Note on a Missed Opportunity for the Administration of Justice Across Europe

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About ten days ago, the Council of the EU failed to reach an agreement on the proposed increase in the number of judges sitting at the General Court of the European Union. The Council thus buried - and for quite a while – a proposal which could have helped the General Court reduce its currently impressive backlog of cases.

This backlog has been problematic for over a decade now. It reached an unprecedented level last year, with "*an all-time high*" number of 790 new cases brought to the General Court, a jump of nearly 30% compared with 2012. Despite the General Court's constant efforts (three additional chambers; optimized scheduling of hearings; simplified procedure in trade mark cases; additional *référendaires*, etc.), the number of cases dealt with remains lower than that of new cases brought each year. Mechanically, the average duration of legal proceedings has steadily increased over time. While ten years ago, that average ranged between 18 months and 21.5 months (depending on the nature of the case), it now varies between 26.9 months and 30.6 months.

Initiated in 2011, the proposal to increase the number of judges at the General Court had made good progress in recent months. In late 2013, the President of the Court of Justice urged the Greek Presidency to help the proposal move forward and

thereby allow the General Court to reduce its backlog. In his opinion, the proposed nomination modalities for additional judges should be exclusively based on merit and professional competence (rather than nationality). This approach seems rather logical for at least two reasons. First, the TFEU itself (Article 254(2) TFEU) requires that judges "*be chosen from persons whose independence is beyond doubt and who possess the ability required for appointment to high judicial office*". Second, any need for the member states to have their nationals present in Luxembourg is already largely met with the requirement in Article 19(2) second subparagraph TEU that the General Court "*include at least one judge per Member State*". Accordingly, the proposed pre-selection of candidates by a specialized panel – possibly the Article 255 TFEU panel, with an extended competence – could be seen as both appealing and easily workable in the short run.

Unfortunately, certain small member states reportedly opposed that merit-based approach, and required that the designation of the additional judges at the General Court take sufficient account of nationality. And unfortunately, they prevailed. This is terrible news for the administration of justice in the EU.

That the Council fails to help the General Court reduce its backlog is already very disappointing and worrying for the future functioning of that Court. If "*justice delayed is justice denied*", such a missed opportunity leaves a bitter taste, at a time when the excessive duration of legal proceedings is increasingly perceived as a denial of litigants' right to a fair trial.

Even more disappointing and, quite frankly, unacceptable are the reasons for that missed opportunity. What a shame that in 2014, more than 55 years after the Treaty of Rome, member states still seem to perceive EU judges as mere guardians of their sovereign prerogatives. The message sent ten days ago is loud and clear: in turning down the initial proposal and the compromise proposed by the Greek presidency, the member states openly refuse to select judges on their merit. This says a lot about how they value the words "*independence*" and "*high judicial office*" in the treaties. In any event, it is a big mistake to believe that once in Luxembourg, the nationality of a judge plays any role in the decision-making process. From immunity rules to the secrecy of deliberations, through the intervention of *référendaires*, everything in the functioning of the General Court is made to ensure the highest quality of the work and debates between judges and to preserve their independence. The system may not be 100% perfect, but the part played by the nationality of a judge in the outcome of the case is, certainly, the

very least of all factors that may play a role.

The approach advocated by opposing member states is not even tenable. Since its creation, the Article 255 TFEU committee already turned down, on at least seven occasions, the candidates proposed by national governments for their lack of competence. For several member states, finding even one candidate meeting the requirements of the treaties has already been a painful, excessively long and sometimes even humiliating exercise. This will certainly not improve if nationality continues to play a role in the selection of additional judges. In this context, there is no room for more nationality-based nominations at the General Court. Extending this criterion to the additional judges promises nothing but further delays and less quality in the European administration of justice.

If this vision of the General Court eventually prevails, it will be interesting to see its consequences in a post-accession perspective, before the ECHR. What will it mean, in terms of duration of proceedings, independence and impartiality, if the administration of European justice depends more on a rotation of nationalities than on judicial competence? How can the General Court comply with Article 6 ECHR if its backlog only increases?

For now, citizens of the EU should be very interested in obtaining the detailed list of the votes in Council. After all, there are elections approaching**...**

The views expressed in this article are exclusively those of the author and do not necessarily reflect those of Sidley Austin LLP, its partners, or clients.

This post originally appeared on the Kluwer Competition Law blog.