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European Union Committee

14th Report of Session 2010–11

The Workload of the Court of Justice of the European Union

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NOTE:

Evidence taken at or in connection with a public hearing is published online at <http://www.parliament.uk/hleue> and available for inspection at the Parliamentary Archives (0207 219 5314)

References in footnotes to the Report are as follows:

- (Q) refers to a question in oral evidence;
- (WE) refers to written evidence as listed in Appendix 3.

SUMMARY

One of the central responsibilities of the Court of Justice of the European Union (CJEU) is to uphold the EU's founding principles including respect for the rule of law. Concerned by both the latest workload statistics in the Court's own 2009 Annual Report and the impact that the Treaty of Lisbon will have on the CJEU's ability to fulfil its central and crucial role, the Committee published a call for evidence in July last year. Our concerns were not misplaced.

In the case of the Court of Justice (CJ) we predict another crisis of workload soon, in part driven by the rise in the EU's membership to 27 States, and also caused by the expansion of the Court's jurisdiction into the Area of Freedom, Security and Justice introduced by the Lisbon Treaty. As for the General Court (GC) the prognosis is even bleaker; we found an institution struggling to manage its existing and ever increasing workload, and twice criticised by the Court of Justice for taking too long to deliver justice, most recently in 2009. As an example of the delays in the GC, the Confederation of British Industry highlighted an average time of 33.1 months for competition cases.

Whilst we recognise the Government's argument regarding the current economic climate, this Report argues that there is a cost for litigants and individuals in allowing the EU's judicial institution to suffer sclerosis in the delivery of justice. This cost will be felt not just financially but in bringing both the CJEU and the wider EU into disrepute whilst at the same time undermining their legitimacy.

We make a number of recommendations designed to alleviate these problems. For the CJ we suggest that an increase in the number of Advocates General should be made as soon as possible. For the General Court where the need is most pressing, we reject the creation of more specialised tribunals provided that their problems are dealt with by other means. The main solution that we suggest is an increase in the number of judges serving the GC. Although this will of course cost money we believe it could be accommodated by adjusting priorities in the existing budget and, given the central role fulfilled by the Court, we believe the benefits will outweigh the costs.

The Workload of the Court of Justice of the European Union

CHAPTER 1: INTRODUCTION

1. The Court of Justice of the European Union (CJEU) is one of the Union's seven principal institutions.¹ Its role is to “ensure that in the interpretation and application of the Treaties the law is observed”² and like the EU's other six³ institutions it is required to promote, advance and serve the Union's interests, including those of the Union's citizens and its Member States, and act within the limits of the powers conferred on them by the Treaties.⁴
2. A simple reading of the relevant Treaty articles, however, does little to convey the important role that the CJEU performs within the EU, a role which is central to the effective functioning of the Union. The importance of the Court's central role was summarised by the Attorney General when he told us that the Government supported “an effective and efficient Court ensuring that EU law is uniformly interpreted and applied in all Member States to ensure a level playing field for UK businesses operating in other Member States, and that British citizens living and working across Member States enjoy the full benefits of EU law”.⁵
3. It is impossible to place a precise figure on the importance of the CJEU's role in the operation of, for instance, the Single Market. Delay has a cost that impacts directly on litigants and individuals operating in the internal market. Allowing the CJEU to suffer sclerosis in the delivery of justice would bring both the CJEU and the wider EU into disrepute whilst at the same time undermining the legitimacy of both the institution and the wider EU.
4. The CJEU upholds the Union's founding principles such as the rule of law and respect for human rights, values common to all the Member States.⁶ For all courts enjoined with the critical function of upholding the rule of law certain prerequisites apply, adherence to which is, in the case of the CJEU, further complicated by the multi-national nature of the EU. All courts ought to deal with matters before them in a timely manner, with consistency, and their decisions ought to be accessible to those subject to its jurisdiction. In an EU of 27 Member States covering 500 million citizens, speaking 23 official languages, in simply fulfilling its role the CJEU confronts unique difficulties. In being drawn from each individual Member State, its judges come from 27 Member States, each with its own legal system (or systems) and history, and together they adjudicate and build a body of law applicable in those 27 states. All this must be achieved in a way that is accessible to the Union's citizens and regarded as legitimate.

¹ Article 13, Treaty on the European Union (TEU).

² Article 19(1) TEU.

³ The other institutions are: the European Parliament, the European Council, the Council, the European Commission, the European Central Bank and the Court of Auditors.

⁴ Article 13 TEU.

⁵ Q 125.

⁶ Article 2 TEU.

5. 2010 marked a decade since the Due Report looked at the future of the EU court structure (see Chapter 2), five years since the largest round of enlargement in the EU's history which brought with it the largest expansion in the EU's judiciary and, potentially, its workload, and also the first anniversary of the institutional structure introduced by the Lisbon Treaty. Sufficient time has passed since all these events occurred to permit an assessment of the impact of the last 10 years on the Court's workload.
6. The Committee's concern for the ability of the CJEU in future to fulfil its central role is motivated on the one hand by worrying statistics in the CJEU's own Annual Report, for example an average duration of 33.1 months for some cases in the General Court, and on the other by the potential impact of the Lisbon Treaty on the CJEU's workload.⁷ Against this background the Justice and Institutions Sub-Committee (whose members are listed in Appendix 1) published a call for evidence in July 2010 (see Appendix 2). The Call for Evidence made it clear that the inquiry would not address the substance of the Court's judgments.
7. The Committee took evidence from those listed in Appendix 3. Three members of the Committee visited the CJEU in Luxembourg (a note summarising the evidence taken on the visit is in Appendix 4). We are grateful to all the witnesses. The Committee would like to take this opportunity to thank all the members of the Court of Justice of the European Union and their staff for making us so welcome when we visited the Court in Luxembourg.
8. **We recommend this Report to the House for debate.**

⁷ See this Committee's previous Reports: *An EU Competition Court* (15th Report of Session 2006–07, HL 75) and *The Treaty of Lisbon: an impact assessment* (10th Report of Session 2007–08, HL 62).

CHAPTER 2: THE COURT OF JUSTICE OF THE EUROPEAN UNION

Introduction

9. The CJEU is the collective term for the European Union's judicial arm,⁸ but the single institution consists of three separate courts, each enjoying its own specific jurisdiction. Generally speaking the three courts' jurisdictions are defined by the types of cases they hear or by the status of the litigant bringing the action and whilst the CJEU does not operate on a formally hierarchical framework like, for example, the UK court structure, it is nevertheless split into three tiers. Forming the upper tier is the Court of Justice (CJ) which was formerly known as the European Court of Justice (ECJ); beneath the CJ is the General Court (GC) which was formerly known as the Court of First Instance (CFI); and the third tier consists of the Civil Service Tribunal (CST), which in the words of the Treaty constitutes the EU's single "specialised court".⁹ Francis Jacobs, former Advocate General at the Court of Justice and presently Professor of Law at King's College London, considered this structure a good one.¹⁰

Rules governing the CJEU

10. The rules governing all aspects of the CJEU are set out in the EU's two treaties: the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). Further detail is provided by the Statute of the Court of Justice of the European Union¹¹ and the CJEU's rules of procedure. The Member States are responsible for setting the rules in the Treaties governing the CJEU's operation through the usual process of negotiation associated with international treaties. Broadly speaking, the three courts are responsible for setting their own procedural rules,¹² though any measures for reform that the CJEU might suggest remain subject to approval by the Council.

The language regime of the CJEU

11. The CJEU's working language is French and consequently all documents, pleadings and judgments are translated into French.¹³ Beyond that, the rules on translation differ depending on the court or the nature of the proceedings.
12. CJ decisions tend to raise issues of general importance for all Member States so there is a greater need for preliminary ruling requests, Advocate General (AG)¹⁴ opinions and the Court's judgments to be translated into all 23 languages. This enables Member States to intervene in proceedings, as is

⁸ Article 19 TEU.

⁹ There is provision in the Treaty for the creation of further specialised courts in accordance with the ordinary legislative procedure.

¹⁰ Q 74.

¹¹ Annexed to the TFEU, Protocol (No 3).

¹² The detail is provided by Article 253 TFEU for the CJ, Article 254 TFEU for the GC and by Article 257 TFEU for specialised courts.

¹³ See Advocate General Sharpston's evidence at paragraph 1.6 in Appendix 5.

¹⁴ The Advocate General's role is discussed in paragraph 21.

- generally their right, and for citizens to understand and be aware of the law as it applies to them.¹⁵
13. In relation to the GC, Judge Nicholas Forwood explained that not everything is translated into the 23 official languages of the EU. Unless a Member State intervenes, a case takes place in a single language of the applicant's choosing. If this language is not French then the case documents would be translated into it as the working language of the Court. As for their judgments, these are produced in French and if the Court decides that the case raises issues of general importance the decision will be translated into the other 22 languages.¹⁶
 14. Unlike the other two Courts, the decisions of the CST are not binding on the Member States and do not take effect within the national legal systems in the same way. As the jurisdiction and decisions of the CST are entirely internal to the EU, the need to translate the CST's decisions routinely is limited.
 15. In 2009 the translation department had to deal with around 800,000 pages of legal documents. Their translators had to identify the correct legal terminology in each of the 23 languages to ensure an accurate translation, all within a 20 working day deadline for each round of translation.¹⁷
 16. The language regime of the CJEU is a sensitive issue. As Professor Arnall said, "[t]he languages which the Court uses are important to its legitimacy"¹⁸ and this importance is reflected in the unanimous voting requirement in the Council for amendment of the language rules. Included within the Statute of the CJEU is a provision addressing the language arrangements.¹⁹ The relevant article is an aspiration that the Council will in future agree a Regulation unanimously, which will set out the Courts' language regime. Until this happens, the current rules are those set out in the relevant rules of procedure. The potential for these rules to delay the CJEU in its work and contribute to the backlog of cases is discussed in Chapter 3.

Cost

17. The EU budget for 2011 shows the cost of running the CJEU to be just over €334m of which €40m is met from its own income. Out of the overall total EU budget for 2011 of €126,527m, the cost of the court represents 0.26%.²⁰

The Court of Justice

18. The CJ can broadly be described as the supreme or constitutional court of the EU with responsibility for examining the legality of EU acts and ensuring that Union law is interpreted and applied uniformly.
19. The CJ has jurisdiction to hear:
 - (i) infringement actions against Member States for non-compliance with EU law potentially leading to fines,²¹ brought by either the Commission²² or other Member States;²³

¹⁵ The CCBE, Q 51.

¹⁶ Appendix 4 at p 53.

¹⁷ CJ, Appendix 4 at p 49.

¹⁸ Q 16.

¹⁹ Article 64 of the Statute of the CJEU.

²⁰ These figures take no account of the fines levied by the Court that in turn contribute to the wider EU budget.

- (ii) preliminary references²⁴—providing interpretative judgments at the request of national courts in order to help them decide a case with an EU law dimension; and
 - (iii) actions for annulment of EU legislation or to require an institution to act, brought by a Member State or by one of the institutions, similar to judicial review proceedings in the UK.
20. The CJ also has jurisdiction to hear appeals from the GC.²⁵

BOX 1

Preliminary References

The preliminary reference or preliminary ruling has been instrumental in the development of European law, with most of the Court's better known judgments being delivered under this mechanism. At the request of the national court,²⁶ the CJ gives its interpretation of the relevant EU law, but the Court does not actually decide the substance of the case. Having given its interpretation, the case returns to the national court for them to decide, based on the CJ's interpretation. On the whole, the CJ is obliged to deal with all cases referred to it.²⁷

The judges of the CJ

21. The 27 judges,²⁸ one per Member State,²⁹ are supported in their work by the AGs of which there are currently eight.³⁰ Their most prominent role is to produce a written opinion for the Court³¹ setting out their understanding of the applicable law and recommending how, in their view, the case ought to be decided. The opinion is not binding. AG opinions tend to offer a far more comprehensive discussion of the EU law governing the case than the CJ judgment. The Lisbon Treaty includes provision for more AGs to be appointed following a request from the CJ to the Member States, a request to which the Member States must agree unanimously.³²

²¹ The Court can impose heavy fines on a Member State for failure to comply with a Treaty obligation. For example, in the case of the UK, this could result in a daily penalty of between €13,194 and €791,640. The basic lump sum which could be suggested against the UK would be €10,995,000. (See Doc SEC(2010) 1371: Commission Communication on the implementation of Article 260(3) TFEU.)

²² Article 258 TFEU.

²³ Article 259 TFEU.

²⁴ Discussed in detail in Chapter 6.

²⁵ Article 56 Statute of the CJEU.

²⁶ In the Area of Freedom, Security and Justice the Treaty of Lisbon expanded the CJ's jurisdiction to hear preliminary ruling requests from any court or tribunal, see paragraphs 42–44.

²⁷ Except for limited exceptions developed by the case law and those occasions subject to the reasoned order process under Article 104(3) of the rules of procedure of the Court of Justice.

²⁸ All Member State nominees for judicial appointment to the CJEU, including AGs, are considered by the Judicial Appointments Committee introduced by the Lisbon Treaty which has seven members drawn from former members of the CJEU, national supreme courts and lawyers of recognised competence, one of whom is nominated by the European Parliament.

²⁹ Article 19(2) of the TEU.

³⁰ France, Germany, Italy, Spain, and the UK have a permanent AG; the remaining three positions rotate in alphabetical order between the other 22 Member States.

³¹ Under Article 44a of the Courts' Rules of Procedure the AG also plays a role, alongside the full College of Judges, in deciding whether an oral hearing is necessary in an individual case.

³² Article 252 TFEU.

22. CJ judges are appointed for a renewable term of six years³³ and they are partially replaced every three years³⁴ in alternate groupings of 13 and 14 judges. Similarly, AGs are replaced every three years in groups of four.³⁵
23. When they are hearing cases the judges of the CJ occasionally sit as the full court of 27 judges,³⁶ sometimes in a Grand Chamber of at least 11 judges presided over by the President or most commonly in chambers of five or three judges. The President of the CJ³⁷ is elected from among its membership by the judges and AGs of the Court for a renewable term of three years.

The General Court

24. The GC has jurisdiction to deal with almost all cases against the institutions and the agencies of the EU. These include:
 - (1) actions brought by an individual against an Institution;
 - (2) actions seeking compensation or damages brought against an Institution;
 - (3) actions brought by an individual for annulment of EU legislation or failure to act;
 - (4) actions by Member States against the Council in the fields of State aid, anti-dumping and the Council's use of its implementing powers;
 - (5) actions by a Member State against the Commission;
 - (6) actions relating to Community Trade Marks i.e. against the decisions of the Office for Harmonisation in the Internal Market;
 - (7) actions based on contracts entered into by the European Union conferring jurisdiction on the General Court;
 - (8) actions brought against decisions of the Community Plant Variety Office or of the European Chemicals Agency; and
 - (9) appeals against decisions of the Civil Service Tribunal.
25. Cases before the GC tend to be more fact based and more likely to involve consideration of written and oral evidence than those before the CJ, whose cases are mostly limited to deciding questions of law, not fact.³⁸ Of particular complexity are the competition cases, challenges by undertakings to Decisions made by the Commission allowing or refusing mergers, or concerning anti-competitive behaviour. These types of cases comprised more than 10% of the new cases filed in the GC in 2008. Illustrating how document-heavy these competition cases can be, the CCBE, the European body representing legal practitioners, told the Committee that “[i]n large competition cases ... five,

³³ Article 253 TFEU.

³⁴ Ibid.

³⁵ Article 9, Statute of the CJEU.

³⁶ For example, see *Commission v Edith Cresson* [2006] ECR I 6387.

³⁷ The current President of the CJ is Mr Vassilios Kouris. He is responsible for both the administrative and judicial organisation of the CJ and he presides over the Court's judicial deliberations.

³⁸ For example, see Professor Takis Tridimas (WE 11) at paragraph 18; Government (WE 10) at paragraph 27; the CCBE Q 71.

seven or 10 applicants may be challenging a Decision of the European Commission of 600 pages or more, and the file may consist of 20,000 pages”.³⁹

26. The number of judges in the GC since its creation as the CFI in 1989 has always reflected the number of Member States.⁴⁰ However, unlike the CJ, the ratio of one judge per Member State is not specified in the Treaty which states that the number of judges in the GC shall be at least one judge per Member State.⁴¹ There is a partial replacement of the judges every three years.⁴² Unlike the CJ the GC is not supported by AGs but the Treaty does include provision for the GC to be assisted in this way by an AG drawn from amongst its own number.⁴³
27. The GC sits in Chambers of five or three or one. Occasionally it sits as a Grand Chamber of 13 judges or as a full Court of 27 if the complexity of the case calls for it. The judges of the GC also elect from amongst their membership a President who enjoys a similar role to that of the President of the CJ.⁴⁴

The Civil Service Tribunal

28. The CST was created partly to ease the workload of the GC. It deals only with disputes between the EU institutions and their employees. It is currently the EU's only specialised court and has been in existence since 2005. It comprises 7 judges⁴⁵ who are appointed for a renewable term of six years from “as broad a geographical basis as possible from among nationals of the Member States with respect to the national legal systems represented”.⁴⁶ There is provision within the Treaty for the Member States in the Council to increase by qualified majority vote the number of judges serving the CST.⁴⁷ Like the other two Courts the judges at the CST elect from among their number a President who fulfils a similar role to the other Presidents.⁴⁸

The Due Report⁴⁹

29. In early 1999, partly in anticipation of the EU's enlargement, the European Commission set up a Working Party on the Future of the European Court of Justice. The Working Party's remit was to examine how the Court was to maintain its quality and consistency in the light of the (then) expansion of jurisdiction and increase of workload as a result of EU expansion.

³⁹ Q 71.

⁴⁰ In the 1990s the Member States tried, but failed, to increase the number of judges serving the GC by six, see paragraph 134.

⁴¹ Article 19(2) TEU.

⁴² Article 254 TFEU.

⁴³ Article 49, Statute of the CJEU.

⁴⁴ The current President of the GC is Marc Jaeger who gave evidence to the Committee on its visit to the CJEU.

⁴⁵ CST judges are also subject to the judicial appointments panel.

⁴⁶ Article 3, Annex 1 of the Statute of the CJEU.

⁴⁷ Article 2, Annex 1 of the Statute of the CJEU.

⁴⁸ The current incumbent is Paul Mahoney from the UK who gave evidence to the Committee on its visit to Luxembourg.

⁴⁹ The Due Report can be viewed by following this link: http://ec.europa.eu/dgs/legal_service/pdf/due_en.pdf

30. The subsequent Due Report, so called after the chairman of the Working Party, former President of the Court of Justice of the European Communities, Mr Ole Due,⁵⁰ was published in January 2000.⁵¹ In considering the litigation statistics for the Community courts up to 1998, the Due Report found that “since the end of 1998 the Community court system has not been able to face the constant growth of litigation and can no longer hear and determine the cases brought before it within an acceptable period of time”.⁵² In order to alleviate this problem the Working Party made a range of proposals⁵³ “intended to show what the system of Community courts could be like some fifteen years hence”.⁵⁴
31. However, as discussed in the following Chapter, as 2015 approaches the statistical analysis included in the CJEU’s Annual Report 2009, supported by the evidence submitted to this Committee, reveals an institution which continues to struggle to cope with its workload.

⁵⁰ Member of the Court of Justice from 1979–1994 (President from 1988–1994).

⁵¹ The Working Party consisted of five former judges and AGs of the Court of Justice of the European Communities, plus one lawyer and a Public Prosecutor from Spain. The British member of the Working Party was the late Lord Slynn of Hadley, former AG and judge at the Court of Justice of the European Communities.

⁵² Due Report at page 8.

⁵³ The Working Party’s five categories of proposals were: (i) Preliminary rulings; (ii) Direct actions; (iii) Categories of special cases; (iv) Procedural reforms; and (v) Membership of the Community Courts. See Due Report at page 11.

⁵⁴ Due Report at page 11.

CHAPTER 3: WORKLOAD PROBLEMS FACING THE CJEU

Introduction

32. The ability of the CJ and the GC to handle their pre-Lisbon workload was highlighted as an issue by this Committee in its Report of April 2007, *An EU Competition Court*.⁵⁵ In addition, focussing more specifically on the CJ, our Report on *The Treaty of Lisbon: an impact assessment*⁵⁶ also expressed concern that the expansion of its jurisdiction resulting from the changes introduced by the Treaty of Lisbon, in combination with the enlargement of the EU, would “further swell the Court’s docket, both in terms of volume and the range of legal issues before it”.
33. The CJEU’s own statistical analysis appears to show that the volume of cases remains high and that the rate of disposal of cases is, in particular in the GC, insufficient to bring about serious reductions in the turnaround time for litigation.

The Court of Justice’s workload

34. The relevant statistical information showing the CJ’s workload is reproduced below in diagrammatic form from their Annual Report 2009.

FIGURE 1

General activity of the Court of Justice—New cases, completed cases, cases pending (2005–09)



| | 2005 | 2006 | 2007 | 2008 | 2009 |
|-----------------|------|------|------|------|------|
| New cases | 474 | 537 | 580 | 592 | 561 |
| Completed cases | 574 | 546 | 570 | 567 | 588 |
| Cases pending | 740 | 731 | 742 | 768 | 741 |

35. Figure 1 shows that there is reasonable stability in the number of new cases at between 500 and 600 per annum, completed cases at between 500 and 600 per annum and cases pending at about 750. The President of the CJ, in

⁵⁵ *An EU Competition Court* (15th Report of Session 2006–07, HL 75).

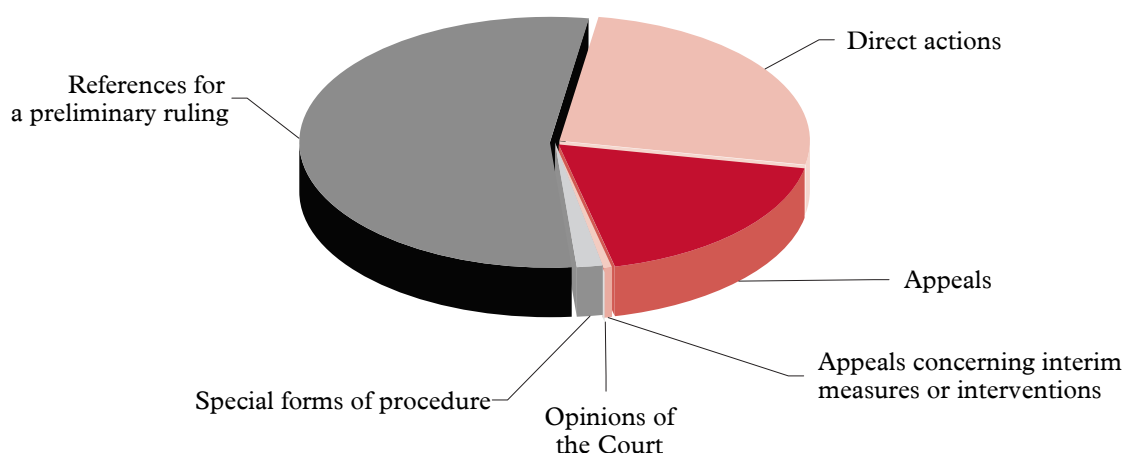
⁵⁶ *The Treaty of Lisbon: an impact assessment* (10th Report of Session 2007–08, HL 62).

his introduction to the Court's Annual Report, noted the increased productivity of the Court highlighted by the rising number of completed cases. He also stated that "the number of judgments delivered in 2009 is among the highest in the Court's history".⁵⁷

36. The evidence submitted to the Committee also highlighted the CJ's productivity and reflected the progress the CJ has made in reducing its workload and cutting its turnaround times.⁵⁸ Señor Luis Romero Requena, on behalf of the Commission, concurred, "I would say that today the delays, even for a preliminary ruling in the Court, are perfectly acceptable".⁵⁹
37. The Court's positive work in this area was also praised by the CCBE, who told the Committee that the "current average time of less than 18 months is a big improvement on 10 years ago"⁶⁰ and they emphasised that it "is important ... to recognise the substantial efforts by the Court of Justice, in a multilingual system, in streamlining its procedures and bringing in a system which works much better than it did".⁶¹

FIGURE 2

New cases—Nature of proceedings (2005–2009)
2009



| | 2005 | 2006 | 2007 | 2008 | 2009 |
|--|------------|------------|------------|------------|------------|
| References for a preliminary ruling | 221 | 251 | 265 | 288 | 302 |
| Direct actions | 179 | 201 | 222 | 210 | 143 |
| Appeals | 66 | 80 | 79 | 78 | 104 |
| Appeals concerning interim measures or interventions | 1 | 3 | 8 | 8 | 2 |
| Opinions of the Court | | | | 1 | 1 |
| Special forms of procedure | 7 | 2 | 7 | 8 | 9 |
| Total | 474 | 537 | 581 | 593 | 561 |
| Applications for interim measures | 2 | 1 | 3 | 3 | 1 |

⁵⁷ CJEU Annual Report 2009 at page 10.

⁵⁸ The evidence suggests that when compared with other courts of similar seniority (itself not a straightforward task) the turnaround times for the CJ are acceptable, especially when taking into account the multilingual nature of the proceedings. For example see the Attorney General, Q 125; Government (WE 10) at paragraphs 28–34; The Bar European Group (WE 12) at paragraph 7; The CJEU (WE 13) at paragraph 16; and AG Sharpston's evidence at paragraph 1.2 in Appendix 5.

⁵⁹ Q 113.

⁶⁰ Q 42.

⁶¹ Q 42.

38. Figure 2 shows that there has been a rise in requests for preliminary rulings,⁶² a sharp decrease in direct actions and a rise in appeals. Preliminary rulings represent 53.8% of the new cases received by the CJ in 2009. The President of the CJ noted the “constant upward trend in the number of references for a preliminary ruling”.⁶³
39. Professor Jacobs told us that while “it is true that the number of references from national courts has broadly been constant at around 250 a year ... in the current year there were over 300 references in the first nine months, which suggests that an annual figure may be around 400. From the point of view of the workload of the Court of Justice, the difference between 300 cases and 400 cases is pretty substantial.”⁶⁴
40. Other witnesses argued that the honeymoon period following the accessions since 2000 within which the CJ was able to take advantage of the increased number of judges to reduce the backlog of cases, without a proportionate increase in the number of cases coming from the new Member States, is coming to a close.⁶⁵
41. **We believe that the window of opportunity has closed within which the CJ was able to avoid longer delays because the increase in its membership preceded an expected increase in its workload.**

The impact of the Treaty of Lisbon on the CJ’s workload

42. Although the CJ has been successful in managing its workload in the last decade, this progress will be offset by the impact of the expansion of the Court’s jurisdiction, particularly into the Area of Freedom, Security and Justice. The evidence we received appears to confirm that this could be a serious problem.⁶⁶ It is not simply a matter of more cases.⁶⁷ This is an area likely to generate difficult and important litigation.⁶⁸
43. It is also an area which requires cases to be dealt with quickly and as a priority; hence a fast track preliminary ruling procedure⁶⁹ was introduced prior to the Treaty of Lisbon,⁷⁰ to deal with situations where national courts make a request to the CJ for a preliminary reference where an individual is held in custody. This is likely to have a significant negative impact by delaying non-urgent cases as the procedure which is presently used less than 10 times per year is used more frequently.⁷¹

⁶² Professor Jacobs’ evidence, discussed in this Chapter, suggests that in 2010 the trend for preliminary rulings has continued to rise to levels that may cause the CJ difficulties. Q 95.

⁶³ CJEU Annual Report 2009, at page 10.

⁶⁴ Q 95.

⁶⁵ For example, see Professor Damian Chalmers (WE 5) at paragraph 2: “with the appointment of twelve new judges, the Court has had an 80% increase in personnel. This has not yet been fully reflected by an increase in its docket as neither the effects of the 2004 or 2007 enlargements have yet filtered through.”

⁶⁶ For examples see: the Attorney General, Q 142; Professor Damian Chalmers (WE 5) at paragraph 3; the Faculty of Advocates (WE 7) at paragraph 1; The Law Society of England and Wales (WE 8) at paragraph 16; Professor Takis Tridimas (WE 11) at paragraphs 5–10.

⁶⁷ Pre-Lisbon recourse to the preliminary ruling system for the interpretation of Freedom, Security and Justice measures was limited to the highest courts in the Member States (Article 68(1) TEC).

⁶⁸ Q 14.

⁶⁹ Article 267 TFEU. Following the French acronym for *Procédure Préjudicielle d’Urgence* this is often referred to in the evidence as the PPU system.

⁷⁰ Used for the first time in the case of C-195/08 Inga Rinau (Area of Freedom, Security and Justice) [2009] 2 WLR 972.

⁷¹ The CCBE, Q 68; Professor Jacobs, QQ 95 & 97; and AG Sharpston’s evidence at paragraph 1.4 in Appendix 5.

49. The average time before determination of cases was steady for intellectual property at the 20 month mark and rose progressively for other actions (this includes competition cases) to 33 months.
50. All the evidence we received confirmed the rather bleak picture of the GC's position painted by the GC's own statistics and suggests that the GC is experiencing great difficulty in managing its case load.⁷⁴ The Government pointed to the increase in intellectual property cases and the complexity of litigation in the GC as factors affecting the GC's "inability to reduce its number of pending cases and the increasing time taken for disposal of its cases".⁷⁵
51. The Confederation of British Industry (CBI) said "an average turnaround time of 33.1 months for competition cases is unacceptable"⁷⁶ and they cited what they hoped was a "wholly exceptional" example, the recent case of *ICI v European Commission*⁷⁷ in which the appeal was lodged on 20 March 2001 and judgment was handed down on 25 June 2010.⁷⁸ The Law Society did not believe "that the General Court will significantly improve the rate of disposal of the backlog of cases without structural measures being taken".⁷⁹
52. To make matters worse, witnesses noted that decisions taken by the European Chemicals Agency (ECHA) under the REACH⁸⁰ regime could have a significant impact on the GC. The CCBE feared that the "cases coming out of REACH will be far more complex than anything coming out of the trade mark regime. The Court could come to a complete standstill if it were hit by a significant wave, and there are signs that that is going to happen".⁸¹ The President of the GC too warned of the impact that REACH could have on the Court's ability to manage its workload.⁸² He said that when the system was originally conceived it was based upon a prediction that 250,000 applications for chemical licences would be made to the European Chemicals Agency. However, he reported that the most recent estimate put the figure at a far greater 2 million applications and as a proportion of these would be challenged at the GC this would further increase their workload.⁸³ Finally, and most telling of all, Professor Arnall noted that the "General Court has, on a couple⁸⁴ of occasions, been found by the Court of Justice not to have delivered decisions within a reasonable time".⁸⁵

⁷⁴ See in particular the CCBE, Q 61; Professor Jacobs, Q 103; the Commission, Q 114; and the Attorney General, Q 125.

⁷⁵ Government (WE 10) at paragraph 27.

⁷⁶ (WE 1) at paragraph 9.

⁷⁷ *Imperial Chemical Industries v Commission (Competition)* [2010] EUECJ T 66/01 (25 June 2010).

⁷⁸ (WE 1) at paragraph 12.

⁷⁹ (WE 8) at paragraph 7.

⁸⁰ REACH is the EU Regulation on Registration, Evaluation, Authorisation and Restriction of Chemicals and created the European Chemicals Agency (ECHA). ECHA ensures the safe use of chemicals within the EU. It is designed to promote a high level of human health and environmental protection within the context of free movement of chemicals around the Single Market. It makes industry responsible for assessing and managing the risks posed by chemicals and providing appropriate safety information to users. Challenges to decisions taken by ECHA can be brought in the GC.

⁸¹ Q 69.

⁸² Appendix 4 at page 52.

⁸³ See also the Commission (WE 4).

⁸⁴ See cases *Baustahlgewebe v Commission (Competition)* [1998] ECR I 8417 and *Der Grüne Punkt-Duales System Deutschland v Commission (Competition)* [2009] EUECJ C-385/07 (16 July 2009).

⁸⁵ Q 2.

CHAPTER 4: TRANSLATION

Does translation cause delays in the CJEU?

57. One general issue that arose repeatedly in the evidence was that of delays caused by the CJEU's language regime. There are two aspects to this issue. The first concerns translation of Court documents into the CJEU's internal working language of French, and the second, the translation of its judgments into the 23 official languages of the EU.

Translation into the CJEU's working language

58. Most evidence submitted to the Committee on behalf of legal practitioners identified the need to translate all documents into the CJEU's working language as creating a significant bottleneck in the system.⁹⁰
59. Mr William Robinson, who worked for 29 years in the English Translation Division at the CJEU, also made the case for English and argued that "English has become a *lingua franca* in a way that French is no longer"; he believes that the Court "should use English as an internal working language alongside French".⁹¹
60. Academic opinion painted a different, rather more pragmatic picture. For example, Professor Tridimas acknowledged the "heavy toll" that translation into French imposed on both the EU's resources and on the length of proceedings, but he accepted that "[g]iven the constraints of multilingualism, it is difficult to see how the burdens of translation can be lessened substantially".⁹² Professor Arnulf told the Committee that there "has to be a language that the court can conduct discussion in, in which all its members are conversant, and for historical reasons that language is French". Whilst there may well be an argument for changing from French to, for example, English, "the consequence of doing that would be similar; you would still have one language which some people spoke better than others".⁹³
61. The CCBE also acknowledged the limited impact reform would have in this area, saying that they were not "convinced that by having two internal working languages you necessarily create greater efficiencies".⁹⁴
62. **It is our view that the popular opinion that delay is caused by translating documents into the CJEU's working language is misplaced. The CJEU has to have a working language and for historical reasons that language is French. Any increase in the number of working languages will, in the Committee's view, merely add another level of translation to the process, thus exacerbating any existing delays caused by translation.**

Translating the Courts' judgments into the EU's 23 official languages

63. The Bar European Group identified this stage of the process as a "major problem" and stated that for "as long as there is a need for ... judgments to

⁹⁰ (WE 8) at paragraph 9; (WE 7) at paragraph 6; (WE 1) at paragraphs 24–26.

⁹¹ (WE 14) at paragraphs 2 and 5.

⁹² (WE 11) at paragraph 31.

⁹³ Q 15.

⁹⁴ Q 51.

- be translated into every EU official language, this bottleneck is unlikely to ease”.⁹⁵ As a solution, they argued that the “EU should select four or five official languages into which every document should be translated and then require translation into a different language only where the origin or interest in the case demanded it”.⁹⁶
64. Professor Arnall disagreed: “it is not clear that we could reduce the number of languages at least at the stages of translating the Advocate General’s opinions and the judgments ... [t]here is at least a core of documents that will have to be available in all languages”. He concluded that “one could spend an enormous amount of energy trying to get the language regime changed, with very little to show for it”.⁹⁷
65. From the perspective of the CJ, Sir Konrad Schiemann said that it would be possible to abandon translation into all 23 official languages but that this would be extremely sensitive politically. He argued that the essence of EU law was that it was also national law and it was understandable that people wanted it translated into their own national languages.⁹⁸
66. The Registrar of the CJ said that in his view translation was not causing a bottleneck. It was an obligation to translate into the EU’s official languages and this was not currently a problem. He did say, however, that this could become a problem if the Court’s workload increased and that the Court needed additional resources but had struggled to receive them. He pointed to a recent attempt by the Court to employ one extra English lawyer-linguist, which had met with resistance from both the Council and the European Parliament.
67. Judge Nicholas Forwood acknowledged that in the GC cases did take longer as a result of translation, but he stressed that it was a necessary part of the process. He argued that in the GC translation was less of a delaying factor than many people supposed as translation took up on average only 3.4 months of a case lasting 32 months. By contrast, as CST judgments have no effect in the Member States, they do not need to be translated into all 23 languages, but the President of the CST feared that this made access to the CST’s case law problematic.
68. **Access to the CJ’s case law, either by Member States’ authorities or their citizens, must remain the key. The law as decided by the CJ applies equally throughout the Member States, and it has to be available in a language that all the citizens of the Member States can understand. This is important for the Court’s legitimacy.**
69. In the cases of the GC and the CST it seems to the Committee that translation levels are already at the minimum level required to satisfy the twin pressures of speed and accessibility.
70. **Translation remains an expensive but necessary service for an institution operating in a multilingual and transnational environment.** It is, as AG Sharpston phrased it, “a simple fact of life”.⁹⁹ If further enlargement of the EU takes place these costs will inevitably rise.

⁹⁵ (WE 12) at paragraphs 6 and 20.

⁹⁶ (WE 12) at paragraph 21.

⁹⁷ Q 17.

⁹⁸ Appendix 4 at page 51.

⁹⁹ See AG Sharpston’s evidence at paragraph 1.6 in Appendix 5.

CHAPTER 5: THE WIDER POLITICAL AND ECONOMIC CONTEXT

71. The Attorney General told us “it’s important that any examination of the Court’s workload and potential solutions is viewed within the wider context”.¹⁰⁰
72. The first point the Attorney made was: “one has to bear in mind ... that after the recent changes to the EU treaties by the Treaty of Lisbon, there is very little appetite among any Member States to embark on further processes for Treaty change in this context”.¹⁰¹ He went on to argue that “the current realities of intergovernmental dialogue suggest that at the moment people are rather content to leave the Court to work as it is, and if problems arise then on a pragmatic basis they will have to be tackled”.¹⁰²
73. His second point concerned the wider economic environment. He argued that “[j]ust as Member States are facing tough budgetary decisions at present, the EU ... are facing similar constraints. It is important that any proposals necessarily take account of the existing financial restrictions”.¹⁰³ For example, the Attorney ruled out as a solution any increase in the number of judges or AGs: “[m]oney is about priorities ... in the short term ... I think the chances of there being more money available in this area must be ... rather low”.¹⁰⁴
74. Both academic and practitioner witnesses¹⁰⁵ questioned this approach and favoured structural reform, particularly to address the delays in the GC.
75. Professor Arnall warned that the “time taken by the ECJ to respond to references from national courts is almost universally regarded as too long, and there is growing criticism and a sense of growing dissatisfaction with the quality of some of the judgments”.¹⁰⁶ As for the GC, the CCBE said that the “caseload before the General Court has increased so much, and continues to increase, that something needs to be done to alleviate the burden and workload of the General Court”.¹⁰⁷
76. The evidence suggests that the CJ faces potential difficulties and the GC is in serious trouble. **The Committee is sensitive to the lack of appetite amongst the Member States for Treaty change and to the current economic constraints. It is our view, however, that the time to “leave the Court to work as it is” has passed and that solutions which may involve additional expenditure on the Courts (not involving an addition to the budget) need to be addressed urgently. We do not make any suggestion likely to involve Treaty change because in the short term other solutions are available. But the Member States**

¹⁰⁰ Q 125.

¹⁰¹ Q 125.

¹⁰² Q 147.

¹⁰³ Q 125.

¹⁰⁴ Q 134.

¹⁰⁵ Professor Tridimas (WE 11) at paragraph 1; the European Circuit of the Bar of England and Wales (WE 6) at paragraph 13; and the CCBE (WE 9) at paragraph 35.

¹⁰⁶ Q 2.

¹⁰⁷ Q 61.

should not be put off from undertaking necessary reform involving Treaty change when the opportunity arises in the longer term.

77. The following Chapters discuss the proposals for reform of the CJEU drawn from the evidence placed before this Committee: Chapter 6 looks at the CJ, and Chapter 7 the GC. We will first consider three further aspects of the context in which the CJEU functions, arising from the actions respectively of the legislator (Council and Parliament), the Commission, and the Member States.

Legislative impact assessments

78. The Law Society proposed that “the European Commission and the other EU institutions should undertake an access to justice impact assessment when considering new legislative proposals”. Such an exercise would be designed to “ensure that a proper assessment is made of the avenues of redress required by the legislation, the potential litigation that could stem from it and the resources that might be needed to accommodate this”.¹⁰⁸ This plea was repeated to the Committee by the President of the GC, Marc Jaeger, who cited the anticipated impact the REACH regime might have on the GC.
79. Both the Government and the Commission were sceptical. On behalf of the Commission, Señor Requena said “I have a lot of sympathy, but in practice I have more difficulty in seeing how this could work”. Even if it were possible to undertake such an assessment from the Commission’s point of view, “it would very often be modified or altered by the legislator”.¹⁰⁹ The Attorney General recognised that “if a Directive is going to be particularly difficult or controversial ... they tend to have a direct impact on the volume of work that ends up in front of the ECJ”. However, whilst he was a “great fan of having impact assessments regarding the impact on the Court”, his view was “tinged with a certain sense of reality ... history seems to show that, when it comes to the crunch, other Governments, and I suspect the Commission, are less keen”.¹¹⁰
80. **We believe that legislation, in particular legislation liable to have a significant impact on the CJEU’s workload, should include within its impact assessment a section considering its likely impact on the CJEU, a cogent recent example being the introduction of the REACH Regulation. Where the EU creates executive agencies designed to police the application of Community law, it is a legal requirement that their decisions be open to challenge. The EU institutions should not ignore the fact that the act of creating a regulatory agency whose decisions are subject to an appeal to the GC brings with it an impact on the GC which, as currently constituted, will struggle to carry the additional burden. Whilst we recognise the limitations of impact assessments highlighted by both the Commission and the Government, it must be the case that at least when creating an executive agency the Member States should consider its judicial impact.**

¹⁰⁸ (WE 8) at paragraph 14.

¹⁰⁹ Q 119.

¹¹⁰ Q 166.

Reform of Commission competition Decisions

81. The Law Society argued that the length of written proceedings before the GC can be exacerbated by the “excessive” length of the Commission Decision being challenged. They suggest that “the Commission should be encouraged to consider shortening its own Decisions in competition and State aid matters without prejudice to the obligation ... to state fully its reasoning”.¹¹¹ In response, Señor Requena pointed to “a new approach” by the Commission, built around an assessment of the ability of third parties to pay Commission fines and the policy of “settlement”. He described “settlement” as allowing “the Commission to impose fines with a 10% reduction ... having received some sort of acknowledgment by the firms of their fault and, at the same time, some commitment in order to avoid repetition of the fault in the future”. He concluded that “our competition policy is in permanent evolution and these two elements ... will contribute to alleviate the workload of the General Court in the coming months and years”.¹¹²
82. The Committee welcomes the Commission’s new approach to competition cases and notes Señor Requena’s comment that the Commission’s competition policy is in “permanent evolution”. In that light, we suggest that the Commission continues to strive to limit the impact their procedures and decisions have on the ability of the GC to cope with its workload. But this alone will not provide a solution to the GC’s difficulties.

The rotation of judges

83. This problem was brought to the Committee’s attention by the CJEU itself. The Court argued that the current rules on the replacement of judges, whereby they are partially replaced every three years in alternate groupings of 13 and 14, cause problems for the Court in relation to how they manage their case-load. They said “[u]ncertainty over the appointment, or renewal, of judges has a direct effect on the scheduling of hearings and the handling of cases, not only in relation to cases assigned to judges whose terms of office are about to expire, but also in relation to cases assigned to the other members of the Chamber of which those judges are members”. They conclude that this lack of stability has a “significant impact on their efficiency”.¹¹³ AG Sharpston added, “in order to ensure that judicial business is handled without interruption, it is important to know who is being renewed and who is likely to be replaced”, but, “Member States do not always communicate this information to the Court until rather late in the day”.¹¹⁴ She asked that the Member States “let the Court know as soon as possible whether or not they intend to re-nominate an incumbent”.¹¹⁵
84. **The Committee recommends that the Member States heed AG Sharpston’s request and state their intentions regarding the appointment of judges in good time. We suggest that the Court stipulates what constitutes a reasonable period of time.**

¹¹¹ (WE 8) at paragraph 21.

¹¹² Q 123.

¹¹³ (WE 13) at paragraph 47.

¹¹⁴ See AG Sharpston’s evidence at paragraph 1.7 in Appendix 5.

¹¹⁵ See AG Sharpston’s evidence at paragraph 2.7 in Appendix 5.

CHAPTER 6: SOLUTIONS FOR THE COURT OF JUSTICE

Introduction

85. Our witnesses offered a wide spectrum of solutions. These ranged from suggestions which can be classed as minor (for example clearer case management information)—which while useful in themselves would offer very little by way of alleviating the workload problems identified in Chapter 3—to more far-reaching reforms. The rest of this Report deals with the solutions most frequently suggested in the evidence and assesses their potential to ameliorate the workload problems facing the CJEU. This Chapter will discuss the suggestions for reform of the CJ and the following Chapter will consider those for the GC.¹¹⁶

Procedural changes

86. The Bar European Group argued that “real thought has to be given as to how sensibly to streamline ECJ procedures”.¹¹⁷ They suggested staggering litigants’ submissions in preliminary reference applications, thus removing the need for lengthy Member State observations to the Court; and better accelerated procedures for those cases which need expedition but cannot be classed as urgent.¹¹⁸ The Faculty of Advocates too picked up on this aspect of the CJ’s procedures, and said that “[w]hile the Court of Justice has introduced rules for the use of urgent procedures, it appears that these are little used”, and they argued that their greater use might “improve justice ... [and] encourage early settlement”.¹¹⁹
87. On the other hand, Professor Jacobs described the CJ’s current procedural rules as “very straightforward” and said that when they are followed the system is “quite effective”.¹²⁰ He felt that “there is probably not a lot of scope for real further time savings”¹²¹ and added this clarification: “[t]here are many aspects of the system that it is difficult—or even perhaps in real terms impossible—to change and the scope for improvements is very limited”.¹²² AG Sharpston¹²³ said that the CJ is currently undertaking a complete review of its rules of procedure,¹²⁴ but acknowledged that, given the structural constraints of language, heavy reliance on written procedure requiring translation and Member States’ privileged status as intervenors, there was not much scope for making a further radical reduction in the average time taken to process cases at the Court of Justice.¹²⁵

¹¹⁶ The Committee acknowledges that if enacted as currently drafted many of the reforms suggested by this Report will engage Clause 10 of the European Union Bill and as such will be subject to parliamentary approval.

¹¹⁷ (WE 12) at paragraph 23.

¹¹⁸ (WE 12) at paragraph 23; they also advocate wider use of judicial training programmes.

¹¹⁹ (WE 7) at paragraph 8.

¹²⁰ Q 103.

¹²¹ Q 99; see also Professor Arnall, Q 20.

¹²² Q 99.

¹²³ Current member of the Court’s Rules of Procedure Committee.

¹²⁴ See AG Sharpston’s evidence at paragraph 1.7 in Appendix 5.

¹²⁵ See AG Sharpston’s evidence at paragraph 1.7 in Appendix 5.

88. **Whilst the Committee received some suggestions for procedural reform, the weight of the evidence suggests that delays due to the CJ's procedures have been reduced to, or close to, the minimum. We look forward to the further conclusions of the Court's Rules of Procedure Committee.**¹²⁶

Give the CJ procedural autonomy?

89. As we have seen, the CJEU does not currently enjoy autonomy to amend its rules of procedure. Change remains subject to Member State agreement. The judges at the CJEU suggested that this rule should be amended to give the Court greater procedural autonomy¹²⁷ which it considered likely to help dispose of cases expeditiously.¹²⁸
90. On the other hand the Government were against procedural autonomy, considering it axiomatic that the Member States who set up the CJEU by Treaty had a right to be consulted over the formal procedure of the Court.¹²⁹ However, the Member States and the Council have never sought to influence the internal rules of procedure of the other institutions they established and the Council determines its own rules of procedure by simple majority: so it is not clear why approval by the Council should be necessary for any change to the Court's rules of procedure.
91. There is obviously a desire amongst the judges of the Court who expressed an opinion to this Committee that they should be given greater procedural autonomy. We have sympathy for this view. On the other hand the Government's views suggest that complete autonomy is unlikely to be granted. We understand that the Court is currently undertaking its own review of its procedures. **We recommend that the Government and the Council give constructive consideration to any reform proposals from the Court.**

Reform the oral hearing?

92. The vast majority of cases heard by the CJ are not automatically dealt with via an oral hearing.¹³⁰ Sir Konrad Schiemann estimated that of the 600 or so cases dealt with per year, around 180 would involve an oral hearing.¹³¹
93. The Law Society argued that the oral hearing was an important step that should always be granted to the parties of the case as it offered the judges an opportunity to reach a greater understanding of the case and the parties' respective positions, and this would mean that the Court would need less time to reach a decision and to agree its judgment.¹³² This was also supported by the CCBE.¹³³

¹²⁶ For example the recent request by the President of the CJEU to amend the Court's Rules of Procedure to allow electronic deposit and service of procedural acts (e-Curia).

¹²⁷ See AG Sharpston's evidence at paragraph 2.1 in Appendix 5, and the evidence of the President of the CST in Appendix 4 at page 57.

¹²⁸ (WE 13) at paragraph 46.

¹²⁹ Q 138.

¹³⁰ Under Article 44a of the Court's Rules of Procedure, after the pleadings have all been lodged, the Judge-Rapporteur has made a Report to the Court, and all the judges have heard from the AG, the Court can decide to dispense with the oral hearing.

¹³¹ Appendix 4 at page 50.

¹³² (WE 8) at paragraph 23.

¹³³ Q 49.

94. Señor Requena, on behalf of the Commission, held a different view. He recognised that in the case of the GC an oral hearing was unavoidable but had sympathy for the attitude of the Court, which often considers that they do not need the oral hearing “because they don’t need to hear the facts in detail. They have to judge only on legal issues, on legal terms.” He concluded that enormous savings of time and resources could be made by dispensing with a hearing.¹³⁴
95. Sir Konrad Schiemann said that to people familiar with the English legal tradition oral hearings before the CJ could appear unsatisfactory. He noted that all Member States were entitled as of right to request an oral hearing before the Court and often one or more did. Further, individuals could submit a reasoned request for a hearing and such requests were generally granted. Sir Konrad also suggested that it would be helpful if the Court could alter its procedure in order to refuse, occasionally, such requests.¹³⁵
96. The evidence on reform of the oral hearing before the CJ is mixed. The bodies which represent the legal professions argue that raising the status of the oral hearing will save time and help to focus the Court’s mind. Sir Konrad Schiemann and the Commission disagree. **In allowing the Court to decide whether an oral hearing is necessary in each individual case, whilst at the same time providing an opportunity for legal representatives to apply for an oral hearing, we consider that the Court’s current rules of procedure strike the right balance.**

Structural reform of the CJ

Reform of the preliminary rulings system

97. This was an area of reform considered by the Due Report. The Working Party suggested a range of reforms, including that national courts should be encouraged to “be bolder” in answering questions of Community law themselves,¹³⁶ that the Commission, in its capacity as guardian of the Treaties, should bring actions for failure to fulfil its obligations against those Member States whose courts illustrate “ignorance” of Community law,¹³⁷ and that provisions should be inserted into the CJ’s rules of procedure encouraging, but not obliging, national courts to “include in the preliminary questions reasoned grounds for the answers that the national court considers most appropriate”.
98. Preliminary rulings formed the largest single group of cases completed by the CJ in 2008 and 2009.¹³⁸ Given this, reform of the system could prove effective at reducing the CJ’s workload.
99. We heard four interrelated suggestions for improving the system:
- (i) sharing jurisdiction for preliminary rulings between the CJ and the GC;

¹³⁴ Q 121.

¹³⁵ Appendix 4 at page 50.

¹³⁶ Due Report at page 14.

¹³⁷ Due Report at page 16.

¹³⁸ Based on the figures appearing in the Court’s Annual Report, of the 567 completed cases in 2008, 301 were preliminary references. The figures for 2009 were 259/588 cases.

- (ii) the use of a filter or leave mechanism designed to govern when, by whom and under what circumstances the application will be heard;
- (iii) a “green light” system built around the inclusion by the national court seeking a reference of a provisional answer to the question; and
- (iv) a requirement that the member of the CJ judiciary from the Member State whence the request emanates be obliged to sit on the judicial panel deciding the case.

The merits of each are discussed below.

Sharing jurisdiction for preliminary rulings between the CJ and the GC

100. Provision for this reform was first included in the Nice Treaty¹³⁹ and it could be instigated without provoking Treaty change. Its merits were considered by the Due Report, but the Working Party rejected it and argued that the *status quo* should be respected and that jurisdiction to give preliminary rulings should remain with the Court of Justice.
101. Both Professor Tridimas and Professor Arnull supported such a reform, although the latter recognised that under the Treaties’ existing provisions there were difficulties in allocating which type of case would be heard by which Court because many references cut across several areas of Union law.¹⁴⁰ Nevertheless, he argued that a “renewed effort needs to be made to crack this nut” and that a “Treaty amendment should not be ruled out” to allow references to be transferred to the General Court in accordance with the statute. This would leave the details to be worked out later and make it possible for the cases affected to be defined by reference to their subject matter or the identity of the referring Court.¹⁴¹
102. Those arguing against this reform included the CCBE who rejected any devolution of preliminary rulings, arguing that “it is difficult to have any filtering system that would not be arbitrary because some cases may appear simple or technical yet may pose fundamental questions of principle that later have an important effect across the board”.¹⁴² They also made the point that “[i]f anything, the need for a reference to be made by a national judge is a pretty strong filter already”.¹⁴³
103. Señor Requena for the Commission argued that “it is crucial to keep the competences for these preliminary references at the level of the Court of Justice; at the level of the Supreme Court in Europe”.¹⁴⁴ This opinion was shared by the CCBE.¹⁴⁵
104. The judges we met also saw practical problems. Sir Konrad Schiemann argued, like Professor Arnull, that determining which cases would be heard by which Court would prove difficult. He pointed out that as the GC was already overloaded¹⁴⁶ it would be difficult to add to its remit without taking

¹³⁹ Now Article 256 (TFEU).

¹⁴⁰ (WE 11) at paragraph 1; Professor Arnull (WE 2) at paragraph 19.

¹⁴¹ Professor Arnull (WE 2) at paragraphs 20 and 21.

¹⁴² Q 45.

¹⁴³ Q 47.

¹⁴⁴ Q 110.

¹⁴⁵ Q 61.

¹⁴⁶ See Chapter 3, and also AG Sharpston’s evidence at paragraph 2.2 in Appendix 5.

other areas away from it. Judge Nicholas Forwood suggested that some preliminary rulings could be handed down by the GC within specific areas of EU law, and the examples he offered were trade mark law or competition. However he too recognised that deciding which cases would be heard by which court could pose practical problems because some areas of EU law will inevitably overlap with others, for example taxation law impacting on the area of freedom of movement.¹⁴⁷ AG Sharpston too dismissed this reform on practical grounds, being of dubious benefit and possibly costly.¹⁴⁸

105. **Given the wider constitutional significance of preliminary rulings, and given that the GC is overburdened, we believe that this jurisdiction should remain exclusively with the CJ.**

Filtering references

106. The Due Report also considered the feasibility of reducing the number of preliminary references by introducing a mechanism whereby the Court of Justice would select only those preliminary questions which it considered were sufficiently important for Community law.¹⁴⁹ However, the Working Party rejected it, arguing that the relationship of “cooperation and dialogue” between the CJ and the national courts inherent in the preliminary ruling system would be upset.¹⁵⁰ On the other hand Professor Jacobs argued that “if there is an area where one can cut back, it would be in not requiring the Court of Justice necessarily to deal with every reference that is made, and finding some way of limiting that to cases that are really important for the European Union system”.¹⁵¹
107. Professor Arnulf argued that “if we could identify the small issues and set them apart, then that would be very convenient” but he was not confident that it could be done. He concluded that “[o]ne of the lessons of the case law of the Court of Justice is that apparently small issues can actually raise issues of profound importance”¹⁵² and he rejected any change to the preliminary reference system that would discourage national courts from referring to the CJ.¹⁵³ The CCBE shared his view.¹⁵⁴
108. On the issue of introducing a filter into the preliminary ruling system both the Due Report, and those who gave evidence to this Committee, emphasised the delicate nature of the relationship between the national court referring the question and the CJ answering it. **It is important that any filtering reform should not disrupt the delicate relationship between the national courts and the CJ, in particular when there is no evidence to support any argument that this reform would address the central goal of reducing the CJ’s workload.**

The green light system

109. This reform was advocated by Professor Jacobs. He envisaged a two stage process: at stage one the national court requesting the preliminary ruling

¹⁴⁷ Appendix 4 at page 54.

¹⁴⁸ See AG Sharpston’s evidence at paragraph 2.2 in Appendix 5.

¹⁴⁹ Due Report at page 21.

¹⁵⁰ Due Report at page 21.

¹⁵¹ Q 101.

¹⁵² Q 7.

¹⁵³ See QQ 7, 9, 10 & 11.

¹⁵⁴ Q 46.

would be encouraged to state its own answer to the interpretation of EU law, then, on completion of the round of written observations, the CJ would decide whether to give that answer a ‘green light’, or possibly simply to state that it was unnecessary to rule on the question(s). By giving the green light the CJ would not be endorsing the view of the national court but would be signalling that it did not regard its view as objectionable.¹⁵⁵ This goes further than the Court’s existing rules of procedure¹⁵⁶ which merely asks national courts to formulate a proposed answer to the question referred, as recommended by the Due Report.¹⁵⁷

110. No other witnesses advocated Sir Francis’ suggestion. The Government questioned the status of the green light¹⁵⁸ and the CCBE suggested that the judiciary in some Member States would actually be deterred from making a reference if there was an obligation to formulate a provisional answer.¹⁵⁹
111. **We agree that encouraging national courts to include a provisional answer in their request for a preliminary ruling is a sensible policy. We reject the idea of making the practice compulsory but we see merit in the Court taking further steps to encourage national courts making reference requests to adopt this policy.**

Should the CJ judge with the nationality of the Member State court making the request be routinely included in the CJ chamber deciding the case?

112. The Government thought that in some cases it would be essential to have a judge with an understanding of the common law tradition¹⁶⁰ as part of the judicial chamber deciding the preliminary reference. Professor Arnall argued that it could be useful but would not go so far as to say that there ought to be a rule.¹⁶¹
113. All the other witnesses who offered an opinion rejected this idea. The CCBE considered that this could lead to delays and preferred cases being allocated in a “rational fashion ... rather than letting the allocation be determined by nationality”.¹⁶²
114. Professor Jacobs felt that it “presents a particular difficulty ... in the Court of Justice, because very often cases will affect a number of Member States—sometimes all of them”.¹⁶³ Citing the collegiate ethos of the institution whereby at the beginning of the CJ’s procedure the whole Court considers the preliminary reference request, he also thought that “it is possible for members of the Court who are not sitting in the case to keep the members who are sitting informed about any particular problems that may arise as a matter of national law”.¹⁶⁴

¹⁵⁵ Professor Jacobs (WE 3).

¹⁵⁶ Article 104(b) of the Courts’ Rules of Procedure.

¹⁵⁷ The Due Report also rejected imposing an obligation on national courts to include an answer in the preliminary reference request. See page 18.

¹⁵⁸ Q 149.

¹⁵⁹ Q 44.

¹⁶⁰ Q 152.

¹⁶¹ Q 30. In the European Court of Human Rights the judge of the nationality of the Council of Europe Member State from where the application comes is always a member of the judicial panel deciding the case.

¹⁶² Q 55.

¹⁶³ Q 83.

¹⁶⁴ Q 85.

115. **We are not persuaded that it is necessary to introduce into the preliminary reference system a requirement for the CJ judge with the nationality of the Member State court making the request to be routinely included in the CJ chamber deciding the case. Moreover we believe that the resultant restriction on the pool of judges available to sit in any given preliminary reference request would exacerbate the workload problems the CJ is currently facing. We do, however, consider it important to retain the stage of the procedure where all judges consider preliminary reference requests.**

Increase the number of Advocates General?

116. Whilst increasing the number of judges in the CJ would necessitate Treaty change there is already a provision in the Treaty for increasing the number of AGs if the Member States unanimously agree to such a request by the Court.¹⁶⁵ AG Sharpston suggested that “given that many cases are still deemed complex and difficult enough to warrant an opinion from the Advocate General, consideration could actively be given to adding a further three Advocates General to the Court of Justice”. She argued for increasing the current number of AGs from eight to 11, “the ratio between Judges and Advocates General was 15:8 in 2003. It is now 27:8”.¹⁶⁶ The CCBE also saw a need for more AGs.¹⁶⁷
117. **It is the Committee’s view that an increase in the number of AGs should be made as soon as possible. This comparatively straightforward reform will assist the Court in increasing the speed with which cases can be dealt, while improving the quality of decision-making. There is provision in the Treaty for an increase in the number of AGs serving the CJ and we recommend that the CJ submit a request for an increase to the Council.**

¹⁶⁵ Article 252 TFEU; see also the Declaration on Article 252 of the TFEU regarding the number of AGs in the CJ: no. 38, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon.

¹⁶⁶ See AG Sharpston’s evidence at paragraph 1.8 in Appendix 5.

¹⁶⁷ Q 62.

CHAPTER 7: REFORM OF THE GENERAL COURT

118. Of the CJEU's three constituent parts, it is the GC that is experiencing the greatest difficulties in managing its workload and where reform is most urgently needed.

Specialist chambers

119. The CBI¹⁶⁸ and the Law Society both argued that allocating cases to specialist chambers within the GC would assist with the quality of decision-making and speed the throughput of cases. They noted that it used to be the GC's practice that trade mark cases were allocated on such a basis but that the system was dropped because it was unpopular¹⁶⁹ with the judges.¹⁷⁰
120. Judge Forwood confirmed to the Committee that in 1999, when trade mark law was a new area of work for the GC, in order to achieve consistency of judgment in the evolving case law, all trade mark cases were remitted to a particular chamber of the Court. However, once the law had become settled it seemed sensible to avoid one chamber from specialising in this way as those judges who sat in the chamber were too busy to take part in other cases, and those from other chambers were unable to contribute to trade mark cases.¹⁷¹
121. **The Committee can see the case for the use of specialist Chambers within the Court, in particular when a new stream of cases flows into the Court. Given the evidence discussed earlier in relation to the REACH Regulation and the impact this area of law may have on the GC's workload, the Committee suggests that, if the GC has not already done so, it should consider the use of specialist chambers.**

Better case management

122. The CBI called for the GC to embrace "more robust case management", in particular setting a public timetable for proceedings.¹⁷² The CCBE suggested the provision of a database where litigants can check the progress of cases;¹⁷³ the Law Society appealed for better and earlier information on procedural timetables;¹⁷⁴ and the Attorney General made similar arguments, subject to cost.¹⁷⁵
123. We put this to the judges of the GC. The President said that the GC needed external help to achieve these types of reform.¹⁷⁶
124. **Although we recognise that addressing the GC's case management record is not going to solve the GC's wider workload problems, we recommend that the Court should consider taking a more robust**

¹⁶⁸ (WE 1) at paragraph 23.

¹⁶⁹ (WE 8) at paragraph 13.

¹⁷⁰ See also the CCBE (WE 9) at paragraph 36.

¹⁷¹ Appendix 4 at page 53.

¹⁷² (WE 1) at paragraphs 30 and 31.

¹⁷³ The CCBE (WE 9) at paragraph 37, Q 51.

¹⁷⁴ (WE 8) at paragraph 19.

¹⁷⁵ See QQ 138, 157 & 158.

¹⁷⁶ See also AG Sharpston's evidence at paragraph 2.8 in Appendix 5.

approach. It ought to be possible to publish clear public timetables charting a case's progress. We suggest that money is made available to create, or add to the Court's website, a facility for achieving this.

Structural Reforms

125. Professor Tridimas identifies two ways by which the case-load of the GC can be lessened: the establishment of specialised tribunals sitting below the GC and a substantial increase in the number of GC judges.¹⁷⁷ The Court noted that even if the efficiency of the judicial work can still be marginally enhanced, it is highly doubtful whether that could suffice to contain the growth of cases, let alone enable a significant reduction in the considerable backlog of cases currently pending before the GC. It too suggested structural remedies such as increasing the number of judges at the GC or the creation of a specialised court potentially in the field of intellectual property.¹⁷⁸
126. We agree that structural reform is necessary to diminish the workload pressures the GC is currently experiencing. This reform could be pursued by creating one or more specialised tribunals similar to the CST, increasing the number of judges in the GC, or a mixture of both solutions. These reforms enjoy the advantage that they could be instigated without the need for Treaty change. The merits of each are discussed below.

Specialist Tribunals

127. Most of our evidence dealt with the question of creating specialist tribunals.¹⁷⁹ Practitioners favoured a Trade Mark Tribunal.¹⁸⁰
128. Professor Arnall suggested both a new specialised intellectual property court and also noted that it “would be possible ... to envisage a specialised court in the field of competition law”, though “it would inevitably have the effect simply of extending the appeals process”.¹⁸¹ The CCBE supported a specialised tribunal for trade marks.¹⁸²
129. Professor Jacobs saw the creation of specialised tribunals as a long-term solution in the right circumstances¹⁸³ which might exist for trade mark cases.¹⁸⁴ For example, “in relation to trade marks and design problems, there seems to be a rapid growth in the number of cases. That would be one reason to consider setting up a specialised tribunal”.¹⁸⁵ Sir Konrad Schiemann also thought that separate tribunals for intellectual property related cases or trade marks might work, if they were properly financed, but from the point of view of the CJEU's structure it would need to be

¹⁷⁷ (WE 11) at paragraph 22.

¹⁷⁸ (WE 13) at paragraph 48.

¹⁷⁹ Some members of the House of Lords may recall that the European Select Committee rejected the creation of a specialised Competition Court in its 2007 Report cited above at footnote 55.

¹⁸⁰ The CBI (WE 1) at paragraphs 32–35; the European Circuit of the Bar of England and Wales (WE 6) at paragraph 9; and the Law Society (WE 8) at paragraph 12.

¹⁸¹ Q 22.

¹⁸² Q 61.

¹⁸³ Q 79.

¹⁸⁴ Q 82.

¹⁸⁵ Q 77.

determined whether such courts would be truly separate, like the CST, or part of the GC.¹⁸⁶

130. The Attorney General was open-minded to the prospect of specialised tribunals, and could see merit in the argument for their creation,¹⁸⁷ but he repeatedly emphasised the cost implications and argued that a trade mark tribunal would have to come out of the General Court.¹⁸⁸ He also pointed out the risk of creating a new set of appeals from a tribunal.¹⁸⁹
131. Señor Requena doubted whether creating specialist tribunals would provide the necessary long-term solution and argued that creating a specialised tribunal would inhibit flexibility if the pattern of the incoming case-load changed.¹⁹⁰

More judges in the GC?

132. Many of the witnesses advocated the appointment of more judges for the GC, as the best and most flexible solution to its current workload problems. Señor Requena argued that in the long-term creating more judges in the GC would offer greater flexibility than specialised tribunals: “the increase in the number of judges ... would be a more efficient solution and a more flexible one because if after some years we see ... new cases coming from a new agency ... it will be able to take advantage of this increase ... in order to deal with these new cases”.¹⁹¹
133. The CCBE endorsed this reform as a means of bringing flexibility to the GC’s efforts to reduce its workload: “[w]hen you increase the number of judges you obtain flexibility to deal with the backlog and different cases”.¹⁹² Even the Government, who repeated the *caveats* regarding costs, accepted the basic premise for this reform that “you can make a powerful argument for more judges to reduce workload”.¹⁹³
134. Increasing the number of judges in the GC raises the issue of how many there should be and of which nationality. The CCBE,¹⁹⁴ Professor Jacobs,¹⁹⁵ and Judge Forwood¹⁹⁶ all highlighted the Member States’ failure in the 1990s to increase the number of judges serving the GC by six.

Overall conclusions on structural reform of the GC

135. **Regarding specialist tribunals, we see the CST as a special case since its work is essentially related to the internal affairs of the EU and its decisions have no impact on the law of the individual Member States. A proliferation of specialist tribunals separate from the GC would not**

¹⁸⁶ Appendix 4 at page 51.

¹⁸⁷ Q 126.

¹⁸⁸ Q 127.

¹⁸⁹ Q 131.

¹⁹⁰ QQ 110 & 111.

¹⁹¹ Q 124.

¹⁹² Q 61.

¹⁹³ Q 137.

¹⁹⁴ Q 40.

¹⁹⁵ Professor Jacobs (WE 3).

¹⁹⁶ Appendix 4 at page 54.

be desirable. They would cost more than the CST, in particular given the greater translation costs because their decisions will be of relevance to all Member States. In addition, their judges will be of the particular discipline and thus be of no use to the GC in coping with its general workload. We do not recommend this course, provided that the problems facing the GC are alleviated by other means.

136. We recommend an increase in the GC's judiciary. Whilst we recognise the cost implications, if the Member States are serious about addressing the GC's workload problems this reform represents the best and most flexible long-term solution. It must surely be possible for the Council to agree to appoint the necessary number, less than 27, which the Court should recommend at this stage. We suggest one third might be a reasonable number on a rotating basis. This reform will of course cost money but, given the central role fulfilled by the Court in the effective operation of the Union, we believe that the benefits would clearly outweigh the costs.

CHAPTER 8: SUMMARY OF CONCLUSIONS

The Court of Justice's workload

137. We believe that the window of opportunity has closed within which the CJ was able to avoid longer delays because the increase in its membership preceded an expected increase in its workload (see paragraph 41).

The impact of the Treaty of Lisbon on the CJ's workload

138. We believe that the expansion of the CJ's jurisdiction into the Area of Freedom, Security and Justice introduced by the Lisbon Treaty, coupled with the increase of EU membership to 27 States, will have an impact on the CJ's ability to manage its workload. We predict another crisis of workload soon (see paragraph 44).

The General Court's workload

139. We conclude that the most immediate problem lies in the GC. The GC's own statistical information, and the evidence we received, point to significant problems with its existing workload and its ability to manage its future workload. We agree with the representatives of the CCBE that it is within the GC that "structural solutions need to be found"¹⁹⁷ and urgently (see paragraph 53).

The Civil Service Tribunal's workload

140. The CST is a success story and the Committee has no concerns regarding its ability to manage its case-load (see paragraph 56).

Translation into the CJEU's working language

141. It is our view that the popular opinion that delay is caused by translating documents into the CJEU's working language is misplaced. The CJEU has to have a working language and for historical reasons that language is French. Any increase in the number of working languages will, in the Committee's view, merely add another level of translation to the process, thus exacerbating any existing delays caused by translation (see paragraph 62).

Translating the Court's judgments into the EU's 23 official languages

142. Access to the CJ's case law, either by Member States' authorities or their citizens, must remain the key. The law as decided by the CJ applies equally throughout the Member States, and it has to be available in a language that all the citizens of the Member States can understand. This is important for the Court's legitimacy (see paragraph 68).
143. Translation remains an expensive but necessary service for an institution operating in a multilingual and transnational environment (see paragraph 70).

The wider political and economic context

144. The Committee is sensitive to the lack of appetite amongst the Member States for Treaty change and to the current economic constraints. It is our

¹⁹⁷ Q 61.

view, however, that the time to “leave the Court to work as it is” has passed and that solutions which may involve additional expenditure on the Courts (not involving an addition to the budget) need to be addressed urgently. We do not make any suggestion likely to involve Treaty change because in the short term other solutions are available. But the Member States should not be put off from undertaking necessary reform involving Treaty change when the opportunity arises in the longer term (see paragraph 76).

Legislative impact assessments

145. We believe that legislation, in particular legislation liable to have a significant impact on the CJEU’s workload, should include within its impact assessment a section considering its likely impact on the CJEU, a cogent recent example being the introduction of the REACH Regulation. Where the EU creates executive agencies designed to police the application of Community law, it is a legal requirement that their decisions be open to challenge. The EU institutions should not ignore the fact that the act of creating a regulatory agency whose decisions are subject to an appeal to the GC brings with it an impact on the GC which, as currently constituted, will struggle to carry the additional burden. Whilst we recognise the limitations of impact assessments highlighted by both the Commission and the Government, it must be the case that at least when creating an executive agency the Member States should consider its judicial impact (see paragraph 80).

The rotation of judges

146. The Committee recommends that the Member States heed AG Sharpston’s request and state their intentions regarding the appointment of judges in good time. We suggest that the Court stipulates what constitutes a reasonable period of time (see paragraph 84).

Procedural changes

147. Whilst the Committee received some suggestions for procedural reform, the weight of the evidence suggests that delays due to the CJ’s procedures have been reduced to, or close to, the minimum. We look forward to the further conclusions of the Court’s Rules of Procedure Committee (see paragraph 88).

Give the CJ procedural autonomy?

148. We recommend that the Government and the Council give constructive consideration to any reform proposals from the Court (see paragraph 91).

Reform the oral hearing?

149. In allowing the Court to decide whether an oral hearing is necessary in each individual case, whilst at the same time providing an opportunity for legal representatives to apply for an oral hearing, we consider that the Court’s current rules of procedure strike the right balance (see paragraph 96).

Sharing jurisdiction for preliminary rulings between the CJ and the GC

150. Given the wider constitutional significance of preliminary rulings, and given that the GC is overburdened, we believe that this jurisdiction should remain exclusively with the CJ (see paragraph 105).

Filtering references

151. It is important that any filtering reform should not disrupt the delicate relationship between the national courts and the CJ, in particular when there is no evidence to support any argument that this reform would address the central goal of reducing the CJ's workload (see paragraph 108).

The green light system

152. We agree that encouraging national courts to include a provisional answer in their request for a preliminary ruling is a sensible policy. We reject the idea of making the practice compulsory but we see merit in the Court taking further steps to encourage national courts making reference requests to adopt this policy (see paragraph 111).

Should the CJ judge with the nationality of the Member State court making the request be routinely included in the CJ chamber deciding the case?

153. We are not persuaded that it is necessary to introduce into the preliminary reference system a requirement for the CJ judge with the nationality of the Member State court making the request to be routinely included in the CJ chamber deciding the case. Moreover we believe that the resultant restriction on the pool of judges available to sit in any given preliminary reference request would exacerbate the workload problems the CJ is currently facing. We do, however, consider it important to retain the stage of the procedure where all judges consider preliminary reference requests (see paragraph 115).

Increase the number of Advocates General?

154. It is the Committee's view that an increase in the number of AGs should be made as soon as possible. This comparatively straightforward reform will assist the Court in increasing the speed with which cases can be dealt, while improving the quality of decision-making. There is provision in the Treaty for an increase in the number of AGs serving the CJ and we recommend that the CJ submit a request for an increase to the Council (see paragraph 117).

Specialist chambers

155. The Committee can see the case for the use of specialist Chambers within the Court, in particular when a new stream of cases flows into the Court. Given the evidence discussed earlier in relation to the REACH Regulation and the impact this area of law may have on the GC's workload, the Committee suggests that, if the GC has not already done so, it should consider the use of specialist chambers (see paragraph 121).

Better case management

156. Although we recognise that addressing the GC's case management record is not going to solve the GC's wider workload problems, we recommend that the Court should consider taking a more robust approach. It ought to be possible to publish clear public timetables charting a case's progress. We suggest that money is made available to create, or add to the Court's website, a facility for achieving this (see paragraph 124).

Overall conclusions on structural reform of the GC

157. Regarding specialist tribunals, we see the CST as a special case since its work is essentially related to the internal affairs of the EU and its decisions have no

impact on the law of the individual Member States. A proliferation of specialist tribunals separate from the GC would not be desirable. They would cost more than the CST, in particular given the greater translation costs because their decisions will be of relevance to all Member States. In addition, their judges will be of the particular discipline and thus be of no use to the GC in coping with its general workload. We do not recommend this course, provided that the problems facing the GC are alleviated by other means (see paragraph 135).

158. We recommend an increase in the GC's judiciary. Whilst we recognise the cost implications, if the Member States are serious about addressing the GC's workload problems this reform represents the best and most flexible long-term solution. It must surely be possible for the Council to agree to appoint the necessary number, less than 27, which the Court should recommend at this stage. We suggest one third might be a reasonable number on a rotating basis. This reform will of course cost money but, given the central role fulfilled by the Court in the effective operation of the Union, we believe that the benefits would clearly outweigh the costs (see paragraph 136).

APPENDIX 1: JUSTICE AND INSTITUTIONS SUB-COMMITTEE

The members of the Sub-Committee which conducted this inquiry were:

Lord Blackwell
 Lord Bowness (Chairman)
 Lord Boyd of Duncansby
 Lord Dykes
 Lord Kerr of Kinlochard
 Lord Maclennan of Rogart
 Lord Morris of Aberavon (from 24 November 2010)
 Lord Renton of Mount Harry
 Lord Rowlands
 The Earl of Sandwich
 Lord Temple-Morris
 Lord Wright of Richmond

Declarations of Interests:

A full list of Members' interests can be found in the Register of Lords Interests:
<http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests/>

Members have drawn particular attention to the following interests relevant to this inquiry:

Lord Bowness

*Consultant Solicitor, Streeter Marshall Solicitors of Croydon, Purley & Warlingham (acting for clients of Streeter Marshall in connection with their private affairs; no parliamentary activity).
 Notary Public*

Lord Boyd of Duncansby

Scottish solicitor advocate in private practice. From time to time the practice covers EU law.

Lord Kerr of Kinlochard

*Deputy Chairman and Senior Independent Director, Royal Dutch Shell plc
 Non-executive Director, Rio Tinto plc
 Non-executive Director, Rio Tinto Ltd (Australia)
 Non-executive Director, Scottish Power plc
 Non-executive Director, Scottish American Investment Co Ltd
 Chairman of Court and Council, Imperial College London
 Chairman, Centre for European Reform (London)
 Vice President, European Policy Centre (Brussels)*

Lord Morris of Aberavon

*Occasional advisory work as a Queen's Counsel
 Occasional lecturing
 Chancellor, University of Glamorgan
 Bencher, Gray's Inn*

APPENDIX 2: CALL FOR EVIDENCE

The House of Lords European Union Committee is to conduct an inquiry, to be undertaken by its Justice and Institutions Sub-Committee, on the workload of the Court of Justice of the European Union. The Sub-Committee invites you to give written evidence to the Inquiry.

Written evidence is sought by 24 September 2010. Public hearings will be held in October and November 2010. The Committee aims to report to the House, with recommendations, in February 2011. The report will receive a response from the Government, and may be debated in the House.

Background

The ability of the Court of Justice and the Court of First Instance to handle their existing (pre-Lisbon) workload was noted by the European Union Committee in its report of April 2007, *An EU Competition Court* (15th Report of Session 2006–07). The Report on *The Treaty of Lisbon: an impact assessment* (10th Report of Session 2007–08) noted also that the expansion of the jurisdiction of the Court of Justice resulting from the changes introduced by the Treaty of Lisbon, in combination with the enlargement of the EU, would “further swell the Court’s docket”, both in terms of volume and the range of legal issues before it. The latest annual report of the Court shows that the volume of cases remains high and the rate of disposal of cases is insufficient to make serious reductions in the turnaround time for litigation. The Courts themselves and other commentators have noted these trends and their effects on the increasing number of individuals who find themselves involved in EU litigation.

The Sub-Committee will examine, in respect of each constituent element of the Court of Justice of the European Union (the Court of Justice, the General Court and the Civil Service Tribunal):

- The trends in the workload of these courts.
- The time taken for cases to be dealt with and the impact of the elapse of time.
- Possible measures which could improve the speed with which cases are dealt with (whilst taking into account the limited possibility of Treaty change).
- The budgetary and other impacts of such measures.

The Inquiry will not consider the substance of the Court’s judgments, nor the procedures for appointing judges.

The issues

In addition to any general points you wish to make, the Sub-Committee invites views on the following:

- What are the significant issues highlighted by the statistics relating to the past and current workload of the Court of Justice, the General Court and the Civil Service Tribunal?
- Are the turnaround times for disposal of cases comparable to other courts of equivalent standing?

- Are the turnaround times for disposal of cases acceptable to litigants?
- What considerations, both from the recent changes brought about by the Treaty of Lisbon and otherwise, are likely to affect the workloads of these courts and to what extent?
- Will accession by the EU to the ECHR affect the working of these courts?
- What are the significant challenges and impediments to the courts in handling their workload effectively and expeditiously?
- Are there any bottlenecks in the processes of these courts?
- What measures would improve the working of the courts, bearing in mind the limited possibility of Treaty change?
- What could the Institutions and Member States do to help the Courts dispose of cases more expeditiously?

28 July 2010

APPENDIX 3: LIST OF WITNESSES

Oral Evidence

13 October 2010

Professor Anthony Arnall, Barber Professor of Jurisprudence, University of Birmingham

Written evidence (WE 2)

3 November 2010

Mr Hugh Mercer QC, Mr Onno Brouwer, and Mr Georg Berrisch, Council of Bars and Law Societies of Europe (CCBE)

Written evidence (WE 9)

10 November 2010

Professor Sir Francis Jacobs, School of Law, King's College London; Advocate General, European Court of Justice, 1988–2006

Written evidence (WE 3)

17 November 2010

Señor Luis Romero Requena, Director-General of Legal Service, European Commission (via video-conference)

Written evidence (WE 4)

24 November 2010

The Rt Hon Dominic Grieve MP, Attorney General; Mr Paul Berman, Director of the European Division of the Treasury Solicitor's Department and Cabinet Office Legal Adviser; and Ms Shasa Behzadi Spencer and Ms Elisabeth Jenkinson, Joint Heads of EU Litigation, Treasury Solicitor's Department.

Written evidence (WE 10)

Supplementary written evidence—letter dated 18 January 2011

Written Evidence

*Evidence is published online at www.parliament.uk/hleu and available for inspection at the Parliamentary Archives (0207 219 5314). Evidence marked * is associated with oral evidence.*

Order of receipt

The Confederation of British Industries (CBI) (WE 1)

*Professor Anthony Arnall, Barber Professor of Jurisprudence, University of Birmingham (WE 2)

*Professor Francis Jacobs, School of Law, King's College London, and former Advocate General, European Court of Justice (WE 3)

*Señor Luis Romero Requena, Director-General of Legal Service, European Commission (WE 4)

Professor Damian Chalmers (WE 5)

The European Circuit of the Bar of England and Wales (WE 6)

The Faculty of Advocates (WE 7)

The Law Society (WE 8)

*Council of Bars and Law Societies of Europe (CCBE), represented by Mr Hugh Mercer QC, Mr Onno Brouwer and Mr Georg Berrisch (WE 9)

*The Rt Hon Dominic Grieve MP, Attorney General, Mr Paul Berman, Director of the European Division of the Treasury Solicitor's Department and Cabinet Office Legal Adviser, Ms Shasa Behzadi Spencer and Ms Elisabeth Jenkinson, Joint Heads of EU Litigation, Treasury Solicitor's Department (WE 10)

Professor Takis Tridimas (WE 11)

Bar European Group and the Bar's European Committee (WE 12)

The Court of Justice of the European Union (CJEU) (WE 13)

Mr William Robinson, Sir William Dale Visiting Fellow, Institute of Advanced Legal Studies, London (WE 14)

Alphabetical

*Professor Anthony Arnall, Barber Professor of Jurisprudence, University of Birmingham (WE 2)

Bar European Group and the Bar's European Committee (WE 12)

Professor Damian Chalmers (WE 5)

The Confederation of British Industries (CBI) (WE 1)

*Council of Bars and Law Societies of Europe (CCBE), represented by Mr Hugh Mercer QC, Mr Onno Brouwer and Mr Georg Berrisch (WE 9)

The Court of Justice of the European Union (CJEU) (WE 13)

The European Circuit of the Bar of England and Wales (WE 6)

The Faculty of Advocates (WE 7)

*The Rt Hon Dominic Grieve MP, Attorney General, Mr Paul Berman, Director of the European Division of the Treasury Solicitor's Department and Cabinet Office Legal Adviser, Ms Shasa Behzadi Spencer and Ms Elisabeth Jenkinson, Joint Heads of EU Litigation, Treasury Solicitor's Department (WE 10)

*Professor Francis Jacobs, School of Law, King's College London, and former Advocate General, European Court of Justice (WE 3)

The Law Society (WE 8)

*Señor Luis Romero Requena, Director-General of Legal Service, European Commission (WE 4)

Mr William Robinson, Sir William Dale Visiting Fellow, Institute of Advanced Legal Studies, London (WE 14)

Professor Takis Tridimas (WE 11)

Witnesses from the Court of Justice of the European Union

- *Sir Konrad Schiemann, UK judge at the Court of Justice (Appendix 4)
- *Judge Nicholas Forwood, UK judge at the General Court (Appendix 4)
- *Mr Paul Mahoney, President and UK judge of the Civil Service Tribunal (Appendix 4)
- *Mr Marc Jaeger, President of the General Court (Appendix 4)
- *Señor Alfredo Calot-Escobar, Registrar of the Court of Justice (Appendix 4)
- *Mr Timothy Millett, Deputy Registrar of the Court of Justice (Appendix 4)
- AG Eleanor Sharpston¹⁹⁸ (Appendix 5)

¹⁹⁸ AG Sharpston was unable to meet the Committee in Luxembourg and instead replied to a set of questions in writing, reproduced at Appendix 5.

APPENDIX 4: VISIT TO THE COURT OF JUSTICE OF THE EUROPEAN UNION, LUXEMBOURG: 8–9 NOVEMBER 2010—NOTE BY THE CLERK

Court of Justice

Evidence was taken from Sir Konrad Schiemann, UK judge at the Court of Justice, Señor Alfredo Calot-Escobar, Registrar of the Court, and Mr Timothy Millett, Deputy Registrar of the Court.

The witnesses were asked what changes could be made to the rules of procedure of the Court without treaty change, and what changes they would advocate if they had complete procedural autonomy. Sir Konrad said that all the Court's procedures took a long time to complete. He could not speak "for the Court" as the Court itself had no policies as such. The Court had no control over its case-load and had to deal with whatever cases came in at whatever time.

Sir Konrad indicated that the Court could reject a case by ordinance. For instance, the Court could say to a submitting court that their preliminary reference was not a matter of EU law, and therefore could not be accepted. However, this would have to be done gently. In the past year, around 40-50 references had been rejected in this way.

Occasionally, the question put to the Court was answered in the meantime in another case. In such circumstances the CJ would write to the referring court asking them whether they wished to pursue their reference. But the Court itself had no power to withdraw a reference unilaterally.

Sir Konrad described the typical progress of a case through the Court of Justice:

A national court makes a request for a preliminary ruling. That court sets out what the problem is, the relevant national provisions and what concerns the court. The Court of Justice has published suggested guidelines for how national courts should submit this request, but there is not a specific template. The guidance asks the national court to find the relevant facts in the case in order to allow the Court of Justice to judge on as narrow an issue as possible. For instance, in the case of English football television rights, the English court asked for a ruling because the case appeared to demonstrate a conflict between previous CJ rulings—the Court was therefore asked to rule on the correct interpretation of the law. Usually, the Court would reformulate the question in such terms as "By its question the national court asks ..."

In regard to whether national judges should give their own opinion on the case, Sir Konrad indicated that this already happened in a number of cases, and was encouraged by the Court's guidance information. This was always encouraged in the English Court of Appeal, and was useful as the national judge was familiar with the practical application of the particular law in that country. However, any ruling by the Court of Justice would bind all 27 Member States, and might therefore have different effects in different States. For this reason, all preliminary references by national courts which were not dismissed by way of ordinance were translated into all official languages and circulated to all Member States and the EU institutions for comments. For the same reason all judgments were translated into all official languages of the Member States.

Señor Calot-Escobar described the procedure for translation both in preliminary reference cases and in the other types of cases—direct actions in which the Commission sued a Member State for failing to fulfil its treaty obligations or in

which a challenge was made to the legality of some piece of Union legislation and appeals from the General Court—which come before the Court. In almost all cases, the translations had to be produced within imperative time-limits, for example 20 working days for references for preliminary rulings. In 2009, the Court translated around 800,000 pages of legal documents, and had to identify the correct legal terminology in each language to ensure an accurate translation. The Court needed the resources in order to meet this workload and to respect the translation deadlines. Sir Konrad observed that occasionally the translations were difficult to follow, but that it was difficult to tell whether this was the fault of the translation or of the draft by the submitting national judge. However, mistranslations were normally discovered reasonably quickly, typically by the judge working on the case cross-checking with someone in one of the other cabinets in the Court who spoke the relevant language.

After translation, in all preliminary ruling cases the documents were sent to the Member States, and to the Commission, the Council and the Parliament who then had two months to formulate their observations. In direct actions and appeals the documents were translated into French (for the benefit of the Court). Appendices to the parties' pleadings were only translated if this was requested by the reporting judge.

Sometimes people did not respond. This might happen if a party to a case suspected they would lose but wanted to delay judgment as long as possible.

Cases were sometimes more complex than necessary because the parties were asked by the national judge to draft the submission, with the judge sending it on unamended. Although in theory it was for the national judge to decide whether or not to make a reference, in practice in England a judge would be inclined to make a reference if both parties accepted that the case needed to be referred.

Normally, a response would be received from at least the Member State in which the case had arisen.

Sir Konrad explained how the judges to hear the case were chosen:

Firstly, the President of the Court would appoint a reporting judge (*juge rapporteur*) to the case. The President had to balance considerations of choosing the judge with the most relevant experience against fair distribution of appointments among the judges. The reporting judge made a summary of the case and the arguments of the parties, and would also propose how many judges should take part in the proceedings and whether there should be an opinion by the Advocate General. There was a choice of 3, 5, 13 or all 27 judges, although all 27 had sat in only two recent cases. The decision as to how many judges should hear each case and whether there should be an opinion was always taken by all the members of the Court.

The numbers from 2005–2009 were as follows:

3 judges—35%

5 judges—57%

13 judges—8%

President alone—1%

Most judges were chosen for cases by rota.

With regard to oral hearings, all Member States were entitled as of right to request a hearing and often one or more did. Individuals could submit a reasoned request

for a hearing, and such requests were generally granted. Sir Konrad suggested that it would be helpful if the Court could alter its procedure in order to refuse such requests occasionally.

There were around 600 cases per year, of which around 180 featured hearings. To people familiar with the English legal tradition, these hearings appeared unsatisfactory. Some of this was due to the need for simultaneous translation of the proceedings, and some due to the variable quality of the counsel. Sir Konrad noted that British counsel were usually the most effective in oral hearings, and the most expensive.

The hearings were normally restricted to 20 minutes for each party, although this could be extended on request. The members of the court could intervene to ask counsel to elaborate on particular points.

Sir Konrad suggested that, ideally, more of the proceedings could take place in writing, but that this would delay the process even further. Currently in preliminary reference cases the written element amounted to one round of simultaneously submitted material: any further elaboration or rebuttal had to be done orally.

The oral procedure had developed in recent years in part perhaps under the influence of British legal tradition—judges took more part in proceedings than before, rather than adopting the French practice of impassivity.

Sir Konrad suggested that there was little tension between common law and Napoleonic approaches as civil law matters rarely arose. Tension mainly arose in cases of choice of forum or enforcement of judgments, where a common law judge would normally expect to have greater discretion, whereas the Court's case law placed more emphasis on the desirability of clear rules inflexibly applied.

Sir Konrad suspected differences of view among members of the CJEU with regard to allowing preliminary references to be taken by the General Court. He had no firm view himself, but argued that there was a difficulty in determining which cases would be suitable to be dealt with at that level. Some people had suggested that technical VAT measures, for instance, might be taken by the General Court, but it was difficult to predict in advance which cases might raise fundamental questions of EU law. He also suggested that any ruling from the General Court would be subject to appeal to the Court of Justice, which would not alleviate either Court's workload. In any case, the General Court was already overloaded, so it would be difficult to add to its remit without taking other areas away from it.

Señor Calot-Escobar argued that translation was not causing a bottleneck. It was an obligation to translate into the official languages and this was not currently a problem, but could become one if the workload increased. He argued that the Court needed additional resources, and was struggling to receive them. An attempt by the Court to employ one extra English lawyer-linguist (bringing the total from 30 to 31) had met with resistance from the Council. Additionally, he confirmed that recruitment of British lawyer-linguists was difficult because the pay was not competitive for such highly-qualified people. Sir Konrad added that everybody in a particular grade had to be paid the same, regardless of their home Member State. Normally this had been done by adopting the most generous rate, but this had still not resolved the problem for English speaking lawyer-linguists who were relatively few and in world-wide demand.

With regard to unusual languages, when no translator from an unusual language (A) to another unusual language (B) could be found and therefore documents in (A) needed first to be translated into a more common language, the 20 day deadline still applied.

Sir Konrad suggested it would be possible to abandon translation into all 23 languages, but this would be extremely sensitive politically. The essence of EU law was that it was also part of national law; it was therefore understandable that people wanted it translated into their own national languages. He suggested that it might be easier if the working language of the Court were English, but that, politically, the one Member State who could not make this suggestion was the UK.

Regarding the accusation of judicial activism and the expansion of the Court's jurisdiction, Sir Konrad noted that the Treaty calls for an "ever closer Union", and that the Court took seriously its obligation to follow the Treaty. The Court did not see itself as having a mission independent of what the Treaties prescribed.

With regard to separate tribunals for intellectual property or trade marks, Sir Konrad suggested it might work if properly financed. Another possibility was the appointment of additional specialist judges as part of the General Court. From the point of view of the overall structure of the CJEU it would need to be determined whether such courts should be truly separate, as was the Civil Service Tribunal, or part of the General Court. There would also be the issue of which court would deal with appeals from the tribunal.

Sir Konrad hoped that, in the light of the new Lisbon provisions, cross-border criminal proceedings could be dealt with more quickly and effectively. He noted that there was a tension between EU and national law in these matters. Overarching EU principle governed the area, in order to ensure that the law did not discriminate and was effective, but individual crimes, and the appropriate procedure to deal with them, were largely left to Member States. There were problems with the adherence of some Member State judgments to EU law, and it was necessary for the Court to provide a consistent interpretation of the provisions of the Treaty. For instance, certain terms, such as "detention in custody", needed to mean the same thing in all Member States.

Sir Konrad explained that many of the problems for the Court arose upstream. The Court had to interpret legislation which had been designed by politicians whose political priority was the achievement of a formula, if necessary at the expense of a clear formula. Where the original legislation was imprecise, the Court was required to intervene. This was often the case with Directives, but could also be seen in the Treaties themselves, particularly in the Treaty of Lisbon's provisions for accession to the ECHR.

Sir Konrad explained that the effect of EU accession to the ECHR would depend on the terms of the accession. Before an action could be brought in Strasbourg, all remedies in a particular nation had to be exhausted. It would need to be determined what equivalent principle would apply if the EU acceded. Sir Konrad argued that it was important that EU bodies had a chance to rule on a matter before it was taken to Strasbourg.

General Court

Evidence was taken from Nicholas Forwood, UK judge at the General Court, Marc Jaeger, President of the General Court, and Arnaud Bohler, Head of the President's Cabinet.

Mr Forwood described how in the early years of the EEC cases brought directly before the ECJ related to competition, trade, and staff matters. The Court of First Instance was established in 1989 to deal with these direct action cases. These cases were fact-intensive. Over time, there was an increase in the areas giving rise to direct action: for instance, trade mark law was originally harmonised by the 1989 Directive, and when national courts faced it, they referred questions to the ECJ. But when the Community trade mark was created in 1994, many cases could be brought directly before the General Court. He speculated that the creation of new agencies, such as the European Chemicals Agency, would give rise to an increase in cases at the General Court.

The General Court was a judicial review court, looking at factual and legal elements of decisions taken at a different level.

Mr Jaeger suggested that, while the Court had no formal role in looking at draft legislation, it might be useful to see impact assessments of the effect of proposed laws on the courts. He pointed to the REACH regulation, where it was originally predicted that 250,000 applications would arise. The most recent estimate was that 2 million applications would be made. A proportion of these would be challenged at the General Court, increasing the workload. Mr Jaeger argued that it should be easier for legislators to assess the potential for litigation provided by their proposals than for the Court.

With regard to the recent decision by the Commission regarding anti-competitive behaviour by European air freight carriers, Mr Jaeger explained that, should the Commission's decision be appealed, this would be dealt with by the General Court. Such competition cases had traditionally been dealt with by the General Court, along with other areas of broad economic interest such as State aid. Because they often had elements which might spill over into wider areas of EU law, it would be difficult to establish a separate competition court.

Mr Forwood explained the procedure of the Court:

Pleadings were exchanged in sequence, rather than simultaneously, as in preliminary ruling cases in the Court of Justice. There were two rounds of pleadings. There was also more scope for interventions from interested parties, which in turn gave rise to procedural issues such as confidentiality.

There were now typically more than 100 distinct procedural documents registered in an average GC case (competition or State aid), i.e. an average of 33 steps per year for a three-year case: this figure had increased in recent years. Case management had become increasingly difficult as there was so much documentation from interested parties. A total of 33,275 procedural documents had been registered in 2010, relating to some 1200 pending cases.

After the written pleadings closed the reporting judge produced a report for the hearing, which was a synthesis of the principal documents received, and in parallel produced a report for his colleagues on the merits and handling of the case. It was at this point that the Court considered whether to hold a hearing and how best to organise it. However, there had to be a hearing in all substantive cases except trade marks (where the judge and parties could decide to dispense with it) or appeals from the CST.

Mr Forwood explained how the Court's judgments involved not only an assessment of the facts and substantive merits of the case, but also the need to produce a judgment consistent with an ever increasing body of EU case law.

In contrast to the CJ, cases were referred to a particular chamber immediately. In the CJ, where the Court had to give a definitive answer on a point of EU law, it was more important for all 27 judges to follow the case until a relatively late stage. In the General Court, cases involved too many complicated issues of merit and fact for all 27 judges to be expected to follow a case in the same way as the CJ.

Mr Forwood explained why the use of specialised chambers had been abandoned. The system had been first introduced in 1999 to deal with trade mark cases. This was, at the time, a new area of EU law with a large volume of work: in order to achieve consistency of judgment in the evolving case law, all trade mark cases were remitted to two of the then five chambers of the Court. However, by 2003 the law in this area had become more settled, and it had also become apparent that with specialisation the Court risked losing its character as a general court combining the expertise and traditions of then 15 (now 27) Member States—those judges who sat in the specialised chambers would have reduced possibilities to take part in other cases, and those from other chambers would have been unable to contribute to trade mark cases.

Mr Forwood explained that the compositions of the chambers were established at the beginning of each three year mandate of the GC President. The President proposed a composition of the chambers with the aim of spreading expertise among them. The three members of each chamber would normally remain in that chamber for the next three years.

Mr Forwood suggested that the solution to reducing the problems with the GC's workload was the appointment of more judges. This could be accomplished in two ways: (1) an increase in the number of judges in the GC, or (2) the establishment of a first instance court at a tier below the GC, rather like the CST. The Treaty allowed for such courts to be established, and they might be appropriate for dealing with trade mark cases.

With regard to the language regime, Mr Forwood explained that not everything was translated into all 23 languages. Unless a Member State intervened in a case, the case took place in a single language of the applicant's choosing. If this language was not French then the case would be translated into French, the Court's working language. The judgment was then produced in French and translated into the language of the case—but only if the chamber decided it raised issues of general importance would it be subsequently translated into all 23 languages. This happened in around 60–70 % of cases.

Mr Jaeger explained that the pleadings contributing to the report for the hearing were voluminous. In the Cement case, there were some 40 applicants and the judgment was extremely long¹⁹⁹ Mr Jaeger explained that there was sometimes a delay in producing translations quickly, due to the length of the documents involved. However, he argued that this was of less importance in the GC than in the CJ. GC judgments had a more specific effect than those of the CJ, which dealt with fundamental aspects of EU law. It was therefore more important for CJ judgments to be produced in all languages at the same time.

Mr Forwood acknowledged that cases took longer as a result of translation, but stressed that it was a necessary part of the process. He argued that it was less of a delaying factor than many people supposed as translation took up on average only around 3 months (including both translation of the written pleadings and of the judgment) of a case lasting 32 months.

¹⁹⁹ Mr Jaeger showed the Committee a copy of the judgment, which ran to over 1000 pages.

The witnesses stated that while appeals were limited to points of law there was no ability for the CJ to refuse leave to appeal. Mr Jaeger reported that around 25–30% of General Court cases went to appeal, with around 5% overturned by the Court of Justice (so only less than 5% of appealable decisions were totally or partially annulled). In 2009, in 85% of all appeals, the decisions of the General Court were fully upheld by the Court of Justice.²⁰⁰

With regard to trade mark cases a much lower proportion (ca. 17%) went to appeal. The proportion of appeals dismissed summarily had also increased as trade mark law had settled down.

With regard to increasing the number of judges, Mr Forwood explained that the Statute of the Court would have to be changed by the Ordinary Legislative Procedure as Article 48 set down the number of judges. The Court has not yet made such a request, but in the 1990s had requested more judges from the Council. The Council agreed in principle but could not come to an understanding on how to allocate the six extra judges. In contrast, the mechanism for appointing judges to specialised courts (such as the CST) involved more flexible arrangements and was less likely to cause a repetition of this problem.

Mr Forwood acknowledged that in the longer term, some preliminary ruling jurisdiction might be given to the GC—for instance in the area of trade mark law or competition. However, even in such areas there was a risk of overlap with other areas of law, as would be the case with taxation law impacting on freedom of movement.

It was noted that the last time the GC reduced its workload, by sending cases to the CST, it merely inherited other new cases from the CJ (i.e. those brought by Member States), so was not in a better position as a result.

Mr Jaeger emphasised that the Court needed external help in order to reform its procedures e.g. e-Curia. It would be difficult for the Court to increase its speed without sacrificing quality, which would merely result in an increase in appeals to the CJ.

Civil Service Tribunal

Evidence was taken from Mr Paul Mahoney, President of the Civil Service Tribunal.

Mr Mahoney provided the Committee with a paper based on a talk he had recently given regarding the use of specialised tribunals.

He reported that most people thought that the CST had been a success, and that the advantages of a small tribunal had outweighed the disadvantages. He explained that there was, though, no consensus within the CJEU as to whether a third tier of tribunals was necessary, or as to whether such tribunals allowed proceedings to progress more quickly. Broadly, there appeared to be more enthusiasm for such tribunals within the General Court than within the Court of Justice.

In the CST, judges had one *référéndaire*, as opposed to three in the Court of Justice, but each judge managed to deal with a similar workload.

Mr Mahoney said that a new specialised tribunal could be established along the lines of the CST. The CST had seven judges, which was enough for its purposes.

²⁰⁰ Annual Report 2009, Table 17, p 181.

He speculated that, for instance, a specialised competition court would not need to have a full set of 27 judges.

Appeals against the CST, on points of law only, went to the General Court. Were other courts to be established, the General Court might take appeals on points of fact as well. However, there was a risk that this might result in two strands of case-law, with one strand going through the specialised court and the General Court, the other going via preliminary references to the Court of Justice. For this reason consideration would need to be given to appeals going to the Court of Justice rather than the General Court.

A major difference between the CST and other proposed specialised courts was that the cases of the CST were “*cuisine interne*”, i.e. they related only to the functioning of the European institutions, and had no wider ramifications.

Mr Mahoney reported that, when the Tribunal was first established, there were a number of appeals against its judgments, testing the vulnerability of the Tribunal. A similar phenomenon had occurred when the General Court (then, the Court of First Instance) had been set up, but in both cases this had trailed off in time.

He reported that sometimes the GC overturned the verdict of the CST for one reason or another, sometimes it upheld the judgment, but changed the reasoning.

Mr Mahoney described how the practices of the Tribunal had originally been challenged on the grounds that it was being too “activist”. The style of cross-examination in the Tribunal was more thorough than people had been used to in the other CJEU courts.

The Tribunal did not look at the merits of disputes (for example, whether somebody should have been promoted) but only the law, except in cases where there had been a manifest error on the merits.

Mr Mahoney explained that only individuals covered by staff regulations could bring a case to the CST. Those staff members could not represent themselves, and had to be represented by a lawyer. Unions had to go to the General Court with cases of more general character; seconded national civil servants could not take cases to the Tribunal, as they were not covered by the staff regulations.

Mr Mahoney described the normal order of proceedings in a case:

1. A staff member makes an application to the Tribunal.
2. The staff member chooses the language in which the case is to be heard; the institution responds to the application in that language.
3. The Tribunal makes a decision on admissibility.
4. The defendant has two months to reply in writing to the application. There is one round of written pleadings as, by that point, the parties will have exhausted all administrative remedies.
5. After a meeting of the relevant chamber, the judge rapporteur gives an opinion.
6. If the case is not thrown out at this point, there is a hearing. Each party has 20 minutes, then there is an hour of questions, followed by 10 minutes of summing up.
7. The chamber of judges then discusses the case immediately after the hearing. This is in contrast to the Court of Justice, where such discussions take place after the Advocate General has presented an opinion, often months later.
8. A text of the final judgment is produced and translated.

Because the judgments of the Tribunal had no wider effect in Member States, they did not have to be translated into all 23 languages. However, this made access to the case-law problematic. There was always a version in French, as the working language of the Court, but translations into other languages depended on the language in which the case was brought.²⁰¹ Therefore the entire case-law of the Tribunal was available only in French.

The CST could get away with not translating its judgments because they had no wider implications, but this would not be the case for another area of law, for instance intellectual property.

Mr Mahoney explained that the CST was based on classic French administrative law and could award unlimited compensation. It could annul decisions taken by the institutions, but could not direct them to act in a particular way.

Member States could occasionally intervene in cases. Notably, Italy and Spain had intervened in cases relating to the language regime of the institutions. Because applicants for positions in the institutions needed to speak one of English, French and German, it was perceived that citizens of other Member States were at a disadvantage. Italy and Spain had challenged this in the General Court, and intervened in certain cases where their citizens were involved.

Mr Mahoney noted a certain fragility of the Tribunal in relation to its small roster of judges. If one of the seven were ill, or unavailable for another reason, that had a greater impact on the CST than it would on a larger court. Mr Mahoney suggested that this could be overcome by drafting in retired ECJ judges on an ad hoc basis, but this would require a change in Statute of the Court which would need to be enacted by the Ordinary Legislative Procedure. The Court of Justice was responsible for the overall structure of the CJEU, but the Tribunal was able to initiate changes by sending proposals to the CJ.

On timings, Mr Mahoney explained that CST judgments had to be executed immediately by the relevant institution. However, were the institution to appeal, it would normally take around two years for the General Court to rule on the appeal. It was not possible to refuse leave to appeal, as it was regarded as almost a right, due to the influence of French administrative law.

There might be a temptation for specialised courts to go their own way, and for this reason it was important that parties were able to appeal to a more general court.

Mr Mahoney explained that the Tribunal had 200 cases pending. It had inherited 122 from the General Court when it had been established, and had been receiving all the new cases in the area since then. He reported that the Tribunal was slowly reducing the backlog.

There were fewer cases coming through for two reasons:

(1) There had been a reduction in the number of cases brought, as the rules on costs had been changed. Previously, staff would not have to pay the costs of the institution, even if they lost. The regime had been changed so that the loser paid all the costs, and this had reduced the number of cases. Mr Mahoney pointed out, though, that the costs of bringing a case were not high. The Commission, for instance, used its Legal Service in such cases, so did not have to pay for outside lawyers—typically, a losing litigant would pay costs amounting to about €250–400.

²⁰¹ Mr Mahoney explained that in the first year of the Tribunal's operation, 85% of cases were brought in French; in 2010, this figure was 60%.

Other institutions, for instance the European Investment Bank and European Central Bank, used outside lawyers, and in these cases the costs would be €6,000–10,000.

(2) Lord Kinnoek, in his time as a Commissioner, changed the staff regulations, resulting in a substantial amount of litigation. The effect of this had now worked through the system, and the levels had reduced.

In relation to changing the rules of procedure of the CJEU as a whole, Mr Mahoney described the process as cumbersome, as it had to be decided by the Ordinary Legislative Procedure. While he could accept Member State oversight of the CJEU, he pointed to a conflict of interests in that the Member States are often parties to cases. Mr Mahoney argued that the rules should have general enabling clauses to allow the CJEU to adapt its procedures where necessary.

Mr Mahoney pointed to differences between UK and EU employment tribunals. The CST undertook a lot of the work in writing in advance of any hearing. Parties would submit papers, which the CST would then question. Though it was possible for the CST to question witnesses, this was never used. Because of this, the CST had less grip on the facts of a case. Occasionally, a case would be annulled on procedural grounds if the facts were unclear. This at least had the advantage of speed.

APPENDIX 5: WRITTEN EVIDENCE OF ADVOCATE GENERAL SHARPSTON

My submissions are confined to the Court of Justice, before which I formerly appeared as counsel (representing the UK in over 50 cases) and in which I now serve as an Advocate General.

1. Questions identified in the original call for evidence

1.1 What are the significant issues highlighted by the statistics relating to the past and current workload of the Court of Justice, the General Court and the Civil Service Tribunal?

Please see the Court's answer dated 28 October 2010, submitted by the Registrar to the Committee under cover of the letter dated 29 October 2010.

1.2 Are the turnaround times for disposal of cases comparable to other courts of equivalent standing?

Please see the Court's answer dated 28 October 2010.

I would emphasise the point made at paragraph 16 of that answer, namely, that it is rather difficult to identify any true comparator (i.e. 'other courts of equivalent standing') to the EU courts. National supreme courts do not have to deal with litigation in 23 official languages (implying both translation of all written pleadings from the original into a common unofficial working language and translation of official court texts—opinions and judgments—into 23 authentic versions). Other international courts, whilst multi-lingual, still do not have such a wide range of equally authentic languages in which the totality of their procedure may be conducted. Nor do they have to write and translate judgments that will take immediate effect in the legal systems of 27 Member States, each with its own legal culture and traditions.

It is trite to observe that the EU is a *sui generis* legal order. Nevertheless, that has to be borne in mind when assessing the operation of the EU's judicature.

1.3 Are the turnaround times for disposal of cases acceptable to litigants?

Please see the Court's answer dated 28 October 2010.

I think it is fair to say that the recently-created urgent preliminary ruling procedure (known within the Court and often outside by its French acronym, 'PPU'—'*procédure préjudicielle d'urgence*'), under which answers to urgent queries relating to the Area of Freedom, Security and Justice ('AFSJ') have consistently been given to the referring court in under three months, is recognised as working well so far. However, please see further my answer to the next question (1.4).

1.4 What considerations, both from the recent changes brought about by the Treaty of Lisbon and otherwise, are likely to affect the workloads of these courts and to what extent?

The Court's answer dated 28 October 2010 identifies a number of significant changes.

The single change most likely to increase the Court of Justice's workload is the extension of the right to make references that are likely to require PPU treatment (i.e. in matters involving the AFSJ) to *all* courts and tribunals. Previously, only

‘final’ courts could make such references, which acted as a natural filter. Thus far, the PPU has been triggered relatively seldom; and the Court has managed to deal with each PPU expeditiously without that impinging significantly on its handling of its normal case-load. No very great exercise of the imagination is required to see that matters would probably be rather different if the Court were to receive (say) 50 requests per year for PPU treatment, rather than less than 10 requests per year.

It is also clear that, historically, it takes a little while from accession for practitioners in a ‘new’ Member State to realise that EU law can be deployed to assist their clients and for the courts of that Member State to start to make references for a preliminary ruling to the Court of Justice. There does not appear to be any ‘normal’ number of references per Member State. Some Member States’ courts refer often, others seldom. What can be said, however, is that the Court is now starting to see an increase in the number of references coming from the Member States that acceded in 2004 (10) and 2007 (2).

1.5 Will accession by the EU to the ECHR affect the working of these courts?

In a word, yes. What is much less easy to predict is, precisely how. To a significant extent, that will depend upon the detailed terms upon which such accession is negotiated.

1.6 What are the significant challenges and impediments to the courts in handling their workload effectively and expeditiously?

The Court of Justice operates with a language regime of 23 official languages and a procedural framework in which all Member States are privileged litigants who can intervene in any procedure in their own language(s). This is a simple fact of life. Its consequences are immensely far-reaching. Certain parts of the total time taken by a case *cannot* be shortened by the Court improving its working methods. By way of illustration: in the procedure for dealing with a reference for a preliminary ruling, translation time is required (a) to translate the order for reference into all 23 languages and notify it to the Member States and EU institutions; (b) to translate the written observations lodged by any Member States that choose to intervene²⁰² into the Court’s working language (French) and also, where necessary, into the language of procedure for the benefit of the parties; (c) to translate the report for the hearing into the language of procedure and notify it to the parties; (d) to translate the Advocate General’s opinion, if one is given, into both French and the language of procedure,²⁰³ (e) to translate the judgment (drafted in French) into all languages.²⁰⁴

²⁰² They have 2 months in which to do so.

²⁰³ The opinion will, in due course, be translated into all languages; but it is standard practice to require only the versions in French and the language of procedure to be available before the opinion is formally delivered. In the PPU, the Advocates General have all agreed to deliver their statements of position in French, precisely in order to save on translation time, even though this creates certain difficulties and imposes additional constraints.

²⁰⁴ The suggestion advanced by the Law Society, that all judgments be drafted in the appropriate language of procedure, would require a degree of linguistic mastery which I am afraid no single member of the Court possesses (still less, all of us!). It is quite difficult enough to express legal reasoning in a working language (French) that, if one is lucky, is one’s second language (as is my case). If one is less lucky, the working language may be the Member’s fifth language (after, for example, mother tongue, Russian, English and German). Judges have to deliberate and amend a draft text in a language that they share. If the text originated in one of 23 languages, it would presumably be produced by the judge whose language that was (who would therefore have automatically to be part of the formation of judgment—not the present procedure). Once that had been done, however, it would still have to be translated into a common tongue

1.7 *Are there any bottlenecks in the processes of these courts?*

As I have indicated, an appreciable increase in the number of references requiring treatment under the PPU has the potential to create a bottleneck in the handling of other cases. That is because the same judges and advocates general handle PPUs as handle ordinary cases.

The need for translation creates points in the processes where time is necessarily spent not on case-handling per se, but on waiting for the file to reach a state where it can be picked up again and moved forward. In my view, it is slightly misleading to describe this as a ‘bottleneck’ when it more closely resembles a long conveyor belt. However, whatever be the appropriate simile, in a multi-lingual court the need for translation is a fact of life.

The Court is currently engaged in a complete review of its rules of procedure (any changes suggested will, however, need to be approved by the Council: please see further the answer to question 2.1 below). We hope that will help to cut out any procedural minutiae that have proved unnecessary and to streamline the various procedures further. Frankly, given the structural constraints (language, heavy reliance on written procedure requiring translation,²⁰⁵ Member States’ privileged status as interveners) which are, realistically, immutable, I do not believe that there is much scope for making a further radical reduction in the average time taken to process cases at the Court of Justice.²⁰⁶

Members’ mandates are for six years. Every three years, there is therefore a partial renewal of mandates (half the judges and half the Advocates General). In order to ensure that judicial business is handled without interruption, it is important to know who is being renewed and who is likely to be replaced; but Member States do not always communicate this information to the Court until rather late in the day. This can create a temporary bottleneck (please see further the answer to question 2.7 below).

1.8 *What measures would improve the working of the courts, bearing in mind the limited possibility of Treaty change?*

Others will have addressed this issue. I limit myself to one suggestion that relates closely to the work of the Advocates General at the Court of Justice.

Given that many cases are still deemed complex and difficult enough to warrant an opinion from the Advocate General, consideration could actively be given to adding a further three Advocates General to the Court of Justice (as promised in the Declaration ad Article 252 TFEU),²⁰⁷ which would give the Court necessary

to be deliberated upon *and at that stage the text would have to be covered by the ‘secret du délibéré’* (i.e. it would be confidential, and all exchanges concerning it would have to be treated as such). Even if the necessary reiterative confidential translation could be arranged, the effect would not be to speed up the Court’s processes—rather the reverse.

²⁰⁵ Reliance primarily on written procedure is partly a function of the civilian legal tradition, partly a reflection of the fact that, within a linguistically complex judicature, it is easier to grasp legal argument if one has a chance to study it calmly in writing rather than trying to follow it—often through simultaneous interpretation—orally at a hearing. Please see Annex I for a comparison of the PPU procedure and the normal procedure in this respect.

²⁰⁶ The Court has made good use of the additional judicial manpower that it received as a result of the 2004 and 2007 accessions, coupled with a number of internal changes to working practices, to reduce the backlog of cases pending before it (particularly, references for a preliminary ruling). Please see the Court’s answer dated 28 October 2010.

²⁰⁷ Currently each Advocate General handles one eighth of the Court’s total case-load. *Each* case in the Advocate General’s docket is studied (not merely the cases in which a public opinion is prepared). The full

additional manpower. The ratio between Judges and Advocates General was 15:8 in 2003. It is now 27:8. Approximately 52% of cases now proceed to judgment without an opinion. That figure encompasses both cases that indubitably do *not* require an opinion (for example, a simple direct action brought by the Commission against a Member State involving a failure to transpose a directive on time, decided by a chamber of three judges) and other cases, important enough to be decided by a chamber of five judges, where the decision not to have an opinion may fairly be described both as more marginal and, to some extent at least, influenced by the knowledge that 8 Advocates General can only, with reasonable despatch, write a certain number of opinions in the course of a given year.

I emphasise that this is a personal view, based partly also on the fact that the Court has received a number of complaints about cases (particularly tax cases) which have been decided without an opinion. The arguments raised are essentially that, where the issues are complex, an opinion is a necessary component in the EU judicial process; and that judgments without opinions are harder to understand and often lead to further references being made to seek clarification.²⁰⁸

If it is *not* deemed desirable to increase the number of Advocates General, the wording of Article 20 of the Statute (which now reads ‘Where it considers that the case raises *no* new point of law, the Court may decide, after hearing the Advocate-General, that the case shall be determined *without* a submission from the Advocate-General’) should, I think, be changed so as to reverse the default value from ‘opinion’ to ‘no opinion’ (thus, into ‘Where it considers that the case raises *a* new point of law, the Court may decide, after hearing the Advocate-General, that the case shall be determined *with* a submission from the Advocate-General’). However, from the perspective of ensuring consistency, coherence and clarity in the Court’s case-law, this would not be my preferred solution.

1.9 What could the Institutions and Member States do to help the Courts dispose of cases more expeditiously?

The quality of the orders for reference made by national courts (in preliminary rulings) and of the written and oral submissions to the Court (in all procedures) has a very significant impact on the speed and quality of the judicial process. Some are exemplary. Some are, frankly, appalling. Much time is sometimes spent poring over deficient submissions, trying to piece together missing background material or pin down what (exactly) the national legislation says in order to understand such fundamental issues as how national law and EU law interact (and thus what the problem before the national court actually involves), or why Member State X might reasonably be advancing a particular point of view.

Improving the quality and consistency of the submissions made to the Court would have a significant impact on the Court’s ability to dispose of cases more expeditiously. The Court can and does offer guidance (available via the website) but is understandably reluctant to issue uniform binding rules regulating, in detail, how precisely lawyers from 27 different Member States should plead cases before it.²⁰⁹

file in every case that proceeds to judgment without an opinion, or that is disposed of by order, has therefore also been analysed in detail and suggestions made as to it should be handled.

²⁰⁸ See, for example, the Opinion Statement of the CFE [*Confédération fiscale européenne*] on ECJ Advocate General Opinions in Tax Matters, available at http://www.cfe-eutax.org/sites/default/files/CFE%20Opinion%20Statment_AdvGen%20revPB.pdf

²⁰⁹ Thus, the rules of procedure specify such matters as the minimum content for an application, but leave the detail to the individual practitioner. Individual Member States could however take the initiative, via appropriate training programmes, to improve the quality of what they themselves lodge. They could also

2. Suggested Questions for the Court of Justice (8 and 9 November 2010)

2.1 *In your submission you advocate procedural autonomy. If you were given this what would be the priorities for immediate change?*

I agree that it would be desirable for the Court of Justice to have a greater degree of control over how it manages its own work (as other supreme courts generally do): currently, any change to the Court's rules of procedure has to be approved by the Council. As to what changes it would be desirable to propose, the Court is—as I have indicated in my answer to question 1.7 above—in the process of revising its rules of procedure. Since I sit on the Court's Rules of Procedure Committee, it would be inappropriate for me to put forward any separate proposals at this stage.

2.2 *The Treaty provides for the General Court to be given a preliminary reference jurisdiction. Should this be done and if so what cases would be suitable?*

Given that two of the principal issues often raised in respect of references are (a) the need to get a swifter reply to the national court and (b) the importance of ensuring uniformity of interpretation (and hence of application) of EU law, I do not think that the possibility offered by this Treaty provision should be activated in the near future.

First, the General Court has, at the moment, rather greater difficulties than the Court of Justice in terms of workload and average length of procedures. Adding a category of cases to its workload (references for a preliminary ruling) that by definition requires to be handled expeditiously does not make sense.

Second, although in theory the subject-matter of certain categories of references—or example, customs classification cases, social security cases and requests for interpretation of the rules governing the common organisation of the market in a particular agricultural sector—lends itself to 'ring-fencing', and those categories could thus be transferred to the General Court, such cases have—historically—shown themselves quite capable of raising issues of principle that go well beyond the boundaries of their 'technical' subject-matter. It would therefore be necessary to have some mechanism whereby (a) cases that raise such issues do not get routed to the General Court, but remain with the Court of Justice; and/or (b) if the true nature of the case becomes clear only as it evolves, either the General Court relinquishes jurisdiction of its own motion or the Court of Justice has power to call the case in and decide it itself. However, such a mechanism can—by definition—only work if someone has the responsibility of exercising the necessary continuing surveillance to ensure that cases are handled where they should be handled. That begs the question: whose job is it going to be? Here, as elsewhere, it must be borne in mind that the EU court system works in 23 official languages, with unofficial translation into French as the internal working language of the institution. Thus, many of those reading any document will be reading in a language which is not their mother tongue and in which, accordingly, they work less fast. Effective surveillance will have a cost, in terms of time and resources, that may be significant.

Finally, I recall that—as with the possibility of review of decisions of the General Court on appeal from the Civil Service Tribunal—such a transfer of jurisdiction would carry with it the possibility that the General Court's decision could be

encourage the relevant professional bodies to provide practical information to their members who represent individual litigants as to how to make their pleadings more helpful and effective. (I personally would be happy to take this point further in a UK context, if I were asked to do so.)

reviewed if necessary by the Court of Justice. The ‘gatekeeper’ to the procedure is the First Advocate General, inasmuch as it is his recommendation for a review that leads the Court of Justice to decide whether or not a review is needed. The experience of the last five years applying this procedure to General Court decisions on appeal from the CST has not been particularly encouraging.²¹⁰

Against that background, transferring jurisdiction for particular categories of references would be of dubious benefit.

2.3 Should the Court of Justice be dealing with technical references, for example in the fields of customs and VAT, or direct actions against Member States which do not raise issues of constitutional significance?

The short answer is that hitherto the Court of Justice has not been a court whose role has been confined to dealing with ‘issues of constitutional significance’. Rather, its function (as conferred by the Treaty) has been to ensure that in the application and interpretation of everything to do with EU law, ‘the law is observed’.

The so-called ‘technical areas’ are often matters of considerable complexity, whose resolution one way or another is likely to have a significant economic impact. A ‘technical’ question may also raise a related question of constitutional principle (such as the extent of direct effect, efficacy of enforcement or recovery of damages against a Member State).²¹¹ It is in practice impossible to separate the technical aspects and the constitutional aspects of such an action. Possible ways of doing so, with monitoring/review/power to ‘call in’ a case if it proves unexpectedly difficult or important have been canvassed and examined by informal discussion groups and working parties within the Court since I joined in 2006; and have been rejected (primarily, because they were considered to be either impracticable or ineffective).

A separate question is whether, *within* the Court of Justice, there should be a greater degree of specialisation (so that, for example, tax cases would go to a tax chamber; agriculture cases to an agricultural law chamber, and so on).²¹² Historically, one of the strengths of the Court has been that it has been full of generalists who turned their hand, as required, to each specialist topic. Moving across to a different arrangement might jeopardise that overview. Avoiding that outcome would probably require either an increase in judicial manpower or a further modification of the selection process (so as to recruit Members who were knowledgeable *both* about EU law as a whole and about a specialist area within EU law). It would also have quite sensitive implications in terms of the existing procedures for appointment to the Court (it is difficult to see how a Member State could be told that it ‘had’ to send a Judge or an Advocate General with a background in—for example—criminal law, or immigration, or social security).

²¹⁰ Please see Annex II for a more detailed explanation.

²¹¹ See, for example, Case C-91/92 *Faccini Dori* [1994] ECR I-3325 (consumer protection in distance selling) and compare Case C-194/94 *CIA Security International v Signalson and Securitel* [1996] ECR I-2201 (notification of technical standard) (both cases concern the extent of direct effect), Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835 (interpretation of technical rules on calculation of ‘working’ time) (efficacy of enforcement of rights under EU law) and Joined Cases C-6/90 and C-9/90 *Francovich* [1991] ECR I-5357 (technical interpretation of directive on employees’ rights if their employer becomes insolvent) (availability of damages against a Member State).

²¹² Informally, this happens to some extent within the present system, inasmuch as similar cases in a series are often, for a time, allocated to the same Reporting Judge and/or the same Advocate General so as to reap the benefits of acquired knowledge. At a certain point, however, a different ‘team’ of Reporting Judge and Advocate General will take over and do further cases in the series, so as to avoid the risk of over-specialisation and inflexibility of approach.

2.4 Commentators and witnesses to our inquiry have suggested that in some areas of EU law, for example technical areas or in relation to the Area of Freedom Security and Justice, there is not the need for the same strict uniformity of interpretation as the ECJ achieved in the past. What is your view?

I am afraid that I disagree categorically with that suggestion.

Precisely because the answer to a question referred in respect of one of the so-called ‘technical areas’ often has a significant economic impact, it is extremely important not to allow a situation to develop in which the single market is undermined by variable interpretations by different national jurisdictions. Just as within the confines of a single Member State interpretation by a supreme court ensures uniformity of application in a way that is cost- and resource-efficient, so it is with the function performed by the Court of Justice in the context of the EU. As already indicated (see my answer to the previous question), a ‘technical’ question may also raise a related question of constitutional principle, to which a single uniform answer must necessarily be given.

The AFSJ is an important new area of EU law, where a number of key decisions of principle will need to be taken over the next few years. Quintessentially, questions will be raised involving fundamental rights and individual freedoms and the parameters of State power. The legal provisions at issue must be interpreted uniformly if there is to be any legal certainty and predictability for persons exercising rights of free movement within the European Union. The fact that the questions may also be sensitive is no reason for departing from that basic principle.

2.5 Does the pressure to allocate cases to small chambers affect the consistency of Court judgments?

I am not sure that the term ‘pressure’ is correct. The reality is, rather, that the Court is conscious of the scale of its workload and seeks to allocate cases to the size of chamber that is appropriate to the case’s complexity. Allocating a case (where this is sensible, in case-handling terms) to a chamber of three judges, or a chamber of five judges, rather than to the Grand Chamber, represents a significant saving in judicial manpower.

As to whether the consistency of the Court’s judgments is affected adversely as a result, my answer would be, ‘occasionally, yes’. Here, I would make a distinction between the chambers of three judges and the chambers of five judges. The former have in the past generally dealt with the simpler cases; and—to my knowledge—no real problems have arisen. The latter deal both cases that are a little too complex to be handled by a chamber of three, and with cases that are only just ‘not worth’ the Grand Chamber. I suspect that everyone who follows the Court’s case-law closely has their own pet examples of divergent decisions by different chambers of five judges.²¹³

2.6 Is it necessary that judges experienced in the legal system of the state relevant to the case or in the subject matter at issue are involved in each case? If so, how could this be achieved?

I am not convinced that, in practice, the former has often proved a problem. Normally the Member State concerned intervenes and explains (in writing and

²¹³ An illustration might be the rather different interpretation of ‘individual concern’ in Case C-125/06 P *Infront* (Fourth Chamber) and in Case C-362/06 P *Sahlstedt* (Second Chamber). Coincidentally, the cases had the same Advocate General (Advocate General Bot), whose two opinions are, unsurprisingly, consistent with each other.

later orally, if a hearing is held) the niceties of its legal system. Members of the formation of judgment (in particular, the Reporting Judge) and the Advocate General often ask questions precisely in order to elucidate such detail. However, if it were thought desirable, the rules of procedure could be amended so that, in this respect, they mirrored those of the European Court of Human Rights and guaranteed that the judge from the Member State whose court had made the reference would always be part of the formation of judgment.

So far as the latter is concerned, national traditions differ as to whether it is considered desirable to be able to adjust the composition of the formation of judgment hearing a case, so that those judges sit who have a particular expertise in the subject-matter, or whether, on the contrary, this comes dangerously close to violating the principle of the *'juge légal'*. It might also give rise to significant organisational difficulties. On the possibility of creating specialist chambers within the Court of Justice, please see the answer to question 2.3 above.

2.7 You have highlighted two bottlenecks, the process for the replacement of judges and translations. What are the potential solutions?

For the former: that Member States should let the Court know as soon as possible whether or not they intend to re-nominate an incumbent. By way of illustration: an Advocate General who does not know whether he is being renewed cannot agree to sit in a case with a hearing much later than early April and *guarantee* that the resulting opinion will be written, translated and presented before 6 October, the date on which, if not renewed, he will leave the Court. A judge sitting in a case with an opinion might find that he had to drop out before judgment was given. To guard against the formation of judgment becoming inquorate, either he cannot be used after a certain point or additional judges must sit as well to guarantee that the quorum will be maintained, which is inefficient.

For the latter (which I do not regard, strictly speaking, as a bottleneck): the possible solutions are either politically unacceptable (changing the language regime so as to reduce the number of official languages used during the procedure and/or to fail to make available the texts of opinions and judgments that have an impact on the case-law in all official languages)²¹⁴ or, at the very least, unpleasant (greater or lesser constraints on the length of orders for reference and all written pleadings, suppression of replies and rejoinders in direct actions save in wholly exceptional cases).

There are those who regard hearings and/or an opinion from the Advocate General as further unnecessary bottlenecks. My impression is that 'users' of the system—particularly those from the common law tradition—tend to find that, properly focussed, both are rather useful.

2.8 To what extent can modern technology assist the Court in dealing with cases efficiently?

Modern technology is already being used to assist the Court in many aspects of its work, from the various (excellent) internal databases used for legal research and to facilitate case-handling to the computerised material available to the lawyer-linguists to ensure rapid and consistent translation of the extracts from EU legislation that appear in orders for reference or in pleadings. The E-Curia project for lodging and notifying documents electronically (currently being tested by the

²¹⁴ The Court already operates a system whereby cases that are not intended for publication in the official court reports because they are not considered to alter/develop the case law are made available on the Court's website only in the languages that are available (normally, as a minimum, the language of procedure and French). They are not translated into all languages.

Court's Registry in collaboration with Member States and the EU institutions prior to general release) is a further illustration.

2.9 Practitioners in particular call for procedural reforms to limit translations, to promote robust case management, to make greater use of a focussed oral procedure, and to improve the dialogue between the Court and the parties. What is your view?

My sense is that limiting the length of written submissions (length being what determines the time needed for translation) is unlikely to be welcomed/accepted by Member States (who control the Court's rules of procedure: see my answer to question 2.1 above). I am unclear as to precisely what more 'robust case management' would mean. To the extent that the Court routinely refuses permission for a reply to be lodged in a direct action if one is not really needed, puts specific questions to the parties for written answer after it has read and analysed the pleadings, and tries to dispose of cases by reasoned order rather than by judgement where possible, such case management already exists. The Court likewise already makes use of its power (a) not to hold a hearing in certain circumstances, (b) to ask the parties (where there is a hearing) to concentrate their oral pleading on certain points or to deal only with certain questions.

It is not, however, possible to legislate for dialogue between the Court and the parties—both sides must be prepared to cooperate. In my experience thus far since joining the Court in 2006, that has not always been achieved in every case. By that I mean no more than that the different legal cultures within the EU do not all have the same traditions in respect of such issues as how to plead a case (in writing and orally), whether there is a positive obligation to identify all relevant case-law and deal with it, the degree of preparedness to field questions from the bench at a hearing—or, indeed, how the bench should ask questions.

2.10 In the past we have looked at (and discouraged) the possibility of a separate competition court and now there are calls for a specialist trade mark or intellectual property court. What are your views on these suggestions? Should such courts have jurisdiction to deal with preliminary references?

By way of background, I note that a request for an Opinion is currently pending before the Court (Opinion 1/09) in respect of the proposal to set up a body of courts/boards of appeal outside the framework of the Court of Justice of the European Union (*qua* institution) to deal with a future EU patent regime. I take the question to refer, rather, to the possibility of setting up a specialist court (or courts) below the General Court (at the same level, therefore, as the Civil Service Tribunal).

Please see my answer to question 2.2 above, together with Annex II below, for a description of the difficulties associated with the present arrangements to ensure coherence and uniformity through a review procedure. Those difficulties would only be exacerbated if further specialist courts at the same level as the Civil Service Tribunal were to be created without some radical change to that review procedure.

In respect of the suggestion that jurisdiction to deal with preliminary rulings should be transferred to such courts, please see the second and third points in my answer to question 2.2 above (which would apply *a fortiori* to a transfer of such jurisdiction not to the General Court, but to such other specialised courts).

2.11 To what extent can Member States, other institutions or litigants and their representatives, assist in helping the Court meet the challenges it faces?

Please see my answer to questions 1.9 and 2.9 above.

*Annex I**A comparison of the normal reference procedure and the PPU*

In creating the PPU, the Court of Justice was faced with a conundrum. How could PPU cases (a) be given urgent treatment and be decided very rapidly whilst (b) allowing all Member States to exercise their rights as privileged interveners and (b) respecting the 23 language regime?

The solution adopted is to permit *only* those who can use the language of procedure (the parties, the Member State concerned and the Commission) to lodge written observations, normally within 10 working days (instead of the usual 2 months). Meanwhile, the order for reference is translated into all other languages so that the other Member States know what is at issue and can decide whether to intervene. A hearing is listed within about three weeks. In the meantime, the (short) written observations are translated into the Court's unofficial working language (French) and are made available to the Member States in that language and the original.

Thus, a lot of time is gained at this stage, in comparison with a normal reference. The cost is twofold. First, there are no written submissions from other Member States and the written material on the case is rather exiguous. Second, both the Reporting Judge and the Advocate General will do a lot of additional work before the hearing, trying to pin down the issues and pre-drafting (respectively) a first version of the draft judgment and the draft statement of position (*'prise de position'*), in the knowledge that everything may change radically as a result of the hearing.

At the hearing (which will last significantly longer than a normal hearing), Member States that intervene can make oral submissions but cannot put in anything in writing. In practice, therefore, they often try (literally) to read out loud at the hearing the detailed (written) submissions that they would otherwise have lodged (thus putting an enormous burden and responsibility on the interpreters, who will have invested heavily in trying to prepare for the unknown). It is also quite a tiring process for the Court to listen to what would have been written submissions delivered through interpretation (sometimes, through a relay, e.g. Lithuanian to English, and then English to Portuguese).

Following the hearing, both the Advocate General and the Reporting Judge are under intense pressure—the former, to produce his statement of position (revised or sometimes entirely rewritten in the light of the hearing) within 48 hours; the latter to submit a draft judgment to his colleagues for deliberation so that the text can be deliberated, finalised and translated for delivery within (if possible) a couple of weeks of the hearing.

Experience shows that the Court *can* manage to do this. It will also be evident that some (not insignificant) disruption of normal work is inevitable, for everyone concerned (the judges, the Advocate General, translators, interpreters, the Registry). Member States dislike being put under pressure to write briefly and quickly (if they are the Member State from which the reference comes). They dislike even more being unable to lodge written observations and having instead to put their submissions orally. The procedure works as a technique for reconciling the irreconcilable (as I indicated at the beginning of this Annex). I find it difficult to conceive that it would ever be accepted as a substitute for the normal procedure in normal references. If it were, the number of cases that the Court could handle in any year would decrease sharply, because every PPU is much more demanding of resources within the Court than a normal case.

*Annex II**The review procedure—experience of the review of staff cases decided by the General Court on appeal from the Civil Service Tribunal*

One of the innovations brought about by the Treaty of Nice was the possibility for specialist tribunals to be created, from which an appeal lies to the General Court. As a safeguard to ensure uniformity of interpretation, however, an additional mechanism was introduced whereby, following a recommendation by the First Advocate General, the Court of Justice may (exceptionally) decide to review the General Court's decision if it considers that that decision represents a serious threat to the coherence and uniformity of EU law. Obviously some such safeguard mechanism is essential if coherence and uniformity are to be guaranteed.

What this means in practice is that, in addition to dealing with his own one-eighth of all cases and allocating cases between Advocates General in parallel with the President's allocation of cases to reporting judges, the First Advocate General has to review every single judgment and order of the General Court relating to a staff case originally dealt with by the Civil Service Tribunal, decide whether or not to recommend a review and (if so) write a reasoned analysis of why a review is necessary, all within a fixed time-frame (1 month). It is not unusual for multiple judgments or orders to be issued just before Christmas and again before the summer break. Should the First Advocate General recommend a review, the Court of Justice is then required—again, within one month—to decide whether or not to proceed with such a review.

The procedure is cumbersome and time-consuming. It raises obvious issues about whether, if there is a review, the same Advocate General and a composition of court including judges who participated in the decision whether or not to conduct a review may deal with the case, or whether the review should be handled *de novo* by a completely different bench assisted by a different Advocate General. It is a very resource-inefficient procedure. I know that I am not alone in hoping devoutly that further specialist tribunals at the same level as the Civil Service Tribunal will not be created, unless this mechanism is, at the same time, radically overhauled.

The Treaty of Nice envisages that, should certain categories of references for a preliminary ruling be transferred to the General Court, a procedure that is in all material respects identical to this existing review procedure should come into effect so as to ensure that the General Court's decisions should be open to review by the Court of Justice. Any such transfer of jurisdiction would indeed have to include some review mechanism to guarantee coherence and uniformity. However, the last five years' experience of reviewing staff cases decided by the General Court on appeal from the CST has shown that the existing procedure is burdensome for the First Advocate General (indeed, denaturing his normal role as a Member of the Court) and creates appreciable additional work for the Court of Justice as an institution. Taken in conjunction with other factors identified in the main text, that experience strongly suggests that transferring jurisdiction for categories of references for a preliminary ruling to the General Court—unless the review mechanism were, at the same time, radically overhauled, would not be sensible.