

# LEGAL BASIS AND “TRASVERSAL” INTERPRETATION OF THE ULTIMATE REFORMS OF THE EUROPEAN UNION JURISDICTIONAL SYSTEM

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## **Abstract**

The present work focuses on the analysis of the latest reform of the EU jurisprudential system which started in 2011 and has been completed on March 2018. The purpose of the analysis is to interpret the need for these reforms, the time needed, the reasons and the effectiveness they will have for the next few years. Obviously the analysis is based on the articles of the Lisbon Treaty and the rich jurisprudence offered up until now to interpret and better understand the division of competences and the new dispute system of the Union.

**Keywords:** CJEU. Treaty of Lisbon. Reg. 2015/2422. Specialized courts. Division of powers. Judges’ doubling. Art. 51 of the Statute of CJEU.

## **1 INTRODUCTION**

On March 26, 2018, the Court of Justice of the European Union (CJEU) filed a request, pursuant to art. 281<sup>1</sup>, second sub-paragraph, of the Treaty of Functioning of the European Union (TFEU) aimed at modifying Protocol no. 3 of

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1 S. VAN DER JEUGHT, *Le traité de Lisbonne et la Cour de justice de l’Union européenne*, in *Journal de Droit Européen*, 2009, pp. 294 ss. J.V. LOUIS, *La “riforme” du statut de la Cour*, in *Cahier de droit européen*, 2011, 10ss.

its Statute. Recipients of the request are, of course, the co-legislators of the European Union, namely the European Parliament (EP) and the Council that should adopt the proposed Regulation according to the ordinary legislative procedure referred to in art. 294 TFEU. According to the President of the CJEU, to the President of the EP, this question is based on three main axes consisting, first, in transferring to the General Court (EGC) (former Tribunal for First Instance) the power in principle to give judgment, at first instance, on actions for failure to fulfill obligations based on Articles 108, paragraph 2<sup>2</sup>, 258 and 259 TFEU<sup>3</sup>, secondly, in attributing to the CJEU the treatment of actions for annulment<sup>4</sup> linked to the failure to properly implement a judgment pronounced by the latter under Article 260 TFEU and, thirdly, to institute a prior admission procedure for certain categories of appeals. Furthermore, the application contains a proposal for terminological coordination. The CJEU's request for justice fits into the context of the changes already made in 2015 and 2016<sup>5</sup> to the judicial architecture of the European Union.

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- 2 A. SINNAEVE, States aid procedures: Developments since the entry into force of the procedural regulation, in *Common Market Law Review*, 2007.
  - 3 A. ARNULL, D. CHALMERS (eds.), *The Oxford Handbook of European Union law*, Oxford University Press, 2014. R. BARENTS, The Court of Justice after the Treaty of Lisbon, in *Common Market Law Review*, 2010, pp. 710ss. C. BARNARD, S. PEERS, *European Union law*, Oxford University Press, 2017, pp. 586ss.
  - 4 J. SLADIČ, Rules on procedural time-limits for initiating an action for annulment before the Court of Justice of the EU: Lesser-known questions of admissibility, in *The Law & Practice of International Courts and Tribunals*, 2016, pp. 154ss.
  - 5 See, Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union (GUUE, L 341/14) and Regulation (EU, Euratom) 2016/1192 of the European Parliament and of the Council of 6 July 2016 on the transfer to the General Court of jurisdiction at first instance in disputes between the European Union and its servants. **Article 3 of Regulation no. 2015/2422** also provides that by December 26, 2020, the CJEU shall establish, with the help of an external consultant, a report on the functioning of the EGC, addressed to the EP, the Council and the EC. This report will focus, in particular, on the efficiency of the EGC and on the use of resources allocated to it, on the effectiveness of doubling the judges and on the appropriateness of setting up specialized sections and/or introducing other structural changes. In particular, with reference to the future appointments of the judges of the EGC,

## 2 THE LEGAL BASIS OF THE CJEU’S REQUEST

The CJEU’s request is based on articles 256, par. 1, and 281, second sub-paragraph, TFEU, as well as article 106 bis, par. 1 of the Treaty establishing the European Atomic Energy Community (EAEC)<sup>6</sup>.

Article 256, par. 1, TFEU establishes, in order, (i) which are the competences of the EU EGC, (ii) the Statute of the CJEU can provide that the EGC is competent for other categories of appeals and (iii) the decisions of the EGC itself can be appealed to the CJEU. This provision does not in fact constitute the operative and procedural legal basis of the request presented by the CJEU, but only the provision which refers to the Statute of the CJEU for the attribution of powers to the EGC for other categories of appeals.

Article 281, second sub-paragraph, TFEU is the appropriate legal basis for the adoption of a Regulation which makes changes to the Statute of the CJEU<sup>7</sup>. As is well known, it is a peculiarity of the European Union Treaties to allow certain modifications of primary law (Treaties and Protocols) through the adoption of deeds that are formally of secondary law<sup>8</sup>. Although it is questionable whether this right is left to the legislator of the Union, it is clear that it greatly facilitates

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the Union legislators have been asked to consider the issue of gender balance, considered “of fundamental importance” (recital 11 of Regulation No. 2015/2422) and pursued with a progressive modification of the EGC partial renewal system (through a revision of article 9 of the Statute), in such a way as to bring the governments of the Member States to propose two judges simultaneously, in order to favor the choice of a woman and a man.

6 F. JACOBS, *The Court of Justice in the twenty-first century*, in A. ROSAS, E. LEVITS, Y. BOT, (eds), *The Court of Justice and the construction of Europe. Analysis and perspectives on sixty years of case-law*, ed. Springer, 2013, pp. 53ss.

7 D. SARMIENTO, *The reform of the General Court: An exercise in minimalist (but radical) institutional reform*, in *Cambridge Yearbook of European Legal Studies*, 2017, pp. 239ss.

8 M. CREMONA, C. KILPATRICK, *EU legal acts challenges and transformations*, Oxford University Press, 2018, pp. 99, 146, 162, 174, 188, 192, 201.

the reforms deemed appropriate of some parts of primary law, avoiding recourse to the complex procedure for revising the Treaties referred to in art. 48 TUE<sup>9</sup>.

Article 281, sub-paragraph 2, TFEU also constitutes an exception to the power of legislative initiative normally held by the European Commission (EC)<sup>10</sup>, since the CJEU may also make a request in the event of amendments to its Statute. However, the provision contained in the same norm of a prior opinion of the EC which allows the EU legislator to have more objective, even technical, elements at his disposal seems appropriate and useful to us. In this regard, it could be argued that perhaps a proposal from the EC, rather than a request from the CJEU, could sometimes be considered more appropriate to the presentation of reforms that are relevant, even before the functioning of the CJEU as the Institution of the Union, all actors of european judicial proceedings, namely, Member States, other Institutions and bodies of the Union, natural and legal persons<sup>11</sup>. Naturally, this assessment is discretionary and it is completely physiological that the CJEU considers that it must use, if the conditions are met, the powers conferred by the Treaties also on the legislative initiative<sup>12</sup>.

With this clarification, it must be emphasized that, in any case, under the terms of the provision in question, the role of the EC is not negligible: it intervenes on the basis of the consultation envisaged therein and its opinion must be taken into consideration, as well as the opinion of the CJEU must be in the case of a proposal presented by the EC. The logic of the provision in question requires that

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9 Seems different the nature of art. 257 TFUE

10 L.A. CASTILLO, *Instituciones y derecho de la Unión Europea*. Vol. II: *Derecho de la Unión Europea*, ed. Marcial Pons, 2016. D. CHALMERS, G. DAVIES, G. MONTI, *European Union law*, Cambridge University Press, 2014.

11 M. DERLÉN, J. LINDHOLM, *The Court of Justice of the European Union: Multidisciplinary perspectives*, ed. Bloomsbury, 2018. W. FRENZ, *Handbuch Europarecht*, band 2, ed. Springer, 2013.

12 J. M. BENEYTO PEREZ, J. MAILLO GONZALEZ-ORUS, B. BECERRIL ATIENZA, *Tratado de Derecho y Políticas de la Unión Europea*, tomo V, *Sistema Jurisdiccional de la UE*, ed. Aranzadi, 2013, pp. 155ss.

this opinion must necessarily be examined by the EU legislature in order to legislate also in the light of the elements and considerations that are exposed to it. In other words, the art. 281, second sub-paragraph, TFEU allows all the Institutions of the Union directly concerned (the co-legislators, the EP and the Council, the EC, having regard to its specific role in the legal order of the Union, and the CJEU) be involved in the legislative procedure, albeit in different ways<sup>13</sup>.

The last rule indicated as a legal basis in the preamble of the request presented by CJEU, art. 106 bis, par. 1, of the EAEC, contains a simple reference also to the articles 256 and 281 TFEU (among others), articles which, consequently, apply to the EAEC Treaty<sup>14</sup>.

The draft amendment of the Protocol n. 3 presented by the CJEU is subject to the control procedures on the application of the principles of subsidiarity<sup>15</sup> and

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- 13 R. GEIGER, D.E. KHAN, M. KOTZUR, EUV/AEUV, C.H. Beck, 2016. A. HARATSCH, C. KOENIG, M. PECHSTEIN, *Europarecht*, C.H. Beck, 2016. M. HERDEGAN, *Europarecht*, C.H. Beck, 2015.
  - 14 A. BERGMANN, *Zur Souveränitätskonzeption des Europäischen Gerichtshofs. Die Autonomie des Unionsrechts und des Völkerrecht*, ed. Mohr Siebeck, 2018.
  - 15 G. A. MOENS, J. TRONE, The principle of subsidiarity in EU judicial and legislative practice: Panacea or placebo?, in *Journal of Legislation*, 2015, pp. 4ss. P. CRAIG, Subsidiarity: A political and legal analysis, in *Journal of Common Market Studies*, 2015, pp. 76ss. G.A. MOENS, J. TRONE, Subsidiarity as judicial and legislative review principles in the European Union, in M. EVANS, A. ZIMMERMANN (ed), *Global perspectives on subsidiarity*, ed. Springer, 2014, pp. 158ss. M. FINCK, Challenging the subnational dimension of the principle of subsidiarity, in *European Journal of Legal Studies*, 2015, pp. 8ss. C. LAZĂR, Subsidiarity in the Union law: A success or a failure, in *AGORA International Journal of Juridical Sciences*, 2014, pp. 72ss. M. COCOSATU, Principles of subsidiarity and proportionality at European Union level, as expression of national interests, in *Acta Universitatis Danubius. Juridica*, 2012, pp. 34ss. O. BARTON, An analysis of the principle of subsidiarity in European Union law, in *North East Law Review*, 2014, pp. 86ss. O. PIMENOVA, Subsidiarity as a "regulation principle" in the European Union, in *The Theory and Practice of Legislation*, 2016, pp. 384ss. K. GRANAT, The principle of subsidiarity and its enforcement in the European Union legal order. The role of National Parliaments in the early working system, Hart Publishing, 2018. G. OĞUZ, Principle of subsidiarity and the European Union Institutions, in *Annales*, 2013, pp. 106ss. T. ORSLEY, Subsidiarity and the European Court of Justice: Missing pieces in the subsidiarity kigsaw?, in *Journal of Common Market Studies*, 2011, pp. 270ss. G. COINU, The enforceability of the principle of subsidiarity in the European Union, in *International Journal*

proportionality<sup>16</sup>, foreseen by Protocol n. 29. Consequently, the request by the CJEU must also, in principle, be justified taking into account compliance with subsidiarity and proportionality and the CJEU and, where appropriate, the EC must take into account any opinion of the national Parliaments or each room of one of these Parliaments.

The legal bases of the CJEU's request correspond, *mutatis mutandis* to the logic of the choice made by the Union legislator for the adoption of the Regulations of 2015 and 2016 and containing the amendments to the Statute of the CJEU. Therefore, no problem should arise in this regard at the different stages of the legislative procedure<sup>17</sup>.

### 3 DIVISION OF COMPETENCES IN THE CONTEXT OF THE UNION DISPUTE

The current system of judicial protection of the European Union does not correspond, as regards its architecture, to the plan outlined by the „constituent“ with the Treaty of Nice and only „touched up“ from the lexical point of view in

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of Management and Applied Science, 2017. P. KIIVER, The conduct of subsidiarity checks of European Union legislative proposals by National Parliaments: Analysis, observations and practical recommendations, in ERA Forum, 2012, pp. 538ss.

- 16 T. HARBO, The function of proportionality analysis in european law, ed. Brill, 2015. W. SANTER, Proportionality in European Union law: A balancing act?, in Cambridge Yearbook of European Legal Studies, 2013, pp. 442ss. A. BARAK, Proportionality: Constitution rights and their limitations, Cambridge University Press, 2012. T.I. HARBO, The function of the proportionality principle in European Union law, in European Law Journal, 2010, pp. 160ss. C. HAGUENAU-MOIZARD, Y. SANCHEZ, The principles of proportionality in European Law, in S. RANCHORDÁS, D. DE WAARD, The judge and the proportionate use of discretion. A comparative administrative law study, ed. Routledge, 2015. D. TASKOVSA, On historical and theoretical origins of the proportionality principle. A contribution towards, a prospective comprehensive debate on proportionality, in Iustinianus Primes Law Review, 2012. L. ANĐLKOVIĆ, The elements of proportionality as a principle of human rights limitations, in Law and Politics, 2017, pp. 238ss. E. POILLOT, The European Court of Justice and general principles derived from the *acquis communautaire*, in Oslo Review Law, 2014.
- 17 M. VAN DER WOUDE, In favour an effective judicial protection: A reminder of the 1988 objectives of the General Court of the EU, in *Revue Concurrences*, 2014, pp. 10ss.

Lisbon<sup>18</sup>. Finally, par. 3 of art. (today) 256 TFEU has foreseen the possible transfer of the preliminary ruling to the EGC, „in specific matters determined by the statute“<sup>19</sup>: where such a transfer occurred, (also) with respect to the decisions of the EGC would operate the mentioned review institute and the EGC itself it could decide to refer the case back to the CJEU if it considered that it „requires a decision of principle that could jeopardize the unity or coherence of EU law“<sup>20</sup>. This opportunity will inevitably require a reflection on the possible consequences of this innovation in relation with national jurisdictions, especially the supreme ones and about the need to guarantee or not a second degree of judgment on

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- 18 C. FARDET, Le “réexamen” des décisions du Tribunal de première instance, in *Revue du Marché Comune de l’Union Européenne*, 2004, pp. 184ss. H. JUNG, Une nouvelle procédure devant la Cour: le réexamen, in *Liber Amicorum en l’honneur de Bo Vesterdorf*, ed. Brill, 2007, pp. 191ss. C. NAÔMÉ, Procédure “RX”: Le réexamen, par la Cour de justice, d’affaires ayant fait l’objet d’un pourvoi devant le Tribunal, in *Journal de Droit Européen*, 2010, pp. 104ss. A. TIZZANO, P. IANNUCELLI, Premières applications de la procédure de “réexamen” devant la Cour de justice de l’Union européenne, in *Diritto dell’Unione Europea*, 2010, pp. 681ss. I. PINGEL, La procédure de réexamen en droit de l’Union européenne, in *Revue du Marché Comune de l’Union Européenne*, 2011, pp. 532ss. R. ROUSSELOT, La procédure de réexamen en droit de l’Union européenne, in *Cahier de Droit Européen*, 2014, pp. 535ss.
- 19 K.D. BORCHARDT, *Die rechtlichen Grundlagen der Europäischen Union*, ed. Manz, 2015. M. BROBERG, N. FENGER, *Le renvoi préjudiciel à la Cour de justice de l’Union européenne*, ed. Larcier, 2013. M. BROBERG, N. FENGER, *Preliminary references to the European Court of Justice*, Oxford University Press, 2014, pp. 309ss.
- 20 See the next cases: C-59/09, *Hasbro* of 10 July 2009; T-485/08P, *P. Lafili v. European Commission* of 2 July 2010; C-27/09, *Republic of France v. People’s Mojahedin Organization of Iran* of 21 December 2011; C-522/09P, *Ferrero v. OHM* of 24 March 2011; C-201/09P and C-216/P, *Arcelor Mittal Luxembourg v. European Commission* of 29 March 2011; C-369/09P, *Polska Sp. z.o.o. and others v. European Commission* of 24 March 2011. See also: F. CLAUSEN, *Les moyens d’ordre public devant la Cour de Justice de l’Union européenne*, ed. Bruylant, 2018, pp. 134ss. C. NAÔMÉ, *Le pourvoi devant la Cour de Justice de l’Union européenne*, ed. Larcier, 2016. V. GIACOBBO PEYRONNEL, E. PERILLO, *Statut de la fonction publique de l’Union européenne: Commentaire article per article*, ed. Larcier, 2017, pp. 98ss. T. BURRI, *The greatest possible freedom. Interpretive formulas and their spin in free movement case law*, ed. Nomos, 2015. E. EZRACHI, *European Union competition law: An analytical guide to the leading cases*, Hart Publishing, 2016. C. HARLOW, R. RAWINGS, *Process and procedure in European Union administration*, Bloomsbury Publishing, 2014. W. VERLOREN VAN THEMAAT, B. REUDE, *European competition law: A case commentary*, ed. E. Elgar, 2018.

the decisions made by the EGC for a preliminary ruling, beyond the forecast of the review as proposed by art. 256 TFEU. Most likely, the reflection on the need to ensure the efficient functioning of the Union's jurisdictions, and especially of the jurisdiction for preliminary rulings, will require a broader rethinking of the whole system of legal protection of the Union, capable of going beyond mere logic of transfer of jurisdiction, although appreciable and asphyxiated in terms of the durability of the solution. And this rethinking can not in our opinion, not involve the role of national judges, in a perspective of which there is now traced in the pending of article 19, par. 1, sub-paragraph 2 of the TEU.

Thus, in the jurisdiction of the summit request of the judicial system (also), the appeals pursuant to art. 263 and 265 TFEU promoted by the Institutions and also, as not expressly provided for by art. (today) 256 TFEU (neither article 51 of the Statute), proceedings for breach pursuant to art. 258-260 TFEU<sup>21</sup>.

Furthermore, art. 256 TFEU (today) provides that the general jurisdiction of the EGC is delimited with respect to the disputes given to the specialized Courts established pursuant to art. 257 TFEU (at the time Article 225A EC): the only specialized EGC created by the Council decision of 2 November 2004 was the European Union Civil Service Tribunal (EUCST)<sup>22</sup>, which was given the power to ascertain, at first instance, disputes between the Union and its agents, pursuant to art. 270 TFEU (today) (then Article 236 EC)<sup>23</sup>. The decisions of this judge could be

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21 P. WENNERAS, Sanctions against Member State under article 260 TFEU: Alive, but not kicking?, in *Common Market Law Review*, 2012, pp. 146ss.

22 X. TRACOL, The new rules of procedure on the review procedure and the application of general principles in European Union civil service law and litigation: Strack, in *Common Market Law Review*, 2014, pp. 994ss.

23 J. FUENTETAJA PASTOR, The European Union Civil Service Tribunal, in *Mélanges en hommage à Georges Vandensanden*, ed. Bruylant, 2008, pp. 873ss. J. PILORGE-VRANCKEN, *Le droit de la fonction publique de l'Union européenne*, ed. Bruylant, 2017.

challenged (only for legal reasons) before the EGC<sup>24</sup>, whose rulings-in turn-could be re-examined in the (exceptional) cases in which-on the basis of the provisions of art. 256, par. 2, TFEU-could seriously undermine the unity or consistency of Union law<sup>25</sup>.

Broadly speaking, EU law disputes include jurisdictional powers, so to speak, „traditional“ and jurisdictional powers *sui generis*, specific to the Union’s legal system<sup>26</sup>.

Traditional litigation includes, firstly, direct, administrative, annulment and inadequate appeals, against acts or abstentions to pronounce on the Institutions, bodies or bodies of the Union, as well as some special appeals; secondly, the European civil service dispute, concerning the disputes between the Union and its agents and, thirdly, a civil-related litigation<sup>27</sup> concerning, on the one hand, contracts regarding the Union containing an arbitration clause<sup>28</sup> devotes jurisdiction to the

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24 In particular the Court of First Instance appointed an Advocate General among its judges on four occasions, in the cases of T-1/89, Rhône-Poulenc v. European Commission of 24 October 1991; T-51/89, Tetra Pak Rausing v. European Commission of 10 July 1990; T-120/89, Stahlwerke Peine-Salzgitter v. European Commission of 27 June 1991; T-24/90, Automec Srl v. European Commission of 18 September 1992.

25 A. HUYUE ZHANG, The faceless court, in University of Pennsylvania Journal of International Law, 2016.

26 A. ALEMANN, L. PECH, Thinking justice outside the docket: A critical assessment of the reform of the EU’s Court system, in Common Market Law Review, 2017, pp. 129-176. E. GUINCHARD, M.-P. GRANGER (a cura di), The new EU judiciary, Wolters Kluwer, 2018. M.P. GRANGER, E. GUINCHARD, Introduction: The dos and don’ts of judicial reform in the European Union, in E. GUINCHARD, M.-P. GRANGER (a cura di), The new EU judiciary, op. cit., pp. 1ss. A. ALBORS-LLORENS, The Court of Justice in the aftermath of judicial reform, in E. GUINCHARD, M.-P. GRANGER (a cura di), The new EU judiciary, op. cit., pp. 123 ss. L. COUTRON, The changes to the general Court, in E. GUINCHARD, M.P. GRANGER (a cura di), The new EU judiciary, op. cit., pp. 143ss. R. SCHÜTZE, T. TRIDIMAS, Oxford principles of European Union law, Oxford University Press, 2018.

27 W. HAKENBERG, The Civil Service Tribunal of the European Union: A model to follow as a specialised Court?, in E. GUINCHARD, M.P. GRANGER (eds), The new EU Judiciary. An analysis of current judicial reforms, op. cit., pp. 162ss.

28 P. STONE, Stone on private international law in the European Union, ed. E. Elgar, 2018.

EU judicature and, secondly, non-contractual liability for damages caused by the institutions and agents of the Union. The *sui generis* litigation concerns, first of all, the preliminary rulings on the interpretation of the Treaties and on the validity and interpretation of the acts carried out by the institutions, bodies or bodies of the Union, pursuant to art. 267 TFEU<sup>29</sup>, secondly, the actions for failure to fulfill obligations of Member States to obligations deriving from EU law and, thirdly, certain types of inter-institutional redress or concerning certain institutions of the Union or bodies of such bodies Institutions.

The current system of division of competences between the two jurisdictions is decidedly complex and is based on the combined provisions of art. 256 TFEU and art. 51 of the Statute<sup>30</sup>. Article 256 TFEU confers on the EGC a general jurisdiction, at first instance, to deal with direct appeals (for annulment, in the event of failure, for contractual and extra-contractual responsibility and relating to the public function), except for those that the Statute assigns to a specialized EGC or reserve to the CJEU.

The same rule also provides for the jurisdiction of the EGC as a judge of the appeal concerning the decisions of any specialized Court established under the art. 257 TFEU<sup>31</sup>, as was the EGC of the civil service, as well as the jurisdiction to hear preliminary rulings on matters specifications determined by the articles of the Statute.

In order to ensure unity and consistency in the judicial application of Union law, the same provision provides, first, for the EGC to refer the case to the CJEU and, second, that the decisions issued by the EGC for a preliminary ruling<sup>32</sup>

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29 N. WAHL, L. PRETE, The gatekeepers of Article 267 TFEU: On jurisdiction and admissibility of references for preliminary rulings, in *Common Market Law Review*, 2018, pp. 52ss.

30 G. CONWAY, *The limits of legal reasoning and the European Court of Justice*, Cambridge University Press, 2012.

31 C. CALLIESS, M. RUFFERT (Hrsg.), *EUV/AEUV*, C.H. Beck, 2016.

32 The CJEU delivered four judgments in review procedures, see, C-197/09, *M v. EMEA* of 17 December 2009; C-334/12 *RX*, *Rèexamen Arango Jaramillo and others v. EIB* of 12 July 2012;

can exceptionally be re-examined by the CJEU, in accordance with the provisions of the articles of the Statute.

Article 51 of the Statute, notwithstanding art. 256 TFEU, subtracts from the competence of the EGC certain direct appeals, especially of inter-institutional nature.

On the other hand, the CJEU, in addition to examining the appeal concerning all the rulings of the EGC (article 256, paragraph 1, second subparagraph, TFEU), retains exclusive jurisdiction over the preliminary reference procedure (article 267 TFEU), considered the „keystone“ of the Union's judicial system. Furthermore, it retains some exclusive powers in the first and only degree, and in particular the actions for infringement (articles 258-260 TFEU), some direct actions, for annulment (article 263 TFEU)<sup>33</sup> or inadequacy (article 265 TFEU), of a constitutional or inter-institutional nature.

First of all, it has to do with (article 51, par.1 of the Statute), the actions brought by the Member States, on the one hand, against acts or an abstention by the EC in relation to enhanced cooperation, pursuant to art. 331, par. 1, TFEU<sup>34</sup> and, secondly, against an act or abstention to be pronounced by the EP and the Council, even jointly. However, the appeals concerning the acts adopted by the Council in the matter of state aid pursuant to art. 108 (2), third sub-paragraph, TFEU, concerning trade defense measures pursuant to art. 207 TFEU, in particular the anti-dumping Regulations, and with regard to implementing acts pursuant to art. 291, par. 1, TFEU, in the ambit of the so-called „comitology“<sup>35</sup>.

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C-579/12 RX-II, *Reexamen Commission v. Strack* of 11 December 2012; C-417/14 RX-II, *Reexamen Missir Mamachi di Lusignano v. European Commission* of 9 September 2014.

33 R. BARENTS, *The Court of Justice after the Treaty of Lisbon*, in *Common Market Law Review*, 2010, pp. 710ss.

34 D. LIAKOPOULOS, *Art. 331 TFEU*, in HERZOG, CAMPBELL, ZAGEL, *Smit & Herzog on the law of the European Union*, ed. LexisNexis, 2018.

35 S. HOBE, *Europarecht*, C.H. Beck, 2014. M. HORSPOOL, M. HUMPREYS, M. WELLS-GRECO, *European Union law*, Oxford University Press, 2018. J. LECHERER, C.F. GUNDE,

As a matter of curiosity, it is useful to point out that are left to the EGC, despite their constitutional, political and inter-institutional nature, the appeals of Member States and of the institutions of the Union against possible acts or an abstention to the European Council, as well as the appeals proposed by the Committee of the Regions in defense of its prerogatives.

The current division of powers between the EGC and the CJEU is the result of an evolutionary process begun with the establishment of the EGC. The latter, at the time of its institution through Decision 88/591<sup>36</sup>, was born as a special judge, first *ratione materiae*, competent to know in the first instance the actions brought by the agents of the Institutions of the Union in matters of public function and natural persons and juridical in matters of competition, then *ratione personae*, competent to know of all the direct appeals presented by natural and juridical persons, thus becoming a “judge of individuals” starting from the Treaty of Nice of 2001, entered into force in 2003, until to the Treaty of Lisbon and to today, the EGC becomes a “common law judge”, competent at first instance for most of the direct appeals, leaving the CJEU the role of CJEU supreme<sup>37</sup> (in which case the EGC becomes the judge of second degree, according to the provisions of article 256, paragraph 1, TFEU) and, secondly, from the competences reserved to the CJEU by the Statute<sup>38</sup>. The EGC is invested with a generalized, first-level jurisdiction, for most of the direct judgments and therefore acts as a „judge of the fact“, i.e. as a judicial body to which the discussion of complex factual matters is devolved. On the other hand, the CJEU, in addition to the jurisdiction over the appeal of the decisions of the EGC, maintains, at first and only degree, constitutional

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H. GERMELMANN, *Europarecht*, C.H. Beck, 2015.

36 V. TOMLJENović, N. BOBIROGA-VUKORATI, V. BUTORAC MALNAR, I. RUNDA, *European Union competition and State rules: Public and private enforcement*, ed. Springer, 2017.

37 A. TIZZANO, P. IANNUCELLI, *Prémiers applications de la procédure de “rèexamen” devant la Cour de justice de l’Union européenne*, in *Diritto dell’Unione Europea*, 2010, pp. 682ss.

38 K. LENAERTS, *European Union procedural law*, Oxford University Press, 2014, pp. 41-42.

competences, such as the questions referred, in the context of which it exercises a “nomofilattico” function, and some direct appeals concerning constitutional and inter-institutional disputes. In particular, the CJEU pursues, as its principal mission, that of ensuring the uniform interpretation of Union law<sup>39</sup>.

#### 4 DOUBLING OF THE NUMBER OF JUDGES OF THE EGC AND LACK OF NEW SPECIALIZED COURTS

At the end of a long and very vigorous legislative process (the original CJEU request to increase the number of judges of the EGC by twelve), the EP and the Council agreed to double EGC members: in view of the substantial inability of the national governments to agree on the method of “dividing” between them a number of judges inferior to that of the Member States (whether it was a draw or rotation between States, the meritocratic choice of candidates to ensure a balanced geographical representation and demographic of the member countries or, again, of a system similar to that which operates for the advocates general, six of which are permanently attributed to the so-called large states and five of which “rotate” among the remaining twenty-two member States), the only viable path to overcome the (presumed or real) difficulties related to the EGC dispute (first of all, the excessive workload and the excessive outcome of the proceedings, as well as the constant increase in the variety of subjects and the technical complexity of the cases to be dealt with) was that of duplicating, as anticipated, the staff of this court order, attributing a second judge to each Member State<sup>40</sup>. This solution was

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39 K. LENAERTS, I. MASELIS, K. GUTMAN, *European Union procedural law*, Oxford University Press, 2014, pp. 303ss.

40 F. DEHOUSSE, *The reform of the EU Courts (I): The need of a management approach*, in *Egmont Paper*, n. 53, December 2011. R. ROUSSELOT, *Tribunal: Une réforme du statut de la Cour de justice de l’Union européenne en demi-teinte*, in *European Papers*, 2016, pp. 275ss. A. ALEMANNI, L. PECH, *Thinking justice outside the docket: A critical assessment of the reform of the EU’s Court system*, in *Common Market Law Review*, 2017, pp. 130ss. C. FRIEDRICH, *Les vicissitudes de la juridiction européenne: une réforme confisquée par*

reached with the only modification of the Statute of the CJEU, at the request of the same CJEU, in accordance with the rules of art. 281 TFEU and, therefore, without the need to resort to a revision of the Treaties pursuant to art. 48 TEU, but on the basis of a (simpler) resolution by the EP and the Council, as mentioned, which have adopted, by an ordinary legislative procedure, Regulation (EU, EAEC) 2015/2422<sup>41</sup>. It should be noted, incidentally, that similar procedure is required for the creation of new specialized courts pursuant to art. 257 TFEU and should be followed to transfer the preliminary ruling competence to the EGC pursuant to article 256, par. 3, TFEU (which, as seen, refers to the transfer in „matters determined by the Statute“, which can also be modified in this case pursuant to ex article 281 TFEU by ordinary legislative procedure).

Thus, after four years from the original proposal of 2011, the Regulation in question has doubled the number of EGC judges in three phases. The modified art. 48 Statute provides, in fact, (i) the appointment of twelve additional judges from the date of entry into force of the regulation itself (i.e. December 25, 2015); (ii) the entry into operation of seven other judges from 1 September 2016 (in conjunction with what should have been the partial renewal of the EUCST, which is actually „absorbed“ in the EGC, in the sense that the seven Member States that had a judge of their nationality in office at the time of the dissolution of the EUCST obtained the second judge to the EGC on this date); (iii) a composition of the EGC equivalent to two judges per Member State from 1 September 2019 (concurrent with the partial renewal of that court request)<sup>42</sup>. To complete the three

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la Cour de justice, in *Revue de Droit de l'Union Européenne*, 2017, pp. 114ss. M.P. GRANGER, E. GUINCHARD, Introduction: The dos and don'ts of judicial reform in the European Union, op. cit. L. COUTRON, The changes to the general Court, in E. GUINCHARD, M.P. GRANGER (ed), *The new EU judiciary*, op. cit.

41 V. CONSTANTINESCO, *La reforma del Tribunal General de la Unión Europea*, in *Teoría y Realidad Constitucional*, 2017, pp. 552ss.

42 It is interesting to note what was stated in recital n. 10 of Regulation 2015/2422, according to which “in order to guarantee the effectiveness in terms of costs, this circumstance [the doubling] should not involve the recruitment of additional referendums nor of other support

phases-with the exit of the United Kingdom (which will not identify its second judge, and whose judge in office on the date of Brexit will cease to function) and in the absence of new Member States entrances-the number of judges it should therefore be fifty-four.

Lastly, the choice of doubling instead of specialization was justified by the same reasons of effectiveness, urgency, flexibility and coherence that justified the original proposal to increase twelve units. Economic reasons have also led to this, deeming the increase in the number of judges *de facto* less expensive than the support for costs related to compensation for damages for those who, affected by the unreasonable duration of the proceedings in which they were involved, had initiated an action of non-contractual liability of the Union pursuant to art. 268 TFEU. To be sure, this type of litigation has not “exploded” as it was feared and the first (few) decisions of the EGC that have ascertained this responsibility<sup>43</sup> are the subject of appeal before the CJEU, which is not said to confirm the amount of compensation imposed by the judge of first instance. It will undoubtedly be interesting to verify what the CJEU’s attitude will be in this regard; and it will be equally interesting to check whether-against the failure to create specialized courts and the increased competence of the EGC-there will be a progressive specialization within it. Indications in this last sense could already be contained in the report that the CJEU, with the help of an external consultant, is called to present-pursuant to art. 3 of the aforementioned Regulation 2015/242-by 26 December 2020. This is

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staff. Internal reorganization measures within the institution should ensure efficient use of existing human resources, which should be the same for all judges, without prejudice to the decisions of the EGC regarding its internal organization”.

43 See the next cases: T-577/14, *Gascogne Sack Deutschland and Gascogne v. European Union* of 10 January 2017; T-479/14, *Kendrion v. European Union* of 1<sup>st</sup> February 2017; T-40/15, *ASPLA and Armando Álvarez v. European Union* of 17 February 2017; T-673/15, *Guardian Europe Sàrl v. European Commission and CJEU* of 7 June 2017; T-725/14, *Aalberts Industries NV v. European Union* of 1<sup>st</sup> February 2017. Cfr. R. SCHÜTZE, T. TRIDIMAS, *Oxford principles of European Union law*, op. cit., A. KACZROWSKA-IRELAND, *European Union law*, ed. Routledge, 2016, pag. 517. E. BERRY, J. HOMEWOOD, B. BOGUSZ, *Complete European Union law: Text, cases and materials*, Oxford University Press, 2017, pag. 342.

a report (addressed to the EP, the Council and the EC) on the functioning of the EGC, which will have to focus on “the efficiency of the EGC, the necessity and the effectiveness of the increase in the number of judges (...), the use and efficiency of resources and the establishment of further specialized sections and/or other structural changes”<sup>44</sup> and which may lead to the presentation of new legislative requests to amend the Statute accordingly.

## 5 FAILURE TO TRANSFER THE PRELIMINARY RULING TO THE EGC

The decision to increase the number of EGC judges instead of creating specialized courts seems to justify (if not in some way impose and, therefore, to presage) the subsequent choice not to transfer the jurisdiction to the judge (now again) of first treatment<sup>45</sup>. Not going along the road of the creation of the Courts specialized in matters that, in fact, could (if not) be the same in which the jurisdiction for preliminary ruling would have been transferred to the EGC (so as to recognize them respectively in the last and in only one line), the choice of not proceeding with such a result seems to be consequential („related“-also in the drawing of Treaty of Nice) transfer. To transfer the sole jurisdiction for a preliminary ruling to the non-creation of specialized Courts would imply that the EGC would have such jurisdiction over matters in which it would be invested in direct actions at first instance, with subsequent appeals to the CJEU and the risk of conflicting decisions. This can be overcome by recourse to the institute for review (or the referral of the judgment from EGC to CJEU pursuant to article 256, paragraph 3, TFEU)<sup>46</sup> or by suspension of the proceedings before the EGC

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44 ÖBERG, M. ALIAND, P. SABOURET, On specialisation of Chambers at the General Court, in M. DERLÉN, J. LINDHOLM (eds), *The Court of Justice of the European Union: Multidisciplinary perspectives*, Hart Publishing, 2018.

45 M. DERLÉN, J. LINDHOLM, *The Court of Justice of the European Union: Multidisciplinary perspectives*, op. cit., pp. 125ss.

46 G. VANDERSANDEN, *Renvoi préjudiciel en droit européen*, ed. Bruylant, 2013. A. TURMO,

pending the decision of the CJEU; but with solutions that are not efficient with a view to ensuring effective and timely judicial protection<sup>47</sup>. The report submitted by the CJEU on 14 December 2017 does not address the interrelation between the two amendments in question and merely considers that, at least for the time being, it is not appropriate to transfer the jurisdiction to the EGC for a preliminary ruling on several grounds, one of which—the one based on the risk of confusion that would be created for national jurisdictions, which could be discouraged by the preliminary reference—already enucleated in the proposal of March 2011 aimed at the increase of twelve units of the judges of EGC<sup>48</sup>.

The CJEU, before explaining the reasons that led it to exclude the necessity (for the moment) of the transfer of preliminary rulings, highlights the diversity of the current context with respect to that which led the constituent in Nice to envisage this transfer<sup>49</sup>. It is not excluded, however, that in the face of an increase in

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L'autorité de la chose jugée en droit de l'Union européenne, ed. Bruylant, 2017. NEFRAMI, Renvoi préjudiciel et marge d'appréciation du juge national, ed. Larcier, 2015.

47 J. AZIZI, Opportunities and limits for the transfer of preliminary reference proceedings to the Court of First Instance, in I. PERNICE, J. KOKOTT, C. SAUNDERS (eds.), *The future of the european judicial system in a comparative perspective*, ed. Nomos, 2006, pp. 242ss. K. LENAERTS, The unity of European Law and the overload of the ECJ—The system of preliminary rulings revisited, in I. PERNICE, J. KOKOTT, C. SAUNDERS (eds.), *The future of the european judicial system in a comparative perspective*, op. cit., pp. 212ss. K. LENAERTS, The rule of law and the coherence of the judicial system of the European Union, in *Common Market Law Review*, 2007, pp. 1265ss. M. BROBERG, N. FENGER, *Preliminary references to the European Court of Justice*, Oxford University Press, 2014. P. CRAIG, UK, *EU and global administrative law: Foundation and challenges*, Cambridge University Press, 2015. T. VON DANWITZ, The rule of law in the recent jurisprudence of the ECJ, in *Fordham International Law Journal*, 2014, pp. 1316ss.

48 N. BERMEJO GUTTIEREZ, *La reforma del Tribunal General de la Unión europea*, in *Almacén de Derecho*, 17 de mayo 2016.

49 See the next cases C-245/09 *Omalet NV v. Rijksdienst voor sociale Zekerheid* of 22 December 2010; C-268/15, *Ullens de Schooten and Rezabek v. Belgium* of 20 September 2011; C-250/08 of 1<sup>st</sup> December 2011; C-601/14, *European Commission v. Italy* of 11 October 2016; C-313/12, *G. Romeo* of 7 November 2013, para. 26; C-583/10, *United States of America v. C. Nolan* of 18 October 2012, paras. 47 and 48; C-488/13, *Parva Investitsionna Banka and others v. “Ear Proparti Development-v nesastoyatelnost” AD e Sindik na “Ear Proparti Development-v*

the competences of the Union-and consequently in areas in which the „European“ legislator intervenes (the example of the European Public Prosecutor’s Office) and the complexity (as well as the number) of the questions raised-it is necessary to reflect on the appropriateness of a partial transfer of jurisdiction to the EGC for a preliminary ruling. The first disadvantage that the CJEU cites to justify the non-transfer consists in the difficulty of identifying with sufficient precision matters to be devolved to the preliminary ruling competence of the EGC. You could think of technical subjects (the report mentions: customs, tariffs, social security and indirect taxation)-but you could also add subjects that the EGC deals with predominantly, such as intellectual property litigation-and focus the top management body on essential subjects (citizenship, internal market, SLSG, economic and monetary integration). But the CJEU shows how often the border is not clearly traceable and how, even behind apparently technical and circumscribed issues, we can hide transversal and principled issues. It should not be forgotten that, to remedy situations of this kind (which could undermine the confidence of the national courts in the CJEU), one could resort to the institute of postponement or, at the limit, to that of the ex art. 256, par. 3, TFEU. But CJEU believes that often only at a late stage could the EGC be aware of the constitutional relevance of the matter submitted

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nesastoyatelnost” AD of 9 September 2014, para. 30; C-246/14, *De Bellis and others v. Istituto Nazionale di Previdenza per i Dipendenti dell’Amministrazione Pubblica* (Inpdap) of 15 October 2014; C-692/15 to C-694/15, *Security services Srl and others v. Ministero dell’Interno and others* of 12 May 2016, paras. 29-31; C-303/16, *Solar Electric Martinique v. Ministre des finances et des Comptes publics* of 19 October 2017, paras. 25 and 26; C-281/15, *Sahyouni v. Raya Mamish* of 12 May 2017, paras. 28-31 (order). However, the possibility for the referring court to pose a new question and give further clarification remains open. See, e.g. with regard to that later case, a follow up case, in which AG Saugmandsgaard Øe delivered his opinion considering that the connecting factor is given (opinion delivered in case C-372/16, *Sahyouni* of 14 September 2017). Cfr. V.P. NEAMT, *Member States liability for judicial error resulting in breaches of European Union law*, in *Journal of Legal Studies*, 2016, pp. 66ss. S. PEERS, *European Union justice and home affairs law*, Oxford University Press, 2016. S. WEATHERILL, *Law and values in the European Union*, Oxford University Press, 2016, pp. 32ss. A. ROSAS, L. ARMATI, *European Union constitutional law: An introduction*, Hart Publishing, 2018. S.I. SÁNCHEZ, *Purely internal situations and the limits of European Union law a consolidated case labor, a notion to be abandoned?*, in *European Constitutional Law Review*, 2018, pp. 8ss.

to it and/or the fact that it could undermine the unity and consistency of Union law and the postponement to that. This would imply a significant lengthening of the procedure, whereby national courts could give up on making a reference for a preliminary ruling, thus frustrating the useful effect of the protection mechanism which is at the heart of the judicial architecture of the Union. Alongside this profile of „disincentive“ of the referral<sup>50</sup>, the CJEU points out that the review, which is certainly possible, albeit subject to restrictive conditions, is not a useful tool to resolve any divergences between the EGC and CJEU<sup>51</sup>; and how in no way does a distortion of the institute appear to ensure a review of all decisions of the EGC (which would otherwise deprive the transfer of its benefits, both in terms of easing the workload of the CJEU, and in terms of effectiveness and duration of the preliminary ruling procedures). Another drawback identified by the CJEU to justify the inappropriateness of the transfer of the preliminary ruling consists in the fact that the EGC has always been the judge of direct actions and as such it may have difficulty handling references which have a profoundly different nature and are characterized by the presence of many parts and for the use of all (!) the (in truth, more-if they were to participate more states) official languages during the procedure. It is not sufficient that the possibility of compromising the values of unity or the consistency of European Union law is considered to exist, instead requiring the presence of “serious risks” of violating these values. And always from a restrictive point of view, it must be considered that the existence of conditions for re-examination is object of a double evaluation and with effect at the end of this procedure, jeopardizing the unity or the coherence of the Union law, including the constraint of the referring court.

Moreover, the CJEU highlights the organizational differences between the functioning of the proceedings before the apical judge, where the preliminary

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50 T-40/15, *Plásticos Españoles, SA (ASPLA) and Armando Álvarez v. European Union* of 17 February 2017.

51 B. WAEGENBAUR, *Court of Justice of the EU*, C.H. Beck, 2012.

reference is submitted to a preliminary examination before the general meeting, before being entrusted to a formation judging on the basis of its complexity, and that before the EGC, where the cases are directly attributed by the President of the section to a judge rapporteur. In our opinion, these differences can be surpassed by a modification of the EGC<sup>52</sup>, procedural regulation, and it is certain that it is not difficult for this judicial request to get used to a different management of certain types of cases brought before it: the justification of the CJEU therefore appears (at least) under this unconvincing profile. Finally, the CJEU points out that the transfer is not at all opportune in this historical moment, in consideration of the fact that the EGC is reorganizing its working method in the face of the increase in judges (and the number of cases to be decided) and that the reform launched in 2015 is still in progress and has not yet clearly given all its fruits. According to the CJEU, it is therefore preferable to await the settlement of the „extended“ EGC and only later to re-evaluate the possibility of transfer, even in the face (as mentioned) of the evolution (in terms of number and type) of the preliminary rulings submitted to it in the next years.

## 6 IMPLEMENTATION PROFILES: CRITIQUES AND DOUBTS

The project under examination proposes three types of modifications to the Statute, two concerning the division of jurisdiction over direct actions and a third the system of appeals before the CJEU. They are flanked by “terminological coordination” interventions aimed at eliminating the lexical inconsistencies between the language used in the TFEU after Lisbon and the one (still) used in the Statute<sup>53</sup>.

The first change request concerns art. 51 of the Statute and, consequently, the subsequent art. 61. The CJEU proposes to add a second paragraph to art.

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52 K. LENAERTS, P. VAN NUFFEL, R. BRAY, N. CAMBIEN, *European Union law*, Sweet & Maxwell, 2014. F. MARTUCCI, *Droit de l'Union européenne*, ed. Dalloz, 2017

53 case C-284/16, *Slowakische Republik v. Achmea BV*. of 6 March 2018, par. 37.

51, so as to confer on the EGC the competence “to know, at first instance, the appeals based on the articles 108, paragraph 2, second sub-paragraph, 258 or 259 TFEU, except for what concerns the appeals based on one of these the last two provisions, actions for the purpose of establishing the failure of a Member State to fulfill its obligations under the TEU, Title V of the third part of the TFEU or an act adopted on the basis of that title”<sup>54</sup>. It is also expected that when „the case requires a decision of principle or when exceptional circumstances justify it, the EGC, either *ex officio* or at the request of a party, may refer the case to the CJEU for justice to be decided by the latter. The application referred to in the preceding sub-paragraph shall be presented, as the case may be, in the application initiating the proceedings or within two months of being notified to the defendant”<sup>55</sup>.

In article 61 of the Statute the CJEU proposes, therefore, to add a last sub-paragraph, according to which, by way of derogation from the general rule fixed in the first sub-paragraph of the disposition, “the CJEU examines all the relevant elements in fact and in law and final decision on the dispute when it accepts an appeal against an EGC decision rendered pursuant to article 51, par. 2, of the present Statute”<sup>56</sup>.

The transfer in question is justified primarily because of the similarity between the infringement procedures and the other direct actions that already fall within the competence of the EGC and by virtue of the fact that such procedures often require a broad assessment of complex facts that certain it could be well done (also) by the EGC. It is precisely in this regard that we can question whether the burden of proof on the part of the EC to demonstrate the existence of the state breach could become more stringent, considering that the EGC is the judge of the fact *par excellence*. And even if, in view of the particular complexity of the facts or

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54 B. WAGENBAUR, Court of Justice of the European Union. Commentary on statute and Rules of procedure, C.H. Beck, 2013.

55 P. CRAIG, The Lisbon Treaty: Law, politics and Treaty reform, Oxford University Press, 2010, pp. 139,

56 S.K. SCHMIDT, The European Court of Justice and the policy process. The shadow of case law, Oxford University Press, 2018.

difficulties in law of the case brought before the EGC, it could decide to directly attribute the case to a college composed of five judges instead of three and to make more frequent use (to date there are only five cases, all of which date back) of the “collaboration” of Advocate General. As is known, this judicial request is not permanently assisted by this figure, who nevertheless can perform the function conferred by the Treaty also in proceedings before it pursuant to the provisions of art. 254 TFEU, and specified in articles 3, 30 and 31 of the rules of procedure of the EGC, which, upon the occurrence of the circumstances mentioned, allow for a decision of the plenary conference and subsequent designation by the President that each judge, except the president, vice president and presidents of section of the EGC, may perform the functions of Advocate General in a given case.

With regard to the change request under consideration, what absolutely can not be ignored is the fact that the “material” criterion that the CJEU uses to exclude the possibility of transferring the preliminary ruling to the EGC given the difficulty of enucleating a net line of demarcation between the competences of the two judicial instances is “recovered” to define the division of jurisdiction regarding the infringement procedures. The competence of the EGC would become, in fact, general, only for the infringement procedures concerning aid pursuant to art. 108 TFEU. For appeals promoted pursuant to art. 258 and 259 TFEU, however, there is a considerable limitation of the transfer; significant and, at the same time, lacking in the revision of the statutory provision when compared with the explanations contained in the explanatory report of the proposal. In fact, while the new art. 51, par. 2, of the Statute provides for the maintenance of the competence of the CJEU for cases of violation of obligations established by the TEU or by the provisions of Title VI TFEU related to the SLSG (or by acts adopted in this context) are indicated among the procedures which must remain CJEU (or anyway, among the hypotheses of derogation of the “formally generalized” transfer to the EGC) also the defaults concerning the rules of the Charter of the Fundamental Rights of the European Union (CFREU)<sup>57</sup>.

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57 B. WAGENBAUR, Court of Justice of the European Union. Commentary on statute and Rules of procedure, op. cit.

Why this hypothesis is not clearly included in the text of the new art. 51, par. 2, of the Statute? Moreover, the violation of a provision of CFREU could be detected in any (or almost) infringement procedure (action for infringement) in which, more specifically, the violation of obligations under secondary legislation rules<sup>58</sup> (also) different from those implementation of Title VI TFEU (with respect to which the competence of the CJEU is already set up in the abstract). Is the violation of a CFREU rule sufficient to attribute jurisdiction to the CJEU? Likewise, the violation-in combination with other obligations-of the principle of loyalty cooperation<sup>59</sup> in art. 4, par. 3, TEU, would it also be appropriate in itself to derogate from the transfer of jurisdiction to the EGC? And again, why not leave to the CJEU also the competence on the infringements which consist in the violation of a general principle of Union law? Indeed, there does not seem to be any appropriate reason to justify a difference in treatment between the violation of the rules of the TEU and CFREU, on the one hand, and of the general principles, on the other hand<sup>60</sup>.

However, in the face of these limitations/exceptions, justified by the “constitutional nature” of the offense or the urgency of coming to a decision (urgency

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58 V. KRONENBERGER, M.T. D’ALESSIO, V. PLACCO (eds), *De Rome à Lisbonne: Les juridictions de l’Union européenne à la croisée des chemins. Hommage en l’honneur de P. Mengozzi*, ed. Brill, 2013, pp. 107 and 117ss. K. LENAERTS, J. A. GUTIÉRREZ-FONS, *The place of the Charter in the EU Constitutional edifice*, in S. PEERS, T. HERVEY, J. KENNER, A. WARD (eds), *The EU Charter of Fundamental Rights. A Commentary*, Oxford University Press, 2014, pp. 1560-1568. S. PEERS, T. HERVEY, J. KENNER, *The European Union Charter of fundamental rights: A commentary*, C.H. Beck, Hart Publishing, Nomos, 2014. S. DE VRIES, U. BERNITZ, S. WEATHERILL, *The European Union Charter of fundamental rights as a binding instrument: Five years old and growing*, Bloomsbury Publishing, 2015. H. ANDERSSON, *Dawn raids under challenge: Due process aspects on the European Commission’s dawn raid practices*, Hart Publishing, 2018.

59 M. KLAMERT, *The principle of loyalty in European Union law*, Oxford University Press, 2014. G. DE BAERE, *European Union loyalty as a good faith*, in *International & Comparative Law Quarterly*, 2015, pp. 818ss. T. HORSLEY, *Reflections on the role of the Court of justice as a “motor” of european integration: Legal limits to judicial lawmaking*, in *Common Market Law Review*, 2013, pp. 932ss.

60 S. VOGENAUER, S. WEATHERILL, *General principles of law. European and comparative perspectives*, Hart Publishing, 2017, pp. 138ss.

that conflicts with the double degree of judgment that would be established in the face of such a transfer), how many proceedings actually be attributed to the EGC (also in view of the relatively small number of infringement proceedings referred to annually by the CJEU)?

The same question arises, “strengthened”, following the examination of the second part of the art. 51, par. 2, on the basis of which, as seen, where a decision of principle or in the presence of exceptional circumstances is necessary, the EGC, either *ex officio* or at the request of a party, may refer the case to the CJEU. A mechanism similar to that envisaged by art. 256, par. 3, TFEU as regards the postponement of the decision on a preliminary question, even if in this case it is accepted that the party (EC or Member State, respectively in the appeal or in the defense) may also request such a reference.

The exceptional circumstance is declined “in particular” in “urgency”. This is certainly not an exhaustive indication, other exceptional circumstances may arise, although the wording may appear to be excessively vague and the risk, therefore, is that of covering too much or perhaps too little, based on discretionary decisions by the EGC that are not syndicated. The exceptional circumstances also seem to include that in which the question (and, possibly, on a question closely linked to that) before the EGC in the context of an action for infringement pays a preliminary question of interpretation before the CJEU. These are not frequent cases, but the practice before the CJEU shows that they are there. And although a formal meeting of the cases is not possible, since they are different in nature and the rules of the proceedings arise from a reference for a preliminary ruling and a direct appeal, it is precisely the practice mentioned that the CJEU has pursued similar causes in parallel and has issued sentence on the same day<sup>61</sup>. In the case of

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61 See the next cases: C-429/02, Bacardi France SAS of 13 July 2004; C-262/02, European Commission v. Republic of France of 13 June 2004; C-158/04 and C-159/04, Alfa Vita Vassilopoulos and Carrefour Marinopoulos of 14 September 2006; C-82/05, European Commission v. Hellenic Republic of 14 September 2006; C-76/05, H. Schwarz and Gootjes-Schwarz v. Finanzamt Bergisch Gladbach of 11 September 2007; C-318/05, European Commission v. Federal Republic of Germany of 11 September 2007. See also: R. DE LA FERIA, S. VOENANER, Prohibition

devolution of jurisdiction over infractions to the EGC, it would be appropriate-if not necessary-that they be decided by the CJEU, invested substantially in the same (or closely related) issue with a preliminary reference for interpretation. It would also seem appropriate that this hypothesis of referral (compulsory) should be expressly configured as an autonomous hypothesis in the text of the new art. 51, par. 2, of the Statute. One could therefore also question the appropriateness (or necessity) of proceeding also (or alternatively) to an integration of art. 54, subparagraph 3, of the Statute. As is known, it regulates the hypothesis of suspension and declination of jurisdiction by EGC or CJEU in the case of „connection“ of causes, but in its current formulation it seems to legitimize only a suspension of the procedure by the EGC in case of a similar problem interpretative subject to the scrutiny of the CJEU. Finally, again with regard to the „material“ division of responsibilities between the two judicial authorities, it can be pointed out that the causes pursuant to art. 260, par. 3, TFEU may be less relevant (on a constitutional level) of cases ex art. 258 and 259 TFEU devolved to the EGC (as of today there is still no ruling issued by the CJEU on the basis of this provision and, therefore, it may be early to evaluate the possible transfer of jurisdiction to the EGC). It seems clear, however, that the basic choice of the CJEU is to maintain exclusively the power to impose fines on the Member States, perhaps also in view of the fact that the latter would be unwilling to be sanctioned by the judge of first cure<sup>62</sup>.

Going to the second modification requested by the CJEU, it consists in the introduction of a further (compared to those already provided for in article 51 of the Statute) derogation from the general jurisdiction of the first instance of the

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of abuse of law: A new general principle of European Union law?, Hart Publishing, 2011. C. BARNARD, *The substantive law of the European Union: The four freedoms*, Oxford University Press, 2016, pp. 91ss. C. JANSSENS, *The principle of mutual recognition in European Union law*, Oxford University Press, 2013, pp. 45ss. E. CLOOTS, *National identity in European Union law*, Oxford University Press, 2015, pp. 116ss. L. GRUSZGZYNSKI, W. WERNER, *Deference in international Courts and Tribunals: Standard of review and margin of appreciation*, Oxford University Press, 2014, pp. 43ss. L. AZOULAI, *The question of competence in the European Union*, Oxford University Press, 2014, pp. 169ss.

62 S.K. SCHMIDT, R.N. KELEMEN, *The power of the European Court of Justice*, ed. Routledge, 2013.

EGC. In fact, the modification of par. 1 of this article, reserving the appeals pursuant to ex art. 263 TFEU: “proposed by a Member State against a EC act concerning the failure to properly implement a sentence pronounced by the CJEU”<sup>63</sup> ex art. 260, par. 2 or par. 3, TFEU.

This is a modification that had been discussed within the CJEU-although never formalized-a few years ago, on the basis of indications given by the same top management body in the jurisdiction. In fact, although these are infrequent assumptions (to date there are a few cases<sup>64</sup>), it may happen that a Member State challenges the requests made by the EC in execution of a CJEU ruling imposing a pecuniary sanction pursuant to art. 260, par. 2, TFEU (to date, as mentioned, there are still no judgments issued under article 260, paragraph 3, TFEU, but only a dozen pending proceedings<sup>65</sup>) and that the EC decision on the quantum

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63 H. ANDERSSON, *Dawn raids under challenge: Due process aspects on the European Commission's dawn raid practices*, op. cit.

64 See the next cases: T-33/09, *Portuguese Republic v. European Commission* of 29 March 2011; C-292/11 P, *European Commission v. Portuguese Republic* of 15 January 2014; T-810/14, *Portuguese Republic v. European Commission* of 27 June 2016; T-139/06, *French Republic v. European Commission* of 19 October 2011; T-733/15, *Portuguese Republic v. European Commission* of 28 March 2017; T-268/13, *Italian Republic v. European Commission* of 21 October 2014; T-122/14, *Italian Republic v. European Commission* of 9 June 2016; T-147/16, *Italian Republic v. European Commission* of 28 November 2016. See also: A. JAKAB, D. JOCHENOV, *The enforcement of European Union laws and values: Ensuring Member States compliance*, Oxford University Press, 2017. D.A.O. EDWARD, R. LANE, *Edward and Lane on European Union law*, E. Elgar Publishing, 2013. M. HEDEMANN-ROBINSON, *Enforcement of European Union environmental law: Legal issues and challenges*, ed. Routledge, 2015, pp. 195, 256ss. QC. KELYN BACON, *European Union law of State aid*, Oxford University Press, 2017, pp. 12ss.

65 See the next cases: C-569/17, *European Commission v. Spain* of 27 September 2017; C-27/18, *European Commission v. Republic of Bulgaria* of 1<sup>st</sup> June 2018; C-61/18, *European Commission v. Republic of Bulgaria* of 4 June 2018; C-77/18, *European Commission v. Republic of Austria*, in progress; C-164/18, *European Commission v. Republic of Spain*, in progress; C-165/18, *European Commission v. Spain*, in progress; C-188/18, *European Commission v. Republic of Slovenia* proposal of 12 March 2018; C-207/18, *European Commission v. Spain*, in progress; C-511/16, *European Commission v. Luxembourg* of 6 March 2017; C-381/17, *European Commission v. Republic of Croatia* of 28 March 2018.

due is, in fact, the subject of appeal before the EU judicature. On the basis of the current division of competences, an action for annulment must be brought by the Member State before the EGC; but it is inappropriate for this judge (albeit in the first instance) to assess the execution of the sentence of „condemnation“ and the payment of the amount defined by the CJEU with respect to a certain failure by the same found: it, in fact, would risk invading the exclusive competence of the CJEU in this field and it is therefore more appropriate that the assessment in question be reserved (in one degree) to the top judicial body of the system. Finally, as regards the third amendment proposed by the CJEU, it concerns the introduction of a „preventive procedure for admission of appeals“<sup>66</sup>, which are destined to increase as a consequence of the restoration of the jurisdiction at first instance for disputes in public employment, as well as the increase in the number of judges in that instance and, therefore, in the decisions taken by tThe filtering mechanism is not generalized, i.e. it does not concern all the *pourvois* that, in any matter and with respect to any type of direct appeal, could be established before the CJEU, but only the disputes that have already been examined by “an independent administrative authority”, that is to say, the cases which benefited from an administrative appeal before being brought before the EGC. This is done, reads the explanatory memorandum of the proposal “in particular, for decisions taken on trade marks of European Union Intellectual Property Office (EUIPO)<sup>67</sup>,

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66 R. SCHÜTZE, *European Union law*, Cambridge University Press, 2015.

67 In particular see the next case: C-619/15P, P Mocek, Wenta, KAJMAN irma Handlomo-Uslugowo-Produkcyjna v. EUIPO of 21 June 2016; C-639/15 P, Gat Microencapsulation v. EUIPO of 26 May 2016; C-35/16 P, Matratzen Concord v. EUIPO of 28 April 2016; C-41/16 P, Min Liu v. EUIPO of 8 June 2016; C-43/16 P, Copernicus-Trademarks v. EUIPO of 14 June 2016; C-63/16, Actega Terra v. EUIPO of 24 May 2016; C-77/16 P, Hewlett Packard Development Company v. EUIPO of 26 May 2016; C-87/16 P, Kenzo Tsujimoto v. EUIPO of 21 June 2016; C-94/16 P, LTJ Diffusion v. EUIPO of 15 June 2016; C-272/16 P, Tayto Group v. EUIPO of 27 October 2016; C-285/16 P, Grupo Bimbo v. EUIPO of 13 October 2016; C-313/16 P, Medis v. EUIPO of 19 October 2016; C-351/16 P, 100% Capri Italia v. EUIPO of 10 November 2016; C-361/16 P, Franmax UAB v. EUIPO of 8 November 2016; C-653/15 P, Carsten Bopp v. EUIPO of 7 April 2016; C-88/16 P, European Dynamics v. Entreprise commune européenne pour ITER et le développement de l'énergie de fusion (Fusion for Energy) of 7 July 2016.

where Boards of Appeals exist, but also for decisions of different Union agencies equipped with administrative appeals bodies, such as Community Plant Variety Office (CPVO) or the European Chemicals Agency (ECHA)<sup>68</sup>. In fact it is not a comprehensive list, the articulated cogent of the change using the remainder generically-as anticipated-the expression „independent administrative authority“, which could also raise some „identifying“ problem. The decisions in question have been the subject of a double check of legitimacy and the CJEU is ruling, in fact, in the third instance, in cases where, as practice shows, many appeals are dismissed as manifestly inadmissible or manifestly unfounded, despite the fact that due to their education, using significant resources. According to the CJEU, therefore, the introduction of such a mechanism is very opportune, with the provision of a new art. 58 bis of the Statute, according to which-in compliance with the procedures to be specified in the Procedural Regulation-the appeal is admitted when „it raises, in whole or in part, an important issue for the unit, the coherence the development of the right of the Union“<sup>69</sup>. It is up to the opposing party to demonstrate, with a special deed attached to the appeal, their interest in a ruling by the CJEU in consideration of the reasons mentioned above and to an *ad hoc* section of the CJEU to verify the existence of these conditions-as happens (ed) to the review (where however the request is presented by the first Advocate General and not by the party, but also in this case the top management intervening after two degrees of judgment, those held before the EUCST first, and the EGC, then). The appeal can be admitted even only partially (in this case, as in the case of full admission,

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68 M. CREMONA, C. KILPATRICK, EU legal acts challenges and transformations, op. cit.

69 N. BESEWER, Investment protection in the European Union, ed. Nomos, Dike Verlag, 2017, pp. 125ss. F. WOLLENSCHLAGER, Fundamental rights regimes in the European Union. Contouring their spheres in, Y. NAKANISHI, Contemporary issues in human rights law, ed. Springer, 2018, pp. 24ss.

it will be notified to the other parties to the dispute); the decision to refuse will have to be motivated and will make the decision of the EGC final<sup>70</sup>.

Certainly it will be interesting to verify if the introduction of such a screening mechanism is only the first step of a longer path aimed at extending a preliminary filter to all the appeals, possibly on the model of the leave to appeal outlined in 1999 (together with the idea a possible filter of references for preliminary rulings, based on the criteria of novelty, complexity and importance of the issues raised) in the discussion paper on the future of the European Union’s judicial system. The latter document provided that the appeal request could be justified, as well as in the event of a risk of prejudice to the uniformity and consistency of EU law, to the importance of the appeal “for the development of european law”, but also for that “of the protection of individual rights”, and that it was up to the CJEU to select the *pourvois* to be admitted, examining justified requests for authorization to appeal. This system differs from the one proposed today in the new art. 58 bis of the Statute, but it is not excluded that if you opt for a generalized filtering mechanism, you would end up accepting a solution modeled on the proposal just briefly recalled, which seems best able to meet the needs of efficiency and procedural economy<sup>71</sup>. It is a system that, if you remember, would not in any way violate the principle of due process in its right to a double degree of judgment, which in fact-beyond criminal matters-is not a general principle to be guaranteed always and in any case<sup>72</sup> (as the same jurisdictional system as the original Community also demonstrated

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70 R. SCHÜTZE, *European Union law*, op. cit., pp. 382ss.

71 A.T. THIELE, *Europäisches Prozessrecht Verfahrensrecht vor dem Gerichtshof der Europäischen Union*, C.H. Beck, 2014.

72 See the next cases: C-69/10, *Brahim Samba Diouf v. Ministre du travail, de l’Emploi et de l’Immigration* of 28 July 2011, par. 69; C-169/14, *Juan Carlos Sánchez Morcillo and Maria del Carmen Abril García v. Banco Bilbao Vizcaya Argentaria SA* of 17 July 2014, par. 36; C-464/13 and C-465/13, *Europäische Schule München v. Silvana Oberto and Barbara O’Leary* of 11 March 2015. cfr. S. WEATHERILL, *Principles and practice in European Union sports law*, Oxford University Press, 2017.

for appeals promoted by natural and legal persons and as still today confirms the fact that-although these are appeals promoted by institutional subjects-there are still cases in which the CJEU judges first and only degree).

## **7 A “TRANSVERSAL” INTERPRETATION AND THE FUTURE OF THE EUROPEAN UNION’S JUDICIAL SYSTEM**

The draft reform in question undoubtedly poses fewer “political” problems than those that led to the doubling of the number of EGC judges and therefore seems to be able to affirm that it should be able to be approved more quickly. At that point, the jurisdictional architecture of the Union would be really distorted with respect to the sketch drawn in Nice, as already art. 225 EC (now Article 256 TFEU), in par. 1, finally, that the articles of association may provide that the EGC is competent for categories of (direct) appeals in the first part of the rule and other than the jurisdiction in preliminary rulings, which is addressed by par. 3 of the same forecast. In any case, it should still be in line with-or at least not prejudice-at least two of the three objectives set out by the Group of Experts set up by the EC in 1999 to propose reforms to the Union’s judicial system, in particular to ensure that maintaining uniformity and consistency of EU law and safeguarding the judicial protection afforded to citizens, Member States and institutions, and ensuring that the quality of the process is not undermined. On the contrary, not a few doubts arise-at least in relation to the first of the planned reforms-with regard to the third of the objectives identified by the Group of Experts, consisting of reducing the timing of decisions, possibly strengthening their impact in national laws.

If the project in question can be read as a positive signal to the extent that it reinforces the role (and the perception itself) of the CJEU as a (almost exclusively) “constitutional” (and) judge of the preliminary reference, it raises some doubts about effectiveness of the infringement procedure in a short time. And it seems then to be able to explain not so much in light of the need to reduce the workload of the CJEU-to retain the only (or almost) references for preliminary rulings-but

to give new work to today’s forty-seven (rectius, forty-six, as seen ), and in the near future (as a result of the Brexit) fifty-four, judges of the EGC, thus confirming the need for their (“sweaty”) doubling.

However, even the numbers of the infringement procedures instituted before the CJEU and those that it has decided in recent years have doubts about the real necessity of the reform (or at least reflect on its premature nature), even in the face of the number of causes that would continue to be judged by the apex judge in virtue of the exceptions dictated by the new art. 51, par. 1 of the Statute and the hypothesis of “postponement” of the exercise of the competence from the EGC to the CJEU. And, what is worse, in view of the fact that the “generalized” referral of jurisdiction to the EGC risks reducing the deterrent effectiveness of the infringement procedure, in contrast to the changes that have always been made to it (and to the studies that followed over the years with the aim of finding solutions that would increase their deterrence, indeed, and certainly not reduce it). In fact, the jurisdiction entrusted to the EGC in first instance implies an overall extension of the procedure, the judgments adopted by it being able to be challenged and, therefore, of further scrutiny by the CJEU. It is true that the non-compliance is always crystallized at the expiry of the deadline set in the reasoned opinion, but the State would feel “free” to remain in default longer (or at least that risk is particularly high), until the decision of the CJEU. The disincentive seems to be the circumstance that the appeal does not normally have a suspensive effect and, therefore, the fact that the State should in any case eliminate the infringement already from the moment of its verification by the EGC. Just as it would serve, in our opinion, the corrective-referred to the aforementioned modification of the art. 61 of the Statute—for which the CJEU, in the *pourvoi*, would decide definitively without referring to the EGC: this because two degrees of judgment still require longer times than a single proceeding. Furthermore, the reduction in deterrence would also be found with respect to the possible launch of the second infringement procedure pursuant to art. 260, par. 2, TFEU, also postponed over time, not long-term—noting the fact that the coefficient of duration of the default to calculate the lump sum would in any case be determined in relation to a later time period.

It also can not go unnoticed as this temporal expansion of the procedure would have negative repercussions also on individuals (natural and legal persons): consider, for all, the jurisprudence on the responsibility of the State for violation of EU law which considers proven to be serious and manifest of the violation in the presence of a ruling to ascertain the non-compliance or preliminary ruling (which also identifies the non-compliance of national law with the law of the Union being interpreted)<sup>73</sup>. Evidently, the longer it takes for the EU judge to ascertain the fault of the State, the harder it will be for the individual affected by the breach to prove the most difficult of the three conditions laid down by the Luxembourg court to obtain compensation for the damage suffered, precisely) the serious and manifest violation.

Even this last observation makes it clear that the Member States, on the other hand, should instead welcome the amendment in question, gaining time before it comes to a definitive assessment of the infringement (whose “faults”, even at the level of internal politics, they may perhaps be leaning against the previous or subsequent Government).

In this perspective, if the aim should be to not see reduced the deterrence of the infringement procedure, little meaning would have really generalized, without exceptions and without possible referrals to the CJEU, the competence of the EGC, because in a greater number of cases we would find the negative effects tested. One might rather ask why not to ban the appeals of the decisions issued by the EGC, issued at the end of the infringement procedure. The States would hardly accept to be judged in first and only degree by the EGC, but because to

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73 See the joined cases C-46/93 and C-48/93, *Brasserie du Pêcheur v. Bundesrepublik Deutschland and The Queen v. Secretary of State for Transport, ex parte Factortame and others* of 5 March 1996, par. 57. A. ŁAZOWSKI, S. BLOCKMANS, *Research handbook on European Union Institutions law*, E. Elgar Publishing, 2016.

assure them a double degree of judgment in a procedure that historically has never contemplated it and that, as seen, is not indispensable from the point of view of respect of fundamental rights, not being a criminal matter?<sup>74</sup>

Perhaps, to enhance the role of the EGC (and ensure a workload appropriate to all judges, once it is in full ranks) and avoid an almost systematic appeal of its decisions with a consequent increase (rather than reduction) of the load of the CJEU (which at least formally seems a ratio underlying the reform)<sup>75</sup>, one could then at least envisage a system of filtering the appeals (also) with respect to the rulings of the EGC issued at the outcome of the infringement procedures. The eligibility criteria may be the same or similar to those envisaged by the reform project as regards the postponement of the jurisdiction from the EGC to the CJEU (which in fact coincides with the hypotheses in which article 256, paragraph 3, TFEU provides for a deferral of the preliminary ruling by the trial judge to the CJEU), and in particular the need to make decisions on matters of principle, or constitutional significance, and to ensure the unity and coherence of Union law. It is recalled that the draft reform of the Statute is currently being examined by the EP and the Council and that the position of the EC, called to provide an opinion pursuant to art. 281 TFEU and whose observations have always played an important role in the statutory changes<sup>76</sup>.

Waiting to know the developments of the legislative process, it seems opportune still a brief reflection on the sidelines of the proposal in question,

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74 See the conclusions in case C-526/08, *European Commission v. Grand Duchy of Luxembourg* of 28 January 2010, par. 33. P. RAIG, G. DE BÚRCA, *European Union law: Text, cases and materials*, Oxford University Press, 2015.

75 M. COHEN, *Judges or hostages? The bureaucratisation of the Court of Justice of the European Union and the European Court of Human Rights*, in B. DAVIS, F. NICOLA (eds), *European law stories*, Cambridge University Press, 2017.

76 H. VON DER GROEBEN, J. SCHWARZE, A. HATJE (Hrsg.), *Europäisches Unionsrecht*, ed. Nomos, 2015.

concerning a further modification of the art. 51 of the Statute, also (as the second proposed reform today to be examined by the legislator) discussed internally at CJEU a few years ago, but never formalized. This is a revision aimed at granting the CJEU first and only instance the jurisdiction over damages actions (pursuant to article 268 TFEU)<sup>77</sup> caused by one of the jurisdictions of the CJEU for violation of the principle of reasonable duration of the process. Although the practice has shown that these are marginal cases, since the cases now filed before the EGC due to an unlawful judicial request (although in different composition) are very limited, it is indeed reasonable that the CJEU decided not to submit to the EP. It is in fact quite clear that the current system of division of competences has proved to be absolutely unsatisfactory from the point of view of compliance with the reasonable period of judgment: almost four years after the introduction of compensation actions before the EGC, appeals are still pending before the CJEU.

## 8 CONCLUSIONS

In conclusion, we can say that the modification in question, on the other hand, in the face of a single degree of judgment, would allow us to obtain compensation more quickly, satisfying requirements of procedural economy<sup>78</sup> and impartiality (full) of the judicial body<sup>79</sup>. Of course such impartiality could be

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77 I.N. MILITARU, An action for damages before the Court of Justice of the European Union, in *International Journal of Academic Research in Economics and Management Sciences*, 2013, pp. 195ss. K. GUTMAN, The evolution of the action for damages against the European Union and its place in the system of judicial protection, in *Common Market Law Review*, 2011. D. LECZYKIEWICZ, Enforcement or compensation? Damages actions in European Union after the Draft common frame of reference, in M. KENNY, J. DEVENNEY, *The transformation of European private law*, Cambridge University Press, 2013.

78 case T-577/14, *Gascoigne Sack Deutschland e Gascoigne v. European Union*, op. cit., par. 48

79 See the conclusions of Advocate General Léger in case C-185/95 P, *Baustahlgewebe v. European Commission* of 3 February 1998, par. 70-76.

„cracked“ again where the offense was challenged at the CJEU rather than at the EGC. Since it is not conceivable that the control of the CJEU's work is left to the primary care court, it could not re-propose the current operational solution for the EGC, namely the assessment of the responsibility of the CJEU by a different judicial section the offense is charged<sup>80</sup>. It is true, however, that the cases in which the infringement of the reasonable duration of the trial could be held responsible (exclusively) for the CJEU seem to be very limited. This does not seem to be foreseeable in the proceedings arising from a preliminary reference, given the increasingly reduced (and not further compressible) times in which the CJEU comes to a decision, even if it does not resort to the accelerated procedure or the urgent preliminary ruling procedure, nor does it resolve the case with an order pursuant to art. 99 RP CG, but operate according to the „ordinary“ rules of the preliminary ruling procedure<sup>81</sup>. In direct actions the CJEU has jurisdiction in the first and only degree (today still in all infringement procedures and) with regard to inter-institutional conflicts and appeals promoted by the Member States according to the specifications set forth in art. 51 of the Statute: with respect to this dispute, it does not seem possible to establish an action of non-contractual liability brought by an Institution or, indeed, by a Member State against the Union (assuming that the matter is resolved on a different plan from the strictly legal one)<sup>82</sup>. The same could be said about the possible transfer of jurisdiction to the EGC of the

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80 D.P. DOMENICUCCI, G. MUGUET-POULLENNEC, *À la recherche du temps perdu: Du droit de voir sa cause jugée dans un délai raisonnable, ou, des difficultés de passer de la prévention à la guérison*, in V. GIACOBBO-PEYRONNEL, C. VERDURE (sous la direction de), *Contentieux du droit de la concurrence de l'Union européenne*, ed. Brill, 2017, pp. 623ss and 663ss.

81 G. BECK, *The legal reasoning of the Court of Justice of the European Union*, Hart Publishing, 2012.

82 D. LIAKOPOULOS, *First considerations and discussion of the proposed reform of litigation competences of the Court of Justice of the European Union*, in *International and European Union Legal Matters-working paper series*, 2018.

infringement procedures, with a judgment in the appeal before the CJEU. Finally, and more generally with respect to the *pourvois*-which can also be promoted by natural and juridical persons-the organizational and procedural changes made with the refinery in 2012<sup>83</sup> seem nevertheless to largely avert the risk in question<sup>84</sup>.

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**APROVADO:** 23/10/2018

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83 M.A. GAUDISSERT, La refonte du règlement de procédure de la Cour de justice, in *Cahier de Droit Européenne*, 2012, pp. 603ss. P. IANNUCELLI, La réforme des règles de procédure de la Cour de justice, in *Diritto dell'Unione Europea*, 2013, pp. 107ss. J.A. GUTIERREZ-FONS, Le nouveau règlement de procédure de la Cour de justice au regard du contentieux de l'Union européenne, in S. MAHIEU (sous la direction), *Contentieux de l'Union européenne. Questions choisies*, ed. Brill, 2014, pp. 41ss.

84 See the next cases: C-578/11P, *Deltafina SpA v. European Commission* of 12 June 2014; T-577/14, *Gascoigne Sack Deutschland and Gascoigne v. European Union*, op. cit., par. 48. S. GREER, J. GERARDS, R. SLOWE, *Human rights in the Council of Europe and the European Union. Achievements, trends and challenges*, Cambridge University Press, 2018.