BRIEFING
EU Legislation in Progress

European Parliament

Amending the Statute of the Court of Justice of the EU

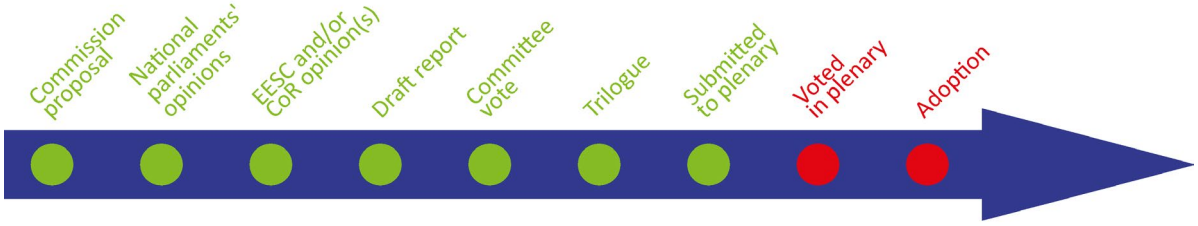
Reform of the preliminary reference procedure

OVERVIEW

On 24 January 2024, the Committee on Legal Affairs approved the compromise text of a proposal to amend the Statute of the Court of Justice of the EU (CJEU). The reform will transfer preliminary reference cases (Article 267 of the Treaty on Functioning of the European Union – TFEU) from the Court of Justice (CJ) to the General Court (GC) in five distinct areas (VAT; excise duties; the Customs Code and tariff; passengers' rights to compensation and assistance; and the greenhouse gas emissions allowance trading scheme).

Parliament has managed to secure the inclusion in the compromise text of a number of significant amendments. All new preliminary references will be systematically notified not only to the Commission, Member States and the institution, body or agency that authored the challenged act, but also to the Parliament, Council and European Central Bank (ECB). These institutions will be allowed to submit observations in the procedure, although, in the case of Parliament and the ECB, only if they consider that they have a 'particular interest' in the case. The GC will have not only *ad hoc* advocates general (AGs), but also one or more permanent AGs, which it will elect – from among its judges – for a three-year term, renewable once. The permanent AGs will assist the GC only in preliminary ruling cases, and will not perform judicial duties while working as AGs. Despite the transfer of certain preliminary references to the GC, the CJ will nonetheless retain jurisdiction in cases that raise 'independent questions relating to the interpretation of primary law, public international law, general principles of Union law or the Charter of Fundamental Rights'.

Request submitted by the CJEU pursuant to the second paragraph of Article 281 of the TFEU, with a view to amending Protocol No 3 on the Statute of the Court of Justice of the European Union		
Committee responsible:	Legal Affairs (JURI)	COM(2023)0135 10.3.2023
Rapporteur:	Ilana Cicurel (Renew, France)	2022/0906(COD)
Shadow rapporteurs:	Angelika Niebler (EPP, Germany) René Repasi (S&D, Germany) Patrick Breyer (Greens/EFA, Germany) Angel Dzhambazki (ECR, Bulgaria) Gilles Lebreton, (ID, France)	Ordinary legislative procedure (COD) on proposal from CJ (Article 281 TFEU)
Next steps expected:	Adoption	



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Introduction

On 30 November 2022, the President of the Court of Justice of the EU (CJEU), Professor Koen Lenaerts, submitted to the European Parliament and the Council of the EU, on behalf of the CJEU, a proposal to amend Protocol No 3 on the Statute of the CJEU (the SCJEU or the Statute). The proposal was made under the procedure envisaged in the second paragraph of Article 281 of the Treaty on the Functioning of the EU (TFEU), which provides that the Parliament and the Council, acting in accordance with the ordinary legislative procedure, may amend the provisions of the Statute (with the exception of Title I and Article 64) on the initiative of the CJEU or the Commission, which need to consult each other. The act amending the protocol (the protocol being an act of primary law and therefore at the same level among the sources of EU law as the Treaties) will have the **legal form** of a regulation of the Parliament and the Council, adopted under the ordinary legislative procedure.

The proposal has two key objectives. Firstly, **to transfer jurisdiction on preliminary rulings** from the Court of Justice (CJ) to the General Court (GC) in a number of **specific areas**: i) the common system of value added tax; ii) excise duties; iii) the Customs Code and the tariff classification of goods under the Combined Nomenclature; iv) compensation and assistance to passengers; and v) the scheme for greenhouse gas emission allowance trading. Secondly, to extend the requirement for **leave to appeal** from the GC to the CJ when it comes to appeals against GC decisions concerning the decision of an independent board of appeal of an office, body or agency of the EU, which, on 1 May 2019, had such an independent board of appeal, but to which Article 58a of the SCJEU does not yet apply. Such appeals are brought in cases that have already been considered twice, initially by an independent board of appeal and then by the GC, with the result that the right to effective judicial protection is fully guaranteed and there is no obvious need for a systematic third reconsideration of the matter in each and every case in which a party launches an appeal.

Context

The CJEU (officially known prior to the Treaty of Lisbon as the Court of Justice of the European Communities) is one of the seven **institutions** of the European Union listed in Article 13(1) of the Treaty on European Union (TEU). Since 1989, the CJEU (as an *institution*) has been composed of **two distinct Union Courts**: the Court of Justice (CJ) and the General Court (GC), known before the Treaty of Lisbon as the Court of First Instance (CFI).[1] Between 2005 and 2016, the CJEU encompassed a third judicial body – the Civil Service Tribunal (CST) – a 'specialised court attached to the General Court' within the meaning of Article 257(1) TFEU.

The scope of the GC's jurisdiction is established in Article 256 TFEU. According to the first sentence of Article 256(1) TFEU, the GC has first-instance jurisdiction in cases brought under Articles 263, 265, 268, 270 and 272 TFEU. According to the third sentence of Article 256(1) TFEU, the CJEU Statute may confer upon the GC jurisdiction in other types of cases. Decisions rendered by the GC at first instance are subject to **an appeal 'on points of law only' (i.e. in the form of a cassation)**, as provided for in the CJEU Statute.

Furthermore, Article 257 TFEU envisages the possibility of establishing **specialised courts** attached to the GC 'to hear and determine at first instance certain classes of action or proceeding brought in specific areas'. Such a specialised court would be established by means of a regulation of the Parliament and the Council put forward on the initiative of the Commission or the CJEU (after the institution having put forward the initiative has consulted the other one). However, this provision has not yet been put into use. Instead, in 2019 the GC decided to create **specialised chambers** to deal with staff matters and intellectual property law. The first sub-paragraph of Article 256(3) TFEU provides that the GC has jurisdiction to decide on preliminary rulings brought by national courts under Article 267 TFEU, but only 'in specific areas laid down by the [CJEU] Statute'. So far, this rule, inserted into the TFEU by the Treaty of Nice,[2] has been a dead letter, because the CJEU Statute does not provide for such a possibility. According to the second sub-paragraph of Article 256(3) TFEU, if on hearing a case under Article 267 TFEU the GC considers that it requires 'a decision of principle

likely to affect the unity or consistency of Union law', it has the option (but not the duty), to refer the case to the CJ. The third sub-paragraph of Article 256(3) TFEU provides for the possibility, only 'exceptionally', for the CJ to **review** a decision given by the GC. It is the CJEU Statute that lays down the 'conditions and ... limits' for review, and the Treaty explicitly provides that this should only be allowed in cases where there is 'a serious risk of the unity or consistency of Union law being affected'.

The functioning of the two Union Courts is governed by two layers of rules: 1) the CJEU Statute, which is *common* to both the CJ and GC and – being a protocol to the Treaties – enjoys the status of **primary law** but can be amended by a regulation of the Parliament and the Council on the CJEU's or the Commission's initiative; and 2) *two distinct sets* of rules of procedure (RoP), i.e. those of the Court of Justice (RoP CJ) and those of the General Court (RoP GC), adopted by each of the two Union Courts separately. Whereas the CJ adopts its own RoP, which then need to be approved by the Council (sixth sub-paragraph of Article 253 TFEU), the GC adopts its **RoP 'in agreement with' the CJ** and with the approval of the Council (fifth sub-paragraph of Article 254 TFEU). According to Article 63 SCJEU, which applies to both the CJ and the GC, the two courts' RoP 'shall contain any provisions necessary for applying and, where required, supplementing this Statute'. Therefore, they may not only specify matters already laid down in the Statute ('apply'), but also regulate matters on which the Statute is silent ('supplement').

Existing situation

At present, jurisdiction to decide on preliminary references from national courts is vested exclusively in the CJ, and **Article 256(3) TFEU has not yet been used**. By virtue of Article 58a SCJEU, a party wishing to bring an appeal against a first-instance GC decision in an action brought against a decision of an independent board of appeal of certain offices and agencies of the EU must first seek **leave for appeal** from the CJ. In other words, there is **no right to bring an appeal** in such cases; whether an appeal will be allowed is within the **discretion** of the CJ (the second-instance court). The offices and agencies concerned are: 1) the European Union Intellectual Property Office; 2) the Community Plant Variety Office; 3) the European Chemicals Agency; 4) the European Union Aviation Safety Agency, as well as actions against decisions of independent boards of appeal set up in other offices or agencies after 1 May 2019.

In statistical terms, the number of incoming preliminary references is about **500-600 yearly**:

Preliminary references at CJ	2018	2019	2020	2021	2022
Incoming	568	641	557	567	546
Resolved	520	601	534	547	564

Source: Court of Justice of the EU.[3]

Preliminary references constitute slightly more than **two-thirds of the CJ's business** (67.74 % of all incoming cases and 69.8 % of decided cases in 2022), although in some years this figure is even higher (e.g. more than 75 % in 2020). The **workload of the GC** (measured by number of incoming cases), compared to the total workload of the CJ, in 2018-2022 was as follows:

All incoming cases	2018	2019	2020	2021	2022
CJ	849	966	737	838	806
GC	834	939	847	882	904

Source: Court of Justice of the EU.[4]

The CJ is composed of **27 judges** and 11 advocates general (AGs), whereas the GC is currently composed of **54 judges (i.e. twice as many as the CJ)** but, by contrast, has no permanent AGs.

At present, the GC does not have separate AGs the way the CJ does. Rather than being a *distinct post*, as in the CJ, **the *role* of an AG at the GC can be fulfilled on an ad hoc basis by a GC judge**. Specifically, Article 3(3) RoP GC provides that: 'Every Judge, with the exception of the President and the Presidents of Chambers of the General Court, may, in the circumstances defined in Articles 30 and 31, perform the duties of an Advocate General in a particular case.' Article 30 RoP GC provides that a GC may be appointed *ad causam* 'if it is considered that the legal difficulty or the factual complexity of the case so requires'. Thus, in such a case, one of the other GC judges would assist the panel of judges by providing them with an opinion. However, the same judge would, in other cases, act as a judge and not as an AG. Procedural arrangements for appointing an AG on an ad hoc basis are laid down in Article 31 RoP. Article 31(1) provides that the decision to designate an AG in a particular case would be taken by the plenum (i.e. all GC judges) at the request of the chamber to which the case was assigned or referred. Article 31(2) specifies that it is the GC president who designates the judge called upon to perform the function of AG in that case.

Preparation of the proposal

The current proposal was prepared, according to the accompanying explanatory memorandum, on the basis of 'an **in-depth analysis of the relevant statistics** relating to the cases closed by the Court of Justice between 1 January 2017 and 30 September 2022'. This analysis was carried out to allow experts to focus on four parameters when identifying the specific areas in which preliminary references should be **transferred to the GC**, so that the areas would: 1) be clearly identifiable; 2) raise a minimum number of issues of principle; 3) be covered by a substantial body of CJ case law; and 4) give rise to a sufficiently high number of references. On this basis, reading the statistics against the four criteria, the CJEU identified 'six areas that correspond to the above mentioned parameters: the common system of value added tax, excise duties, the Customs Code and the tariff classification of goods under the Combined Nomenclature, compensation and assistance to passengers, and the scheme for greenhouse gas emission allowance trading'.[5]

The changes the proposal would bring

The proposal, as submitted by the CJEU, would: 1) amend Article 50 of the CJEU Statute; 2) insert a new Article 50b into the CJEU Statute; 3) amend Article 58a of the CJEU Statute.

New chamber of intermediate size at the General Court

Article 50 SCJ provides for the **internal division of the GC into chambers**. At present, it provides that the GC sits in chambers of three or five judges (first sub-paragraph). It also provides that the RoP GC may provide for the GC to sit as a full court, in a Grand Chamber, or in the composition of a single judge. However, the CFI/GC has apparently only sat three times as a full court:[6] once in 1990 (T-51/89 *Tetra Pak* and twice in 1992 (T-82/90 *Asia Motor France* and T-24/90 *Automec*).

The amended text would modify the wording of Article 50, in particular by swapping sub-paragraphs 2 and 3, and making the Grand Chamber standard (under the CJEU Statute) rather than optional (to be provided for in the RoP GC). The option of the GC sitting as a full court would be removed. The amended text would provide for a 'chamber of an **intermediate size** between the chambers of five judges and the Grand Chamber', i.e. a chamber composed of 6-14 judges. Thus, the possible formations of the GC would remain five (elimination of Full Court, inclusion of intermediate chamber) and comprise the following: 1) Grand Chamber (of 15 judges); 2) intermediate chamber (6-14 judges); 3) chamber of five judges; 4) chamber of three judges; 5) one judge. It would still be for the RoP to 'govern the composition of the chambers and the circumstances in which and conditions under which the General Court shall sit in its different formations'. The latter proposed provision (discussed in the next section) provides that preliminary references would be dealt with by 'chambers designated for that purpose'.

Transfer of preliminary references in five subject-matter areas

The newly inserted Article 50b would provide for the transfer of jurisdiction on preliminary references, in the first instance, to the GC in **five specific areas identified by subject matter *(ratione materiae)***. Article 50b(1) enumerates those five[7] areas as: 1) the common system of value added tax (VAT); 2) excise duties; 3) the Customs Code and the tariff classification of goods under the Combined Nomenclature; 4) compensation and assistance to passengers; 5) the scheme for greenhouse gas emissions allowance trading. Cases would be send to the GC only if they 'come exclusively within one or several of the ... specific areas' enumerated in Article 50b(1). According to the explanatory memorandum, these cases should amount to approximately **20 % of all preliminary references** reaching the CJEU.

Article 50b(2) provides for **procedural arrangements** on transfers. All preliminary references would be submitted to the CJ, and only after the CJ has verified that a given case should be sent to the GC would this case be transmitted to the latter court. Thus, it would be for the CJ to decide on the interpretation of the criteria laid down in Article 50b(1), and the CJ would remain a guardian of its own jurisdiction. The proposal does not provide for any joint analysis by the two courts, or for any form of remedy available to the GC in case the CJ reserves for itself a case which, under Article 50b(1), should be decided upon by the General Court. Detailed rules on the verification and transfer procedure would be laid down in the RoP CJ.

Article 50b(3) provides for an **internal procedure** within the GC. It provides that the Rules of Procedure would lay down detailed rules on assigning preliminary references to GC chambers 'designated for that purpose'. Thus, only some chambers would be competent to rule on preliminary references, and they would in effect specialise in internal procedures (and possibly also in one or more of the specific six legal areas). The second sentence of Article 50b(3) provides that 'in those cases' (meaning in all preliminary references cases transmitted to the GC), an AG would be designated, in accordance with the procedure provided for in the RoP GC (on the current rules concerning *ad hoc* AGs at the GC, see previous section).

Amendment of Article 58a SCJEU: leave to appeal

Article 58a SCJEU provides for leave (permission) to bring an appeal, i.e. the requirement for the CJ to allow an appeal to be brought against a GC decision. Without such leave, an appeal may not be lodged. In other words, the parties to the proceedings **do not have a right** to bring an appeal; they may do so only if allowed. Leave to appeal is a procedural arrangement **permitting the CJ to select the cases** that would actually reach it, and therefore acts as a 'filter' or 'safety valve', protecting the CJ from being overwhelmed with appeals and/or with appeals where no serious legal question is at stake.

At present, under the first paragraph of Article 58a SCJEU, leave to appeal is required with regard to GC decisions in actions brought against independent boards of appeal of four offices and agencies of the EU: 1) the European Union Intellectual Property Office; 2) the Community Plant Variety Office; 3) the European Chemicals Agency; and 4) the European Union Aviation Safety Agency. The second paragraph of this article provides that the same rule applies to actions against decisions of independent boards of appeal set up in other offices or agencies after 1 May 2019. The third paragraph of Article 58a provides that leave should be granted only if the case 'raises an issue that is significant with respect to the **unity, consistency or development of Union law**' and the fourth paragraph provides that the decision to grant or refuse appeal must be reasoned and published.

The proposed amendment would affect the scope of GC decisions subject to the leave requirement. The wording would include not only 'offices' and 'bodies' but also 'agencies', and the list would include, on top of the four bodies currently mentioned, the following other bodies: 5) the EU Agency for the Cooperation of Energy Regulators; 6) the Single Resolution Board; 7) the European Banking Authority; 8) the European Securities and Markets Authority; 9) the European Insurance and Occupational Pensions Authority; and 10) the EU Agency for Railways. As each of these additional

bodies had introduced a board of appeal before 1 May 2019, they were therefore not covered by the second paragraph of Article 58a but had previously been omitted from the list in the first paragraph of that article. The open-ended rule of the second paragraph of Article 58a, whereby any independent boards of appeal established after 1 May 2019 are covered by the procedure, would remain unchanged. A new category of cases subject to the leave requirement would cover 'decisions of the General Court relating to the **performance of a contract containing an arbitration clause**, within the meaning of Article 272 [TFEU]', i.e. cases in which the GC is acting in its capacity as a **civil court**, deciding on a contract between an EU institution, body or agency, on one hand, and a private party (delivering goods or services to the EU), on the other (proposed Article 58a(2), second indent).

Intertemporal law

Article 4(1) of the proposal provides that requests for a preliminary ruling and 'pending' before the Court of Justice on the **first day of the month following the date of entry into force** of the proposed regulation would be dealt with by the CJ. The text does not specify whether 'pending' means submitted by the national judge (but not yet received by the CJ), already delivered to the CJ (but not yet registered) or only registered (i.e. assigned a case number). Neither the CJEU Statute nor the RoP CJ contains a definition of when a case is 'pending'. Article 4(2) of the proposal provides that the expansion of the scope of the leave procedure would not affect cases for which an appeal has already been launched. Article 5 provides that the regulation would enter into force on the first day of the month following that of its publication in the *Official Journal*.

National parliaments

On 15 March 2023, the Mixed Committee for European Affairs of the Cortes Generales of Spain issued a favourable opinion on the proposal. On 12 April 2023, the Italian Chamber of Deputies submitted a favourable opinion, highlighting the need for a more precise definition of the specific areas of jurisdiction transferred to the GC, as well as the need to clarify the notion of 'requests… that come exclusively' within any one of the five specific areas. Furthermore, the Italian deputies argued in favour of retaining matters of primary law, general principles of law and the Charter of Fundamental Rights of the European Union (CFR) within the CJ's exclusive jurisdiction, regardless of the specific area. They also argued that exclusive CJ jurisdiction should be retained if a request refers to a pending case against a **Member State**, considering that a specific amendment should possibly be made to the GC's rules of procedure providing for the suspension of any decision on infringement cases pending a ruling from the Court of Justice. Finally, for **VAT** cases, they wondered whether they should indeed be transferred to the GC given the fact that they 'can still cause systemic problems for the legal order of the Union'.

Stakeholder views[8]

In May 2023, the **Council of Bars and Law Societies of Europe** (CCBE), which represents the professional associations of lawyers from 46 European countries, submitted to the Council working party its comments on the proposal. Regarding the areas to be transferred to the GC's jurisdiction, the CCBE recalls that, in the past, it had already called for transferring preliminary references on competition and state aid to the GC. Thus, it welcomes the proposal and expects that the list of areas to be transferred from the CJ to the GC would grow longer in the future. The CCBE agrees with the Commission that the mere fact that a given rule of secondary law within one of the five areas, which is to be interpreted by the CJ or the GC, actually corresponds to a rule of primary law or to a general principle of EU law, should not preclude transfer to the GC. The CCBE also supports the idea of greater specialisation (of chambers) within the GC. By contrast, the CCBE expresses concern regarding the leave to appeal, arguing that an expansion of this 'filtering mechanism' would not 'result in the total elimination of the appeals in all the areas concerned'.

Academic views

Prof. Sara Iglesias Sánchez (Complutense University, Madrid) considers that the proposal 'marks a new chapter in the history of the EU judicial architecture, which deserves thoughtful consideration'.[9] She is of the opinion that, once relieved of trivial preliminary references on such matters as the customs classification of pyjamas or toilet paper, the CJ would be able to devote more of its energy to its vital role, i.e. its 'constitutional function'.[10] The GC, in turn, would now be expected to 'come of age', and 'will have to develop its style as a new interlocutor in the otherwise already well-established world of judicial dialogue with national courts'.[11] Considering relations between the CJ and GC, Prof. Iglesias Sánchez considers that both will be 'supreme' in their areas of jurisdiction and both will have to deal with constitutional matters. She believes that the criteria for deciding what kind of questions are paramount from the point of view of unity and consistency of EU law will need to be refined and possibly revisited.[12] Commenting on the specific areas proposed by the CJEU for transfer, she points out that only cases related to VAT are numerous, whereas those related to the remaining four areas are of a 'modest' number. Certainly, many legal questions will have to be addressed in the two courts' reformed rules of procedure. As regards the 'intermediate chamber' to be created within the GC, Prof. Iglesias Sánchez describes it as a '"mini Grand Chamber" composed of presumably around 10 judges (appertaining to specialised chambers)', and notes that its establishment 'may also send the **signal of a hyperspecialisation and lack of jurisdictional unity** within the General Court, creating a bipolar division or even a hierarchisation'.[13] Regarding the case allocation mechanism, she is of the view that 'national courts can easily circumvent the allocation system by throwing in their order for reference a mention of different legal instruments and/or horizontal principles or fundamental rights'.[14]

Prof. Chiara Amalfitano (University of Milan) recalls that the reason for the reform is the ever-increasing size of the CJ's docket, which risks undermining its mission of 'ensuring, in a timely manner, "that in the interpretation and application of the Treaties the law is observed", according to Article 19(1) TEU'.[15] She wonders how the RoP GC could be amended to provide for the involvement of AGs in more cases before the GC. More specifically, she wonders whether the model of 'fixed' AGs would be introduced, or the judges would continue to serve ad hoc on a rotating basis, as is the case now. On practical organisational matters, she notes that 'it is conceivable that the ad hoc chambers for preliminary ruling cases will be the two chambers currently composed of six judges and that the function of AG will be attributed to judges sitting in those chambers', noting that creating a permanent AG at the GC would require amending the CJEU Statute.[16] She also hypothesises that, if the transfer of some areas of preliminary references proves successful, it is possible that more will be transferred in the future, as happened with direct actions.[17] On a more general note, she considers the possibility – through an amendment to the Treaty – of later introducing a generalised filtering mechanism for preliminary references.[18]

Dr Davor Petrić (University of Zagreb) considers that the reform will bring about a differentiation of the CJ and the GC, bringing the CJ closer to being 'the EU constitutional court' and 'a proper Kelsenian constitutional court, which is tasked with the authoritative determination of the meaning of EU law', whereas the GC would resemble more closely an 'EU supreme court/council of state' that is 'responsible for correcting individual outcomes and assisting national courts with questions of factual interpretation, which are a prerequisite for the application of EU law'.

Dr Ricardo García Antón (University of Tilburg) addresses the specific question of preliminary references on VAT, noting that, in its recent case law, the CJ has tried to avoid evaluating the facts of cases and opted for giving national judges general and abstract guidelines on the interpretation of VAT rules. He leaves the question open as to whether the GC will follow the CJ's example regarding cases related to VAT and highlights the need to create a chamber specialised in VAT law at the GC.

Legislative process

Commission

- On 10 March 2023, the Commission delivered a positive opinion on the CJEU proposal, stating that it **fully shares the objective** of the reform. It agrees with the CJEU that it has become necessary for the CJ and GC to share jurisdiction over requests for a preliminary ruling. However, it made some comments on the details of the proposal, suggesting *inter alia* to further clarify the definition of the areas transferred to the GC – for instance, in the recitals of the regulation; and further clarify (preferably within the recitals) what the expression 'exclusively within one or several of the specific areas' means, especially in situations where 'a request for a preliminary ruling includes issues both of interpretation or validity of provisions of a Union act falling within one or several of the specific areas, and of issues of interpretation of primary law provisions, general principles of law or the Charter'. The Commission also considered that the fact that a request for a preliminary ruling seeks to verify whether an EU rule is 'consistent with primary EU law or with international law, or even where the request includes an issue relating to a specific legal act the substantive content of which is equivalent to general principles of law or the Charter, **should not preclude transfer** to the General Court'. However, in the Commission's view, questions that do not relate as such to the interpretation of an act falling within one of those specific areas, but, for example, to provisions of primary law, general principles of law or the CFR, should remain within the jurisdiction of the CJ even if the legal context of the main proceedings falls within one of those specific areas. The Commission also considered that, if a national judge **simultaneously submits questions** relating to the interpretation or validity of the provisions of a Union act falling within one or several of the specific areas *and* separate questions relating to the interpretation of primary law provisions, general principles of law or the CFR, the case should be **retained by the CJ**, rather than handed over to the GC.

Finally, it pointed to the need to specify the arrangements for allocating requests for a preliminary ruling, which, in addition to issues falling within one or more of the specific areas, explicitly or implicitly raise issues of CJ jurisdiction or admissibility.

Parliament

Within the Parliament, the file is being dealt with by the **Committee on Legal Affairs** (JURI), with the Committee on Constitutional Affairs (AFCO) providing an opinion. On 9 May 2023, JURI held a discussion on the proposal with the participation of the CJEU President, Prof. Koen Lenaerts, the GC President, Prof. Marc van der Woude, and representatives of the Commission Legal Service, the CCBE, the Austrian Constitutional Court, the French Council of State and Prof. Daniel Sarmiento (Universidad Complutense, Madrid). The focus of the meeting was on the partial transfer of Article 267 TFEU preliminary references from the CJ to the GC. Presidents Lenaerts and van der Woude highlighted the urgent need for the reform as a way to reduce the CJ's workload. The debate within the committee showed general support for the CJEU legislative proposal, but also highlighted the need for **democratic scrutiny** of the reform, especially given the decision to **leave out many details from the proposal and to deal with them in the two courts' rules of procedure instead**. According to Article 253 TFEU, the RoP CJ need to be approved by the Council. By contrast, this article does not provide for any role for the Parliament, as its legislative involvement is limited to amending the Statute but not the RoP. Other issues discussed in committee included the allocation of cases that touch upon horizontal issues and fundamental rights; the legal nature of a decision allocating a case to the GC; the protection of the fundamental rights of litigants; and the possibility of referring a case back from the GC to the CJ. The debate also focused on the types of cases selected for the transfer, with President Lenaerts highlighting that cases in which the CJ acts as a court of appeal for the GC would not be transferred (e.g. trademark law).

JURI draft report

On 13 June 2023, the JURI rapporteur, Ilana Cicurel (Renew, France), submitted her draft report. She proposed that a Member State or EU institution that is a 'party' to the proceedings be allowed to request that the GC hear it in an intermediate chamber (the 'mini grand chamber'). According to Article 1(2)(c) RoP GC, the term 'party' includes not only the 'main party' (as defined in Article 1(2)(d) RoP GC) but also the intervener; otherwise, the rule might also apply if the Member State or EU institution is a party to national proceedings in which a preliminary reference is launched (e.g. in cases concerning private-law contracts under procurement procedures launched by the EU institutions, or in situations where national law allows bringing an application against the state as such). She also proposed that cases relating to interpretation of primary law, public international law, general principles of law or the CFR would not be deemed to be within the GC's jurisdiction. She would make Article 54 of the CJEU Statute, allowing the GC to refer a case to the CJ if it does not fall within its competence, applicable to preliminary ruling proceedings.

AFCO opinion

On 18 July 2023, the AFCO committee adopted its opinion on the proposal, tabling 21 amendments, which have been considered by JURI (see below). The opinion raises a number of concerns regarding the proposal. Firstly, AFCO considers it difficult to provide a consistent and persuasive explanation for why the five specific areas should be transferred to the jurisdiction of the GC. Secondly, AFCO questions the assumption that the CJ's workload has risen significantly (noting only a 7 % increase in cases compared to 2017). Thirdly, AFCO questions whether **equal treatment of all preliminary ruling procedures** can be ensured, especially given the fact that some judges would also act as AGs at times, which AFCO considers not to be comparable to the role of the independent AGs in the CJ. Fourthly, AFCO points out that identical legal questions can arise both in an infringement procedure and in a preliminary ruling procedure, and that transferring some preliminary references to the GC could lead to discrepancies in the case law. Fifthly, AFCO raised concerns about the practical functioning of the mechanism of transferring some preliminary references to the GC, notably by allowing national courts to include additional questions as a way to influence the decision whether the question would be heard by the CJ or the GC. Nonetheless, AFCO generally supports the idea of transferring some preliminary references to the GC, as long as this is done according to a general plan, and that Article 47 CFR (right to an effective remedy) is respected. Finally, it recommends codifying the admissibility criteria for preliminary rulings to avoid arbitrary decisions on admissibility.

JURI report tabled for plenary

The committee voted on compromise amendments on 18 September 2023, and on 27 September 2023 its report was tabled for the plenary. JURI proposed to add a new rule on access to CJEU documents, whereby any EU citizen and any natural or legal person residing or established in the EU would have the right to access CJEU documents, upon request, although there would be exceptions based on public interest, privacy or the integrity of an individual, as well as commercial interests. A new rule would provide that Parliament be notified of all incoming preliminary references in order to be able to submit observations. The GC would elect, from among its judges, permanent AGs for a renewable term of three years. The GC's composition would include a chamber of intermediate size, which would deal with requests for a preliminary ruling if a Member State or institution that is a party to the proceedings so requests. JURI would also allow the CJ to retain jurisdiction to hear and determine the requests for a preliminary ruling that raise independent questions relating to the interpretation of primary law, public international law, general principles of law or the CFR.

Council

Within the Council, the Working Party on the Court of Justice examined the proposal at its meetings on 3 February, 17 March and 5 May 2023 and agreed on a general approach. Whereas the main part (the articles) of the proposal has been modified only technically, a number of additional motives have been added to the preamble. A new recital 6a would give more specific details on the actual extent of the five areas to be transferred to the GC's jurisdiction. With regard to the area on VAT and excise duties, for instance, the recital specifies that it covers 'the determination of the tax base for the assessment of value added tax or the conditions for the exemption from payment of that tax, the interpretation of the general arrangements for excise duty and of the framework relating to duties on alcohol, alcoholic beverages, tobacco, energy products and electricity'. A new recital 7a would directly refer to Directive 2003/87 establishing a scheme for greenhouse gas emission allowance trading within the European Union. Finally, a new recital 8a would specify that the CJ should maintain its jurisdiction if the reference 'raises autonomous questions of interpretation of primary law, public international law, general principles of law or the [CFR]'.

'Quadrilogue' negotiations

The JURI committee's decision to enter into interinstitutional negotiations was announced in plenary on 2 October 2023 (Rule 71(2) of the European Parliament's Rules of Procedure) and, given that there was no request for a plenary vote, the negotiations – in a 'quadrilogue' format (Parliament, Council, CJEU and Commission) – began on 4 October 2023. On 7 December 2023, the negotiators reached a provisional agreement. On 18 January 2024, the final text was endorsed by COREPER, and on 24 January 2024 the JURI committee unanimously voted to approve it.

Final compromise text

The compromise text, as approved by JURI and COREPER, provides for a number of amendments that largely follow the Parliament's position as articulated in the JURI report (discussed above).

Parliament's, Council's and ECB's right to submit statements or observations

Until now, Parliament could submit statements of case or written observations in preliminary ruling procedures only if it 'adopted the act the validity or interpretation of which is in dispute' before the national court which submitted a reference to the CJ (Article 23 CJEU Statute, second paragraph). An amendment to Article 23 of the Statute will enable Parliament to present its position in also in all other preliminary reference procedures. According to the amended rule, preliminary rulings will also be notified to the Parliament, Council and the European Central Bank (ECB), in addition to the Member States, Commission and the institution, body, office or agency of the Union which 'adopted the act the validity or interpretation of which is in dispute' before the national court. All those entities to which the reference is notified (and the parties) will be allowed to submit statements of case or written observations. However, **Parliament and the ECB will have this possibility only if they 'consider [they] have a *particular interest* in the issues raised'**, while the institution, body, office or agency of the Union which adopted the act will have this possibility only 'if appropriate'. Thus, the Council gains a right to submit its observations in any preliminary reference case, whereas Parliament and the ECB can do so on condition that they *consider* they have a particular interest. It remains to be seen in practice whether this criterion will be evaluated in any way by the CJ or GC – for example, whether it will be required for Parliament or the ECB to justify *why* they have an interest.

Statements of case or written observations submitted according to the above rule will be published by the CJ 'within reasonable time after the closing of the case, unless that person [who submitted the statements or observations] raises objections to the publication of its own written submissions'. This amendment provides for a further increase in the transparency of the CJEU.

This new rule should be distinguished from **rules on intervention** before the CJ and GC (Article 40 CJEU Statute; Article 129-132 RoP CJ; Article 142-145 RoP GC). These rules allow Parliament to intervene in cases before the Union Courts in support of one of the parties, and without proving any special interest. However, these rules are not applicable to preliminary reference proceedings.[19] Furthermore, intervention in a case under Article 40 of the Statute is different from the submission of statements or observations under Article 23 of the Statute, because 'the interveners' submissions must be limited to supporting, in whole or in part, the form of order sought by one of the parties'.[20]

One or more advocates general elected from among General Court judges

According to newly added Article 49a, the GC will elect, from among its judges, one or more permanent AGs for a term of three years, renewable once. During their term as AGs, they will not perform judicial duties (i.e. they will not decide cases). Those permanent AGs of the GC will work only on preliminary ruling cases, and not on other cases. For each request for a preliminary ruling, an AG will be selected from among the judges elected to perform that duty who belong to a chamber other than the chamber to which the request in question has been assigned. The rule on *ad hoc* AGs at the GC (Article 49 CJEU Statute) remains unaffected.

The amendment does not provide for any role for the selection panel set up under Article 255 TFEU which evaluates candidates put forward by the Member States for posts of CJ and GC judges and CJ AGs. However, that panel is to give an opinion 'before the *governments of the Member States* make the appointments referred to in Articles 253 and 254 [TFEU]' and, in the case of permanent AGs at the GC, they will not be appointed by the governments, but elected from among GC judges (without any role for the Member States in the procedure).

Other rules

According to the amended Article 50, if required by a Member State or by an EU institution which is party to the preliminary reference proceedings (e.g. by intervening), the GC will sit as an intermediate chamber (between five judges and Grand Chamber). Despite the transfer of certain preliminary references to the GC (the list was not modified), the CJ will nonetheless retain jurisdiction in cases that raise 'independent questions relating to the interpretation of primary law, public international law, general principles of Union law or the Charter of Fundamental Rights' (Article 50b(1a)). According to modified Article 54 second paragraph, if the GC finds that it does not have jurisdiction to hear and determine an action or a request for a preliminary ruling because the CJ has jurisdiction over it, it must refer it to the CJ; and vice versa, if the CJ finds that a case should be heard by the GC, it must send it to the GC, which may not refuse to accept the case. Newly added Article 62d provides that, before making any further proposal to amend the Statute, the CJ or Commission must 'consult widely'.

Next procedural steps

It is expected that the compromise text will be approved by Parliament's plenary in February 2024. Once approved by the Council, the text will be signed by the Presidents of the two institutions, published in the Official Journal and enter into force.

EUROPEAN PARLIAMENT SUPPORTING ANALYSIS

Mańko R., Preliminary reference procedure, EPRS, European Parliament, July 2017.

OTHER SOURCES

European Parliament, Statute of the Court of Justice: Amendment of Protocol No. 3, Legislative Observatory (OEIL).

FURTHER READING

Amalfitano C., 'The Future of Preliminary Rulings in the EU Judicial System', *EU Law Live Weekend Edition* No 125, 2022.

Iglesias Sánchez S., 'Preliminary Rulings before the General Court Crossing the last frontier of the reform of the EU judicial system?', *EU Law Live Weekend Edition* No 133, 2023.
Petrić D., 'The Preliminary Ruling Procedure 2.0', *European Papers*, Vol. 8(1), 2023.

ENDNOTES

1 B. Wegener, commentary to Article 19 TEU, in C. Callies, M. Ruffert (eds.), EUV/AEUV. Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtskarta: Kommentar, 6th edition, C. Beck, 2022, paras 6-7.
2 See Article 2(31) of the Treaty of Nice amending what then was Article 225 of the Treaty Establishing the European Community (TEC).
3 At the time of writing (30 January 2024), the official statistics for 2023 were not yet available.
4 CJEU, Annual Report 2022: Statistics concerning the activity of the Court of Justice, 2023, p. 1; CJEU, Annual Report 2022: Statistics concerning the activity of the General Court, 2023, p. 1.
5 The number of areas is described as six if the Customs Code and Combined Nomenclature count as two, and as five if they are combined together as one item.
6 As checked on the CJEU search engine on 2 October 2023.
7 The explanatory memorandum names six areas (Customs Code and Combined Nomenclature counted separately).
8 This section aims to provide a flavour of the debate and is not intended to be an exhaustive account of all different views on the proposal. Additional information can be found in related publications listed under 'European Parliament supporting analysis'.
9 S. Iglesias Sánchez, Preliminary Rulings before the General Court Crossing the last frontier of the reform of the EU judicial system?, EU Law Live Weekend Edition, No 125, 2022, p. 15.
10 ibid.
11 ibid.
12 ibid., p. 16.
13 ibid., p. 12.
14 ibid., p.10.
15 C. Amalfitano, The Future of Preliminary Rulings in the EU Judicial System, EU Law Live Weekend Edition, No 125, 2022, p. 2.
16 ibid., p. 3.
17 ibid., p. 13.
18 ibid., p. 12.
19 This practice of the CJEU is justified by a narrow interpretation of the term 'case' used in Article 40 CJEU Statute. See K. Lenaerts, K. Gutman, J. Nowak, EU Procedural Law, 2nd edition, OUP 2023, p. 735: 'The term "case" refers **only to contentious procedures before the Union Courts** designed to settle a dispute, and does not encompass preliminary ruling proceedings.'
20 K. Lenaerts, K. Gutman, J. Nowak, op. cit., p. 733.

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Second edition. The 'EU Legislation in Progress' briefings are updated at key stages throughout the legislative procedure.