

Response from the CCBE to the follow up inquiry into the Workload of the Court of Justice of the EU

27 February 2013

The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 31 member countries and 11 further associate and observer countries, and through them more than 1 million European lawyers, welcomes this further opportunity to contribute to the work of the Justice, Institutions and Consumer Protection Sub-Committee of the House of Lords.

COURT OF JUSTICE

Has the Lisbon Treaty impacted negatively on the workload of the Court of Justice?

1. The impression of the CCBE is that the burden of the justice and home affairs cases heard under the urgent preliminary ruling procedure continues to be manageable for the Court.
2. The House of Lords will no doubt already have had sight of the report of President Skouris dated 31 January 2012, "Report on the use of the urgent preliminary ruling procedure by the Court of Justice".¹
3. The tables thereto provide the duration of proceedings and include details of where the procedure was refused. Approximately nine weeks as a total duration of the procedure demonstrates that such cases do receive truly urgent treatment.
4. However our view is that the full impact of a) the 2004 and 2007 enlargements of the EU and b) the rapid extension of scope of EU law into the field of justice and home affairs is not yet fully reflected in the volume of references for preliminary ruling. Accession Member States have traditionally taken a number of years for the judiciary and legal profession to become properly familiar with EU law so as to make references where necessary. Also the expansion of EU law into justice and home affairs continues on an ongoing basis. Immigration, criminal, family, succession and possibly, in the future, European contract law cases are taking the Court of Justice into areas at the heart of the concerns of the citizen but which are, in the main, uncharted waters for EU law and the Court.
5. In short, the true impact of the Lisbon Treaty on the workload of the Court of Justice is in our view still to be felt.

Will the three legislative proposals already adopted have a significant impact on workload?

6. The legislative measures already adopted set the broad parameters within which the workload of the Court is managed. In particular the Rules of Procedure have been significantly revised and, in general, improved. However the management of the Court's workload depends probably to a greater degree on the working practices adopted by the

¹ <http://register.consilium.europa.eu/pdf/en/12/st06/st06140.en12.pdf>

Court at a micro level. These will include but are not limited to Practice Directions which are, it is believed, in preparation.

7. Working practices affecting the workload include:

- a. The need to balance efficiency against both procedural fairness and quality of judgments – judgments are being issued in which the parties may have made no submissions, in which there has been no report for the hearing, no opinion from an Advocate General, and no oral hearing. This is not the right balance, in particular because such judgments are binding on the parties and are regarded as binding on future chambers deciding the same issue;
 - b. The need to monitor the progress of cases, in particular at the pinch points in the procedure such as the report for General Meeting submitted by the Reporting Judge. If the report is not filed by the due date, the case does not go before the General Meeting. The degree to which the case is followed up by the Registry or by any other person when this or any other deadline is missed is unclear. It is important that responsibility for such follow-up is clearly attributed;
 - c. The parties currently have no access to information on the progress of each case, such as is provided by some Supreme Courts,² thus compounding the problem of unexplained delays in the processing of cases. The CCBE has proposed that parties at least be informed of developments.
8. A further issue for workload is the turnover of judges and the varying skills and experience which newly recruited judges (and référendaires) bring both to the Court and to the General Court. In common with every other profession in Europe and most judiciaries,³ it seems appropriate for there to be an active programme of induction of new judges and référendaires through a programme of continuing education/sharing of good practice in the practice of judging. This is particularly the case because Member States appoint a vast range of persons (judges, lawyers, professors, politicians, ambassadors etc) some of whom may have never been into a court room prior to arriving in Luxembourg.
 9. In the future, resources permitting, it would also be likely to be fruitful for Luxembourg judges on the occasion of visits to Luxembourg by national judges to have more structured exchanges of experience and knowledge with the national court judges who have in-depth practical experience of judging but would themselves be keen to have guidance on dealing with issues of EU law.⁴
 10. Finally there is a clear logic for involvement of the Court's stakeholders, including the legal profession through the CCBE, in the development of the Court's working practices, including the Practice Directions which are to be prepared. There is currently no legislative remit for such involvement but a desirable future development would be a "Users Committee" of the Court involving representatives from the Judges, Registry, Member States, Institutions and the legal profession.

Is there a case for increasing the number of Advocates General?

11. A ratio of eight Advocate Generals to twenty seven Judges is not adequate. The Advocate Generals provide an important role in maintaining the consistency of the case law of the Court. But with such a low ratio of Advocate Generals to Judges, there is an ever increasing tendency to dispense with the written opinion of the Advocate General which increases the risk of uneven or, on occasions, contradictory caselaw. We welcome the request by the President of the Court of Justice under cover of a letter dated 16 January 2013 for an increase in the number of Advocates General by 3 and support the reasons given in that request.

² <http://www.supremecourt.gov.uk/current-cases/>.

³ See for example the training programmes for sitting judges run by the Judicial College of England and Wales and the Ecole de la Magistrature in France.

⁴ See the European Parliament Report on Judicial Training in the European Union Member States: <http://www.europarl.europa.eu/committees/en/studiesdownload.html?languageDocument=EN&file=60094>

GENERAL COURT

Has the case for increasing the judiciary of the General Court become more urgent since 2011?

12. This is undoubtedly the case. Significant numbers of cases from 2005-2007 remain without judgments. A factor in this is that some cases (for example those concerning nationals of third countries subject to EU sanctions) are being prioritised but such prioritisation necessarily has an adverse impact on the progress of large complex competition and state aid cases.
13. The absence of a properly functioning administrative court of the EU is a drag on the functioning and ultimately on the economic efficiency of the EU. Valuable judicial guidance on the legality or good administration of the EU institutions is being delayed with the result that bad or questionable practices persist for long periods of time when a prompt court decision would have provided timely guidance to the EU Institutions on how to conduct themselves in accordance with the law.

How would any additional judges be appointed?

14. It is critical that the most competent judge be nominated by each Member State. Member States should propose candidates by means of open and transparent procedures as is already the case in a number of Member States (UK, NL...).
15. Under Article 19 TEU, each member State has the right to nominate one judge but, with regard to the exceptional addition of 12 additional judges, there should be no nationality requirement or affiliation because the EU is incurring this significant cost in a time of financial crisis precisely in order to ensure that there is an efficient judiciary for the EU.
16. The decision to renew the additional 12 judges should be taken by the Article 255 Committee based on a reasoned recommendation from the Court (the CCBE would support a situation where that committee would also be involved in the reappointment of the other 27 judges).
17. The selection/nomination process itself could be improved as it is not effective to have a system where a selection committee (the Article 255 Committee) only has the option to accept or reject a nomination. A rejection of a nominated judge by the selection committee tends to be seen as an aggressive move. Instead, at least for the additional 12 judges, there should be an open procedure where candidates would be ranked in order of merit by the Article 255 Committee (as is the case with the nomination process for the Civil Service Tribunal or Strasbourg).
18. In addition, it can be difficult in itself for some countries to find a suitable candidate for a judicial appointment when one considers the number of judicial appointments that a Member State may need to make - an appointment to the Strasbourg court, possibly three appointments to the Luxembourg Courts etc. - and hence why nominations along the lines of nationality can also give rise to difficulties quite apart from the prohibition of discrimination on grounds of nationality contained in the EU Treaties. Indeed the fundamental Treaty requirement of non-discrimination distinguishes the EU from other international organisations. At least as regards any supplemental judges, there can be no justification in principle for an unqualified candidate being appointed to the Court by a Member State under some form of rotation when a fully qualified candidate from another Member State has not been considered.
19. Members of the Article 255 Committee themselves have commented on the limitations – and therefore by inference to possible improvements – to the selection procedure. In this regard we attach the informative paper from Lord Mance. Paragraphs 20, 27-29, 32, 36 and 53(b), (d) are most relevant to our discussion.

20. A possible new Article 48 of the Protocol on the Statute of the Court of Justice might read as follows:

"The General Court shall consist of 39 judges of whom the appointment of 12 judges shall be subject to the following additional provisions:

- **Any person who is an EU citizen and who fulfils the conditions in the first sentence of the second paragraph of Article 254 TFEU may submit an application to be appointed as one of the 12 judges. The Council , acting on a recommendation from the Court of Justice, shall determine the conditions and the arrangements governing the submission and processing of such open application process;**
- **When the panel provided for in Article 255 TFEU is consulted on the appointment, the panel shall append to its opinion a list in order of priority of candidates having the most suitable high-level experience. Such list shall contain the names of at least twice as many candidates as there are judges to be appointed by the Council;**
- **Each of the 12 judges may be reappointed upon expiry of their term of office provided that both the judge concerned and the General Court so request."**

What view is there on the continued inability of the Member States to reach agreement on increasing the number of judges?

21. The failure to reach agreement on the system to be used to select the judges was entirely predictable given the previous failure to agree in 1999. Unfortunately it demonstrates a manifest lack of a *communautaire* approach by those countries which are not prepared to contemplate selection of supplemental judges purely on merit. A functioning judicial system cannot be sacrificed to national prestige or, still less, to political patronage.
22. If the above-mentioned suggestions for adding additional judges are not followed, other options for adding judges to the General Court must be discussed and put forward as a matter of priority.