The place of the General Court in the institutional framework of the Union

FIDE 4 November 2021

Introduction

The European integration project has a complex relationship with crises. One could say it is built and fed by crises. Today's one is of a different nature, however, because it affects the legal foundations of the Union and hence its capacity to overcome other crises. Indeed, some Member States call into question the very rule of law itself in disrespect of their initial commitments.

The Court of Justice finds itself at the heart of this legal tempest. This does not come as a total surprise. EU law is increasingly at the core of many societal issues. Dealing with questions of high societal importance is not the only worry of the Court of Justice. In consequence, it also has to face an ever-growing workload.

Against this backdrop, one might be inclined to forget that the Court of Justice is not the only jurisdiction that must safeguard the rule of law. This mission is entrusted to two jurisdictions: the Court of Justice and the General Court. In the sphere of economic administrative law, the General Court fulfills this task by upholding the rights, which the Treaties grant to individuals, companies, public authorities and States in their dealings with the EU institutions.

This is an important role for at least two reasons.

First, in a context in which the EU institutions must deal with rule of law problems in some Member States, their own conduct must be irreproachable There can be no double standards in the Union.

Second, the cases brought before the General Court raise rule of law questions of their own. They are different, but are not less problematic. In cases dealing with large players of the digital industry for instance, the General Court is regularly requested to define the limits of private power over society. In many respects, the threats to freedom and open society also originate from private sources.

Unlike the Court of Justice, however, the General Court has benefitted from a reform that significantly increased its resources. I refer in this respect to Regulation 2015/2422. Once the transition phase foreseen by this regulation has been completed, the General Court will be in a position to take on additional responsibilities.

It follows that there are two Union courts pursuing a common objective, which is the protection of the rule of law in the Union, with one court gradually reaching the limits of its capacity and another court gradually getting up to speed to take on more work. Under these conditions, the question arises as to whether the allocation of tasks between the two jurisdictions composing the Court of Justice of the EU should be reviewed and, if so, when and how.

Obviously, this is a complex matter that requires both courts to redefine their respective tasks and missions within the limits set by the Treaties and in particular by Article 19 TEU, which not only refers to the Court of Justice and the General Court, but also to national courts. Indeed, any reshaping or reorganization of the Union's jurisdictional architecture must take account of national courts that ensure effective judicial protection in the Member States. Even if the Union legislators have the final say in redefining judicial powers, a judicial system that does not have the support of all its constituent parts, is bound to fail. In other words, any future reform should be acceptable for the Court of Justice, the national courts and the General Court. Or, to paraphrase Brussels' eurospeak, Article 19 TEU relies on a "*trilogue juridictionnel*".

Redefining the work allocation between the Union courts is not easy. It cannot be decided in a hurry, but requires time for reflection and discussion. Moreover, there is sufficient time for such concertation, since the matter is not particularly urgent. Despite occasional criticism, mostly from dubious sources, the judicial system of the Union works rather well. Even so, given the complexity of the question and the time needed for reflection, I submit it is important that we launch the discussion on the redefinition of powers in a not too distant future.

First, as regards the Court of Justice my colleague President Lenaerts is much better placed than I am to explain its workload and capacity constraints. My understanding remains nevertheless that with the constant influx of increasingly delicate preliminary reference issues, the Court of Justice will soon reach the limits of its capacity. Second, as regards the General Court, I have the conviction that it will soon be ready to take on new responsibilities.

Before discussing, in the second part of my speech, the various options and avenues for such responsibilities, I will explain, in the first part, why the General Court will be able to take on additional work in the relatively short term.

Part I: A jurisdiction getting on cruise speed

Specific implementation measures

As regards the situation at the General Court, it is not my intention to retell the story of the reform put in place by Regulation 2015/2422. I will just briefly refer to a series of concrete measures that the General Court has put in place to make this reform work as best as possible.

These measures concern in particular the new structure of ten chambers composed of five judges, to the specialization of these chambers in the field of intellectual property and civil service law and to a new role for the vice-president, who acts as a broker between the chambers to ensure the consistency of their case law. The General Court also adopted a series of resolutions pertaining to its working methods focusing on more pro-active case management, especially in large groups of cases, and more in depth-control, especially by extended formations.

Current state of play

Of course, it is still early days to claim that all these measures have been a success, especially after 18 months marked by the pandemic. Even so, there are tangible results. The length of proceedings has decreased considerably. Moreover, the General Court refers more and more case to extended formations, hence giving more weight and authority to its judgements. It should also be noted that the criticism in legal doctrine about the allegedly "unbearable lightness of the General Court's judicial control" has ceased all together. Finally, the General Court has been in a position to gain specific expertise in dealing with complex issues in the economic, medical or chemical sphere.

These results do not only reflect the possibly subjective opinion of the President of the General Court, but also the more critical view of the Court of Justice. I refer in this respect to the report of the Court of Justice, as foreseen in Article 3(1) of Regulation 2015/2422, assessing the merits of the reform, which the Court of Justice delivered in December 2020. This assessment is on balance positive. There is obviously room for improvement, as the General Court had largely acknowledged itself before the adoption of the report. The General Court is now finalizing the internal review process on the basis of the various recommendations made by the Court of Justice.

The Council was less positive in its conclusions on the report of the Court of Justice. It is perfectly normal that the legislator is entitled to have a return on a budgetary investment. However, I am concerned by the tone of the Council's conclusions, since they seem to reflect the intention for constant monitoring of the internal functioning of the General Court. At a certain point, the page of the reform of the General Court must be turned. It cannot and should not justify ongoing oversight on judicial activities, especially not in the context to which I referred above.

The road ahead

I am convinced that the reform of the General Court will be a success. The General Court is gradually achieving its cruise speed and will have completed its internal review process at the end of this triennial period in September 2022. Even so, there are still some obstacles on the road to success, both within and outside the General Court.

As regards the internal challenges, the General Court still has to improve its handling of large groups of cases as well as the handling of increasingly complex antitrust, State aid or banking cases.

With respect to the external challenges, I refer to the permanent instability in the composition of the General Court; judges come and go. First, not all Member States attach the same importance to a good functioning of the General Court. They do not renew their judges, even after a term of less than six years. Second, when judges leave, often to join the Court of Justice, Member States fail to appoint a successor in time, despite the obligation to do so foreseen by the Statute. Both causes imply that the General Court is in an ongoing process of recomposing chambers and portfolios.

To conclude the first part of my speech: the General Court will take all measures necessary for the implementation of the reform before September 2022 and will be able to take on additional responsibilities any time thereafter.

Part II: Future options

Now, starting the second part of my speech, the question arises as to what these new responsibilities could possibly be. At this stage, I see two approaches for a future reallocation of tasks, each being the extreme of a spectrum on which the legislator or treaty makers can place the cursor to find an intermediary solution.

The first model is a pragmatic one

The underlying rationale of this possible model is simple. It activates the mechanism foreseen of Article 256 TFEU and consists of an ad hoc transfer of powers from one court to the other. Under this system, the Court of Justice decides on an ad hoc basis, which preliminary reference cases it wants to keep for itself and which cases it transfers to the General Court. The Court of Justice would thus have a dispatch role.

This system is akin to the approach followed in the past for the transfer of competencies in direct appeals. In the early days, when the General Court was still a court of first instance attached to the Court of Justice, its competence was limited to competition law and staff matters. Subsequently, its competence grew organically to what it is today. Even if the General Court is a jurisdiction in its own right after the Treaty of Nice, there is no clear reason why this step-by-step or incremental approach could not be duplicated in the future.

Even so, some could object that pragmatism has its limits. As any building, the judicial architecture of the Union must obey certain rules and stay within the limits set by the Treaties. It cannot grow in all directions.

More fundamentally, the division of tasks between the two jurisdictions must be understood by the outside world and in particular by national courts, the other party in the "*trilogue juridictionnel*". For example, a system under which preliminary reference cases were to be transferred on an ad hoc basis from the Court of Justice to the General Court is likely to encounter resistance from the part of national courts. It would be strange, from the perspective of the referring national court, if its preliminary questions were not treated by the Court of Justice, but would be transferred to the General Court without any clear underlying rationale for work allocation. The national court could interpret such an ad hoc transfer as a sign that its questions are not sufficiently important to deserve the attention of the Court of Justice. If so, the system set up by Article 267 TFEU could possibly lose its attractiveness in general.

The conceptual model

The conceptual approach lies at the other end of the spectrum of options and consists of identifying the main responsibility of each of the two courts and adjusting the judicial architecture accordingly. This description begs the

question as to how to identify that responsibility. The answer to that question is obviously not easy to give.

That answer does not follow from the Treaties themselves. Article 19 TEU entrusts the Court of Justice and the General Court with one and the same overarching mission: they must ensure that, in the interpretation and application of the Treaties, the law is observed. The picture does not become much clearer when reading the Treaty on the Functioning of the European Union.

More guidance could possibly be found when analyzing the roles played by the two courts in the architecture of the Union. Here again, the Court of Justice combines most roles. It undoubtedly has a constitutional role, as illustrated by a series of high profile cases dealing with fundamental societal questions. It also acts as a Council of State in direct appeals brought by or against institutions and Member States or when it issues an opinion at their request. The Court of Justice is also a review court when it rules on appeals brought against decisions adopted by the General Court. In the majority of cases, this review is akin to cassation technique limited to questions of law. There are, however, also cases where the Court of Justice seems to act differently, as a Court of Appeal.

For its part, the General Court combines in essence two roles. It is a trial court of first instance operating in separate chambers rendering decisions subject to the review by the Court of Justice. However, it also acts as a Court of Appeal or Council of State in the areas covered by the mechanism of prior authorization of appeals provided for by Article 58a of the Statute, to which I already referred to above. In those areas, essentially trade mark law, the General Court de facto acts as the judge of last resort, unless it raises an issue that is significant with respect to the unity, consistency or development of Union law.

When comparing the roles exercised by the two courts, one may assume that the Court of Justice will be increasingly called upon to exercise its constitutional role in high profile cases such as the recent rule of law cases. A comparison with national constitutional courts suggests that it will have to be more selective. Indeed constitutional courts in the USA, UK and the Members States rarely to deliver more than 150 written judgments per year.

Obviously, redefining work allocation between the Union courts on the basis of the Court of Justice's constitutional role is easier said than done. A case that

seems a suitable candidate for such a transfer at first sight, may well turn out to be of fundamental importance on closer examination. The Van Gend & Loos case for example dealt with a relatively simple customs classification issue. Although it will be difficult to find a clear criterion, the demarcation line could be drawn in several ways.

Various avenues

One avenue to explore is to free the Court of Justice as much as possible from its review functions by extending the mechanism of prior authorizations of appeals to a wider range of legal areas. This could be done at the legislative level by creating new administrative appeal bodies, comparable to the Boards of Appeal in intellectual property cases, in secondary legislation. Regulation 1049/2001 on access to documents and the EU Staff Regulations would be obvious candidates for such additional bodies, which would guarantee a quasi-judicial review before a case is brought before the General Court.

Alternatively and more categorically, it could be envisaged to provide for an additional level of review within the General Court itself, justifying that appeal to the Court of Justice would be limited to cases affecting the unity, consistency and development of EU law. This internal review could be entrusted to a larger formation within the General Court, along the lines of the systems existing within the US Federal Courts of Appeal.

Another avenue consists of defining specific categories of cases that would trigger the competence of the General Court to hear preliminary reference cases within the meaning of Article 256 TFEU. This definition could rely on a combination of two interacting factors.

The first factor could relate to the specific expertise acquired by the General Court over the years, such as its experience in competition law, in the law governing the registrations of various chemical or medical substances, or the rules on the supervision of the banking sector and trademarks.

The second factor is more institutional in nature and refers to situations in which it is hard to define the dividing line between the EU administration and national administrations. These situations often occur when these authorities act as a network, such as the ECN and the Single Supervisory Mechanism in the banking sector, but also the registration of medical and chemical substances. In many respects, the intertwining nature of the EU and national authorities create confusion as to where private and public authorities can seek judicial

review. In those situations, the case law of the Court of Justice clearly states that preference should be given to review by the General Court. Even if this case law purports to give priority to direct appeals before the General Court under Article 263 TFEU, it could serve as an indicator for the specific legal areas, which could eventually be transferred to the General Court.

Final comments

Even if I am pragmatist by nature, my preference lies with this conceptual model pursuant to which the Court of Justice would increasingly act as the Union's constitutional court and transfer lesser tasks and responsibilities to the General Court. This court which could become the Union's Council of State controlling the conduct of its institutions, when they act directly or indirectly in close cooperation with national administrations.