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GAPS AND 'KNOWN UNKNOWNS' IN THE TRANSFER OF PRELIMINARY REFERENCES TO THE GENERAL COURT

Lacune e "incognite note" nel trasferimento dei rinvii pregiudiziali al Tribunale

Les lacunes et les « inconnues connues » dans le transfert des renvoi préjudiciels au Tribunal

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SUMMARY: 1. Introduction. – 2. The Reform in Perspective. – 3. The Transfer of Preliminary References in Detail. – 4. Gaps. – 5. Known Unknowns. – 6. Conclusions.

1. Introduction

The Court of Justice of the European Union is entering a new era. As of 1 September 2024, preliminary reference procedures will be partly transferred to the General Court, as a result of a reform of the Statute setting into action the provisions of Article 256(3) TFEU, almost three decades since their enactment in the Nice Treaty. This turn of events triggers a new age for the Union's justice system, focused on the interpretative monopoly held by a single jurisdiction: the Court of Justice. After more than seven decades, this court alone made good use of the main procedural feature of the Treaty's remedial system, the preliminary reference procedure, to provide a uniform interpretation of Union law in cooperation with national courts. This will change in 2024, once the task of responding to questions from national courts will become a shared burden together with the General Court.

In this contribution I will explore some of the open questions that the reform has inevitably left unresolved when regulating the preliminary reference procedure in the General Court. Although a considerable effort has been made to replicate the rules of the Court of Justice and its past experience in order to pass it on to the General Court, the reality is that

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the 'new' preliminary references will have to be handled by another jurisdiction, in a different procedural environment. These differences are not to be found in the practice of the General Court itself, but in the overall design of the transfer, which will condition the terms under which questions for a preliminary ruling are handled.

Together with a number of gaps left by the legislature, a variety of 'known unknowns' also emerge. These are not omissions of the legislature, but points of policy (of *judicial policy*) that will need to be addressed in the course of the coming years as a result of the ordinary implementation of the reform. However, these 'known unknowns' point at broader and more systemic issues, such as the relation of the General Court with past case-law of the Court of Justice, the perception that national courts will have of the General Court, or the way in which the latter decides to handle its rapport with national courts. These are 'known unknowns' that only time will tell how they are to be resolved, but which will define the way in which the Union court system will develop in the years to come.

This contribution will firstly put the reform in its broader perspective, in an attempt to locate the new rules within the general evolution of the Union courts' evolution. The next section explores the reform in more detail and it portrays the basic rules governing the functioning of the new preliminary reference procedure in the General Court. In the third and fourth section, an enumeration of the gaps and the 'known unknowns' will be made, with the aim of raising questions that will need an answer in the course of time, in some cases with immediate practice effect (gaps) and in others with a more systemic impact ('known unknowns').

2. The Reform in Perspective

The 2024 reform has been defined as the most relevant overhaul of the Union's judiciary since the creation of the Court of First Instance in 1989.[1] There is truth to that assertion, considering the symbolic importance of the loss of the Court of Justice's monopoly to rule on

[1] See, *inter alia*, S. IGLESIAS SÁNCHEZ, *Preliminary References Before the General Court*, in *Weekend Edition* nº 125, *EU Law Live*, 2022; P. DERMINE, *What the European Court of Justice is for – Making Sense of the ECJ's Procedural and Organisational Law*, in *EuConst*, 2024, p. 1 ff.; C. AMALFITANO, *The Future of Preliminary References in the EU Judicial System*, in *Weekend Edition* nº 133, *EU Law Live*, 2023; M. BOBEK, *Preliminary rulings before the General Court: What judicial architecture for the European Union*, in *CMLR*, 2023, p. 1515 ff., p. 1534; T. TRIDIMAS, *Sharing Uniformity: A New Era Beckons*, in *Yearbook on Procedural Law of the Court of Justice of the European Union,* 2024, *Luxembourg Centre for European Law*; R. ALONSO GARCÍA, *The Persian Jurist in Luxembourg. On the Decentralisation of the Preliminary Reference Procedure*, in *Weekend Edition* nº 195, *EU Law Live*, 2024; and D. PETRIC, *The preliminary ruling procedure 2.0*, in *European Papers*, 2023, p. 25 ff., p. 25.

preliminary references sent from national courts. However, this change is not entirely novel, because the Treaties already envisaged such a change in 2001, as a result of the Nice Treaty and the introduction of new rules to the Union courts, which included the possibility of triggering such a transfer. Furthermore, the Court of Justice is not renouncing to a cherished privilege, but, on the contrary, the reform originates from the Court of Justice itself, after a long period of reflection that finally materialised in the 2022 proposal referred by the Institution to the Union's legislators.[2]

The importance of the reform must be seen from a broader perspective, considering the sum of developments taking place simultaneously, which are not limited to the transfer of preliminary references to the General Court. At the same time that the transfer takes place, the reform consolidates a previous measure that did not capture too much attention thus far: the filtering of appeals in the Court of Justice. In 2019 a new system of filtering of appeals entered into force, allowing the Court of Justice to select the appeals being brought to it based on the overall relevance of the case from a systemic perspective.[3] This power was made available to the Court of Justice when the appeal challenged a judgment of the General Court in a case previously heard by a board of appeal of a Union agency. In such a setting, it is to be assumed that the General Court acts already as an appellate jurisdiction, thus justifying a more limited and selective role on the part of the Court of Justice. The 2018 reform enumerated the boards of appeal whose prior intervention would justify a filtering of ulterior appeals before the Court of Justice,[4] a selection of boards based on their jurisdictional features, closely resembling those of a proper jurisdiction. In 2024, the reform of the Statute has amplified the list and it has now expanded to a total of ten boards of appeal, thus amplifying the Court of Justice's powers to filter appeals on points of law.

The filtering of appeals is not the only development of importance taking place prior to the transfer of preliminary references to the General Court. In 2015, a major novelty was introduced in the Union's judiciary, when the Member States agreed to the doubling of judges of the General Court, following a period of deadlock in which no consensus was achieved

[2] Proposal of the Reform by the CJ.

[3] C. ORÓ MARTÍNEZ, *Filtering of Appeals on Points of Law Before the Court of Justice*, in *Yearbook of Procedural Law of the Court of Justice of the European Union*, *Max Planck Institute of International and European Procedural Law*, Luxembourg, 2019, and M.-A., GAUDISSART, *L'admission préalable des pourvois : une nouvelle procédure pour la Cour de Justice*, in *CADE*, 2020, p. 177 ff.

[4] See Article 58a of the Statute.

to expand the court with twelve additional judges, aiming at alleviating the backlog of pending cases.[5] The 2015 reform doubled the size of the General Court, thus providing all the necessary means to undertake a serious reconsideration of case management. By turning into a jurisdiction with abundant human resources to handle a significant number of cases, the scene was set for a new transfer of powers. Whilst the reform took time to be fully implemented, once all fifty-four sitting judges were appointed and operative, the Court of Justice came to the realisation that the time was ripe to start the process of transferring the preliminary reference to the General Court.[6]

Seen from this perspective, the reform is operating a long-term and profound seismic change in the Union's judiciary, turning the Court of Justice into a jurisdiction with the ability to choose to rule on a significant number of cases, leaving the bulk of the task on the shoulders of the General Court. The filtering of appeals turns the General Court into the main appellate jurisdiction in direct actions when a prior adjudicative decision has been made by a board of a Union agency. By transferring preliminary references to the General Court, the role of cooperating with national courts in providing a uniform interpretation of Union law is not delegated to the General Court, albeit in 'specific areas'. There is no doubt that, in case the reform is implemented with success in the following years, more 'specific areas' will follow until the General Court assumes a broad array of subject-matters in which to decide in preliminary reference procedures. In the course of time, the Union judiciary will be mostly represented by a General Court handling the bulk of the docket, whilst the Court of Justice will sit at the apex of the system, deciding on points of principle and cases of constitutional relevance. This is a very different design from the one envisaged in the Nice Treaty, where the General

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[5] A. ALEMANNO, L. PECH, *Thinking justice outside the docket: A critical assessment of the reform of the EU'S court system*, in *CMLR*, 2017, p. 129 ff., and D. SARMIENTO, *The Reform of the General Court: An Exercise in Minimalist (but Radical) Institutional Reform*, in *CYELS*, 2017, p. 236 ff..

[6] In 2017 and 2020, the Court of Justice issued two reports on the implementation of the reform of the General Court, including remarks on the convenience of triggering the transfer of preliminary references provided in Article 256(3) TFEU. In both reports the Court of Justice came to the conclusion that the time was not ripe for the transfer, a position that changed in 2022 with the referral of the reform of the Statute that ensued in the reform now in force. The concluding words of the 2017 report were rather blunt: 'the Court considers that there is no need, at this time, to propose an amendment of its Statute in order to transfer to the General Court part of the jurisdiction that the Court exercises in preliminary ruling cases.' (pg. 7, available at https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-01/en_2018-01-12_08-43-52_183.pdf).

Court would co-exist with specialised tribunals handling specific areas of Union law.

In sum, the transfer of preliminary references to the General Court plays a key role in the success of this new design of the Union's judiciary. If the transfer is a success, more 'specific areas' will follow and the General Court's role as the main go-to jurisdiction will be secured in the long term. If the transfer fails to persuade its audience, the new approach towards the Union's court system will probably be reconsidered, in the same way that the Civil Service Tribunal and the creation of other specialised tribunals was reviewed and abandoned in 2015. As it can be seen, the stakes are high, and the General Court has significant pressure to make a success of the reform.

3. The Transfer of Preliminary References in Detail

As a preliminary point worth highlighting, the General Court's jurisdiction to hear preliminary references is articulated as a *derivate* competence. The court entitled to rule on the request for a preliminary ruling is still the Court of Justice and, as a result, the references will be addressed to that court. The interlocutor with national courts, at least at the first stage of the procedure, will remain the Court of Justice and it will be at the door of this court that national judges will be knocking on. As a result, the General Court will become competent to rule on the case once the Court of Justice has decided that the jurisdiction is for the former, a decision that will be taken by the *Réunion Générale* of the Court of Justice after having gone through a procedure of '*guichet unique*'. Article 50b of the amended rules of the Statute are clear in attributing the original jurisdiction to the Court of Justice, when it states that "every request for a preliminary ruling made under Article 267 of the Treaty on the Functioning of the European Union shall be submitted to the Court of Justice". It is the task of the Court of Justice to verify "as quickly as possible" if the preliminary ruling "falls exclusively within one or more of the areas" referred to in the said provision, namely: the common system of value added tax; excise duties; the Customs Code; the tariff classification of goods under the Combined Nomenclature; compensation and assistance to passengers in the event of denied boarding or of delay or cancellation of transport services, and the system for greenhouse gas emission allowance trading.

The issue of the General Court's original or derivative jurisdiction stems from the wording of Article 256(3) TFEU, which states that the General Court "shall have jurisdiction to hear and determine questions referred for a preliminary ruling under Article 267, in specific areas laid

down by the Statute".[7] The imperative terms in which jurisdiction is conferred on the General Court sits uncomfortably with the new regime introduced in 2024, based on a conditional system of jurisdiction depending on the Court of Justice's determination on the 'exclusivity' of the questions referred and their connection with the subject matters to which the General Court is committed. The risk of having preliminary references addressed to the 'wrong' court was mitigated by the power of the General Court to refer the case to the Court of Justice, once confirmed that the subject matter of the case did not fall under the specific areas. However, the 2024 reform has articulated a different set-up, in which the Court of Justice is the first-hand interlocutor of all national courts and the first filtering authority to decide on whether the references must be resolved by the General Court or the Court of Justice.

The '*guichet unique*' works in the terms established in Article 93a of the amended Rules of Procedure of the Court of Justice. This provision sets out the internal procedure that the Court of Justice must follow to determine whether a preliminary references will be resolved by the General Court or by the Court of Justice, a procedure triggered from the moment that the Registry transmits the request of the national court to the President, the Vice-President and the First Advocate General. The President is the appointed authority with the power to refer the matter to 'the Court of Justice' in case he or she considers that the case raises other questions of law different from those under the "specific areas". This referral will be resolved by the *Réunion Générale* of the Court of Justice, a body made up of all the judges and Advocates General of the Court of Justice.

It is striking to observe that Article 93a does not refer generically to any other area of law different from the "specific areas" enumerated in Article 50b of the Statute. The grounds that justify the jurisdiction of the Court of Justice's are enumerated in Article 93a, para. 3, for cases that concern "other areas or [raise] independent questions relating to the interpretation of primary law, public international law, general principles of Union law or the Charter of Fundamental Rights of the European Union, within the meaning of the second paragraph of Article 50b of the Statute, he shall immediately refer the request to the Court of Justice". This enumeration is puzzling in some respects, as it makes an artificial distinction between, on the one hand, "other areas" and, on the other hand, an enumeration of constitutional rules that are difficult to extricate from a generic notion of "other areas". Furthermore, it is unfortunate that

[7] J. MARTÍN Y PÉREZ DE NANCLARES, *La Reforma del Tribunal de Justicia de la Unión Europea: la Ruptura de un Tabú*, in *Revista Española de Derecho Europeo,* 2024, p. 33 ff.

the enumeration distinguishes between "primary law" and the "general principles of Union" and the Charter, all three comprising rules of primary law. It appears as if the new provision is attempting to confer a certain degree of solemnity to the decision of the Court of Justice to retain a case, thus leaving the General Court with the widest possible margin for interpretation of the rules applicable to the case. If that is the aim of the provision, it could have attained it through different and more clarifying means.

The decision of the President and/or the Court of Justice to refer the matter to the General Court or to retain the case is not published at the time it is made, nor will it be available in an ulterior decision. Once the President refers the case to the General Court, the matter is in the hands of the lower instance and it is uncertain if the final judgment will make any reference to the decision of the President. The same applies to the decision of the *Réunion Générale* agreeing to retain the case, which in principle will not be a reasoned decision available to the parties. At present, it is also uncertain if the final judgment of the Court of Justice will explain in its introductory passages the reasons that led it to rule on the matter. In some cases it will be obvious and the decision will not require further details, but in others it might not be as clear and, in such situations, the reasoning underlying the decision is a valuable source for understanding the Court's interpretation of Article 50b of the Statute and of Article 93a of the Rules of Procedure.

Once the case is referred to the General Court, the matter will be handled by one of the two specialised chambers entrusted with the task of resolving preliminary references. In addition, the General Court will decide having heard the Advocate General, for which purpose a judge of the General Court shall assume that task. In the same terms as apply to the Court of Justice, preliminary references at the General Court will have an Opinion of the Advocate General only when the matter raises a new point of law, thus introducing the possibility of preliminary rulings in which the Advocate General will be heard, but not through an Opinion. According to Article 31a of the Rules of Procedure of the General Court, a number of judges are appointed during a period of three years to perform the task of Advocate General, a task that at first will be performed together with their activity as judge, but in the course of time should develop into a full-time activity.[8]

The formation of chambers in the General Court is also the subject-matter of the reform. As previously mentioned, preliminary references will

[8] At its early stages of implementation, the General Court will appoint *two* judges as acting Advocates General.

be attributed to two specialised chambers, which are in a position to rule on cases in a formation of three or five judges. Additionally, an "intermediate" chamber of nine members will also be available, composed of nine judges, as a middle-way solution between a chamber of five judges and a Grand Chamber. It would be paradoxical to attribute a preliminary reference in one of the "specific areas" to the Grand Chamber, inasmuch the attribution of the case to such a formation would confirm that the case should be resolved by the Court of Justice.[9] Therefore, the intermediate-sized chamber provides a reasonable solution that allows the General Court to make decisions of principle in "specific areas" but without the risk of entering into other domains which are of the competence of the Court of Justice.

In case that the General Court decides that the reference brought before it raises issues that come under the jurisdiction of the Court of Justice, Article 54, second paragraph, of the Statute states that the General Court "shall refer that action or request to the Court of Justice". This corrective tool also works inversely, when the Court of Justice has retained a preliminary reference and eventually comes to the realisation that the subject matter mostly falls under one of the "specific areas". The same provision, in its second sentence, provides that "where the Court of Justice finds that an action or a request for a preliminary ruling falls within the jurisdiction of the General Court, it shall refer that action or request to the General Court, whereupon that Court may not decline jurisdiction".

The main corrective tool available to the Court of Justice, the review procedure, is not the direct subject-matter of the reform, inasmuch its rules were already engraved in the Treaty. In fact, the review procedure was put into practice during the existence of the Civil Service Tribunal, and the main features of this mechanism do not differ significantly from the pre-existing precedent, with only specific variations.[10] The review procedure applied to preliminary rulings operates through a proposal of the First Advocate General, falling upon the Court of Justice to decide on whether to review the judgment of the General Court or not. Article 62 of the Statute states that the ground on which the First Advocate-General must decide is "a serious risk of the unity or consistency of Union law being affected". The main practical consequence of the review procedure is that the judgment of the General Court will not 'take effect' until the time-period of two months for the Court of Justice to make a determination expires. In case the Court of Justice decides to open a

[9] See J. MARTÍN Y PÉREZ DE NANCLARES, *La Reforma del Tribunal de Justicia de la Unión Europea: la Ruptura de un Tabú*, cit., p. 36.

[10] K. LENAERTS, K. GUTMAN, J. NOWAK, *EU Procedural Law*, Oxford, 2023, chapter 20.

review procedure, the judgment of the General Court will only take effect once the review procedure has finalised, as *per* Article 62b of the Statute.

The rules of procedure applicable to the General Court are those provided in the amended Rules of Procedure, which have introduced, almost identically, the previous provisions on the preliminary reference procedure available in the Rules of Procedure of the Court of Justice. An exercise of reproduction is on full display, as a means of showing that the rationale of the preliminary reference procedure is not significantly altered by the fact that the General Court will now assume part of the task. The underlying message is that the preliminary reference procedure remains unchanged and a litigant party, or its representatives, should not notice any difference from participating in a preliminary reference procedure in the Court of Justice or in the General Court. However, as Amalfitano has noted, the similarities should not lead the reader to rushed conclusions.[11] The new Rules of Procedure of the General Court can be categorised into four different groups, following the categorisation of Amalfitano: (i) provisions substantially identical to those of the RoP of the CJ, with at most some minor refinements considering that they are applicable to the procedure before the GC and not the CJ; (ii) provisions corresponding to those of the CJ's RoP but with some additions due to the absence of common provisions; (iii) new provisions to compensate for the absence of common provisions; and (iv) provisions on the necessary coordination with Article 256(3) TFUE, Articles 50b and 54 of the Statute and the corresponding CJ RoP's provisions implementing this primary law.[12]

Overall, the partial transfer of preliminary references to the General Court is a highly transformative evolution for the Institution. It shatters the traditional monopoly of ultimate uniform interpretation, and it divides it into two segments, properly connected and with corrective mechanisms to avoid miscoordination. At first sight, the reform undertakes a cautious approach that avoids the creation of new dynamics within the General Court. The preliminary reference should operate in identical terms, whether it may be in the Court of Justice, or in the General Court. The aim of the reform is to assure a safe and manageable assumption of tasks on the part of the General Court, relying on the know-how of the Court of Justice.

However, this safe approach towards the new tasks of the General Court is not deprived of risks. An alternation to the dynamics of the preliminary reference procedure after seven decades of experience can come with unexpected surprises and difficulties attached. Some of them

[11] C. AMALFITANO, *The Transplant of Procedural Rules from the Court of Justice to the General Court*, in *EU Law Live*, 2024.

[12] *Ibidem*.

were foreseen by the law-making institutions and they introduced remedies to avoid any unintended externalities. Others may be more surprising and upend the overall success of the reform, acting as unexpected knowledge gaps needed to be filled in the future. These 'knowledge gaps' and 'known unknowns' will be explored in the following sections.

4. Gaps

The gaps of the reform refer to unsolved matters that the legislature refused to address, which will need further clarification in the course of time, in some cases resulting from practice and, in others, due to spontaneous and unscripted development. At least five gaps will be addressed in this contribution, explained as follows.

A first gap is to be found in the fact that, despite the rules of procedure being a semi-reproduction of the rules applicable to the Court of Justice, such rules are subject to interpretation. Furthermore, the reform has refused to introduce a 'homogeneity' or 'consistency' clause that would bind the General Court to the interpretation made by the Court of Justice of the equivalent provisions. The way in which the Court of Justice has interpreted the Statute and its Rules of Procedure is not the only possible option, but one among several interpretative routes.[13] It is not clear if the General Court will not only reproduce the wording of the Court's Rules of Procedure, but whether it will also mimetize the interpretation of these rules. An example of how the General Court will operate can be found in the cases that will be subject to an Opinion of the Advocate General. As is known, following the Nice Treaty, cases will have an Opinion as long as they raise a "new point of law", as provided by the fifth paragraph of Article 20 of the Statute. In the practice of the Court of Justice, only the cases in which there are genuinely new issues being brought forward, or points of general principle have generally been given the advantage of having an Opinion of the Advocate General. However, in the case of the General Court the decision is more complicated, because the "specific areas" in which the General Court will rule are those in which there is previous case-law of the Court of Justice. Therefore, if the General Court makes the equivalent interpretation to the one being developed by the Court of Justice, the outcome will be one in which only a very small number of cases will include an Opinion of the Advocate General. By not

[13] On the use of different methods of interpretation in the task of judicial decision-making in the Court of Justice, see K. LENAERTS, J. GUTIÉRREZ-FONS, *To say what the law of the EU is: methods of interpretation and the European Court of Justice*, *Working Paper*, *EUI AEL*, 2013.

introducing any specific reference to the peculiarity of the General Court's docket, the use of a common criterion might eventually lead to the development of two approaches by each court.

Another example of a gap can be found in the practice of validity review. As is known, preliminary references can focus on the interpretation of Union law or in the validity of secondary Union law. The new rules operating the transfer to the General Court make no distinction to this effect, so the new jurisdiction will cover both types of references. The purpose of both types of references is different, since a reference of interpretation will focus on the uniform reading that a rule of law merits in order to derive its proper sense and scope, while the reference of validity serves a purifying task within the Union legal system. The traditional approach of the Court of Justice in handling references of validity has not departed significantly from the overall dynamics of a preliminary reference of interpretation. The decision of the Court of Justice will be based on a single round of written submissions, there will hardly be any expert input throughout the procedure and the ruling will articulate its reasoning through a relatively syllogistic and brief argumentative structure. This approach towards judicial review of Union acts stands in stark contrast with the review of the same type of acts undertaken in a direct action, in which the parties have two rounds of written exchanges, it is frequent to rely on expert witnesses or expert opinions, and both the Court of Justice and the General Court have a chance to participate in the review process through a two-tier system in which an appeal on points of law is available to the parties. Will the General Court follow the path of the Court of Justice and adhere itself to the expedient and simplified review process generally experienced in references of validity? Or will it use its expertise and track-record handling direct actions and engaging in complex issues of technical complexity, to develop a more sophisticated approach towards preliminary references of validity? It is too early to tell, but the General Court could profit from the opportunity now available to prove that preliminary references of validity can be handled differently and in more thorough terms, providing more clarity and insight into its decision-making process of a review of validity.

The question of specialised chambers and members of the General Court opens up another gap in the system. Will the specialisation of chambers open a new approach towards adjudication in the Union courts? It is a standard and well-established practice, with well over seven decades of precedent, that the Court of Justice and the General Court do not have specialised judges nor chambers.[14] The rationale of creating specialised

[14] M. JACOBS, M. MÜNDER, B. RICHTER, *Subject Matter Specialization of European Union*

tribunals in the Nice Treaty was a reaction to the general lack of specialisation with the Union courts. However, since 2019 the General Court introduced an internal distribution of tasks that took the court into its first attempt towards specialisation: by assigning staff and trademark cases to targeted groups of chambers, the General Court sent the message of a tacit specialisation taking place, as a mean to accelerate proceedings and leave the expertise in very specific areas of the law in the hands of a stable number of judges and its legal secretaries. This effort is now reinforced by assigning the preliminary references of "specific areas" to two chambers of the General Court, which will now handle the six areas exclusively. This is a significant departure from the practice of the Court of Justice, where preliminary references are handled by the chamber to which the reporting judges is ascribed. It is true that on many occasions the attribution of cases to a reporting judge is based on a prior know-how on the part of the judge, but that is not a strict rule and it is open to multiple exceptions. In contrast, the General Court will have a strict rule on attribution based on chambers, not individual judges, and therefore the "specific areas" will necessarily be addressed within the specialised chambers. Will this specialisation have an impact in the long-term development of the General Court's handling of preliminary references? It is too early to say, but it is not improbable that such a high degree of specialisation will contribute to a good understanding of the areas of law being handled, thus enhancing the authority of the chambers taking care of the said areas. This authority will incite national courts to refer cases to the General Court, maybe providing even stronger reasons to interact with the court rather than the Court of Justice, due to the detailed understanding of the areas of law by the latter. However, the opposite could also be true: by concentrating an area of law in the exclusive hands of a chamber, a one-sided view or understanding of that area could develop, imposing a specific view on all national jurisdictions, with no diversity of views (as the one provided by having diverse chambers ruling on the same area of law, as it happens in the Court of Justice). Specialisation can be an excellent opportunity for the General Court, in the same way that it could also pave the way for future complications.

A variant of the previous gap concerns the Advocates General, which will also become specialised operators within the General Court. The contrast with the Court of Justice is once again striking: whilst the Court of Justice works with eleven non-specialised Advocates General, the General Court will rule in specialised chambers with specialised Advocates General. Specialisation multiplies by having the double authoritative view

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Jurisdiction in the Preliminary Rulings Procedure, in *German Law Journal*, 2019, p. 1214 ff.

of the chamber *and* of the Advocate General, with a long-standing line of decisions in areas that will give all the intervening members a specific *auctoritas*. In the case of the Advocate General, the specialisation is limited by his or her tenure, which is capped at three years plus one single option of renewal, thus limiting its range of action within a six-year temporal time-frame. However, this is a considerable departure from the role of the Advocate General known to date, characterised by his or her ability to give an opinion on any point of law. The 'new' Advocate General will be constrained by the subject matter of the "specific areas", having as the sole object of his or her activity the six areas of law in which the General Court can deploy its jurisdiction. It is open to question whether this compulsory specialisation is in line with the role of the Advocate General, a figure that adds value by providing a diverse view on new points of law. The 'new' Advocate General of the General Court will be giving a view on matters which are mostly settled in advance by the case-law of the Court of Justice, and having to express them always within the same subject-matter. This is a variable from the traditional stance played by the Advocates General, which will need time to develop and to create a tone and style of its own. The fact that their tenure is limited to a maximum period of six years will probably make it difficult to develop such a tone and style, thus delaying the overall process of fleshing out the role of the 'new' Advocate General of the General Court.

Another knowledge gap appears in the behaviour of the parties following the preliminary ruling of the General Court. As opposed to the events in the Court of Justice, where the preliminary ruling is fully effective and deploys its legal effects in all the Member States immediately on the day of its delivery, the judgments of the General Court deviate by having to adjust to a period of ineffectiveness of two months. Until the Court of Justice decides not to open the review procedure, the judgment of the General Court does not take effect and is not binding. If the Court of Justice decides to open the review procedure, the effects of the ruling will not come to effect until the review procedure has ended.[15] Therefore, preliminary rulings will always come into effect following an embargo

[15] Article 62(b) of the Statute: "In the cases provided for in Article 256(3) of the Treaty on the Functioning of the European Union, in the absence of proposals for review or decisions to open the review procedure, the answer(s) given by the General Court to the questions submitted to it shall take effect upon expiry of the periods prescribed for that purpose in the second paragraph of Article 62. Should a review procedure be opened, the answer(s) subject to review shall take effect following that procedure, unless the Court of Justice decides otherwise. If the Court of Justice finds that the decision of the General Court affects the unity or consistency of Union law, the answer given by the Court of Justice to the questions subject to review shall be substituted for that given by the General Court".

period in which the parties have a limited say. In particular, during the two-month period in which the First Advocate General and the Court of Justice must decide on whether to trigger the review procedure or not, the parties have no say on the matter, and they will have to await the final decision of the Court. However, during that time there will be strong incentives on the part of the losing party to convince the First Advocate General and the Court of Justice to review the case. Despite having no remedial course of action to make its views heard, the losing party may use the national court as a speaking voice to reach the Court of Justice. Nothing stops a national court from referring a preliminary reference during the two-month period, in an attempt to make it clear to the Court of Justice that it is not satisfied with the ruling of the General Court. Similar manoeuvres could develop after the Court of Justice has decided not to review the ruling of the General Court, inasmuch the review procedure is limited to a specific ground. If the losing party or the national court conclude that the General Court erred in its decision, the fact that the Court of Justice did not initiate the review procedure is not an indication that the preliminary ruling is devoid of any problems. Preliminary references from unsatisfied national courts with the decisions of the General Court will first arrive at the Court of Justice due to the '*guichet unique*' system, and new opportunities for the Court of Justice to review a judgment of the General Court could emerge through that route.

5. Known Unknowns

A different category of uncertainty is what will be called the 'known unknowns': developments that the new provisions cannot anticipate nor regulate, but simply leave to the development and good sense of the interpreters of the reform. The implementation of the reform will bring about new challenges for the General Court and the Court of Justice to handle, in which one or both courts will need to take a stand. In the following section three 'known unknowns' will be described: first, the General Court's ability to develop and innovate in the pre-existing case-law of the "specific areas"; second, the reaction of national courts to the existence of a specialised preliminary reference court; and third, the handling of points of fact by the General Court.

The rationale underlying the transfer of preliminary references to the General Court is closely attached to the existence of predetermined "specific areas" in which the Court of Justice has already delivered a sufficiently consolidated case-law. This combination of expertise and pre-existing case-law justifies the transfer, quietening the concerns of critics who might suspect of the General Court's credentials to assume

preliminary reference jurisdiction. However, there is an implicit contradiction in this rationale: by transferring the jurisdiction in these areas to the General Court, the new power can also include the ability to depart from that pre-established case-law. This ability is reinforced by the fact that the judgments of the General Court are only subject to a review procedure with a sole ground: "where there is a serious risk of the unity or consistency of Union law". It is hardly foreseeable that a new approach towards the interpretation of Article 135 of the VAT Directive will have a significant impact and create a risk to "the unity or consistency of Union law". Therefore, it can be submitted that the General Court, as of the day it assumes its new jurisdiction, is free to depart from the pre-existing case-law of the Court of Justice in the "specific areas" in which it will deliver its preliminary rulings.

This scenario can be problematic when seen in the light of the aims of the reform. If the General Court was granted jurisdiction on the basis of the existence of a previous case-law, in some cases of a very well and long-established case-law, it is surprising that one of the immediate consequences of the reform is to empower the General Court to depart from the said case-law. However, the hard truth is that the General Court has been given such a power, as long as the Court of Justice is deprived of any remedial course to rectify any deviation that it is unsatisfied with. Therefore, one of the known unknowns that the reform raises is the willingness of the General Court to undertake such deviations, even explicit overrulings of previous judgments of the Court of Justice. In addition, it is also soon to predict the Court of Justice's appetite to refrain or intervene in the said incursions of the General Court, and how willing is the Union's supreme jurisdiction to make use of the review procedure to scrutinise the General Court's deviations from past case-law.

A second group of known unknowns revolves around the role of national courts and their reaction to the implementation of the reform. At first, the commentary on the reform referred to the risk of diminished trust of some national courts in the General Court, particularly from national supreme courts, used by now to maintain their traditional judicial dialogue with the Court of Justice. However, this concern is unfounded and it actually operates in reverse: the risk of national courts becoming used to a specialised preliminary reference court, preferring this specialised dialogue than the previous and more generalist (and sometimes too vague or abstract) advice coming from Luxembourg. The risk of a growing 'fan base' of national courts, including supreme courts, becoming more at ease and comfortable with the decisions of a specialised chamber of the General Court, could lead to an unprecedented situation in which the Court of Justice becomes a default option in providing interpretative

guidance. The fears of some commentators that national courts would manipulate the questions referred in an attempt to keep the procedure within the remit of the Court of Justice, could actually be framed in the reverse: national courts aiming to have their references resolved by the General Court and minimising the risk of such cases being retained by the Court of Justice.

The scenarios mentioned above will depend on the proficiency of the General Court and its track record in handling preliminary references. The factors involved in the overall success of the General Court are not only limited to the quality of its technical rulings in the "specific areas". Other factors also come at play, such as, inter alia, the quality of the legal reasoning, the speed at which it delivers its rulings, the richness of the debates in the course of oral hearings, or the willingness of the judges in the General Court to engage with their national counterparts. Overall, the creation of a national 'fan base' is a process that will take a considerable amount of time, but eventually, if finally consolidated and confirmed, it would drive a wedge between the two courts in the general perception that they receive from the main clients of the preliminary reference procedure: national courts.

Closely connected to the previous known unknown is a third open question: in the same way that the General Court could excel in its management of the preliminary reference procedure, the same could be true of its handling of factual issues and expert knowledge input to the procedure. As is known, preliminary references empower the Union courts to provide interpretations on points of law only, not of fact. This is particularly relevant in preliminary references of interpretation, in which a national court has all the relevant facts and is the sole jurisdiction to characterise them for the purposes of reaching a decision to the case. In some instances, issues of fact have become contentious in preliminary reference procedures before the Court of Justice. This is particularly the case of the role of national law, a subject matter that is kept outside the remit of the Union courts, but it can hardly be considered to be a point of fact. When national law becomes a matter of dispute before the Court of Justice, the traditional approach has been to rely on the interpretation provided by the national court, even in cases in which the portrayal of the domestic legislation is not entirely accurate. This reluctance to engage on the scope of national law has been at the heart of many tensions between the Court of Justice and Member States, but no solution has appeared to be found yet. Therefore, the question comes up as to the approach that the General Court will use in such cases, particularly of a General Court that is frequently called to interpret national law, as is usually the case in

proceedings pursuant to Article 272 TFEU, on cases concerning the performance of contracts subject to an arbitration clause.

A possible way forward that departs from the traditional approach of the Court of Justice is the use of Article 101 of the Rules of Procedure of the Court of Justice and Article 212 of the Rules of Procedure of the General Court, which empower both courts to refer questions to the national court for the purpose of clarification. This tool has found a modest use on the part of the Court of Justice to date, but nothing precludes the General Court from relying on it in more ambitious terms. In fact, the proposal of a 'reverse preliminary reference' has been made in the past, in line with the practice of some federal circuit courts of the United States, which refer questions on points of State law to State courts. Although Article 212 is far from a 'reverse preliminary reference', it could act as a tool facilitating dialogue between the General Court and national courts on points of national law.[16] This would be particularly useful when the General Court holds doubts as to the scope of national law as described in the order for reference, or in case the intervening parties eventually disagree of the terms of national law.

By developing different practices in the handling of the preliminary reference a certain degree of diversity would emerge between both courts. This is not necessarily a bad outcome, and it could eventually ensue in the practice of different practices that help both courts in finding the best approach towards common issues. The example of Article 212 is good proof that a different approach towards the dialogue with national judges could prove helpful to the Court of Justice, paving the way to a better and more effective handling of questions on points of national law. Overall, some degree of divergent approaches could pave the way to a constructive competitive interaction between both courts, for the benefit of a good administration of justice.

6. Conclusions

The 2024 reform of the Court of Justice of the European Union is a major development in the history of the Union's judiciary. From the very moment of its proposal in the end of 2022, academic commentators raised awareness as to the relevance of this reform, considering it the most important step forward since the creation of the Court of First Instance in 1989. This contribution puts the reform in its broader context and confirms the view of those who pointed at the importance of this new era,

[16] A. NICOTINA, E. MARTINI, *From Monologues to Dialogue: The US "Certification" Procedure as a Source of Inspiration for EU Cooperative Judicial Federalism*, in *EYCL*, 2022.

in which the Court of Justice will gradually become the master of its own docket, whilst leaving the majority of day-to-day decisions to the General Court, working closely with boards of appeal of specialised agencies. This is the model of Union courts to which the reform is leading the current system.

However, this contribution aims to raise awareness about other more detailed or technical aspects of the reform that could deepen the scope of the changes ahead even further. Whilst it is true that the reform is turning the Union judiciary into a three tier system with a constitutional court at its apex, there are other open questions that could introduce additional amendments to the functioning and practice of the Union's courts. Specialised Advocates General are a novelty that could have an impact in the very definition of the role of the Advocate General in a broader way. The experience of the General Court handling matters of fact or complex technical issues could transform the way in which preliminary references, particularly those of validity, are handled and rely on expert evidence or witnesses. This development could have an impact in the practice of the Court of Justice itself, in an attempt to avoid looking like an unwilling or deferent jurisdiction, in contrast with its more incisive lower court. The absence of a formal appeal mechanisms can free the General Court from the constraints of the threat of ulterior appellate revision, thus allowing a more imaginative interpretation of Union law that could persuade the Court of Justice to explore different routes as well.

In sum, the reform is not a mere transfer of preliminary references, but the first step in a process of transformation that the Union courts have started. The point of departure can be set in 2001 and the firing shot signalling the start of the race took place in 2024. From now on, it is open to question how far this reform will take the Union's judiciary in turning it into an entirely new judicial organisation, or into a more familiar arrangement with novel but highly relevant modifications in its DNA. The gaps and the 'known unknowns' will take some time to resolve, but once clarified we will have more clarity as to the kind of Union judiciary we have been left with.

ABSTRACT

The article first deals with contextualising the Reform of the Statute of the Court of Justice, placing it in relation to the evolution and changes that have already affected the Union's judicial system since the Treaty of Nice. After a detailed and in-depth examination of the rules governing the functioning of the 'new' preliminary ruling procedure, the contribution analyses the perceivable critical aspects of the reform, distinguishing between gaps and what the Author calls 'known unknowns'. The aim is to identify questions relating to the concrete operation of the 'new' preliminary ruling procedure that will have to be answered over time, sometimes with an immediate practice effect (gaps), sometimes with a systemic impact ('known unknowns').

L'articolo, innanzitutto, esamina la Riforma dello Statuto della Corte di giustizia contestualizzandola e ponendola in relazione con l'evoluzione e le modifiche che già hanno interessato il sistema giurisdizionale dell'Unione a partire dal Trattato di Nizza. Dopo una dettagliata e approfondita disamina delle norme che regolano il funzionamento del "nuovo" rinvio pregiudiziale, il contributo analizza le criticità intuibili nella riforma, distinguendo tra lacune vere e proprie e ciò che l'Autore chiama "*known unknowns*". Il fine è quello di individuare fin da subito i quesiti relativi al concreto funzionamento del "nuovo" rinvio pregiudiziale cui nel tempo occorrerà dare risposta, talvolta con un effetto pratico immediato (lacune), talaltra con conseguenze di natura sistemica ("*known unknowns*").

L'article, tout d'abord, examine la réforme du Statut de la Cour de justice en la contextualisant et en la mettant en relation avec l'évolution et les modifications qui ont déjà affecté le système juridictionnel de l'Union depuis le traité de Nice. Après un examen détaillé et approfondi des règles de fonctionnement du « nouveau » renvoi préjudiciel, l'article analyse les aspects critiques de la réforme, en distinguant entre les lacunes réelles et ce que l'auteur appelle les « *known unknowns* ». Le but est d'identifier les questions relatives au fonctionnement concret de la « nouvelle » procédure préjudicielle auquel il faudra répondre dans le temps, parfois avec un effet pratique immédiat (lacunes), parfois avec des conséquences systémiques (« *known unknowns* »).