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Will the Civil Service Tribunal be sacrificed to the whims of the Member States?

Giving in to a sweeping tide of intergovernmentalism, the Court of Justice is proposing to abolish the Civil Service Tribunal (CST) and to double the number of judges of the General Court!!

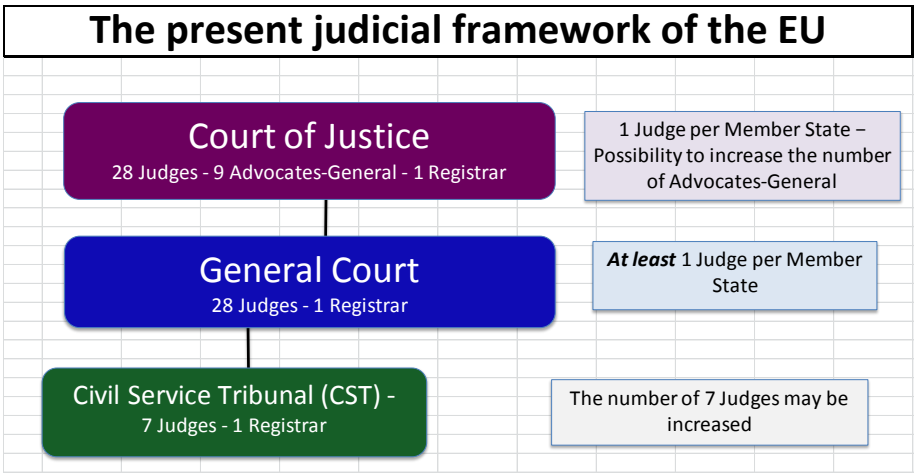

Diagram 1

The Court of Justice of the EU, considered as an Institution, presently consists of three courts, which are shown in **Diagram 1**. The third of these was set up in 2004, following the adoption of the Treaty of Nice in 2001.

2000– Before even the signing of the Treaty of Nice, which opened the way to establishing '**specialised courts'** (now Article 257 TFEU), Member States asked (Declaration No 16) the Court of Justice and the Commission to prepare as swiftly as possible a draft decision establishing a 'judicial panel' entrusted with settling civil service disputes. This intention was not subject to any '*re-evaluation'* clause (unlike Declaration No 14).

The European constituent power thus expressed its will to create **three levels of jurisdiction**, while calling for the immediate creation of a civil service tribunal.

2004– Adopted by the Council, backed by a positive opinion from the Court of Justice, Decision 2004/752 establishing the CST recites that '[*the establishment of a specific judicial panel to exercise jurisdiction* […] *in European civil service disputes* […] *would improve the operation of the Community courts system*'.

An innovation of the CST

As for the **appointment of the 7 judges** of this new court, an original mechanism was introduced: contrary to what happens with the Court of Justice and the General Court, where each Member State chooses its own candidate, for the CST it is the candidates themselves who apply directly for the job; a selection committee draws up a list with twice as many candidates as the judges to be appointed by the Council; it is the first judicial body of the Union whose composition is at odds with the intergovernmental approach.

The Member States regretted giving up even a small part of their prerogatives, which adds to the reasons that push them to destroying this small court that is not shaped in the image of the Council.

Furthermore, the case-law of the CST has been marked by some progress in favour of staff, a tendency which will probably be abandoned if staff cases are put again in the same basket as competition cases.

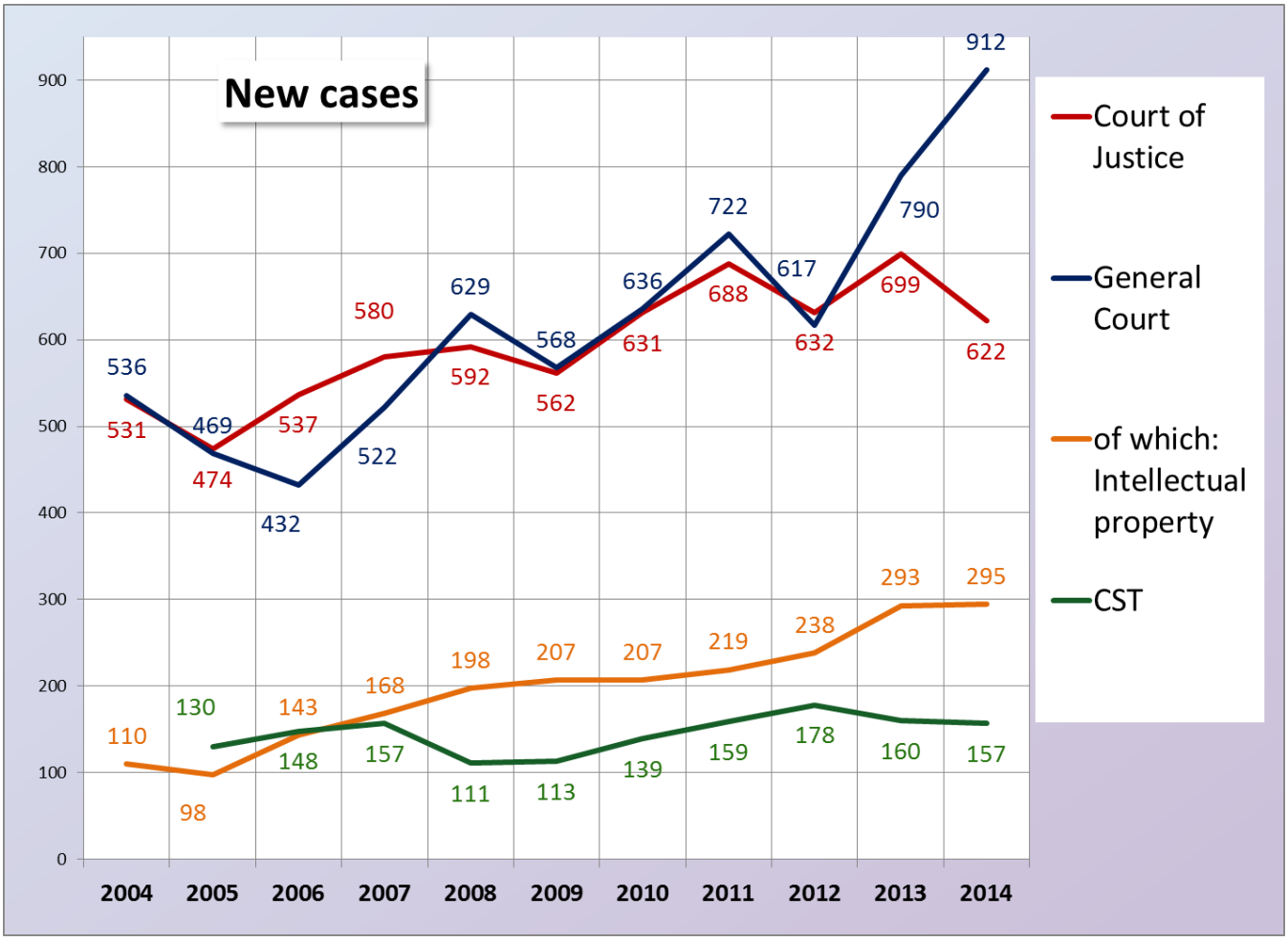

Diagram 2

When the number of judges does not match the composition of the Council …

2011– Faced with an increasing case burden (see **Diagram 2**), which sometimes entails excessively lengthy proceedings, the Court of Justice asked the EU legislature **to increase the number of judges of the General Court**. The Commission, Parliament and Council agreed in principle, ***but***… diverging views of the Member States as to how to appoint additional judges proved impossible to reconcile!

2014– The Court of Justice takes note of the conclusion of the Council's Greek presidency that *'any solution involving fewer Judges than the number of Member States and, consequently, requiring a choice to be made between Member States, would encounter the same difficulties as those which, in recent years, have prevented agreement from being reached in the Council'*".

Similar 'difficulties' have prevented Member States from reaching agreement on appointing the judges of the CST.

Conclusion: Whenever the number of judges departs from the sacred number 28 or a multiple of this number, the legislative process is bogged down by the whims of the Member States, to the detriment of the Institution, its staff and the litigants.

In search of the sacred number 28

Without expressing the slightest reservation over national egoism and the cavalier attitude of the Member States, the Court strives to satisfy them.

By way of a '**legislative initiative'** (which the Treaty curiously confers on a judiciary appointed by the executive power, which will then conveniently hide behind 'expert opinion'), it proposes to add to the General Court the sacred number of 28 judges, in three stages (see Diagram 3), so that everything would fall into what, in the Council's mind, appears to be the 'natural' order, shaped on its own intergovernmental image.

In the process, the CST would be abolished and civil service cases would return to square one, the General Court; with no legal basis, given that the Treaty (Art. 257) provides for 'establishing ', but not for 'abolishing' a specialised court. Article 257 TFEU would henceforth become a dead letter.

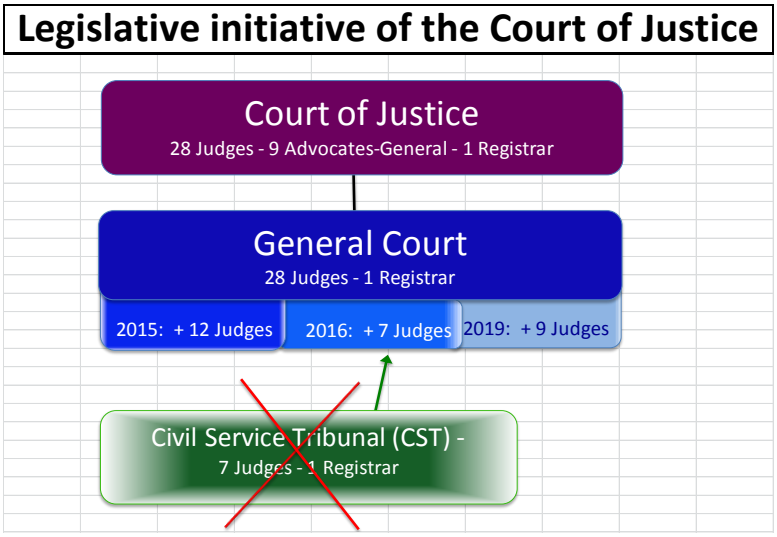

Diagram 3

Constitutional drift

But the bickering of the Member States over the sharing of attractive jobs of additional judges is not enough in itself to explain this constitutional drift: Can the judiciary take the liberty: i) to take a legislative initiative with no legal basis? ii) to render a Treaty provision inoperative (and pave the way for formally repealing it at the next opportunity of Treaty revision)?

Besides, the quarrel about figures converged with the centralist approach that the top officers of the institution have regarding the judicial structure of the Union: the President and the Vice-President of the Court had already expressed the view that Article 257 of the Treaty, which provides for the creation of 'specialised courts', was a 'bad article', which should not be applied.

Yet another illustration of the confusion of powers which reigns in our European Union, which should be corrected by amending the Treaties as regards the composition of the Court following the example of the European Court of Human Rights, where each State shall submit a list of three candidates; following a scrutiny of the list of candidates, it is the Parliamentary Assembly that **elects** the judge for a non-renewable term of nine years. In this way the appointment of judges is based on democratic legitimacy and greater independence.

A discussion of the deaf

'Lack of alternatives' says the Court of Justice! However, in an analytical document, the General Court takes the opposite view. **Alternatives do exist**, which are less expensive and more efficient, since they rely on specialisation, more respectful of litigants' rights and legally indisputable. Under Article 257 of the Treaty once again, the General Court proposes the creation of a specialised court for trademarks and designs, using the same formula as for the CST (see Diagram 4).

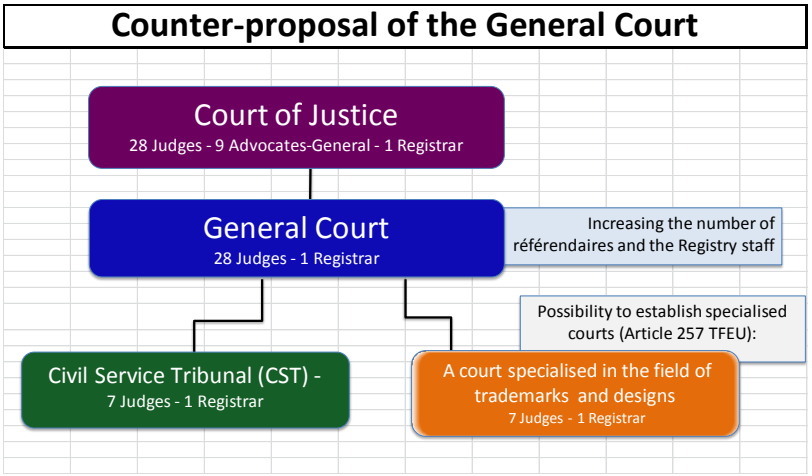

Diagram 4

The General Court has no specialised chambers within its own structure and does not want to have any. Indeed, if the Court of Justice's plan were to be adopted, setting up 'labour disputes' Chambers within the General Court would do nothing more than perpetuate the Member States' quarrel:

In a court in which Economic Law and huge financial stakes prevail, **Civil Service cases would look like a poor relative**, unrewarding for the judges who would be placed in these Chambers, and who would no longer be chosen on the criterion of their specialising in the field of the Civil Service.

As for appeals on points of law, which would henceforth be of the exclusive competence of the Court of Justice, plans for swiftly determining cases are under consideration (increased use of Orders, filtering appeals, etc.).

Wasting money

Member States are not known to be particularly sensitive about democratic legitimacy and the separation of powers nor about understanding the way institutions, and the administration of justice in particular, work, but they are known to be particularly hair-splitting about budgetary savings; except, it seems, when it comes to increasing the highest political jobs to be distributed among their own governments.

But the formula that seems to be taking shape would be a blatant example of waste of budget resources: each Member State would be entitled to two judges, governments would fully recover their prerogative to appoint judges of their choice; furthermore, to offset this mess, the Council's revised proposal would reduce the number of legal secretaries (*référendaires*) and assistants per cabinet. Anyone familiar with the way of functioning of the institution understands that the common sense solution would be to do the opposite: increase the number of staff without modification of the structures or, alternatively, create a specialised court for trademarks.

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