The New EU Judiciary
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Editor

Prof. Andrea Biondi is Professor of European Law and Director of the Centre of European Law at King’s College London

Introduction & Contents/Subjects

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The titles published in this series are listed at the end of this volume.
The New EU Judiciary
An Analysis of Current Judicial Reforms

Edited by
Emmanuel Guinchard
Marie-Pierre Granger
Editors

Marie-Pierre Granger is an Associate Professor at the School of Public Policy, Department of Legal Studies and Department of International Relations of Central European University, Budapest (Hungary), which she joined in 2004. She graduated with a Diploma from the Institut d’Etudes Politiques of Lyon, and Masters’ in both Political Sciences and Law (Lyon III/Thessaloniki, Montpellier). She received a PhD in Law from the University of Exeter (UK) in 2001, where she also worked as a lecturer prior to joining CEU. She teaches courses on EU law, law and public policy, European integration and courts in global governance. Her research interests focus on courts and interactions between law and politics, in particular in the context of regional integration.

Emmanuel Guinchard has a LLB, a LLM in European and International Law and MPhil. in Private International Law from the University of Pantheon-Assas Law School (France), heir to the Sorbonne Law School. He taught for several years in France (Paris and Lille) before joining Northumbria Law School in 2004. His principal areas of teaching are European Union Law, World Trade Organization Law, Competition Law and International Dispute Resolution/Private International Law. He teaches or has taught on a wide variety of programmes: LLB (FT, OL and PT) and LLB Law and Business; GDL (FT and DL); and LLM (Commercial Law, International Commercial Law and International Trade Law). He is also the FT Commercial Law LLMs Programme Leader. Some of his publications may be found on http://northumbria.academia.edu/emmanuelguinchard. He blogs at https://europeanciviljustice.wordpress.com/.
Contributors

Albertina Albors-Llorens is University Reader in European Union Law in the Faculty of Law at the University of Cambridge, and a Fellow and Director of Studies in Law at St John’s College. Her research focuses on EU law and competition law and she has lectured and published widely in these fields. Among others, she is the co-author of the 5th edition of Goyder’s EC Competition Law (Oxford University Press, 2009), and her recent publications include pieces for the Cambridge Law Journal (2012), the European Law Review (2014), the Yearbook of European Law (2014) and contributions to The Images of the Consumer in EU Law (D. Leczykiewicz and S. Weatherill, eds., Hart Publishing, 2016) and to the 2nd edition of Barnard and Peers’s European Union law (Oxford University Press, 2017). She is a member of the Cambridge Law Journal editorial committee, and since 2016, one of the editors for the Yearbook of European Law.

Paolo Biavati (Bologna, 1953) is Full Professor of Civil Procedure Law at the University of Bologna, Italy. He has written more than one hundred and fifty books, articles and essays, most of which relate to European procedure law, international arbitration and Italian civil procedure law. Some of these works have been published out of Italy, in English, French, Spanish and Portuguese. Among the books, Argomenti di diritto processuale civile (Bologna, 2016, 3rd edition), Diritto processuale dell’Unione europea (Milan, 2015, 5th edition), European Civil Procedure (Alphen aan den Rijn, 2011) and Europa e processo civile (Turin, 2003) are to be quoted. He has been Secretary of the Italian Association of Civil procedure law and he is actually member of the Council of the International Association of Procedural law. He also practises civil and commercial law in Bologna.

Kieran Bradley is currently special advisor to the Court of Justice of the European Union on Brexit and on general staff matters. He was a judge from October 2011 until August 2016, and latterly president of the second chamber, of the European Union Civil Service Tribunal, Luxembourg. Prior to that, he was a member of, then a Director in, the Legal Service of the European Parliament; from 1995 to 2000, he worked as a
référendaire at the European Court of Justice. He is currently an adjunct professor at the Law School, Trinity College, Dublin, a Fellow of the Robert Schuman Institute of the University of Luxembourg, and a visiting professor at the College of Europe (Bruges), the Catholic University of Portugal (Lisbon), and the Autonomous University of Barcelona. In 2000, he was the first Distinguished Lecturer on EU Law at Harvard Law School. Kieran Bradley has published a monograph on EU Institutional Law, and a large number of articles and book chapters on this and a variety of other areas of EU law. In 2014, he co-edited “Of Courts and Constitutions – Essays in Honour of Nial Fennelly” (Oxford, Hart Publishing).

Laure Clément-Wilz is Professor of Public Law at the University of Limoges (France), Member of the Observatoire des Mutations Institutionnelles et Juridiques (OMIJ, EA n°3177) and Associate Member of Versailles Institutions publiques (VIP, EA n°3643). She teaches EU institutional Law and EU Legal Order, and Substantive Law of the EU. Her research focuses on European Procedural Law and on the Court of justice of the European Union as a political actor.

Francesco Contini is a senior researcher at the Research Institute on Judicial System of the National Research Council of Italy (www.irsig.cnr.it), where he coordinates the research area ‘Quality and assessment of justice systems’. He studies the institutional transformations of European judiciaries with focuses on case management, performance and quality evaluation, and e-justice. He is the principal investigator of the research project Handle with Care: Assessing and Designing Methods for the Evaluation and Development of the Quality of Justice, co-financed by the European Commission.


Gerard Conway is a Senior Lecturer and Director of CPE at Brunet Law School, University of Brunel, United Kingdom.

Laurent Coutron is a Professor at the University of Montpellier, France.

Henri de Waele is Professor of International and European Law at Radboud University Nijmegen, currently also serves as Professor of EU External Relations Law at the University of Antwerp, and is affiliated as a Senior Fellow with the Center for European Integration Studies at the University of Bonn. He has published extensively on topics pertaining to the institutional law of the EU – covering inter alia issues of external relations, administration of justice, fundamental rights, judicial protection, Union citizenship – and on general principles of public international law.
Mattias Derlén is Professor of Law in the Department of Law at Umeå University, Sweden. His research interests include Law & Language, European Union Law, Constitutional Law and Empirical Legal Studies.

Waltraud Hakenberg is a former Registrar of the Civil Service Tribunal of the European Union, Luxembourg, and Honorary professor at Saarland University, Germany. Born in 1955 she studied Law in Regensburg and Geneva (1974–1979) and took her first State examination in 1979. She completed her postgraduate studies at the College of Europe, Bruges in 1979–1980, Doctor of Laws in 1982 and second State examination in 1983. From 1980–1983 she has been the trainee lawyer in Regensburg; from 1983–1989 a lawyer in Munich and Paris. She has also been the official at the Court of Justice of the European Union from 1990 to 2005 and Legal Secretary at the Court of Justice in the Chambers of Judge Jann, 1995–2005. She has been teaching in a number of universities in Germany, Austria, Switzerland and Russia. Since 2009, she is an honorary professor at Saarland University and member of various legal committees, associations and boards. She has contributed to numerous publications on EU law and public international law. From 30 November 2005 to 31 August 2016, she has been the Registrar of the Civil Service Tribunal.

Jean-Paul Jacqué is Emeritus Professor at the University of Strasbourg, France. He was Director of the Legal Service of the Council of the European Union from 1992 to 2008.

Georgia Koutsoukou is a Research Fellow at the Max Institute Luxembourg for International, European and Regulatory Procedural Law. Before joining the Max Planck Institute Luxembourg, she worked as Research Assistant at the Chair of Professor Dr Dres. h.c. Burkhard Hess at the University of Heidelberg (Germany). She holds a LLB from the University of Athens (Greece) and has completed her LLM and doctoral studies at the University of Heidelberg (Germany). She is a qualified lawyer admitted to the Athens Bar Association.

James Lee is a Reader in English Law and PC Woo Research Fellow 2016–2017, The Dickson Poon School of Law, King’s College London, and Associate Academic Fellow of the Honourable Society of the Inner Temple.

Marie-Luce Paris is Assistant Professor of Law at University College Dublin Sutherland School of Law. She is a graduate from Université Paris II Panthéon-Assas. She is also a qualified barrister-at-law from the Ecole d’Avocats du Barreau de la Cour d’Appel de Paris. Her research interests are in comparative public law, European human rights law and European Union law. She has widely published in these fields in, among others, the Yearbook of European Law, the German Law Journal, the Irish Journal of European Law, the Irish Jurist and the Revue Internationale De Droit Comparé. Her latest publication, with Professor John Bell, is Rights-Based Constitutional Review – Constitutional Courts in a Changing Landscape (Edward Elgar 2016). She has held research visiting positions at the University of California, Davis School of Law, and the
Australian National University Centre for European Studies, and worked for the European Commission as a TAIEX expert in EU institutional and constitutional law.

**Felix Ronkes Agerbeek** is a member of the Legal Service of the European Commission since 2008. He has represented the Commission in numerous cases before the Court of Justice and the General Court of the European Union. Between April 2008 and November 2014, his main area of practice was competition law; since November 2014, his main area of practice has been the law of external relations of the EU. Before joining the Legal Service, he was référendaire in the Chambers of Advocate General Poiares Maduro at the European Court of Justice. Felix is on the board of the Netherlands Association of European Law (Nederlandse Vereniging voor Europees Recht).

**Ingve Björn Stjerna**, LLM, is an Attorney at Law in Düsseldorf, Germany. After his studies at the Universities of Heidelberg and Newcastle upon Tyne, UK, he obtained a Master’s in Intellectual Property Law from the University of Düsseldorf which later also promoted him to “Dr iur.” for his thesis on a topic from procedural patent law. Having started his career as an Attorney at Law in 2005, Dr Stjerna is a Certified Specialist in Intellectual Property Law and advises, in particular, on the law of technical protective rights, i.e. patent law and utility model law, as well as on the associated areas of law, e.g., unfair competition law.

**Imola Streho** is Associate Professor at the Law school and Associate Researcher at the Centre d’études européennes at Sciences Po, Paris, where she is Vice Dean of its Graduate school. Her works focus on trade in services in the EU and in particular the evolution of the European legal framework in the freedom of service provision. She is part of the ASEAN Integration through law research project at CIL of NUS, working on a comparative study of the liberalization of services in the regional and multilateral organization frameworks. She is part of the FOLIE research project; she will be working with the students, as a rich and evolving category of the form of life. Before joining Sciences Po, until 2008, she was référendaire at the European Court of Justice in Luxembourg. From 2000–2002, she was Emile Noël Fellow at Harvard Law School and at NYU School of Law where she was the founding executive director of the Jean Monnet Center. She holds a PhD in Law from the University of Paris 2 (Panthéon-Assas) and LLM from the College of Europe. Imola Streho has taught EU Law at the College of Europe, the Central European University of Budapest, the Instituto Empresa Law School in Madrid, the Catolica University Law School in Lisbonne, the National University of Singapore and the University of Melbourne Law School and Paris Sorbonne Université Abu Dhabi. At Sciences Po, she teaches at the Law School and the School of Public Affairs.

**Konstanze von Papp** is Lecturer in Law at Keele University (UK), where she teaches EU Law, International Economic Law, Commercial Law and Company Law. She was a Career Development Fellow at Oxford University (St Hilda’s College) from 2012 to 2015, and a Visiting Scholar at Boston University (USA) in 2012. Konstanze’s research interests lie in EU fundamental rights and EU external relations law, as well as in
international commercial and investment arbitration. She has a PhD (Dr iur.) from the University of Heidelberg (Germany), where she worked as a Graduate Research Assistant at the Institute of German and European Business and Corporate Law. Konstanze also has a LLM from Columbia Law School (USA) and a maîtrise-en-droit international from the University of Aix-Marseille III (France). Konstanze is admitted to the German Bar, and she is also a (currently non-practising) Solicitor of England and Wales. Before returning to academia, she worked as an Associate and Senior Associate in international law firms.

**Bertrand Wägenbaur**, LLM, is a lawyer admitted in Hamburg and Brussels, and partner at Alber & Geiger. He leads the firm’s CJEU litigation department in Brussels and has pleaded more than 400 cases before the EU-courts. He further regularly litigates before the Administrative Tribunal of the International Labour Organisation (ILO) in Geneva. Dr Waegenbaur is the author of *The Statute and Rules of Procedure of the Court of Justice of the European Union*. He is the author of numerous publications in legal journals and co-author of the *EU Competition Law Handbook* Loewenheim/Meessen/Riesenkampff. He holds a law degree from the University of Bonn, Germany, along with a Master’s in European Law from the University of Northumbria, Newcastle and a Doctorate from Middlesex University, London.
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CHAPTER 1
Introduction: The Dos and Don’ts of Judicial Reform in the European Union

Marie-Pierre Granger & Emmanuel Guinchard

[T]he emerging picture is thus not one of a judicial pyramid with stable foundations, but rather one of a tall skyscraper with a somewhat shaky basis, regularly threatened to tip over.¹

This reflection on the Court of Justice of the European Union (CJEU)² was articulated by Michal Bobek, before he joined the Luxembourg-based court. Since, the institution has undergone various reforms and a significant institutional reorganization, notably the doubling of the number of judges of the General Court (GC) from 28 to 56 judges and the termination of the young and performant Civil Service Tribunal (CST). The picture that emerges is that of a tired building, which may look safer because it has lost one floor and has broader base, but is still very top heavy and may thus well collapse for that reason.

Only time will tell whether the latest reforms will really improve the EU courts’ effectiveness and enable them to reduce their backlog and deliver fast and quality


2. The 2009 Lisbon Treaty, which came into force on 1 December 2011, re-labelled the EU courts. The whole institution is now called the ‘Court of Justice of the European Union’ (CJEU), which includes, as the top-tier, the ‘Court of Justice’ (CJ), formally known as the ‘European Court of Justice’ (ECJ) or simply ‘the Court’, and still often referred to in those terms in academic and practitioners’ circles, the middle-tier the ‘General Court’ (GC), formally the ‘Court of First Instance’ (CFI), and the lower tier ‘specialized courts’, previously named ‘specialized panels’. Following the abolition of the Civil Service Tribunal (CST), with the latest reform, the system currently comprises only two-tier. This book adopts the official post-Lisbon terminology but also uses common informal labels or acronyms to refer to the EU judicial institutions and bodies (e.g., ECJ or the Court may be used to refer to what is formally the CJ). Old terminology will only be used when necessary to the analysis.
Chapter 21

Conclusion: Sisyphus in Luxembourg

Emmanuel Guinchard & Marie-Pierre Granger

A major reform of the Court of Justice of the European Union has recently taken place.¹ However debated the reform was, and still is, it is everything but a surprise. A state of judicial crisis is declared on a regular basis, and reforms – whether adjustments or ‘revolutions’ – are then brought in, often as a matter of urgency, with the associated pressure.² The story of judicial reform at the CJEU resembles the Greek mythological hero Sisyphus. The workload issue is solved for a few years before it starts all over again. Ideally, Sisyphus should be relegated to where he truly belongs: mythology. Such enterprise would inevitably fail, since there will be more reforms to come eventually. We would however like to warn against too frequent, and inevitably disruptive, CJEU reforms triggered by a workload problem and make suggestions to that effect. We start from the assumption that the CJEU workload will increase, even without the extension of jurisdiction of the CJEU for which we advocate later on. The main reason is that EU law keeps expanding, and the EU normative production does not seem to slow down, in terms of both quantity and complexity. Moreover, despite the Brexit, further enlargement of the EU may not be excluded. In fact, ‘resistance’ attempts across the EU by disgruntled governments and citizens are likely to trigger more, rather than less, litigation involving EU courts.

We therefore suggest some structural solutions, which are based on the idea that the Court of Justice is the Supreme Court of the EU,³ and which would hopefully allow

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¹ In reality it is not achieved yet – it will be in 2019 – but the Regulations have been enacted and major developments, such as the initial increase of judges at the GC and the abolition of the CST, have already been implemented: see the introduction to this book.

² This is not to say that there was no need to any reform of the CJEU (!), nor that a judicial crisis is artificially made up (despite some recent arguments along this line in relation to the GC by some of its Judges), it is rather an objective observation.

³ The current President of the Court of Justice speaks of it as a Supreme and Constitutional Court (Interview Président Koen Lenaerts: la CJUE est-elle une constitutionnelle ou une Cour Suprême, 1 April 2016, at 0 min 25 s, Blog Droit européen, https://www.youtube.com/watch?v=2kh
for greater stability. Ideally, these should be negotiated and adopted before any crisis occurs, to avoid negotiations in a rush, where expediency often leads to second-best solutions. The new structure would be prepared and finalised following the procedures provided by the Treaties, but should include extensive consultation, in particular among the Courts’ users. In the light of some recent ‘experience’, the GC should have an official, independent and distinct say in the matter. The expression of dissenting opinions should be encouraged, so as to provide the most comprehensive assessment possible.

We start by advocating an extended jurisdiction for the CJEU (1) before recalling some of the advantages a balanced workload could bring (2) and commenting on the solutions which have been rejected (3). We then offer some alternative proposals (4).

§21.01 AN EXTENDED JURISDICTION FOR THE CJEU

Substantial progress has been made over the years regarding the jurisdiction of the CJEU. However, there is still room for improvement, whether it should come from the CJEU or through amendments to the Treaties. The first situation may be illustrated by the vexed question of the locus standi of private parties challenging acts of the EU institutions directly before the CJEU. Progress made through the introduction of a third limb to Article 263 (4) TFEU by the Treaty of Lisbon – the admissibility of actions for annulment brought by natural and legal persons against EU regulatory acts no longer being subject to the condition of individual concern – has been partially curtailed by the Court of Justice. The Grand Chamber, notably, excluded legislative acts from the concept of ‘regulatory act’ in Inuit, which seriously limit the ability of private parties to challenge EU legislative measures. Historical reasons (exposed in the travaux...)

4. We would like here to commend the initiatives taken on a regular basis by the House of Lords of the UK Parliament to hold debates on various aspects of the CJEU, including its alleged overload. The HL has invited comments from any interested party, resulting in a quality discussion, even if limited to one linguistic zone. One could perhaps argue that the HL did what the European Parliament should have done and its consultation model should be followed at the EU Level, by the EU Parliament, with the corresponding extension of accepted languages of course (all official EU Languages).

5. See Introduction.

6. Article 263 paragraph 4 TFEU states that a natural or legal person may ‘institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures’.

7. Court of Justice, Grand Chamber, 3 October 2013, Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union, C-583/11 P, at paragraph 61. The Court of Justice endorsed the interpretation of the General Court in the same case. On the judgment of the General Court, see A. Albors-Llorens, Sealing the fate of private parties in annulment proceedings? The General Court and the new standing test in article 263(4) TFEU, 71 The Cambridge Law Journal, 52, 53 (2012), who considers that such case law ‘dashed any hopes that the gap in the Treaty system of judicial protection identified in UPA […] would be fully closed’. The author nevertheless mentions as ‘a message of hope’ the Microban v Commission judgment of the General Court (25 October 2011, T-262/10), which is the first case where the Lisbon test has been fully satisfied.
preparatoires), as well as democratic considerations, may explain the move, albeit perhaps not always convincingly, since ‘many special legislative procedures only provide a limited role to the European Parliament’. Furthermore, the requirement that the regulatory act does not entail implementing measures has also been interpreted narrowly, to the effect that ‘[t]he potential of the revised locus standi rules has thus been significantly restricted’. Furthermore, the gap in judicial review at EU level is not necessarily plugged in at domestic level by Article 19 (1) TEU, which states explicitly that Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law. K. von Papp aptly notes that, ‘this may be made difficult by another line of cases that applies the two-months time-limit for challenges to EU acts under Article 263(6) equally if an EU act is challenged incidenter before a Member State court […]. This plea of illegality can become important for example in state aid cases where a Member State is obliged under a Commission decision to recover the illegal aid […]. While the lawfulness of the Commission decision (i.e. the EU measure) could become a preliminary question to be referred to the CJEU […], the analogous application of the two-months time-limit if the applicant could have brought a direct challenge under Article 263 may make this route impossible’. An area of specific concern is access to justice in environmental matters, which does not appear to comply with the existing international commitments of the

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8. See the Court itself at paragraph 59.
9. A. Van Waeyenberge and J. Van Meerbeeck, Case Comment: Inuit Tapiriit Kanatami and Others (C-583/11 P), 13 November 2013, https://eutopialaw.com/2013/11/13/case-comment-inuit-tapiriit-kanatami-and-others-c-58311-p.: ‘The Court chose undoubtedly the most respectful interpretation of the intention of the authors of the treaty, making it very difficult for individuals to challenge legislative acts. This is hardly surprising since many Member States have opted for similar solutions in their domestic legal order. At the national level, allowing the challenge of legislative acts amounts to hurting popular sovereignty, but forbidding it leads to providing these acts with a quasi impunity. This respect of democratic legitimacy must, however, be put into perspective when one talks about the EU legal system. Indeed, many special legislative procedures only provide a limited role to the European Parliament.’
10. A. Kornezov, Locus standi of private parties in actions for annulment: has the gap been closed?, 73 The Cambridge Law Journal 25, 26 (2014), who concludes at 28 that ‘The true challenge that lies ahead is the practical application of Article 19(1) TEU [interpreted “as imposing a positive obligation on the Member States to allow in all circumstances (at least indirect) challenges of EU legislative acts before the national courts, even where they are self-executing”] at the national level.’
11. K. von Papp, Chapter 5, fn. 6. For a view that, following the UPA case law, national protection is efficient, even if not the most efficient, see L. Couton, Premières précisions sur la clause Jégo-Quéré, Revue des affaires européennes 163 (2012): ‘La jurisprudence UPA [est] à l’abri du soupçon tiré de la méconnaissance du droit au juge. Grâce à la collaboration des juridictions nationales, elle est en effet censée garantir, en toute hypothèse, une protection juridictionnelle, qui pour n’être pas la plus effective possible, n’en demeure pas moins effective ! L’apport du traité de Lisbonne réside dans la consolidation de la jurisprudence UPA qu’opère l’article 19, paragraphe 1er, alinéa 2, TUE. Désormais, les juridictions nationales doivent impérativement garantir la protection juridictionnelle des justiciables. Ce faisant, le traité de Lisbonne substitue une obligation de résultat à une […] obligation de moyens. Le renvoi vers le juge national est donc affermi dans les hypothèses où ni la jurisprudence Plaumann, ni la clause Jégo-Quéré ne sont susceptibles d’offrir une protection juridictionnelle directe au justiciable’. We note that the author seems to focus on the theoretical framework (‘censée garantir’).
European Union, notably the Aarhus Convention. The Compliance Committee, which had in past considered that the addition by the Treaty of Lisbon of a third limb to Article 263 (4) TFEU could guarantee compliance with Article 9 of the Aarhus Convention on access to justice, recently expressed its disappointment with the interpretation given by the CJEU to this provision, starting with the concept of regulatory act in Inuit. The Committee also assessed the Microban case in the light of the Aarhus Convention and concluded that the case law of the EU Courts fails to comply with its Article 9 regarding the meaning of 'direct concern' and the expression 'does not entail implementing measures'. In brief, 'the Committee finds that the direction taken by the case law of the EU Courts still runs against compliance with Article 9, paragraph 3 and consequentially, Article 9, paragraph 4 of the Convention'. The Committee consequently held that 'the Party concerned [the EU] fails to comply with Article 9, paragraphs 3 and 4, of the Convention with regard to access to justice by members of the public because neither the Aarhus Regulation, nor the jurisprudence of the CJEU implements or complies with the obligations arising under those paragraphs'. In other words, international observers are of the opinion that the EU does not fully guarantee the rule of law at present. The criticisms have so far focused on environmental matters but one could think of other areas where access to

15. Findings, paragraphs 75 and 76.
16. Findings, paragraph 79.
17. Article 9 paragraph 3 states: 'In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.'
18. Article 9 paragraph 4 states: 'In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.'
19. Findings, paragraph 81; see also paragraph 122.
20. Findings, paragraph 123. The European Commission has since issued a notice: Commission Notice on access to justice in environmental matters, C/2017/2616, 28 April 2017 (OJEU C 275, 18.8.2017, p. 1, reported on https://europeanciviljustice.wordpress.com/2017/09/06/access-to-justice-in-environmental-matters/). The Council took Decision (EU) 2017/1346 of 17 July 2017 on the position to be adopted, on behalf of the European Union, at the sixth session of the Meeting of the Parties to the Aarhus Convention as regards compliance case ACCC/C/2008/32 (OJEU L 186, 19.7.2017, p. 15). The Council notably noted in recital 8 that 'in view of the separation of powers in the Union, the Council cannot give instructions or make recommendations to the Court of Justice of the European Union [...] concerning its judicial activities' and that the recommendations of the Compliance Committee in this respect cannot therefore be accepted.
a court to challenge EU legislation is excessively restricted due (in particular) to the restrictive interpretation of Article 263 (4) by the CJEU.

In other fields, however, the Court of Justice seems keener to expand the scope of its control. For example, it has adopted a dynamic interpretation of the Treaties in the field of the Common Foreign and Security Policy (CFSP), eating away\(^1\) the limitations placed on its jurisdiction. Its efforts are nonetheless hampered by the explicit restrictions of its competence set in the Treaties. Indeed, Articles 24 (1) TEU and 275 TFEU state that as a matter of principle, the CJEU does not have jurisdiction with respect to the provisions relating to the CFSP nor with respect to acts adopted on the basis of those provisions. The Treaties explicitly establish two exceptions to this rule, namely that the Court has jurisdiction to monitor compliance with Article 40 TEU and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 TFEU, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of provisions relating to the CFSP. In several cases, the Court of Justice has interpreted strictly the limitations on its jurisdiction, as exemplified lately by the Grand Chamber’s decision of 28 March 2017: ‘while, admittedly, Article 47 of the Charter cannot confer jurisdiction on the Court, where the Treaties exclude it, the principle of effective judicial protection nonetheless implies that the exclusion of the Court’s jurisdiction in the field of the CFSP should be interpreted strictly’.\(^2\) The Court then interpreted as widely as possible the exceptions to the exclusion of its jurisdiction and concluded that ‘Articles 19, 24 and 40 TEU, Article 275 TFEU, and Article 47 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that the Court of Justice of the European Union has jurisdiction to give preliminary rulings, under Article 267 TFEU, on the validity of an act adopted on the basis of provisions relating to the Common Foreign and Security Policy (CFSP) […] provided that the request for a preliminary ruling relates either to the monitoring of that decision’s compliance with Article 40 TEU, or to reviewing the legality of restrictive measures against natural or legal persons.’\(^3\) This case law\(^4\) is commendable. However, in order to secure the full rule of law at EU level, at least when human rights are at stake, restrictions to the jurisdiction of the CJEU should be lifted\(^5\) through either a direct amendment of the relevant provisions or an accession of the EU to the European Convention on Human Rights.\(^6\) The question of the jurisdictional status of the

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\(^1\) L. Coutron, Chronique Droit du contentieux de l’Union européenne, Revue Trimestrielle de droit européen, 418 (2017).
\(^2\) Court of Justice (Grand Chamber), 28 March 2017, Case C-72/15, The Queen, on the application of PJSC Rosneft Oil Company v Her Majesty’s Treasury, Secretary of State for Business, Innovation and Skills, The Financial Conduct Authority, paragraph 74.
\(^3\) Part I of the ruling.
\(^4\) The Rosneft case relates to a reference for a preliminary ruling. Previous cases include in particular Court of Justice (Grand Chamber), 19 July 2016, H v Council and Commission, C-455/14 P (action for annulment; see notably paragraphs 50-55 and 60).
\(^5\) The CJEU could develop a jurisprudence which is sensitive to the special context and needs of foreign policy.
\(^6\) On the positive consequences of the adhesion of the EU to the ECHR regarding the jurisdiction of the CJEU over the CFSP, see A. Popov, ‘L’avis 2/13 de la CJUE complique l’adhésion de l’Union européenne à la CEDH. Cour de justice de l’Union européenne (Art. 6§2 TUE et Protocole
common foreign and security policy is precisely a difficult negotiating point in the current negotiations on the Accession Agreement of the EU to the European Convention on Human Rights. However, well-versed J.-P. Jacqué notes that the ‘dialogue between the two courts has nonetheless resumed’.\(^{27}\) Moreover, there is perhaps hope in sight as in a resolution of 16 February 2017 on possible evolution of and adjustments to the current institutional set-up of the European Union, the European Parliament stated that ‘the European Union is a constitutional system based on the rule of law’ and therefore that ‘the Treaties must be changed to give the Court of Justice of the European Union (ECJ) jurisdiction over all aspects of EU law, in accordance with the principle of separation of powers’.\(^{28}\) The resolution adds that the Parliament ‘[p]roposes extending the right of natural and legal persons who are directly and individually affected by an action to bring a case before the ECJ for alleged violations of the Charter of Fundamental Rights either by EU institutions or by a Member State, by amending Articles 258 and 259 TFEU’.\(^{29}\)

The full application of EU Law goes further. While the exclusion of foreign courts, whether public courts or private ones (arbitration tribunals), from courts or tribunal entitled to use the PR procedure before the CJEU is perfectly understandable in the light of the current version of the TFEU, it raises some issues, i.e., significant gaps in the application of EU Law. This is particularly true for arbitration tribunals, since they decide on the vast majority of international commercial disputes in the European Union and most are courts of both first and final instance.\(^{30}\) A solution could be to create a mechanism inspired by the PR procedure. However, the mechanism would operate on a purely voluntary basis on both sides: it would be optional for the foreign court,\(^{31}\) and
the CJEU may decline hearing the case.\textsuperscript{32} The decision of the CJEU would not be binding on the foreign court but its disrespect could lead to a refusal of recognition or enforcement of the foreign judgment/award in Member States of the European Union. The fact that the mechanism is not identical to the PR procedure could save a treaty reform.\textsuperscript{33}

\section*{§21.02 \ THE BENEFITS OF A BALANCED WORKLOAD}

One of the aims is to reduce the duration of proceedings to an acceptable level. This duration does not have to reach the high level of threshold required for the liability of the EU for breach of the right to a fair trial for unreasonable delay\textsuperscript{34} in order to be unacceptable in all but absolutely exceptional cases. However, the aim is perhaps even more to enable the CJEU to fully use its human resources, starting with the high quality of its judges and AG, in order to increase the quality of the judgments delivered. There would be no point in increasing the quality of these members of the CJEU, for example by suggesting imposing the introduction of a national preselection procedure with minimum standards (where it does not already exist) or granting those members of the Court and Tribunal a longer mandate at the CJEU (from the current term of six years under Articles 253 and 254 TFEU to a term of nine years), if at the end of the day those members are not in a position to fully use their knowledge and experience because of severe time constraints. The same holds true for the référendaires, should the CJEU devise an attractive plan to retain the best of the crop by conferring them more job security (without granting them a civil servant status). On a very practical level, more time could among others mean that judges are able to read more legal literature than currently is the case. The doubling of the number of judges at the GC has been seen positively in this respect.\textsuperscript{35} The possibility for judges and AGs and their staff to spend more time on a given case should lead to an increase in the quality of the judgments.\textsuperscript{36} Such evolution appears essential where the lack of reasoning touches on fundamental principles of EU Law. An excellent example is provided in this respect by G. Conway. Following a careful analysis of the \textit{United Kingdom v. Council} case,\textsuperscript{37} G. Conway

\textsuperscript{32} Guidance on selection criteria could be issued. The rationale is that the foreign court has no right in contrast to a lower court of a MS (it may be a restricted access to the CJEU but it is still a right) or the court of last resort of a MS. In some ways, it could be said that the CJ would play the role of an AG to the foreign Court in the very interest of the correct interpretation of EU Law.


\textsuperscript{34} See the case law mentioned in M.-P. Granger and E. Guinchard, Introduction, fn. 64.

\textsuperscript{35} See the interview of Judge Gervasoni (La formation des juristes, la doctrine et quelques lectures, Interview Stéphane Gervasoni Part 4, 22 January 2016, Blog droit européen, https://www.youtube.com/watch?v=kixwzN9hqug, at 5.34).

\textsuperscript{36} The CJEU should not however be expected to compensate for what may be perceived as the decreased quality of EU legislation over time.

\textsuperscript{37} Case C-81/13, \textit{United Kingdom v. Council}, 18 December 2014.
exposes the consequences, which may touch on the fundamental allocation of competences in the European Union: the judgment ‘paradoxically proposes that a specific legal basis is necessary for the exercise of legitimate competences, but then immediately almost negates this holding by stating that an accumulation of Article 48 TEU and Article 217 TFEU could be an appropriate legal basis without really explaining how the conjunction is justified. […] It is not clear how legislative intention can be inferred from several provisions if it cannot be inferred from any of them individually, all the more so since the Court of Justice does not explain how such a process of composite construction is actually to work. […] The accumulation is entirely unexplained or unjustified, in that essentially the Court simply makes an assertion’. 38 Weak reasoning at the CJEU is not without consequences at Member States level. It has thus been argued that a better reasoning could go a long way in addressing the concerns expressed in a recent high-profile decision of the Danish Supreme Court. 39

The translation service would also, with more time, be able to increase the quality of its translation. 40 The quality of the judgment is often the focus of literature but the importance of a correct translation of judgments cannot be underestimated both for democratic reasons 41 and for pragmatic reasons. 42

Finally, a lesser workload could ultimately benefit the court-users in relation to the understanding of the judgments. Given the importance of the case law of the CJEU as a source of EU Law, the possibility for practitioners and academics to grasp the exact meaning of its judgments appears essential. One of the difficulties in doing so is to understand which linguistic version(s) should be used. Article 41 of the Rules of Procedure of the Court of Justice provides a clear answer in stating that the language of

38. G. Conway, Chapter 20, §20.05; see also §20.07.
39. D. Sarmiento, An Instruction Manual to Stop a Judicial Rebellion (before it is too late, of course), 1 February 2017, https://despiteourdifferencesblog.wordpress.com/2017/02/01/an-instruction-manual-to-stop-a-judicial-rebellion-before-it-is-too-late-of-course/; ‘doing a better job drafting judgments and explaining them. I believe that the Danish Supreme Court’s reaction has quite a lot to do with all that’. On the Danish Supreme Court decision, see L. Coutron, Quand la réitération de l’effet direct horizontal du principe de non-discrimination en raison de l’âge passe mal : du rififi avec la Cour suprême danoise, Revue trimestrielle de droit européen, 389 (2017); M. Rask Madsen, H. Palmer Olsen and U. Šadl, Competing Supremacies and Clashing Institutional Rationalities: The Danish Supreme Court’s Decision in the Ajos Case and the National Limits of Judicial Cooperation, 23 European Law Journal, 140, 150 (2017): ‘The most conservative reading is that it is simply a singular case highly specific to a now amended provision in Danish law. […] A second – and more expansive – reading is that the case is a kind of warning issued to the CJEU on the need for a two-way judicial collaboration. […] This implies that the CJEU will have to exercise more restraint when it reaches the boundaries of its conferred competences. A more expansive reading still would maintain that the SCDK is pursuing a neo-sovereigntist agenda.’
40. More time would also benefit the Research service of the CJEU, and its lecteurs d’arrêts, among others.
41. Europe is diverse and monolingualism may constitute a cause of rejection of the entire idea of the European Union by some citizens who feel disenfranchised.
42. M. Derlén, Multilingual Interpretation of CJEU Case Law: Rule and Reality, 39 European Law Review 295 (2014), fn. 162, notes that ‘About 200,000 cases were brought before German courts owing to the erroneous translation’, which may be seen as waste of resources.
the case, which may be any of the twenty-four official languages of the EU\(^43\) and which
is used for the written and oral pleadings of the parties, is the only one to be authentic
(save where another language is authorised pursuant to Articles 37 and 38 RoP).
However, the judgment is in reality drafted in the working language of the Court of
Justice (French), thus leading to a debate on the correct approach to case law
interpretation, starting with the conflict between formalism (emphasis on the language
of the case) and realism (emphasis on the drafting language). Consulting both
languages (dualism) or relying on other languages (pragmatism) are alternative
options. The current lack of guidance from the Court of Justice on this point leads to a
diverse practice, as demonstrated by the fact that a single Advocate General may
employ a different approach from one case to another.\(^44\) The Court of justice itself
seems to favour pragmatism. In any case, it does not always follow the authentic
language, as the Bacardi case illustrates.\(^45\) The fact – aptly noted by M. Derlén –
that the pragmatic approach treats a decision of the Court as a piece of legislation, Article 41
RoP notwithstanding, may not be foreign to this preference. The absence of a clear
policy on the matter is nevertheless a source of uncertainty and confusion for national
courts,\(^47\) which may reach different outcomes in similar cases or add to the workload
of the Court by referring a second preliminary question.\(^48\) The ‘need for clarification
seems clear’.\(^49\) A balanced workload could provide the opportunity for the Court to
devise an acceptable solution, whether it comes from the judges or the AG.\(^50\)

§21.03 THE WORKLOAD SOLUTIONS WHICH HAVE BEEN REJECTED

A discussion on the ways to reach a more balanced workload at the CJEU should
probably start with a reminder of the excellent work done by the CJEU in the last
decades, such as coupling with nearly twice as many countries and a significant
increase in the competences of the EU. The debate around the latest round of reform
should not eclipse this fact. A remarkable achievement is that of the digitalisation of the
Court (e-curia), which succeeded where many national experiences have failed despite
the added challenges at the CJEU level (e.g., multilingualism).\(^51\) F. Contini highlights

\(^{43}\) The language of the case is not necessarily unique, as cases may be joined together: see M.
Derlén, Multilingual Interpretation of CJEU Case Law: Rule and Reality, 39 European Law
Review 295 (2014), fn. 82 who gives an example with nine languages of the case.
\(^{44}\) M. Derlén, Multilingual Interpretation of CJEU Case Law: Rule and Reality, 39 European Law
\(^{45}\) M. Derlén, Chapter 19, §19.04[B].
\(^{46}\) M. Derlén, Multilingual Interpretation of CJEU Case Law: Rule and Reality, 39 European Law
\(^{47}\) M. Derlén, Chapter 19, §19.04[B].
\(^{48}\) M. Derlén, Multilingual Interpretation of CJEU Case Law: Rule and Reality, 39 European Law
\(^{49}\) M. Derlén, Chapter 19, §19.05[A] fine.
\(^{50}\) M. Derlén, Chapter 19, §19.05[B], believes it is unlikely to come from the Judges and instead
expects a clear message from the AG.
\(^{51}\) F. Contini, Chapter 18, §18.01[A]. A downside is the dependency on the IT system, especially
since ‘Curia relies on various systems, which malfunctioning can trigger different problems,
including delays and blockages’ (Chapter 18, §18.04). Generally speaking, the CJEU has
the fact that e-curia led to functional simplifications, e.g. the ‘users do not have to print and sign the documents or perform any other operation. […] it is sufficient to type the name of the lawyer/agent at the bottom of the document’, or the acceptance of the conditions of use of e-curia means that ‘the documents served and not accepted by users are ‘presumed as accepted’ seven days after their delivery’. The latter demonstrates that technology is not merely a tool, as it touches on procedure. Procedural rules have been one of the most favoured ways to increase the efficiency of the CJEU. The new rules of procedure of the Court of the Justice (2012) and General Court (2015) have often been welcomed in their effort to improve the functioning of the Courts, even it may be too early to judge the effects at the General Court or simply futile in the light of the doubling of the number of judges. When comparing the original procedure before the CJEU and the current one, the simplification efforts made often appear striking. However, it precisely seems difficult for this very reason to go much further without endangering fundamental values such as the right of the defence or multilingualism. For example, what could be the next step in the pursuit of a quicker procedure when it comes to the oral hearing, or the opinion of the AG, or the number of pages for written pleadings and observations? In their respect, procedural reforms seem to have reached a ceiling. Of course, some further reforms could be suggested, especially by lawyers who are among the ones giving life to these rules, starting with the lawyers of the parties and those of the prestigious legal services of key EU institutions (whose inner workings are revealed by F. Ronkes Agerbeek and K. Bradley). Our contributors have provided precious indications in this respect. For example, B. Wägenbaur suggests rectifying the misleading sequence of rules governing the time limits, or translating the digest of the case law in English and German as it constitutes a ‘formidable working tool’. G. Koutsoukou recommends a number of additional measures in order to reduce the duration of the proceedings, in particular the establishment of specialised Chambers for a predetermined period of time, in areas such as taxation or intellectual properties invested in new technologies. Besides the success story of e-curia, one could for example mention the launch on 11 May 2016 of an application, CVRIA, for smartphones and tablets. It enables the reader to access the latest case law and press releases as well as the judicial calendar and a search facility for all the case law of the Court (The Court of Justice of the European Union launches its first application for smartphones and tablets, Press release no. 51/16, 11 May 2016).

52. F. Contini, Chapter 18, §18.05.
53. P. Biavati, Chapter 16, §16.09.
54. F. Ronkes Agerbeek reveals the inner workings of the repeat player by excellence – the Legal Service of the European Commission – in relation for example to the handling of Court proceedings (F. Ronkes Agerbeek, Chapter 12, §12.04.), or on the existence of a litigation strategy at the macro-level, the meso-level and the micro-level (F. Ronkes Agerbeek, Chapter 12, §12.06.). Similarly, K. Bradley provides us with an insight into the organisation (Chapter 13, §13.03) and functioning of the Legal Service of the European Parliament (e.g., its cooperation with other legal services, §13.05).
55. B. Wägenbaur, Chapter 14, respectively §14.04[B] and §14.06. The author also offers advice to lawyers throughout his contribution, either indirectly (e.g., the case law on the conduct of a lawyer which may not be exemplary) or directly, for example on the necessity to provide precise information in an exhaustive manner in relation to lawyers’ fees (§14.04[E]) or the fact that clients and their lawyers may access, on request, the recording of the oral hearing Chapter 14, (§14.05).
and industrial property. However, overall, the scope of potential procedural reforms has substantially narrowed down since the latest reforms. Moreover, as P. Biavati teaches us, ‘the efficacy of civil proceedings is more linked to the organisation of the judiciary, rather than to the procedural rules, as the experience of many countries undoubtedly shows. The EU jurisdiction makes no exception’. Structural solutions are the way forward. This is what we would like to recommend after however assessing the solutions which have been rejected in the latest round of reforms.

[A] A Solution Which Has Been Rejected Wisely: The Appointment of Référendaires Instead of Judges

While we do not support a reduction in the number of référendaires allocated to each judge, currently scheduled under Regulation 2015/2422, we do not believe that an increase in their number is the way forward even if it has in the past helped the General Court to reduce its backlog. Increasing the number of référendaires may help improve the quality of the case law, but it does not diminish the workload. Judges, not référendaires, take the decisions, and unless the judges start to rubberstamp the findings of the référendaires – thus breaching their legal and ethical duties – increasing their number cannot provide a suitable solution. We are aware that judgments are in practice often drafted by référendaires. We also understand that a case may – at times – already be allocated to a particular judge on the basis of the specific expertise of one of the référendaires in his team. We do not think that this practice should be encouraged. The judgment is by definition the responsibility of the judge(s) and the trend towards the transformation of judges into mere managers is not to be welcomed: the starting point that judges should do the drafting should not be lost from sight. The informed prognostic of a former référendaire, I. Streho, on the current reform at the GC is in this sense reassuring: ‘The doubling of the number of judges […] means that the référendaires write fewer draft judgments and work more on following the case law and gathering research for their judges in the middle and long run.’ Should this not be

56. G. Koutsoukou, Chapter 15, §15.06.
57. P. Biavati, Chapter 16, §16.09.
58. Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union, OJEU L 341, 24.12.2015, p. 14, recital 10: ‘In September 2019, the remaining nine Judges should take office. In order to ensure cost-effectiveness, this should not entail the recruitment of additional legal secretaries or other support staff.’ Given the fact that the then existing human resources ‘should be equal for all Judges’, in practice it means less référendaires per judge.
59. Such an increase has been advocated by, for example, M. Abenhaïm ‘Follow-Up Note on Another Missed Opportunity for the Administration of Justice Across Europe’, 16 Dec. 2014, http://kluwercompetitionlawblog.com/2014/12/16/follow-up-note-on-another-missed-opportunity-for-the-administration-of-justice-across-europe/: ‘adding 28 référendaires instead of 28 judges […] would have been the “most cost-effective” approach’.
60. The same could be said of Advocates Generals at the Court of Justice: see E. Guinchard, Breaking Point in Luxembourg, New Law Journal, p. 992, 15 July 2011. https://ssrn.com/abstract=2026480. The appointment of more AG at the CJ in the recent years is to be welcomed, albeit not as a measure to decrease the workload of the Court but rather to guarantee quality judgments.
61. I. Streho, Chapter 11, §11.04.
the case and référendaires in effect replace judges even more than today, their selection and status should be completely revamped.62.

[B] A Solution Which Has Been Surprisingly Rejected: The Existence of Specialised Tribunals

It is well known that the President of the General Court, M. Jaeger as well as individual Judges at the same Court were in favour of a specialist tribunal for solving the problems of the General Court’s workload (even if L. Coutron very interestingly points out that the General Court was previously of exactly the opposite opinion).63 Some professional bodies strongly supported the idea.64 Detailed analysis was carried out in literature to identify the most relevant areas,65 first and foremost in Intellectual Property. Arguments in favour of such a Tribunal included the fact that specialists would need less time to settle in than generalists at the General Court, that the appointment of specialists would reduce the time taken for each individual case. It was also argued that it would not be slower to establish an Intellectual Property Tribunal than to add judges to the General Court because the appointment process of Judges would take about the same time, that offices were already available as well as central services (registry and translation services) in case specific ones could not be set up. Counter-arguments were brought in.

One of the key arguments against the creation of specialised tribunals is that once a tribunal has been set up, it is difficult to remove it even where there is no need for it anymore. L. Romero Requena, Director General of Legal Service of the European Commission, appearing before the UK House of Lords, thus declared:

If I was obliged to make a choice between the creation of a new specialised jurisdiction similar to the existing Civil Service Tribunal, and increase the number of judges in the General Court, my choice would be very easy. I would take the second option, basically, for reasons of flexibility. I have a lot of experience in the public sector, and notably in public finance, and I know that once you have created

62. In reality, despite the rightful regular insistence on the intuitu personae relationship between a référendaire and the AG or Judge, one may wonder — reading the engaging contribution of I. Streho — if the Court should not offer more job security to the best référendaires in order to retain them. The fact that the ‘relative precarity of the position, as the member can hire and fire in practice, is compensated with a monthly salary that is in the equivalent position in the directorates and services of the Court and other European institutions’ (Chapter 11, §11.01) may not be convincing enough past a certain age and therefore a disincentive to stay at the Court.
63. L. Coutron, Chapter 7, §7.03[B]: ‘it is ironic that the General Court should have adopted – officially, on this occasion – exactly the opposite position on the fringes of the negotiation of the Treaty of Amsterdam’.
65. D. Hadroušek & M. Smolek, Solving the European Union’s General Court, 40 European Law Review 188, 200 (2015), who identify two conditions the area of jurisdiction to be transferred to a new specialised should fulfil: ‘cover a considerable portion of the General Court’s caseload’ and ‘be stable enough’. They then embark on an analysis of the caseload of the General Court over the years to narrow down the suitable areas.
a new administration – so a new jurisdiction – the opposite way is almost impossible.\textsuperscript{66}

The prompt abolition of the Civil Service Tribunal reveals the weakness of this argument: the CST was quickly abolished (and its judiciary disbanded) despite being a highly successful Tribunal, both in itself and in comparison with the Court it took over from.\textsuperscript{67} Would a not so successful specialised Tribunal be abolished in less time?

The above argument ultimately relates to (waste of) money. The lack of resources has indeed often been put forward to reject the establishment of new specialised tribunals (despite their limited contingent of judges), and containing the costs of the doubling of judges at the GC was the rationale for the abolition of the CST. One may express surprise at such an argument (despite the legitimate desire not to unduly increase the pressure on taxpayer’s money at a time of sluggish economic growth): is the EU not building courts abroad?\textsuperscript{68} The reallocation of European taxpayers’ money in favour of European Courts may have been considered to address this perceived lack of money.\textsuperscript{69}

In any case, it seems that, at present, specialised tribunals have been confined to history.\textsuperscript{70} If the ability of an institution to deliver quality judgments in a reasonable amount of time is not sufficient to keep it alive, what else is? The threshold for the creation of a specialised tribunal is now set at a level so high it seems impossible to satisfy. Nevertheless, it is interesting to recall that the then First Advocate General N. Jääskinen did not exclude such creation in the future:

It is no secret that some members of the General Court would have preferred the establishment of new specialised EU courts such as a trademark court or an IPR court. It is necessary to emphasise that the EU Court of Justice has not excluded that option for the future.\textsuperscript{71}

\textsuperscript{66} UK House of Lords, Justice and Institutions Sub-Committee, Enquiry into The Workload of the Court of Justice of the European Union, Oral evidence, 17 November 2010, Q 111 (Evidence Session No. 4).

\textsuperscript{67} W. Hakenberg recalls the success story of the CST, starting with the time it took to deal with cases, especially in comparison with the General Court which previously dealt with those staff cases (and now does so again): see Chapter 8, fn. 13.

\textsuperscript{68} For example, the European Union financed the creation of four Commercial Courts in the Democratic Republic of Congo (Butembo, Kananga, Boma and Kolwezi), including the provision of IT equipment and furniture. Other governmental buildings were renovated or built. See the 2013 Report of the COFED (République Démocratique du Congo), http://www.cofed.cd/wp-content/uploads/2014/06/RA_2013_WEB.pdf p. 58-59. The value of the assistance was 16 million euros. The CJEU has estimated in 2014 an annual increase in costs by 2019 due to the increased number of General Court judges of approximately EUR 13.5 million.

\textsuperscript{69} This argument is only shared by E. Guinchard.

\textsuperscript{70} A way to reconcile the doubling of the number of judges at the General Court and the creation of specialised courts would be to create specialised tribunals at the level of the General Court with judges coming from the General Court. For the ‘introduction of specialised courts in well-defined, specific areas of Community law at the level of the Court of First Instance’, see P.J.G. Kapteyn, \textit{Reflections on the Future of the Judicial System of the European Union after Nice}, 20 Yearbook of European Law 173, 179 (2001). In favour of a specialisation ab initio of judges, see H. de Waele, Chapter 10, §10.03[A].

\textsuperscript{71} N. Jääskinen, First Advocate General, Court of Justice of the European Union, King’s College, London, 15 February 2013, \textit{Through Difficulties towards New Difficulties – Wandering in the
Should specialised tribunals be created in the future, lessons should be drawn from the CST experience and W. Hakenberg provides in this respect invaluable advice on a wide range of matters, starting with the appointment of judges. She notably recommends a ‘longer, non-renewable, perhaps nine-year long, judicial term’ and a judicial rotation among the Member States, while pointing out that a multiplicity of specialised courts would ease the nationality issue as more positions would be available. On the latter, one may add that the fact that the reforms at the GC are currently implemented in tranches means that the MS have accepted on a temporary basis what they refused on a more permanent basis: that some MS have more judges than others (until the completion of the reform in 2019). If they can live with it for a few years, why not extend that duration next time? Additionally, a remarkable feature characterises the recruitment of judges at the UPC, as pertinently observed by I.B. Stjerna: the ‘Contracting Member States are not entitled to make candidate proposals’. However, the difficulties once encountered by the CST in recruiting judges, the abolition of this court and the possibility that the UPC may never come to life following Brexit seriously limit the probability of a solution such as an open recruitment through tender. It is true that even in a State which has been united for several centuries, it is a non-written rule to appoint judges from the various countries composing it at the UK Supreme Court, as J. Lee usefully reminds us. It may be submitted that it did not prevent this Court to do an excellent job, even less to innovate.
elsewhere, i.e., on gender matters with the appointment for the first time in the history of a female President in July 2017, Lady Hale.\footnote{77}{J. Lee, Chapter 4, §4.01; \textit{ibid.}, §4.03[B] on diversity and appointments. Another inspiring innovation is the decision of the Court to sit for the first time outside of London, i.e. in June 2017 in Edinburgh (J. Lee, Chapter 4, §4.06). Regarding the doubling of judges at the GC and gender balance, on 6 December 2016, MEP M. Delvaux, on behalf of the JURI Committee, observed that ‘Following the reform of the General Court, only 3 out of 15 newly appointed judges were women, and Member States keep proposing mostly male candidates.’ She then asked the following questions to the Council: ‘How does the Council intend to deliver on its commitment to address the gender balance among the judges at the Court of Justice? What measures are the Member States going to take in order to promote gender equality when it comes to appointments of the judges of the Court of Justice?’ (O-000149/2016, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+OQ+O-2016-000149+0+DOC+XML+V0//EN). The answer was given on 1 March 2017 by C. Agius, President-in-Office of the Council: ‘[…] The final stage, in which the Court will comprise two judges per Member State, will be completed by 2019 and only then will it be possible to assess whether we have come closer to the objective of gender balance in the composition of the General Court. At present, out of a total of 44 judges at the General Court, ten are women and, among the 22 judges who were newly appointed in 2016, six are women. This is of course not yet satisfactory, even if there is a slight upward trend, which hopefully we will further consolidated. […] Regarding the selection procedure, the decisive criterion for the appointment of judges is not gender but merit’ (http://www.europarl.europa.eu/sides/getDoc.do?reference=20170301&secondRef=ITEM-022&language=FR&ring=O-2016-000149).}

W. Hakenberg also offers expert advice on procedural matters to future specialised courts. She notes, for example, that ‘the initial pleas in law set out in the application determine the scope of the arguments for the whole proceedings to follow. This is arguably too strict. Lower courts including specialised courts should be allowed to relax or abolish the rule.’\footnote{78}{W. Hakenberg, Chapter 8, §8.04[C].}

Numerous other illustrations could be given. Unfortunately, for the time being, this experience will be lost.

The demise of specialised tribunals may however revive another institution, that of the single judge at the GC. The single judge,\footnote{79}{By contrast, an unfortunate consequence of the doubling of judges at the GC is that the full Court becomes definitively unworkable for judicial matters at least. This stems from the experience of the European Court of Human Rights which, in its full composition, i.e., with less judges that the GC in 2019, is unworkable and ‘The plenary is confined to administrative functions’ (C. Tomushat, ‘National representation of judges and legitimacy of international jurisdictions: lessons from ICJ to ECJ’, in: I. Pernice/J. Kokott/C. Saunders (eds.): The Future of the European Judicial System in a Comparative Perspective (Nomos 2006), 183, 185, http://www.ecln.net/elements/conferences/book_berlin/tomuschat.pdf). That said, it will not change the practice of the GC since the plenary only ever dealt with a handful of cases but it now appears practically impossible to use it. C. Tomushat interestingly notes that ‘Apparently, the drafters [of the Permanent Court of International Justice, later the International Court of Justice] found back in 1920 that 15 was an ideal number which permits everyone on the bench to present his views individually without any institutional need to form coalitions, which are the appropriate form of action in a parliamentary body’ (\textit{ibid}).} who appeared in 1999, is currently used only in a handful of cases (in total, 0.66% of the completed cases in 2016).\footnote{80}{According to the 2016 Annual Report, Judicial Activity, p. 212 (https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-03/ra_jur_2016_en_web.pdf).}
Nevertheless, in the future, we may witness a greater use of the single judge at the GC.\textsuperscript{81} since it was most often used in staff cases,\textsuperscript{82} now that CST jurisdiction has been retransferred to the GC.\textsuperscript{83} Moreover, the 2015 Rules of Procedure of the General Court have extended the scope of the provisions relating to a single judge to intellectual property (IP) cases.\textsuperscript{84} It may signal a desire of the Court, in the absence of a specialised tribunal in this area, to use as much as possible the single judge in those cases, which are numerous,\textsuperscript{85} but deemed to be relatively simple in comparison to (notably) competition law cases. The success of the institution of the single judge would however require an amendment to the current version of the Rules of Procedure. To improve the effectiveness of the institution, it would indeed be necessary for a case to be directly allocated to a single judge on arrival at the Court rather than being initially assigned to a Chamber of three judges before being delegated to the Judge-Rapporteur sitting as a single judge under current Article 29 (3) RoP. However, it would imply establishing a list of cases which fulfil the conditions for delegation (in particular the lack of difficulty of the questions of law or fact raised, the limited importance of the case and the absence of other special circumstances), which, to some, does not appear feasible.\textsuperscript{86} The solution in our opinion could be to leave it to the single judge to prima facie decide on the matter on a case-by-case basis (within the categories of staff and IP cases) and thus abolish current paragraph 3 of Article 29 (3) 3 RoP. Is the single judge not already entrusted with the duty to ‘refer the case back to the Chamber [of three Judges] if he finds that the conditions justifying its delegation are no longer satisfied’ (Article 29 (3) 4 RoP)?

\textsuperscript{81} Albeit a limited usefulness given the recent increase in the number of judges and the fact that it was originally created as precisely an alternative to an increase in the number of judges at GC.

\textsuperscript{82} See U. Klinke, Le juge unique auprès du Tribunal de l’Union européenne, Revue des affaires européennes, 467, no. 3 (2009–2010).

\textsuperscript{83} The jurisdiction of the single judge derives from the reference to Article 270 TFEU in Article 29 (3) 1 (b) Rules of Procedure of the GC, provided that the staff cases, as others which may be assigned to the single judge, ‘raise only questions already clarified by established case-law or that form part of a series of cases in which the same relief is sought and of which one has already been finally decided’, in accordance with the fact that the single judge should deal with cases of little difficulty and limited importance referred to in Article 29 (3).

\textsuperscript{84} The jurisdiction of the single judge derives from the reference to Article 171 RoP in Article 29 (3) 1 (a) Rules of Procedure of the GC. We note that, in contrast with Article 29 (3) 1 (b), there is no explicit requirement that the cases ‘raise only questions already clarified by established case-law or that form part of a series of cases in which the same relief is sought and of which one has already been finally decided’. On the specific proceedings for intellectual property rights before the General Court, see P. Biavati, Chapter 16, §16.06.

\textsuperscript{85} In 2016, out of 974 cases received by the GC, 336 were IP cases (see the 2016 Annual Report, Judicial Activity, p. 206). They may not be deemed as time-consuming as competition law cases, however they still need to be dealt with and their sheer number is an issue.

\textsuperscript{86} U. Klinke, Le juge unique auprès du Tribunal de l’Union européenne, Revue des affaires européennes, 467, nos 62-63 (2009–2010)).
§21.04 THE RECOMMENDED STRUCTURAL SOLUTIONS

[A] Transferring Preliminary References (PR) Originating from Lower Courts to the General Court

After convincingly arguing in favour of a transfer of jurisdiction to deliver PR from the Court of Justice to the General Court, A. Albors-Llorens examines the vexed question of which PR should be transferred. Rejecting the use of a criterion based on subject matter as in Article 256(3) TFEU, she suggests an attractive solution.\(^{87}\) PR from lower national courts would be brought before the General Court (subject to the safeguards in Article 256(3) TFEU) and those from national courts of last resort before the Court of Justice.\(^{88}\) Such solution appears very fitting in the light of the doubling of judges at the GC and the fact that the bulk of PR comes from lower courts. It may appear acceptable to the Court of Justice while raising the profile of both the GC and the courts of last resort of Member States. The report ‘on possible changes to the distribution of competence’ for PR that the Court of Justice must submit to the key European institutions by the end of 2017 should be telling.\(^{89}\) Should jurisdiction in PR be transferred along these lines to the GC, it would be advisable to also transfer a certain number of features of the procedure before the CJ to the GC, in order to guarantee an equivalent quality of justice. We would like to recommend in particular the institution of the Advocate General on the model of the Court of Justice, the creation of an urgent procedure and the revision of the review procedure.\(^{90}\)

\(^{87}\) Chapter 6, §6.03[B]. In reality, she also suggests transferring preliminary rulings on validity on the ground of consistency since ‘the General Court already considers in the first instance the bulk of annulment actions under Article 263 TFEU. In this manner, the General Court would examine both the direct and indirect challenges to the legality of EU acts’. However, such solution does not appear to make full use of the doubling of judges at the GC. Moreover, as she notes, a certain K. Lenaerts has expressed some reservations on the matter.

\(^{88}\) Compare with S. Prechal, *National Courts in EU Judicial Structures*, Yearbook of European Law 429, 440 (2006): ‘at the end of the day, in my view, all preliminary references should go to the CFI. The CFI should become the regular court for every action – direct actions and preliminary questions. Only cases of particular importance, novelty and complexity, which may seriously affect the unity and coherence of EU law or cases including important and new constitutional aspects should be dealt with by the ECJ’. However, she later cautions against sudden changes: ‘any change to the co-operation between the national and the Community courts [PR] must be prepared with utmost caution, paying sufficient attention to this reality [lack of knowledge of EU Law]. Otherwise an important part of the Community system of judicial protection will again be based on a false assumption about the ‘capacity’ of the national courts’ (ibid., 448).

\(^{89}\) Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union, Article 3.2. Given the fact that the report must be submitted by the end of 2017 and that the doubling of judges at the GC will only occur in 2019, it could perhaps be tempting for the Court of justice not to suggest any change to the distribution of competence for preliminary rulings, taking advantage of the fact that the clearance of the backlog has just started.

\(^{90}\) For another point which may deserve monitoring, see J. Rodriguez Medal, *Concept of a court or tribunal under the reference for a preliminary ruling: who can refer questions to the Court of justice of the EU?*, European Journal of Legal Studies 104, 141 (2015): ‘the General Court has competence, but has never dealt with references for preliminary rulings. If it is ever to exercise it, it is clear that there is a need for solid guidance from the CJEU about who exactly is empowered to make references. Otherwise, there is a risk that the General Court creates
The Institution of the Advocate General (AG) on the Model of the Court of Justice

The institution of AG on the model of the Court of Justice rather than on the current model found in Article 31 of the Rules of Procedure of the GC (i.e., a judge of the GC being appointed as an AG) is advisable. Such institution would greatly help to guarantee the quality of the responses to the questions sent by the lower national courts to the GC. To do otherwise may be perceived as doing justice on the cheap in comparison with existing standards before the CJ. The new AG at the GC would be selected by the 255 TFEU Panel as their colleagues at the GC and their peers at the CJ. Given the limited composition of the latter – only seven persons, most of them holding high judicial offices in their home countries – ‘a Treaty amendment would be perfectly justified that allows for additional appointments to the Panel’, as H. de Waele aptly suggested. Without doubt, the institution of AG at the GC on the model of the CJ may be opposed by some on the ground of budgetary constraints. Apart from the fact that Regulation 2015/2422 seems to focus more on the limitation of support staff at the GC than members of this court, we believe that the answer provided above in relation to the cost of specialised tribunals equally applies here.

The Creation of an Urgent Procedure

We should draw lessons from the experience of the Court of Justice. An urgent procedure specific to preliminary rulings should be created. The new procedure would

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91. The latter would keep its own contingent of AG in order to be able to provide opinions in all cases of importance.
92. A strong argument in favour of a greater involvement of the European Parliament in the selection process of the Judges and AGs at the CJEU, beyond the current proposal of a member of the 255 TFEU panel, is democratic legitimacy. As C. Tomushat pointed out, ‘If an international judicial body makes determinations on the status of citizens, on their rights and obligations, does it not require some kind of democratic legitimacy?’ (C. Tomushat, ‘National representation of judges and legitimacy of international jurisdictions: lessons from ICJ to ECJ’, in: I. Pernice/J. Kokott/C. Saunders (eds.): The Future of the European Judicial System in a Comparative Perspective (Nomos 2006), 183, 187, http://www.ecil.net/elements/conferences/book_berlin/tomushat.pdf). However, the danger then becomes the potentially excessive politicisation of the process and the author notes that, unfortunately, for the appointment of judges at the European Court of Human Rights, ‘in a number of instances the selection process has been politicized on grounds manifestly not serving the ideal of justice’ (ibid., at 188-189). In the light of this experience, where the risk of politicisation of the selection process is simply moved from the Member States’ governments to the European Parliament, H. de Waele’s position on the need not to undermine the importance of ‘output legitimacy’ seems balanced (Chapter 10, §10.03[B]). M.-L. Paris helpfully indicates that the example of the European Court of Human Rights is not unique: ‘an appointment procedure by parliamentary assemblies is not necessarily a safer option since it can also lead to intense politicisation of the nomination process as has been the case in Spain’ (§3.02[A][1]).
93. H. de Waele, Chapter 10, §10.02.
94. An euphemism given the doubling of judges.
95. With the same proviso: this argument is only shared by E. Guinchard.
merge the current Urgent Preliminary Procedure (PPU) and accelerated procedure.\textsuperscript{96} As L. Clément-Wilz rightly puts it, ‘[e]ssentially, a case is either urgent or it is not’.\textsuperscript{97} A unique procedure,\textsuperscript{98} albeit with variable modalities, notably in terms of participation of Member States, depending on the importance of the case, could thus be created. It would notably avoid the confusion created by the fact that the scope of the accelerated procedure encompasses that of the PPU, leading to its use in some cases where the PPU could also have been used. Moreover, the criterion triggering the use of the accelerated procedure – which has been lowered over time – appears difficult to distinguish clearly from the one triggering the use of the PPU, again generating unnecessary confusion.

The new procedure would have two distinctive features. First, the Court would have the duty to explain – even briefly – why it rejects a request for the new urgent procedure.\textsuperscript{99} It would help the courts of Member States to assess when the use of the procedure is possible. Second, as a matter of principle, the ‘view’ of the AG would be systematically published, in contrast with the initial (and exceptionally still existing) practice of the Court of Justice in PPU cases.\textsuperscript{100} Better still, a full opinion would be the

\textsuperscript{96} This new procedure is obviously also advocated for the CJ.

\textsuperscript{97} L. Clément-Wilz, Chapter 17, §17.04[C], who provides this useful guidance: ‘Even if the ECJ does not always explain when a situation is urgent, we can deduce from the case law that an emergency exists when someone is deprived of their freedom of movement and in the case of a child abduction. It could also be the case if a fast proceeding is pending at the national level, if someone could be expelled from the EU territory, or if there is a risk, for the owner, of losing his main dwelling puts him and his family in a particularly fragile situation.’

\textsuperscript{98} For a merger of the PPU and the accelerated procedure, see V. Kronenberger, Actualité du renvoi préjudiciel, de la procédure préjudicielle d’urgence et de la procédure accélérée – quo vadis ?, in S. Mahieu (ed.), Contentieux de l’Union européenne. Questions choisies, Larcier, 2014, Chapter 2 of Part III ‘Les autres voies de droit’, pp. 397, 422 ff.: ‘Peut-être est-il temps pour la Cour d’envisager la fusion de cette procédure avec la PPU, en aménageant les modalités selon les circonstances’; L. Coutron, Urgence et renvoi préjudiciel, Revue des affaires européennes, 385, 401 (2012), argues in favour of a merger between the accelerated procedure (whose use is extremely limited given its effect on other cases) and the PPU in consideration of the difficulty to distinguish their respective scopes of application, and quotes C. Naômé in this respect.

\textsuperscript{99} In relation to the European Court of Human Rights, see the recent change of policy regarding inadmissibility decisions handed down by a single judge: ‘given the progress made in the treatment of the backlog, the Court was able to announce that, in 2016, applicants will receive a succinct indication of the grounds on which their case was rejected’ (J.-P. Jacqué, Chapter 2, §2.01[B]). The single-judge formation is a key formation of the Court since Protocol 14, designed to address the exponential increase in the number of applications (for an assessment, see J.-P. Jacqué, Chapter 2, §2.02[A]).

\textsuperscript{100} L. Clément-Wilz, Chapter 17, §17.03[D]: ‘The Court of Justice has finally allowed the publication of the position taken in some of the first previously decided PPU cases, but not all of them. Subsequently, in all the cases submitted to the emergency procedure that followed, the position taken by the Advocate General was systematically published. Surprisingly, the judgment in Jeremy F was given without Opinion or published View of the Advocate General.’ The publication of the ‘prise de position’ had been advocated in particular by British and
right way forward, albeit with a delayed publication in order not to slow down the procedure.\textsuperscript{101} The argument put forward in the early days of the PPU in order to publish the AG’s position should indeed equally lead in our mind to the replacement of the ‘view’ by a full opinion: ‘It is odd that an Advocate General’s Opinion in a non-PPU case on say, whether the contents of residential caravans sold to the public should be excluded from zero-rate VAT, enjoys the full treatment (translation into all Community languages, publication in the Official Reports) but not the prise de position in \textit{Rinau}, a case which goes to the very heart of citizens’ rights.’\textsuperscript{102}

\textbf{[3]} \textit{The Revision of the Review Procedure}

The Nice Treaty created before the Court of Justice a review mechanism (as opposed to an appellate procedure) of the decisions of the General Court in two circumstances: where the General Court has jurisdiction to determine actions brought against decisions of a specialised Court, i.e. till recently the Civil Service Tribunal (Article 256 (2) TFEU), and where the General Court has jurisdiction to determine questions referred for a preliminary ruling in specific areas following the transfer of competences in these areas from the Court of Justice to the General Court (Article 256 (3) TFEU). Given that no such transfer took place so far, we only have experience in relation to the review mechanism under Article 256 (2) TFEU. The latter states:

\begin{verbatim}
Decisions given by the General Court under this paragraph may exceptionally be subject to review by the Court of Justice, under the conditions and within the limits laid down by the Statute, where there is a serious risk of the unity or consistency of Union law being affected.
\end{verbatim}

Any lesson we learnt from it may apply prima facie to the review mechanism of Article 256 (3) TFEU as it similarly reads:

\begin{verbatim}
Decisions given by the General Court on questions referred for a preliminary ruling may exceptionally be subject to review by the Court of Justice, under the conditions and within the limits laid down by the Statute, where there is a serious risk of the unity or consistency of Union law being affected.
\end{verbatim}

\textsuperscript{101} Spanish jurists in petitions to the Court. See also the balanced position of C. Barnard, \textit{The PPU: Is It Worth the Candle? An Early Assessment}, 34 European Law Review, 281, 293 (2009): ‘the same criteria could be applied to the PPU cases as to other cases, namely, if the case would not have an Opinion published then the PPU prise de position should not be published either. However, I would argue that, as a general rule, the prise de position should be published.’

\textsuperscript{102} See L. Clément-Wilz, \textit{La procédure préjudicielle d’urgence, nouveau théâtre du procès européen?}, Cahiers de droit européen, 135, conclusion (2012): ‘il conviendrait de réintroduire le prononcé oral et public de conclusions, qui pourraient alors être publiées postérieurement afin de préserver la célérité de la procédure’; \textit{ibid.}, Chapter 17, §17.04[A], in fine.

In both cases, the review must be exceptional and the Court of Justice acts as a Supreme Court ensuring the unity and consistency of the law in its jurisdiction.

Two key criticisms of the review mechanism under Article 256 (2) TFEU emerge from experience. The first one relates to the right of initiative of the First Advocate General and is transposable to the review mechanism under Article 256 (3) TFEU as the relevant provision of the Statute of the Court of Justice applies explicitly to both review procedures (Article 62). One may understand the discretionary nature of the initiative of the First Advocate General but the confidentiality of his proposal is more questionable. A reform on this point would be highly recommended.

The refusal of the Court to allow parties to informally alert the First Advocate General is subject to criticism, especially if the review mechanism were to apply beyond staff cases, which would be the case in the situation where jurisdiction for preliminary rulings would be transferred from the CJ to the GC not so much in specific areas (as the Treaty states) but whenever the reference comes from a lower Court. The second criticism relates to the need of inter partes proceedings, notably where the Court of Justice itself delivers the final judgment as it may do so under Article 62b of the Statute (first paragraph in fine). The situation is nonetheless slightly different in the context of

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103. On the exceptional character of the review mechanism under Article 256.2 TFEU, see the analysis of the relevant case law of the Court of Justice by M. Afroukh, who recalls the conditions laid down by the Court in case C-197/09 RX-II, 17 December 2009, M v European Medicines Agency, paragraphs 62-65) and highlight the importance of general principles of law (M. Afroukh, Le réexamen devant les Cours européennes, Revue des affaires européennes 139, nos 20 ff. (2011).

104. The difference between Articles 256.2 and 256.3 TFEU is that the latter has an added paragraph, which reads: ‘Where the General Court considers that the case requires a decision of principle likely to affect the unity or consistency of Union law, it may refer the case to the Court of Justice for a ruling.’

105. Article 62 reads : ‘In the cases provided for in Article 256(2) and (3) [TFEU], where the First Advocate General considers that there is a serious risk of the unity or consistency of Union law being affected, he may propose that the Court of Justice review the decision of the General Court. The proposal must be made within one month of delivery of the decision by the General Court. Within one month of receiving the proposal made by the First Advocate General, the Court of Justice shall decide whether or not the decision should be reviewed’.

106. R. Rousselot, La procédure de réexamen en droit de l’Union européenne, Cahiers de droit européen, 535, paragraph 90 (2014). The author criticises other aspects of the review mechanism under Article 256.2 TFEU which will not be mentioned in this chapter. For example, should the Court of Justice review the case and refer it back to the General Court, another review procedure may take place, thus leading to six or even seven decisions for a single case (paragraph 90; see also D. Dero-Bugny, Journal du droit international 479 (2011)), which does not seem effective. Generally speaking, the author notes that this review mechanism has been reformed more times than it has been used and raised more questions than it solved (paragraph 89).

107. M. Afroukh, Le réexamen devant les Cours européennes, Revue des affaires européennes 139, no. 9 (2011): ‘le plus inquiétant est que les propositions du Premier avocat général ne sont pas publiées alors que la procédure met en jeu des questions essentielles. Aussi apparaîtrait-il hautement souhaitable que cette lacune [...] soit rapidement corrigée’.


109. R. Rousselot, La procédure de réexamen en droit de l’Union européenne, Cahiers de droit européen, 535, paragraph 90 (2014). On the fact that the review mechanism under Article 256.2 TFEU may not be compared to the French procedure of recours dans l’intérêt de la loi and that
Article 256 (3) TFEU as the final judgment will necessarily be given by the Member State’s court.

We note in passing that the fact that the review mechanism has been seldom used (albeit in particular in cases where fundamental procedural rights were at stake) shows that to transfer jurisdiction from the Court of Justice to the General Court in certain situations should not backfire: it will not merely create an additional step (before the GC) before reaching the CJ as most cases will be solely dealt with by the GC. This conclusion will stand even if the review procedure is used a little more liberally than it has been (and as it should perhaps be).

[B] Restricting the Use of the Preliminary Rulings Procedure by the Lower Courts

It is a cliché to say that the Court of Justice is in charge of securing a uniform interpretation of EU law within the Union and that this is done through the PR procedure. However, Supreme Courts of Member States are also in charge of securing a uniform interpretation of the law applicable within their jurisdiction. It does not mean that lower judges are systematically being given the possibility to refer a question to their Supreme Court(s). The duty of any judge is precisely to ‘say the law’: juris-dictio / interpret the law and deliver a ruling according to the facts of the case. The origin of the law – whether European or national – should have no impact on the duty of the judge in this respect. He is not to refer to a colleague higher in the hierarchy unless there are rather exceptional circumstances. If the case raises a technical question in a specific area, the solution is probably to, prima facie, have specialised judges. Of course, the intervention of the Supreme Court of the EU is as welcomed as that of a Member State Supreme Court within a purely national context in the meaning that it will – or should – enable a better answer to the issue raised as it will come from more qualified and experienced judges.\footnote{110} This does not warrant the intervention of a Member State Supreme Court in all cases within its jurisdiction at the simple request of a lower court judge, even less without an effective filtering of such requests, which has substantially increased over time in most countries.\footnote{111} Similarly, it should not warrant the intervention of the Supreme Court of the EU in (potentially) all cases within its jurisdiction.

\footnote{110} Albeit with the reserve that the lack of specialisation at times of the judges of the CJ has been criticised as it led to rulings that did not fully convince experts / specialised judges.

\footnote{111} For example, the Italian Constitutional Court has from 1996 onwards decided to select very strictly the preliminary questions of constitutionality by setting new criteria for admissibility. Thanks to this proactive policy, the number of questions dropped in ten years (2003 to 2013) by more than 75\% (D. de Béchillon & M. Guillaume, La régulation des contentieux devant les Cours suprêmes. - Enseignements des réformes étrangères et perspectives françaises, JCP ed. G., n° 46-47, doctr. 1194, no. 4 (10 Novembre 2014)). The authors note that similar strict filtering now applies to recourses initiated by the individuals themselves before the Supreme Court(s) of several civil law countries, as in Germany since 2001 (no 3) or Spain since 2007 / 2011 (no. 2).
jurisdiction at the sole request of a lower court judge (save for a few obvious exceptions such as a contrived dispute). In exceptional circumstances, it may be possible for a lower court to have an opinion from the Member State Supreme Court (such as the ‘saisine pour avis’ in France in case of a new legal question presenting a serious difficulty and arising in numerous disputes) and it should also be possible, albeit on an exceptional basis, before the CJ. However, as a matter of principle, the EU lower judge at national level should interpret EU Law by himself. The Supreme Court of the EU should not become a first instance court by delivering the first interpretation on a certain matter in potentially all cases before courts of Member States. Compelling arguments in favour of a restriction of access of lower courts to the Court of Justice have thus been put forward since long, notably by J. Komarek. We do not wish to rehearse those arguments, even if we ultimately suggest the same principle – lower courts should not be entitled to send preliminary references to the Court of Justice – albeit with different exceptions: where the validity of EU secondary Law is at stake; where the questions raise urgent, new and fundamental issues of EU Law; where it is alleged that a Supreme Court has breached EU Law, starting with its duty to refer to the Court of Justice. We will elaborate on the third exception after questioning how much Member States courts are ‘national’ courts for which EU Law is somehow foreign (even if not completely foreign) and whether they should not rather be seen more and more as European Courts at Member States level.

112. It could be argued that a filtering is already at work at the Court of Justice, the so-called responsibilisation of national judges. No one may deny the relevant evolution of the case law in the last decades, nor the useful inclusion of provisions enabling the Court to decide by orders. However, rather than leaving it to the Court of Justice to decide on a case-by-case basis in all circumstances, with a policy which seems to vary over time according more to the available resources than the need, it appears more appropriate to reverse the principle in respect of the lower courts (in the meaning of Article 267 TFEU).

113. The procedure was originally created in 1987 before the Conseil d’Etat. In contrast with the PR, the ‘avis’ (advice) is non-binding, neither on the lower court nor on the Supreme Court should the case come back to it through the normal appellate procedures (lato sensu). It should be delivered within three months and is therefore similar in this respect to the PPU. The procedure was extended in 1991 to the Cour de cassation, where its use is currently decreasing, even if its scope of application has been extended in 2015.

114. In parallel, training in EU Law should be increased and the 2011 ambitious programme of the European Commission to train 700,000 members of the legal profession (with an emphasis on judges and prosecutors) by 2020 (COM(2011) 0551 final, 13 Sept. 2011) is welcomed, even if it is not without any hidden intentions: see E. Guinchard, *Formation ou standardisation des acteurs de l’espace judiciaire européen?*, 47 Revue trimestrielle de droit européen 876 (2011). Sacha Prechal, *National Courts in EU Judicial Structures*, Yearbook of European Law 429, 432 (2006) already pointed out to the fact that national courts are still ‘struggling with [EU] Law’ (lack of in-depth training). However, where a specific EU Regulation has been enacted, i.e. published at the Official Journal of the EU; that national measures facilitating its application have been enacted, i.e. published in the national equivalent of the OJEU; that the Ministry of justice published extensive guidelines addressed to all courts on this Regulation, and that still some judges a few years later declare that they are not even aware of the existence of the Regulation (let alone its contents), we wonder if a ‘mere’ training in EU Law is an effective solution.


116. In contrast with the first structural solution recommended, the number of cases to the CJEU and not only to the CJ decreases.
We are currently witnessing the creation of an EU civil procedure stricto sensu, i.e. beyond the questions of international jurisdiction and recognition and enforcement of judgments in the EU (regulated by para-EU then EU Law since 1968). We are not referring to the power of the national judge to put aside a national rule impacting on the effectiveness of EU Law and more generally to the interpretation of the principles of equivalence and effectiveness as limitations to the principle of national procedural autonomy (with questions such as the duty of national courts to raise points of EU law of their own motion). It is also not about creating an entirely new remedy before the national courts in order to accommodate a specific right conferred by EU Law. Nor is it about the interpretation of isolated procedural provisions included in EU secondary legislation whose main focus is substantive law, such as the extensive body of case law from the Court of Justice on Articles 6 and 7 Directive 93/13 on unfair terms in consumer contracts which recently led to repeated amendments of (notably) the Spanish order for payment procedure and the Spanish enforcement procedure. It is about the abolition of the principle of national procedural autonomy through legislative action. This is not a codification of the case law of the Court of Justice in relation to procedure, which operates within the framework of national procedural autonomy. It is about a change of settings, i.e., the entire replacement of national procedure by European procedure before ‘national’ Courts wherever EU Law is applied/at stake (which arguably covers the majority of cases).

Building on the European Order for Payment and the European Small Claims procedure in particular, a member of the JURI Committee of the European Parliament – MEP Radev – presented on 28 February 2017 his draft report of 10 February

117. On the impact of the Court of Justice case law on national civil procedure, see I. Delicostopoulos, Le procès civil à l’épreuve du droit processuel européen, L.G.D.J – Thèses, vol. 401, 2003. It seems that the expression national procedural autonomy was originally coined by J. Rideau in 1972 (V. Couronne, L’autonomie procédurale des Etats membres de l’Union européenne à l’épreuve du temps, Cahiers de droit européen 273 and 282 (2010)). It appeared in an Opinion of AG Darmon in 1993 and was named as such by the Court in 2006 (V. Couronne, L’autonomie procédurale des Etats membres de l’Union européenne à l’épreuve du temps, Cahiers de droit européen, 281 and 283 (2010)).


119. Such codification was called for by A. Arnell, The Principle of Effective Judicial Protection in EU Law: An Untruly Horse?, 36 European Law Review, p. 51, at 68 (2011): ‘there remains a need for legislation of general application codifying the extensive case law of the Court to make it more visible and accessible to the citizen’. His entire article revolves around the case law of the Court of Justice and focus on the interplay between the principles of effective judicial protection in EU law and national procedural autonomy, outlining several phases in the case law (expansion, restraint, possible renewed activism).

He requests that the Commission submit a proposal for a directive setting minimum rules in civil procedure. The suggested directive is extensive both in its scope of application and in its contents. Regarding the former, the directive would apply in 'disputes having cross-border implications'. However, the definition of such a dispute proves very extensive and will thus probably be very pleasing to hear for the European Commission. Indeed, a dispute having cross-border implications goes beyond a (true) cross-border dispute. It encompasses the dispute in which 'at least one of the parties is domiciled or habitually resident in a Member State other than the Member State of the court or tribunal seized' and the dispute in which 'both parties are domiciled in the same Member State as that of the court or tribunal seized, provided that the place of performance of the contract, the place where the harmful event takes place or the place of enforcement of the judgment is situated in another Member State'. However, it also includes the dispute in which 'both parties are domiciled in the same Member State as that of the court or tribunal seized, provided that the disputed matter falls within the scope of Union law'. The question could rather be what is left to and of domestic disputes. Regarding the contents, the directive covers, inter alia, effective judicial protection, oral hearings, provisional and protective measures, procedural efficiency, reasoned decisions, principles for direction of proceedings, evidence taking, court experts, settlement of disputes, litigation costs, 'loser pays' principle, legal aid, funding, service of documents, the right to a lawyer, access to information, obligations of the parties and their representatives, publicity of proceedings, judicial independence and impartiality, and judicial training. Again, the question is rather what is left to and of national procedural law. The report of MEP Radev was adopted by the JURI Committee in June 2017 and by the Parliament in July 2017. The project may seem utopian to some. Twenty years ago, the abolition of the exequatur also seemed unrealistic. It is now the principle in positive law. Progress will be slow but the trend is clear since the adoption of the European Order for Payment in 2006, the first

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122. The European Parliament has, at times, fought the (very) extensive interpretation of the legal basis by the European Commission, even if it was not as hostile to it as the Council. The European Order for Payment is a good example of that since the European Commission wanted originally to apply it to domestic matters despite the legal basis being Article 65 EC (now 81 TFEU). The Commission lost the battle but the war continues on the definition of a cross-border dispute.

123. Article 3.1 (a) and (b) of the suggested directive.

124. Article 3.1 (c) of the suggested directive.
European procedure leading to a decision on the merits. How long are we still going to talk about ‘national judges’ for judges who will be mostly applying EU substantive Law and abiding by EU procedural rules? Will the preliminary rulings procedure as we know it since the origins of the EU still have a raison d’être?

[2] The Need to Allow for an Exception in Case of an Alleged Breach of EU Law by a Supreme Court

If, as a matter of (non-absolute) principle, courts of last resort in the current meaning of Article 267 TFEU have the monopoly of referral to the Court of Justice, the obvious question is whether they can be trusted. If they cannot be, and in the absence of effective sanctions, the suggestion here made would amount to nothing more than the abolition of the preliminary rulings procedure, which would be deeply regrettable. An exception to the principle of non-referral to the Court of Justice by lower courts in case of an allegation of a breach of EU Law (starting with the duty to refer) by a court of last resort would therefore have to be made so as not to empty of its substance the preliminary rulings procedure.

Despite the huge progresses made over time (some courts of last resort openly refused the doctrine of direct effect, most constitutional courts refused to refer…), it appears impossible to trust all courts of last resort in all circumstances to abide by their duty to refer and more generally to abide by EU Law. The Court of Justice may even find itself being a ‘collateral damage’ of an internal war, as some examples in very different countries have demonstrated. Are existing sanctions effective? Two sanctions seem available: infringement proceedings and state liability. Despite significant progress over time, whether through Treaty revisions (e.g., the power given to the Court by the Maastricht Treaty to impose pecuniary sanctions against a defaulting State) or case law (e.g., the possibility to impose both a lump sum and a penalty payment), infringement proceedings against Member States remain a weak part of EU law, especially in relation to breaches of EU Law by the judiciary. Granted, the possibility exists in theory since a judgment against Spain in 2009, which definitively clarifies a previous decision against Italy. However, the European Commission remains extremely reluctant to initiate proceedings against a State for breach of EU law by the judiciary. Moreover, the procedure is not satisfactory in many respects. It is often considered to be marred by several structural problems, including an insufficient number of civil servants at the European Commission with the required expertise (both technical and linguistic) to deal with each and every case; the wide discretion of the European Commission in the administrative stage; a tension between the political nature of the decision-making process and the enforcement of the rule of law; an excessive reliance on information provided by the Member States themselves; a lack of

125. On the paradigm shift, see E. Guinchard, Commentaire sur la proposition d’injonction de payer européenne, Petites Affiches, 17 May 2006.
127. CJEU, 12 November 2009, Commission v. Spain, C-154/08.
128. CJEU, Full Court, 9 December 2003, Commission v. Italy, C-129/00.
satisfactory treatment of the complainant despite the progress made following the
Ombudsman’s involvement in the matter; the existence of cases of maladministration
revealed by the Ombudsman using his powers of inspection and interview of individual
Commission officials, etc. Progress is slow and fragile. For example, the acceleration
by the Lisbon Treaty of the procedure leading to pecuniary sanctions in the event a
State fails to comply with a judgment of the Court of Justice establishing an infringe-
ment – since the Commission is no longer obliged to issue a reasoned opinion before
the second referral to the Court of Justice – has seen its positive effects somehow
thwarted by the emergence of a new litigation before the General Court (and the Court
of Justice) consisting in annulment actions against decisions of the European Commiss-
on on periodic payments following the Court’s decision imposing such a sanction.
The effectiveness of the procedure should not come at the expense of the rights of the
defence. However, there is clearly room for improvement. States are still far from being
ordinary litigants, and it appears impossible to rely on the infringement procedure to
ensure that courts of last resort abide by their duty to refer cases to the Court of Justice
despite a positive evolution. Recent promises of a tougher action from the European
Commission do not alter this conclusion. The Commission declared that it will:

give high priority […] to infringements which affect the capacity of national
judicial systems to contribute to the effective enforcement of EU law. The
Commission will therefore pursue rigorously all cases of national rules or general
practices which impede the procedure for preliminary rulings by the Court of
Justice, or where national law prevents the national courts from acknowledging
the primacy of EU law.

129. For a sharp critique of the procedure but also of the attitude of the European Commission,
including in relation to the pilot scheme then introduced and perceived as a potential way for
the Commission to get rid of the complainant once it has been made aware of an infringement,
see M. Smith, Enforcement, Monitoring, Verification, Outsourcing: The Decline and Decline of
130. Article 260. 2 TFEU.
131. On infringement proceedings, see notably D. Blanc, ‘Les procédures du recours en manque-
ment, le traité, le juge et le gardien : entre unité et diversité en vue d’un renforcement de l’union
de droit’, in S. Mahieu (ed.), Contentieux de l’Union européenne. Questions choisies, Larriol,
on annulment actions against decisions of the European Commission on periodic payments.
The author also notes (pp. 441 ff.) the unpredictability of the sanction imposed by the Court
under Article 260.2 TFEU, in contrast with the more mathematical approach of the European
Commission, and the wide difference sometimes observed between the suggestion of the
Commission and the sanction effectively imposed by the Court (often much lower). He argues
in conclusion p. 459 for the possibility for the European Commission to directly impose
financial sanctions on States as in competition law (with recourse before the CJEU), whilst
adding that the low probability of such a revolution is the assurance of necessary evolutions.
See also, for more decision-making powers to the European Commission in the light of the
limited effectiveness of Article 260 TFEU, P. Wenneras, Sanctions Against Member States under
132. Communication from the European Commission on ‘EU law: Better results through better
application’ (C/2016/8600), OJEU, C 18, 19 January 2017, which adds that the European
Commission ‘will also pursue cases in which national law provides no effective redress
procedures for a breach of EU law or otherwise prevents national judicial systems from
ensuring that EU law is applied effectively in accordance with the requirements of the rule of
law and Article 47 of the Charter on Fundamental Rights of the EU’.
Given the insistence on general practices, it is feared that only the most extreme cases of constant refusal or reluctance to refer would be pursued. The structural weaknesses of the infringement procedure in any case remain.

State liability for breach of EU Law by the judiciary may prima facie offer a better solution as private parties have proved time and time again how keen they are to enforce their rights. An extensive comparative analysis on the breach of the duty of courts of last resort to refer under Article 267 (3) has fortunately been undertaken a few years ago. Reading the national reports, one cannot escape from the conclusion that, while progress has been made in the theoretical acceptance of the principle, the practicalities of SL for breach of EU Law by the judiciary, starting with the breach of the obligation to refer under 267 (3) TFEU, are far from secured. For example, while Spain is characterised by the existence of several legal regimes of diverse nature sanctioning its judiciary and compensating for its breaches of the law, the judges applying these bodies of rules tend to be far more lenient towards their peers than towards other servants of the State. Moreover, the compensation granted tends to be modest. Importantly, compensation requires the Supreme Court (Tribunal Supremo) to explicitly acknowledge the existence of the ‘judicial error’ (Article 121 Spanish Constitution) made by the lower court (if the mistake has allegedly been made by the Supreme Court itself, a special Chamber composed of the highest judges as well as the oldest and the youngest judges will have jurisdiction). The relevant case law of the Supreme Court is so strict that the error nearly amounts to mental illness: ‘est exigé un niveau extrêmement élevé d’inaptitude, dont je dirai qu’il est plus proche du trouble mental que de la négligence judiciaire’. Doubts as to the compatibility of this case law with the Köbler conditions are therefore expressed. Available studies on the same topic conclude similarly in that in practice compensation is very hard to come by. It was

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134. Perhaps to the point that AG Léger’s Opinion in Köbler, according to which application of the principle of State liability to judicial decisions has been accepted in one form or another by most of the Member States (even if subject only to restrictive and varying conditions) and on which the Court relied at paragraph 48, is now justified …
136. In his conclusion, D. Sarmiento also mentions a worrying judgment of the Tribunal Supremo, as the Court considered, in a decision of 17 January 2012, that a judgment of the Court of Justice finding a breach of EU Law is not in itself sufficient to consider the breach sufficiently serious.
137. Among others: M. Broberg, National Courts of Last Instance Failing to Make a Preliminary Reference: The (Possible) Consequences Flowing Therefrom, 22 European Public Law, 243, 250 (2016), who mentions an isolated decision of the Swedish Ministry of Justice; M-P Granger, Francovich liability before national courts: 25 years on, has anything changed?, at 2.4: ‘Somewhat unexpectedly, principled objections were relatively easily set aside by national courts to accommodate the Köbler doctrine. However, the practical impact of Köbler has remained marginal.’
138. Some studies may at times demonstrate greater issues. K. Maria Scherr, Comparative Aspects of the Application of the Principle of State Liability for Judicial Breaches, 12 ERA Forum 565, 578 (2012) thus noted: ‘the Austrian system is a vivid example of a public liability regime that restricts the State’s liability for harmful acts committed by the judiciary according to the source of the damaging act. […] Austria only shields those judicial acts from public liability claims
thus recently stated that ‘about a dozen Member States have actually implemented Köbler liability in their legal framework’ and that ‘even in these Member States, compensation has been allocated on very few occasions’. In this respect, the relatively recent landmark decision in the Ferreira da Silva case is an important step in the right direction as it complements the case law of the European Court of Human Rights and may encourage national courts to change their attitude. However, the...
case also demonstrates that lower courts look for the support of the Court of Justice before sanctioning their own Supreme Court for breach of their duty to make a preliminary reference under Article 267 (3) TFEU (and more generally EU Law). Therefore, it appears necessary to allow as an exception lower courts to refer a question to the Court of Justice in case of an allegation of breach of EU Law (starting with the duty to refer) by a Member State court of last resort.  

Article 6 ECHR, European Law Review 599 (2016); F.-V. Guiot, La responsabilité des jurisdic-

142. An alternative would be to allow a recourse directly before the Court of Justice for breach of the duty of a court of last resort under Article 267 (3) TFEU, i.e. a proposal similar in philosophy but not in scope to that of a ‘cassation européenne’, that is the possibility for private parties to initiate proceedings against decisions of courts of last resort for breach of EU Law directly before the Court of Justice (a proposal vigorously defended by J. Baquero Cruz, La procédure préjudicielle suffit-elle à garantir l’efficacité et l’uniformité du droit de l’Union européenne?, in L. Azoulai, L. Burgorgue-Larsen (eds), L’autorité de l’Union européenne, Bruylant, Bruxelles, 2006, pp. 241, 261). J.-P. Jacqué, Conclusion, in L. Coutron (ed.), L’obligation de renvoi préjudiciel à la Cour de justice: Une obligation sanctionnée ?, Bruylant, 2014, p. 497 suggests this solution before inclining against it on the basis of three arguments: if this procedure took place after the judgment on the merits, it would inevitably call into question the latter; if it took place before, it would delay the solution to the dispute; finally, the workload of the Court of Justice would greatly increase as lawyers would try ‘their luck’. The workload issue is precisely being addressed by taking out the bulk of PR, which are the ones coming from lower courts. For the same reason, the average duration of the PR proceedings should be reduced, and the PPU and accelerated procedures are in any case available (their merger being welcomed). As for the first argument, the situation could easily be avoided by the Member State court of last resort by referring the case to the CJ in the first place. It may also be argued that this solution runs against the spirit of collaboration between the Member States’ courts and the CJEU. Indeed, the preliminary rulings procedure is traditionally presented as a collaborative procedure between the CJEU and national judges rather than a hierarchical one. It is in some respects. However, it is a very specific form of ‘collaboration’ where one (the court of last resort) is obliged to refer a question and is equally obliged to accept the answer. The acceptance by the States of a direct recourse before the Court of Justice for breach of the duty of a court of last resort under Article 267 (3) TFEU currently seems nevertheless low.