry. This *ad hoc* approach is not satisfactory and is time consuming for those in the Registry. It should be replaced by an online docket providing essential information about the case, including pleadings, and available to all parties and – subject only to legitimate confidentiality concerns – to third parties.

³⁹ <http://www.lawsociety.org.uk/influencinglaw/policyinresponse/view=article.law?DOCUMENTID=258501>

Accession to the European Convention on Human Rights (ECHR)

18. The ECHR requires one to exhaust domestic remedies so cases in the General Court and appeals to the Court of Justice (with *renvoi* perhaps to the General Court with a further appeal) will all be domestic remedies for the purpose of the exhaustion rule in the ECHR. There is a risk that this will lead to more litigation in the EU courts so that persons can get to the European Court of Human Rights (ECtHR) itself, so extending the duration of litigation. Given the fact that there have been some inconsistencies between the case law of the Court, on rights akin to those in the Convention, and that of the ECtHR, litigants could well want to pursue their case all the way to the ECtHR. Its status as a non-EU institution will make this all the more attractive. On the other hand, the low percentage of cases actually accepted by the ECtHR is likely to deter some potential litigants.

Case management

19. The Society considers that it is imperative that the Court exercise rigorous case management. The Society understands that the internal deadlines of the Court are not currently binding and thus it is difficult for the Court and the parties to foresee with certainty the next step in the process. This is particularly the case for the General Court, which has evolved into a court which appears essentially reactive with little if any active case management – procedural issues take a long time to deal with and correspondence with the Court can sometimes appear to disappear into a “black hole”. The General Court might benefit from holding a case management conference meeting or telephone conference call before the filing of any defence in order to determine the key steps in the procedure, including the date for the hearing. In summary, better and earlier information on procedural timetables would be welcomed.
20. Hands on case management, for example by collaboration between the Registry and the *référéndaires* of the judges, is suggested so that each case is subject to active management and does not sit in a queue awaiting its turn. It may be that the adoption of procedural judges (akin to Masters) and listing offices, as per UK experience, might assist. In common with many courts, the English courts have had to grapple with an excessive backlog of cases and, albeit assisted by the transfer to Civil Procedure Rules, have been largely successful in reducing the backlog. The sharing of best practice from the Competition Appeal Tribunal and from successful parts of the Courts Service might assist.

Proceedings – written procedure

21. The length of written proceedings may often result from the fact that the decision being challenged before the General Court is itself excessive in length. While appreciating the need to justify its decision, the Commission should be encouraged to consider shortening its own decisions in competition and State aid matters without prejudice to the obligation on the Commission to state fully its reasoning, and to exceptionally complex cases. The Society considers that limits on the length of written pleadings before the General Court and Court of Justice should take this factor into account in a rigorous and consistent manner.

Proceedings – oral hearing

22. The Society considers that oral hearings should always be scheduled in appeals against judgments of the General Court and preliminary rulings. A case brought before the Court of Justice will not necessarily be heard at an oral hearing. This emerges from Article 120 of the Rules of Procedure where it is stated: “After the submission of pleadings as provided for in Article 115(1) and, if any, Article 117(1) and (2) of these Rules, the Court, acting on a report from the Judge-Rapporteur and after hearing the Advocate General and the parties, may decide to dispense with the oral part of the procedure unless one of the parties submits an application setting out the reasons for which he wishes to be heard. The application shall be submitted within a period of three weeks from notification to the party of the close of the written procedure. That period may be extended by the President.”
23. In the Court of Justice’s practice, which strives for shorter duration of the total proceedings and better use of resources, the rule is that oral hearings are scheduled only if the Court thinks it necessary and only upon request of the parties. In fact, it is rather common to dispense with the oral hearing at the Court of Justice. However, given the importance of the proceedings at the Court of Justice (highest court) level, the oral hearing is an important step that should always be granted to the parties of the case. In particular, by providing the Court with the opportunity to question the parties, the Court will often be able to reach a greater understanding of the parties’ positions on the relevant issues and need less time to reach a decision and to agree its judgment. This is especially true for appeals against the General Court’s judgments and for preliminary rulings.
24. In addition practitioners have commented that the limited time within which parties are allowed to make their pleadings is often insufficient. The default time period allocated is very short and there should be more flexibility on time periods built into the system on a case by case basis. If the oral hearing includes a proper question and answer session including interaction between judges, the Advocate General and the parties, a short time for oral submissions is not a problem. However some chambers seldom ask questions and the impression is that the oral hearing is more of a formality when it must be central to the proceedings. It should also be made clearer that, in practice, a party can request that the speaking time, as well as the question and answer session, be divided up between the advocates of that party when arrangements for the oral hearing are being made.

September 2010

Memorandum by William Robinson, Sir William Dale Visiting Fellow, Institute of Advanced Legal Studies, London (WE 14)

I realise that I have woken up far too late to the inquiry being conducted by the Justice and Institutions Sub-Committee into the working of the Court of Justice of the European Union (ECJ).

Memorandum by William Robinson, Sir William Dale Visiting Fellow, Institute of Advanced Legal Studies, London (WE 14)

That does not matter because the main point I would have made, as someone who worked for 19 years in the English Translation Division at the ECJ, where I became deputy to the Head of Division, has already been made by a number of your witnesses. It is that the ECJ should use English as an internal working language alongside French.

I made that suggestion in the ECJ's in-house magazine some 20 years ago – and it sank without trace.

Various witnesses to your inquiry have pointed out that this would enable the ECJ to deal more rapidly with the large and growing number of cases that are brought in English.

May I add, purely by way of background, some additional arguments in support of the suggestion that the ECJ should make English a working language with equal status to French. Even though I am doubtless a linguistic chauvinist, I would suggest that there are strong objective reasons for raising the status of English, chiefly that English has become a lingua franca in a way that French is no longer.

The European Commission's own survey in 2006 revealed that 51% of respondents spoke some English, 32% some German and only 26% French (http://ec.europa.eu/education/languages/languages-of-europe/doc137_en.htm).

The figures on education show that the trend towards English and away from French is becoming more accentuated.

1. Efficiency of ECJ

By enabling ECJ staff and judges to read all the pleadings in the numerous English-language cases in the original language and then to discuss them and draft the judgment in that language, there would be much less scope for confusion resulting from mistranslation or misunderstandings in internal communication.

2. Staffing of ECJ

The ECJ would enlarge considerably the pool from which it draws its judges and other staff by extending it beyond those who speak French.

3. Efficiency of Commission

The workload and efficiency of the Commission in its work before the ECJ would be improved. As you may know, the Commission appears in every case before the ECJ. The Commission works very largely in English now. Yet it has to translate into French every document it submits to the ECJ.

4. Transparency

The most important argument is one of transparency. The ECJ would make its information sources available not just to the few users who have mastered French but to all those with knowledge of English. I find it strange that the ECJ can still have some of its key information sources in French only. Two examples from the website are set out below:

http://curia.europa.eu/jcms/jcms/Jo2_7046/

The Répertoire de jurisprudence (Digest of case-law) is a systematic collection of the summaries of the judgments and orders of the Court of Justice, the General Court and the Civil Service Tribunal delivered since their inception, presented following a **layout** subdivided into seven parts...

Please note : that item is only available in French

The [alphabetical table of subject-matter](#) lists the legal questions dealt with in the decisions of the Court of Justice, the General Court and the Civil Service Tribunal and in the Opinions of the Advocates General, presented in alphabetical order.

Please note : the above item is available only in French

Who am I?

After working for 35 years for the ECJ, European Patent Office and Commission, I am now visiting fellow at the Institute of Advanced Legal Studies in London.

3 December 2010

Memorandum by Professor Takis Tridimas (WE 11)

- I. This submission contains a brief assessment of the judicial statistics for the years 2005-2009 as appear in the Annual Report of the European Court of Justice 2009. Its main points are the following: There is a substantial imbalance between the supply and demand for rulings by the EU courts and a number of factors are likely to increase the demand for rulings; the problem is currently more acute in relation to the General Court (GC) than in relation to the European Court of Justice (ECJ); it would be difficult to provide long-term solutions without radical thinking which would necessitate amending the Treaties; within the confines of the current Treaty framework, a way forward would be to establish specialised tribunals and also increase the number of judges of the GC; at the same time, serious consideration should be given to transferring certain kinds of preliminary references to the GC.

The caseload of the European Court of Justice

2. The figures provided in the 2009 Annual Report of the ECJ show that, in the period 2005 – 2009, there has been good progress in reducing the length of proceedings. Whilst the average length of preliminary references stood at 20.4 months in 2005, it was 17.1 months in 2009. The average length of direct actions was reduced from 21.3 months in 2005 to 17.1 months in 2009 and that of appeals from 20.9 to 15.4 months respectively.⁴⁰ This is commendable progress given especially that the number of cases introduced to the ECJ during the same period has increased. A total of 474 cases were introduced to the ECJ in 2005 as compared to a total of 561 in 2009.⁴¹
3. This progress is welcome and shows that the ECJ continues to make strenuous efforts to cope with increasing workload. The challenges that lie ahead, however, should not be under-estimated. A number of forces are likely to put pressure on judicial workload.
4. First, EU legislation continues to proliferate. The EU now possesses extensive competence in matters going beyond the internal market and has already adopted a large number of measures in the field of freedom security and justice. Measures that have been adopted in the last five or six years can be expected to generate significant litigation. Moreover, the Treaty of Lisbon has increased the competence of the EU in certain areas, including the field of criminal law. This can be expected to increase EU legislative output.⁴²
5. Secondly, the Lisbon Treaty has abolished the limitations on jurisdiction which were previously in force in relation to matters relating to freedom, security and justice under Article 68 EC and matters relating to the Third Pillar under Article 35 TEU. This means that, as a general rule, the ECJ and the GC now have jurisdiction in relation to all measures in the field of freedom, security and justice. This includes jurisdiction in relation to judicial review, preliminary references, actions in damages, and enforcement actions. Furthermore, as a general rule, the ECJ may now accept a

⁴⁰ See ECJ Annual Report for 2009, p. 94.

⁴¹ *Op.cit.*, p. 81.

⁴² See Article 83 TFEU.

preliminary reference from any court or tribunal, and not only from courts of last instance, of any Member State.

6. It is true that the expansion of the Court's jurisdiction is limited by the Protocol on transitional provisions.⁴³ This limitation, however, will only last for a period of five years after the entry into force of the Lisbon Treaty⁴⁴ and therefore will not halt the growth of preliminary references in the medium to long term.
7. The third, equally important, upward force is the enlargement of the EU to Central and Eastern Europe. Although in absolute numbers the volume of references generated by the 2003 enlargement is so far not large, the full extent of the litigation impact of accession is not yet apparent. There is a steady upward trend in the number of references made by Hungary and Poland in the period 2005-2009.⁴⁵ The 2003 accession and the accession of Bulgaria and Romania can be expected to increase demand for rulings.
8. Finally, we are likely to experience growth in administrative rule-making and administrative decision-making at EU level. Under the new procedures introduced by the Treaty of Lisbon, there is greater scope for the implementation of EU primary legislation, i.e. acts adopted by the Council and the Parliament under the ordinary legislative procedure, by administrative rule-making at EU level. This has already occurred in certain areas of EU law, for example, financial services regulation as a result of the introduction of the so-called Lamfalussy process. Furthermore, over the last ten years, we have experienced a considerable growth in EU independent agencies with power to adopt binding acts which are open to challenge.
9. The precise effect of these upward forces is unclear. It is however reasonable to assume that they will increase significantly the demand for rulings.
10. In conclusion, although the ECJ has succeeded in reducing the length of proceedings in the period 2005-2009, there continues to be an imbalance between supply and

⁴³ Article 10 of the Protocol states that, in relation to EU measures in the field of police and judicial cooperation which were adopted before the Treaty of Lisbon came into force, the jurisdiction of the ECJ will continue to be governed by Article 35 of the TEU as in force before the Treaty of Lisbon.

⁴⁴ See Protocol, article 5. Note that special arrangements apply to the UK: see articles 6 etc

⁴⁵ See 2009 Annual Report of the ECJ, p. 103.

demand for rulings and there are powerful forces which are likely to put greater pressure on the EU judiciary.

11. Excessive workload has both quantitative and qualitative consequences.
12. In quantitative terms, it leads to a high number of pending cases and an increase in the length of proceedings. This, in turn, has adverse effects on judicial protection. Some users of the court system, i.e. litigants or national courts which may refer cases to the ECJ, may be put off and seek alternative ways to resolve disputes. There is some informal evidence to the effect that the excessive duration of proceedings before the ECJ discourages English courts from making references. Furthermore, the queuing system which ensues as a result of excessive caseload may shake citizens' trust in the administration of justice and even encourage the use of litigation as a delaying tactic.
13. It also has qualitative effects. A court which is burdened by a high number of cases is more likely to rely on precedent in an effort to process pending cases faster. But this is a mechanical reliance on precedent as opposed to one dictated by reasons of sound judicial policy and persuasive argument. Also, rights created by new legislation or the extension of constitutional principles to new areas (e.g. the principle of non discrimination on grounds of age) effectively compete with well-established rights for judicial time. An overburdened court may prioritise old versus new rights wrongly. It is, in essence, less likely to deal with rights properly.

Possible solutions

14. In an ideal world, where all options would be practically possible, one might wish to model the ECJ on the basis of Anglo-saxon jurisdictions. There is a lot to be said about a Supreme Court with a small number of judges (say 7 or 10). This, however, would require Treaty amendment. It is also foreign to the great majority of the legal traditions of the Member States and would therefore make it less representative of the constituent judicial systems of the EU. It would be highly unlikely to receive political support.

15. The imbalance between supply and demand for judicial rulings can be redressed by increasing supply or reducing demand. Forcing a decrease in demand is difficult. An efficient mechanism for controlling demand would be through the introduction of a *certiorari* or leave to appeal system but, for the same reasons as those given above in relation to the introduction of a Supreme Court, it is not a realistic option. By contrast, an increase in the supply of rulings can be achieved through the following mechanisms:

- a. The establishment of specialised courts attached to the GC;
- b. Increasing the number of members of the GC;
- c. Transferring jurisdiction over certain types of preliminary references to the GC;
- d. Increasing procedural efficiency.

16. Mechanisms (a), (b) and (c) are briefly discussed below. In relation to proposal (d), suffice it to say that the ECJ has already successfully taken a number of measures of procedural economy and that the ECJ is best placed to decide what further measures might be taken. Consideration might perhaps be given to disposing of more cases by order than full judgment, dispensing with the oral hearing or the opinion of the advocate general in cases of lesser importance, or allocating more cases to chambers. In general, it is submitted that it would not be appropriate to do away with the oral hearing as a matter of course but, instead, consideration should be given to ways of increasing its usefulness.

The General Court

17. The imbalance between supply and demand appears to be greater in the caseload of the GC. Notably, as Table A below demonstrates,⁴⁶ whilst the number of cases introduced before the ECJ in the period 2005-2009 is slightly higher than the number of cases introduced before the CFI (now the GC) within the same period, the ECJ disposed of more cases. The table needs to be read subject to certain riders but it

⁴⁶ The table has been drawn by aggregating the data given in the tables provided in the 2009 Annual Report of the ECJ, pp. 81 and 165.

can serve as a valid working hypothesis.⁴⁷ Whilst the ratio of new to completed cases is a modestly negative one for the ECJ (1:1.036), it is a modestly positive one for the GC (1:0.993). This suggests that, if the current trend continues over the next few years, the backlog of the GC will increase considerably. Indeed, as of the end of 2009, the number of pending cases in the GC is much higher than that in the ECJ.

Table A

2005-2009	ECJ	GC
New cases	2744	2620
Completed cases	2845	2603
Cases pending at the end of 2009	741	1191

18. The reasons which may account for this difference are that cases before the GC are direct actions rather than preliminary references and also tend to focus on more technical areas such as competition law and state aid. They therefore require more extensive study of factual evidence and more economic analysis than cases which reach the ECJ.

19. As appears from Table B below, the average length of proceedings before the GC has increased substantially during the period 2005 to 2009, and now stands to 33.1 months for actions other than intellectually property cases, staff cases, and appeals. This is well above the average length that would be in line with good governance standards and is liable to have adverse effects, mostly on small and medium sized enterprises and individuals which may not be able to absorb the costs of waiting. More generally, the long duration of proceedings maintains legal uncertainty not only for the litigants but also third parties who encounter similar legal issues and whose legal position may be affected by the outcome to the dispute. The problem appears

⁴⁷ Thus, the figures for the ECJ are gross figures, i.e. represent the total number of cases without account being taken of the joinder of similar cases: see ECJ Annual Report, p. 81, n.1. The figures for the GC incorporate special forms of procedure such revision and rectification of judgment: Annual Report, p. 165, n. 1.

to persist in 2010. There are currently actions which were introduced in 2007 and the oral hearing for which has not yet been fixed.

20. The duration of proceedings for staff cases also appears extremely high. It stood at 52.8 for 2009 compared to 19.2 in 2005. The length of proceedings in the other types of cases heard by the GC is also high but, in absolute numbers, the problem appears to be less acute. For intellectual property cases, it stood at 20.1 in 2009. This is the only category of cases where the duration appears stable during the 5 year reference period and there has, in fact, been a slight improvement since 2005.

Table B: General Court: Duration of proceedings in months⁴⁸

	2005	2006	2007	2008	2009
Other actions	25.6	27.8	29.5	26.0	33.1
Intellectual property	21.1	21.8	24.5	20.4	20.1
Staff cases	19.2	24.8	32.7	38.6	52.8
Appeals			7.1	16.1	16.1

21. Shortening the duration of proceedings before the General Court appears to be the highest priority. As things stand at the moment, it is questionable whether the waiting period for litigants meets the standards of Article 6(1) of the European Convention and, arguably, falls below the standards of good governance and judicial protection set by the EU judiciary itself. It is not inconceivable that excessive delay in proceedings may lead to an action in damages against the EU.⁴⁹ The upward forces outlined above are likely to worsen the imbalance.⁵⁰

22. There are essentially two ways by which the caseload of the GC can be lessened. A vertical model would envisage the establishment of specialized tribunals sitting below the GC in a way similar (although not necessarily identical) to the EU Civil Service

⁴⁸ This table is taken from the Annual Report of the ECJ 2009, p. 173.

⁴⁹ The ECJ appeared to leave open that possibility in Case C-385/07 P *Der Grüne Punkt – Duales System Deutschland GmbH v Commission*, judgment of 16 July 2009.

⁵⁰ See above, paras 4-8.

Tribunal. A horizontal model would envisage a substantial increase in the number of GC judges. Both models are possible without Treaty amendment.⁵¹ It would also be possible, and in the longer terms may well prove necessary, to combine both models, i.e. increase the number of GC judges and establish specialised tribunals.

23. The establishment of specialized tribunals is not unproblematic. Many arguments would caution against them. Although it is correct to say that certain areas of law are more technical and complex than others, and therefore would benefit from a dedicated body of specialist adjudicators, law remains a system of inter-related rules. Judicial methodology remains fundamentally the same irrespective of the rules to be applied. It would be difficult to defend the establishment of a specialized tribunal on the ground that the rules applicable in a certain area require such a distinct methodology that only a specialized body can apply it. A specialized court may be preoccupied with upholding the purity of its specialist area of law at the expense of ensuring the integrity of the legal system as a whole. Indeed, the most powerful argument against specialism is that over-specialized courts may lead to a culture of false distinctiveness and failure to connect with the wider matrix of the law. Specialized institutions are also more likely to be captured by specific, sectoral or institutional interests. No area of law is vacuum-sealed. Thus, for example, the interpretation of intellectual property rights or VAT is closely connected with free movement and the objectives and policy of the internal market. Any specialized tribunal would have to apply EU law as a whole. Furthermore, the more specialized tribunals that are created, the more difficult it becomes to defend the distinct character of the legal area in question and deny other fields of law their own separate judicial panels.

24. On the other hand, given the structure of the EU judicial architecture, there are also powerful arguments in favour of specialized courts. Increasing or even doubling the number of GC judges also incorporates dangers of fragmentation since the

⁵¹ Under Article 19(2) TEU and Article 253 TFEU, the number of judges of the GC is determined by the Statute of the Court of Justice subject to the limitation that there must be at least one judge per Member States. The Statute may be amended to provide for a higher number of judges by the ordinary legislative procedure: see Article 281 TFEU. Specialised courts adjudicating at first instance may also be created by regulations adopted by the Parliament and the Council under the ordinary legislative procedure: see Article 257 TFEU.

proliferation of chambers would make it more difficult to ensure the coherence of the case law. It would also make for a large and unwieldy institution.

25. On balance, it is submitted that, given the challenges posed by increasing case law and the limitations imposed by the Treaty framework, the establishment of specialized courts attached to the GC seems a way forward. The concerns identified above can be addressed by providing safeguards pertaining to the appointment of judges, the jurisdiction and procedure of the new courts, and the possibilities of appeal.
26. A category which would lend itself to the establishment of a specialist tribunal is trademark cases. Intellectual property cases account for a considerable part of the GC's workload. In the period 2005-2009, they accounted for 36,44% of the cases introduced, which is a higher percentage than any other category.⁵² Transferring such cases to a specialist court would therefore release a considerable amount of judicial time. Furthermore, the method of appointing judges to the GC does not guarantee that appointees will be well-versed to the intricacies of trademark law. A specialist court would meet that concern.
27. An additional advantage of specialist tribunals is that it is not necessary to appoint one judge per Member State. They thus encourage a more *communautaire* judicial structure. Also, from the point of view of the Member States, it may prove less controversial to establish a specialist court with, say, seven or ten members than to increase the number of GC members by appointing seven or ten additional judges, even if an objective method of appointment is agreed.
28. Other areas where specialized courts could be established are state aids or competition law cases. In the long term, the pressure of the case law may be such that the GC would end up assuming the role of a general court of appeal.
29. Further, in addition to the establishment of specialized courts, to maximize the efficiency in the administration of justice, thought should be given at this stage to two further issues. First, the possibility of increasing the number of members of the GC

⁵² See Annual Report 2009, p. 167. Notably, intellectual property cases account for 30,45% of the completed cases during the same period (see Annual Report, p. 170).

and, secondly, the possibility of transferring certain categories of preliminary references to the GC as envisaged by Article 256(3) TFEU. The detailed discussion of the latter possibility is beyond the scope of this paper. Candidates for such transfer might be customs classification cases, VAT cases, state aid cases, and competition cases. It is however submitted that, instead of spoon-feeding reform, it would be advantageous to combine a number of measures with a view to redressing the imbalance between supply and demand for rulings.

30. In general, and in the longer term, it would not be out of place to rethink the division of jurisdiction between the ECJ and GC even though the introduction of changes may require Treaty amendment. Consideration should be given, for example, to the possibility of transferring enforcement actions to the CFI. The monopoly of the ECJ on enforcement actions serves political sensitivities but is not justified by the importance of the issues of interpretation and application of EU law that such cases raise. Furthermore, it would be preferable if the decision on the allocation of preliminary references were reversed. As it stands at the moment, Article 256 TFEU envisages the possibility of transferring certain preliminary references to the CFI by amending the Statute of the Court of Justice. In such a case, Article 256(3), subparagraph 2, provides that, where the GC considers that the case requires a decision of principle likely to affect the unity or consistency of EU law, it may refer the case to the ECJ for a ruling. It would be preferable to envisage a system whereby the ECJ could decide whether a preliminary reference made to it raised issues of fundamental importance or could be referred to the GC for a ruling.

Specific questions

31. In practical terms, the need for translation of judgments imposes a heavy toll on the resources of the EU and also lengthens the time of the proceedings, since pleadings have to be translated into French and possibly other languages. Given the constraints of multilingualism, it is difficult to see how the burdens of translation can be lessened substantially.
32. The possible impact of the EU accession to the ECHR in the caseload remains to be seen. It will depend, to some extent, on the legal framework which governs

accession. In this context, it is important to avoid procedures which will further delay the administration of justice at EU level, for example, a procedure whereby an application to the ECtHR may be made after the ECJ delivers a preliminary ruling but before the case returns to the referring court for judgment. In any event, it is likely that accession will have some impact but it is difficult to measure it. It may increase the submission of arguments based on breach of fundamental rights to the EU courts, especially the ECJ, which may in turn find it necessary to provide more detailed reasoning in dealing with those arguments to avoid the possibility of recourse to Strasbourg.

33. It is also not easy to see what the EU institutions or the Member States could do to assist the EU courts to dispose of cases more expeditiously. Insofar as they are involved in cases, their interests as litigants would take priority over the general responsibility to assist in reducing the caseload. Member States and the institutions could be encouraged to explore possible alternative resolution procedures, for example, friendly settlements in the case of enforcement proceedings or commitments in the field of competition law cases.
34. Although it is difficult to provide for hard and fast rules, it is submitted that an average length of proceedings of one year for preliminary rulings and two years for direct actions would be an appropriate target. Given however the current state, it is difficult to see how this could be achieved unless one was prepared to think radically.

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