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Past, Present, and Future of European Union's Judicial Architecture

Rimvydas Norkus*

Judge at the General Court of the European Union
Affiliated professor of Mykolas Romeris University
Court of Justice of the European Union
L-2925 Luxembourg
E-mail: Rimvydas.Norkus@curia.europa.eu

Past, Present, and Future of European Union's Judicial Architecture

Rimvydas Norkus

(General Court of the EU (Luxembourg), Mykolas Romeris University (Lithuania))

Summary. This article delves into the essential conditions for the transfer of jurisdiction from the Court of Justice to the General Court to hear and determine questions referred for a preliminary ruling in specific areas. Against the backdrop of the ongoing legislative process aimed at implementing Article 256(3) of the Treaty on the Functioning of the European Union, the article examines proposed legislative changes to the Statute of the Court of Justice of the European Union. Furthermore, the article explores potential practical implications associated with these legislative amendments, shedding light on their anticipated applications.
Keywords: Court of Justice, General Court, requests for a preliminary ruling, transfer of jurisdiction to the General Court, Article 256(3) of the Treaty on the Functioning of the European Union.

Europos Sąjungos teisminės architektūros praeitis, dabartis ir ateitis

Rimvydas Norkus

(Europos Sąjungos Bendrasis Teismas (Liuksemburgas), Mykolo Romerio universitetas (Lietuva))

Santrauka. Šiame straipsnyje analizuojamos esminės sąlygos, leidžiančios iš Teisingumo Teismo perduoti jurisdikciją Bendrajam Teismui nagrinėti ir spręsti klausimus dėl prejudicinio sprendimo. Atsižvelgiant į vykstantį teisėkūros procesą, kuriuo siekiama įgyvendinti Sutarties dėl Europos Sąjungos veikimo 256 straipsnio 3 dalį, straipsnyje nagrinėjami siūlomi Europos Sąjungos Teisingumo Teismo statuto pakeitimai. Be to, straipsnyje nagrinėjami galimi praktiniai su šiais teisės aktų pakeitimais susiję padariniai, paaiškinant numatomą jų taikymą.
Pagrindiniai žodžiai: Teisingumo Teismas, Bendrasis Teismas, prašymai priimti prejudicinį sprendimą, jurisdikcijos perdavimas Bendrajam Teismui, Sutarties dėl Europos Sąjungos veikimo 256 straipsnio 3 dalis.

* All views and opinions expressed in this article are personal.

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Introduction

When Lithuania joined the European Union on 1 May 2004, the Court of Justice of the European Union (CJEU) had already been operating for 52 years. Created in 1952 by the Treaty establishing the European Coal and Steel Community and having grown since then in size, functions, and global significance, this Court represents today the world's largest judicial institution of an international character. Having undergone numerous reforms spurred by successive EU enlargements, amendments to founding Treaties, and internal reorganizations, the CJEU now comprises two distinct jurisdictions: the Court of Justice and the General Court, collectively known as the Court of Justice of the European Union.

However, the institutional framework of the Court is undergoing further transformation. As of the time of writing, a substantial reform is under discussion among European legislators. Following the proposal of the Court of Justice of the European Union, the partial transfer of competence from the Court of Justice to the General Court to hear and determine questions in specific areas referred for preliminary rulings by the courts of Member States is on the agenda.[1] A significant milestone in this ongoing reform occurred on 7 December 2023, when representatives from the Council presidency and the European Parliament reached a provisional agreement on amending the Statute of the Court of Justice of the European Union (hereinafter, "the Statute"). This development, as highlighted in the press release from the Council of the EU, strongly suggests that approval of the reform is imminent. The article explores the implications of this potential change, analyzing its significance in the broader context of the CJEU's role and responsibilities.

The main objective of this article is to analyse the envisaged reform and evaluate its potential contributions to strengthening the European judicial architecture. To achieve a comprehensive understanding, it is imperative to contextualize the reform within the historical and current operational framework of the institution. By doing so, the article aims to assess the necessity, underlying objectives, and anticipated outcomes of this transformative initiative.

As the preliminary ruling procedure constitutes the cornerstone (Opinion 2/13 (Accession of the Union to the ECHR) of 18 December 2014) of the judicial system based on cooperation between the judicial authority of the European Union and the courts and tribunals of the Member States, which is quintessential for ensuring the uniform application and interpretation of EU law, the analysis of the impact of the envisaged reform for this mechanism of cooperation from the point of view of national courts and tribunals should be made.

The examination of the potential transfer of jurisdiction to the General Court to hear and determine requests for a preliminary ruling has been thoroughly investigated, particularly in the aftermath of the implementation of the Treaty of Nice. This treaty, enacted with provisions allowing for such transfers, has been analyzed by notable scholars such as Azizi (Azizi, 2006), Craig (Craig, 2001), Lenaerts (Lenaerts, 2006), and Weiler (Weiler, 2001)). Subsequent reforms, such as the augmentation of judges at the General Court, as discussed by Sarmiento (Sarmiento, 2017, pp. 236-251)), have also prompted a reassessment of this possibility. The broader discourse on the allocation of competencies between the Court of Justice and the General Court has been a subject of scrutiny in the general legal literature. Works by Kellerbauer et al. (2019) and Lenaerts et al. (2014) delve into these issues.

[1] There is a second important part of the proposal, which envisages extending the mechanism for the determination of whether an appeal brought against the decision of the General Court is allowed to proceed. Despite the same global objective as of the transfer of competence to the General Court, namely to increase the efficiency of court proceedings by allowing the Court of Justice to focus on important legal questions, this part of the reform will not be analysed in the present article.

Notably, this article contributes to the ongoing dialogue by contextualizing its analysis within the current reform landscape. It explores specific legislative proposals and assesses the practical viability of their implementation. For a comprehensive overview of this reform, scholars such as Kühn (2023), Petrić (2023), Iglesias, Sarmiento (2024) and others have presented detailed discussions in specialized literature.

1. Historical foundations of current European judicial architecture

The Court of Justice of the European Union has its origins in the aftermath of World War II when European leaders sought to create lasting peace, stability, and economic prosperity through cooperation and integration. Thus, the European Coal and Steel Community (ECSC) was established in 1951 through the Treaty of Paris (Treaty establishing the European Coal and Steel Community, 1951), its founding members being Belgium, Germany, France, Italy, Luxembourg, and the Netherlands. Recognizing the need for a judicial institution to interpret its provisions and ensure their correct and uniform application across the Member States, the Treaty of Paris also provided for the creation of the Court of Justice of the European Coal and Steel Community.

This Court was established in Luxembourg and began its operations in 1952. Its first members, seven Judges and two Advocates General nominated by common agreement between the governments of the ECSC countries, took office on 4 December 1952. The Court's rulings aimed to strengthen economic integration, eliminate trade barriers, and foster cooperation in the coal and steel industries.

As European integration progressed, the need for further consolidation and efficiency arose. The Treaties of Rome, signed in 1957, established two new Communities: the European Economic Community (EEC) (Treaty establishing the European Economic Community, 1957) and the European Atomic Energy Community (EAEC more commonly known as "Euratom") (Treaty establishing the European Atomic Energy Community, 1957). Thus, the Court was established as a single common Court to serve all the three European communities and was renamed the Court of Justice of the European Communities. It retained its location in Luxembourg and expanded its jurisdiction to cover not only the ECSC but also the EEC and the EAEC. This streamlined the judicial system and allowed for a more coherent approach to legal matters within the European Communities.

In 1988, the Court of First Instance was created by Council Decision 88/591 (Council Decision 88/591/ECSC, EEC, Euratom, 1988) based on the 1986 Single European Act (Single European Act, 1987), which had given the Council power to create such a Court. The main objective of this institutional reform was to improve the judicial protection of individual interests in respect of actions requiring close examination of complex facts but also to help ease the Court's workload by enabling it to concentrate its activities on its fundamental task of ensuring uniform interpretation of Community law. The Court of First Instance began its work on 25 September 1989 and heard its first case in November of the same year.

The Maastricht Treaty (Treaty on European Union, 1992), signed in 1992, marked a significant turning point in European integration, further expanding the scope of cooperation beyond economic matters. In regards to the Court, its jurisdiction was broadened. The Treaty extended the Court's right to review the legality of acts to include those adopted by the European Parliament as well as the European Central Bank. It also gave the Court the power to impose a lump sum or penalty payment in the case of a failure by a Member State to comply with a judgment. In the same vein, with the entry into force of the Treaty of Amsterdam (Treaty of Amsterdam, 1997) in 1999, the Court's jurisdiction further expanded to cover areas such as judicial cooperation in civil matters.

In 2003, the Treaty of Nice (Treaty of Nice, 2001) introduced the possibility of establishing specialized courts at the EU level. Consequently, on 2 November 2004, the Council of the European Union made the decision to create the Civil Service Tribunal. This Tribunal was composed of seven Judges appointed by the Council, serving a renewable term of six years. Its function was to hear and determine at first instance European civil service disputes, a task previously undertaken by the Court of First Instance. Appeals against the decisions of the Civil Service Tribunal, limited to points of law, could be brought before the Court of First Instance within a two-month period. In exceptional circumstances, the Court of Justice could review the decisions delivered by the Court of First Instance on appeal.

The Treaty of Lisbon (Treaty of Lisbon, 2007) signed in 2007, which entered into force on 1 December 2009, further solidified the Court's role and powers within the European Union. It extended the Court's jurisdiction in several fields, such as the area of freedom, security and justice; police and judicial cooperation in criminal matters; visas, asylum, immigration and other policies linked to the movement of persons. Furthermore, the Treaty granted the Charter of Fundamental Rights of the European Union a legally binding status, the same legal status as EU Treaties, requiring the CJEU to ensure the protection of the fundamental rights enshrined in the Charter. The Court of First Instance was renamed (now the General Court) and its competence was expanded to cover at first instance all actions for annulment, failure to act, compensation for damage, civil servants' disputes, and disputes pursuant to an arbitration clause, with the exception of those assigned to a specialised court and those reserved in the Statute for the Court of Justice.

In 2015, due to an increase in the volume and complexity of the cases brought before the General Court, particularly in the areas of competition, state aid, and intellectual property, as well as prolonged proceedings, the EU legislature decided to address the issue by gradually expanding its number of Judges from 28 to 56 by 2019 and transferred it to the jurisdiction of the Civil Service Tribunal, which as a result was dissolved on 1 September 2016 (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). Thus, the Court of Justice of the European Union acquired its current name and composition, consisting of two courts: the Court of Justice and the General Court.

2. Pre-requisites for the reform

Article 256(3) of the TFEU confers jurisdiction to the General Court to hear and determine questions referred for a preliminary ruling under Article 267, in specific areas laid down by the Statute of the Court of Justice of the European Union. This provision has been awaiting activation through necessary amendments to the Statute since its introduction by the Treaty of Nice in 2003. References for preliminary rulings have remained within the exclusive jurisdiction of the Court of Justice despite the invitation by the European legislator to consider the option of their partial transfer to the General Court (Article 3(2) of the Regulation 2015/2422) and despite the prediction of the likelihood of this move by legal scholars (for instance, Sarmiento, 2017, pp. 236-251). In its report submitted to the European Parliament and to the Council in December 2017, the Court of Justice explained the absence of the necessity of such a transfer by efficiency and reduced the duration of the preliminary ruling procedure at that time[2] as well as by the fact that the reform of the judicial framework of the Union was still underway and had not yet produced all its effects. Indeed, several Judges of the General Court had yet to be appointed and measures linked, inter alia, to the internal organisation of the General Court following the reform

[2] The average length of time for dealing with requests for preliminary rulings was then 15 months.

had yet to be adopted. The Court of Justice also identified several disadvantages related to the partial transfer of competence, such as difficulties in identification of areas in which such a transfer could take place, the risk of divergence of approaches in the interpretation of transversal provisions of the Treaties or of legislation as well as the prolongation of proceedings in case of a review procedure by the Court of Justice as a remedy against such a divergence (Report submitted under Article 3(2) of Regulation (EU, Euratom) 2015/2422). A similar approach was adopted in the Report provided for under Article 3(1) of Regulation 2015/2422 on the functioning of the General Court (Report submitted under Article 3(1) of Regulation (EU, Euratom) 2015/2422, p. 54).[3]

The developments from 2017 to 2023 in the workload and working methods of both jurisdictions demonstrate a substantial change in these considerations. First, the workload of the Court of Justice grew not only due to the increased number of requests for a preliminary ruling[4] but also due to its increasing complexity and sensitivity. This is demonstrated by growing recourse to the Grand Chamber of the Court of Justice[5], which in turn necessitates the employment of bigger resources of the Court. Correspondingly, the duration of the proceedings also grew.[6]

At the same time, the reform of the judicial framework of the European Union has been fully implemented. Since July 2022, the General Court has had two Judges per Member State, namely a total of 54 Judges. As recognised by the Court of Justice, the General Court has, in recent years, carefully considered its internal organisation and working methods which has led, in particular, to a partial specialisation of that Court's chambers,[7] more proactive case management, and increased referral of important or complex cases to extended formations, composed of 5 Judges.[8] Those developments placed the General Court in a good position to be able to hear and determine not only a larger number of cases but also new cases which do not come solely within the jurisdiction that it has enjoyed until now (Request submitted on 30 November 2022 by the Court of Justice with a view to amending Protocol No. 3 on the Statute of the Court of Justice of the European Union, 2022).

The combination of these factors is presented as a main element that drove the Court of Justice to initiate, in 2022, the partial transfer of competence by submitting the request pursuant to the second paragraph of Article 281 of the Treaty on the Functioning of the European Union, with a view to amending Protocol No. 3 on the Statute. One should not, however, ignore the broader context in

[3] "Redefining how jurisdiction is shared between the Court of Justice and the General Court is not necessary at present. In the light of the foregoing analysis and the particularly positive results recorded by the Court of Justice in 2020, which are reflected in a significant reduction in the number of pending cases, it appears both possible and appropriate to wait until the increase in the number of judges of the General Court has produced all its effects – in particular in the light of the changing organisation and working methods envisaged above – before formulating, where appropriate, a request for a legislative act seeking to amend the Statute on the basis of the second paragraph of Article 281 TFEU, as provided for in the third subparagraph of Article 3(1) of Regulation 2015/2422."

[4] While the Court of Justice was seized, in 2016, of 470 requests for a preliminary ruling, that number increased, three years later, to 641 requests, and to 567 requests in 2021 (Request submitted by the Court of Justice with a view to amending Protocol No. 3 on the Statute of the Court of Justice of the European Union).

[5] In 2022, there were 77 cases heard by the Grand Chamber, which corresponds to 10,63 percent of all cases. In 2021, these numbers were 83 (12,26 percent), in 2020, 70 (10,65 percent), in 2019, 77 (10,1 percent), in 2018, 76 (11,7 percent) (Annual reports of the Court of Justice of the European Union).

[6] In 2022, the average length for dealing with preliminary ruling cases was 17.3 months (Annual report, 2022).

[7] General Court's chambers are specialised in the cases stemming from the employment relationship between the European Union and its staff and in the cases concerning intellectual property rights (Criteria for the assignment of cases to Chambers).

[8] In 2022, there were 100 cases heard by extended compositions of the General Court, which corresponds to 11,65 percent of all cases. In 2021, these numbers were 87 (9,15 percent), in 2020, 111 (14,84 percent), in 2019, 59 (6,76 percent), and in 2018, 87 (8,62 percent) (Annual reports of the Court of Justice of the European Union).

which the Court of Justice positions itself in a long-term perspective as an additional element in the puzzle of transfer. While the Court of Justice is not a national court that has to find its role in a national, constitutional system (Rosas *et al.*, 2012, p. 30), its exact place within the Union's legal architecture is in the process of constant development. The fact that the Court of Justice increasingly plays a role comparable to that of national constitutional courts in their respective national legal systems cannot be overlooked. It is expressly recognised in one of the recitals of the Proposal amending Protocol No 3 on the Statute that the Court of Justice is increasingly required, in preliminary ruling cases, to rule on matters of a *constitutional nature* or related to *human rights* and the Charter of Fundamental rights of the European Union. This is not conditioned by judicial activism of the Court of Justice but rather objectively reflects the nature of cases upon which this Court has been called upon to decide in recent years.[9] Although not specifically identified as the constitutional court in the Treaties,[10] the Court of Justice ensures the primacy of the Treaties in the Union's legal order in the same manner as national constitutional courts ensure the primacy of national constitutions in their respective legal systems. This role, however, is difficult to reconcile with a workload situated around 800 cases per year, rendering the thorough examination of important cases, in particular by the Grand Chamber, complicated. The transfer to the General Court of lesser tasks and cases of high technical, but not necessarily, legal complexity corresponds to the conceptual model within which Union courts operate.

3. Transfer of competence to the General Court

3.1. Specific areas

The identification of specific areas in which the General Court could be called upon to hear and determine questions referred for a preliminary ruling under the first subparagraph of Article 256(3) TFEU constitutes one of the most sensitive issues in this exercise. It is evident from the reading of this provision that the General Court does not have general jurisdiction, which extends to all areas of Union law, but instead, its jurisdiction is guided by the principle of conferral, covering only areas clearly identified as such in the Statute. This implies, first, that these specific areas, which form an exception to the general jurisdiction of the Court of Justice, should not be subject to broad interpretation. Secondly, the requests for preliminary rulings that exceed the scope of specific areas should stay within the purview of the Court of Justice.

The Court of Justice identified three parameters that guided its considerations in determining specific areas under the first subparagraph of Article 256(3) TFEU. The first one refers to the need, for these areas, to be identifiable upon reading the request for a preliminary ruling and sufficiently separable from other areas governed by Union law in order not to give rise to doubts about the precise scope of the questions posed by the national courts and, consequently, the jurisdiction of the General Court to deal with them. The second concerns the identification of areas that involve few issues of principle and have a substantial body of case law of the Court of Justice. This body of case law can guide the General Court in its new jurisdiction, thereby preventing potential risks of inconsistencies or divergences in case law. The third parameter is quantitative and concerns the need to transfer to the General Court a sufficiently high number of references for a preliminary ruling to have a real impact on the workload of the Court of Justice (Request submitted on 30 November 2022 by the

[9] It suffices to think about the series of Rule of Law cases or cases related to Brexit.

[10] Nevertheless, the Court of Justice is clearly identified as a constitutional court in legal doctrine (for example, Lenaerts *et al.*, 2021, p. 18).

Court of Justice with a view to amending Protocol No. 3 on the Statute of the Court of Justice of the European Union, 2022).

Based on these parameters, (1) the common system of value-added tax, (2) excise duties, (3) the Customs Code, (4) the tariff classification of goods under the Combined Nomenclature, (5) compensation and assistance to passengers in case of delay or cancellation of transport services or denied boarding and (6) the scheme for greenhouse gas emission allowance trading were identified as specific areas in which the General Court should acquire jurisdiction to hear requests for a preliminary ruling.

These areas range from matters close to both administrative law and civil law and cover roughly 20% of all requests for a preliminary ruling brought before the Court of Justice each year.

There is no contestation of the pertinence of the above-mentioned parameters regarding the identification of the areas in which transfer of competence can be envisaged. One cannot ignore, however, the absence of the parameter related to the expertise of the General Court in the areas in which it traditionally operates. This court has acquired significant experience in hearing direct actions in technical and economic matters related to competition law, State aid law, and trademark law, hence the transfer of competence in these areas would bring about a synergy effect for the treatment of both direct actions and requests for preliminary rulings. However, no transfer of competence in these areas has been proposed, which can be explained by the lack of correspondence with other above-mentioned parameters. For instance, competition law or State aid law often raise issues of principle, which require the recourse to the Grand Chamber of the Court.[11] In addition, the Court of Justice would retain full appeal jurisdiction on points of law against the judgments of the General Court in relation to its direct action jurisdiction in the same matters. Thus, the parallelism between direct actions and preliminary rulings in the overall system of 'saying the law' as to these matters would be broken (Lenaerts, 2006, p. 235). The absence of trademark law in the package of transfer is more difficult to justify. On the one hand, it could be explained by the relatively low number of references for preliminary rulings in this field, which may not significantly impact the Court of Justice's workload. On the other hand, this factor alone did not prevent to propose the transfer in the area of the scheme for greenhouse gas emission allowance trading.[12] Besides, the argument of maintaining the parallelism between direct actions and preliminary rulings is hardly applicable in trademark cases since an appeal brought against a judgment of the General Court concerning a decision of the EUIPO is subject to a filtering mechanism of the Court of Justice (Article 58a of the Statute) making an admission of appeal in trademark cases exceptional.[13]

It is also worth noting that all requests in specific areas defined in the Statute should be transferred to the General Court irrespective of the level of adjudication of the national court or the tribunal that referred. Hence, the General Court will be competent to hear and determine requests for preliminary rulings presented by national Supreme Courts in the same manner as by national first-instance tribunals, Article 256(3) TFEU not allowing any distinction in this respect.

Neither there is a distinction possible between the requests for preliminary rulings concerning the interpretation and validity of acts of the institutions, bodies, offices or agencies of the Union. As, however, the question of the validity of such an act would most likely require a decision of principle

[11] As an example, in 2022 and 2023 alone, the Grand Chamber of the Court of Justice delivered seven judgments in competition and State aid cases.

[12] There was only one case closed in 2022 concerning the reference for a preliminary ruling in the area of Greenhouse gas emission allowance trading. From 2017 to 2022, there were 21 cases concerned.

[13] From 2019 to 2022, out of 175 appeals brought against a decision of the General Court concerning the decision of an independent board of appeal of EUIPO, three appeals were allowed to appeal (Annual report of the Court of Justice, 2022).

likely to affect the unity or consistency of Union law, it could be referred to the Court of Justice by applying Article 256(3)(2) TFEU (see below).

It is essential for legal certainty and the implementation of the right to a tribunal established by law that the requests for preliminary rulings be handled by a competent court of the Union and to exclude discretionary case allocation. Nevertheless, however precisely one or another specific area will be indicated, the exact scope and delimitation of them will always be subject to interpretation. Some requests for preliminary rulings, which clearly exceed the scope of a specific area (such as a request for interpretation of the EU Passenger Rights Regulation combined with the interpretation of Brussels I bis Regulation) present no difficulties and should stay within the competence of the Court of Justice. The more problematic requests will be those that concern not only one or several specific areas but at the same time raise some questions regarding the interpretation of Treaty provisions, Charter of Fundamental Rights, or general principles of EU law. It is not uncommon that requests for preliminary rulings require interpreting a provision of secondary legislation read in conjunction with the Charter or one or another fundamental freedom. In fact, nothing should prevent the General Court to use systemic method of interpretation and interpret legislation in specific areas in the light of general principles of law or Charter of Fundamental Rights. Where, however, the request for a preliminary ruling raises *independent* questions of interpretation of primary law, public international law, general principles of law, or the Charter of Fundamental Rights, having regard to their *horizontal nature*, the Court of Justice should retain jurisdiction, despite the legal framework of the case in the main proceedings falling within one or more of the specific areas.[14] The criterion of sufficient 'independence' of the horizontal question which would attract the jurisdiction of the Court of Justice instead of that of the General Court should not be subject to broad interpretation. First, it is the General Court that will be competent to hear and determine requests for a preliminary ruling in specific areas, hence its jurisdiction in specific areas will become a principle one, not an exceptional one. Secondly, the transfer of the competence to the General Court in specific areas would be largely deprived of its *effet utile* if it were easy to circumvent the jurisdiction of the General Court by formulating a preliminary question in a manner that touches upon the primary law.

Therefore, only cases in which questions of interpretation of primary law, public international law, general principles of law, or the Charter of Fundamental Rights could be raised independently of a specific area, and that area, in principle, could be replaced by any other area of law without changing the substance of the horizontal question, should be retained by the Court of Justice[15].

3.2. Transmission of the request for a preliminary ruling to the General Court

The underlying idea behind the transfer of competence is that neither the national courts requesting a preliminary ruling nor the parties to the main proceedings should perceive any difference between the hearing of the preliminary question before the Court of Justice and the General Court.

In this perspective, from the point of view of national courts, the question as to which jurisdiction should be competent to deal with their preliminary questions should not arise. In so far as the distribu-

[14] This provision was added as an amendment to the Draft regulation amending Protocol No. 3 on the Statute of the Court of Justice during the legislative process following the vote of the Committee on Legal Affairs of the European Parliament.

[15] The well-known case *Åkerberg Fransson* (judgment of the Court of Justice of the European Union of 26 February 2013, Åkerberg Fransson, C-617/10) could serve as an example: although the case had its origin in responsibility for tax offences in the field of common system of value added tax, the essential question treated by the Court of Justice was the applicability of the Charter within the scope of Union law.

tion of jurisdiction between the Court of Justice and the General Court in preliminary ruling matters is governed by a substantive criterion and requests for preliminary ruling may be mixed in nature and contain questions relating to several areas, it is important for the referring courts not to decide themselves the question whether their request for a preliminary ruling falls within the jurisdiction of the Court of Justice or the General Court (Request submitted on 30 November 2022 by the Court of Justice with a view to amending Protocol No. 3 on the Statute of the Court of Justice of the European Union, 2022). The proposed system is designed as a 'one-stop-shop' in which all requests for preliminary rulings should be addressed to the Court of Justice. This Court will conduct the necessary verification of whether the request comes exclusively within one or within several of the specific areas for which the General Court will be competent. If so, the Court will transmit the request to the General Court. The objective of this verification is not to filter out cases of lesser importance and to leave more important cases to be decided by the Court of Justice but, under the principle of conferral, to ensure that a request for preliminary ruling does not exceed the limits of specific areas. This transmission of the request by the Court of Justice should be without prejudice to the prerogative of the General Court to refer a request for preliminary ruling back to the Court of Justice if, despite the transmission to the General Court, this court arrives at the conclusion that it does not have jurisdiction. This could in particular be the case where in the course of proceedings supplementary questions are asked by the national court or the real scope of initial questions appears larger than preliminary verification suggested, thus exceeding the limits of specific areas. This referral of the General Court should not be binding on the Court of Justice, which would be able to refer the question back to the General Court,. Upon such referral, the General Court may not decline jurisdiction.

The referral to the Court of Justice by the General Court is also provided for by article 256(3)(2) of the TFEU. However, unlike the referral based on the absence of jurisdiction, this referral is conditioned by the importance of the case, which requires a decision of principle likely to affect the unity or consistency of Union law. In other words, a preliminary question that stays strictly within the boundaries of specific areas for which the General Court will be competent, can be referred to the Court of Justice if it features such importance that the unity or consistency of Union law will be at stake and, for that reason, it will be more appropriate for the Court of Justice to respond.

The procedure of verification of a request for a preliminary ruling before its transmission to the General Court will be laid down in the Rules of Procedure of the Court of Justice. However, it stems already from the legislative proposal submitted by the Court that the decision to transmit the request to the General Court will be taken by the President of the Court of Justice following a preliminary analysis and after hearing the Vice-President of the Court of Justice and the First Advocate General. If, however, this preliminary analysis leads to doubts about transmitting the case to the General Court, the decision to retain it will not be made by the President alone. Instead, it shall be referred to the general meeting of all Judges and Advocates General of the Court of Justice for further analysis, which will make the final decision. This procedure encompasses sufficient safeguards against discretionary mechanisms of establishing the jurisdiction. In particular, the decision not to transmit the case due to the horizontal nature of a question pertaining to the interpretation of primary law, public international law, general principles of law, or the Charter will necessitate a collective debate and voting in the general meeting of the Court of Justice.

3.3. Procedure before the General Court

The procedure of hearing and determining requests by the General Court will be guided by the principle of equivalence to the procedure before the Court of Justice. No substantial difference should be observed

by the national courts which submitted the reference for a preliminary ruling or by interested persons, in particular parties to the main proceedings, Member States and institutions, bodies, or agencies of the Union. This means that apart from small technical adaptations, not only the rules of procedure of the General Court but also their practical application must not diverge from those of the Court of Justice.

There are, however, two major differences inherent in the structure of the General Court which need to be overcome to render the procedure as equivalent and smooth as before the Court of Justice.

First, unlike the Court of Justice, the General Court does not have Advocates General. Although the Statute foresees that the Members of the General Court may be called upon to perform the task of an Advocate General in the cases laid down in the Rules of Procedure (Article 49 of the Statute), this option is conditioned by the legal difficulty or the factual complexity of the case and is subject to the decision taken by the plenum of the General Court to this effect (Articles 30 and 31 of the Rules of Procedure). So far, this possibility has had only very limited application, perhaps due to the fact that all the members of the General Court are nominated as Judges and their involvement in the capacity as an Advocate General would diminish their ability to treat cases in judicial capacity. At the same time, the Court of Justice enjoys the presence of eleven Advocates General who intervene in every case. Even if the Court of Justice considers that the case raises no new point of law and may decide to determine the case without an opinion from the Advocate General, this decision is taken after hearing the Advocate General (Article 20(4) of the Statute), so that the complexity of every request for preliminary ruling is examined not only by the chamber dealing with the case but also by the Advocate General. Since the participation of an Advocate General is one of the essential procedural elements of dealing with requests for a preliminary ruling before the Court of Justice, it is completely logical that in the preliminary ruling procedure, the General Court be assisted by Advocates General in the same way as before the Court of Justice. To this end, as it is proposed in draft amendments to the Statute, Judges of the General Court should elect from among their members those who will perform the duties of Advocates General in dealing with requests for a preliminary ruling. Their exact number should be determined by the General Court itself depending on their workload. As those Judges who will be called upon to perform the duties of Advocates General will not lose their status as Judges, nothing should prevent them from exercising judicial functions alongside those of an Advocate General, as long as their workload permits it. However, to safeguard their independence, it would be reasonable to expect that they will not deal with preliminary references as Judges during the period in which they act as Advocates General and their involvement in judicial capacity will remain within the domain of direct actions.

The second difficulty is related to the size of the General Court, which is composed of 54 Judges organised in ten Chambers sitting with five or three Judges (Decision of the Plenum of the General Court, 2022). This high number demonstrates the importance of this jurisdiction but at the same time carries a risk of divergence in jurisprudence if no adequate measures are taken to prevent it. As Sarmiento pointed out 'areas of highly technical expertise, such as VAT or customs law, could be answered in very different ways by different chambers. In fact, the purpose of the transfer of jurisdiction could be undermined if highly technical cases, which deserve technical expertise from judges, end in a myriad of chambers, dispersed among judges of very different backgrounds and sensitivities.' (Sarmiento, 2017, pp. 236-251). To mitigate that risk, it is foreseen in the draft amendments to the Statute that it is appropriate to allocate requests for a preliminary ruling to chambers of the General Court designated for that purpose. This amounts to a specialisation of certain chambers of the General Court to deal with requests for a preliminary ruling. The exact number of such chambers and their model of functioning, in particular, whether besides requests for preliminary rulings, they will be allocated other types of

cases, will be decided by the General Court with the objective of proper allocation of resources and balanced repartition of workload between Judges. It cannot be overlooked that this type of specialisation, which is not based on substantive law but instead on a certain type of procedure (in this case, to deal with requests for preliminary rulings), is not a very common phenomenon. At the same time, it also amounts to specialisation based on substantive law as it means that designated chambers of the General Court will deal with the requests for preliminary rulings *in specific areas* as only in these areas the jurisdiction of the General Court will be established.

The consistency of the jurisprudence of the General Court should also be reinforced by the creation of a new chamber of an intermediate size between the chambers of five Judges and the Grand Chamber, which is also proposed in the draft amendments to the Statute. Although not specifically limited to hearing requests for preliminary rulings, the proposal to create such a chamber is in particular justified by the transfer of competence in this area. The exact number of Judges that compose this chamber will be determined by the Rules of Procedure of the General Court after having considered various elements, such as the objective to avoid duplication of the Grand Chamber composed of fifteen Judges but also to be sufficiently representative to reflect the legal difficulty or the importance of the case, as provided in Article 28 of the Rules of Procedure of the General Court.

3.4. Decisions of the General Court and review procedure

The judgment of the General Court by which it answers the preliminary question submitted to it will acquire, in principle, the same legal power as the judgment delivered by the Court of Justice. First, it will be binding on the national court, as regards the interpretation or the validity of the acts of the Union institutions in question, for the the decision to be given in the main proceedings (judgment of the Court of Justice of the European Union of 5 October 2010, Elchinov, C-173/09), as well as on other national courts at a later stage of the same proceedings (Lenaerts *et al.*, 2014, p. 243). Second, it will acquire *erga omnes* effect and thus will be binding on all national courts applying the same legal provision due to the declaratory nature of such an interpretation. Naturally, the possibility to refer a new question will always be preserved. Third, the interpretation of a rule of Union law given by the General Court will have *ex tunc* effects, which means that it 'clarifies and where necessary defines the meaning and scope of that rule as it must be, or ought to have been, understood and applied from the time of its coming into force' (Judgment of the Court of Justice of the European Union of 13 April 2010, Bressol and Others, C-73/08). Therefore, it must be applied by the courts even to legal relationships arising and established before the judgment ruling on the request for interpretation, subject to the possibility of limiting, exceptionally, the temporal effects of the preliminary ruling (for instance, the judgment of the Court of Justice of the European Union of 8 April 1976, Defrenne, 43/75, §§ 69-75).

The interpretation given by the General Court will not be subject to appeal. However, article 256(3) (3) of the TFEU foresees an exceptional review mechanism of decisions given by the General Court on questions referred for a preliminary ruling, where there is a serious risk of the unity and consistency of Union law being affected. The conditions of such a review are laid down by the Statute. Where the First Advocate General considers that there is a serious risk of the unity or consistency of Union law being affected, he may propose that the Court of Justice review the decision of the General Court. There is a deadline of one month from the delivery of the decision by the General Court to make such a proposal, as well as a one-month deadline from receiving the proposal made by the First Advocate General for the Court of Justice to decide whether or not the decision should be reviewed (Article 62 of the Statute). Therefore, the answer given by the General Court to the questions submitted to it will not take effect immediately but only upon the expiry of the periods prescribed in Article 62 of the

Statute. 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 (Article 62b(2) of the Statute).

Certainly, the risk that the answer given by the General Court contains legal errors cannot be entirely eliminated. Therefore, the review constitutes a necessary safeguard mechanism in order to prevent that *erga omnes* effects are attached to the interpretation jeopardizing the unity or consistency of Union law. However, the exceptional nature and strict conditions for triggering such a review make frequent recourse to it rather unlikely. If the review procedure is opened by the Court of Justice, this would delay the preliminary ruling procedure with all the negative effects on the main national proceedings. The whole *raison d'être* of the transfer of competence could be called into question if the interpretations given by the General Court required frequent intervention by the Court of Justice through the review procedure, thus exposing the parties to the main proceedings to longer delays as it would have been the case before the transfer.

4. The evaluation of the reform

Whether the debated reform will produce the desired effects by reducing the workload of the Court of Justice to allow it to strengthen the unity and consistency of Union law will largely depend on the efficiency of the working methods of the General Court. This Court will be faced with a new challenge to deal with new types of cases and new type of proceedings. While the General Court has been, from the beginning, designed to deal with direct actions, brought by natural or legal persons, Member States, or the EU institutions, and not references for a preliminary ruling coming from national courts and tribunals, it is also true that this Court has demonstrated its ability to adapt to numerous changes connected with successive enlargements of its competence.

As regards the rapidity by which requests for preliminary rulings are likely to be determined by the General Court, this Court has all the potential not to exceed or even improve the duration of a preliminary ruling procedure by which the of the Court of Justice deals with requests in transferred areas[16]. It is true that the time necessary for the verification by the Court of Justice whether the request comes exclusively within the specific areas and for the transmission to the General Court, as well as suspensory effects connected with the verification by the First Advocate General whether to propose the review of the decision of the General Court, will contribute to the global duration of proceedings. Nevertheless, specialised chambers of the General Court designated to deal with requests for preliminary rulings should enable the acquiring of necessary expertise on both procedural and substantive levels and thus swift conduct of proceedings.

The same could be said about the consistency of the case law. A limited number of Judges sitting in specialised chambers of the General Court and the possibility of convening a chamber of intermediate size should substantially reduce the risk of divergence of jurisprudence.

The equivalence of procedural rules before the General Court to those before the Court of Justice, in particular concerning the designation of Advocates General, should offer to the national courts and all interested persons the same guarantees as those provided by the Court of Justice. The combination of these elements allows for a cautious optimism about the outcome of the reform.

[16] In 2022, the average duration of the preliminary ruling procedure was 17,3 months (Annual report of the Court of Justice, 2022). This duration is longer in cases decided by the Grand Chamber and shorter in cases which do not raise questions of principle, such as in transferred areas.

Conclusions

1. After the entry into force of the Treaty of Nice, the conditions are met for the implementation of Article 256(3) of the TFEU to transfer from the Court of Justice to the General Court jurisdiction to hear and determine questions referred for a preliminary ruling in specific areas laid down by the Statute. This transfer corresponds with the role that both Courts play in the Union's system of judicial protection. While the primary mission of the Court of Justice resides in safeguarding the unity and consistency of Union law, the General Court was created and is designed to deal with questions of high factual and technical complexity. The transfer of competence in specific areas envisaged in the draft amendments should establish an equitable balance in the type and number of cases treated by each jurisdiction, allowing the Court of Justice to allocate necessary resources for the most sensitive cases, in particular those decided by the Grand Chamber, thus strengthening European judicial architecture.
2. The equivalence of procedure before the Court of Justice and the General Court in hearing and determining requests for a preliminary ruling, in particular the participation of an Advocate General in every case, should provide the parties to the main proceedings, the national courts, the Member States as well as Union's institutions with the same guarantees as to the quality of administration of justice. The consistency of the jurisprudence in the transferred areas to hear requests for preliminary rulings should be ensured by allocating these cases to the specialised chambers as well as by the possibility of dealing with the request by the chamber of an intermediate size. Exceptionally, the review procedure provided for by Article 256(3)(3) of the TFEU will provide a necessary 'safety net' against the unity and consistency of Union law being affected.
3. The implementation of the mechanism of the transfer of competence is to be determined by the Rules of Procedure of both jurisdictions. In particular, the practicalities of the functioning of the system of 'one-stop-shop', the speed by which the requests for a preliminary ruling will be transmitted by the Court of Justice to the General Court as well as the cases of non-transmission due to an independent nature of a horizontal question of interpretation of primary law or public international law remains to be seen. There is a reasonable prospect, however, that the global duration ofhandling requests for a preliminary ruling in specific areas should improve, thereby strengthening judicial protection of individual interests.

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Rimvydas Norkus yra Europos Sąjungos Bendrojo Teismo teisėjas ir Mykolo Romerio universiteto afilijuotasis profesorius. Pagrindinės jo mokslinių interesų ir tyrimų sritys – Europos Sąjungos proceso ir materialinė teisė, civilinis procesas, nemokumo teisė.

Rimvydas Norkus is a Judge at the General Court of the European Union and an Affiliated Professor of Mykolas Romeris University. His primary scientific interest and research areas include, among others, European Union procedural and substantive law, civil procedure, and insolvency law.