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COVER NOTE

From:	Mr V. Skouris, President of the European Court of Justice
date of receipt:	13 October 2014
To:	Ambassador Stefano Sannino, Chairman of Coreper
Subject:	Response of the Court of Justice to the Presidency's invitation to present new proposals on the procedures for increasing the number of Judges at the General Court of the European Union

Delegations will find attached a new proposal from the Court of Justice on increasing the number of Judges at the General Court of the European Union, forwarded in a letter from Mr Vassilios Skouris, President of the European Court of Justice, to Mr Stefano Sannino, President of Coreper. The Court of Justice's proposal is accompanied by a statement of arguments and a financial statement showing the estimated cost of strengthening the General Court.

Luxembourg, 13 October 2014

The President

His Excellency Stefano SANNINO
Rue du Marteau 5-11
B-1000 Brussels

Your reference: 8433

Dear Ambassador

Please find attached as an annex the reply of the Court of Justice to your letter of 3 September last, in which you suggest that the Court should put forward new proposals with a view to facilitating the task of securing agreement within the Council on the detailed arrangements for increasing the number of judges of the General Court of the European Union. The proposal is accompanied by a statement of the Court's reasoning and an estimate of the cost of increasing the number of judges at the General Court. The three documents have been translated into all languages.

In furtherance of our exchanges, I am also sending these documents to Mr Freddy Drexler, Legal Adviser to the European Parliament, and to Mr Luis Romero Requena, Director-General of the European Commission's Legal Service.

Yours Sincerely,

Vassilios SKOURIS

Copy: Mr Drexler, Legal Adviser to the European Parliament
Mr Requena, Director-General of the European Commission's Legal Service

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Response to the invitation from the Italian Presidency of the Council to present new proposals in order to facilitate the task of securing agreement within the Council on the procedures for increasing the number of Judges at the General Court

The Court of Justice wishes to thank the Italian Presidency of the Council for having taken the initiative, by its letter dated 3 September 2014, to invite new suggestions regarding the procedures for increasing the number of Judges at the General Court.

I. The background to the current situation

Increasing the number of Judges at the General Court is part of the legislative initiative to reform the Statute of the Court of Justice of the European Union which the Court of Justice submitted to the EU legislature on 28 March 2011. Having been favourably received by the Commission, the increase was approved by the Parliament on a first reading. At the Council, while an agreement in principle has been established, it has not proved possible to overcome differences of opinion as to the method of appointment of additional Judges. In regard to that last point, the Greek Presidency of the Council in the first half of 2014 concluded that, while the Court of Justice would have to consider other options, any solution involving fewer Judges than the number of Member States, and, consequently, requiring a choice to be made between Member States, would encounter the same difficulties as those which, in recent years, have prevented agreement from being reached in the Council.

Furthermore, the difficulties which the Council has recently encountered on a number of occasions when it has been called upon to appoint Judges to the Civil Service Tribunal (CST) have a certain amount in common with the situation outlined above. Both last year and this, the need to make a choice on account, on the one hand, of the limited number of positions to fill, owing to the small size of the CST, and, on the other, of the desire to achieve a balance between the principles of stability and rotation, has given rise to long and difficult discussions, so much so that, as matters stand, the appointments that were to

have been made for 30 September 2014 owing to the expiry of the terms of office of two Judges of the CST, including its President, have still not been made. The negative impact of this impasse on the proper functioning of the CST is already becoming evident, as the uncertainty regarding its composition is clearly not conducive to efficient case-management.

So far as the workload of the General Court is concerned, the situation is even more serious than it was when the legislative initiative of the Court of Justice was put forward. While the number of pending cases before the General Court at that time was approximately 1 300, that figure will shortly rise to 1 600, which, moreover, is double the number of pending cases before the Court of Justice. As regards the number of new cases brought before the General Court, that figure, which was 636 in 2010 and 722 in 2011, will probably reach 1 000 in 2014.

It must also be noted that the first actions for damages, in consequence of the Court of Justice's finding of a breach by the General Court of the reasonable time principle, have now been brought (T-479/14 *Kendrion v Court of Justice of the European Union*; T-577/14 *Gascogne Sack Deutschland GmbH and Gascogne v Court of Justice of the European Union*). In other cases, currently pending before the Court of Justice, the issue of the General Court's breach of the duty to adjudicate within a reasonable time has been raised by the applicants. Taken together, these cases, including those still at a pre-litigation stage (submission to the Court of Justice and/or the Commission of a claim for compensation for damage), involve claims for damages of close to 20 million euro.

II. Proposal to double the number of Judges at the General Court in three stages, and to transfer first-instance cases relating to the EU civil service to the General Court

In these circumstances, the Court of Justice considers that the procedure for increasing the number of Judges at the General Court must be managed in such a way as to enable the General Court's judicial capacity to be reinforced in the very near future, so that it is in a position to achieve a rapid and substantial reduction both in the duration of proceedings before it and in the backlog of pending cases.

That is why the Court of Justice proposes to raise the number of Judges at the General Court to two per Member State, while at the same time providing, on the one hand, for such an increase to be phased in so as to ensure that it proceeds in parallel with the growing number of new cases brought before that court, and, on the other, for first-instance cases relating to the EU civil service to be transferred to the General Court.

This proposal thus not only meets the immediate needs of the General Court but, looking much further ahead, is also intended to provide a structural and lasting response to the difficulties encountered, one which provides a longer term solution to the issue of how cases brought before the General Court should be dealt with, by enabling that court to cope with the increase in its workload that is to be anticipated.

- The first stage would consist of an increase in the number of Judges of the General Court by 12, and would provide the General Court with the immediate reinforcements it urgently requires. That figure, which is the figure originally proposed in 2011, is justified now more than ever by the growing workload of the General Court, and would not generate costs in excess of those already envisaged in that respect under the 2011 legislative initiative, which have, in principle, been approved by the EU legislature.
- The second stage would consist of an increase in the number of Judges of the General Court by 7, and would include the transfer to the General Court of first-instance cases relating to the EU civil service. It could take place in 2016 (a year in which the General Court will be partially renewed), on the basis of a legislative initiative to that effect which the Court of Justice would prepare. Where a national of a Member State is performing the duties of Judge at the CST, that Member State will have the opportunity to propose his appointment as a Judge of the General Court, provided that it did not participate in the first stage.
- The third stage would consist of an increase in the number of Judges of the General Court by 9, and would coincide with the partial renewal of the General Court in 2019.

This proposal has been discussed internally, first of all with the President and the Vice-President of the General Court and the President of the CST. It was subsequently approved by the general meeting of the Court of Justice, and the plenary meeting of the CST expressed itself to be in favour of the proposal, whereas the plenary meeting of the General Court stated its preference for the establishment of a specialised trade mark court and for the status quo to be maintained as regards the CST, after which the President and the Vice-President of the Court of Justice, having been invited to take part in a special plenary meeting of the General Court, were able to explain to the Members of the General Court why the Court of Justice is proceeding with the current proposal.

In those circumstances, the Court of Justice hopes that its proposal will, as soon as possible, be given a favourable reception by the EU legislature.

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Reasoning

1. *Main advantages*

The proposal which has just been outlined in broad terms constitutes a genuine ‘reform’, which is not merely a temporary solution to a limited number of problems of greater or lesser importance, but provides a structural and lasting response to the difficulties encountered.

In particular, it would make it possible

- to dispose of the same number of cases as the number of new cases brought, thus halting the increase in the number of pending cases;
- to take steps to clear the backlog of pending cases;
- to reduce the length of proceedings before the General Court, and thus also the risks of the European Union being held in breach of the reasonable time principle;
- to simplify the judicial framework of the European Union, and to promote the consistency of the case-law;
- to have greater flexibility in dealing with cases, since the General Court will be able, in the interests of the proper administration of justice, to assign a greater or lesser number of Judges to one or more Chambers, depending on changes in the caseload, or to make certain Chambers responsible for hearing and determining cases falling within certain subject areas;
- to solve the recurring problems linked to the appointment of additional Judges at the General Court and the appointment of Judges of the CST, as well as those arising from the failure to appoint Judges at the end of a term of office or in the temporary absence of a Member;
- to restore to the Court of Justice the power to rule on appeal in EU civil service matters, thus rendering superfluous both the review procedure (the implementation of which has proved somewhat complex) and the office of temporary Judge at the CST.

2. *Lack of alternatives*

It is true that the TFEU provides for a number of options for dealing with an increase in the caseload of the Courts of the European Union, and that those options include the establishment of one or more specialised courts. However, owing to the circumstances mentioned above, and in view of some of the particular features of specialised courts, the Court of Justice considers that the establishment of such courts does not constitute a viable alternative.

There are a number of reasons for this:

- A court specialising in intellectual property matters would not, by itself, be capable of providing an adequate solution to the problems identified. While it is certainly true that intellectual property cases constitute, in numerical terms, a substantial proportion of the cases brought before the General Court, their transfer to a court specialising in that area would not solve the problem in the long term, as the resulting ‘relief’ would be quickly offset by the constant increase in the overall number of cases brought before the General Court. In addition, according to current statistics, one third of intellectual property cases would return to the General Court in the form of appeals against decisions of the specialised court.
- The establishment of a specialised intellectual property court could, at most, reduce the workload in the area in respect of which that court has jurisdiction to hear and determine disputes, and would therefore have no role to play as regards the introduction of more sustained relief, including in other areas, such as the freezing of funds or REACH, unless the intention were to establish other specialised courts in parallel.
- The establishment of new specialised courts increases the risks of the unity and consistency of EU law being affected, since there would always be two courts that might be seised of similar issues, one by way of the preliminary ruling procedure (Court of Justice), the other by way of an appeal (General Court), in addition to the problems linked to a likely increase in the number of reviews.
- Small courts are not flexible. If the number of cases increases substantially, the court is likely to be unable to cope with them; conversely, if the number of cases in the relevant area declines drastically, the Judges concerned would quickly risk having no duties to perform.
- Small courts have structural weaknesses linked to their method of appointment (difficulties associated with the appointment of their Judges) and the way in which they operate, since the absence of one or two Judges can paralyse the functioning of the court. While these weaknesses and, in particular, their full extent, may have been

difficult to foresee at the outset, their present existence and persistence is such that it would be inadvisable to use the CST as a model for the establishment of other specialised courts. On the contrary, any changes to be made in the judicial system of the European Union should be made without resorting to elements which experience has shown – and continues to show – are inadequate for the purpose of contributing to the flexible and efficient functioning of the Courts of the European Union.

This conclusion is not affected by the fact that the establishment of one – or even several – other specialised courts could mitigate the ‘representation’ problem. Even though the number of posts would accordingly be higher and the Member States could perhaps more easily share the posts among themselves, that would not alter the fact that the Member States do not fully have control of the procedure for the appointment of Members of specialised courts. If the CST model is adopted in connection with the establishment of a new specialised court, the Judges’ posts thus created will be open to competition between those having an interest in applying for them. Next, a selection committee would have to examine the applications and draw up a list for submission to the Council. Therefore, even if the total number of posts available in the specialised courts were to be the same as the number of Member States, there would be no guarantee that the committee(s) would adjust their proposals in such a way that the Member States’ interest in all being ‘represented’ in the specialised courts would always be taken into account. Furthermore, it would be a very delicate matter in legal terms if those committees were required to rule out, of their own motion and automatically, all applications put forward by nationals of Member States already ‘represented’ in the composition of another specialised court. Lastly, it would be incompatible with the principle of non-discrimination enshrined in EU primary law for nationals of certain Member States not to be permitted to submit their applications for the position of Judge in a specialised court merely because a person of the same nationality is performing the duties of Judge in another specialised court of the European Union. It should be noted in that context that, while the Court of Justice is indeed called upon, in accordance with Article 3(1) of Annex I to the Statute of the Court of Justice, to ensure a balanced composition of the Civil Service Tribunal, that does not in any way mean that any application by a person having the same nationality as a person already ‘represented’ in the CST is to be excluded from the selection procedure on that ground alone.

3. *Specific aspects concerning the CST*

Appointments to the CST have never been straightforward. Ever since the CST was established, there have been differences of opinion as to whether the committee(s) responsible for examining applications and submitting to the Council a list of suitable candidates should refrain from submitting their proposal in the form of a list presenting candidates in order of merit, in order to give the Council as much freedom as possible in taking its decision. Similarly, the question whether the rotation principle should be applied and, if so, to what extent, has given rise to strongly divergent views.

Instead of diminishing over the years, those difficulties have recently become even more acute, so much so that it is now impossible for the Council to make the appointments which primary law requires it to make.

4. The urgency of finding a solution in order to clear the General Court's backlog

As long ago as 2011, the Court of Justice highlighted the urgency of finding a solution in order to clear the General Court's backlog. Since then, as the figures set out above have shown, the situation has deteriorated even further, so that the urgency is now greater than ever. It is therefore essential that a solution be adopted which can be rapidly implemented and which is capable of producing its effects in the near future.

It is important to note in that regard that the implementation of the first stage (2015) does not require any amendment of the judicial framework of the European Union and could therefore proceed in very early course. By contrast, any establishment of a specialised court would, in accordance with Article 257 TFEU, require a legislative initiative on the part of the Court of Justice or the Commission. Given that the Court's current initiative does not relate to the establishment of a specialised court, it would still be necessary to draw up a proposal to that effect, to have it examined by the competent bodies and adopted by the two branches of the European Union's legislative authority. Furthermore, a committee would have to be given the task of examining applications for the posts of Judge of that court and submitting a list of suitable candidates to the Council. Within the Council, a consensus would have to be reached regarding the method of appointment of those Judges. In addition, before it could become fully operational, any such court would have to have a registry and rules of procedure. It is therefore difficult to envisage all of this being accomplished within a timescale that will enable the General Court to achieve a genuine short-term reduction in the number of cases pending before it.

Ultimately, the measures necessary to implement the first stage should be taken quickly, on the basis of an appropriate policy orientation relating to the proposal as a whole. As regards the legislative procedure, this first stage is covered by the 2011 legislative initiative of the Court of Justice and would exhaust it. The detailed arrangements for the subsequent stages (2016, 2019) would then have to be discussed on the basis of a legislative initiative of the Court of Justice the object of which would be the reassignment to the General Court of first-instance cases relating to the EU civil service and the amendments to the Statute of the Court of Justice required in order for the CST to be reintegrated into the General Court. The final decision on those aspects would be taken in the context of the examination of that legislative initiative.

The costs of the present proposal are detailed in a document annexed hereto. It should be emphasised that the costs of the first stage will not reach those already envisaged in that regard under the 2011 legislative initiative, and which have, in principle, been approved by the legislative bodies of the European Union. The addition of 7 Judges to the General Court by the reintegration of the CST would, in a normal year, require additional appropriations of 2.4 million euro. The costs in respect of the third stage correspond, in terms of the amount per Judge's post (including Chamber and infrastructure costs), to the costs in respect of the first stage, that is to say, in a normal year, approximately one million euro per Judge's post (including Chamber and infrastructure costs).

Ultimately, the inevitable yet moderate costs generated by the doubling of the number of Judges of the General Court should be viewed having regard to the advantages of reform for litigants. The significant delays in the handling of direct actions brought before the General Court have serious repercussions for individuals and undertakings, and it is therefore the primary interest of litigants that makes reform essential.

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October 2014

Estimated cost of increasing the number of Judges at the General Court

1. Increasing the number of Judges of the General Court by 12 would require additional appropriations in an amount estimated at EUR 11.6 million in a ‘normal year of operation’.

This amount comprises the remuneration and expenses associated with 12 Judges, their Chambers staff (51 posts, taking into account the 9 legal secretaries already taken on in 2014) and Registry staff (17 posts), as well as the corresponding operating expenditure (in relation to buildings, furnishings and information technology). In the year of establishment, the various installation expenses would be in the order of EUR 3.4 million.

As compared with the financial statement attached to the March 2011 proposal by the Court of Justice, there is a reduction in the appropriations required in a normal year of just over EUR 2 million. This is essentially accounted for by the appropriations already obtained in 2014 for the nine legal secretaries.

2. Adding 7 Judges to the General Court by the reintegration of the Civil Service Tribunal (CST) would require additional appropriations of EUR 2.4 million.

This additional cost is essentially attributable to a more substantial Chambers structure at the General Court than that at the CST. As regards CST Registry staff, their reintegration into the General Court Registry would have no financial impact.

At the time of the CST’s reintegration, a provision would be required for installation expenses of (no more than) EUR 1.3 million (that is if none of the serving Judges at the CST were to be appointed Judge at the General Court).

3. Lastly, the appropriations required when increasing by 9 the number of Judges at the General Court may be estimated at EUR 8.9 million in a normal year of operation.

This amount comprises the remuneration and expenses associated with 9 Judges and their Chambers staff (45 posts), as well as the corresponding operating expenditure. The additional cost in the first year would be approximately EUR 2.2 million.

4. Finally, as compared with the budget of the Court of Justice and with the administrative budget of all the institutions, the cost burden of increasing the numbers of Judges at the General Court would be as follows, in a normal year of operation:

	Budget of the Court		Total administrative budget of the institutions	
2014 amount	€348.7 mill	100%	€6,783.2 mill	100%
Creation of 12 Judges	€11.6 mill	3.3%	€11.6 mill	0.17%
Creation of 7 Judges (CST reintegration)	€2.4 mill	0.7%	€2.4 mill	0.03%
Creation of 9 Judges	€8.9 mill	2.6%	€8.9 mill	0.13%
Total (28 Judges)	€22.9 mill	6.6%	€22.9 mill	0.34%