DOUBLING THE GENERAL COURT'S JUDGES: WHY PROGRESSIVE, REVERSIBLE AND MORE ECONOMICAL SOLUTIONS ARE FAR BETTER

To the European Parliament's rapporteurs

We have been invited, as individual experts, to provide an opinion on the proposal to double the number of judges at the General Court. We felt compelled to accept this invitation given the framework laid down by the Treaties[1].

This being said, we must point out that, according to Article 281 TFEU, the Court of Justice has exclusive responsibility for the legislative proposal. We are present in an exclusively advisory capacity. Moreover, we do not represent the General Court. The General Court's position is explained in detail in its position paper of 17 September 2014, the principal conclusions of which were reiterated in a resolution communicated to the Council by letter dated 9 December 2014. For all practical purposes, however, we would observe that there is no substantial difference between the position of the General Court and our own.

To assist you in your task, we have divided the topics according to the public positions taken. Judge G. Berardis presents the true state of the caseload of the General Court at the start of 2015, Judge I. Pelikanova the advantages of creating specialized courts, Judge A. Collins the problems likely to arise with the doubling of the size of the General Court, and Judge F. Dehousse the management and cost aspects of the proposal.

We wish to emphasize that none of us have any material or personal interest in this debate – on the contrary! Doubling the number of judges at the General Court would certainly reduce our individual workload. It would also facilitate our re-nomination. Nevertheless, we are of the view that, in the interest of the Institution and the public interest generally, we should strive to find more efficient and less costly long term solutions to ensure the smooth running of the General Court. In that light, it is regrettable that the President of the Court of Justice has commenced an official disciplinary procedure against our court with the aim of preventing the communication of any previously uncensored information to the legislative authorities (which is also particularly difficult to accept given that we are independent judges charged, inter alia, with the duty of adjudicating upon the Court's administrative decisions).

Since 2011, and notably in the last two years, during which the number of cases before it have increased, the General Court has strongly improved its overall performance. That experience confirms that the solution for improving the productivity of the General Court lies in measures of progressive, reversible and comparatively economical nature. Increasing, let

[1] According to Article 10 § 3 TEU, "Decisions shall be taken as openly … as possible". According to Article 15 TFEU, "the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible". Finally, Article 13 § 2 TEU imposes an obligation on the institutions to "practice mutual sincere cooperation" between them. These obligations are particularly strong in the legislative field, where the judicial power can only present "requests".

alone doubling, the number of judges at the General Court is yesterday's solution for yesterday's problem. The last thing the General Court needs is the creation of a Mexican army of new judges, supported by a reduced number of qualified personnel, which will inevitably lead to a serious reduction in the productivity per personnel unit.

G. Berardis A. Collins F. Dehousse I. Pelikanova

EXECUTIVE SUMMARY

In full accordance with the official position of General Court, our conclusion is drawn from three very simple facts.

THE BACKLOG HAS ALREADY BEEN CONSIDERABLY REDUCED

The General Court has stock of cases, NOT to be confused with a backlog. It mainly consists of cases filed in 2013 and 2014 which are still pending. They cannot yet be worked on for various reasons (the written procedure is incomplete, all of the pleadings have not as yet been translated, answers are awaited to questions asked of the parties, the case is suspended due to litispendence with cases before the Court of Justice...).

There was a real problem with the backlog in 2010, but the improvement since then has been such that approximately 80 % of that backlog has been liquidated and the balance is being reduced on a monthly basis. Furthermore, the length of proceedings has also diminished. As a matter of fact, it has never been so short in the General Court's history. Consequently, there is no longer any urgency in finding a solution to any projected increase in the General Court's caseload.

THIS ENORMOUS IMPROVEMENT HAS BEEN ACHIEVED WITHOUT ADDITIONAL JUDGES

The huge reduction of the backlog has been attained through the dedication of the existing members and staff, internal reforms and targeted increases in personnel[2]. The General Court had already recommended this approach in its 2011 position paper, repeated it in its 2014 paper, and it has been completely vindicated by the facts. Priority was always given first to limited additional personnel for the cabinets and registrar. More judges are not the priority solution – especially not 28 of them. We do not understand why neither the Court, nor the Commission, has been interested in analyzing these very simple data.

THE DOUBLING OF THE COURT MAY CREATE SUBSTANTIAL PROBLEMS

The proposed reform will raise extremely difficult questions. How can the General Court specialize on the one hand and guarantee the equal representation of national legal systems on the other? How are the rights of citizens to a full appeal to be protected in practice? How can the coherence of the case-law be maintained with so many chambers? Given that the vast majority of judges are working in a second or third language, how can productivity be maintained if the ratio of highly qualified personnel is reduced to compensate for the explosion in the number of judges? None of these essential questions have been examined. We fail to understand why.

Given the total absence of any urgency to remodel the General Court, we suggest that a meaningful and deep impact assessment be carried out, which has not happened to date, together with the establishment of an independent group of wise men and women to consider the most appropriate options for the EU judicial architecture.

[2] The addition of a Croatian judge in 2013 is neutral in this regard, since it also brings new workload.

MANAGEMENT AND FINANCIAL ASPECTS

Some management aspects having already been covered by Judge A. Collins, I shall only add a few observations.

1. What I recommended in 2011 has since been implemented by the General Court with considerable success. In a nutshell this consisted of a cocktail of internal measures, case management, and targeted increases of personnel. We now observe a reduction of at least 80 % of the backlog, as shown by Judge G. Berardis. Consequently, had additional legal assistants been appointed in 2011 (as was also recommended by the European Parliament and the Council at the time) rather than in 2014, there would no longer be any backlog.

2. The importance of the stability of the General Court's composition is often overlooked. 2014 was a productive year for many reasons, not least that there was no judge replacement. From this point of view, the legislative proposal has at least two drawbacks. First, it creates a permanent climate of uncertainty in the General Court, thereby reducing the morale and commitment of its personnel. Second, if implemented, the General Court will endure at least six years of serious organisational instability. The backbone of the General Court consists of its highly qualified personnel. Everything that encourages them to leave the General Court, like the proposal to double the number of judges while reducing their staff, will have a directly negative impact on its productivity.

3. As I indicated in 2011, the correct management approach is to study less costly measures first, and only thereafter propose such additional expenditure as is absolutely necessary. The well of technical measures that do not cost a single cent is far from dry. For example, one fails to see why the Court of Justice's reflection upon charging court fees (which I also recommended in 2011) has begun only recently. Case management can still be slightly improved, notably in the context of the General Court's new Rules of Procedure. Here precisely the opposite strategy is proposed: first the heavy expenditure, then a reflection about the most economical measures. It must be emphasised that no EU Member State currently applies such an approach in judicial reform – and rightly so.

4. The suggested reorganisation of the General Court will require a tremendous amount of time and energy. Much of the theoretical benefit of appointing 28 new judges will be sunk into the morass of a more complex organization, new structures to protect the coherence of the case-law, compensation for the departure of qualified elements of personnel, additional rotations between chambers, etc. On the basis of past experience the only thing one can predict with absolute certainty is that the productivity per unit of personnel will sink considerably after 2014.

5. Certainly, a very simple (and immediate) measure could be to allocate the Institution's resources proportionally to the workload of the three courts.

6. Adding a limited number of judges could make sense in a long term perspective. Doubling this number in three years makes no sense. It will provoke as explained a

brutal reduction of productivity, and will also be totally irreversible. If the caseload of the General Court does not increase at a corresponding rate (i.e. a doubling of the number of cases over four years, which seems highly unlikely), the General Court will be stuck with an excess of highly paid personnel, which situation will be impossible to correct. Such a white elephant is, understandably, likely to become a lightning rod for public criticism of the European Union.

7. In a nutshell, experience has shown very clearly which measures deliver real results. It thus makes sense to continue on the path of progressive, reversible and more economical solutions. Otherwise we will be confronted by a splendid application of Gresham's law in judicial management: the bad measures will kill some benefits of the good ones. The taxpayer will pay more to get proportionally less.

8. The solution is now more obvious than it was in 2011. The reform should be frozen for three years, since there is no urgency at all. In the present context it is manifestly disproportionate. Meanwhile, limited increases of personnel should be granted to the cabinets and registrar. Finally, a serious impact assessment should be made in order to examine the various problems mentioned by Judge A. Collins.

Franklin DEHOUSSE