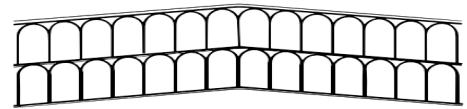




EUROPEAN
COMMISSION



RIVISTA DEL CONTENZIOSO EUROPEO
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REVIEW OF EUROPEAN LITIGATION

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COMMISSION OPINION

**on the draft amendment to Protocol No 3 on the Statute of the Court of Justice of the
European Union, presented by the Court of Justice on 30 November 2022**

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Having regard to the Treaty on the Functioning of the European Union, and in particular the second paragraph of Article 281 thereof,

1. On 30 November 2022, the Court of Justice of the European Union submitted a request to the European Parliament and the Council under the second paragraph of Article 281 of the Treaty on the Functioning of the European Union (TFEU) to amend Protocol No 3 on the Statute of the Court of Justice of the European Union (the Statute). The main part of that request is to make use of the possibility provided for in the first subparagraph of Article 256(3) of the Treaty on the Functioning of the European Union to transfer to the General Court jurisdiction to hear and determine questions referred for a preliminary ruling under Article 267 of that Treaty in specific areas laid down by the Statute. A new Article 50b would be inserted into the Statute for this purpose. The second part is a proposal to extend the mechanism for the determination of whether an appeal is allowed to proceed provided for under Article 58a of the Statute, which would be consolidated and replaced. These two parts are accompanied by a proposal for a specific amendment to Article 50 of the Statute as regards the composition of the chambers of the General Court.

I. General considerations

2. As the Court of Justice explains in its request and in the accompanying explanatory memorandum, the main part of this request is made in the context of the extension of the reform of the judicial framework of the Union, decided in 2015, which led to the doubling of the number of judges in the General Court¹. The Court of Justice highlights the significant increase in both the number of requests for a preliminary ruling and the average duration of proceedings. The Court of Justice also stresses that the aim of strengthening the General Court, in line with the aforementioned reform, has now been achieved and the General Court has begun to adapt its working methods in order to improve the coherence and effectiveness of the proceedings falling within its jurisdiction. As regards the second part of the request, the Court of Justice proposes extending the mechanism, introduced in 2019², for the determination of whether an appeal against a judgment or order of the General Court is allowed to proceed to include, on the one hand, other independent boards of appeal of offices, bodies or agencies of the European Union and, on the other hand, cases referred to in Article 272 TFEU relating to the performance of a contract containing an arbitration clause.
3. The Court of Justice justifies its request on the basis that both courts need to be able to perform properly the tasks assigned to them by the Treaties, taking into account the developments described in the previous paragraph.
4. The Commission fully shares the objective of this reform.

¹ Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union (OJ L 341, 24.12.2015, p. 14).

² Regulation (EU, Euratom) 2019/629 of the European Parliament and of the Council of 14 April 2019 amending Protocol No 3 on the Statute of the Court of Justice of the European Union (OJ L 111, 25.04.2019, p. 1).

5. It is essential that the Court of Justice is able to fulfil its role as the supreme judicial body of the Union. In order to do so, it must be able to focus more on cases which raise issues of fundamental importance to the Union legal order, by devoting all necessary resources to the handling of those cases and, where this proves necessary, by deepening dialogue with national courts, including courts of last instance, to ensure the unity of the Union legal order.
6. Moreover, it seems essential that the expertise specific to the General Court in dealing with technical and complex cases, as well as the additional resources of the General Court resulting from the reform of the judicial framework of the Union, be placed fully at the service of individuals.
7. For those reasons and in view of the constant increase in the number of requests for a preliminary ruling, which must be dealt with expeditiously in order to enable national courts to guarantee individuals respect for the right to an effective remedy, the Commission agrees with the Court of Justice that, despite the difficulties inherent in such an operation, it has become necessary for the Court of Justice and the General Court to share jurisdiction over requests for a preliminary ruling. Nonetheless, the Commission sets out below some comments on the main part of the request submitted by the Court of Justice.
8. As regards the second part of the reform and the specific amendment to Article 50 of the Statute, the Commission has no particular remarks to make and is able to give a favourable opinion on this subject.

II. The transfer to the General Court of jurisdiction to hear and determine the questions referred for a preliminary ruling under Article 267 TFEU in specific areas

II.1 Choice and definition of specific areas

9. In its choice of specific areas, the Court of Justice explains that it was guided by four parameters. First, the need for those areas to be clearly identifiable and sufficiently separable; second, that they raise few issues of principle; third, that there is already a substantial body of case law on the area; fourth, that the choice enables a sufficiently high number of references for a preliminary ruling to be transferred. Using these parameters, the Court of Justice identified the following specific areas: the common system of value added tax; excise duties; the Customs Code and the tariff classification of goods in the Combined Nomenclature; compensation and assistance to passengers; the system for greenhouse gas emission allowance trading.
10. The Commission approves the choice of parameters used by the Court of Justice. Adding other parameters, such as the issue of whether the cases relating to the specific areas entail significant budgetary implications, would jeopardise the aim of transferring a sufficiently high number of references for a preliminary ruling to the General Court to relieve the Court of Justice and to enable the General Court to develop a real and significant practice. The Commission thus welcomes the choice of specific areas identified. In particular, there is a significant body of case law in these areas on which the General Court can rely, even if, as is the case with all areas of EU law, those areas are liable to legislative changes which may lead the General Court to develop new case law³.

³ This could be the case, in particular, following the adoption of the new Customs Code, replacing Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code, OJ L 269, p. 1.

11. The Commission approves the approach proposed by the Court of Justice not to make a distinction between requests for a preliminary ruling regarding interpretation and those regarding validity.
12. As regards the definition of those specific areas, it may be useful to clarify further the areas in which jurisdiction over preliminary rulings is transferred to the General Court, while retaining the flexibility necessary to ensure that those areas are defined so as to ensure their allocation in such a way that takes into account developments in the *acquis*. This aim could, for example, be achieved by including in the recitals of the proposed Regulation an abstract but sufficiently precise description of the various components of each specific area concerned, at the time of adoption of the reform.
13. In any event, it should be noted that the decision to transfer an incoming request for a preliminary ruling is without prejudice to any decision that the General Court may be required to take pursuant to the second subparagraph of Article 256(3) TFEU and the precise provisions that should be inserted into the Rules of Procedure of the General Court in that regard.

II.2 The condition that a request for a preliminary ruling falls ‘exclusively within one or several of the specific areas’

14. The Court of Justice proposes that the General Court acquire jurisdiction to hear and determine requests for a preliminary ruling which fall ‘exclusively within one or several of the specific areas’, so that a request for a preliminary ruling involving issues relating both to those specific areas and to other areas would remain with the Court of Justice.
15. The Commission agrees with this approach in principle. However, it considers that it would be preferable to clarify, preferably in the recitals to the draft Regulation, what is meant by ‘exclusively within one or several of the specific areas’ in the situation that regularly arises, in which a request for a preliminary ruling includes issues both of interpretation or validity of provisions of a Union act falling within one or several of the specific areas, and of issues of interpretation of primary law provisions, general principles of law or the Charter.
16. According to the Commission, the fact that a request for a preliminary ruling requires an interpretation of whether the rules relating to specific areas are consistent with primary or international law, or even where the request includes an issue relating to a specific legal act the substantive content of which is equivalent to general principles of law or the Charter, should not preclude transfer to the General Court.
17. On the other hand, a request for a preliminary ruling which raises questions which do not relate as such to the interpretation of an act falling within one of those specific areas but, for example, to provisions of primary law, general principles of law or the Charter should remain within the jurisdiction of the Court of Justice even if the legal context of the main proceedings falls within one of those specific areas. The same approach should be followed where a referring judge simultaneously submits questions relating to the interpretation or validity of the provisions of a Union act falling within one or several of the specific areas and separate questions relating to the interpretation of primary law provisions, general principles of law or the Charter.
18. Finally, it would also be preferable to specify the arrangements for allocating requests for a preliminary ruling which, in addition to issues falling within one or more of the specific areas, explicitly or implicitly raise issues of the jurisdiction of the Court of Justice or admissibility (conditions laid down in Article 267 TFEU and the Rules of Procedure). The Commission sees no compelling reasons against the

transfer of such requests to the General Court, since the conditions relating to the jurisdiction of the Court of Justice or the admissibility of requests for a preliminary ruling must from now on be applied by both courts.

II.3 The transfer procedure

19. As regards the transfer procedure, the draft Regulation merely provides that all requests for a preliminary ruling are to be submitted to the Court of Justice. The Court of Justice, after verifying that the conditions discussed in the preceding paragraphs have been met in accordance with the detailed rules set out in its Rules of Procedure, will transmit each request for a preliminary ruling falling within the specific areas to the General Court.
20. The Commission has no objections to this basic rule of the transfer procedure.

II.4 The detailed rules and procedure applicable to the handling of requests for a preliminary ruling by the General Court

21. The Court of Justice proposes that the General Court hear the preliminary ruling cases transferred to it in chambers designated for that purpose, in accordance with the detailed rules set out in the Rules of Procedure of the General Court. The Court of Justice also proposes that an Advocate General be designated in all cases, again in accordance with the detailed rules set out in the Rules of Procedure of the General Court, it being understood that such designation does not mean that an Opinion will systematically be delivered in all cases.
22. The Commission supports the greater specialisation of the Chambers of the General Court. This is all the more important since the handling of the preliminary ruling cases transferred to it will require, in addition to expertise in the specific areas, a mastery of the detailed rules of the preliminary ruling procedure, which differs significantly from the procedures for which the General Court has been responsible until now. The Commission considers that this reform could provide an opportunity for the General Court to continue its reflection on the more general introduction of a degree of specialisation to the Chambers.
23. Furthermore, the Commission considers that the General Court should include in its Rules of Procedure, and effectively apply in practice, all the detailed rules of procedure enabling requests for a preliminary ruling to be dealt with expeditiously, including, in particular, the possibility of deciding a case without a hearing or without the Advocate General's Opinion, or by reasoned order. In addition, the Commission considers that it would be particularly appropriate for the General Court to adopt a practice ensuring that, in cases in which an Opinion is delivered, it is delivered very quickly after the hearing, if there is one, so as not to delay the deliberation of the case and the decision of the General Court.
24. Finally, as regards the designation of Advocates-General, the Commission has no objections as such to the provision proposed by the Court of Justice in the draft amendment to the Statute. Nonetheless, the Commission considers that particular attention should be paid to the arrangements for appointing the Advocates-General, who will be chosen from among the judges of the General Court, in accordance with Article 49 of the Statute. The Commission suggests exploring the option of providing that a judge belonging to a Chamber other than that to which the request has been assigned fulfil the role of Advocate-General for a certain period, to be no shorter than three years, either for all requests for a preliminary ruling assigned to that Chamber, or for requests for a preliminary ruling falling within one or more of the specific areas.

III. Conclusion

25. The Commission gives a favourable opinion on the draft amendment to Protocol No 3 on the Statute of the Court of Justice of the European Union, presented by the Court of Justice on 30 November 2022.