European Parliament
2014-2019

Committee on Legal Affairs

2011/0901B(COD)

10.9.2015

***II
DRAFT RECOMMENDATION FOR SECOND READING

on the Council position at first reading with a view to the adoption of a regulation of the European Parliament and of the Council amending Protocol No 3 on the Statute of the Court of Justice of the European Union (09375/1/2015 – C8-0166/2015 – 2011/0901B(COD))

Committee on Legal Affairs

Rapporteur: António Marinho e Pinto

Symbols for procedures

*	Consultation procedure
***	Consent procedure
***I	Ordinary legislative procedure (first reading)
***II	Ordinary legislative procedure (second reading)
***III	Ordinary legislative procedure (third reading)

(The type of procedure depends on the legal basis proposed by the draft act.)

Amendments to a draft act

Amendments by Parliament set out in two columns

Deletions are indicated in ***bold italics*** in the left-hand column. Replacements are indicated in ***bold italics*** in both columns. New text is indicated in ***bold italics*** in the right-hand column.

The first and second lines of the header of each amendment identify the relevant part of the draft act under consideration. If an amendment pertains to an existing act that the draft act is seeking to amend, the amendment heading includes a third line identifying the existing act and a fourth line identifying the provision in that act that Parliament wishes to amend.

Amendments by Parliament in the form of a consolidated text

New text is highlighted in ***bold italics***. Deletions are indicated using either the ▌ symbol or strikeout. Replacements are indicated by highlighting the new text in ***bold italics*** and by deleting or striking out the text that has been replaced.
By way of exception, purely technical changes made by the drafting departments in preparing the final text are not highlighted.

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DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

on the Council position at first reading with a view to the adoption of a regulation of the European Parliament and of the Council amending Protocol No 3 on the Statute of the Court of Justice of the European Union
(09375/1/2015 – C8-0166/2015 – 2011/0901B(COD))

(Ordinary legislative procedure: second reading)

The European Parliament,

– having regard to the Council position at first reading (09375/1/2015 – C8-0166/2015),

– having regard to its position at first reading[1] on the request from the Court of Justice submitted to Parliament and the Council (02074/2011),

– having regard to Article 294(7) of the Treaty on the Functioning of the European Union,

– having regard to Rule 69 of its Rules of Procedure,

– having regard to the recommendation for second reading of the Committee on Legal Affairs (A8-0000/2015),

1. Adopts its position at second reading hereinafter set out;

2. Instructs its President to forward its position to the Council, the Commission and the national parliaments.

Amendment 1

Council position
Recital 1

Council position	*Amendment*
(1) As a consequence of the progressive expansion of its jurisdiction since its creation, the number of cases before the General Court has been steadily increasing over the years, resulting over time in an increase in the number of cases pending before that Court. This has an impact on the duration of proceedings.	***deleted***

Or. pt

[1] Texts adopted of 15.4.2014, P7_TA(2014)0358.

Amendment 2

Council position
Recital 2

Council position	*Amendment*
(2) At present, the duration of proceedings does not appear to be acceptable from the point of view of litigants, particularly in the light of the requirements set out in Article 47 of the Charter of Fundamental Rights of the European Union and in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.	***deleted***

Or. pt

Amendment 3

Council position
Recital 3

Council position	*Amendment*
(3) The situation in which the General Court finds itself has structural causes relating,* inter alia*, to the increase in the number and variety of legal acts of the institutions, bodies, offices and agencies of the Union, as well as to the volume and complexity of the cases brought before the General Court, particularly in the areas of competition and State aid.	***deleted***

Or. pt

Amendment 4

Council position
Recital 4

Council position	*Amendment*
(4) Consequently, the necessary measures should be taken to address this situation, and the making use of the possibility, provided for by the Treaties, of increasing the number of Judges of the General Court would allow for a reduction within a short time of both the volume of pending cases and the excessive duration of proceedings before the General Court.	***deleted***

Or. pt

Amendment 5

Council position
Recital 5

Council position	*Amendment*
(5) ***Taking into account the likely evolution of the workload of the General Court,*** the number of Judges ***should*** be ***fixed at 56 at the end of a three-stage process, it being understood that at no point of time can there be more than two Judges sitting at the General Court appointed upon a proposal by the same Member State.***	(5) The number of Judges ***at the General Court may*** be ***increased up to a maximum of 40***. ***The Court of Justice should give reasons for the exact number of Judges considered necessary, taking into account the change of circumstances that has arisen for the General Court.***

Or. pt

Amendment 6

Council position
Recital 6

Council position	*Amendment*
(6) In order to rapidly reduce the backlog of pending cases, twelve additional Judges should take office …*.	***deleted***
**** OJ: insert "in September 2015", or "upon entry into force of this Regulation" if the date of entry into force of this Regulation is after 31 August 2015.***	

Or. pt

Amendment 7

Council position
Recital 7

Council position	*Amendment*
(7) ***In September 2016, first instance jurisdiction in Union civil service cases, and the seven posts of the Judges sitting at*** the ***European Union*** Civil Service Tribunal***, should be transferred to the General Court, on the basis of a future legislative request by the Court of Justice.***	(7) ***As the Court of Justice has already announced, a second legislative proposal is to be submitted for the purpose of laying down all necessary arrangements for the abolition of*** the Civil Service Tribunal ***and the transfer of its staff and resources***.

Or. pt

Amendment 8

Council position
Recital 8

Council position	*Amendment*
(8) In September 2019, the remaining nine additional Judges should take office. In order to ensure cost effectiveness, this should not entail the recruitment of additional legal secretaries or other	***deleted***

support staff. Internal re-organisation measures within the institution should ensure that efficient use be made of existing human resources.

Or. pt

Amendment 9

Council position
Recital 9

Council position	*Amendment*
(9) It is necessary to adapt accordingly the provisions of the Statute of the Court of Justice of the European Union on the partial replacement of Judges and Advocates-General that takes place every three years.	***deleted***

Or. pt

Amendment 10

Council position
Recital 9 a (new)

Council position	*Amendment*
	(9a) Nineteen legal secretaries should be appointed in order that every Judge may have an additional legal secretary (taking into account the nine appointed in 2014), this being an arrangement already existing within the Court of Justice. Staffing levels in the Registry and the translation services should also be increased.

Or. pt

Amendment 11

Council position
Recital 9 b (new)

Council position	*Amendment*
	(9b) The European Parliament and the Council should set up a specialist joint committee to examine the overall administration of justice within the Union and suggest possible improvements.

Or. pt

Amendment 12

Council position
Recital 9 c (new)

Council position	*Amendment*
	(9c) All courts in the Union should be scrutinised by the European Commission for the Efficiency of Justice (CEPEJ) in the same way as those of member states of the Council of Europe.

Or. pt

Amendment 13

Council position
Article 1 – point 2
Protocol No 3 on the statute of the Court of Justice of the European Union
Article 48

Council position	*Amendment*
The General Court shall consist of***:***	The General Court shall consist of at least one Judge per Member State***, which may be increased by up to twelve additional Judges. Such an increase, providing for up to twelve additional Judges, may be***

	made if the Court of Justice furnishes detailed evidence showing it to be objectively necessary in the light of the trend in the caseload for the General Court in 2015.
(a) 40 Judges as from …*;	
(b) 47 Judges as from 1 September 2016;	
(c) two Judges per Member State as from 1 September 2019.".	
**** OJ: insert "1 September 2015", or the date of entry into force of this Regulation if that date is after 1 September 2015.***	

Or. pt

Amendment 14

Council position
Article 1 – point 2 a (new)
Protocol No 3 on the statute of the Court of Justice of the European Union
Article 48 a (new)

Council position	*Amendment*
	2a. The following Article is inserted:
	"Article 48a
	Where Judges are to be appointed per Member State, the right of nomination shall lie with the Government of the Member State in question, after consultation of the European Parliament and the Council."

Or. pt

Amendment 15

Council position
Article 1 – point 2 b (new)
Protocol No 3 on the statute of the Court of Justice of the European Union
Article 48 b (new)

Council position	*Amendment*
	2b. The following Article is inserted:
	"Article 48b
	1. Posts for additional Judges shall be filled, irrespective of origin. by nominees from any Member State.
	2. Where one or more additional Judges' posts are to be filled, the Government of a Member State may propose a nominee of the opposite sex to the sitting judge from that Member State.
	3. Furthermore, outgoing General Court Judges may nominate themselves in a written submission to the Chair of the panel referred to in Article 255 of the Treaty on the Functioning of the European Union.
	4. When one or more of the 12 additional Judges' posts are to be filled, the panel referred to in Article 255 of the Treaty on the Functioning of the European Union shall deliver an opinion on the suitability of the nominees to perform the duties of Court Judge. To accompany its opinion on the nominees' suitability, the panel shall draw up a list of nominees best qualified in the light of their high-level experience, ranking them in order of merit. The list shall include at least twice as many nominees as there are Judges to be appointed by the governments of the Member States in agreement with the European Parliament and the Council."
	Or. pt

Amendment 16

Council position
Article 2 – point b

Council position	*Amendment*
(b) The term of office of three of the seven additional Judges to be appointed as from 1 September 2016 shall end on 31 August 2019. Those three Judges shall be chosen by lot. The term of office of the other four Judges shall end on 31 August 2022;	***deleted***

Or. pt

Amendment 17

Council position
Article 2 – point c

Council position	*Amendment*
(c) The term of office of four of the nine additional Judges to be appointed as from 1 September 2019 shall end on 31 August 2022. Those four Judges shall be chosen by lot. The term of office of the other five Judges shall end on 31 August 2025.	***deleted***

Or. pt

EXPLANATORY STATEMENT

Introductory note and explanatory statement

1 - In 2011, the Court of Justice of the European Union (CJEU) launched a legislative initiative to change its status to allow the appointment of 12 more judges to the General Court (GC). It claimed at the time that there was a need to reduce both the number of cases per judge and their duration in the GC. In 2013, the CJEU reduced its request to nine judges, a figure that was agreed by the Council of the European Union (hereinafter the Council), the European Commission (EC) and the European Parliament (EP). Nevertheless, in the previous session, the EP had approved 12 additional judges at first reading. However, the Council never appointed any of these 12 judges, apparently because the Member States did not reach agreement on the choice of judges, since each wanted to appoint 'its own' judge and the number of judges to be appointed (12) did not match the number of nominating states (28). Therefore, in October 2014, the CJEU proposed doubling the number of GC judges (28 more) in three stages, and abolishing the Civil Service Tribunal (CST). The Council immediately agreed to these new proposals. This report deals with this new proposal.

2 - The first question to be addressed with regard to the CJEU proposal is establishing which issue it aims to address. It is necessary to establish whether this is a problem with the GC resulting from a shortage of judges, or whether it is rather an issue arising from the Council itself due to its inability to make a number of appointments that does not match the number of its members. In fact, it is inexplicable that only nine more judges were enough to solve the problems of the GC in 2013, while 28 more judges were suddenly required in 2014, as well as the abolition of another court. In other words, the GC requested another twelve judges, in 2011, it agreed that nine were sufficient in 2013 and it stated that 28 more judges are required after all in 2014, together with the abolition of a court. No one can, in good faith, believe that such a change in the number of judges has to do with the problem of outstanding GC cases. If there were 38 members of the Council, they would then request the same number of judges; if there were 21, they would choose that number. Obviously, the problem lies with the Council, which can only make a solution for the GC viable if that solution involves each Member States being able to appoint 'its own' judge, even when the resulting number of judges clearly exceeds the actual needs of the GC (see latest General Court statistics, in annex).

3 - The EP should, therefore, reject the Council's position for a number of reasons. First, it shows deep contempt for European taxpayers' money. At a time when the EU is imposing severe austerity measures to balance Member States' budgets and calling on these states to reduce public spending, it makes no sense for the EU to increase spending so frivolously and would be poorly received by the European public. The proposed doubling of the judges would increase the related legal secretaries and assistants by over 100. Given that each office costs more than EUR 1 million a year to run, the total remuneration would require an increase in EU structural spending of more than EUR 20 million per year.
It is inexplicable that, while all the other institutions have agreed to reduce employee numbers by around 5 % and make cuts of around 0.5 % to their budgets, the CJEU should greatly increase its budget without any justification.
Another reason for the EP to reject the CJEU proposal has to do with the dignity of the judicial arm itself, particularly the prestige and respect due to the courts. In fact, the EU

should not appoint judges in the way it appoints political commissioners. Judges are not commissioners from Member States and should not be appointed as such. Judges should be chosen for their technical and legal expertise, which guarantees the quality of decision-making, but they should also be chosen for the quality of their character to ensure probity, honesty, impartiality and resilience to any pressures to which they may be exposed. In short, they should be appointed for their courage and independence. Therefore, no judges should be re-nominated; they should be appointed for a single nine-year term instead. There is a very justifiable fear that a judge who could be re-nominated may be tempted to carry out their duties in such a way as to please those who appointed them and earn re-nomination. Even in this section on appointments, moreover, particular emphasis should be given to gender equality. It is incomprehensible that EU justice should be delivered predominantly by men. The number of male judges in the EU courts should be strictly equal to the number of female judges.

4 – Furthermore, the CJEU request is not a true legislative proposal, first and foremost because it was made via a simple letter in October 2014, addressed to the Italian Presidency of the Council. A letter is not the appropriate procedure for formalising a legislative initiative. Yet even if this procedure is deemed appropriate, the proposal should, because of its content, be considered a new legislative initiative and a completely new procedure should therefore be opened. In fact, what is now being discussed is not the appointment of 12 more judges, but rather the appointment of 28 judges and the abolition of a specialist court. In cases, such as this one, of legislative proposals with new content (since this is totally new and, therefore, has never before been considered), the procedural legality of the whole process is harmed (see the correspondence in annex regarding compliance with procedural obligations). Form is the sworn enemy of arbitrariness.

5 - Moreover, a reform of this nature – of the intended depth and scope – should be preceded by an impact study explaining to the co-legislators (Council and EP) its necessity, scope, costs and other consequences. Yet this study, although promised by the CJEU since 2011, has never been carried out. This legislative initiative therefore clearly lacks transparency, both internally and externally (again, see the correspondence in annex regarding compliance with procedural obligations).

In fact, the whole legislative process reveals that none of the bodies that should be consulted commented on the CJEU proposals (28 more judges and scrapping the CST). The EC itself only commented in 2011 (on the increase of 12 judges) and not even the judges of the two courts (GC and CST) directly affected by the proposal or their employees have been consulted. How, then, can a reform abolishing one court and increasing to over 28 the number of judges in the other be introduced, when a body that should automatically be heard on these proposals was only consulted regarding an increase of 12 judges and never commented on scrapping the Civil Service Tribunal? Can it be that a mere letter from the President of the CJEU was enough for a deferential Council and EP immediately to approve everything proposed – i.e. scrapping an EU court and doubling the number of judges in another court – without any objective analysis of all its implications, particularly the financial ones?
This legislative proposal, if approved, would set a very bad example because it would display a double standard. The EU is reserving the right to increase its spending unnecessarily, while imposing severe spending cuts on some Member States, including redundancies, and reductions in wages and other remuneration.
6 - However, beyond the inherent faults of the CJEU proposal, it would, if realised, have

serious long-term consequences for the EU's judicial system. Indeed, many of the elements in this proposal (court structure, financial impact) require a serious and impartial impact analysis and assessment, which have not taken place. There has not even been a cost/benefit analysis or any impact assessment. Conducting an external and independent study is a prerequisite for the legislator to be able to weigh up all the consequences of its statutes. Without this study, Parliament should not move forward with doubling the number of judges and scrapping the CST. Reforms like this should not be introduced through the back door.

It should be noted that the CST has been in existence for over 10 years and has always been seen as a judicial success story, even by the President of the CJEU himself. In addition, the EU Treaties provide for the creation of specialist courts, so it is inexplicable that the CST should now suddenly be abolished. Instead, the possibility of creating new specialist courts should be studied, in particular for trademarks and patents.

The CFEU itself suggests that the proposed abolition of the CST is due to an impasse in the Council on the appointment and re-nomination of its judges. In addition to the decision to double the GC's judges, the reason for scrapping the CST is, once again, the Council's inability to make appointments and not the workings of the court to be abolished. Since it cannot adapt to reality, the Council is trying to force reality to adapt to its ossified ways of working.

Scrapping the CST would, therefore, mean abandoning the system of specialist courts provided for in the Treaties of Nice and Lisbon, when it is widely known that specialist justice is better quality justice, not to mention the lack of a legal basis for the abolition of a court. The Treaty provides for the establishment of specialist courts, not their abolition.

7 - The figures provided by the CJEU on the outstanding GC cases and the average duration of these cases are contradicted by the figures provided by the President and by the GC judges during their hearing before the Legal Affairs Committee in Strasbourg, at the invitation of the rapporteur. Inexplicably, the Council completely ignored a GC document expressing the opposition to the reform proposed by the CJEU and the explanations given in Strasbourg, referring to facts and figures contradicting those presented by the CJEU (see the documentation in annex). The most elementary prudence would suggest that, since the two courts have presented mutually contradictory facts, it should be established which facts are correct and which are wrong before any decision is taken. Unfortunately, the Council did not take the precaution of this investigation and pushed foolhardily ahead with judicial reform. The legal community and the European public itself will hardly accept a decision to double the 28 GC judges when the GC judges themselves are against this increase and assert that only a few more officials would be enough to resolve the impasse. In any event, at present, the number of cases brought before the three courts has decreased because of the number of cases ruled on by those same courts. Therefore, the alleged urgency in doubling the number of judges does not exist.

It is worth reiterating that GC productivity has improved significantly since 2013, especially during 2014, without any new judge being appointed. This may be solely due to the hiring of nine new legal secretaries, who enabled the closure of more than 100 cases in 2014 alone. According to the GC's own information, the number of cases ruled on in the first half of this year was higher than the number of new cases brought before it. Once again: the alleged urgency so often invoked by the CJEU no longer exists. A preferable solution would therefore

be to appoint more staff at the Registry and in the translation services, as well as, above all, appointing 19 more legal secretaries, so that each judge would have one more legal secretary, taking account of the nine already appointed in 2014. This solution would significantly limit the fiscal impact of the proposed measure and would also be easily reversible (see documentation in annex).

8 - The issue of compensation for possible delays with GC decisions is pure smoke and mirrors because, for there to be a duty to compensate, it is necessary for (i) there to be actual harm, for (ii) it to derive from an unlawful act (action or omission) and (iii) be culpably practised, and for, between this fact and the harm, there to be (iv) adequate causality; this should all be alleged and proven by those claiming compensation. Judicial experience shows how difficult it is to make these claims. In addition, the European Court of Human Rights (ECHR) itself takes the view that the right to compensation for delays in justice arises only when there is a delay of more than five years. As far as we know, on average, pending cases at the GC do not exceed this time: quite the opposite.

9 - It is surprising that a reform of this magnitude should be made without prior preparation and without weighing up the consequences across the board. How can the creation of over 100 highly paid jobs (judges, legal secretaries, assistants) be justified to the public, when it is certain that many of them, including judges, would soon end up becoming technically underemployed, since they would not have enough work? Knowing that each GC judge currently rules on an average of 25 cases a year (which is an average infinitely smaller than that of any high court in the Member States), is this new legislative proposal not an affront to the European taxpayer? Having reversed the growth in cases, how many rulings will each judge hand down annually? How will the public see the EU in terms of responsibility for this possible increase?

In the current situation, the CJEU is asking the co-legislator to reach a decision without any basis in fact or in law, and to adopt a costly solution that is very complex and difficult to reverse.

It is the duty of the co-legislator to adopt balanced measures in proportion to the challenges facing it, with deep respect for European taxpayers' money. These measures have to be sustainable over the long-term.
The new legislative proposal could, if adopted, harm the architecture of European justice, the EU's image and the way it spends European taxpayers' money.
Under which terms the following have been formulated:

Conclusions and Recommendations

Based on the Rules of Procedure of the European Parliament, Rules 66(6) and 69(1) and (2)(a), (c) and (d), the rapporteur makes the following conclusions and recommendations:
1 - Rejection of the proposal to double the number of GC judges and abolish the Civil Service Tribunal and, pursuant to and for the purposes of Rule 69(2)(a) and (d), the position adopted by Parliament in its first reading should be recast. The Court of Justice should justify the exact number of judges actually required, taking into account the subsequent change in circumstances, namely the reversal of the growth in the number of new cases brought and ruled on.

2 - Rejection of the proposal to abolish the CST because of lack of legal basis in the Treaty. Instead, judges already appointed should immediately be sworn in and those missing should be appointed; a committee of experts should also be created to analyse the advantages and disadvantages of creating a new court specialising in trademarks, patents and intellectual property.

3 - Pursuant to and for the purposes of Rules of Procedure, Rule 69(2)(c) the appointment of 19 legal secretaries is recommended, so that each judge has one more legal secretary (taking account of the nine already appointed in 2014); this solution is already before the Court of Justice. Increasing the staff of the Registry and translation services is also recommended.

4 - The establishment by Parliament and the Council of a joint committee of experts is recommended to analyse the overall workings of justice in the EU and make suggestions to improve it, taking into account, inter alia, the following aspects:

a) – The recruitment of judges through open tender from amongst law professors of repute and judges from the high courts of each Member State;
b) – The appointment of each judge for a term of nine years only, which cannot be renewed or extended.
c) – Absolute respect for gender parity in the recruitment of judges.

5 - Recommends that all EU courts now be scrutinised by the European Committee for the Efficiency of Justice (CEPEJ) on the same terms as the courts of the Member States of the Council of Europe.

Annexes: For a comprehensive understanding of the process, all documentation and correspondence exchanged regarding this case from the beginning of the parliament to date is in annex.