

# NEWSLETTER CVA



## REFORM OF THE STATUTE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

### Introduction

On 30 November 2022, the President of the Court of Justice of the European Union ('Court of Justice') submitted to the European Parliament and to the Council of the European Union a request with a view to amending Protocol No 3 on the Statute of the Court of Justice of the European Union ('Statute').

Based on the second paragraph of Article 281 of the Treaty on the Functioning of the European Union ('TFEU'), the Court of Justice's request is '*made against a background of sustained high levels of judicial activity marked by both the volume and complexity of cases brought before the Court of Justice*' and has been designed along two main lines. *First*, the Court's request concerns the specific areas in which, according to Article 256(3) TFEU and the Statute, the General Court is to have jurisdiction to hear and determine questions referred for a preliminary ruling by the national courts under Article 267 TFEU. *Secondly*, it concerns the mechanism by which the Court of Justice determines whether an appeal brought against decisions of the General Court handed down in respect of decisions of boards of appeals is allowed to proceed.

In the following sections, we will examine the concrete proposals and the arguments put forward by the Court of Justice.

## **The request from the Court of Justice**

*a. Transfer of jurisdiction on preliminary rulings from the Court of Justice to the General Court is to be made only in specific areas*

The preliminary ruling procedure is considered to be the keystone of the Union's judicial system (Opinion 2/13, paragraph 176). This mechanism of cooperation between the Court of Justice and national courts of Member States may or must (Article 267(3) TFEU) be used when a case pending before a national court or tribunal raises a question of interpretation of EU law or a question concerning the validity of acts of the institutions or bodies of the Union.

When a case is brought before a national court or tribunal, it is for that court or tribunal alone to decide whether it is necessary to refer the case to the Court of Justice (Article 267(2) TFEU).

The Court of Justice's ruling is binding on both the referring court and all the courts of the Member States, in identical legal and factual circumstances.

At present, references for a preliminary ruling remain within the exclusive jurisdiction of the Court of Justice. Although the first subparagraph of Article 256(3) TFEU provides that the General Court has jurisdiction to hear and determine questions referred for a preliminary ruling under Article 267 TFEU in specific areas laid down by the Statute, no such provision has yet been included in the Statute. In fact, this possibility has existed for more than 20 years (pp. 2 and 3 of the Court's request) – the Court of First Instance (now General Court) was actually the first one to suggest, in the document it produced to the 1992 Intergovernmental Conference which led to the Treaty of Maastricht, a transfer of competences in specific areas corresponding to homogeneous blocks of Court of First Instance competences.

Now, with the continuous and sustained increase in the number of requests for a preliminary ruling, triggering lengthier proceedings, the question of recourse to the possibility provided for in the first subparagraph of Article 256(3) has re-emerged (p. 4 of the Court's request).

A general transfer of jurisdiction to the General Court is precluded from the outset by the wording of Article 256(3) TFEU, which expressly refers to "specific areas" (p. 4 of the Court's request). In order to identify these specific areas, the Court of Justice has been guided by four parameters or principles (pp. 4 and 5 of the Court's request): (i) the specific areas must be clearly identifiable upon reading the reference for a preliminary ruling and sufficiently separable from other areas governed by EU law; (ii) they must be areas that raise few points of principle; (iii) there must be substantial body of case-law of the Court of Justice capable of

guiding the General Court; and (iv) there must be a sufficiently large number of references for a preliminary ruling in the areas concerned.

The application of these criteria, supported by statistical data relating to cases closed by the Court of Justice between 1 January 2017 and 30 September 2022 (Annexes 2 and 3 to the request), led the Court of Justice to identify six specific areas: the common system of value added tax, excise duties, the Customs Code and the tariff classification of goods under the Combined Nomenclature, compensation and assistance to passengers, and the scheme for greenhouse gas emission allowance trading (p. 5 of the Court's request).

*b. The division of tasks between the two courts*

It follows from the Court's request that it will continue to receive all references for preliminary rulings. Thus, the national judges shall address their requests to the Court of Justice, which will verify the criteria of specificity and exclusivity and will then forward to the General Court the questions that fall within its jurisdiction.

Indeed, some references for preliminary rulings may be of a mixed nature and contain questions relating to several areas, not all of which are covered by the six specific areas mentioned above. Since the General Court has jurisdiction only for questions referred for a preliminary ruling which fall exclusively within one or more of the specific areas (p. 6 of the Court's request), conferring responsibility for the allocation of cases on the Court of Justice guarantees legal certainty and celerity.

However, even if a reference for preliminary ruling falls within the jurisdiction of the General Court, this Court may refer the case back to the Court of Justice for a judgment if it considers that the case requires a decision of principle likely to affect the unity or consistency of EU law (Article 256(3) TFEU). There is also the exceptional possibility of a decision given by the General Court on questions referred for a preliminary ruling being reviewed by the Court of Justice where there is a serious risk of the unity or consistency of Union law being affected (Article 256(3) TFEU).

*c. Procedural guarantees proposed by the Court of Justice: chambers within the General Court and the possibility of Opinions by an Advocate General*

The Court of Justice has proposed the inclusion of three procedural guarantees in the Statute to ensure consistency in the judgments of both EU courts.

*Firstly*, according to the first sentence of Article 50b (3), only certain chambers shall have jurisdiction to deal with references for a preliminary ruling (p. 7 of the Court's request).

*Secondly*, an Advocate General can be appointed when references for a preliminary ruling are submitted to the General Court. At present, the General Court is not permanently assisted by its own Advocates General, but the role of Advocate General at the General Court can be performed on an ad hoc basis by a judge of this Court (this is, in fact, provided in Article 49 of the Statute). However, this does not mean that there will necessarily be an Opinion in every case, since Opinions are and must remain reserved for cases which raise novel questions of law (Article 20(5) of the Statute and p. 7 of the Court's request).

*Finally*, the General Court will have the possibility to sit in a formation of intermediate size between the chambers of 5 Judges and the Grand Chamber of 15 Judges (p. 7 of the Court's request). As with the Court of Justice, the Grand Chamber will be convened for cases of greater importance and complexity.

*d. Determining whether an appeal is allowed to proceed*

This part of the Court's request seeks to extend the mechanism of prior admissibility of appeals to the Court of Justice, while ensuring that the requirements of effective judicial protection are respected (pp. 8 and 9 of the Court's request).

In substance, if a party wishes to bring an appeal against a judgment of the General Court concerning a decision of one of the independent boards of appeal of the offices and agencies referred to in the request (such as the European Union Intellectual Property Office, the Community Plant Variety Office, the European Chemicals Agency, the European Union Aviation Safety Agency, the European Union Agency for Railways, the European Banking Authority, the European Securities and Markets Authority and the European Union Agency for the Cooperation of Energy Regulators), it must first seek leave to appeal from the Court of Justice, i.e. it is for this Court to decide whether the appeal is admissible.

In addition, *'an appeal will not be allowed to proceed, wholly or in part, unless it raises an issue that is significant with respect to the unity, consistency or development of Union law'* (p. 8 of the Court's request).

*Finally*, this mechanism is to be extended to disputes relating to the performance of contracts containing an arbitration clause, within the meaning of Article 272 TFUE (p. 9 of the Court's request).

**Provisional agreement with the Council and the Parliament**

Representatives of the Council and the European Parliament, together with representatives of the Court of Justice and the European Commission, reached a provisional agreement on 7 December 2023 on the reform of the Statute of the Court of Justice (see the press release [here](#)). According to these institutions, *'The changes to the Statute of the Court of Justice will*

*allow the Court of Justice of the EU to manage its judicial work more efficiently, by taking advantage of a previous judicial reform that increased the number of judges in the General Court'.*

The legislative proposal, which will take the form of a Regulation of the Parliament and the Council, maintains the specific areas proposed in the request for the General Court to have jurisdiction to give preliminary rulings. The same applies to the three procedural aspects analysed above: (i) national judges will continue to refer questions for preliminary rulings to the Court of Justice; (ii) judges of the General Court will be appointed to act as Advocates-General; and (iii) a chamber of intermediate size will be created within the General Court to deal with certain questions referred for preliminary rulings.

However, it introduces a novelty: although the rules on access to documents laid down in Regulation 1049/2001 remain fully applicable, the written submissions of the parties will be made public after the judgment, unless the party concerned objects to such publication.

The provisional agreement must now be approved by the Council and the Parliament. It will then be formally adopted by both institutions after legal and linguistic revision.

### **Concluding remarks**

While we await the adoption of the Regulation by the European Parliament and the Council, which should take place this year, it is safe to say that the Court's request undoubtedly opens a new chapter in the history of the judicial architecture of the European Union. Whereas until now we have had a uniform system for preliminary rulings, centralised in the Court of Justice, we will now have two courts with shared jurisdiction, depending on the case, to rule on preliminary questions referred to them by the courts of the Member States. Article 256(3), which has been dormant for many years, will finally take shape and become operational.

The procedural aspects proposed are to be welcomed, since the importance of ensuring and improving the coherence and effectiveness of the procedures falling within the jurisdiction of the courts cannot be overlooked. It is indeed of the utmost importance that both courts should be able to carry out properly the tasks assigned to them by the Treaties.

The division of work between the two courts will also enable the Court of Justice to devote more time and resources to focus on cases raising issues of fundamental importance for the Union's legal order and to improve the dialogue with national courts. It should also ensure greater respect for the right to an effective remedy, in particular by reducing the length of national legal proceedings.

For national courts and applicants, this partial transfer of jurisdiction to the General Court

may reduce the overall length of the proceedings. As national proceedings must be stayed while the case is pending in Luxembourg, a speedier preliminary ruling will enable the dispute to be settled more quickly.

In addition, access to the parties' written submissions will certainly have a positive impact. On the one hand, it will help to better understand and interpret the judgment, in the light of what the parties (including the Member States) have written. On the other hand, it will increase confidence in the EU and in EU law.

Although not yet fully implemented, all these proposals represent a significant change in the EU's ongoing efforts to modernise and streamline its judicial process, reflecting a commitment to uphold a robust and effective administration of justice.