Conseil des barreaux européens
Council of Bars and Law Societies of Europe
Association internationale sans but lucratif
Rue Joseph II, 40 /8 – 1000 Bruxelles
T. : +32 (0)2 234 65 10 – F. : +32 (0)2 234 65 11
Email : ccbe@ccbe.eu – www.ccbe.eu

CONFERENCE "EU COURTS – LOOKING FORWARD"

28 April 2014
9.00 – 17.30
Stanhope Hotel – 9, Rue du Commerce – 1000 Brussels

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CONFERENCE "EU COURTS – LOOKING FORWARD"

28 April 2014
9.00 – 17.30
Stanhope Hotel – 9, Rue du Commerce – 1000 Brussels

09.00 ***Registration***

09.30 ***Welcome - President of the CCBE, Aldo Bulgarelli***

Keynote address by **Koen Lenaerts**, Vice-President of the Court of Justice

10.00 – 11.15 ***Topic 1 : Dealing with an increasing workload – organisation, appointment & training of judges***

Chair: **Onno Brouwer** (Partner, Freshfields Bruckhaus Deringer)

Panel: **Jean-Marc Sauvé** (Vice-President of the French *Conseil d'État*)
Nicholas Forwood (Judge, General Court)
Professor Dame Hazel Genn (Dean UCL Faculty of Laws)
Pamela A. Bresnahan (Partner, Vorys, Sater, Seymour and Pease LLP, Washington, DC)

Audience discussion

11.15-11.30 ***Coffee break***

11.30-12.45 ***Topic 2: Limits on the right to bring an action under Article 263(4) TFEU – striking the right balance***

Chair: **Dean Spielmann** (President of the European Court of Human Rights)

Speaker: **Roberto Mastroianni** (Full Professor of International Law and EU Law, Federico II University, Naples; Professor of EU Law, LUISS-Guido Carli University, Rome)

Panel: **Jean-Paul Keppenne** (European Commission, Legal Service, Legal Adviser, INST Team (Institutions))
Denis Waelbroeck (Partner, Ashurst LLP, Brussels)
Jean-Claude Bonichot (Judge at the Court of Justice)

Audience discussion

12.45 – 14.10 ***Lunch***

14.10 – 14.30 ***Address by the President of the General Court, Marc Jaeger***

14.30 – 15.45 ***Topic 3 : Judicial Protection / Interim Relief from the Court***

Chair: **Christopher Thomas** (Partner, Hogan Lovells, Brussels)

Panel: **Vittorio Di Bucci** (European Commission, Legal Service, Principal Legal Adviser - Équipe AIDE (*Aides d'état et dumping*))
Georg Berrisch (Partner, Baker Botts, Brussels)
Rosa Perna (Judge, Regional Administrative Court for Latium (TAR LAZIO), Rome)

Audience discussion

15.45 – 16.00 ***Coffee break***

16:00 - 17:15 ***Topic 4 : Future Procedural Developments: Maximising oral hearings; secret pleadings; online access to the case file; remote access to video/audio feeds; how many lawyers plead; page limits; dissenting opinions and other procedural issues***

Chair: **Hugh Mercer QC** (Essex Court Chambers and Chair of the CCBE Committee on the EU Court of Justice)

Panel **Lord Mance** (Justice of the Supreme Court of the United Kingdom)
Joachim Bornkamm (Vorsitzender Richter am Bundesgerichtshof a.D.)
Géraud de Bergues (Chef de service at the French Ministry of Foreign Affairs Legal Service)
Massimo Condinanzi (Full Professor of EU law, University of Milan)

Audience discussion

17:15 - 17:30 ***Closing remarks: Aldo Bulgarelli / Hugh Mercer***

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CONFÉRENCE « L'AVENIR DES TRIBUNAUX DE L'UNION EUROPÉENNE »

28 avril 2014
9 h à 17 h 30
Stanhope Hotel – 9, Rue du Commerce – 1000 Bruxelles

09.00 ***Inscriptions***

09.30 ***Discours de bienvenue du président du CCBE, Aldo Bulgarelli***

Discours d'ouverture de **Koen Lenaerts**, vice-président de la Cour de justice

10.00 – 11.15 ***Sujet n° 1 : l'augmentation de la charge de travail : organisation, désignation et formation des juges***

Présidence : **Onno Brouwer** (associé chez *Freshfields Bruckhaus Deringer*)

Intervenants : **Jean-Marc Sauvé** (vice-président du Conseil d'État français)
Nicholas Forwood (juge au Tribunal)
Professor Dame Hazel Genn (*Dean* de la *UCL Faculty of Laws*)
Pamela A. Bresnahan (associée chez *Vorys, Sater, Seymour and Pease LLP* à Washington)

Débat avec les participants

11.15-11.30 ***Pause-café***

11.30-12.45 ***Sujet n° 2 : les limites du droit d'intenter une action en justice en vertu de l'article 263(4) du TFUE : à la recherche d'un juste équilibre***

Présidence : **Dean Spielmann** (président de la Cour européenne des droits de l'homme)

Orateur : **Roberto Mastroianni** (professeur titulaire de droit international et de l'UE à l'université Frédéric II de Naples et professeur en droit de l'UE à l'Università LUISS-Guido Carli à Rome)

Intervenants : **Jean-Paul Keppenne** (conseiller juridique de l'équipe INST (institutions) du service juridique de la Commission européenne)
Denis Waelbroeck (associé chez Ashurst LLP à Bruxelles)
Jean-Claude Bonichot (Juge à la Cour de justice)

Débat avec les participants

12.45 – 14.10 ***Déjeuner***

14.10 – 14.30 ***Discours du président du Tribunal Marc Jaeger***

14.30 – 15.45 ***Sujet n° 3 : la protection judiciaire et les mesures conservatoires de la Cour***

Présidence : **Christopher Thomas** (associé chez Hogan Lovells à Bruxelles)

Intervenants: **Vittorio Di Bucci** (conseiller juridique principal de l'équipe AIDE (aides d'État et dumping) du service juridique de la Commission européenne)
Georg Berrisch (associé chez Baker Botts à Bruxelles)
Rosa Perna (juge au tribunal administratif régional du Latium (TAR LAZIO) à Rome)

Débat avec les participants

15.45 – 16.00 ***Pause-café***

16:00 - 17:15 ***Sujet n° 4 : évolutions procédurales à venir : l'optimisation des audiences publiques, des plaidoiries à huis clos, de l'accès en ligne aux pièces, de l'accès à distance aux enregistrements vidéo et audio, du nombre d'avocats plaideurs, des restrictions en termes de pages, des avis dissidents et d'autres problèmes de procédure***

Présidence : **Hugh Mercer QC** (*Essex Court Chambers* et président du comité du CCBE auprès des tribunaux communautaires)

Intervenants : **Lord Mance** (juge à la Cour suprême du Royaume-Uni)
Joachim Bornkamm (*Vorsitzender Richter am Bundesgerichtshof a.D.*)
Géraud de Bergues (chef du service juridique du ministère français des affaires étrangères)
Massimo Condinanzi (professeur titulaire de droit de l'UE à l'université de Milan)

Débat avec les participants

17:15 - 17:30 ***Conclusion : Aldo Bulgarelli/Hugh Mercer***

CCBE Keynote Address – Outline

KOEN LENAERTS*

Opening remarks

- Thank you to the President of the CCBE, Aldo Bulgarelli, for his kind welcome.

- The CCBE performs a vital function in bringing together stakeholders who have a professional interest in EU law and in the functioning of the EU Courts in particular.

- This conference raises four topical subjects of vital importance to the functioning of the EU Courts. Without wishing to preempt those four discussions in any way, may I just take this opportunity to make some brief comments on each of those issues.

Increasing Workload

- I imagine that many of you may be tired of hearing us say that the institution's workload is increasing and many of us at the Court are tired of repeating it but it remains true. That is particularly true at the General Court.

- The most recent quarterly statistics for January – March 2014 bear this out.

- The Court of Justice is facing a high but relatively stable workload. Indeed, the number of cases closed in the first quarter of 2014 was slightly higher (169 in total) compared to the same period in 2013 (158 in total) while the number of cases pending on 31 March 2014 (869) was slightly lower than on 31 March 2013 (895).

- At the General Court, by contrast, although some welcome improvement has taken place in the number of cases closed – 702 in 2013 as opposed to 527 in 2010, or 555 in 2009, the number of cases coming in is still rising and is significantly higher than the number closed. 790 cases were brought in 2013. Worse still, the number of cases brought in the first quarter of 2014 was 229. If maintained, that rate would give rise to a figure of roughly 900 new cases for 2014 as a whole.

- Since the beginning of this year the General Court has appointed 9 new Legal Secretaries (*référendaires*), one being attached to each chamber, but in its own that change is unlikely to be sufficient to resolve the workload problem in the longer term, or indeed even in the medium term. It is to be hoped that further efficiency gains may be possible as the EGC continues to improve and streamline its working methods.

- In terms of the EU Courts' structure I am not optimistic that any reform will be possible in the near future. The EU Treaties provide for two potential solutions but do *not* decide between

* Vice-President of the Court of Justice of the European Union and Professor of European Law, University of Leuven. All opinions expressed are strictly personal to the author.

them: new specialised courts or additional judges at the EGC. However, the problem that would be likely to arise in practice *whichever* of those solutions were adopted is that the Member States may not agree which of them should nominate new judges. Whilst it is true that a compromise was reached for the European Civil Service Tribunal one cannot assume that the Member States would necessarily agree to the same approach in respect of a new court dealing with economic cases.

- However the workload problem is resolved, the ECJ's main concern is to ensure that the coherence of the case law is maintained. For that reason, it is important that final decisions on points of law in all economic and institutional matters, including IP cases, should continue to be made by the ECJ rather than by any other court. That is true, in particular, of all decisions on a preliminary ruling or on an appeal in such cases.

- One final point regarding the appointment of judges: I would just like to emphasise that the work of the Article 255 panel is extremely important to the EU Courts. I have been privileged to work with many talented and highly competent judges both at the CFI, as it then was, and the ECJ, and I am conscious that it is vitally important that the quality of the EU judiciary is – and is also seen to be – maintained at that high level. The panel, presided by Jean-Marc Sauvé, plays an essential role in achieving that and the fact that five members of the panel are serving presidents or members of national supreme or constitutional courts of the Member States is especially important in guaranteeing the ECJ's legitimacy as the interlocutor of all Member State courts through the preliminary ruling procedure.

Limits on the Right to bring an action under Article 263(4)

- The ECJ took the view in the *UPA* case, back in 2002, that it was for the legislator, not the judiciary, to act to re-calibrate the balance of the admissibility rules for individuals wishing to bring actions before the EU Courts. As you all know that has been done, through the Lisbon Treaty, and the EU courts' task is now to interpret those modified rules.

- The first step has of course already been taken in the recent *Inuit* case where the ECJ, rejecting an appeal against a judgment of the EGC, has already provided some guidance regarding the concept of a regulatory act within the meaning of Article 263(4) TFEU. I won't say any more about that now to avoid stealing the thunder of those who are to speak later in the day.

- The ECJ took a further step in the even more recent *Telefonica* case where it was asked to interpret the words "and does not entail implementing measures". Again, it is not for me to go into more detail in the present context, but taken together these two cases are of vital importance for the work of the EGC and indeed the ECJ itself.

Judicial Protection/Interim Relief

- The third topic is one that touches very specifically on my work since as Vice-President I have been responsible for dealing with interim measures cases before the Court of Justice since the Court's decision to that effect, which entered into force in November 2012. As head of the European Court of Justice as an institution, the President has to deal with a significant workload not just in the judicial – but also in administrative – sphere. It is for that reason that certain tasks have been delegated to a Vice-President, one of those being the interim relief cases.

- In dealing with those cases in the past 18 months I have been acutely conscious that time is of the essence and that justice delayed really is justice denied in such cases. Of course, each case is different and the time taken will depend on its complexity, the possible need to hear the parties orally and the language in which the case is brought, but on average I have resolved the cases that have come before me in about 3 1/2 months and each of them has been dealt with in under 5 months. In addition, where a matter is especially urgent, the Court may grant interim relief *inaudita altera parte* and I have also been called upon to grant such relief in one case, in February this year; the application came in on the Monday and I signed the order granting the suspension sought on the Friday.

- In this connection I would just like to emphasise that where parties seek interim relief it is particularly important to bear in mind that they must put the Court in a position to determine – in concrete and practical terms – that the case is urgent, in the sense that the party seeking relief will suffer *serious and irreparable harm* if such relief is not granted. It is not sufficient to rely on vague allegations and assertions in that regard. The Court must be able to determine, with a sufficient degree of certainty, that such harm is liable to occur.

Future Procedural Developments

- The ECJ is always open to suggestions as to how we could improve our procedures. As you are all aware, we have just undertaken a significant reform of our Rules of Procedure. We hope and believe that this reform has improved those rules in a number of important respects.

- In particular, the Rules of Procedure have been restructured with a view to making them easier to read and understand. Those rules that are common to all cases that come before us are now set out separately at the beginning. The importance of preliminary rulings in our caseload is also better reflected in the new structure with an important section of the rules being devoted to those procedures.

- As regards the issue of hearings, which is to be discussed later on, I would just like to make the following point. Hearings before the EU Courts are a very important part of the procedure since they enable the bench to engage in a direct dialogue with the parties' representatives. In appropriate cases that dialogue is vital to achieving a proper understanding of the arguments that are being put before the relevant court. However, hearings do inevitably take up significant amounts of judicial time and, in the light of the institution's growing caseload, an appropriate

balance has to be struck in terms of the holding and organisation of hearings, in order to utilise the EU courts' limited resources as efficiently as possible.

Conférence organisée par le Conseil des barreaux européens

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L'avenir des tribunaux de l'Union européenne

***

L'augmentation de la charge de travail :

organisation, désignation et formation des juges

***

Lundi 28 avril 2014

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Intervention de Jean-Marc Sauvé

vice-président du Conseil d'Etat,

président du comité de l'article 255

du Traité sur le fonctionnement de l'Union européenne

Monsieur le président de la Cour européenne des droits de l'Homme,
Monsieur le président du Tribunal de l'Union européenne,
Monsieur le vice-président de la Cour de justice,
Mesdames et messieurs les juges et les avocats,
Mesdames, messieurs,

L'avenir des tribunaux de l'Union européenne intéresse au premier chef leurs juges, mais aussi les justiciables, les citoyens de l'Union et, comme cette conférence en témoigne, toute la communauté des juristes, qui doit jouer pleinement son rôle de réflexion et de proposition au service du renforcement de l'Etat de droit en Europe. Je tiens à remercier les organisateurs de ce colloque de m'avoir permis de contribuer à cette réflexion en ma qualité de président du Comité de l'article 255 du TFUE, mais aussi en tant que responsable d'une juridiction suprême nationale. Je concentrerai mon propos sur la situation du Tribunal de l'Union européenne mais, bien sûr, mes remarques peuvent avoir une portée plus générale.

Après avoir analysé la charge qui pèse sur lui (I), j'évoquerai des moyens qui paraissent susceptibles de remédier, en amont comme en aval, à certaines des difficultés rencontrées (II).

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* *

I. La situation du Tribunal de l'Union européenne, tendue depuis plusieurs années, est devenue « difficile »[1].

A. Confronté à un alourdissement structurel de sa charge de travail, le Tribunal ne dispose pas de capacités suffisantes pour y faire face à moyen terme.

1. Le nombre des affaires enregistrées chaque année a cru de manière spectaculaire : de 568 affaires enregistrées en 2009, à 636 en 2010 et à 722 en 2011. Si, en 2012, une décrue a été observée (avec 617 nouvelles affaires), il s'agissait bien d'une simple accalmie, car le nombre des affaires enregistrées a atteint en 2013 le nombre record de 790. Sur les seuls trois premiers mois de l'année 2014, le Tribunal a reçu 229 nouvelles affaires. Il est ainsi confronté à une hausse tendancielle de plus de 10% par an.

2. Face à cette hausse, les capacités de jugement du Tribunal ont augmenté grâce aux réformes menées et aux efforts réalisés pour améliorer sa productivité. Mais elles n'ont pas suffi à répondre à la croissance des affaires nouvelles. Si le nombre des affaires jugées a fortement augmenté, de 555 en 2009 à 714 en 2011, un palier paraît en effet avoir été atteint : en 2012, ce nombre est revenu à 688, avant de remonter à 702 en 2013. Surtout, cette évolution n'a pas encore permis de stabiliser le stock des affaires pendantes, car le nombre des affaires jugées reste chaque année inférieur à celui des nouvelles affaires.

3. La conjonction de ces deux facteurs – progression rapide du contentieux et insuffisance des capacités de jugement - explique, presque mécaniquement, deux phénomènes inquiétants. D'une part, s'est produite une progression constante du nombre des affaires pendantes : elles s'élevaient en 2009 à 1 191, elles ont désormais dépassé la barre des 1300 affaires en 2013 (1325 affaires pendantes)[2]. D'autre part, les délais de procédure sont devenus préoccupants : en 2013, 48 et 46 mois sont en moyenne nécessaires pour que soient jugées les affaires d'aide d'Etat et de concurrence, ces délais étant déjà en 2009, respectivement, de 50 et 46 mois, ce qui montre que les marges de progression ont été réelles, mais sont difficiles à conquérir.

B. Cette dégradation de la situation du Tribunal intervient dans un contexte marqué par de nouvelles contraintes.

1. La première tient à l'affirmation du droit à ce que sa cause soit entendue dans un délai raisonnable, principe général du droit de l'Union[3] désormais consacré au deuxième alinéa de l'article 47[4] de la Charte des droits fondamentaux. Selon les critères définis par la

[1] Selon les termes de l'exposé des motifs introductif du projet de règlement de procédure du Tribunal, en date du 14 mars 2014, p. 6

[2] Les principaux bassins de rétention sont constitués par les contentieux de la propriété intellectuelle (465 affaires pendantes au 31 décembre 2013), de la concurrence (148 affaires pendantes au 31 décembre 2013) et des aides d'Etat (146 affaires pendantes au 31 décembre 2013).

[3] CJCE 17 décembre 1998, Baustahlgewebe/Commission, C-185/95, point 21 : « Le principe général de droit communautaire selon lequel toute personne a droit à un procès équitable, qui s'inspire de ces droits fondamentaux (voir, notamment, avis 2/94, du 28 mars 1996, Rec. p. I-1759, point 33, et arrêt du 29 mai 1997, Kremzow, C-299/95, Rec. p. I-2629, point 14), et notamment le droit à un procès dans un délai raisonnable, est applicable dans le cadre d'un recours juridictionnel contre une décision de la Commission infligeant à une entreprise des amendes pour violation du droit de la concurrence » ; CJUE 16 juillet 2009, Der Grüne Punkt – Duales System Deutschland GmbH, C-385/07 P, point 178

[4] « (…) Toute personne a droit à ce que sa cause soit entendue équitablement, publiquement et dans un délai raisonnable par un tribunal indépendant et impartial, établi préalablement par la loi. (…) »

Cour de justice[5], en l'absence d'incident majeur de procédure provoqué par les parties et lorsque le litige ne présente pas de difficultés particulièrement élevées, alors même que ses enjeux économiques peuvent être importants, il a été jugé qu'une procédure devant le Tribunal de l'Union européenne ayant duré 5 ans et 10 mois[6] ou 5 ans et 9 mois[7] méconnaissait les exigences de l'article 47 de la Charte[8].

2. La seconde contrainte résulte de l'impossibilité de résorber à court terme le stock des affaires pendantes par une augmentation significative du nombre de juges. Comme vous le savez, le projet de nommer des juges supplémentaires au Tribunal n'a pas fait, en mars de cette année, l'objet d'un consensus parmi les Etats membres, en dépit des propositions de compromis proposées par la présidence. Si chacun s'accorde sur le caractère insoutenable à moyen terme des stocks et des délais de jugement, ainsi que sur la nécessité d'une réforme d'envergure, les divergences d'appréciation sur les conditions de nomination des juges n'ont pu être résolues.

*

II. Pour redresser la situation du Tribunal de l'Union européenne, doivent être actionnés l'ensemble des leviers susceptibles d'améliorer, en amont comme en aval, sa productivité contentieuse.

La situation actuelle met en effet davantage[9] en exergue la priorité à donner aux mesures tendant à améliorer la productivité du Tribunal, avant toute réforme structurelle. A cet égard, j'insisterai sur certains facteurs pouvant déterminer en amont une telle amélioration (A), avant d'ébaucher ceux qui pourraient, en aval, en compléter l'efficacité (B).

A. En amont, il faut souligner l'importance cruciale que revêt l'appréciation rigoureuse de « l'adéquation des candidats à l'exercice des fonctions de juge ou d'avocat général (…) du Tribunal »[10]. Cette appréciation doit en effet contribuer à garantir un fonctionnement optimal de la juridiction. Le comité de l'article 255 TFUE sert cet objectif par une mise en œuvre objective et exigeante des critères du traité (1), que la situation présente du Tribunal n'incite pas à atténuer (2).

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[5] Le délai effectif est apprécié en fonction des circonstances propres à chaque affaire, notamment, selon la complexité du litige et/ou le comportement des parties : CJUE 27 janvier 2007, Sumitomo Metal Industries et Nippon Steel/Commission, C-403/04 P et C-405/04, point 116 ; CJUE 15 octobre 2002, Limburgse Vinyl Maatschappij e.a./Commission, C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P à C-252/99 P et C-254/99 P

[6] CJUE 16 juillet 2009, Der Grüne Punkt – Duales System Deutschland GmbH, C-385/07 P, point 183

[7] CJUE 26 novembre 2013, Gascogne Sack Deutschland GmbH, C-40/12 P, points 97 à 102

[8] Si une telle irrégularité ne saurait conduire à l'annulation de la décision prise au terme de cette procédure, « en l'absence de tout indice selon lequel la durée excessive aurait en une incidence sur la solution du litige »[8], elle peut donner lieu en revanche à une demande indemnitaire qui devra être présentée devant le Tribunal.

[9] « Before pumping pumping more resources in a system, it is useful to analyze in depth where the existing problems come from. If a plane flies low because there are numerous leaks in the motor, one can always push much more kerosene in the motor but this is rarely seen as the optimal way to improve performance. Plugging first the leaks is widely seen as more economical. Furthermore, it is always dangerous to make immediate structural reforms with a long term impact under the pressure of urgency. Finally, in the case of a sudden rise of judicial activity in the next years (which is the working hypothesis of the debated proposals), the neglect of the productivity measures could lead to an explosion of costs." Franklin Dehousse, *The reform of the EU Courts, the Need of a Management Approach*, Egmont Paper 53, december 2011, p. 4

[10] Art. 255 TFUE

1. Les critères[11] d'évaluation des candidatures, qui sont énoncés aux articles 253, 254 et 255 du TFUE et explicités par le comité 255[12], visent à garantir que les juges désignés seront, dans un délai raisonnable, pleinement aptes à l'exercice des fonctions juridictionnelles auxquelles ils sont candidats. Le comité s'est efforcé, depuis son installation en mars 2010, de mettre en œuvre les critères d'appréciation fixés par le Traité en prenant appui sur une vision objective et exigeante de ce que doivent être les capacités juridiques, l'expérience professionnelle et l'aptitude à exercer le métier de juge, qui sont bien sûr requises pour l'exercice de « hautes fonctions juridictionnelles »[13].

a) Le comité attend en effet des candidats, non seulement qu'ils fassent la preuve, en tant que généralistes de haut niveau, de leur maîtrise des éléments fondamentaux du droit de l'Union européenne et de son articulation avec les droits nationaux, mais surtout de leur capacité à argumenter en droit, à résoudre des difficultés d'interprétation et à prendre des décisions claires et motivées sur une base juridique. A cet égard, le comité réfléchit à une normalisation du dossier de candidature afin de disposer de tous les éléments d'information nécessaires, et de ceux-là seulement. En outre, dans le cas d'une première candidature, une audition a lieu et le comité a fixé sa durée à une heure, de telle sorte qu'il puisse véritablement apprécier si le candidat remplit l'ensemble des conditions requises pour être nommé juge.

b) Le candidat doit aussi manifester qu'il a bien conscience des exigences contraignantes du métier de juge, et qu'il les assume, non seulement celles relatives à l'indépendance et à l'impartialité, mais aussi celles inhérentes à la charge de travail. Le comité est particulièrement attentif à évaluer un candidat au regard de sa capacité à apporter une contribution pertinente et efficace au traitement des contentieux relevant du Tribunal, et cela dans un délai raisonnable : si un délai d'adaptation peut être nécessaire, celui-ci doit rester, compte tenu de la durée du mandat des juges -6ans-, de l'ordre de quelques mois et, en tout cas, ne peut manifestement excéder un délai d'un et, *a fortiori*, deux ans.

Il est ainsi clair que le comité conçoit l'évaluation des candidatures à laquelle il procède, au regard de l'ampleur et de la difficulté de la tâche concrète qui attend les candidats.

2. Dans les années à venir, il n'est pas raisonnablement envisageable que le mode d'évaluation des candidatures par le comité s'émousse. Sa composition, l'autorité qu'il a acquise, comme la charge de travail pesant sur les juridictions de l'Union, permettent de penser qu'il fera plutôt preuve d'une vigilance accrue et qu'il procédera à un examen très approfondi des candidatures.

a) Comme le soulignent ses rapports d'activité, lorsque le comité a la conviction qu'un candidat n'est pas en mesure d'assurer efficacement les fonctions de juge, il émet un avis négatif. Sur les 32 avis délivrés depuis 2010 pour une première nomination à la Cour ou au Tribunal, 7 ont été défavorables, soit 22% du total. Sans être excessive, cette part n'est pas négligeable : elle reflète le travail rigoureux et objectif du comité. Le comité est en effet

[11] Outre les garanties d'indépendance et d'impartialité que présentent le candidat, sont en effet examinées ses capacités juridiques et son expérience professionnelle, son aptitude à exercer des fonctions de juge et, enfin, ses connaissances linguistiques et sa capacité à travailler en équipe dans un environnement international marqué par différentes traditions juridiques.

[12] 3ième rapport d'activité en date du 13 décembre 2013, rapport disponible sur le site internet de la Cour de justice : http://curia.europa.eu/jcms/jcms/P_64268/

[13] Selon les termes de l'art. 254 TFUE

pleinement conscient qu'une appréciation erronée des capacités d'un candidat conduirait, en cas de nomination, à un travail juridictionnel moins efficace et, par suite, nuirait au bon fonctionnement du Tribunal. Alors que débute son deuxième mandat, il m'apparaît que le comité entendra continuer à assumer pleinement ses responsabilités, en faisant montre de la plus grande attention dans l'examen des candidatures.

b) En complément de son office, pourraient sans doute être envisagées certaines réformes structurelles pour juguler, selon les termes du président Jaeger, « l'acuité du phénomène d'instabilité que subit la composition du tribunal »[14] : en 2013, près d'un quart de l'effectif du Tribunal a en effet été renouvelé. Pour parer à cette instabilité, l'allongement du mandat des juges, par exemple de 6 à 9 ans, pourrait être envisagé, même si une telle mesure nécessite une révision du TFUE[15]. Il pourrait, à tout le moins, être envisagé que les juges cessant leurs fonctions puissent achever, sous certaines conditions de délai, le traitement des dossiers qui leur ont été confiés, à l'instar de ce qui se passe dans plusieurs juridictions internationales. Par ailleurs, le projet d'augmenter le nombre des juges du Tribunal ne devrait pas être abandonné. Dans cette perspective, les juges additionnels devraient être sélectionnés à titre principal sur la base du mérite, c'est-à-dire sur leur aptitude à exercer efficacement et rapidement les fonctions dévolues au Tribunal. [A défaut d'augmenter le nombre des juges, pourrait être envisagée la création de juridictions spécialisées, comme cela a été le cas avec la création[16] en 2004 du Tribunal de la fonction publique].

B. Les efforts, entrepris en amont, de sélection de juges pleinement aptes à l'exercice de leurs fonctions devraient être complétés par une réforme des méthodes de travail. De nombreuses mesures ont certes déjà été adoptées, comme le rappelle[17] l'exposé des motifs du projet de nouveau règlement. Mon expérience de chef d'une juridiction suprême nationale me conduit à souligner l'importance de certains instruments.

1. La promotion d'un véritable « case management », qui tend à se généraliser, même dans les juridictions suprêmes, implique de développer la différenciation du travail juridictionnel selon la nature et l'importance des affaires. Certaines peuvent en effet être traitées par un juge unique plutôt que par une formation collégiale. En outre, dès l'enregistrement des requêtes, des procédés de filtrage peuvent permettre de rejeter rapidement et avec un formalisme allégé beaucoup de requêtes irrecevables ou manifestement dépourvues de substance.

2. Par ailleurs, plus la conduite de l'instruction est dynamique, plus les délais de jugement peuvent être maîtrisés : à cet égard, les délais de production ou d'intervention en cours d'instance peuvent être mieux encadrés et le nombre des mémoires par partie limité, tout en laissant une durée suffisante pour un débat pleinement contradictoire. A ce titre, doivent aussi être exploités, grâce à des échanges dématérialisés, les apports des technologies de l'information.

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[14] Rapport d'activité de la Cour de justice, édition 2013, p. 113

[15] Art. 254 TFUE : « Les membres du Tribunal sont choisis parmi les personnes offrant toutes les garanties d'indépendance et possédant la capacité requise pour l'exercice de hautes fonctions juridictionnelles. Ils sont nommés d'un commun accord pour six ans par les gouvernements des États membres, après consultation du comité prévu par l'article 255. Un renouvellement partiel a lieu tous les trois ans. Les membres sortants peuvent être nommés à nouveau. »

[16] Décision 2004/752/CE, Euratom instituant le Tribunal de la fonction publique de l'Union européenne (JO L333, p.7)

[17] Projet de nouveau règlement, p. 5

3. Enfin, une gestion active des affaires pendantes passe par un enrôlement sélectif des affaires selon leur ancienneté ou leur degré d'urgence, mais également par des mouvements de réaffectation de dossiers entre chambres, voire entre rapporteurs, en fonction de l'état de leur stock ou des remaniements ayant affecté leur composition. Même en l'absence de spécialisation des chambres, de tels transferts peuvent servir à mieux équilibrer la charge de travail entre elles.

*

* *

Alors qu'est examiné le projet d'un nouveau règlement de procédure et que doit se poursuivre la recherche d'un consensus politique sur des réformes de structure, je suis certain que nos échanges d'aujourd'hui contribueront à l'enrichissement des débats sur les moyens d'améliorer à court et moyen terme le fonctionnement des juridictions de l'Union.

CCBE Speech 28 April 2014

Judge Nicholas Forwood

OUTLINE

1) Description of CJEU workload, evolution to date and likely future trends

- General trends 2004-2013 :
- Differences between Court of Justice and General Court
- 1Q 2014

2) Detailed analysis of reasons for growth of General Court case load
- Competition / State aids
- Trade marks and other IP
- Other direct actions : EU funds, transparency, commercial policy, sanctions/restrictive measures, new and future agencies (EChA, Financial services)

3) Options (more or less desirable) for managing GCt's current case load
- More judges (2011 CJ proposal – repeat of 1999 proposal)
- Specialized court for IP (trade marks)
- Other specialized courts (redefine competence of EUST)
- Specialised chambers within GCt
- Additional référendaires
- Single judges
- Amendments to Rules of Procedure

4) Broader restructuring of CJEU competences
- Trends of preliminary rulings and other direct action CJ competences
- Transfer of infringement actions
- Perceived problems of further transfers and possible solutions
  a. The 2 "cour de cassation" problem
  b. Revision of the "exceptional review" procedure
  c. Treaty modification to allow – provisionally - direct appeals from specialized courts to CJ?

5) Appointment of judges
- Treaty requirements and limitations for CJ / GCt; importance of link to MS
- Need for stability – particularly for GCt
- Increased flexibility possible for specialized courts
- Selection on merit – pros and cons

CONCLUSION – The way(s) forward?

CONFERENCE "EU COURTS – LOOKING FORWARD"
28 April 2014

Judicial Training – Introductory Comments
Hazel Genn

Outline[1]

Why is judicial training important?

- It is widely recognized that judicial training is an essential element of an efficient system of justice.
- The independence and efficiency of judicial systems is considered a key factor in ensuring human rights and the rule of law
- Training improves the professional competence of judges and is of growing importance as judiciary are increasingly involved in adjudicating on complex and sensitive social issues.
- Changes in judicial recruitment, increasing caseloads, and more complex laws and legal issues have increased the demand and need for judicial continuing education and training in both common law and civil law jurisdictions. There is now greater comparability between the two systems in terms of judicial training and educational needs.
- The European legal world presents unique needs for training with a cross-national dimension.
- European integration places special demands on judges to develop skills in new legal areas, to communicate and work cooperatively with judicial counterparts in other European countries.

What are the tangible benefits of judicial training?

- Judicial training delivers tangible benefits to **individual judges, court systems** and the **public,** including:
    - Better controlled and efficient case management
    - Confident and fair court management
    - Better quality decision writing
    - Greater consistency in decisions
- Judicial training also helps judiciary better to meet the changing and diverse demands on the role such as:
    - media and public relations
    - understanding of the wider social context to litigation
    - personal welfare issues for judges themselves.

Judicial training provides the information and tools judges need to do their jobs effectively. Beyond providing information in substantive law, judicial training and education equips the judiciary with essential judicial skills. Judicial training is also important in developing collegiality among the

[1] This draws on: Hazel Genn, *Learning Needs Analysis of the Circuit and District Bench Judiciary*, Final Report, June 2006 (Judicial Studies Board); *Framework of Judicial Abilities & Qualities*, 2008 (Judicial Studies Board) http://www.judiciary.gov.uk/Resources/JCO/Documents/Training/framework_AandQ_081008.pdf; Hazel Genn *Judicial Learning Needs Analysis For The Judicial Studies Committee For Scotland*, August 2008; Cheryl Thomas, *Review of Judicial Training and Education in Other Jurisdictions,*2006 (Judicial Studies Board) http://www.ucl.ac.uk/laws/judicial-institute/docs/Judicial_Training_Report.pdf

judiciary, promoting a judicial culture of service to the community and, occasionally, inspiring attitudinal change.

Should judicial training be mandatory?

Although attendance at induction and continuing development programmes in many jurisdictions is not mandatory, there is a strong **expectation** that the judiciary will undergo induction and continuation training. The modern judiciary recruited from practice are used to continuing professional development and expect to receive training on appointment and throughout their judicial career in order to develop and hone their judicial skills. Many jurisdictions have established annual training 'entitlements' specifying the number of days each year that judges can expect to attend training courses. Many jurisdictions have now established **blended learning programmes** so that the judiciary can take greater responsibility for their own professional development.

Content of judicial training and delivery methods

Judicial education programmes are designed to improve judicial performance by preparing new judges for performing their duties, guaranteeing greater consistency in judicial decisions, updating judges in new methods, laws and other knowledge.

Regardless of jurisdiction, the scope of training programmes generally covers:

- Substantive law
- Judicial skills (court and case management, media, technology, languages)
- Decision making and writing
- Social context
- Judicial ethics

The range of options used in different jurisdictions for delivering judicial training programmes is wide and can include:

- centralised, face-to-face programmes
- decentralised, court-based programmes
- IT and web-based distance learning modules
- streamed programmes for individual judicial ranks
- integrated programmes for judges and court personnel
- bespoke programmes for individual courts

COUNCIL OF BARS AND LAW SOCIETIES OF EUROPE CONFERENCE "EU COURTS — LOOKING FORWARD"

The United States Federal Judiciary: Nomination and Appointment

VORYS

Pamela A. Bresnahan, Esq.
Vorys, Sater, Seymour and Pease LLP
1909 K Street NW, Suite 900
Washington DC 20006
+1 (202) 467-8861
pabresnahan@vorys.com

JUDICIAL POWER OF THE UNITED STATES:

The U.S. Supreme Court, the federal courts of appeal, the federal district courts, and the U.S. Court of International Trade are established by Article III of the Constitution. Justices and judges on these courts are known as Article III judges.

- Article III § 1 of the U.S. Constitution

  The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

Under the Constitution, U.S. Supreme Court justices and judges on the federal courts of appeal and federal district courts are nominated by the President with the advice and consent of the Senate.

NOMINATIONS AND APPOINTMENT:

Recommendations:

Recommendations regarding potential nominations often are made by senators and sometimes members of the House of Representatives, usually from the President's political party.

Nominations:

Presidential nominations sent to the Senate for consideration must first be reported by the Senate Judiciary Committee. Nominees for federal judicial appointments are required to complete a Committee questionnaire in which nominees are asked to list previous professional experience. An evaluation from the American Bar Association also is needed before the Judiciary Committee will schedule a hearing to consider the nomination. Nominations also are scrutinized by the U.S. Department of Justice, as well as outside interest groups.

While there are no formal requirements to be an Article III judge, members of Congress who recommend potential nominees, and the Department of Justice, have developed informal criteria for nominees.

Appointment:

After a Judiciary Committee hearing during which nominees answer questions from Committee members, nominations are listed for consideration by the Committee. The full Senate considers the nomination if the Committee orders the nomination to be reported to the full Senate.

Nominees are appointed by simple majority of the full Senate. In recent times, the minority party often has filibustered (a delay rule preventing a full vote) nominees preventing a

full Senate vote on their nominations. A three-fifths vote (in the full Senate = 60 votes) is necessary to end a filibuster and put the proposal to a full vote. Consequently, when a nominee is filibustered, in effect, the nominee must carry a super-majority of votes in order to get appointed. With the increased use of the filibuster with regard to lower-court nominees, in November 2013, the Senate amended its parliamentary rules to prohibit filibusters on (executive branch nominees and) judicial nominees, other than those nominated to the Supreme Court.

Since November 2013, opponents of federal court nominees, who are now unable to filibuster them, have used a tactic known as the "blue slip." Traditionally, as a courtesy and not as a formal Senate rule, each (of the two) senators from the home state of a nominee is given a "blue slip" (so-called because the paper that was originally used was blue) asking for their opinion and any information regarding the nominee. At various times throughout the 1900s and 2000s, stated objections by a home-state senator or the failure by one of the home-state senators to return the blue slip had varying significance depending on the Committee Chair—from stopping or preventing all Judiciary Committee action on the nominee to not necessarily preventing Judiciary Committee action on the nominee. The current Chairman of the Judiciary Committee has so far allowed home-state senators to stop or prevent Judiciary Committee action on a nominee with or without stated objections by declining to return blue slips.[1]

MAKE-UP OF FEDERAL COURTS:

Organization:

The Judiciary Act of 1789 organized the Supreme Court and provided for the appointment of a Chief Justice and five Associate Justices. Between 1801 and 1869, the size of the Supreme Court fluctuated (by various acts of Congress) between 5 Justices and 10 Justices. In 1869, Congress increased the size of the Court from 7 to 9 Justices—one for each of the then-circuits—and the number has since remained unchanged. Congress currently authorizes 179 court of appeals judgeships and 677 district court judgeships. There are thirteen federal judicial circuits. The smallest court is the First Circuit with six judgeships, and the largest court is the Ninth Circuit with 29 judgeships.

Selection of Chief Justice/Judges:

Article III judges become "chief judge" of their respective courts based only on seniority. The lone exception is the Chief Justice of the United States, who is nominated by the President and confirmed by the Senate.

The United States Court of Appeals for the Federal Circuit:

In 1982, in order to cut down on the backlog of cases for the federal circuit courts of appeal, Congress created the only federal circuit court defined by jurisdiction rather than geographic area—the United States Court of Appeals for the Federal Circuit, which is based in Washington

[1] *See* Congressional Research Service, *Report RL 32013 – The History of the Blue Slip in the Senate Committee on the Judiciary, 1917-Present*, Updated Oct. 22, 2003; The Editorial Board, *The Senate's Discourtesy to Judges*, N.Y. Times, Mar. 30, 2014, http://www.nytimes.com/2014/03/31/opinion/the-senates-discourtesy-to-judges.html.

DC. The Federal Circuit has jurisdiction over all appeals related to patents, international trade, government contracts, trademarks, certain money claims against the United States government, federal personnel, veterans' benefits, and public safety officers' benefit claims. Judges on the Federal Circuit are Article III judges. Like other Article III judges, there are no formal requirements for being on the Federal Circuit. However, nominees should have a strong background in intellectual property law.

AMERICAN BAR ASSOCIATION STANDING COMMITTEE EVALUATIONS:[2]

Background:

In 1948, a committee of the American Bar Association ("ABA") began to evaluate federal judicial nominees and to submit those evaluations to the Senate. In 1953, President Dwight Eisenhower, requested that the ABA committee conduct evaluations of federal judicial nominees to assist him in appointing qualified nominees.

Today, the American Bar Association Standing Committee on the Federal Judiciary evaluates the professional qualifications of nominees to the Supreme Court and to the federal district and appellate courts by conducting extensive peer reviews of each nominee's integrity, professional competence and judicial temperament. In conducting its evaluation, the Standing Committee focuses solely on a nominee's professional qualifications. It does not take into consideration a nominee's philosophy, political affiliation, or ideology. The Standing Committee's investigations of Supreme Court nominees are particularly rigorous.

Current Composition of the Standing Committee:

The Standing Committee consists of fifteen members, two members from the Ninth Circuit, one member from each of the other federal circuits, and the Chair of the Standing Committee. The ABA President appoints members for staggered three-year terms, and no member may serve more than two terms. Appointment to the Standing Committee is based on a lawyer's possession of the highest professional stature and integrity, and members have varied professional experience and backgrounds.

Ratings:

The Standing Committee rates nominees and prospective nominees as "Well Qualified," "Qualified," and "Not Qualified." After a rigorous examination, each nominee or prospective nominee is assigned a rating that is submitted to the President, and is made public when a prospective nominee is nominated for a federal judgeship.

- Well Qualified: A nominee must be a preeminent member of the legal profession, have outstanding legal ability and exceptional breadth of experience, and meet the very highest standards of integrity, professional competence, and judicial temperament.

[2] American Bar Association Standing Committee on the Federal Judiciary, What it is and How it works, http://www.americanbar.org/groups/committees/federal_judiciary.html.

- Qualified: A nominee satisfies the Standing Committee's high standards with respect to integrity, professional competence, and judicial temperament, and the Standing Committee believes the nominee is qualified to perform satisfactorily all of the duties and responsibilities required of the distinguished office of a Supreme Court Justice.

- Not Qualified: A nominee does not meet the standards with respect to one or more of its evaluation criteria—integrity, professional competence, or judicial temperament.

Federal Courts of Appeal and Federal District Court Nominees:

Evaluation:

- After a judicial vacancy occurs and prior to any nomination to fill the vacancy, the Standing Committee Chair receives from the President or the Department of Justice the name of a prospective judicial nominee for evaluation

- The primary evaluation is conducted by a single circuit member, usually a member of the Standing Committee from the judicial circuit in which the vacancy exists.

- The evaluator reviews a questionnaire prepared by the Department of Justice and completed by the prospective nominee. The evaluator also conducts research on the nominee, examines the nominee's writings, and conducts interviews of others to ascertain the prospective nominee's integrity, judicial temperament, and professional competence.

- The evaluator conducts a personal interview of the prospective nominee.

- The evaluator prepares and submits a report to the Chair of the Standing Committee, who, after consulting with the evaluator, informs the President of the evaluation's likely outcome. If the President subsequently requests a rating by the ABA, the evaluator prepares a final report, and submits the final report, along with the Department of Justice questionnaire and any other pertinent materials to each Standing Committee member. Each member then votes on the appropriate rating for the prospective nominee, and the resulting rating is conveyed to the President.

- If the prospective nominee is nominated, the ABA rating is made public.

Supreme Court Nominees:

Evaluation:

- Evaluations of Supreme Court nominees are conducted after the President has made a nomination or has announced an intention to nominate a particular lawyer or judge.

- All members of the Standing Committee conduct confidential interviews of persons most likely to have information regarding the professional qualifications of the nominee. In excess of one hundred Hundreds of such interviews are usually conducted. Generally, the member of the Standing Committee from the circuit the nominee resides in, practices law in, or sits on the bench in conducts the investigation.

- A team or teams of distinguished law school professors examines the nominee's legal writings for quality, clarity, knowledge of the law and analytical ability. Customarily, this is accomplished by dividing the material into areas of law on which the nominee has written and having it reviewed by professors who are recognized experts in each area. Each team provides the Standing Committee with its comments.

- A national team of leading practicing lawyers with Supreme Court experience—typically former Supreme Court clerks, past members of the Solicitor General's office and other lawyers with experience arguing before the Supreme Court—also examines the legal writings of the nominee and provides the Standing Committee with its comments.

The results of these analyses are reported to the Standing Committee. The Committee then rates the nominee.

Ratings of the current Supreme Court Justices:

• Chief Justice John Roberts:	Well Qualified	(unanimous)
• Justice Antonin Scalia	Well Qualified	(unanimous)
• Justice Anthony Kennedy	Well Qualified	(unanimous)
• Justice Clarence Thomas	Qualified	(divided vote)
• Justice Ruth Bader Ginsburg:	Well Qualified	(unanimous)
• Justice Stephen Breyer	Well Qualified	(unanimous)
• Justice Samuel Alito	Well Qualified	(unanimous, one recusal)
• Justice Sonia Sotomayor	Well Qualified	(unanimous)
• Justice Elena Kagan	Well Qualified	(unanimous, one abstention)

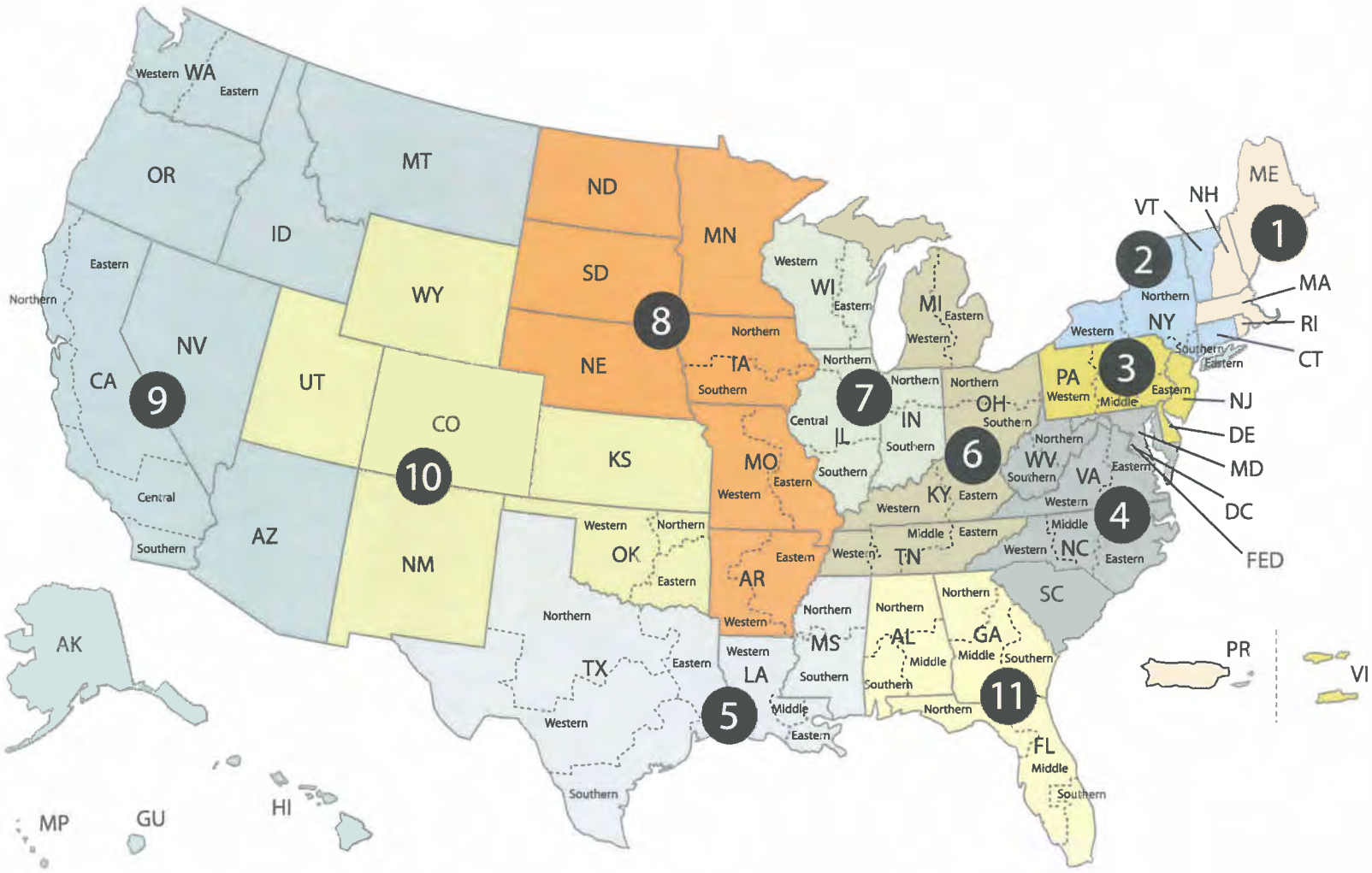
APPENDIX

1. Geographic Boundaries of the United States Courts of Appeal and the United States District Courts[3]

[3] www.uscourts.gov/uscourts/images/CircuitMap.pdf

Geographic Boundaries

of United States Courts of Appeals and United States District Courts



CCBE CONFERENCE

EU COURTS - LOOKING FORWARD

BRUXELLES, 28 APRIL 2014

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LIMITS ON THE RIGHT TO BRING AN ACTION UNDER ARTICLE 263(4) TFUE – STRIKING THE RIGHT BALANCE

Roberto Mastroianni

1) INTRODUCTION

- The debate on private applicant's *locus standi* before the EU Courts to challenge acts adopted by European Institutions has accompanied for decades all those who study, teach or practice EU Law. I remember a cartoon published on The Times newspaper about 20 years ago, and reproduced in a famous handbook on EU Procedural Law, where two upset *gendarmes* at the entrance of the Court reproached an astonished attorney for a potential plaintiff asking brutally: "HOW DID YOU GET IN?"
- Apparently, notwithstanding the reforms brought about by the Lisbon Treaty, and in part as a consequence of a questionable clarity, to say the least, of the new text of Article 263, para. 4, TFEU the debate is still very lively. This fully justifies the decision taken by the CCBE to dedicate a session of this Conference to the specific topic of the limits for non-privileged applicants to bring an action under the above mentioned provision.
- It is not my intention to cover the whole subject in the limited time at my disposal. My colleagues in this panel will deal with some key questions much more in detail. Given the special audience I have to pleasure and honor to address, I can give for granted that many if not all of you are aware of the fact that the Lisbon Treaty reformulated the basic Treaty provision. It did so by "relaxing" (this is the word used by the Court itself[1] , although it is still not clear to what extent) the conditions of admissibility of actions for annulment brought by legal or natural persons against acts of the European Union, so trying to give a reply to the long debate on the insufficient protection provided by the previous text which involved the General Court, the Court of Justice and its advocate general and the Member States with the signature of the Constitutional Treaty and finally the adoption of the new text of Article 263.
  - In brief, according to the new text of para. 4 of the Article just mentioned, a "non-privileged" applicant may bring an action seeking for the annulment of an EU act in three different situations:

    A) When the applicant is the addressee of the act, which is obviously not an act of general application, he or she can undoubtedly challenge it before the European Courts;

    B) When in turn, the act is not addressed to the applicant, two situations may arise:

    - action can be brought against an act which is of direct and individual concern to the

[1] *Stichting Woonpunt*, C-132/12 P, 27 February 2014, para 43.

applicant. This covers both individual acts and acts of general application; legislative or non-legislative (or regulatory) acts; according to the Court, this is exactly the same situation previously covered by art. 230 TEC;

- finally (and this is notoriously the most controversial innovation of the Lisbon Treaty), access to Court is allowed when the application concerns a "regulatory act" which is of direct concern to the applicant and does not entail implementing measures.

- The Lisbon Treaty revision was intended to remove the main obstacles that, according to many and also in the opinion of the ECJ, obstructed natural or legal persons' access to an effective judicial protection against illegal acts of the EU: satisfying the condition that the contested act, if formally not addressed to that person, was in fact a disguised decision since it concerned him or her "individually", and in the negative case, if the act does not require implementing measure, avoiding a legal or natural person being obliged to violate the law in order to have access to a national court entitled to raise a question of validity before the ECJ. Unfortunately, the text of the new provision is not an example of clarity. Two problems came immediately to the attention of commentators and to the Court itself: first, the notion of "regulatory acts", a category which derives from the Constitutional Treaty but is unknown to the Treaties in force (an error in the text?); second, the meaning of the expression "acts which do not entail implementing measures".
- In the last months the European Courts have adopted what they consider to be the correct interpretation of the new rules, in particular the scope of the new third limb of paragraph 4. First, they pointed out that according to the principle "tempus regit actum" the new rules apply for all applications lodged after the entry into force of the LT (December 1st, 2009), irrespective of the date of adoption of the contested act[2]. For applications lodged before that date, the applicable rules on admissibility are those in force at the time of application, irrespective of the moment when the Court rules on its admissibility[3].
- On the scope of application of the new rules, in *Inuit* the ECJ upheld the conclusion of the GC that a "regulatory act" is an act of general application adopted according to a procedure different from the legislative one (ordinary or special). In other recent judgments (*Telefonica*[4], *Stichting Woonpunt, BSI*[5]) the two Courts gave a broad interpretation of "implementing measures", including any measure which at the European or national level give effect or even only bring onto operation a regulatory act, but apparently the matter is not definitively decided since other pending cases (*T&L Sugars*[6], *Forgital*[7], for example) might require additional clarifications. But this point will be analyzed much more in detail by the other speakers.

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[2] GC *Norilsk Nickel*, T-532/08, paragraph 70.

[3] GC 14 February 2012, AJD Tuna, T-329/08, para 26 ff.
[4] 19 December 2013, case C-274/12 P.
[5] 5 February 2013, case T-551/11.
[6] C-456/13 P.
[7] C-84/14 P.

2) A CASE STUDY: THE (SAD) STORY OF BLUEFIN TUNA FISH

- In order to give a small contribution to the debate on the practical impact of the new rules on admissibility of private actions, I have decided to make reference to a real case that I had the opportunity to argue before the two Courts, concerning the "Bluefin tuna" saga.
- The story begins with the adoption of Commission Regulation (EC) No 530/2008[8], of June 12, 2008, establishing emergency measures to restrict fishing before the expiry of the programmed period. It prohibited bluefin tuna fishing from 16 June 2008 for the purse seiners flying the flag of all Mediterranean member States with the exception of Spain, whose vessels were allowed to fish until the 23rd of June. The Regulation considered that fishing opportunities for bluefin tuna had to be deemed as exhausted by the above mentioned dates, whereas overfishing would pose a serious threat to the conservation of the bluefin tuna stock.
- In order to reinforce the effectiveness of these measures designed to forestall a serious threat to the conservation of the bluefin tuna stock, the Regulation also obliged Community operators not to accept, according to the same temporal limitations, landings, placing in cages for fattening or farming and transhipments of bluefin tuna caught by purse seiners in the Atlantic Ocean, east of longitude 45°W, and the Mediterranean.[9]
- Many operators of different Mediterranean countries challenged the Regulation. Among them, AJD Tuna, a company established in Malta, whose main activity is the farming and fattening of bluefin tuna caught alive in the Mediterranean Sea with a view to reselling them to traders. The applicant's name is included in a list of authorized operators issued by Member States and notified to the Commission and ICCAT. Therefore, considering to be part of a "closed circle" for the purpose of admissibility of the claim, it brought an action before the GC on 12 August 2008, contesting the validity of the Regulation on different grounds, including insufficient motivation, violation of general principles such as legitimate expectations as well as fundamental rights protected by the EU. Since its activity concerned the farming of tuna caught by non-Spanish seiners, it also argued that no objective reasons justified a different date for the application of the ban according to the nationality of the seiners (case T-329/08).
- The defendant immediately raised an objection as to admissibility of the action, arguing that the applicant was not "individually concerned" by the contested Regulation. Let me open a parenthesis on this point: while the Rules of Procedure (art. 114, para 1) provide that "a party applying to the General Court for a decision on admissibility (…) shall make the application by a separate document", so apparently requiring the defendant to take position also on the merits within the time limit of two months for lodging a defense (art. 46), in practice the interpretation given to this provision is that the defendant may limit itself to contest the admissibility of the action, which appears contrary to both the letter of art. 114 RP ("separated" from what?) and the principle of equality of arms (the defendant will eventually reply on the merits only after the end of the *incidental* procedure triggered by the objection).

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[8] Commission Regulation of 12 June 2008 establishing emergency measures as regards purse seiners fishing for bluefin tuna in the Atlantic Ocean, east of longitude 45° W, and in the Mediterranean Sea (OJ 2008 L 155, p. 9).
[9] Regulation 530/2008, Article 3.

- Being aware of the objective difficulties, and even more of the time required by this procedure, AJD Tuna decided to circumvent the problem by "inventing", so to speak, a domestic action and raised before the national Court a question of validity of the Commission Regulation. AJD Tuna filed a liability action before a civil court in Malta asking for the restoration of damages provoked by the adoption of an administrative act applying ("implementing"?) the ban imposed by the Regulation.
- On 4 June 2009 the Maltese Court asked the ECJ (Case C-221/09) on the interpretation and validity of the above mentioned Regulation, in practice repeating the same arguments put forward by AJD Tuna before the GC. Among them: is Commission Regulation No 530/2008 invalid because the adopted measures are unreasonable and discriminatory on grounds of nationality, within the meaning of Article 12 of the Treaty establishing the European Community, insofar as the said regulation makes a distinction between purse seiners flying the Spanish flag and those flying the flag of Greece, Italy, France, Cyprus and Malta?
- The Regulation was eventually declared invalid by the Court of Justice in its judgment of 17 March 2011 for violation of the principle of equal treatment irrespective of nationality: unlike those flying the flags of other MS, Spanish vessels enjoined a few additional days of fishing, and this difference of treatment was not objectively justified.
- Later on, on February 2012 the General Court (Fifth Chamber) dismissed the action brought by AJD Tuna as inadmissible for lack of individual concern.

3) HOW WOULD THIS CASE BE DECIDED TODAY? A REGULATORY ACT WHICH DOES NOT ENTAIL AN IMPLEMENTING MEASURE

- The answer is given by the general Court, which recently (judgment of 27 February 2013, T-367/10, *Bloufin Touna Ellas Naftiki Etaireia v. Commission*) considered admissible an action brought against a similar Regulation adopted by the Commission in 2010, hence after the entry into force of the Lisbon Treaty. It qualified the act, which prohibited fishing activities for purse seiners flying the flag of Greece or France, as "regulatory" since first, it was adopted by the Commission on the basis of Article 36(2) of Regulation No 1224/2009; second, it was an act of general application since "it is (…) indisputable that the provisions of the contested regulation are addressed in abstract terms to an indeterminate number of persons and apply to objectively determined situations".
- As to the other conditions spelled out in para 4, the GC affirmed that the applicants were directly concerned by the contested regulation, since the applicants' activity is in fact fishing for bluefin tuna using purse seiners. In addition, the stopping of the fishing, which followed from the contested regulation, did not require any implementing measure on the side of the Member States. So apparently the requirement of being directly concerned was referred to a "subjective" element, that is the impact of the contested act on the legal situation of the applicant (no need of a subsequent discretionary act in order to produce such an impact); that of "entailing implementing measures" was intended as an "objective" element referred to the act itself, which requires by definition a subsequent intervention at the national or European level to produce legal effects.

- The action was dismissed on the merits, but this example appears to confirm that the entry into force of the new regime has – at least to some extent - actually enhanced private individuals' access to justice before the European Courts.

4) DOES THIS EXAMPLE SHOW THAT RECOURSE TO THE PRELIMINARY RULING PROCEDURE IS A VALID ALTERNATIVE TO ACTION FOR ANNULMENT? IS THE COURT RIGHT IN ESTABLISHING THAT IF AN APPLICANT IS NOT ALLOWED TO BRING SUCH A "DIRECT" ACTION IT MAY ALWAYS ENJOY THE SAME LEVEL OF PROTECTION VIA ARTT. 267 AND 277 TFEU?

- The example of the bluefin tuna saga is apparently reassuring: first, the preliminary ruling procedure allowed access to the Court for its assessment on the validity of the act; second, the LT revision permits today a direct access previously blocked by the pre-Lisbon regime.
- Notwithstanding the "positive" solution in the tuna case, which I have no doubts in qualifying as "exceptional" for a number of reasons, my answer to the questions is no. If read in conjunction with the general principle of effective judicial protection referred to in Article 47 of the Charter of Fundamental Rights, Article 263, paragraph 4, deserves a less strict interpretation than that given by the General Court in cases such as *Forgital* (T-438/10) and *Te&L Sugars* (T-411/13 P), not surprisingly both under appeal before the ECJ.
- This negative answer is mainly justified by the unconvincing main argument (the "complete system of legal remedies and procedures established by the Treaties" argument) that the Court refers to in order to maintain that even a limited access to direct actions is counterbalanced by alternative remedies which guarantee an effective protection vis-à-vis illegal acts.
- It is clear that even in a context of "enlarged" judicial protection involving both European and national courts (art. 19 TUE), when an act is not open to direct challenge via Article 263 TFUE since, for instance, it is a regulatory act which entails implementing measures (as, at least in the opinion of the GC, in the case of Council Regulation 566/2010 in *Forgital*, reestablishing custom duties previously suspended), the preliminary ruling procedure on the validity of the contested act is by no means a comparable mechanism in terms of assuring the same legal protection as direct challenge (nor is comparable to an exception of illegality). This for a number of reasons, some of which are listed below:

    1) The preliminary ruling procedure on validity is, like that on interpretation, not accessible to the parties of a dispute: it is for the national Court to decide if a reference is necessary for the solution of that specific case, while the parties may only suggest the questions they consider appropriate. If it is true that a question of validity requires reference to the ECJ even if it is raised before a "lower" court (*Fotofrost*), the Court has consistently held (for instance recently in *Consiglio nazionale dei geologi*) that any national court, including that of last resort, cannot be deprived of its competence to decide: a) the relevance of the question of validity for the solution of the dispute; b) the very text of the questions to refer, which in principle can be different to those suggested by the parties, or similar to what requested by one party but opposite to what requested by the

other party. In all those cases national courts respect their obligations under Article 267 by submitting a preliminary reference, irrespective of their identity with the questions raised by the parties. It follows that the conclusion reached by the Court in Inuit, at par. 95, that "requests for preliminary rulings which seek to ascertain the validity of a measure constitute, like actions for annulment, means for reviewing the legality of European Union acts", is not fully justified if related to the position of an interested party[10].

2) In addition, the immense distance from direct access to the European Courts is confirmed also by the limited reactions that unsatisfied private parties may put in place in case of failure of the obligation to refer. Infringement procedure? No advantage for the interested persons. Setting aside the principle of *res iudicata*? Possible only in very limited situations. State liability? Very difficult to prove before a national court, since violation of the obligation to refer is not in itself a sufficiently serious violation for the purpose of a "Francovich" action. Strasbourg? It is true that recent EtCHR judgments (e.g. *Vergauwen c. Belgium* of 10 aprile 2012, n° 4832/04, §§ 89-90; Dhabi v. Italy of 8 April 2014, n° 17120/09, § 17 ff.) confirm that a national jurisdictional procedure is not "fair" if the obligation to refer is not respected, but again the only "consolation" is, *in casu*, just satisfaction.

Once again, the Spinelli draft Treaty provided for a more effective solution[11].

5) FINALLY, "INTERNATIONAL" AGREEMENTS

A final point: a more generous approach of the Court towards "non-privileged" applicants is needed: it seems quite paradoxical that in *Stichting Woonpunt* the applicants found an easier way to *locus standi* via the "old" test of "individual concern" rather than via the new, "enlarging" test of paragraph 4, which the Court itself qualifies as "less stringent"[12]! In particular, it is submitted that a stricter interpretation of "implementing measures", appears more in line not only with the "internal" requirements of the rule of law (art. 47 of the Charter), but also with international obligations of the EU, present and future.

a) As to present commitments, the Aarhus Convention[13] is worth mentioning.

[10] In fact, reading the judgments cited by the Court at paragraph 103 of INUIT (ABNA of 2004, concerning interim measures) it is clear that the "parallel" goes between the position of the applicant in direct action and that of the national judge, not that of a private party in a national dispute: "As the Court has held in its judgment in Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest* [1991] ECR I-415, paragraph 18 ('*Zuckerfabrik*'), references for preliminary rulings on the validity of a measure, like actions for annulment, allow the legality of acts of the Community institutions to be reviewed. In the context of actions for annulment, Article 242 EC enables applicants to request enforcement of the contested act to be suspended and empowers the Court to order such suspension. The coherence of the system of interim legal protection therefore requires that national courts should also be able to order suspension of enforcement of a national administrative measure based on a Community regulation, the legality of which is contested".

[11] Spinelli draft Treaty (1984!), art. 43, provided for the "creation of a right of appeal to the Court against the decisions of na tional courts of last instance where reference to the Court for a preliminary ruling is refused or where a preliminary ruling of the Court has been disregarded".

[12] *Stichting Woonpunt*, para 46.

[13] UNECE Convention on access to information, public participation in decision making and access to justice in environmental matters, signed in 1998, approved by the EU in 2005 - Council decision of 17 February 2005, 2005/370/EC.

Art. 9 par 3, so provides: "… 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 (*This definition does not include bodies or institutions acting in a judicial or legislative capacity – art. 2*) which contravene provisions of its national law relating to the environment".

The Compliance Committee of the Convention (CC), following a complaint by a British NGO denouncing the violation by the European Union of paragraphs 2 to 5 of Article 9 of the Convention, considered in a Report issued in 2011 that the conditions laid down in Article 230 TEC, as interpreted by the ECJ, were too restrictive for natural and legal persons to proceed against an act before the Court of Justice. The CC concluded as well that the preliminary ruling does not meet the requirements of access to justice in article 9 of the Convention, nor compensates for the strict conditions imposed by the EU Courts.

The question is whether Article 263, para 4, is now in line with the Aarhus Convention requirements, and what are the consequences in case it is not. One may argue that a broad interpretation of "implementing measure" would probably realize a new violation of the Convention. In fact, if a EU regulatory act intervenes in the scope of application of the Convention, an interested person needs to challenge a national act and ask for a preliminary ruling. The Compliance Committee, in the cited report, stated that the preliminary ruling is not a sufficient remedy. So, it appears that only a strict interpretation of implementing measure can assure compliance with the Aarhus Convention. If this is true, the next question is whether Treaty provisions require the Court of Justice to give an interpretation of primary law which permits the EU to respect its international obligations. On this point, the position taken by the GC in *Inuit* on the effect of the Aarhus Convention (paragraphs 52-55) is clearly not satisfactory. The questions is then still open.

b) ECHR after EU accession: even after the Lisbon revision, in the opinion of some commentators "there are strong arguments for holding that the indirect access of individuals to justice by means of the preliminary ruling procedure neither fulfills the conditions which the ECJ itself has imposed on national courts, nor Articles 6 and 13 of the European Convention for the protection of Human Rights and Fundamental Freedoms (ECHR)" (v. BRIEM, The preliminary ruling procedure as part of a 'complete system of remedies'). When it comes to judging on the exhaustion of domestic remedies, the Strasbourg Court is clear on the non-accessible nature of an incidental procedure "de juge à juge", as in the case of the Italian centralized system of constitutional scrutiny reserved to the Constitutional Court.
A final remark: the Strasbourg system itself is open to criticism with regards to the practice of adopting uncontestable "decisions" of inadmissibility totally deprived of motivation[14]. But this is probably good food for another seminar.

[14] See J. GERARDS, *Inadmissibility Decisions of the European Court of Human Rights: A Critique of the Lack of Reasoning*, in H.R.L.R., 2014, p. 1 ff.

Droit d'intenter une action en justice en vertu de l'article 263(4) du TFUE

J.-P. Keppenne

Je voudrais partager quelques réflexions sur les nouvelles conditions de recevabilité pour les recours en annulation des particuliers qui ont été ajoutées à l'article 263 TFUE par le traité de Lisbonne, en particulier à propos de la condition que l'acte attaqué ne doit pas comporter de mesures d'exécution :

- Mon point de départ est que le système en place avant Lisbonne, tel qu'interprété par la Cour, peut sans doute se discuter en termes de 'politique juridictionnelle' mais ne soulevait pas d'objection juridique. Il faut garder à l'esprit que le traitement des recours des particuliers contre des actes de l'Union, ce n'est pas seulement une question de protection juridictionnelle, mais c'est aussi une question de délimitation des compétences attribuées à la Cour par les traités, et que c'est donc à juste titre que celle-ci veille à ne pas élargir indûment le champ de ses compétences. Mais nous aurons l'occasion de revenir sur ces questions après avoir écouté Denis Waelbroeck…

- Je suggère de partir de la distinction entre deux catégories de conditions de recevabilité, celles qui tiennent à la nature de l'acte attaqué, d'une part, et les conditions de recevabilité qui tiennent à la personne du requérant, d'autre part ;

- Sous cet angle, avant Lisbonne, les requérants non privilégiés avaient une double barrière à franchir: concernant la nature de l'acte (il devait en principe s'agir d'une décision) et, surtout, conditions de recevabilité qui tenaient à la personne du requérant (outre l'intérêt à agir, il fallait soit être destinataire, soit être concerné directement et individuellement) ;

- Ces conditions liées à la personne du requérant requièrent nécessairement ce que j'appellerais une "approche subjective" de la part du juge, à savoir la prise en compte, souvent détaillée, de la situation personnelle de chaque requérant (surtout pour l'appréciation de l'intérêt individuel). Cette approche subjective est inhérente à la nature de ces conditions de recevabilité. Elle présente toutefois de gros désavantages, à savoir un faible niveau de prévisibilité pour les requérants et la nécessité d'un examen approfondi de la part du juge dans chaque cas d'espèce.

- Avec le traité de Lisbonne, nous sommes confrontés à cette nouvelle catégorie : « actes réglementaires qui […] concernent directement [le particulier] et qui ne comportent pas de mesure d'exécution »

- 3 conditions doivent être remplies : actes règlementaires ; « qui la concernent directement », « qui ne comportent pas de mesures d'exécution »

- « qui la concernent directement » : condition de recevabilité qui tient manifestement à la personne du requérant; jurisprudence bien établie, quoique…

- Quid des deux autres conditions : « actes règlementaires » et « qui ne comportent pas de mesure d'exécution » ? Leur libellé est neutre et ne renvoie pas à la situation particulière du requérant.

- On aurait donc pu envisager de développer, pour ces deux conditions, une approche 'objective', purement fondée sur la nature de l'acte attaqué. Les avantages d'une telle approche tiennent à l'économie de procédure (application rapide et aisée) et à la prévisibilité (cela permet aux requérants potentiels de déterminer facilement leur situation et, par ricochet, de savoir s'ils pourront ou non indirectement remettre en cause la validité de l'acte de l'Union devant le juge national (jurisprudence Deggendorf)

- Dans certains arrêts, les juridictions de l'Union ont paru privilégier une approche objective:

    - Concernant la notion d'acte réglementaire, la Cour a, à juste titre, suivi une approche objective et, en se fondant sur les travaux préparatoires, a conclu que les actes règlementaires étaient des actes de portée générale mais à l'exclusion des actes législatifs (Inuit).

    - Concernant la notion d' "acte qui ne comporte pas de mesure d'exécution, dans T&L Sugars, le Tribunal juge qu'il suffit qu'il y ait des mesures d'exécution et qu'il ne faut pas vérifier en outre s'il existe une voie de recours effective contre les mesures dans l'Etat concerné.

- Toutefois, dans d'autres affaires, les juridictions ont mis l'accent sur une approche subjective pour le 3ème critère (ne pas comporter de mesures d'exécution):

    - dans ANICAV, le Tribunal a pris en compte la situation spécifique des requérantes dans l'affaire pour évaluer s'il y avait des mesures d'exécution ;

    - la Cour a confirmé ce principe dans arrêt Telefonica, à savoir une approche subjective, dépendant de la situation personnelle du requérant: "aux fins d'apprécier le point de savoir si un acte réglementaire comporte des mesures d'exécution, il y a lieu de s'attacher à la position de la personne invoquant le droit de recours…"

- Inconvénients de cette approche subjective : d'une part, nécessité d'un examen approfondi de la situation de chaque requérant; ensuite, le même acte règlementaire, même s'il concerne directement plusieurs particuliers, pourra être attaqué directement par certains d'entre eux mais pas par d'autres, qui devront attaquer la mesure d'exécution prise à leur égard et, dans ce cadre, soulever une exception d'illégalité de l'acte de base.

- Pour justifier cette approche subjective, on peut certes se fonder sur la genèse de cette disposition, à savoir la discussion autour des affaire Jego Quéré et Pequenos Agricultores: les rédacteurs du traité de Lisbonne ont essayé de permettre l'accès direct au juge de l'Union chaque fois qu'un acte concerne directement un particulier et que,

sans un tel accès direct, ce particulier serait obligé d'enfreindre la règle pour avoir droit à une protection juridictionnelle ; ceci pourrait effectivement indiquer qu'il faudrait avant tout se focaliser sur la situation particulière de chaque requérant et voir s'il dispose d'une autre voie pour défendre ses droits en justice.

- Toutefois, force est de reconnaître que la formulation retenue par les rédacteurs du traité de Lisbonne n'est pas apte à cerner les seules situations du type Pequenos Agricultores. Au contraire cette formulation est susceptible d'englober un nombre beaucoup plus important de situations. Il y a, en effet, beaucoup de cas où des particuliers cherchent à attaquer des actes alors même que ceux-ci ne leur imposent pas directement un comportement; dans de tels cas, on ne saurait considérer que, en l'absence de la nouvelle catégorie de recevabilité ajoutée par le traité de Lisbonne, 'ils devraient d'abord "enfreindre le droit" pour ensuite pouvoir accéder au juge.

- Exemple : le concurrent du bénéficiaire d'un régime d'aides notifié qui attaque la décision « deuxième phase » de la Commission déclarant ce régime compatible → à supposer que cette décision de la Commission constitue un acte réglementaire, comporte-t-il des mesures d'exécution ? Dans l'absolu, oui (la mesure nationale créant le régime), mais ce ne sont pas des mesures d'exécution vis-à-vis de ce concurrent : faut-il lui donner un droit de recours parce qu'il n'y a pas de mesure d'exécution "à son égard", comme semble l'exiger la jurisprudence Telefonica, alors que l'on ne se trouve pas du tout dans une situation où le particulier devrait enfreindre une règle pour avoir une protection juridictionnelle?

- Ces réflexions conduisent donc à la conclusion est donc la suivante: faut-il vraiment chercher dans le traité, et en particulier dans l'article 263, une cohérence qui ne s'y trouve pas? d'une part, la distinction acte législatif/non-législatif est purement formelle, d'autre part, la nouvelle formule ajoutée à l'alinéa 4 n'est pas apte à saisir les situations que l'on avait à l'esprit au moment de la rédaction de cette disposition. Dans ces conditions, ne faudrait-il pas plutôt chercher avant tout à rendre ces nouvelles conditions de recevabilité aussi faciles à appliquer, et donc prévisibles, que possibles:

    - Concernant l'exigence d'être concerné directement, maintien de la jurisprudence existante;

    - Pour la notion d'acte règlementaire, définition simple donnée dans Inuit, qui correspond à la volonté des rédacteurs;

    - Pour savoir si un acte règlementaire comporte des mesures d'exécution, voir s'il détermine lui-même définitivement ses effets juridiques sans requérir de mesures d'exécution.

Due access to the ECJ for private parties – *ubi jus ibi remedis* ?

D. Waelbroeck

Partner Ashurst LLP

Professor ULB and College of Europe, Bruges

1) The current situation (*Plaumann*):

In summary:

a remedy before the ECJ exists only exceptionally for private parties (mostly only if an individual decision of the EU is identified of which the applicant is a direct or indirect addressee).

2) A gap filled by remedies before national courts?

Question : is it true that any gap at EU level is filled by national remedies? (see e.g. in para. 92 *Inuit*).

Three comments:

(a) national remedies are often inexistent;

(b) even where national remedies exist, the requirement to go through national courts will often not be reconcilable with the principle of effectiveness;

(c) due to *Foto-Frost*, the final decision on the legality of EU measures is at best given through a largely non-contradictory preliminary ruling procedure, with serious loss of procedural guarantees for the parties

*a) National remedies are often **inexistent** when EU measures are at stake*

- First, certain avenues before national courts are excluded :
  - No direct appeal can be brought before national courts against EU acts (prohibited by the Treaty).
  - Damage actions before national courts are not a substitute for actions for annulment (*Schöppenspedt*) and Member States can in any event not be liable for the actions of the EU.
  - It is not a substitute to expect private parties to infringe the law and plead its illegality as a defence.
- Second, in many instances, there is and can be no remedy at all before national courts, e.g.
  - if it is a legislative measure of the EU without implementing national measure (*Inuit*);
  - if the national measure is purely confirmatory (increasingly the case in view of the very prescriptive nature of EU law giving mostly to national authorities the role of mere "*mailboxes*");
  - (in a number of legal systems) if the national authority has no discretion on its own;

- if the national measure is addressed to third parties (and not notified to the affected parties) (but some hope after *Telefonica*?);
- if the EU measure is taken after the national measure (See e.g. *Danielsson*);
- etc…

b) *Even where national remedies exist, the requirement of going before national court will often* ***not be reconcilable with the principle of "effectiveness"***

- Jurisdiction is given to a court that has no power to rule on the legality of the EU act (*Foto-Frost*).
- Jurisdiction is given to a court whose decisions are not applicable to the whole territory of the EU.
- Jurisdiction is given to a court that is not well placed to look at 24 linguistic versions, EU terminology, EU methods of interpretation, …
- Obligation in many cases for the parties to go before courts of 28 Member States (or even more if powers are decentralised), as otherwise:
  - national measures become definitive if not challenged in time;
  - problems of interim relief (see *Toulorge* and *ABNA* saga), etc.
- Before the national court, the EU institution concerned is not a party.
- Private parties cannot intervene if Member States challenge EU acts before the ECJ and thus matters are prejudged without their views being heard.
- As to the possibility to get the case referred to the ECJ, the obligation to refer to the ECJ is all but guaranteed (e.g. if national court finds no problem of legality, …).
- It can take years before a reference if at all is made;
- There is no sanction if no reference is made.
- No control over wording and scope of the questions.
- There is no possibility for arbitral courts to refer (*Nordsee* vs *Foto-Frost*).
- Etc.

c) ***Procedural guarantees*** *for the parties are significantly affected if they have to go through national courts.*

- The preliminary reference procedure is not an "*appeal*", which is open to the parties at their discretion, but a largely voluntary cooperation system between judges.
- The procedure before the ECJ in a preliminary reference case is not truly contradictory (all parties have two months to submit comments, no real possibility to reply, page limits, hearing not in all cases and often very short, with strict limits as to speaking time, etc.)

3) Conclusions

- Is the current system compatible with the principles of economy of procedure, effectiveness and subsidiarity? With Articles 6, 13 and 14 ECHR? With Article 19 TEU and Article 47 Charter?
- Is it compatible with the rule of law and a modern democracy to have such a discrepancy between privileged and non-privileged applicants?
- Is it consistent with e.g. the ECJ's entirely different approach on damage actions?
- Is it acceptable that with the ever increasing transfer of powers to the EU, judicial protection should progressively be eroded?
- Conflict between intergovernmental approach (with weak Court and Commission) and federal approach (with strong Court and Commission).

In my view :

➔ The rule of law requires the ECJ to open its case-law on admissibility. (Note : there is no restriction anymore in the wording of the Treaty. The *Plaumann* case-law in particular has lost its justification as the Treaty does not contain anymore the words "*decision taken in the form of a regulation*").

➔ Moreover given the *Foto-Frost* obligation to refer, there is in theory little economy in terms of workload for the ECJ in the present system (and in view of the large workload on national courts, it makes little sense to burden them with cases on which they are not even allowed to decide).

Marc Jaeger
Président du Tribunal de l'Union européenne

L'avenir des juridictions de l'Union européenne

Bruxelles – 28 avril 2014

« L'avenir des Tribunaux de l'Union européenne », ou plutôt, si vous me permettez, des « juridictions » de l'Union européenne, car nous ne pouvons pas nous permettre d'exclure d'emblée la Cour de justice de nos réflexions…

Voilà une thématique qui est omniprésente dans les débats au sein du Tribunal depuis que j'ai l'honneur de présider cette juridiction, c'est-à-dire depuis 2007.

Pourtant, ce sujet est on ne peut plus actuel, et je ne peux que saluer le CCBE pour son flair dans le choix du thème et de la date de cette conférence…

Car vous le savez, la proposition de la Cour visant à augmenter le nombre de juges du Tribunal vient de connaître un sort funeste. Après trois années de discussions, de négociations, de renvois dans diverses enceintes (groupe technique, Coreper, Amis de la présidence, Conseil des ministres, trilogue…), de propositions et contre-propositions de modèles de désignation (y compris – chose inédite – par la Cour elle-même), les États membres sont arrivés à la conclusion que … ils ne parvenaient pas à se mettre d'accord sur la manière dont seraient désignés ces 12 juges, devenus 9 au cours des négociations.

Trois années donc, et pas moins de sept présidences de l'Union successives (hongroise, polonaise, danoise, chypriote, irlandaise, lituanienne et finalement grecque), pour aboutir à la constatation, communiquée par cette dernière présidence au président de la Cour, selon laquelle « any solution which would necessitate a choice between candidates for a number of posts which is lower than a number of Member States will most likely face the same difficulties as the present proposal ».

D'aucuns diront que cette impasse politique était prévisible, vu le précédent, au début des années 2000, concernant une demande d'adjonction de 6 nouveaux juges pour le traitement de ce qui était, à l'époque, le « nouveau » contentieux de la propriété intellectuelle.

Prévisible ou non, cette impasse n'en demeure pas moins préoccupante, et je voudrais vous faire part de mes sentiments *personnels* sur cette question. Par avance, mes excuses si mes propos sont plus explicites que d'autres, mais – rassurez-vous, ceci est volontaire !

D'abord, **celui d'un grand gâchis**, en temps et en énergie : tant dans la conception de la proposition que dans sa discussion, pour un résultat que l'on peut qualifier à ce stade de quasi nul. Alors que d'autres solutions étaient envisageables, chacun devra tirer les leçons de ce fiasco et assumer sa part de responsabilité.

Ensuite, **celui d'une profonde perplexité**. Car avec toute la compréhension que l'on peut avoir pour l'importance des équilibres géographiques au sein d'une juridiction internationale, on ne peut pas s'empêcher de constater que, dit crument, les États membres – pris globalement – ont fait prévaloir les questions de représentation nationale sur l'intérêt du justiciable et sur le droit à une protection juridictionnelle effective. Et ce alors même que le Tribunal, en tant que juge de la légalité des actes de l'Union au regard du droit de l'Union, n'est par nature pas composé de « représentants » des États membres…

Et ce alors même, également, que des délais de traitement excessifs ont un coût pour les entreprises et pour l'économie, fragilisent la confiance du justiciable dans l'organe judiciaire et, par là-même, affaiblissent la légitimité du système institutionnel de l'Union dans son ensemble.

Enfin, **celui d'un léger agacement**. D'abord celui de constater que la nécessité absolue de renforcer la stabilité de la composition de la juridiction, pourtant proférée à de multiples reprises et sous toutes les formes, ne semble toujours pas faire partie des priorités, si l'on en juge aux différents modèles de désignation proposés et fondés sur le caractère non renouvelable des mandats des juges supplémentaires.

Pourtant, et encore une fois, la stabilité de la composition du collège est un facteur essentiel d'efficience : pour des raisons de continuité de l'activité et de valorisation de l'expérience.

Agacement, également, face aux tentations de certains acteurs institutionnels – à n'en pas douter bienveillants – de s'immiscer dans ce qui relève avant tout de l'autonomie organisationnelle de la juridiction. Je pense ici à certaines insinuations ou recommandations, faites dans le cadre de groupes de travail ou ailleurs, et ayant trait à la manière dont le Tribunal devrait améliorer sa gestion interne. Soyons bien clairs sur ce point : s'il y a bien quelqu'un qui se soucie au quotidien de l'optimisation du fonctionnement de la juridiction, en disposant de la connaissance intime de tous ses paramètres, en vue de répondre aux besoins fondamentaux du justiciable, c'est bien le Tribunal lui-même ! C'est cette rénovation permanente des méthodes de travail qui a permis à la juridiction de gagner 45 % de productivité en 5 ans, atteignant – sans avocats généraux – des niveaux supérieurs à ceux de la Cour *(NB : moyenne sur les **trois** dernières années, 645 pour Cour et 701 pour Tribunal ; si ces chiffres sont reportés aux membres et aux référendaires des juridictions, les ratios de ces chiffres sont encore plus éloquents).* Ce gain d'efficience de 45 % s'est fait sans que le délai moyen de traitement des affaires ne s'allonge (présenter isolément, comme cela a été fait ce matin, les délais de quelque 48 mois nécessaires pour traiter des affaires en matière d'aides d'État est une manière biaisée de rendre compte de la réalité) et sans que la qualité de nos décisions n'en ait souffert (si l'on en juge au taux de pourvoi globalement constant).

C'est d'ailleurs un vrai motif de satisfaction – au moins un ! –, qui permet à la juridiction d'encore tenir le coup malgré l'augmentation du contentieux et l'absence de mesures structurelles.

* * *

Ce constat d'échec réalisé, il convient de s'interroger sur la suite.

Nous savons que des solutions autres que la proposition rejetée existent, et notamment, bien entendu, la création d'une juridiction spécialisée en matière de propriété intellectuelle. On entend, ici et là, émerger d'autres idées, plus ou moins innovantes : l'adjonction d'un quatrième référendaire par juge, la nomination de rapporteurs adjoints, la nomination de juges « juniors », la nomination d'avocats généraux, le transfert du contentieux de la propriété intellectuelle au Tribunal de la fonction publique, et même – à l'inverse – le doublement du nombre de juges du Tribunal moyennant l'absorption du Tribunal de la fonction publique … et enfin la création de tribunaux spécialisés dont les décisions seraient susceptibles de pourvoi directement devant la Cour, ce qui nécessiterait une modification de l'article 256 TFUE. Avant de s'atteler à cette possibilité, peut-être conviendrait-il de réfléchir à la voie du réexamen et d'analyser s'il n'est pas possible d'utiliser différemment cette voie procédurale.

À l'heure où la proposition de la Cour vient à peine de s'éteindre et où le projet de règlement de procédure du Tribunal est en cours d'examen au sein du Conseil, je crois que la sagesse impose de prendre le temps du recul et de l'analyse, afin de tirer – pour l'avenir – tous les enseignements de cet échec. C'est nécessaire pour que l'éventuelle prochaine proposition de réforme non seulement réponde de manière pérenne et cohérente aux besoins identifiés, mais surtout aboutisse !

Notre responsabilité consiste donc, à ce stade, à mettre en place les bases et méthodes de travail qui rendront ceci possible.

En effet, depuis la proposition de 2011, le paysage statistique et la configuration du contentieux ont changé. Une analyse approfondie doit donc être réalisée afin d'identifier les besoins et d'anticiper l'évolution de la situation à moyen terme.

Dans ce cadre, il me semble important qu'une étude d'« impact assessment on litigation » sur le système judiciaire soit systématiquement opérée lors de l'élaboration de nouveaux instruments législatifs ou réglementaires. L'expérience du contentieux en provenance d'Alicante ou des mesures restrictives ainsi que, à l'inverse, les craintes – finalement infondées – de l'explosion des litiges en provenance de l'agence des produits chimiques à Helsinki, montrent à quel point nous ne pouvons plus nous permettre de naviguer à vue. Très concrètement, à ce jour, nous ne savons pas, par exemple, quelle sera l'ampleur ni la nature exacte du contentieux qui sera généré par les nouvelles agences de surveillance en matière bancaire, d'assurance et de marchés financiers ou encore par la BCE dans le cadre de ses nouvelles compétences au sein du mécanisme de surveillance et de résolution unique.

Les trois années perdues avant de constater que la proposition ne recueillait pas l'accord des États membres doivent également nous conduire à nous interroger sur la méthode suivie. Peut-être serait-il opportun d'impliquer, en amont, les diverses parties prenantes, y compris – d'ailleurs – les avocats, en vue d'aboutir à une réflexion ayant les plus grandes chances de rencontrer un consensus. Cette réflexion pourrait aborder plus largement la problématique, à l'instar de ce qu'avait fait le groupe de réflexion sur l'avenir du système juridictionnel de

l'Union présidé par Ole Due, en examinant des questions liées, telles que – par exemple – la durée du mandat des juges ou encore la création d'un barreau européen.

* * *

Quoiqu'il en soit, toute nouvelle conception de réforme prendra du temps, temps durant lequel le Tribunal devra faire face seul à la situation. Nous espérons pouvoir compter, dans ce contexte, sur le nouveau règlement de procédure qui poursuit clairement l'objectif de rendre notre dispositif procédural plus efficient, dans le strict respect des droits processuels des parties. Je citerai, parmi les nombreuses mesures proposées en ce sens :

- Les dispositions relatives à la réattribution d'affaires ;
- La possibilité de recourir au juge unique en matière de propriété intellectuelle ;
- La possibilité généralisée de statuer par voie d'arrêt sans audience, lorsque les parties ne demandent pas la tenue d'une audience ;
- La simplification des règles relatives à la détermination de la langue de procédure en matière de propriété intellectuelle ;
- La réduction de certains délais légaux ;
- L'encadrement de l'intervention ;
- Le transfert de compétence de la chambre vers le président de chambre pour l'adoption de certaines décisions, ne prenant d'ailleurs plus la forme d'ordonnances.

Ces évolutions, dont il conviendra d'assurer une mise en œuvre raisonnée, ne changeront pas radicalement la donne mais contribueront, à n'en pas douter, à renforcer la capacité de jugement de la juridiction, qui peut également compter – depuis quelques mois – sur l'adjonction de 9 référendaires supplémentaires, affectés chacun à une chambre. Parallèlement, il nous appartiendra également de poursuivre l'optimisation de notre organisation interne en vue de réaliser des économies d'échelle et de garantir la cohérence de notre jurisprudence, par exemple en développant encore l'attribution polarisée des affaires par matière (ce qui se fait par le biais du critère de la connexité, interprété largement).

Je suis également certain que nous pourrons compter sur les auxiliaires de justice que sont les avocats et les agents des institutions et des États membres pour faciliter le travail de la juridiction par des actions aussi simples et concrètes que le respect des règles formelles de présentation et d'introduction des requêtes (les demandes de régularisation des requêtes concernent globalement 38 % des affaires, et si l'on ne considère que les requêtes en matière de propriété intellectuelle, ce pourcentage atteint 55 % ; si nous déclarions irrecevables ces requêtes, au lieu de solliciter leur régularisation, nous réduirions sensiblement le nombre des affaires pendantes ! Soyez rassurés, évidemment, sensibles à l'accès au juge, nous

n'envisageons pas cette possibilité). Parmi ces actions concrètes, je pense également à la sélectivité et la mesure dans les moyens et fins de non-recevoir soulevés…

* * *

Pour conclure, je crois pouvoir dire que le système judiciaire de l'Union, et en particulier le Tribunal, sont à la croisée des chemins. D'un côté, le contentieux porté devant l'institution est en plein boom. Certes devant le Tribunal, mais également devant la Cour, dont la capacité d'absorption des pourvois contre les arrêts du Tribunal atteint ses limites. De l'autre, les perspectives d'évolution structurelle sont – à court terme – réduites, voire nulles.

Pour rebondir face à ces contraintes antagonistes, tous les efforts sont déployés, d'un point de vue procédural et de gestion interne, pour maîtriser la situation. Il est clair toutefois que nous devons créer les conditions d'une réflexion globale et éclairée permettant d'aboutir à une réforme effective et d'envisager l'avenir sereinement. Parmi les lignes directrices qui devraient guider cette réforme figure la nécessité de maintenir (voire d'accroître) la stabilité des juridictions, de consolider le double degré de juridiction – l'une des raisons d'être de la création du Tribunal – et de garantir l'exercice d'un contrôle juridictionnel de première instance à la fois intense et cohérent.

Merci de votre attention.

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Improving interim measures before the Union courts – an introduction to the debate

Christopher Thomas
Partner, Hogan Lovells International LLP

Opening words for Topic 3: Judicial Protection / Interim Relief from the Court, at the "*EU Courts – Looking Forward*" conference organised by the CCBE on 28 April 2014

The fundamental issue and the EU solution

1. Interim measures raise a universal dilemma, in which the demands of justice pull in two different directions at once.

2. The applicant, if its arguments are correct, is being wronged on the day its application is lodged and will continue to be wronged on every day until final judgment can put things right. In a very real sense, "justice delayed is justice denied", and it is right that this concern should weigh heavily when considering the issue of interim measures.

3. But on the other hand – and casting the issue in the context of the administrative proceedings that are the typical work of the General Court – the defendant administration has adopted an act in the performance of its public duties and, in its view, within its legal rights. If the applicant's arguments are unfounded, any interference with that act would directly impinge on the legal rights of the administration and its ability to advance the public interest.

4. The EU solution to this dilemma is a classic one, and it has been essentially the same since the Union's judicial system was created in the 1950s. The drafters of the Treaty did not themselves dictate the solution. Thus Article 278 TFEU provides that actions brought before the Court of Justice of the EU shall not have suspensory effect, and that

the Court may, "if it considers that circumstances so require", order that application of the contested act be suspended. In turn, the Court of Justice and the General Court have consistently applied a rule that suspension or other interim measures will be granted only if the applicant can show a prima facie case on the merits and can establish urgency; if the request for suspension or other interim measures is not rejected on one of these grounds, then the balance of interests will be considered. It is similarly well established that mere financial loss does not establish urgency, although it is in principle open to the applicant to demonstrate that a financial loss will cause it a distinct serious and irreparable harm.

Looking forward

5. The issue for the future is, quite simply, can we do better? The present conference organised by the CCBE is most timely in that respect, and the panel of speakers for Topic 3 will enable different perspectives to be aired, based on experiences acting as an advocate for litigants before the Union courts, as an agent of the Commission – the defendant in most cases before the General Court – and as a national judge dealing with comparable situations. The present paper is intended to highlight in advance some of the issues that may be worthy of consideration.

6. Since this is merely an introduction to the debate, only questions are proposed: not answers. The answers may not be obvious, and it should not be assumed that change is ultimately required in relation to each of the points discussed in this paper. But clearly, there is much to debate.

Is the balance between applicant and defendant the right one?

7. The urgency test is well known to be a difficult one to satisfy. This is the basis on which most applications for suspension and other interim measures fail. But it is worth reflecting on whether such a restrictive approach is always appropriate.

8. Firstly, is the balance right today, in light of the current duration of proceedings?

9. In the 1950s and 1960s, an annulment action in the competition law field took around 15 to 16 months on average.[1] But today, competition cases before the General Court take on average 46 months to complete, and State aid cases take on average over 48 months.[2] When it is taking around four years for an average competition case – let alone a "long" case, and ignoring the additional time that may be needed for appeal to the Court of Justice – is it really justified to maintain exactly the same balance as in the 1950s and 1960s when the rights and wrongs of the dispute were resolved in a fraction of that time?

10. Second, is the balance right in light of the potentially "criminal" nature of some proceedings?

11. More specifically, is it still appropriate to treat competition law fines as involving nothing more than mere temporary financial loss, when the Court of Justice is

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1 This figure is based on my amateur statistical analysis of the judgments in competition annulment actions adopted before the end of 1969, as identified by the search function on the Curia website. However, not all of the judgments mention the date the application was lodged, and so this figure is subject to correction.

2 The Courts of Justice's latest annual report indicates that in 2013 the average duration of proceedings before the General Court was 46.4 months for competition cases and 48.1 months for State aid cases. These figures are broadly in line with the pattern in recent years, with the average duration for competition cases between 2009 and 2012 being 46.2, 45.7, 50.5 and 48.4 months respectively, and for State aid cases 50.3, 32.4, 32.8 and 31.5 months respectively. See Court of Justice of the European Union, *Annual Report 2013*, available at http://curia.europa.eu.

otherwise willing to hold proceedings under Regulation 1/2003 to the fundamental rights standards applicable to "criminal" charges?[3]

12. If the "criminal" standards are a relevant point of reference, is the strong presumption against the suspension of competition law fines during proceedings before the General Court – which follows inevitably from the treatment of such fines as involving nothing more than mere temporary financial loss – really appropriate? Put another way, is it so easy to conclude in a "criminal" case that the fine should be paid, and thus the punishment carried out, before a judicial determination that an infringement has even been committed?

13. Incidentally, viewing the issue as relating to the execution of a punishment before a judicial determination that an infringement has been committed might suggest a possible distinction that could be made when applicants seek suspension of competition law fines. Concerns related to the premature carrying out of a punishment are clearly at their greatest where the applicant contests the existence of the infringement (or its participation in that infringement for certain years), but arguably

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[3] Of course, the Court of Justice has not to date held that EU competition law proceedings under Regulation 1/2003 involve a "criminal charge" within the meaning of Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. But it has – for example in Case C-389/10 P *KME Germany and Others* v *Commission* EU:C:2011:816, paragraphs 133 and 136 – responded to arguments that the judicial review of competition law decisions carried out by the General Court is insufficient to satisfy the requirements in "criminal" cases of Article 6 ECHR, and the requirements of the equivalent Article 47 of the Charter of Fundamental Rights of the European Union, by insisting that the "full and unrestricted review, in law and in fact" that is required of the General Court does indeed comply with Article 47 of the Charter. Similarly, the Court of Justice has upheld the rules relating to parental liability in competition cases as consistent with the presumption of innocence applicable to those "charged with a criminal offence" under Article 6(2) ECHR, and under Article 48 of the Charter. See Case C-238/12 P *FLSmidth* v *Commission* EU:C:2014:284, paragraph 25. In neither of those cases did the Court of Justice reject the applicants' arguments on the basis that proceedings under Regulation 1/2003 simply do not fall within the scope of the fundamental rights provisions relating to "criminal" matters. In that reticence, it may have been influenced by the judgment of the European Court of Human Rights in *Menarini Diagnostics* v *Italy*, no. 43509/08, § 37, 27 September 2011, which held that a cartel fine imposed for infringement of Italian competition law by the Italian competition authority did indeed fall within the "criminal" scope of Article 6 ECHR.

such concerns have less force where the dispute before the Court relates merely to the size of the fine.

Are the procedural arrangements really sufficient for emergency situations in today's environment?

14. There is a valid question whether all the requirements of the interim measures procedure are really necessary, or whether some of them are excessive and merely tend to limit effective access to justice.

15. In evaluating this issue, it needs to be borne in mind that the acts of the Union that may be challenged before the Courts are much more varied in nature, and arguably more intrusive into the activities of individuals and private companies, than when the procedural arrangements were first conceived some decades ago. Merely as examples, one might mention EU sanctions imposing immediate restrictions on the lives of individuals; merger control decisions against corporate acquisitions and joint ventures, that immediately affect the confidence of stock market investors; or competition law dawn raids, including at homes of private individuals.

16. In particular, is it really necessary – before interim measures can be requested – to require an applicant to draft and lodge their full application on the merits, to which they cannot subsequently add new pleas or new evidence? The restriction on new pleas and evidence means that the drafting of the annulment application must inevitably be a careful and thorough exercise, and the Treaty envisages that an applicant will have two months in which to do it. But if serious and irreparable harm will intervene within days – or hours – then the current rules mean that the application for annulment must be finalised within a dramatically shortened timeframe.

17. Thus, in truly urgent situations, the applicant may not be able to benefit from its full rights of defence, in that it may be forced to lodge an inadequate application for annulment long before the time limit laid down by the Treaty, and may thus eventually lose the case on the merits for this reason alone.

18. Moreover, the current rules do not obviously benefit the judge reviewing the request for interim measures, since the applicant must in any event set out its prima facie case in that request. Indeed, the judge is likely precluded as a matter of law from taking the content of the application for annulment into account, since that document does not form part of the case-file in the interim measures proceedings.

19. Is there a solution? It would seem that any abolition of the rule that interim measures can be sought only once proceedings have been begun by the lodging of the application for annulment would imply an amendment of the Rules of Procedure. That said, it should also be observed that Article 278 TFEU envisages the suspension by the Court of "the contested act", and Article 279 TFEU provides that the Court may "in any cases before it" prescribe any necessary interim measures. Conceivably, those Treaty provisions might be viewed as assuming that suspension and other interim measures are available only once a "main" case is underway.

20. An alternative to modifying the texts would be simply to allow an applicant to improve their application for annulment within the time limit laid down for such applications by Article 263 TFEU (as extended by the *délai de distance*). Thus an applicant faced with imminent harm would prepare their request for interim measures, including arguments sufficient to establish a prima facie case on the merits that the relevant Union act is invalid; it would then copy the text containing those initial arguments into an application for annulment which would be lodged at the same time as the request for interim measures. The defendant institution would respond to the

request for interim measures in the normal way. In the meantime, the applicant would have the remainder of its two months and ten days to submit a revised and improved application for annulment, which would be served on the defendant in the main case. Provided that the object of the proceedings remains unaltered – that is, provided that the form of order sought in the application for annulment remains the same – such an arrangement might help to reconcile the legitimate interests of all concerned.

21. Other procedural innovations might also be considered. For example, and particularly in urgent cases, holding hearings by video conference or by telephone could be very useful. Indeed, some national courts operate a 24-hour rota system enabling a judge to be available for urgent oral applications at any time. As the Union now takes measures that are effective in timescales measured in hours, rather than the months involved in typical interim measures proceedings, perhaps this too is a possibility that might merit attention.

Are we sufficiently imaginative in achieving good solutions for all those affected in the interim stage?

22. There have been relatively few innovations in the range of interim measures applied by the Union Courts.

23. One such innovation was the introduction of provisional damages in 1997. In Case C-393/96 *Antonissen* v *Commission* EU:C:1997:42, paragraphs 37 to 42, the Court of Justice held that provisional damages are available, although they should be confined to cases where the prima facie case is particularly strong and the urgency of the measures sought undeniable.

24. This explicit recognition of the relationship between the strength of the prima facie case and the willingness of the Court to provide interim relief is helpful, and is

suggestive of the possibility that – with sufficient imagination – interim measures can be a more flexible instrument for achieving substantive justice than might sometimes be assumed by external observers.

25. Another imaginative solution was found by the General Court in Case T-211/02 *Tideland Signal* v *Commission* EU:T:2002:232. This was a challenge to a decision rejecting a tenderer from a procurement procedure run by the Commission. The day after the application was lodged, and without hearing the Commission, the General Court granted an immediate order requiring the Commission either to suspend the contract award procedure or provisionally to reinstate the applicant. The Court then followed an expedited procedure in the main case, held a hearing on the merits, and adopted a final judgment annulling the Commission's decision within 11 weeks of the lodging of the application for annulment. Because the main case was determined so quickly, there was ultimately no need to adjudicate definitively on the request for suspension.

26. But putting these examples aside, are there other imaginative solutions that could make it easier to achieve the interests of justice?

27. In particular, are we properly handling cases in which the circle of those closely affected goes beyond the applicant and the defendant? Examples of this kind of situation include competition cases deriving from a commercial dispute between two undertakings; access to facilities and compulsory licensing cases where multiple market entrants might wish to benefit from a remedy adopted by the Commission; and merger control remedies affecting third parties not involved in the notified transaction.

28. In such scenarios, it may be worth giving more thought to the possibility of inviting interested third parties to be represented at the hearing on interim measures. In

competition cases, the Commission and applicant will very likely know exactly who to contact, and so this ought to be feasible from a practical perspective. If those third parties would need to be bound by an interim solution designed to make a Commission remedy reversible, then they could be invited to intervene. Although the EU system does not provide for forced intervention, a failure to engage with the Court might perhaps be taken into account when the Court considers the best way forward in the – possibly lengthy – interim stage before judgment.

29. This paper has sought merely to highlight a few areas for reflection. These are issues where discussion and debate are fundamental to understanding the issues at stake, and the various legitimate interests of those involved. It is very much hoped that the CCBE's conference on the future of the Courts will contribute to advancing this understanding.

Speaking notes Vittorio Di Bucci - CCBE seminar 28 April 2014 – Panel on interim measures

Some general remarks

- It is important to keep in mind the fundamental features of the system.
- First, actions for annulment have no suspensory effect. The situation may be different in certain national legal systems, but in Luxembourg the suspension of the challenged act and other interim measures are a (limited) exception to this rule.
- Second, when the institutions enjoy a wide discretion the conditions for obtaining damages are understandably strict. So, there is nothing surprising if, in some cases, it may not be possible to obtain interim measures nor to recover damages at a later stage. Interim measures are not intended to remove the uncertainty as to the outcome of an action for damages. It may well happen that the only redress available will be the annulment of the contested act. This debate already took place more than ten years ago and was concluded, with excellent arguments, by the order in Case C-404/01 P(R) *Commission* v *Euroalliages and Others*.
- Another introductory remark. In the debate about interim measures before European courts there is an elephant in the room: the duration of procedures on substance before the General Court, which is now on average 4 years for competition and State aid cases. Interim measures are meant to guarantee the full effectiveness of the final future decision in order to ensure that there is no lacuna in the legal protection provided by the Court. If the main procedure is likely to last longer, this must be taken into account when assessing the necessity of interim protection. But this cannot lead the Courts to alter the nature of interim procedures and to make them a surrogate for judicial protection in the main case.
- This being said, brief comments on Georg's remarks and suggestions. Finally, I will raise two further issues.

Procedure

1. Link with main action

- In my view, this follows from the text of the Treaty (278: "The Court may … order that application of the contested act be suspended"; 279: "The Court … may in any cases before it prescribe any necessary interim measures").
- Normally not a huge problem, a competent lawyer can file a good application and a request for interim measures in much less than two months. Even when there is a need to prevent the publication of allegedly confidential data, if you tell the Commission that you are going to challenge and request interim measures it will refrain from publishing the alleged confidential data, in compliance with Case C-53/85 *Akzo* v *Commission*.

2. Separate, self-standing document

- It is for the applicant to set out concisely a *prima facie* case, not for the defendant nor for the Court to look into 50 pages or more of application and dozens of annexes to find out whether the applicant's pleas have any merit.

3. Provide evidence on urgency in the initial request. Hearings

- Again, the applicant should be able to present evidence, or at least offer evidence, in the initial request. No need to delay proceedings which are urgent by nature by multiplying written pleadings. In any event, the President will often invite the applicant to submit comments on the observations lodged by the defendant and will take into account even late documents.
- Precisely for that reason the President now normally does without a hearing. This represents a change compared with the Vesterdorf era, when hearings were often organized with a view to explore intermediate solutions. However, even then, compromises were not frequent, i.a. because in most cases the agents of the defendant lack any authority to accept a solution departing from the decision of the institution.

<u>Substance</u>

4. Strict criteria?

- In my view, the criteria and the way they are applied follow from the nature and function of the interim proceedings. One cannot seriously argue that the requirement of a *prima facie case* is assessed strictly. What is normally required is *fumus non pessimi iuris*. It is enough to show that there is something to be discussed, which is fine if there is a real, obvious urgency. So, Georg's criticism must refer to urgency. Well, if you are right on substance, but there is no urgency, you will obtain the annulment of the act in due course. Again, the duration of the main procedure should not be a reason to alter the function of interim measures.

5. Prima facie and urgency are assessed in isolation

- Is that really so? It seems to me that the respective strength of *fumus* and urgency are taken into account at the stage of balance of interests. So, a stronger *fumus* may lead to interim measures if there is some degree of urgency, but cannot make up for an absolute lack of urgency. If there is no urgency, there is indeed no need to look at *fumus*.
- The risk I see is rather that in some cases urgency will structurally be present (see State aid to undertakings in difficulty). This may lead to an opportunistic use of interim measures to delay the application of the contested act, even if the *prima facie* case is very weak. But probably the only remedy lies in swifter judgments on the merits of the case.

6. On urgency: two points

a. Irreparable harm: financial and non-financial damage

- In the *Pilkington* and *AbbVie* cases the outcome of the orders of the President of the GC (respectively, T-462/12 R and T-44/13 R) was that when the publication of alleged confidential information is at stake the condition of urgency would always be satisfied. Given that a *prima facie* case is easily established, in practice, publication would always be delayed until the end of the main proceedings. The orders of the Vice-President of the ECJ (C-278/13 P(R) and C-389/13(R)) admit that breach of some fundamental rights, like prohibition of torture, in itself gives rise to serious and irreparable harm, so that interim protection will be easily available. But this cannot be automatically extended to other fundamental rights, for which protection in the form of annulment and damages is acceptable. In other words, no automatic suspension just because the Applicant invokes fundamental rights.
- But the Vice-President of the ECJ then found that the damage caused by publication would be irreparable, because one cannot identify and quantify the effects of giving access to the documents at stake to different categories of persons. Two remarks. First, this may still mean that interim protection will be awarded in many cases concerning publication of alleged confidential information, so the Court should carefully consider the nature of the interests at stake. Second, it will be essential to keep the distinction between damage that cannot be quantified because of its "diffuse" nature and other cases where the exact level of the damage is difficult to establish.

b. Assessment of the financial means of the group

- The issue is not whether there is "bad intent" on the side of the applicant's parents. By the way, how would you establish whether that is the case? The point is that if the group itself is ready to let a particular company of the group go bust, why should there be a general interest to ensure the survival of that company, even when this means paralyzing the normal application of the law?

<u>Two further issues</u>

7. Urgent measures inaudita altera parte

- Certainly necessary in some cases. But dangerous, the Court may not be properly informed on all circumstances, may overlook some consequences of an interim order and, very simply, there is a risk to make mistakes when you act quickly. In particular when the applicant has taken its two months to lodge a request for interim measures, it may be better to waste ten more days to receive the observations of the defendant and have a full picture. So, super-urgent orders should be a truly exceptional tool, to be used only when circumstances clearly require it.

8. Orders addressed to third parties or affecting their interests

- According to an order in case T-411/07 *Aer Lingus* v *Commission* the judge may impose orders directly on third parties. I am personally not entirely convinced that this is legally correct, but in any event there are cases where orders addressed to the defendant may heavily affect the interests of third parties. Given that the Statute of the Court does not foresee a compulsory intervention, it may be useful to seize the occasion of the reform of the Rules of Procedure and provide for an invitation to intervene in such cases.

Conclusion: a far too rigid system?

- I beg to differ. The system allows for sufficient flexibility. True, interim orders have progressively abandoned a casuistic approach to embrace a more structured analysis. The possibility of appeals has certainly contributed to a more rigorous (not rigid) reasoning. But this is part of a general evolution since the times of palm tree justice.

Speaking notes CCBE seminar 28 April 2014 -- Panel on interim measures

Introduction

- Jäger article on recent case law: I assume that the audience is familiar with the article and the case law. This article is very helpful but makes a depressing reading because it shows that in practice interim relief is available in only very few and exceptional cases. One may wonder whether the purpose of this article is to discourage requests for interim measures that have no chance of success.

- My role here is to present the issues from the perspective of a private practitioner who has to explain his client this case law -- and who is faced with the clients disbelieve. Consequently, the views I am going to represent are quite critical of the system of interim relief and the case law. I won't even attempt to present a balanced view--this is the task of others on this panel.

- The first 3 points I am going to make concern procedural aspects; the next 3 points (one of which has 4 sub-points) concern substantive aspects.

- My overall critique is that we have an overly rigid system that ties the Courts. While some of the points may require changes to the legal instruments; others don't. The Courts need to get always from that rigid system to a system of natural justice that better allows to accommodate the conflicting interests.

Procedure

1. Request for interim measures permissible only if main action filed.

- Problem: One can file a request for interim measure only together with a main action or after the main action is filed. This poses problems in cases where the implementation of an act is imminent and liable to take place before the expiry of the time limit to challenge the act. Example: Recent decisions by the EMA under the transparency rules to disclose confidential information to a third party. The decisions stated that the information would be disclosed if no request for interim measures is filed within 10 days. Thus, within 10 days the applicant must produce an application and a request for interim measures--and in principle may not amend them later.

- Solution: Allow urgent interim measures to prevent implementation of an EU act until the time of the expiry of the normal time limit to bring an appeal.

2. Application for interim measures has to be set out in a separate, self-standing document

- Problem: The rules of procedure require that the application for interim measures has to be set out in a separate, self-standing document. This rule leads to unnecessary duplication, in particular as regards the need to set out a prima facie case. In complex cases, this can be problematic because there simply is not the time to rewrite the application. In addition, it is a waste of resources for the Courts resources.

- Solution: Allow the applicant to refer to the Application as regards the prima facie case and only include a very brief summary in the request for interim measures.

3. The prohibition to supplement the evidence on urgency during the proceedings

- Problem: The case law provides that an applicant may not supplement evidence on urgency during the proceedings. There is no need for such a strict rule in an interim measures proceeding. Moreover, given the speed with which the application has to be lodged, it is sometimes simply impossible to collect all the evidence in time.

- Solution: A more flexible approach that allows the applicant to supplement the file until shortly before the hearing.

- As a footnote: The statistics show that in the past several years, the GC has decided the majority of interim measures cases without an oral hearing. This is regrettable, because a hearing is always a good occasion to explore possible compromises--and in any event necessary to get to the bottom of the case.

Substance

4. Overly strict interpretation of the criteria for interim measures

- Problem: Article 278 TFEU provides that applications for annulment do not have suspensory effect. The Courts have deduced from that provision that acts by the Union are presumed lawful and that therefore the conditions for granting interim measures must be interpreted strictly. In many instances, the presumed legality of Union acts has been used as a justification for an extremely rigid interpretation.

- Solution: I believe the case law has given too much importance to the fact that applications for annulment do not have suspensory effect. It does not follow from this rule that the criteria for granting interim measures must be interpreted as strictly as the current case law does. A challenged act is not presumed lawful but is what it is: An act whose lawfulness is in dispute.

5. Consideration of conditions of prima facie case and urgency in isolation

- Problem: The case law provides that applications for interim measures can be rejected if one of the 3 conditions (prima facie case; urgency; and balance of interest) is not met. Moreover, the Courts examine these 3 conditions in isolation (although urgency and balance of interest are often looked at together). In particular, a strong prima facie case has no impact on the assessment of the urgency requirement. Indeed, in many cases Courts only assess the urgency.

- Solution: Treat prima facie and urgency / balance of interest as communicating tubes. Thus, the stronger the case on prima facie, the less strict the urgency requirement -- and vice versa.

6. On the issue of urgency: 4 points which must be considered together

a. Every damage is "reduced" to a financial damage

- Problem: The Courts have a tendency to "reduce" any damage to a financial damage. Recent examples are cases, where the applicant objected to the disclosure by the Commission or the EMA of information which it considered confidential. The President of the GC considered that disclosure would inflict serious harm because it would violate the right to privacy (and would be irreparable, as information once disclosed cannot become confidential again). The Vice President of the CJEU reversed the ruling and held that the disclosure would only inflict a financial damage. (It considered the damage irreparable because it could not be quantified).

- Solution: Adopt a more nuanced approach that, in particular, protects the applicant's primary interest / objective and not only a secondary financial interest.

b. Financial damage is considered, in principle, reparable because the applicant could, in theory, recover it through a damage action

- Problem: It is well known that the standard for a damage action is different than the standard for an annulment action. Thus, the fact that the applicant succeeds with its application for annulment does not necessarily mean that he will be able to recover damages--even if he can prove damages and a causation. The Courts are aware of this, but consider it irrelevant by stating that the purpose of an interim procedure is not to prejudice a future damage action. Needless to say that clients look rather puzzled if they learn that they don't get interim measures because they can recover any loss through a damages action that has very little chance to succeed.

- Solution: Adopt a case-by-case approach that focusses on the specifics of the case at hand instead of applying a rigid formula.

c. Financial damage is considered irreparable only if it threatens the very existence of the applicant

- Problem: Safe in cases where the damage cannot be quantified, in order to sow urgency, an applicant must basically claim that it will go bankrupt unless interim measures are adopted. For all practical purposes, this makes it virtually impossible for any company to seek interim relief. Which company can say that it will go bust? So for most companies interim relief simply is not available--and not only in the area of public contracts.

- Solution: This problem is the consequence of the two previous problems. Hence, the solutions advocated there apply.

d. Parental liability / group assessment

- Problem: When assessing whether an applicant has sufficient financial means to "survive" the damage caused by the immediate implementation of the challenged act, the Court requires that, where necessary, the shareholders or other related entities "bail" out the applicant. Thus, the shareholders must either forgo the protection offered by the corporate veil or the protection to obtain interim measures. The justification given is the need to avoid that companies structure their operations in a manner that circumvents the effectiveness of the application of EU law.

- Solution: A more flexible case-by-case approach that assesses whether there really is bad intent on the side of the applicant's parents.

Overall conclusion

- A far too rigid system that is applied far too rigidly and thus makes it impossible to find "just" and adequate solutions.

- Effective enforcement of EU law is important but it is not everything. Effective judicial protection is equally important. If cases take many years and if for all practical purposes interim relief is not available, effective judicial protection is not guaranteed. This will eventually harm the Union.

CCBE
Council of Bars and Law Societies of Europe
Brussels 28th April 2014

Conference
"EU COURTS – LOOKING FORWARD"

CONS. ROSA PERNA
Administrative Judge in Rome
Member of AEAJ – Association
of the European Administrative Judges

Interim relief from the Court

the Italian experience

Honourable Chairman,

Let me thank the Organizers of the event for this conspicuous occasion, I am really pleased to introduce myself to such a noticeable audience and enrich the debate on the relevant issues in the Agenda.

I attend my duties at the Administrative Court of Rome, the organ of administrative justice of 1st instance which basically deals with disputes between citizens and public bodies, and that has come to represent a sort of "Hub of the Administrative Justice" in Italy today, considering the sensitive nature of litigations brought before the Judge and the dimension of interests involved.

I am very pleased to steer the attention of the Participants towards the Italian legal system, a system of *Civil Law* basically founded on the legislative sources of the law and leaving to the Judiciary the task to apply the positive provisions upon their correct interpretation.

I do hope that in the present debate, as focussed on interim measures from the Court, the Italian model can offer a useful and stimulating example of the judicial recourse to provisional measures, especially when they aim at protecting European rights or rights having a constitutional rank coming into consideration in domestic litigation.

The Italian model of administrative proceedings

Before entering the topic at hand, we must state that the Italian administrative proceedings - recently refurbished by a complex work of reform – is regulated and scanned by a the Code of the Administrative Proceedings, enacted by legislative decree n° 104/2010; the "Code" sets some basic principles for the administrative trial - some of them of European derivation - such as: slenderness and simplification of the proceedings, reasonable time of the process (article 6 European Convention for the

Protection of Human Rights and Fundamental Freedoms - ECHR), concentration and effectiveness (article 13 ECHR) (1), full implementation of the debate through the respect of the adversarial principle.

These principles find expression also in the interim, precautionary phase of the proceedings.

The principle of an "effective remedy before a national authority", as set by article 13 ECHR, is pursued through the arrangement of a fairly wide set of actions, all giving rise to cognizance proceedings: an action for annulment of administrative decisions; an action for compensation for damages; an action against "the silence" (i.e. inactivity) of a public administration and, as from 2012, an action for the order to administration to issue a certain act (as a substitute for the annulled act).

The enforcement of the judgements is guaranteed through a special action, namely through the "*giudizio di ottemperanza*" (i.e. enforcement proceedings).

We must also consider that as a general rule the jurisdiction of the administrative judge is a jurisdiction of legality, implying a verification of the legitimacy of the administrative act and not of the decision's substance (possibility of a different administrative decision) so that the judge cannot interfere with the merit of the discretionary choice made in the act and take a decision in the place of the administrative authority (2).

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2 As for the limits of the national judge's review of the acts of an administrative authority, it has been pointed out that the administrative judge can with a full cognition check the facts considered in the proceedings as well as the evaluation process through which the Authority has come to apply the very rule of law, undisputed being however that, where the legitimacy of the action and the correct use of the underlying technical rules have been ascertained, the jurisdictional review cannot go beyond so as to substitute the judge's evaluation to the one already effected by the Administration, who remains the sole subject in charge of the exercised powers (Ex multis: **Cons. Stato, VI, 12.2.2007, n. 550; Cons. St., VI, 10.3.2006, n. 1271; TAR Lazio, Rome I, 24.8.2010, n. 31278; id., 29.12.2007, n. 14157; id., 30.3.2007, n. 2798; id., 13.3.2006, n. 1898).**

In process of time, the national courts have definitely come to affirm the lawfulness of a stronger, more incisive review of the judge, even on acts of the national regulatory authorities (especially of antitrust authority, characterized by a high level of technical discretion as well as by the use of indeterminate juridical concepts having their roots in the economic science), oriented to a full and effective tutelage of the individual juridical situations deducted in litigation. This intrinsic review of the judge has lately been deemed as comprehensive of a re-examination of the technical evaluations made by the Authority as well as of the economic principles and the indeterminate juridical concepts applied (**Cons. St., VI, 20.2.2008, n. 595; 8.2.2007, n. 515)**, and is to be conducted by the judge by having recourse to rules and technical knowledge belonging to the same disciplines applied by the Administration, also with the aid of experts (**Cons. St., VI, 23.4.2002, n. 2199).**

Also in the field of electronic communications the judge has finally relinquished its previous reluctant attitude towards the cognizance of the material issues underlying the highly technical matter at hand, and reconsidered his own role by enriching his practise with the jurisprudential attainments already registered in the contiguous antitrust sector (**Cons. St., III, 2.4.2013, n. 1856; 28.3:2013, n. 1837; Tar Lazio, Rome, I, 14.4.2014, n. 4032; id., 21.6.2013, n. 6259; III ter, 14.12.2011, n. 9739**), so resulting more consistent with the trends emerged in the forum for national judges organized by the European Commission in order to elaborate and disseminate an *acquis communautaire* for the sector (see, for instance: "Seminar on predictable market regulation and effective right of appeal", November 26, 2012; "Implementing the revised regulatory framework in electronic communications", November 29, 2011).

The described legal context is aimed at conflict resolution as far as the judge's attention is focussed on the requests of the applicant, not only in view of a due tutelage of individual rights and legal interests but, as far as possible, also keeping an eye on the settlement of the conflict.

This having considered, I do hope that in the present debate as focussed on interim measures from the Court, the Italian model can offer a useful and stimulating example of the judicial recourse to such an instrument, especially when it aims at the protection of European rights or rights of constitutional rank coming into consideration in domestic litigation.

I shall focus my attention on interim measures given by a chamber in the precautionary phase of the administrative proceedings, which is the most common situation. ([3])

The precautionary phase of the proceedings

It is a functional phase, instrumental in the decision on the merits of the claim, aimed at ensuring effectiveness to the final decision through the granting of provisional measures under certain conditions (interim measures). In practise the granting of provisional measures apt to avoid that the contested administrative acts generate final modifications in the factual reality more often represents the only chance of protection of the citizens; it follows that the interim measure is essential to grant the positive end of the proceedings and its practical utility, saving the good to which the claimant aspires and that could be damaged owing to the duration of the trial.

The legal requirements for a provisional measure. According to the Code of the Administrative proceedings, the applicant, while waiting for a final decision on the

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[3] Sticking to the procedure, the provisional measures are generally issued by a chamber in case of a **heavy and irreparable prejudice** alleged by the plaintiff (art. 55 of the Code).
In cases of **extreme gravity and urgency**, an interim measure is taken by the President of the court, as soon as the applicant files his claim, and is later approved or revoked by the Chamber in the first non public hearing (art. 56).
Only in situations of **exceptional gravity and urgency**, the applicant may ask for the issue of an "ante causam" interim measure, before he files his claim (measure "ante causam") and a proceeding is initiated (art. 61): as a matter of fact the Code has extended the applicability of "ante causam" interim measures to all trials before the administrative Court, generalizing an instrument provided for the sector of public procurement procedures and public contracts by special legislations.

merits, by alleging that the execution of the challenged act causes him a heavy and irreparable prejudice, may ask for the adoption of interim measures which, under given circumstances, are likely to appear suitable to better ensures effectiveness to the decision itself (art. 55, par. 1, of the Code). The legal requirements for such a provisional measure can be summarized in the Latin expressions "*fumus boni iuris*" and "*periculum in mora*", i.e. a prospective positive outcome of the proceedings and a heavy and irreparable prejudice during the time necessary to come to a decision on the claim, which must be compared with the public interest involved in the case.

The judicial order, to be released upon a cursory examination of the case, must be grounded accordingly.

In the practical applications the reference to a "prejudice" has been considered comprehensive also of injuries other than property damages (i.e. damages of economic or patrimonial nature, bankruptcy for undertakings), such as the damage to reputation (like in case of antitrust fines) or the violation to the right to express one's ideas (in cases concerning radio and video broadcasting: Tar Lazio, I, 4.7.2013, n. 2634; id., 21.6.2012, n. 2174).

The idea of the irreparability of the prejudice has been interpreted in different ways, sometimes as the attitude of the damage not to be refunded, in other cases as something further and different, not precluding the issue of an interim measure when the prejudice is refundable with the final decision.

Generally speaking, in the view of balancing the different interests involved in the case, the Judge shall consider all probable consequences of the act on all the interests invested by it and potentially apt to be injured, as well as on the public interest. As acute doctrine has underlined, the Judge should take into account also the effects that the interim measure might produce towards the Administration and towards the nominally opposed parties, by making a comparative evaluation of interests according to non codified criteria, based on his own wise appraisal. ([4])

[4] When the measure may cause irreversible effects, the judge can order the plaintiff to give a caution money, except in cases concerning fundamental rights of the person or other goods of primary constitutional relevance. The rare application of money caution in the interim phase is due, on one hand to the incidence of provisional measures on fundamental rights, on the other hand to a certain vagueness in the wording of the provision, and finally to the peculiarity of the interests in consideration in the administrative proceedings – where the damage caused to the public interest by the suspension of

Legal models of measures

The Code confirms the atypical character of the interim measures identifying them as the measures, among them the injunction to pay a provisional sum of money, more suitable to ensure the effectiveness of the decision on the claim. The principle of atypicalness is the result of a long transformation of the traditional suspensive order, due to its inability to safeguard the claimant anytime the contested act was a negative act or a default of the Administration, which could not be technically suspended.

Crossing the legal requirements with the paradigm of the Administration's acts we run into different forms of protection which the Court, by touching upon the ground of the complaint and the existence of a danger, can grant or otherwise refuse during the precautionary phase of the proceedings.

The practice has identified the following models:

1) suspensive orders, which suspend the execution of the contested act, generally until the definition of the case on the merits: they are proper and useful when the claimant is interested in keeping his own juridical sphere unchanged and unaffected by the administrative act;

2) propulsive orders (remands), which urge the Administration to renew the procedure, with a new examination of the contested act, an implementation of the investigation or the evaluation of profiles, also substantial ones, previously disregarded.

By means of this technique the Judge can intervene in a moment when it is still possible to avoid that the alleged violation produces its effects and, as far as practicable, to readdress the following behaviour of the Administration, which is of critical importance not only for the good conduct of the public subjects but also for the competitiveness of the country as a whole.

Inside this technique we find two macro-categories:

I. Orders which remand the case to the Administration, having recognized more or less explicitly the utility of a new examination of the question "in the light

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administrative acts is often more serious than the damage covered by the caution, so that the balancing of interests involved is made by the Court in advance, when evaluating if the claim is grounded.

of the grounds" of the claim ([5]); in these cases the propulsive order does not oblige the Administration to exercise its powers in a predetermined direction and towards a predefined result.

II. Orders which remand the case to the Administration, with punctual indications for a new investigation and/or the definition of procedural requirements, reasoning paths or evaluation elements to be taken into account ([6]); in these latter cases the intervention of the Judiciary, even though does not contain the obligation to conclude the administrative procedure with a predetermined result, nevertheless is surely more influential and incisive on the conduct of the Administration.

3) positive orders (substitute orders), through which the Judge directly adopts the determinations necessary to avoid that the time required for the definition of the trial thwarts (frustrates) the interest of the claimant irreparably; they can be admitted as far as the Administration has no discretionary power to question the good result of the pending proceedings and are useful when the claimant is interested in modifying his own juridical sphere by means of an administrative act.

Practical examples

With reference to the different kinds of provisional intervention above considered, we will now inspect the most recent jurisprudential attainments registered in Italy in the matter of interim measures granted by an administrative Court.

[5] **Council of State**, **ord. n. 5009/2011**, on a denial of transfer of an official in spite of the health conditions of his spouse; **TAR Calabria**, ord. n. 28/2013, on confidential information of the Prefect on Mafia-like nature of the claimant's acquaintances; **TAR Lombardia**, **ord. n. 379/2013**, on the expiry of a concession of a public space in a protected area to exercise a commercial activity, and the duty of the Administration to indicate another equivalent pitch outside the area; **TAR Toscana**, **ord. n. 809/2011**, on the denial of authorization to exercise games by means of visual display units.

6 **Council of State**, **ord. n. 4084/2011**, on a denial of updating of residence permit for foreigners; **TAR Lazio**, **ord. n. 1808/2012**, on a denial of concession for the construction and exercise of a clearance space in the Grand Ring Road in Rome; **TAR Lombardia, Brescia ord. n. 111/2012**, on the revocation from the office of town councillor for non attendance at the meetings: the act merely took formal note of the justification given by the party concerned, without however considering it, with an evident lack of reasoning; **TAR Sicilia**, **ord. n. 561/2013,** on a denial of authorization to the transfer of a chemist's shop from the centre of the town to another city district: the administrative act lacked in reasoning, not having duly considered the factual concentration of chemist's shops in the centre - it has been ordered to the Administration to evaluate the request again, primarily with reference to the new seat indicated by the claimant and eventually also to different seats to be proposed, if necessary, by the Administration itself, also taking into consideration the consumers' wants.

1) SUSPENSIVE ORDERS: right to health and scientific research (The Stamina Method), environmental law (The lagoon of Venice), state aid (Airports of Milan), competitive procedures;

a) Right to health and scientific research - <u>The Stamina Method</u> ([7]) : on the experimentation of the "stamina method", proposed by a private foundation, the Court suspended the ministerial decrees concerning the appointment of a scientific Commission for the experimentation of the method (due to a lack of objectivity and impartiality of the members) and the following acknowledgment by the Ministry of the negative opinion expressed by the Commission on the experimentation itself (due to incompetence and cursory investigation of the Commission);

b) Environmental law - **The lagoon of Venice** ([8]) : on a severe limitation of transit in the Canal of Giudecca for passenger ships of a certain gross tonnage, introduced by the Harbour Office of Venice for the protection and safeguard of the natural environment of the Lagoon of Venice; the Court suspended the act for infringement of the principle

[7] A very famous case in a sensitive matter (health and scientific research) has concerned the ministerial decrees on the experimentation of the "stamina method", contested by a private foundation proposing this method. The decrees concerned the appointment of a scientific Commission for the experimentation of the method and the following acknowledgment by the Ministry of the opinion expressed by the Commission on the exclusion of the experimentation of the stamina method.
In the precautionary phase the Court has suspended both the decrees (**TAR Lazio**, **ord. n. 4728/2013**), having deemed that:

- in the nomination of the scientific commission for the clinical experimentation has not been granted the objectivity and impartiality of the judgment, thus harming the work of the whole organ, where the members have approached the experimentation in a biased way, having already expressed a negative opinion on the method before examining the pertaining documentation;
- in the acknowledgment of the negative opinion expressed by the Commission, the Ministry has not considered that no legal provision entrusts the Commission with the task of evaluating the existence of conditions to initiate the experimentation; in any case, the decision of initiating or not the experimentation would have required a thoroughly investigation than the one – fast and cursory - made by the collective organ.

8 The Harbour Office of Venice, in alleged execution of a ministerial decree (D.M. n. 79/2013), had issued an order establishing: for the year 2014 a limitation of transit in the Canal of Giudecca of passenger ships of a gross tonnage superior to 40.000 GT; for the year 2015 a prohibition of transit in the Canal of Giudecca of passenger ships of a gross tonnage superior to 96.000 GT.
The object of the measure was the protection and the safeguard of the natural environment of the Lagoon of Venice.
The undertaking in charge of the handling of traffic operations in the city port contested the act.
The administrative court (**Tar Veneto**, **ord. n. 178/2014**) suspended the order for infringement of the principle of graduality set in the mentioned decree, for which the limitation of transit could be provided only on condition of the availability of alternative practicable waterways: the order lack this specific requirement.
Besides the order lacked an adequate preliminary investigation on the factual elements and of risks connected to the transit in the canals in question, especially of ships of such tonnage, and a proper balance of elements which founded the limitations imposed.

of graduality set out in the ministerial regulation, since the act had not considered the possible availability of alternative practicable waterways.

c) State aids - Airports of Milan ([9]) : on a note of the Italian Administration concerning the starting of an administrative procedure for the recovery of a very relevant amount of money (about 452 million euro), unduly transferred from a parent company to a totally controlled company on the occasion of a capital increase made within a corporate group, in charge of the management of airport services in Milan, in alleged violation of art. 107 of the Treaty; the note, based on a decision of recovery of the European Commission, had been served to the Municipality of Milan as shareholder of the parent company.

The Court suspended the act, having held the illegitimacy of the request for recovery towards the Municipality, which was a mere shareholder of the private legal entity making the capital increase, and also the heavy and irreparable damages deriving from the execution of the act to the Municipality of Milan and to the Milan airports.

However, the judge of appeal reformed the suspensive order owing to the superiority of the public interest, including the general interest of the European Community.

d) competitive procedures (public tenders and procurements, selective procedures): in competitive procedures the suspensive order represents an ordinary

[9] In particular, the Municipality contested the acts of the procedure before the administrative court in Milan, asking for the annulment and, as a provisional measure, for the suspension of them.
The court granted the suspension of the acts (**Tar Lombardia, III, ord. n. 553/2013**), having considered:
a) on one hand that a proceedings on the validity of the decision of the Commission was already pending before the Tribunal of the European Union;
b) on the other hand that at a cursory examination the grounds of the claimant did not appear without foundation :
- in particular, the transfer of money in the period 2002-2010 for the capital increase of SEA Handling S.p.A., totally controlled by SEA S.p.A., was not to be referred to the Municipality of Milan but to the private legal entity Sea spa, of which the Municipality was a mere shareholder; as an effect, the request for recovery towards the Municipality was illegitimate;
- from the execution of the contested note a very heavy and irreparable damage would derive to the Municipality of Milan considered as a public administration and as a representative entity of the territorial community; the subsequent recovery of the sum from SEA spa would determine its insolvency and probably its bankruptcy with very serious consequences for the employees (about 2300) and for the regular execution of handling operations at the Milan airports.
But the judge of appeal reformed the suspensive order of the 1st instance Court and rejected the request for interim measures, having deemed the superiority of the public interest, included the general interest of the Community, also considering the request from the European Commission to give prompt execution to the decision of recovery (**Council of State, IV, ord. n. 3756/2013**).

instrument to give interim relief to a participant who has contested a positive act of the procedure, such as the evaluation of the technical or economic offer of an undertaking, the admission of a participant to the procedure, the evaluation of qualifications or tests of a participant, the minutes of the Commission, the provisional or final classification of the participants, the nomination of the winning participant, the adjudication of the public contract to an undertaking.

In public tender procedures it is relevant to notice that the judge has traditionally been reluctant to grant an interim measure in cases in which the Administration had already close the contract to be adjudicated (Council of State, V, ord. n. 5207/2011).

This trend has lately changed; in most cases the judicial suspension has been granted, although limited to the effects of the adjudication and with a remand to the Administration for a decision on the contractual relationship with the third party until a pronouncement on the merits was delivered (Council of State, IV, ord. n. 1680/2013; id., VI 5810/2010). In some cases however interim measures have directly concerned the effects of the contract already closed (Council of State, IV, decr. n. 1590/2013; id., V, ord. n. 4677/2011).

2) PROPULSIVE ORDERS (REMANDS): education (National qualifying examinations for Senior Lecturer), telecommunications (the transition to the digital television).

e) Education - National qualifying examinations for Senior Lecturer (10): In the precautionary phase of the proceedings against a denial of qualification, interim

10 In the recent animated litigation brought against the Ministry of Education in matter of national qualifying examinations for Senior Lecturer – associate professor, in the precautionary phase the Court has sometimes given interim measures by issuing a remand to the Administration for a new examination of the single candidates by a different Commission, in cases of:

- an absence in the first Commission of experts in the peculiar scientific area of the candidate (**Tar Lazio, ord. nn. 1332/2014 and 1351/2014);**
- a divergence in the evaluation of the Commission from the opinion expressed by the appointed external expert (**Lazio, ord. n. 1113/2014)**;
- inadequacy of the evaluation of the publications of the candidate (**Tar Lazio ord. n. 1115/2014);**
- a lack of evaluation of the candidate's qualifications and curriculum vitae (**Tar Lazio, ord. n. 1347/2014);**
- inconsistency between the final judgment of inability rendered by the Commission and the positive evaluations given by single members **(Tar Lazio, ord. n. 1363/2014).**

measures have been given in the form of punctual remand to the Administration for a new examination of the single candidates to be operated by a different Commission, in adherence with the specific indications given by the Chamber (the presence of experts in the peculiar scientific area of the candidate; the consistency between the final judgment rendered by the Commission and the evaluations given by single members; the relevance of the opinion expressed by the appointed external expert; the adequacy of the evaluation of the candidate's publications, qualifications and curriculum vitae; an so on).

f) Telecommunications - the release of digital radio frequencies in Band 800 MHZ ([11]): a brilliant example of the intervention of the administrative judge in the precautionary phase of the proceedings to grant interim measures has been lately offered by litigation in the matter of radio and video broadcasting, in which the judge has tried to give substantial protection to the position of the applicants by granting the formal respect and the correctness of the administrative procedures concerning the transition to the terrestrial digital television.

In particular, with regard to the release of frequencies in "Band 800 Mhz" - devoted to the broadband mobile services and previously attributed to local operators in regions already digitalized - legislative provisions have introduced a form of voluntary release of the frequencies in question to the State for a valuable consideration.

In this case the role of the administrative judge has been decisive to grant the largest participation to the procedure, by ordering the Ministry to re-open the terms – already

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[11] In Italy, the transition of video broadcasting to the digital system has suffered from factual circumstances and legal criticalities linked to the previous disorderly, unregulated asset of the ether, resulting in a heavy, unusual and animated ligation before the administrative judiciary, on the part of all kind of operators, national and local, incumbents and minor operator. In controversies where radio frequencies, which are a public and scarce and so a contestable resource, are demanded by different operators, each alleging a plausible preferential title (the area of service already exercised, the prior use of the transmitting plant, the good faith in using the radio frequencies) the principal question that the judge had come to pose to himself concerned the exact "role" to be attributed to the Court in such a sector: a neutral examiner of the legitimacy and legality of the acts of the Administrations involved in the allocation and allotment procedures of the frequencies, or otherwise a sort of Super Authority which recognizes and grants the rights of the claimants, till he comes himself to assign the right channel to the just operator? The answers articulated by the actual pronouncements have gone in the first direction.

Nevertheless the judge has played a central role in the definition of the market of digital television as a whole.

At the end of 2010 the Italian Government had to release the frequencies in "Band 800", in order to devote them to the broadband mobile services according to international agreements and European provisions.

With reference to regions not yet digitalized, where the switch off of analogical transmissions had taken place without allotting frequencies in "band 800", in some cases the Court has ordered the Administration a new examination of the situation of the claimant operators not usefully qualified in the public procedures called for the assignment of the frequencies (**Council of State, ord. n. 1296/2012; TAR Latium, ord. n. 2174/2012, id., n. 3046/2012).**

elapsed – so that the local broadcasters, after an initial tepid attitude towards the relevant procedure, could assent the release, as this would correspond to the general interest to the widest participation of the operators (TAR Latium, ord. n. 1978/2012 and n. 1979/2012); such measures made it possible to maximize the participation and, as an effect, to readdress the following behaviour of the Administration and set limits to future litigation in the matter.

3) POSITIVE ORDERS: telecommunications (the transition to the digital television); competitive procedures (public tenders and procurements, examinations, qualifying examinations: the admission with reservation, i.e. *sub condicione*); telecommunications (Centro Europa 7);

g) telecommunications (the transition to the digital television) : still with regard to the release of the frequencies in "Band 800 Mhz", it is interesting to mention that in areas where the voluntary release of band 800 had not been completed, the Ministry initiated procedures of elimination. In cases of exclusion of operators from the classifications giving right to the assignment of digital frequencies, the Court – in presence of the prescribed legal requirements for granting an interim measure - has sometimes arrived to directly authorize the operator to go on using the frequency previously held (Council of State, ord. n. 1196/2013; id., n. 1620/2013, n. 2552/2013; TAR Latium, ord. n. 266/2013, id., n. 546/2013, n. 547/2013, n. 1271/2013, n. 1559/2013, n. 5188/2013), or to occupy another resource having the same characteristics, to be identified by the Ministry (TAR Latium, n. 571/2013; id., n. 851/2013 and n. 4987/2013).

h) competitive procedures (public tenders and procurements, examinations, qualifying examinations: the admission with reservation): I will not quote any particular case concerning the measure in question, because the admission with reservation has become the ordinary way to protect the interest of the applicant any time he contests an act of exclusion from a tendering or a selective procedure or from examinations and qualifying procedures.

The admission with reservation in competitive procedures is a meaningful example of an atypical use of the interim instrument and represents one of the first expressions of the evolution of the interim protection from a measure aimed at preserving the status quo of the applicant while waiting for a decision on the merits, to an instrument of temporary transformation of the existing situation with propelling rather than conservative purposes.

Against an act of exclusion from a competitive procedure, the uselessness for the applicant of a mere suspension of the act made it necessary, in process of time, to elaborate a provisional atypical interim measure, able to correspond with the needs of protection of the affected party: the admission *sub condicione* to the procedure, i.e. a positive act of the judge provisionally operating though subject to the final scrutiny on the merits of the pending claim. And the effect of this provisional measure is not only the admission with reservation to the procedure or to the exam, but also the utilization of the relevant title – in case of positive result of the procedure – although with reservation of the final result of the pending claim; provided, of course, that the titles and qualifications *medio tempore* obtained by the applicant unavoidably decay in case of unfavourable judgment.

i) the case Centro Europa 7: a final reference to the epic case of Centro Europa 7 represents a must. I assume that the audience is familiar with it.

It was the national private television operator most damaged from the application of the Italian transitory regimes in the radio and video broadcasting sector, holding rights to broadcast but having no radio frequencies to exercise the broadcasting.

After a long lasting controversy this operator has recently brought a new action before the administrative judge in order to have the Italian Administration comply with the administrative agreement closed with the Ministry of Economic Development in execution of the judicial decisions closing the long lasting controversy, stating the right of the operator to have frequencies in order to exercise his rights to broadcast and ordering the Ministry to pronounce again on the demand for frequencies from Europa 7

(12). The frequency had then been allotted in 2008 but it was not sufficient to respect all the technical conditions provided in the Agreement; in particular, the operator had obtained the due frequency and the pertaining plants indicated in the Agreement, but not the patch frequencies necessary to reach all the areas of the national territory as provided in the Agreement, especially those connected to the main plant of Monte Penice in Lombardia. And so in the precautionary phase, the Chamber has supplemented that radio frequency by ordering the Administration to assign the operator free frequencies to broadcast from the plant of Monte Penice (TAR Latium, ord. nn. 1220/2012, 7206/2012 and decision n. 3516/13).

The case at hand is exemplary also from the point of view of the effectiveness of provisional measures, which can be brought to execution through an enforcement proceedings – conceived as an incident of the precautionary phase - in case of non compliance of the Administration with the judicial interim order. As a matter of fact, the Ministry has not given execution to the interim order of its own free will; the applicant has then initiated an enforcement action of the provisional measures so that the Chamber has ordered the Administration to execute the previous interim measure; the measure has been finally executed by a third subject, the so called *Commissario ad acta,* appointed by the judge as an auxiliary of his, to act in compliance with the judicial instructions and in place of the administration, taking any measure required to enforce the decision.

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At this point, before closing my short intervention, I will provide some explanatory figures.

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12 The decision of the case Europa 7 had needed a reference to the European Court of Justice for a preliminary ruling.
The Court of Justice had held that art. 49 of the Treaty and, from the date on which they became applicable, the European Directives on electronic communications, as well as Article 4 of the Competition Directive, must be interpreted as precluding, in television broadcasting matters, national legislation, the application of which makes it impossible for an operator holding rights to broadcast in the absence of broadcasting radio frequencies granted on the basis of objective, transparent, non-discriminatory and proportionate criteria (**ECG, 31 January 2008, C380-05, "Centro Europa 7" v. Ministry of Communications and Authority for the Guaranties in the Communications).**
The Council of State then ordered the Ministry of the Economic Development to pronounce again on the demand for frequencies from Europa 7.

In 2013 at Tar Latium - Rome about **13.000** appeals against the Public Administration have been filed, of which roughly **6.000** (i.e. **47%**) containing a request for interim measures. Of these requests, only **1.440** have been granted (i.e. **23.21 %**), 2.246 have been rejected (i.e. 36.21%) and the remaining 40% has had a different result.

The statistical data at hand express a confident approach of the public in the request for an interim protection; they show as well a prudent attitude of the judge to grant the requested measure, a special attention in verifying the existence of the legal requirements.

Therefore my conclusion is that the precautionary phase certainly represents a critical moment of the administrative proceedings; it would be consequently desirable to preserve and even emphasize the significance of such a phase since it qualifies the judicial system with the characters of transparency and reliability, and definitely increases the efficiency of the jurisdiction as well as the confidence and the satisfaction of the customers with the judicial system as a whole.

CONFERENCE « L'AVENIR DES TRIBUNAUX DE L'UNION EUROPEENNE »
(Bruxelles, le 28 avril 2014)

Géraud SAJUST de BERGUES
Directeur adjoint des affaires juridiques au
ministère français des Affaires étrangères
Agent de la France devant
les juridictions de l'Union européenne

TEXTE DE MON INTERVENTION

Introduction : contrairement à ce qui est le cas des tables rondes précédentes, le thème de notre table ronde est très vaste et il offre une infinie variété de sujets. Je profiterais donc de la liberté qui m'est offerte pour me concentrer sur deux points : d'une part, sur les nouvelles contraintes imposées par la Cour de justice en matière de longueur des actes de procédure et, d'autre part, sur la place des Etats membres intervenants dans les recours directs, en particulier les recours interinstitutionnels, et les procédures de demande d'avis.

1) Les nouvelles contraintes imposées par la Cour de justice en matière de longueur des actes de procédure

- L’article 58 du nouveau règlement de procédure de la Cour de justice habilite désormais celle-ci à fixer la longueur maximale des mémoires ou observations déposés devant elle.

- Cette disposition est différente de celle initialement proposée par la Cour, qui prévoyait que la Cour était habilitée à déterminer les conditions dans lesquelles la traduction des mémoires ou observations déposés dans une affaire peut, en raison de leur longueur excessive, être limitée à celle des passages essentiels de ces mémoires ou observations. Cependant, cette proposition s’est heurtée à l’opposition de nombreux Etats membres (autres que la France) qui se sont déclarés en faveur de la solution alternative d’une limitation de la longueur même des mémoires et observations écrites, à l’instar de ce que faisait déjà le Tribunal.

- Il n’est évidemment pas question de contester la nécessité d’une disposition destinée à limiter le travail de traduction d’une Cour dont la charge de travail s’accroit de jour en jour et qui, contrairement à la Cour internationale de justice et à la Cour européenne des droits de l’homme, ne compte pas deux mais vingt-trois ou vingt-quatre langues de procédure.

- La Cour de justice n’a pas utilisé sa nouvelle habilitation pour adopter une décision mais, dans ses instructions pratiques publiées le 31 janvier 2014, elle a indiqué que les requêtes et les mémoires en défense ne devraient pas excéder 30 pages, les mémoires en réplique et en duplique 10 pages, les mémoires en intervention 10 pages, les requêtes en pourvoi et les mémoires en réponse 25 pages et les observations préjudicielles 20 pages.

- Malgré leur caractère indicatif, ces limites apparaissent beaucoup plus strictes que celles du Tribunal, qui oscillent entre 20 et 50 pages (hors propriété intellectuelle), d’autant que la Cour impose l’interligne 1,5 quand le Tribunal admet l’interligne 1.

- La France, qui a, je crois, une réputation de synthèse et de clarté devant la Cour, s'efforce évidemment de respecter ces limitations. Cependant, avant que les nouvelles règles ne soient en vigueur, il lui est arrivé de dépasser largement ces limites. Par exemple, son pourvoi dans l'affaire C-559/12 P, France/Commission (« Garantie implicite de l'Etat/La Poste ») comptait 49 pages, son mémoire en défense dans l'affaire C-237/12, Commission/France (« Pollution par les nitrates »), comptait 71 pages (étant entendu que la requête de la Commission en comptait 77), ses observations écrites dans l'affaire préjudicielle fiscale C-310/09, Accor, comptaient 45 pages, et son mémoire en intervention dans l'affaire C-146/13, Espagne/Parlement et Conseil (« Coopération renforcée brevet unitaire »), comptait 51 pages.

- Ainsi, même en rabotant les marges et en supprimant le rappel préalable des dispositions applicables, je peux vous dire, pour prendre des exemples tous récents, qu'il n'a pas été facile pour les agents de la France de limiter à 10 pages leur argumentation sur des questions aussi nouvelles pour la Cour que : 1) la question relative à la marge de manœuvre dont doit disposer la Commission dans le cadre de la négociation d'un accord international (affaire C-425/13, Commission/Conseil, « Système coordonné d'échanges de quotas d'émission avec l'Australie »), et 2) la question relative à la conclusion par la Commission, sans habilitation préalable du Conseil, de mémorandums of understanding non contraignants avec des pays tiers (affaire C-660/13, Conseil/Commission).

- Par conséquent, sans vouloir méconnaître les différences entre les contentieux de la Cour et du Tribunal, il faudra que la Cour applique ses nouvelles règles en matière de longueur maximale des mémoires et observations de manière souple. En effet, l'inconvénient des limites posées à la longueur des mémoires et observations, c'est qu'elles ne tiennent pas compte de circonstances comme la complexité des affaires, le nombre de questions préjudicielles posées par la juridiction de renvoi (notamment les juridictions britanniques) ou encore le

rôle particulier que joue l'Etat membre de la juridiction de renvoi en ce qui concerne l'information de la Cour sur le contexte juridique national. Je rappelle que c'est d'ailleurs pourquoi la Cour avait proposé initialement une autre solution.

2) La place des Etats membres intervenants dans les recours directs, en particulier les recours interinstitutionnels, et les procédures de demande d'avis

- Par l'article 127 de son nouveau règlement de procédure, la Cour a entendu, disait-elle dans son exposé des motifs, rappeler que l'intervenant ne se confond pas avec la partie principale. Cet article dispose ainsi que l'intervention ne confère pas les mêmes droits que ceux conférés aux parties et, notamment, celui de demander la tenue d'une audience.

- La France n'entend évidemment pas contester un article qu'elle a accepté au Conseil et qui, au demeurant, n'a fait que consacrer une pratique de la Cour (même si celle-ci ne reposait pas toujours sur une base évidente).

- Cependant, ce nouvel article du règlement de procédure de la Cour est l'occasion de s'interroger sur la place que la Cour entend réserver aux Etats membres qui interviennent dans des recours directs, en particulier dans des recours interinstitutionnels (qui n'ont jamais été aussi nombreux), ainsi que dans les procédures de demande d'avis.

- En effet, il est normal que, en tant que « Herren der Verträge », les Etats membres s'intéressent de près à ce type d'affaires et qu'ils n'entendent pas laisser au seul Conseil le soin d'argumenter et de défendre leurs positions.

- Cependant, avec la complexité croissante des questions institutionnelles et la limitation à dix pages des mémoires en

intervention, il peut être difficile pour un Etat membre d'exposer clairement son argumentation.

- En outre, lors des audiences dans lesquelles un nombre important d'Etats membres sont présents, la Cour n'interroge pratiquement toujours que les institutions, afin d'éviter sans doute le risque que tous les Etats présents veuillent reprendre la parole et ne prolongent ainsi la durée de l'audience. Il semble cependant que la Cour se prive ainsi de précisions ou de réflexions qui pourraient lui être utiles. Ainsi, la Cour devrait, au contraire, inviter les Etats membres à réagir, s'ils le souhaitent, au fur et à mesure, aux réponses des institutions aux principales questions qu'elle pose. Certes, l'Etat membre a, en principe, la possibilité de répliquer en fin d'audience mais cette réplique finale, que la Cour n'encourage guère d'ailleurs, ne dissipe pas le sentiment que peuvent éprouver parfois les Etats membres présents d'être laissés à l'écart du débat.

- Ce sentiment, les Etats membres ont pu l'éprouver particulièrement au cours des audiences dans les procédures de demandes d'avis, qui présentent la particularité de réunir un nombre très important d'Etats membres (21 Etats membres présents dans l'avis 1/09 « Juridiction du brevet », 20 dans l'avis 1/13 « Convention de La Haye sur l'enlèvement international d'enfants » et 22 - record absolu - dans la demande d'avis 2/13 « Adhésion de l'Union à la CEDH », dont l'audience va prochainement avoir lieu).

- C'est pourquoi, pour les affaires impliquant un grand nombre d'Etats membres intervenants et qui se signalent donc par l'importance que les auteurs des traités leur accordent, la Cour ne devrait pas hésiter à programmer, si nécessaire, des audiences plus longues. Il en va d'autant plus ainsi que le nouveau règlement de procédure permet désormais à la Cour de se dispenser d'audiences dans les affaires dans lesquelles elle estime être suffisamment informée par la procédure écrite.

- De ce point de vue, la prochaine audience dans la demande d'avis 2/13 va dans le bon sens. En effet, l'audience organisée par la Cour est programmée pour durer jusqu'à une journée et demi et non plus seulement une journée comme pour les audiences dans les précédentes demandes d'avis.

La plume et la voix devant la Cour de Justice de l'UE. La flexibilité de la procédure

Massimo Condinanzi

L'AVENIR DES TRIBUNAUX DE L'UNION EUROPÉENNE

Bruxelles, 28 avril 2014

2012-2014 : Le départ d'une nouvelle saison pour la justice de l'Union européenne

- Grandes révisions des textes qui régissent les procédures devant la Cour de justice de l'UE:
- Modifications statutaires publiées au JOUE L 228 du 23 août 2012;
- Modifications du règlement de procédure de la CJ publiées au JOUE L 265 du 29 septembre 2012;
- Projet du nouveau règlement de procédure du Tribunal transmis au Conseil le 14 mars 2014;
- Modifications des règles de *soft law* cohérentes avec les changements introduits dans le Statut et dans les règlements de procédure.

Des modifications de structure

- Comparée aux modifications précédentes, la saison de modifications 2012-2014 nous apporte une grande nouveauté:
- Les modifications adoptées et proposées, loin d'être que des détails et de changements mineurs aux règles de «cuisine interne», pour gagner en efficacité et améliorer l'efficience, abordent la **structure** des textes et du cadre règlementaire faisant-nous oublier que l'origine du contentieux européen est à rechercher dans la Cour CECA.
- Au niveau de la CJ, la nouvelle structure est symbolisée par la prévision du titre troisième du règlement de procédure consacré aux renvois préjudiciels, mais aussi par la prévision d'un titre deuxième consacré aux dispositions procédurales communes.
- Au niveau du Tribunal, l'effort de réorganiser la structure du règlement passe par l'introduction d'une claire distinction entre les trois foyers de contentieux dont il a à connaître: recours directs, propriété intellectuelle, pourvois.

Le Statut de la CJUE reste à l'abri des grandes modifications

- Toutes les modifications réglementaires ont été apportées **sans changements importants** à la source de base pour la « procédure devant la Cour de justice »: le **Titre III du Statut** de la Cour de Justice de l'Union européenne.
- Les seules modifications aux articles du 19 au 46 du Statut apportées par la réforme du mois d'août 2012 concernent:

A) la suppression de la lecture du rapport d'audience comme élément constitutif de la phase orale;

B) la prévision des pouvoirs du Vice-Président, à côté des ceux du Président, dans le cadre de l'article 39 St.

La règle (encore aujourd'hui) de base: l'article 20 du Statut

- La règle de base pour l'organisation et l'articulation de la procédure devant la CJUE est donc, encore aujourd'hui, l'art. 20 St. La procédure comporte **deux phases**:
- Phase **écrite** qui comprend: communications aux parties des requêtes (voir mémoires, défenses, observations) et **éventuellement**, des répliques;
- Phase **orale** qui comprend: auditions par la Cour des agents, conseils et avocats des parties et des conclusions de l'avocat général.
- **Seules dérogations**:
- A) absence dans la phase écrite des répliques;
- B) absence de conclusions de l'avocat général (art. 20, dernier alinéa, St. – art. 252, deuxième alinéa, TFUE).

Plume et voix: combinaison ou hasard?

- Aujourd'hui, les combinaisons entre les différentes façons de moduler la phase écrite et la phase orale au niveau des règlements de procédure nous montrent un *scenario* assez articulé, où la justification du choix répond à une logique du cas d'espèce.
- Procédures « communes »

Cour de justice - Recours directs

- **Phase écrite**: le modèle paradigmatique
- a) Requête / Mémoire en défense;
- b) Réplique / Duplique (pouvoir du Président de diriger l'attention des parties – art. 126 RP).
- **Phase orale**: soumise à une décision discrétionnaire de la Cour et à condition qu'il y a une demande motivée d'audience de plaidoiries (art. 76 RP).

Cour de justice - Renvois préjudiciels

- **Phase écrite**: les intéressés visés par l'art. 23 St. sont autorisés à présenter des observations écrites.
- **Phase orale**: soumise à une décision discrétionnaire de la Cour et à condition qu'il y a une demande motivée d'audience de plaidoiries (art. 76 RP). Dérogation: si il y a une demande motivée d'audience de la part d'un intéressé visé à l'art. 23 St. qui n'a pas déposé des observations écrites (*risque d'abus de procédure? – art. 97 RP et aff. jointes C-403/08 et C-429/08, Football Association Premier League)*.

Cour de Justice - Pourvois

- **Phase écrite**: Pourvoi / Mémoire en réponse. Importantes limitations au niveau des répliques (art. 175 RP): demande motivée, autorisation du Président qui l'estime nécessaire. Nombre de pages et objet des mémoires limités par le Président.
- **Phase orale**: soumise à une décision discrétionnaire de la Cour et à condition qu'il y a une demande motivée d'audience de plaidoiries (art. 76 RP).

Tribunal de l'UE – Première instance

- **Phase écrite**: le modèle « quasi-paradigmatique »
- a) Requête / Mémoire en défense;
- b) Réplique et Duplique, sauf que le Tribunal décide qu'un deuxième échange n'est pas nécessaire [« dossier suffisamment complet » – art. 83 (p)RP].
- **Phase orale**: admise d'office ou à la demande (motivée) d'une partie principale. En l'absence de demande le Tribunal peut décider de statuer sans phase orale [art. 106 (p)RP]. *Ainsi, a été prévue que le Tribunal puisse statuer sans phase orale. Pas de lien entre le deuxième échange et la phase orale*

Tribunal de l'UE - Pourvois

- **Phase écrite**:
- Requête en pourvoi / Mémoire en réponse;
- Réplique / Duplique: sur demande motivée et si le Président le juge nécessaire [art. 201 (p)RP] – Même que pour les pourvois à la CJ.
- **Phase orale**: l'art. 207 (p)RP admet la phase orale sur demande, sauf pour le Tribunal le pouvoir de s'estimer « suffisamment éclairé » et de statuer sans phase orale.

Tribunal de la Fonction Publique

- **Phase écrite**: limitations
- Requête / Mémoire en défense;
- Répliques: si estimées nécessaires par le TFP.
- **Phase orale**: admise, sauf que les parties ne soient d'accord à y renoncer et à conditions qu'il y a eu l'échange des répliques.

- Au niveau du TFP, les écartements de la règle de l'art. 20 St. trouvent une base juridique dans l'annexe I au Statut (art. 7.3).

Remarques

- L'art. 20 St. connait un certain niveau de **souplesse** dans la procédure au niveau de la **phase écrite** (les répliques). Par contre, **l'évolution pratique** des règles de procédure démontre que la **souplesse** est exigée surtout au niveau de suppression de la **phase orale** et non pas de la phase écrite, où le deuxième échange de mémoires reste, surtout dans la pratique, règle.
- Apparemment, c'est donc la phase orale qui gêne beaucoup les juges du Luxembourg.

Suggestions

A) Prévoir une **modification** à l'art. 20 St. pour rendre **éventuelle l'audience de plaidoirie**, car il n'est pas acceptable qu'elle soit devenue éventuelle en violation flagrante de la règle de droit (primaire). Les artt. 53.1 RP CJ et 63 (p)RP T n'assurent pas la cohérence avec le St.

B) **Lier la tenue de l'audience au deuxième échange des mémoires écrites**: en principe, il serait acceptable de voir disparaitre l'audience où le deuxième échange soit intervenu et de la maintenir où il n'y a pas eu deuxième échange. **Dans la procédure préjudicielle**, où le deuxième échange n'est pas prévu, l'audience devrait rester une garantie pour les parties. La réponse par ordonnance motivée (art. 99 RP CJ) assure déjà un bon degré de flexibilité.

C) S'il est vrai - comme observe le (p)RP T que **l'absence d'audience** est de nature à permettre à la juridiction et à son greffe d'**utiliser de manière optimale les ressources** à disposition en profitant des **économies** réalisées pour accomplir d'autres tâches, il ne serait pas inconcevable d'**imaginer l'audience tenu par le seul juge rapporteur** (et l'avocat général), qui est censé d'être le mieux informé du dossier.

Merci

Massimo Condinanzi

Professeur Droit de l'Union europeenne – Università degli Studi di Milano.