MAKING THE COURT OF JUSTICE OF THE EUROPEAN UNION MORE PRODUCTIVE

– DIFFERENT WAYS OF SQUARING A CIRCLE

Introduction

There is a – perhaps apocryphal – story that in the far-off, early days of the ECSC and the EEC and the brand-new Court of Justice, the arrival of the first ever reference for a preliminary ruling was greeted with joy, relief ('they've noticed we're here!') and the cracking open of a bottle of prime champagne. Alas, gone are those halcyon days. In 2013, 450 new references for preliminary rulings came winging our way from national courts; and as the 450th came in, it was greeted with groans, not cheers. Our overall 'tally' of new cases for that year was 699; and contemporary Court of Justice lore had it that 700 new cases would represent some kind of a watershed figure. Armageddon was thus at our very gates. Since then, the tide of references has receded a little (down to 428 in 2014; up slightly to 436 in 2015). But the overall figure for new cases, having fallen to 622 in 2014, has now broken through the seven hundred barrier. Once requests for advisory Opinions under Article 218(11) TFEU (three) and the various 'procédures spéciales' (eleven) are counted in, there were 713 new cases registered in 2015.

I am relieved to be able to tell you that, as I write this, the Court of Justice is still standing. The twin golden towers so mocked by the British tabloid press have not yet crumbled to the ground. We are still in business. But the days of leisured Euro-justice are, I think, gone for good. We, like many other supreme jurisdictions, are under continuous and continuing pressure to 'perform'; to get through our caseload with speed and efficiency; to handle (increasing) quantity without sacrificing quality. I want to look at how to try to square this circle. I preface my remarks by saying that I (still) love my job. I think that being an Advocate General at the Court of Justice is fun and exciting and a privilege. I want to make that clear; because the picture that I am about to paint is, in places, rather bleak.

Likely trends / the pressures in the pipeline

The bad news is that I do not think that the medium- to long-term trends will lead anywhere but upwards. Each of the three main categories of our work – references for a preliminary ruling, direct actions and appeals from the General Court – is subject to clear pressures in that direction.

References for a preliminary ruling

To begin with the blindingly obvious: there are almost twice as many Member States now as there were in 2003. The big accession in 2004 added ten (Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovak Republic and Slovenia). Bulgaria and Romania joined in 2007, Croatia in 2013. This means that there is a very large potential 'market' for authoritative guidance on EU law.

There are also many more courts empowered to make references, both because there are more Member States and because, on 1 December 2014, the five year transitional period provided for by the Treaty of Lisbon came to an end and the old 'second pillar' (Justice and Home Affairs (JHA) / the Area of Freedom, Security and Justice (AFSJ)) – that is, such prolific and reference-worthy topics as criminal law, asylum and immigration – became absorbed within mainstream EU law. Save for the limiting effect of the various opt-outs / special arrangements (principally, affecting the UK) contained in Protocols 19, 20, 21 and 30 to the TFEU, *any* court in *any* Member State can now make a reference to the CJEU under Article 267 TFEU on *anything* falling within the scope (thus enlarged) of EU law.

There are, moreover, simply more legal instruments (both conventional instruments like directives and regulations and extra-ordinary instruments like the European Stability Pact) that need to be interpreted or whose validity may be challenged. In sensitive areas (like the AFSJ), drafting compromises may be the only way to get measures that are needed adopted. Ambiguity is helpful for this. However, ambiguity also means that there may be more that the national court may legitimately feel that it needs help in interpreting.

Finally, there is the real joker in the pack, in the shape of the 'PPU' (the 'procedure préjudicielle d'urgence': the urgent preliminary ruling procedure). A PPU is triggered by an AFSJ case where there is extreme urgency – for example, because someone is being detained pending the outcome of the reference, or because a child has been abducted. Such cases normally go to a designated 5-judge PPU chamber. But if they are big enough and difficult enough, they may (like the recent asylum-seeker reference in Case C-601/15 PPU J.N.) end up in the Grand Chamber. The Court turns them around in under 3 months and there appears to be an unofficial competition between reporting judges / presidents of the PPU chamber to see if they can go even faster. We do not know, and cannot control, how many such cases we get in any given year. And (at least if you are this Advocate General and her team!) ordinary life – and with it ordinary case-handling – is suspended whilst you are trying to deal with a PPU. By giving the PPU total priority, you are (of course) pushing other cases temporarily onto the back burner. Time is not expandable.

Direct actions

The fact that there is simply more EU law means that there is more potential for the Commission to consider it necessary to bring infringement proceedings against Member States. These may, of course, merely concern straightforward failures to implement directives in time. But infringement proceedings may also sometimes be much more elaborate disputes about whether Member State X is – or is not – in breach of its Treaty obligations by maintaining a particular regime of domestic law in force.

Quite apart from Commission v Member State (or indeed Member State v EU institution(s)), there is no shortage of inter-institutional turf wars, particularly in terms of who has what competence to do what in external relations. Examples drawn merely from my own recent cases are Joined Cases C-103/12 and C-165/12 European Parliament and European Commission v Council of the European Union (Venezuelan Fishing Rights), ECLI:EU:C:2014:334 (Opinion), ECLI:EU:C:2014:2400 (judgment); Case C-73/14 Council of the European Union v European Commission (UNCLOS), ECLI:EU:C:2015:490 (Opinion), ECLI:EU:C:2015:663 (judgment); and Case C-660/13 Council of the European Union v European Commission (Switzerland – EU 'Memorandum Of Understanding'), ECLI:EU:C:2015:787 (Opinion), awaiting judgment. There are also ongoing disagreements about whether competence is exclusive to the EU or shared between the EU and the Member States: see, e.g., C-114/12 European Commission v Council of the European Union (broadcasting rights – convention – exclusive competence of EU), ECLI:EU:C:2014:224 (Opinion), ECLI:EU:C:2014:2151 (judgment).

More use seems also currently to be being made of the procedure under Article 218(11) TFEU that enables Member States or an EU institution to ask the Court of Justice for its Opinion on a proposed international agreement. The negative Opinion 2/13 on EU accession to the ECHR needs no introduction; but (for example) I am currently doing the preparatory work to write an Opinion in a blockbuster Article 218(11) TFEU request (24 Member States have intervened) concerning whether the EU has exclusive or shared competence to conclude the proposed EU-Singapore Free Trade Agreement (Opinion 2/15, pending).

Appeals

The General Court has been reproached (not least, by its zealous big brother) for sloth, excessive delay, unacceptable backlogs and inadequate reasoning. Perhaps unsurprisingly, its response has been to make Herculean efforts to speed up (using chambers of 3 even for big cases to push out judgments more quickly) and to try to make the judgments more appeal-proof by making them longer. (I have to say that, personally, I think the longer the text the more opportunities there are for clever lawyers to spot – or at least allege – inconsistencies in the reasoning and craft multiple grounds of appeal!)

The Court asked for 12 more judges for the General Court. After 4 years of deadlock between the Member States trying to agree how 28 Member States nominate 12 judges, a compromise solution was found that will give the General Court 28 more judges – partly, by abolishing the only 'specialist tribunal' below the General Court, the Civil Service Tribunal (CTS), and folding up its jurisdiction and its judges into the General Court. The General Court is therefore just about to have lots more manpower. It is also about to become (again) the first instance jurisdiction for the staff cases previously handled by the CST. Inevitably, any appeals in staff cases will therefore again come before the Court of Justice.

What is in the existing appeals from the General Court? Apart from occasional, but big, competition law appeals, there are often complex state aid appeals. Significant new areas – such as the REACH (chemicals) regulation – are just coming on-stream in appreciable quantities for the General Court and hence for the Court of Justice on appeal. Trademarks, access to documents and public procurement cases also provide a steady diet of appeals. Even if a significant proportion of the last three categories of cases end up being dismissed by order under Article 181 R.P. as partly manifestly inadmissible and partly manifestly unfounded, they still soak up judicial man-hours in processing time.

An optimist, then, might summarise the situation by saying that at the Court we are currently living in exciting and challenging times. A pessimist might liken it to standing with one's finger in the dyke when an exceptional spring tide is forecast.

Some parameters to reform

Since its inception, the Court of Justice has placed a heavy emphasis on the written procedure. I cannot rationally see that changing (indeed, for 'equivalent' supreme jurisdictions in a number of the Member States, there *is* no oral procedure). Use of the written procedure is overwhelmingly in our collective genes. That written procedure, moreover, takes place within the EU's linguistic regime which, for understandable reasons linked to sovereignty and cultural identity, is sacred. That means that *everything* that we do is hedged about with translation issues. We have 24 official languages of procedure. We need to get documents that are lodged out of those 24 languages and into the internal working language(s) that we use inside our beautiful Tower of Babel. Once we have opined, deliberated and judged, we need to translate the results back out into the 24 official languages.

The Court of Justice is a collegiate court. Except for the interim relief applications, which are handled by the Vice President, we never decide by single judge. The chamber of three judges is the smallest judicial unit. Again, I think that (institutionally and culturally) that is unlikely to change.

Under President Skouris, the big focus was on improving our statistics. That led to a dramatic improvement. The average time taken to answer a reference for a preliminary ruling fell from 25.5 months in 2003 to 15.3 months in 2015: an improvement for which he indeed deserves credit. Unfortunately, in consequence we are now under automatic annual pressure from the European Parliament to 'do even better next year', whether or not that is conceivably realistic as a target. At the same time, we are conscious of the mounting criticism from our interlocutors (particularly from senior national courts) that, in our quest for more and yet more speed, we may sometimes have sacrificed quality of reasoning in the judgment adopted.

Big changes to judicial architecture need Treaty change. I am not sure that there is much appetite for that in the immediate future. But perhaps we should be doing some blue-sky thinking *now* (ideally, in dialogue with our 'clients' and with our friends), so that as / when / if other forces mean that Treaty change is on the table, we either have a thought-through shopping list *or* know that we do *not*, on considered reflection, want to change anything.

The provisions of the Statute of the Court (Protocol 3 to the TFEU) have the same normative force as Treaty articles (see Article 51 TEU). With the exception of Title I of the Statute and Article 64 thereof (the language regime), which require the same machinery as Treaty change, the rest of the Statute can be changed by the European Parliament and the Council acting in accordance with the ordinary legislative procedure (see Article 281 TFEU). Changing the Statute is therefore possible; but it is not a trivial undertaking.

Even changing the Court of Justice's own Rules of Procedure requires the agreement of the Council – that is, first, a detailed discussion / negotiation of the CJEU's proposals in the technical 'Groupe "Cour de justice" ' within the Council and then formal endorsement by the Member States.

Thus, very little change can be achieved overnight.

The new Presidency of the CJEU and impending reforms

Koen Lenaerts took over as President of the CJEU on 8 October 2015. In the first five months of his presidency, he has made it crystal clear that he is acutely aware of both the problem and these parameters. He understands that it is vital to improve / maintain quality without allowing the overall speed of processing to slip. He has already indicated (for example) that to improve quality and transparency he would like to see more cases that actually merit Opinions decided with Opinions. At the same time, he has urged the Advocates General to stick as closely as possible to internal targets for getting those Opinions written and to be as concise as possible. Crucially, President Lenaerts has already re-launched the general examination of possible ways forward. Here is a non-exhaustive personal snapshot of the kind of solutions that are being explored and some of the issues that (fairly predictably) they may raise. I emphasise that nothing in what follows is more than an overview of the start of what will assuredly be a long process.

Should we invoke Article 256(3) TFEU, propose amending the Statute so as to give effect to that provision and get some categories of references for a preliminary ruling transferred to the General Court?

Which category/categories of cases would we envisage transferring? What about consistency? (For example, on this hypothesis references from national courts on the interpretation of the trademark directive might perhaps go to the General Court; but the Court of Justice would still deal with appeals involving the meaning / application of the trademark regulation.) Sometimes, big issues of EU law are buried just under the surface of an apparently banal, technical case on the application of (for example) the customs regulation or arrangements under the Common Agricultural Policy or the Common Fisheries Policy. What should we do about that? If certain categories of cases are transferred but the Court of Justice had the power to 'call in' a case (either for initial decision or for review), what would be the effect on the Court of Justice's workload (and who would do that work)? In the meantime, would any ruling by the General Court be binding, or would its effects be suspended? Could we deal with (some of) the problems by having a mechanism under which all references for a preliminary ruling were still sent to us but, after a quick 'vet', we sent some of them down to the General Court? How would that actually work? All this, and more, is being looked at.

Could we / should we transfer some direct actions to the General Court?

Assuming that we can do this (see Article 256(1) TFEU and Article 51 of the Statute), one possibility might be to have the General Court as the first instance court for infringement actions (Commission v Member State), with the possibility of a subsequent appeal to the Court of Justice. That might fit in quite well with the fact-finding skills of the General Court. But how would the Member States feel about it? Would they be deeply affronted at having a case brought *against* them (rather than a case that *they* brought) decided initially by the lower court? Or would they like two bites at the cherry (a first instance decision and then the possibility of an appeal)? This specific question, and more, is being looked at.

Could we / shall we introduce either a leave / permission system or a filter system for (some / all) appeals?

There are, first, issues of principle about whether the litigant 'should' have an automatic right to two instances rather than just one (how one approaches this question being deeply coloured by the legal culture in which one was raised!). Perhaps there could be an automatic right only to one instance if there is an independent outside review body to which the litigant has first had access (c.f. the boards of appeal in Alicante for trademarks)? However, at the moment and for all the cases where the General Court has / will have jurisdiction, such an independent outside review body does not necessarily exist. The internal appeal to the 'AIPN' (the 'autorité investie du pouvoir de nomination') in staff cases, for example, would scarcely fit the bill … How about competition cases? And do we mean *leave / permission to bring an action*, or *filtering out the dross* amongst appeals that have already been lodged? These are different philosophies that would involve creating different procedures and that would have different resource implications. All this, and more, is being looked at.

Stop press news: one imminent reform

In the meantime, President Lenaerts has identified one way, within the existing rules, of gaining precious time to invest in more complicated cases by moving away from the 'one size fits all' philosophy of the previous presidency. As matters presently stand, appeals that are clearly destined to be dismissed by reasoned order under Article 181 R.P. as manifestly inadmissible and / or manifestly ill-founded are not regarded as particularly important or urgent. They sometimes – to be frank – hang around for a while in the background whilst more interesting and urgent work is processed. There are even (fortunately, rare) examples where it has taken the Court of Justice over a year from the date when the appeal was lodged to get round to issuing the order that says the appeal should *manifestly* be dismissed for one or other or both reasons (which is a little embarrassing!).

Under new arrangements approved by the Court of Justice's 'reunion générale' on 1 March 2016 with immediate effect, how Article 181 R.P. orders are processed and within what timeframe changes dramatically. Once the case has been identified through an internal administrative analysis

as a potential candidate for an Article 181 order, the Reporting Judge and the Advocate General are nominated by, respectively, the President and the First Advocate General. As soon as the French translation of the application in the appeal is available, they examine it jointly. If they jointly take the view that an Article 181 order may properly be used, they place a proposal to that effect swiftly before the réunion générale. If the réunion générale endorses the principle that the appeal should be disposed of by Article 181 order, the Advocate General then (equally swiftly) prepares a short proposal (either in French or in the language of his choice – if the latter, it is speedily translated into French). That proposal contains a synthesis of the appeal and explains, very succinctly, why its component parts should in the Advocate General's view be dismissed as either manifestly inadmissible or manifestly unfounded. The Advocate General's proposal is integrated into, and becomes the core of, the draft order that the Reporting Judge then places for rapid processing before the chamber of three judges that has been assigned this task for a year (a 'designated chamber' system akin to the arrangements for the PPU). If the chamber agrees with the Advocate General's analysis (possibly, adding extra elements if it considers those to be essential), it endorses the proposal and dismisses the appeal by reasoned order. The chamber remains free, of course, *not* to agree; if so, the procedure resumes its normal course.

As will be seen, there are therefore a number of safeguards. Assuming, in any particular case, that an Article 181 order is indeed appropriate, it should be possible (once the system is up and running) for the average case to be concluded within 3-4 months of the French translation being available.

From the judges' perspective, the advantage is twofold. The main burden of processing these cases is transferred from the judges to the advocates general (although the ultimate decision remains, of course, with the designated chamber of three judges). That frees up judicial time that can be 'invested' in a more extended délibéré phase for difficult cases (perhaps a 'cooling-off period' to give individual judges a chance to reflect, re-read the compromise text and react further; perhaps a second or sometimes even a third délibéré). And the (considerable) time gained by processing the Article 181 orders so much more quickly may / will enable this extra deliberation to be done without worsening our overall case-handling statistics, which are calculated as the arithmetic mean of all cases.

From the perspective of an individual advocate general, this is not unmitigated good news. There are rather interesting academic questions as to whether (and if so, precisely how) this affects / alters / enhances / radically undermines the constitutional role of the advocates general. But leaving those to one side, the plain fact is that I do not seem currently to have vast swathes of spare time on my hands. (Somehow, 'mes amis juges' have already asked me to write more Opinions, which has already taken up any slack that might have been about to be created!) I had hoped that the arrival of two (in principle, three) more nice colleagues to join the 'collège des avocats généraux' would enable me to catch up on the quasi-permanent backlog, reduce the pressure ever so slightly and even get a little ahead of the game. These now seems forlorn hopes. Nevertheless, from the slightly different perspective of a Member of the Court, I am squarely behind the reform. I can readily see that IF getting the advocates general to pitch in and help out with the Article 181 orders frees up time for more / better délibérés and hence better quality judgments, that is a GOOD THING.

Conclusion

Both the present and the predicted future situation call for innovation and reform if the Court of Justice is to continue to deliver quality judgments within a reasonable time. As for how (precisely) we are going to manage to do that – the only suggestion that I can give is, 'Watch this space …'

Eleanor Sharpston