



CCBE PRELIMINARY RESPONSE TO HOUSE OF LORDS INQUIRY ON THE WORKLOAD OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

Conseil des barreaux européens – Council of Bars and Law Societies of Europe

association internationale sans but lucratif

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CCBE Preliminary Response to House of Lords Inquiry on the Workload of the Court of Justice of the European Union

1. The Council of Bars and Law Societies of Europe (CCBE) welcomes this further opportunity to contribute to the work of the European Union Committee of the House of Lords.
2. Given that the focus of this inquiry is on the ability of the Courts to handle their existing caseload, the questions will be addressed separately for the Court of Justice and for the General Court.
3. In summary, whilst we note the progress which has been made by the Court of Justice in the rate of disposal of cases, the situation as regards delays before the General Court is wholly unacceptable. Opportunities have been available to the Member States over the past decade to avoid or at least to alleviate the current situation but the range and scope of EU activities has increased substantially in the last ten years without a corresponding increase in judicial resources for the General Court which serves as the EU Administrative Court, the EU Trade Mark appeals court and the EU Competition/State Aid Appeals Court. The CCBE view is that structural change is urgently necessary in the General Court.
4. We attach as Annexes to this evidence copies of the following documents:
 - a. CCBE letter concerning delays within the General Court sent to the Permanent Representations of all EU Member States, the Council of Ministers, European Parliament, Commission and Court of Justice (Annex 1);
 - b. CCBE Proposals regarding amendments to the Procedural Rules of the Court of Justice dated September 2010 (Annex 2).
5. The EU Civil Service Tribunal is not addressed separately in this document. Given the relatively short time since this Tribunal was formed and an average duration for cases filed with the Civil Service Tribunal of less than 18 months, whilst there is likely to be room for improvement, the situation is wholly different to that before the General Court.

Court of Justice

Q.1 What are the significant issues highlighted by the statistics relating to the past and current workload of the Court of Justice, the General Court and the Civil Service Tribunal?

6. The CoJ has made very significant progress in reducing delay in processing cases (to less than 18 months on average) and has been able to respond to urgent requests for preliminary rulings within a period of less than three months.

Q.2 Are the turnaround times for disposal of cases comparable to other courts of equivalent standing?

7. This varies across all EU Member States but our personal experience suggests that this is either comparable to or better than courts of equivalent standing.

Q.3 Are the turnaround times for disposal of cases acceptable to litigants?

8. Broadly, yes, given the considerations covered below.

Q.4 What considerations, both from the recent changes brought about by the Treaty of Lisbon and otherwise, are likely to affect the workloads of these courts and to what extent?

9. The extension of EU law brought about by the Treaty of Lisbon will lead to:
 - a. A significant extension of Community law, in particular through the incorporation of Title IV of the EC Treaty as part of mainstream Community law, thus including the fields of criminal, asylum and family law as mainstream EU law;

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- b. Preliminary references in the field of criminal law, asylum and judicial cooperation in civil matters (e.g. Brussels I and II Regulations) where hitherto such references have either not been available or have only been available from courts of final appeal;
 - c. A degree of displacement of cases from Strasbourg to Luxembourg is to be expected, where human rights issues arising within the scope of EU law under the Charter can be the subject of references for preliminary ruling to Luxembourg (subject to the filter provided by the national court's discretion).
10. The impact is difficult to estimate but is expected to be substantial – see for example the number of challenges to European Arrest Warrants currently coming before the courts of Member States.

Q.5 Will accession by the EU to the ECHR affect the working of these courts?

11. As for the incorporation of the Charter by Article 6(1) TEU, accession by the EU to the ECHR is a further step in the gradual development of the protection of fundamental rights by the EU. It should be noted however that the CoJ has been seeking to align its jurisprudence with that of the Strasbourg court for some time.

Q.6 What are the significant challenges and impediments to the courts in handling their workload effectively and expeditiously?

12. The major challenge will be to make further efficiency gains without jeopardising the quality of judgments. There is a particular challenge in the preliminary ruling procedures, as the CoJ is often called to rule on fundamental points and interpretation of EU law, without there being a written procedure with reply and rejoinder and a hearing which allows for extensive interactive debate and consideration. Moreover, these cases tend to have a significant impact on other cases that may be pending before the EU or other national courts and EU law in general. There is however no possibility for parties other than the parties in the particular case to intervene or submit comments and there is no system of amicus curiae intervention or letters.¹In a substantial number of preliminary reference cases, the Court dispenses with the Advocate General's opinion and also with the oral hearing. There are also occasions when the parties to preliminary references file no written observations. Sometimes, but far from invariably, the Commission's written observations canvass various possible responses to the national court's questions. The limitation of procedure in this way, in particular in preliminary reference cases, risks jeopardising the quality of judgments because, without proper assistance from the other stakeholders in the process, the CoJ does not have access to the material on which to give a considered view.
13. Dispensing with the Advocate General's Opinion would seem prima facie more justified in appeals from the General Court where the CoJ already has a first instance judgment.

Q.7 Are there any bottlenecks in the processes of these courts?

14. See general comments in paragraph 12 above. In addition, translation issues with regard to pleadings, judgements etc are complex and can give rise to many difficulties.

Q.8 What measures would improve the working of the courts, bearing in mind the limited possibility of Treaty change?

15. Reference is made to Annex 2. Active case management combined with a real focus on maximising the utility of the oral hearing are capable of assisting the disposal of business. We highlight in particular that part of Annex 2 which deals with the oral procedure proposals: paragraphs 7 (re disclosing a draft of the Advocate-General's Opinion in advance of the hearing) and 12 (deliberation on the day of the hearing).

¹ For CCBE papers which focus on issues of judicial protection, see: http://www.ccbe.eu/index.php?id=94&id_comite=14&L=0

Q.9 What could the Institutions and Member States do to help the Courts dispose of cases more expeditiously?

16. Member States could actively seek to share the best practice of their superior courts with the CoJ. Judge Timmermans, in his retirement speech on 10 June 2010, spoke of the need for the CoJ to seek concrete cooperation with the Supreme Courts of the Member States, either by visits of delegations from those courts or by contacts with the network of Presidents of Supreme Courts, as well as with the Association of Conseils d'Etats and Supreme Administrative Courts of the EU. Judge Timmermans' context was more specifically directed towards reinforcing the legitimacy of the CoJ but it is also valid for procedural issues.
17. It is not only a task for the CoJ but also for Member States to identify innovative and efficient developments in procedure which will make a positive contribution to the work of the CoJ. In the context of its current consideration of amendments to the rules of procedure, the CoJ has asked for suggestions from the Institutions, from the CCBE, and from Member State agents who would therefore be in a position to provide such input.

General Court

Q.1 What are the significant issues highlighted by the statistics relating to the past and current workload of the Court of Justice, the General Court and the Civil Service Tribunal?

18. The issue is one of unacceptable delay. The number of completed cases approaches the number of new cases but the number of cases pending for each year is approximately twice the number of new cases for that year. The result was that for 2009, the average length of proceedings for "Other actions" is excessive (33.1 months) for cases other than intellectual property cases (20 months). Those statistics on the General Court's website do not condescend to particulars as regards the "Other actions".
19. The statistics are also deceptive as they only provide the average duration. However, there are great differences in the length of proceedings and the length of a case seems to be determined not only by the complexity of the factual and legal issues at stake or the cooperation of the parties but also by which chamber is handling the case. Indeed, sometimes fairly complex cases are handled relatively swiftly whereas simple cases take much longer than the average length.
20. It has been identified that the average duration for state aid and competition cases now exceeds 60 months. This is manifestly excessive.

Q.2 Are the turnaround times for disposal of cases comparable to other courts of equivalent standing?

21. This again depends on each Member State but from our experience we do not believe so. For example, the UK Competition Appeal Tribunal averages 7.8 months from introduction to judgment over 2007-2009 albeit our experience suggests that this is exceptionally short.

Q.3 Are the turnaround times for disposal of cases acceptable to litigants?

22. For the above reasons, no. Citizens, as well as the business community are unable to rely on effective judicial protection (itself a general principle of Community law). Average duration of procedure of 50+ months breaches Article 47 of the Charter. It should also be highlighted that the restrictive conditions for interim relief results in a situation whereby interim relief is rarely granted.
23. Moreover the Commission's role under Article 17 TEU is as the guardian of the treaties but "under the control of the Court of Justice of the European Union". In a system where justice does not function without unacceptable delays, the risk for citizens is that the Commission becomes the sole arbiter of what is lawful. This is manifestly bad for the citizen but it is also bad for the Commission which needs guidance in order properly to perform its tasks under Article 17 TEU.

24. Moreover, the fact that the length of a case is unpredictable and more or less beyond the control of the litigants, add an additional element of uncertainty. As a result of the length and unpredictability of the process, litigants risk being discouraged seeking judicial review.

Q.4 What considerations, both from the recent changes brought about by the Treaty of Lisbon and otherwise, are likely to affect the workloads of these courts and to what extent?

25. We believe that recent Treaty changes are likely to have the following effects:

- a. The likely evolution of the admissibility criterion under Article 263 TFEU is that admissibility will become less strict, thereby rendering more applications for judicial review admissible and increasing the workload;
 - b. Upgrading the Charter to give it the status of law is likely to lead to an increase in workload through an increase in the likelihood of successful arguments being raised;
 - c. The increase in the scope of EU law in the fields of visas, asylum and immigration and in police and judicial cooperation in criminal law will lead to an increased workload for the Court of Justice which may therefore transfer further competence to the General Court.
26. The first and second factors are very concrete and will have an immediate effect. The CCBE comments on the first of those factors that, prior to the Treaty of Lisbon, there was widespread unease about the almost total absence of judicial protection under EU law for parties affected by EU Regulations which did not require implementation in national law. Unless such parties could establish individual concern in the sense that the effect on them was unique, they did not have standing to bring an action. The evolution which is marked by Article 263 (although not yet providing the judicial protection which the CCBE has advocated in its various submissions)² is positive for judicial protection but will undoubtedly lead to an increase in applications for judicial review.

Q.5 Will accession by the EU to the ECHR affect the working of these courts?

27. There will be cases where the accession by the EU to the ECHR will be significant, e.g. possible further relaxation of admissibility imposed by Strasbourg jurisprudence; possibly more intrusive judicial review; possible relaxation of interim relief conditions.

Q.6 What are the significant challenges and impediments to the courts in handling their workload effectively and expeditiously?

28. The General Court plays a fundamental role in providing judicial protection. The General Court has to deal with complex and labour intensive cases, raising extensive issues of fact and evidence, as well as important issues of law. The challenge for the General Court is to be able to get on top of its current workload so that it does not fall further behind, whilst at the same time not sacrificing the quality and consistency of its decision making.³
29. The delays stem from the serious deterioration in the backlog of cases pending which, as noted by Advocate General Geelhoed deteriorated between 2000 and 2004 from 512 to 1012.⁴
30. As noted in paragraph 3 above, the General Court serves multiple roles. It is perhaps unsurprising that there has been a steep increase in the number of new cases, from 432 in 2006 to 629 in 2008, and it seems reasonable to regard this as a steep increase and not a temporary spike.
31. The Court now serves twenty-seven Member States; deals with Member State challenges to decisions of the Institutions (e.g. challenging deductions from the Commission's reimbursement to Member States of agricultural expenditure); handles the ever increasing

² CCBE papers are available at: http://www.ccbe.eu/index.php?id=94&id_comite=14&L=0

³ See Presentation of Anthony M. Collins, SC, Bar of Ireland, to the "Quality of Justice" Workshop From 20 to 2020 – Building the CFI of tomorrow on solid foundations - The time factor in proceedings <http://curia.europa.eu/jcms/upload/docs/application/pdf/2009-10/collins.pdf>

⁴ Cases C-403/04 P and C-404/04 P Sumitomo and Nippon Steel v. Commission [2007] ECR I-729, §162-164.

number of appeals in trade mark cases and furthermore the changes introduced by the Lisbon Treaty will also have an immediate effect.

Q.7 Are there any bottlenecks in the processes of these courts?

32. Given the substantial challenges facing the General Court, it can seem to the advocates involved that every stage is a bottleneck. There are challenges at all stages of the procedure, including many procedural decisions to be taken in cartel cases. Certainly it would appear that the stages at the end of the written procedure and at the end of oral procedure are a bottleneck as each case waits its turn.
33. It must be stressed that procedural issues take time to resolve whilst waiting for a judge to give the matter his attention. The impression is also that communications to the Court take a long time to be read. Moreover, today it is not uncommon that it takes 1 year or more between the oral hearing and the delivery of the judgment. In almost no case is the judgment delivered earlier than 8 months after the hearing. Given that at the hearing the Reporting Judge has already sent to the other judges the Rapport Préalable, and that the judges start deliberating immediately after the hearing, these delays point to an important bottleneck. It does not however appear that translating the judgment is the main factor.

Q.8 What measures would improve the working of the courts, bearing in mind the limited possibility of Treaty change?

34. The General Court has itself been active in seeking to improve its functioning through a wide range of procedural improvements. The result is that some cases are processed relatively quickly and effectively, including for example some cases involving challenges by Member States in the agricultural field; some cases involving access to documents. But the picture is very uneven.
35. Given the shifts in EU law, the CCBE does not believe that there will be any significant improvement without a structural change in the organisation of the General Court. The main two options which have been canvassed (see Annex 1) are an increase of judges at the GC combined with a specialised chamber for trade mark cases or a specialised tribunal for such cases, in the model of the Civil Service Tribunal.
36. The specialised chamber would be easier to introduce but has already been tried by the General Court and was not popular among the judges. The specialised tribunal would take longer to introduce (which itself counts against it) but could work well given the easily identifiable block of work which would be removed from the General Court. Other structural options have been discussed in the past, like the possible introduction of a specialised tribunal for competition cases.
37. In addition, three procedural suggestions are made but they would not be a substitute for structural change:
 - a. Active case management with deadlines fixed in advance, sharing of procedural correspondence with the Court, involvement of référendaires in the procedural development of cases etc etc as practised for example in the UK Competition Appeal Tribunal;
 - b. Consideration being given to the appointment of procedural judges to perform the tasks equivalent to “Masters” of the High Court in England and Wales;
 - c. The creation of an electronic case file accessible to the parties (and in part to third parties) via the internet.⁵

Q.9 What could the Institutions and Member States do to help the Courts dispose of cases more expeditiously?

38. As regards the Institutions, the Commission in particular must review its policy of almost systematically challenging admissibility. It may be possible for the Court to consider admissibility as a preliminary issue in some cases but only if the Commission takes a

⁵ See under the heading “Transparency” in Annex 2.

considered view on whether the admissibility point is a good one in each case, including whether a successful argument on admissibility would lead to an absence of judicial protection. It is only in those circumstances that Court time could reasonably be saved by considering admissibility separately from the merits.

39. As regards Member States, the General Court is extremely conscious of its predicament and, in consequence, is very open to constructive suggestions/input from outside the Court. Member States are encouraged to provide such input/support and to propose sharing with the General Court good practice from national courts/tribunals. This might logically come either from Member States or from EU-wide organisations such as the Association of European Competition Law Judges.
40. Given the UK context of this Inquiry and also the fact that the Competition Appeal Tribunal upon its formation borrowed several features of its organisation and procedure from the General Court, it is suggested that the House of Lords might recommend that there be a sharing of best practice between the General Court and the Competition Appeal Tribunal or similar tribunals.