

# CCBE comments on the draft text of the amendments to Protocol No 3 on the Statute of the Court of Justice of the European Union

29/06/2018

The Council of Bars and Law Societies of Europe (**CCBE**) is grateful for the opportunity to comment on the Court of Justice's request (**Request**) for amendments to Protocol No 3 on the Statute.

The Request merits thoughtful consideration, in particular since it touches upon points not previously discussed or foreseen by the Union Legislature and which, if implemented, significantly impacts the nature and structure of the Union judicial system.

The CCBE welcomes the Court of Justice's announced objective of "*providing judicial protection of the highest quality*" and provides the comments below in the hope that the Council and the Parliament will find them helpful when reviewing the Request.

## 1. Background

The Request should be considered against the backdrop of the current provisions in the Treaty foreseeing a possible re-allocation of competence to hear references for preliminary rulings and the possibility to establish "*specialised courts*".

Under Article 3(2) Regulation 2015/2422 amending Protocol No 3 on the Statute, the Court of Justice was requested to submit a report by the end of 2017, and if necessary a request for legislative changes, on possible modifications to the distribution of competence for preliminary rulings.

However, to date the Court of Justice has concluded that it is not appropriate to effect a transfer to the General Court of jurisdiction in relation to preliminary rulings nor to establish "*specialised courts*".

Instead, in the Request the Court of Justice is proposing a different re-allocation of competence within the Union's two tier judicial system. Moreover, the Request also proposes a restriction of the litigants' rights to appeal General Court rulings in certain fields.

While the Union Legislature's 2015 decision to double the number of General Court judges touched upon a question of resources within the General Court, the current Request, less than three years after the latest reform, materially impacts the nature and structure of the Union judiciary.

## 2. Procedure whereby the Court of Justice determines whether certain appeals should be allowed to proceed

The Request seeks to introduce for the first time within the Union law, a procedure whereby the Court of Justice, within its discretion and for certain categories of cases, shall determine if appeals against General Court decisions shall be heard.

The categories of cases to which the new leave to appeal procedure would apply are those in which an appeal procedure within the administrative body must have taken place before the case may be brought to the General Court (e.g. actions against the decision of the Board of Appeal of the European Union Intellectual Property Office<sup>1</sup>). Under the Request, for such cases the Court of Justice will only consider an appeal against a General Court decision if it raises, wholly or in part, a significant issue with respect to the development of EU law or in which the unity or consistency of EU law is at stake.

The CCBE has strong reservations on the possibility of a filter mechanism being introduced. The CCBE is of the view that in principle a two-tier judicial control on both points of law and fact is required, as one finds in most Member States, in both administrative and civil proceedings. This may all the more be appropriate at the level of the EU Courts because their judgments are an important point of reference or binding in many areas of law for national courts.

The CCBE believes that a one-tier system of judicial control would only be sufficient on the basis that such control be of high quality and effective, and an independent, diligent and impartial internal control exist within the institution or agency whose decision is being challenged.

### *a) Categories of cases subject to the proposed filtering procedure*

- First, the CCBE suggests to make it clearer in the draft new Article 58a of the Statute that the filtering procedure proposed in the Request applies in cases where an intra-agency appeal procedure is a mandatory requirement for an action to be admissible at the General Court. This is to dispel any doubts and to confirm that the filtering procedure would not apply to cases where the administrative appeal is optional for the appellant (e.g. Banking Supervision<sup>2</sup> and Recovery and Resolution of credit institutions and investment firms<sup>3</sup>).
- Second, the CCBE submits that while the Request's proposed criterion is appropriate it is not necessarily sufficient. The criterion – a mandatory appeal procedure within the administrative body as a prerequisite for an action for annulment with the General Court - will apply to a wide range of agencies acting in different legal fields and under different legal instruments. While the case law in appeal proceedings is well developed for some of them, such as for trademarks, this is not necessarily the case for the other matters.
- Notably, among the examples provided by the Court of Justice in the Request (decisions from the Community Plant Variety Office<sup>4</sup> and the European Chemicals Agency<sup>5</sup>) there

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<sup>1</sup> Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union Trade Mark (OJ L 154/1 16.6.2017).

<sup>2</sup> Article 24 Council Regulation (EU) No 1024/2013, of 15 October 2013, conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287/63 29.10.2013), last amendment 15 October 2015.

<sup>3</sup> Article 85 of Regulation (EU) No 806/2014 of the European Parliament and the Council of 15 July 2014, establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ L 225/1 30.07. 2014), last amendment 19 May 2017.

<sup>4</sup> Council Regulation (EC) 2100/1994 of 27 June 1994 on Community Plant Variety Rights (OJ L 227/1 1.9.1994), last amendment 31 January 2008.

<sup>5</sup> Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006, concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) no 793/93 and

are less than 20 Court of Justice appeal judgments issued during the last five years.<sup>6</sup> Their impact on the Court's workload must therefore be insignificant.

- Moreover, the current drafting of the criterion would automatically encompass *future* agencies and unforeseeable new legal fields as Union law develops.
- It appears therefore questionable whether it is warranted for matters where little or no prior guidance is available in the Court's precedents to be subject to the new filtering procedure and the Court's discretion. In this context, the CCBE notes that during the last five years around 25% of all the rulings by which the Court of Justice set aside the General Court's decision were based on fundamental procedural grounds such as the right to a fair hearing<sup>7</sup>, lack of reasoning, or access to documents.<sup>8</sup>
- The CCBE therefore suggests that the Request's current criterion should be supplemented. The supplement should, on top of a prerequisite for a mandatory intra-agency appeal procedure, limit the leave for appeal procedures to pre-defined subject matters where a significant body of case law has already been developed. As Union case law further develops the categories of subject matters can be expanded when appropriate. We also suggest that the Council, the Commission, the European Parliament and the CCBE be consulted before it is suggested that a sufficient body of case law exists to apply the filter mechanism.

*b) Conditions under which a leave for appeal would be granted*

- Under the Request, leave to appeal will be granted when the question at stake "*raises, wholly or in part, an issue that is significant with respect to the unity, consistency or development of EU law*".
- If despite the CCBE's strong reservations on the introduction of a filter mechanism the Court was insistent on this proposal, the CCBE would suggest that it is explicitly set out in the draft Article 58a of the Statute that, where the Court takes a decision on whether an appeal should be allowed to proceed or not, such a decision shall contain a full statement of reasons (as opposed to a short standard phrase without real explanatory value) and be published. In more general terms, the CCBE believes that all procedural orders containing an interpretation of law, including of procedural rules, should be published.

### **3. Conclusion**

The significant changes envisaged by the Request to the nature and structure of the Union judicial system merit thoughtful consideration.

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Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/ECC, 93/105/EC and 2000/21/EC (OJ L396/1 30.12.2006), last amendment 13 May 2013.

6 Research for the period 1/1/2013-3/5/2018 on the basis of the search tool on the Court's website.

7 See e.g. Case C-530/12 P - OHIM v National Lottery Commission.

8 Research for the period 1/1/2013-3/5/2018 on the basis of the search tool on the Court's website.