The Many-Faced Court: The Value of Participation in Annulment Proceedings

Krajewski, Michal Andrzej

Published in:
European Constitutional Law Review

Publication date:
2019

Document version
Peer reviewed version

Citation for published version (APA):
The Many-Faced Court: 
The Value of Participation in Annulment Proceedings
Michał Krajewski*

European Court of Justice – General Court – EU procedural law and practice – Procedural rights of the parties to judicial proceedings before the EU Courts – Participation of the parties to judicial proceedings and the legitimacy of judicial decisions – Accuracy of decision-making, the right to a hearing and procedural economy as guiding values of EU procedural law and practice – Different procedural practices of the General Court and the Court of Justice – The filtering of appeals by the Court of Justice – The accountability of the EU Courts for their procedural law and standards

Introduction: Who Sets the Guiding Values of EU Procedural Law?
Procedural law is often regarded as a set of technicalities. However, discrete procedural arrangements reflect underlying assumptions regarding the court’s legitimacy and the role of litigants.1 By pursuing specific values, procedural law shapes the legitimacy of court decisions and the entire legal order. Fuller has argued that the active participation of the parties lies at the heart of judicial procedure. Party participation is a distinctive quality of adjudication, as a decision-making method, as opposed to negotiations or voting in a parliament. It consists of advancing arguments and adducing evidence before an impartial arbiter.2 On the one hand, it facilitates the arbiter’s task; on the other, it provides the parties with reasons to trust that they might genuinely influence the decision that will affect them. Therefore, participation becomes a core building block of judicial legitimacy in the normative sense: it provides the parties and the general public with moral reasons to perceive court decisions as binding sources of legitimate authority.3

Procedural law secures the participation of the parties in judicial proceedings. Thus, it structures and constrains the exercise of judicial power. This is why in continental Europe it is usually enacted in the form of parliamentary legislation: comprehensive codes of civil and criminal procedure or statutes regulating proceedings before administrative and constitutional courts.4 EU procedural law,5 on the contrary, is scattered among sundry primary and secondary sources. But in fact, the EU judicature retains dominant control over its creation and application. First of all, the EU judicature dictates the

---

5 K. Lenaerts, I. Maselis, K. Gutman, EU Procedural Law (Oxford University Press 2014) p. vii. These authors define EU procedural law as that which sets out the remedies and mechanisms available to enforce EU law in the EU Courts to obtain judicial protection against unlawful action on the part of EU institutions and bodies.
interpretation of Treaty provisions relating to its own powers. Moreover, the Court of Justice has the right to propose amendments to the Statute of EU Courts, a protocol attached to the Treaties that can, however, be modified via the ordinary legislative procedure. The Court of Justice has, in practice, a considerable impact on the amendment process. Furthermore, the Court of Justice and the General Court adopt their own rules of procedure, which concretise the procedural rights and obligations of the parties (hereinafter, ‘RPCJ’ and ‘RPGC’ respectively). While the rules of procedure need approval by the Council, the Council largely seems to follow the EU Courts’ proposals. Importantly, there are no rules delimiting the scope of matters to be regulated by, respectively, the Statute and the rules of procedure. Hence, in theory, the EU Courts can choose freely where to regulate a given matter. Finally, there is no external review of fair trial standards applied by the EU Courts. It is the EU Courts that must occasionally rule on the compliance of procedural rules – enacted by themselves – with fundamental rights. The cumulation by the EU judicature of different kinds of power over EU procedural law, predominantly composed of provisions drafted and approved behind closed doors, could raise doubts as to the democratic legitimacy of EU procedural law.

How the EU Courts apply their procedural law in practice is a separate matter. Various public documents and extra-judicial statements of the EU Courts’ members suggest that the EU Courts have embraced efficiency as the main yardstick of their activity. Admittedly, efficiency would seem to imply

---

6 Article 47 of the EU Charter of Fundamental Rights, Article 19 TEU and Articles 251-284 TFEU.
7 Protocol n° 3 to the Treaties on the Statute of the Court of Justice of the European Union.
8 Article 281 TFEU.
11 Article 253(6) TFEU and Article 254(5) TFEU. The draft of the RPGC must be approved by the ECJ, Article 254(5) TFEU.
13 Keppenne, supra n. 4, p. 356. In the course of the last process of amending the Statute aimed at introducing the filtering of appeals from the General Court’s rulings lodged at the Court of Justice (see, Section 5.2. below), the Commission asked for draft rules of procedure implementing the new device without waiting the adoption of the relevant provision of the Statute. See, Commission, supra n. 9, para 38.
14 Such a review could be provided by the ECHR under Article 6 ECHR, following the EU accession to the ECHR.
15 For instance, regarding the prohibition against being represented by an in-house lawyer, ECJ 24 November 2016, Case C-464/16 P, PITEE v Commission, paras. 10-14 and 23-36. Regarding the obligation to lodge submissions in the EU Courts’ headquarters, ECJ 23 April 2013, Case C-478/11 P, Laurent Gbagbo et al. v Council, para 63. On the possibility to dispense with the oral hearing and optional procedural steps, see, ECJ 19 July 2017, Case C-666/16 P, Lysoform v ECHA, paras. 35-46.
17 Sarmiento sees efficiency as the leitmotif of Skouris’s presidency, D. Sarmiento, ‘The Skouris legacy and the Skouris Court’, Despite Our Differences, 8 October 2015, https://despiteourdifferencesblog.wordpress.com/2015/10/08/the-skouris-
an appropriate balance between the costs of proceedings and quality of decision-making. But, for instance, the reasoning given to back up a major procedural reform of the General Court completed in 2015, which has affected the procedural rights of the parties, was replete with efficiency-related rhetoric: ‘maximum effectiveness with minimum resources’, ‘a significant increase in the number of cases disposed’, ‘a need for increased judicial productivity’, ‘heavy budgetary constraints faced by the institution’, while not mentioning fair trial equally often. Also, other EU institutions and the Member States have been calling upon the EU judicature to improve efficiency and expedite proceedings.

The effects of multiple efficiency-oriented reforms of EU procedural law coupled with the limited accountability of the EU Courts for their procedural rules and practices – should attract scholarly attention. EU procedural law has hitherto escaped the attention of theorists, being rather the object of practice-oriented doctrinal studies. Relying on empirical data, this article aims to map the tendencies regarding the participation of the parties in Article 263(4) TFEU annulment proceedings brought by private applicants. The active participation of the applicants in annulment proceedings is particularly significant as it is protected under the fundamental right to a fair trial guaranteed by Article 47 of the Charter. The participation of the parties is enabled by means of several procedural tools: two exchanges of written pleadings, an oral hearing, measures of organisation of procedure (e.g. written questions) or comments on evidence. It can also be curtailed if the case is promptly dismissed as manifestly bound to fail. Whether some of the said procedural tools enabling or curtailing participation can be used depends on a case-by-case discretionary appraisal by the judges, the rules of procedure providing only very general criteria in this respect. Therefore, a study of participation in procedures

---

24 Articles 76-83 RPGC; Articles 167-175 RPCJ.
25 Articles 106-115 RPGC; Articles 76-85 RPCJ.
26 Articles 89-90 RPGC; Articles 61-62 RPCJ.
27 Article 91 et seq. RPGC; Articles 63 et seq. RPCJ.
28 Article 126 RPGC; Article 180 RPCJ.
before the EU Courts cannot solely rely on the text of procedural rules and case law but must also involve an empirical inquiry.\textsuperscript{29}

This article analyses data disclosed by the Registries of the Court of Justice and the General Court relating to the use of procedural tools for participation. The data cover annulment proceedings brought by private applicants under Article 263(4) TFEU and completed between 2014 and 2016.\textsuperscript{30} The analysis is corroborated by a series of semi-structured interviews with twelve members of the institution – EU judges and their legal secretaries – carried out between April and July 2017.\textsuperscript{31} The interviewees were asked to describe the circumstances under and the purposes for which the EU Courts use the indicated procedural tools enabling or curtailing participation. The article also analyses documents that shed light on the EU Courts’ procedural practices: internal procedural guidelines, received within the regime of public access to documents, and the motives of draft rules of procedures submitted within the recent reforms.

This article is structured in the following way. The first section discusses theoretical accounts of a connection between the course of procedure, including the participation of the parties, and the legitimacy of judicial decisions. The second section analyses the adversarial logic of annulment proceedings, which is primarily aimed at procedural economy yet can make the system of judicial review vulnerable to mistakes committed by lawyers representing the applicants. The third section explores the first-instance proceedings before the General Court. It demonstrates that the General Court rarely uses the option to dispense of a case without allowing the parties to expand upon their arguments in writing and at the oral hearing. Following the efficiency-oriented procedural reforms, the General Court still makes extensive use of the tools for participation, even the optional ones aimed at promoting the accuracy of decision-making but also arguably recognising an intrinsic right to a genuine hearing. The fourth section explores appellate proceedings before the Court of Justice, in which the parties enjoy considerably fewer opportunities for participation and may soon be faced with the rejection of their appeal by means of a new procedural device aimed at filtering appeals. The fifth section concludes that, due to their differing procedural practices, two EU Courts focus on tasks that are different in part: the legal protection of private parties and uniformity in the application of law. Be that as it may, EU judges have instruments to determine, in a fairly autonomous way, the course of EU judicial proceedings. The issue of procedural rights before the EU Courts, due to its close link to judicial legitimacy, should be further monitored.

\textsuperscript{29} The data do not cover intellectual property cases (mostly regarding trademarks) which are governed by a distinct procedural regime. See, Article 171 ff RPGC. On the study of judicial practices at international courts, see, J. Dunoff, M. A. Pollack, 'International Judicial Practices: Opening the “Black Box” of International Courts’, 40 Michigan Journal of International Law (2018), p. 47-113.

\textsuperscript{30} Carried out under both the previous and the current RPGC. The latter entered into force on 1 July 2015.

\textsuperscript{31} Several interviewees changed positions at the EU Courts in the course of their careers. Five interviewees were judges at the General Court; four were legal secretaries at the General Court; one was a member of the Court of Justice; five were legal secretaries at the Court of Justice; one occupied another position.
Procedure and Legitimacy

Theorists distinguish at least three objectives, also called ‘process values’, that decision-making processes should pursue to enhance the legitimacy of their outcomes. In other words, it has been argued that the course of procedures can provide decision-makers, such as courts, with legitimating assets, i.e. argumentative resources that decision-makers can later invoke in support of the legitimacy of their decisions.

First, procedures should guarantee accuracy in the application of law to the facts of the case. The active participation of the parties is seen as instrumentally useful inasmuch as it enables data collection. The parties have the best knowledge of their own case. Wishing to influence the judgment, they advance legal arguments and adduce evidence which the court may not be able to identify or gather on its own. Accordingly, applicants for judicial review supply courts with the data necessary to review the legality of law, rule or decision-making acts adopted by political or administrative bodies. Acting in their own interest, applicants contribute to the public interest by enabling courts to provide law, rule or decision-making bodies with instruction for the future and ensure uniformity in the application of law.

Second, procedures should provide opportunities for a hearing of the parties, their grievances and arguments. It has been argued that a genuine hearing has an intrinsic value related to personal dignity and autonomy. The participation of the parties is not only instrumentally useful; the notion that those affected by a decision should have the option to participate in the process by which the decision is made reflects nothing less than a moral obligation. In a more radical version of this theory, the very idea of a correct or, rather, legitimate court decision must be understood as a function of a process that warrants equal participation. Only if the parties deem that their arguments have been genuinely heard and considered do they have rational reasons to perceive themselves as morally obliged to comply with the decision, irrespective of its substance. Accordingly, the task of a judicial review procedure is to assure applicants that they will be able to voice their grievances, engage in reasoned deliberation with the institution they are challenging, and induce a genuine reconsideration of the impugned acts by an impartial court.

---

35 Fuller, supra n. 2 p. 382-385; Solum, supra n. 3 p. 244-252; D. J. Galligan, Due Process and Fair Procedures: A Study of Administrative Procedures (Clarendon Press 1996).
38 Galligan, supra n. 35 p. 10 and 130-162.
40 Solum, supra n. 2, p. 259.
41 Ibid., p. 260. Rawls calls this model ‘pure procedural justice’. Rawls, supra n. 34 p. 86.
Third, procedures should take procedural economy into account. They cannot aim for perfect accuracy or unlimited opportunities for hearing due to limited resources and time. They should rationalise the costs incurred by the court and the parties to proceedings, as well as third parties, especially the costs generated by lengthy proceedings and ensuing legal uncertainty.\footnote{Hovell, supra n. 32 p. 63-64 and the literature cited. A model which balances accuracy and procedural economy is called by Rawls ‘imperfect procedural justice’. See, Rawls, supra n. 34 p. 85-86. Solum speaks of the ‘balancing model’ of procedural justice, supra n. 2, p. 252-259. See also, M. E. Bayles, Procedural Justice – Allocating to Individuals (Springer 1990) p. 115-139.}

Evidently, none of the three process values can serve as an exclusive guiding value of procedural law.\footnote{Solum, supra n. 3 p. 264.} Nor are the said process values mutually exclusive. Rather, they should be conceived of as optimisation requirements\footnote{Values that should be realised to the greatest extent possible, R. Alexy, A Theory of Constitutional Rights (Oxford University Press 2010) p. 47.} that should be advanced in a parallel manner and balanced with each other, including in the application of procedural tools that enable the participation of the parties, such as oral hearings or written submissions.

The Framework of Participation in Annulment Proceedings and Criticism thereof

The most essential characteristic of the annulment procedure, in contrast to, for instance, the preliminary reference procedure, is that it is governed by what Barents has called a ‘system of pleas’.\footnote{R. Barents, ‘EU Procedural Law and Effective Legal Protection’, 51 Common Market Law Review (2014) p. 1437.} The system of pleas intends to strike a fair balance between the process values related to the parties’ participation and procedural economy.\footnote{ECJ 14 November 2017, Case C-122/16 P, British Airways, paras. 86-87 and 89; ECJ 8 December 2011, Case C-272/09 P, KME v Commission, para 102.} According to Article 21 of the Statute of the EU Courts, an initial application for annulment must contain a brief statement of the pleas in law against the impugned act and the relevant evidence.\footnote{A plea in law is an allegation that a contested act or conduct on the part of the institution constitutes an infringement of a legal norm. Barents, supra n. 21 p. 618.} In its early days, the EU judicature derived from this provision that – in principle – it is not competent to raise new pleas in law on its own motion in the course of proceedings (ne ultra petita).\footnote{ECJ 14 December 1962, Case 46 & 47/59, Meroni v High Authority.} The subject-matter and limits of the dispute should be set from the outset by the initial application, in the interest of the legal certainty for the litigants and any affected third parties.\footnote{ECJ 10 December 2013, Case C-272/12 P, Commission v Ireland, paras. 27-29; British Airways v European Commission, supra n. 47, para 84.} The applicant cannot raise new pleas or offer or demand new evidence at a later stage of the procedure, save for exceptional events. This also avoids the risk of repeating certain procedural stages to enable submission of comments on the new pleas or pieces of evidence.\footnote{Pursuant to Article 84 RPGC, a new plea may be raised if it is based on facts that have come to light in the course of the proceedings. Pursuant to Article 85(2 and 3) RPGC, parties may produce or offer further evidence in the course of the proceedings provided that the delay in the submission of new evidence is justified.}

Nevertheless, the system of pleas does not reduce the role of EU Courts to passive observers of proceedings.\footnote{If it needs to obtain the evidence from the institution, the EGC first adopts a so-called measure of organisation of procedure. Between 2014 and 2016, a binding measure of inquiry was adopted in only 49 private annulment cases that}
of their pleas; they have developed a thorough standard of review, applicable even to legal acts based on complex technical or scientific assessments. The responsibility of the applicant’s lawyer for the case is still significant, especially with regard to indicating the relevant evidence, as the General Court enjoys discretion with regard to the need to supplement the information about the case. In fact, the EU judicature had in the past been criticised for not adopting a sufficiently active approach to fact-finding.

The EU judicature can, exceptionally, raise a ‘plea relating to public policy’ on its own motion. This judge-made concept assumes, as explained by AG Jacobs, that certain pleas relate to fundamental values of the EU legal order, the interests of third parties, and the general public rather those of only the persons directly concerned. This concept encompasses pleas relating to the competence to adopt the impugned act and essential procedural requirements, e.g. motivation and adoption rules. Legal norms setting out competences and essential procedural requirements are believed to warrant legal certainty and observation of the principle of conferral. In contrast, pleas relating to breaches of ordinary procedural requirements, the misuse of powers, and, especially, breaches of any substantive norm are not considered to relate to public policy. The EU judicature would seem to be cautious about broadening the catalogue of pleas relating to public policy, hesitating especially about the status of the right to be heard within administrative proceedings and the rights of defence.

The system of pleas is complemented by the adversarial principle, pursuant to which the EU judicature may consider only those procedural items which have been made available to the representatives of the parties and on which they have been given an opportunity to express their views. This principle is enforced strictly and must be applied even if the EU judicature raises a plea relating to public policy on its own motion.

ended in judgment (app. 9.6%). Statistical data from the EGC Registry in an email of 21 February 2018 are on file with the author.

58 For instance, EGC 4 February 2016, Case T-676/13, Italian International Film v EACEA, para. 40 and the case law cited.
60 ECJ 15 March 2017, Case C-415/14 P, Quiminetica.com and de Mello v Commission, para. 57.
63 Articles 65 RPCG and 62 RPCJ. For exceptions, see, Articles 104-105 and, among others, ECJ 18 July 2013, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, Commission v Kadi, para. 129.
64 ECJ 2 December 2009, C-89/08 P, Commission v Ireland, paras. 38-40, 50-57 and 59-61. Arguably, this requirement stems from the case law of the ECtHR, Case No. 19075/91, Vermeulen v Belgium, para. 33.
The reason behind the system of pleas, coupled with the adversarial principle, lies first and foremost with the process value of accuracy. As argued by Fuller, partisan advocacy before a passive arbiter facilitates judicial decision-making and increases the likelihood of accurate decisions. Whereas by dint of partisan advocacy, the arbiter is always fully acquainted with both sides of the story, the role of active inquisitor is more demanding. An inquisitor must develop the most effective statement of its case for each party and then proceed to ‘view with distrust… the products of his best mental efforts.’ A passive arbiter plays only one role in the process whereas an active inquisitor must somehow play all three: representative of each of the parties and decision-maker. The adversarial principle undoubtedly also realises the parties’ right to a hearing since it ensures that they have opportunities to present their views on all relevant issues and evidence. Last but not least, the system of pleas fosters procedural economy. As the parties must put ‘all cards on the table’ in their initial written submissions, the risk of protracted proceedings due to a sudden broadening of their subject-matter is minimised.

The system of pleas puts a great deal of responsibility for the outcome of the case on the lawyer. This is why the EU Courts cling to a strict interpretation of the duty to be represented by an independent lawyer (not in-house counsel), although an equivalent concept of ‘lawyer as an independent officer of the court’ is not common to all EU member states. Reality, however, does not always align with theory. As there is no distinct body of lawyers specialising in litigation before the EU Courts, the applicant’s lawyer may not always succeed in setting out all relevant pleas correctly. Any mistake a lawyer makes might have broader repercussions; it could result in an unlawful act being upheld which might somehow affect third parties. Arguably, it could also create the impression that the applicant’s case has not been fully and genuinely heard due to juristic formalities. In this respect, much depends on the judge’s flexibility in interpreting the pleas which have in effect been raised. The EU judicature has striven to minimise the drawbacks of the system of pleas. It has held that it is not bound by any specific argumentation in support of pleas and that it can admit new pleas provided they can merely be qualified as ‘amplifying’ those already raised by the initial application. Still, as has been reported by an insider to the EU judicature writing extra-judicially, appellants increasingly allege, before the Court of Justice, that the General Court has failed to raise a public policy plea to remedy a lawyer’s mistake.

---

63 Fuller, supra n. 2, p. 382-383.
66 K. Lenaerts, ‘De quelques principes généraux du droit de la procédure devant le juge communautaire’, in Mélanges en hommage à Jean-Victor Louis (Editions de l’Université de Bruxelles 2003) p. 242 at p. 245-246. If the applicants were allowed to broaden the subject matter during the course of proceedings, they would also circumvent the time limit for bringing annulment proceedings set in Article 263(6) TFEU.
68 ECJ 6 September 2012, Case C-422/11 P and C-423/11 P, PIKE & Poland v Commission, para. 23. See also, EGC 13 June 2017, T-137/16, Universtyt Wrocławski v Research Executive Agency, in which the EGC rejected an action because the lawyer was also a professor at a university he represented. This ruling is now under appeal before the ECJ, C-515/17 P.
69 Respondent 6.
70 Xingji v Commission, supra n. 53.
71 For instance, EGC 15 September 2016, Case T-76/14, Morningstar v Commission, para. 54.
72 C. Naômé, Le pourvoi devant la Cour de Justice de l’Union européenne (Larcier 2016) at 41.
Barents argues that the system of pleas might not comply with the fundamental right to effective judicial protection. In certain domestic jurisdictions, administrative courts indeed play a more active role. In Germany, for instance, the role of the administrative courts is to ensure that law prevails over all State activities. In consequence, administrative courts are bound to assess the legality of impugned acts not only on the basis of pleas explicitly put forward by an applicant but in light of all rules that they deem applicable to the case. Moreover, they are required to carry out all necessary factual investigations on their own motion. The system of pleas adopted in EU annulment proceedings is just one of several existing models of administrative justice.

Given the EU judicature’s omnipotence over EU procedural law, it would seem that it is within its power to revise the system of pleas if it feels the need to do so. Even assuming that the system stems explicitly from Article 21 of the Statute, the Court of Justice could initiate its amendment. Naturally, any relaxation of the system of pleas would affect procedural economy by slowing down proceedings and increasing costs. It is not unknown for case files, e.g. in competition law cases, to be several volumes thick. It is furthermore up for debate whether any liberalisation of the system of pleas would result in a systemic increase in the legal accuracy of acts adopted by EU institutions and bodies or, rather, overburden the EU Courts with responsibility for primary decision-making.

The system of pleas would seem to have yet another important justification: It arguably reflects an assumption as to how far the EU Courts should or are capable of constraining administrative and political institutions. As noted by Barents, the system of pleas had been adopted in the early days of European integration and never fundamentally revised. In those early days, the Court functioned in an emerging legal order without fully-fledged standards of public law at its disposal. Courts cannot be active in a legal vacuum, i.e. without certain pre-existing normative standards for their decisions. Such public law standards have, however, been laboriously worked out over the years; this is perhaps why the proposal has been made to revisit the rationale used to underpin the system of pleas.

---


76 Ibid., p. 197.

77 The ECHR standards under Article 6 exclude neither the adversarial nor the inquisitorial system of administrative justice. See Opinion of AG Colomer in ECJ 10 January 2002, Case C-480/99 P, Gerry Plant v Commission, paras. 34-37.

78 This is debatable in light of the text of Article 21 of the Statute.

79 It could still be argued that the system of pleas follows from Article 263 TFEU, which stipulates that the Court of Justice can review legal acts of institutions in response to actions and considering grounds for review indicated by authorised applicants.

80 Clausen, supra n. 62, p. 287-288.

81 M. Damaška, supra n. 1, p. 8-11.

82 Barents, supra n. 21, p. 877-881.


84 Fuller, supra n. 2., p. 372-373.
The authors of the founding Treaties furthermore intended to protect the fledgling supranational institutions, especially the High Authority, from being swamped with legal challenges and from the Court’s dominance. That is why they opted for the restrictive *locus standi* rules of annulment actions, which result in private actions being excluded against acts of general application. The system of pleas follows an analogous rationale. It limits the powers of the EU judicature vis-à-vis political institutions since the scope of judicial review depends on the applicant’s initiative. A more active role for the EU judicature in annulment proceedings would reinforce concerns about the fine line between judicial review and the actual replacement of challenged institutions in primary decision-making.

**The General Court**

**Participation and Workload**

Since applicants bear considerable responsibility for their cases brought before the EU Courts, the opportunities they enjoy for participation in the course of the proceedings become crucially important. When presenting written and oral submissions, they must prove the unlawfulness of the contested measure. Given the complex admissibility criteria of annulment actions, not only the substance but also the admissibility of the action may be discussed during the proceedings. For the sake of procedural economy, the General Court has been granted the option to dismiss actions on admissibility or substantive grounds without undergoing the full course of procedure if they are considered manifestly bound to fail. Namely, pursuant to Article 126 RPGC, if it is clear that the General Court has no jurisdiction to rule on the action, the action is ‘manifestly inadmissible’ or ‘manifestly lacking any foundation in law’, the General Court may dismiss the action by means of a reasoned order without taking any further procedural steps. The Court of Justice has held that the application of Article 126 RPGC does not amount to a breach of the right to a fair trial provided that the criteria for application of that provision are fulfilled. While this practical device allows the General Court to moderate its workload, its use nevertheless results in a constriction of the ability of the parties to participate in the proceedings.

Given that it has occasionally been suggested the EU Courts actively try to reduce their workload by rejecting a large number of actions on admissibility grounds, one might accordingly expect to see frequent and flexible use of Article 126 RPGC. Besides, the General Court can apply Article 126 RPGC at any stage of a procedure, even shortly after an action has been lodged. The collected data demonstrate, however, that Article 126 RPGC is used quite moderately. Between 2014 and 2016, 104

---


90 Irrespective of any other steps already undertaken, e.g. measures of organisation of procedure. See, ECJ 19 January 2006, *C-547/03 P, AIT v Commission*, para. 30.

annulment actions brought by private parties were dismissed on the basis of said provision with a reasoned order declaring the action manifestly bound to fail. An identical number of actions was dismissed pursuant to Article 130 RPGC, which provides for a separate procedure regarding the admissibility of the case including further opportunities for participation through an exchange of written pleadings and, optionally, even an oral hearing. During the same period, 509 annulment actions lodged by private parties proceeded to judgment following a complete procedure.\footnote{The EGC Registry, Email of 8 August 2017, on file with the author.} A closer analysis of the actions dismissed as manifestly bound to fail without undertaking further procedural steps shows that such cases often suffer from formal deficiencies, such as a lack of required legal representation or failure to meet a deadline.

As regards the option to dismiss an action ‘manifestly lacking any foundation in law’, i.e. on substantive grounds, this has been narrowed down to cases in which the applicant’s argumentation contradicts a consistent line of case law,\footnote{ECJ 1 July 1999, C-155/98 P, Alexopoulou v Commission, paras. 11-13.} or where the applicant’s pleas have already been examined by the EU judicature in another case with regard to the same decision.\footnote{ECJ 14 October 1999, C-437/98 P, Infrisa v Commission, paras. 16-24.} The collected data also suggest that this option is used sparsely – in at most 19 cases.\footnote{Importantly, these numbers may include a certain number of actions lodged by member states. For intellectual property cases, this number is 33. These data come from the Greffe du Tribunal, ‘Statistiques judiciaires’, état au 31 décembre 2014, p. 10; 31 décembre 2015, p. 12; 31 décembre 2016, p. 12, received in response to a request for public access to documents on 15 February 2018, on file with the author.} Interviewees have mentioned proposals to broaden the scope of the Article 126 RPGC procedure to include cases requiring a legal assessment of fact.\footnote{Respondents 6, 8, 10.} It would seem, however, that the restrictive stance generally prevails and an action may be deemed ‘lacking any foundation in law’ only if the applicant’s interpretation of law finds no support in the legal text or established case law.\footnote{Respondents 3, 4, 6 and 8. As noted by the EGC President, the General Court, with its strengthened judicial capacity, can now refer more cases (87 in 2018) to Chambers in an extended composition of five judges in order to maintain the quality of case law and to deal with cases which raise very significant issues. See, Court of Justice, ‘Press Release No 39/19’, 25 March 2019, available at <https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-03/cp190039en.pdf> accessed 29 March 2019.}

Interestingly, rather than cite the need to moderate the judicial workload, e.g. by use of the simplified procedure, certain interviewees have instead expressed concerns about a shortage of work for the recently enlarged General Court, also noting the current tendency to assign more cases to chambers of five rather than three judges.\footnote{For instance, EGC 29 June 2015, Case T-19/13, Frank Bold Society v Commission; EGC 16 September 2015, Case T-89/13, Calestep v ECHA; EGC 8 June 2016, Case T-178/15, Kohrenst v Commission.} This might suggest that, for the near future, there is no risk that the procedural rights of parties will be limited due to a lack of resources.

**Participation and Accuracy of Decision-making**

Written and oral submissions by the parties advance the accuracy of decision-making but also slow down the proceedings and generate costs for both parties (e.g. lawyers’ fees) and the court (e.g. time needed to process submissions, translations). This is why the RPGC allows judges leeway to tailor the scope of the parties’ right to participation. In particular, the new RPGC has maintained the provision enabling judges to dispense with the second exchange of written pleadings and eased the requirement...
to hold oral hearings.\textsuperscript{99} Despite predictions of an increasingly moderate use of the second exchange of written pleadings and lesser importance being accorded to oral hearings,\textsuperscript{100} the General Court was still holding these procedural stages in nearly every annulment case through late 2016\textsuperscript{101}; interviewees reported no signs of any major change in this trend, highlighting, rather, the contribution of additional written and oral submissions to the accuracy of decision-making.

Pursuant to Article 83 RPGC, a second exchange of written pleadings – a reply and rejoinder – takes place by default, unless the General Court decides that a second exchange of pleadings is unnecessary because the contents of the file in the case are ‘sufficiently comprehensive’. Under the 2015 RPGC, the chamber president can also specify the matters to which the additional pleadings should relate, in order to increase their usefulness.\textsuperscript{102} If the General Court decides not to proceed to a second exchange, the parties may still present a reasoned request to supplement the case file. The decision in this respect rests with the judges.

An oral hearing, on the contrary, does not take place by default, pursuant to Article 106 RPGC. A party may file a request for an oral hearing, stating the reasons for which it wishes to be heard. The General Court may dispense with an oral hearing if no request has been filed for one to be held and if it deems that ‘it has sufficient information available to it from the material in the file.’ The text of this provision again highlights the instrumental value of oral hearings. Under the previous rules of procedure, an oral hearing was always mandatory in annulment proceedings.\textsuperscript{103} Making it dependent on the court’s appraisal and a party’s request\textsuperscript{104} was intended to speed up the proceedings.

It may come as somewhat of a surprise that said non-mandatory procedural stages were still taking place in nearly all cases through late 2016. Of the 509 annulment cases brought by private applicants that ended in the General Court issuing a judgment, a second exchange took place in 453 cases (app. 90%). In only 11 cases (2%) did the General Court reject a party’s request for a second exchange.\textsuperscript{105} The interviewees shared the conviction that second exchanges were useful in nearly every case in terms of fostering the accuracy of decision-making. In particular, they help make subsequent oral hearings more productive. Before the General Court embarked upon its course of expansion, most judges and legal secretaries could only find time to look at the case file after the second exchange had transpired and the written pleadings subsequently translated.\textsuperscript{106} At present, judges increasingly have the time to examine case files after the first exchange, and the chamber president has a chance to indicate which matters the

\textsuperscript{99} Draft RPGC, Council doc. n. 7795/14, supra n. 12, p. 6.


\textsuperscript{101} This could play out very differently in intellectual property and other types of cases. The EGC informed that in 2018 the oral hearing was not held in 29% of all cases combined and in 42% intellectual property cases. See, Court of Justice, ‘Annual Report 2018 – Judicial Activity’, available at (https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-04/ra_2018_en.pdf) visited 29 May 2019, p. 227.

\textsuperscript{102} Draft RPGC, Council doc. 7795/14, supra n. 12, p. 80.

\textsuperscript{103} But not intellectual property cases.

\textsuperscript{104} The problem of applications by the parties for the oral hearing will be discussed in the following Section.

\textsuperscript{105} EGC Registry, supra n. 91. In the 3-year period between 2010 and 2012, the EGC authorised a second exchange of written pleadings in over 95% of all direct actions. Draft RPGC, Council doc. 7795/14, supra n. 12, p. 80.

\textsuperscript{106} Ibid., p. 80-81.
parties should focus in the second round. This development fosters the accuracy of decision-making, eliminates the need for subsequent written questions, and helps focus the discussion at oral hearings.\textsuperscript{107}

The General Court adopts a similar approach to oral hearings. In the period under consideration, 498 of 509 (app. 98\%) judgments in private annulment cases were issued after the oral hearing.\textsuperscript{108} Likewise, is it a widely shared view that oral hearings are instrumentally useful in nearly every case; they allow the parties and their lawyers to meet face to face, ask questions directly and observe the reactions of their opponents. Judges try, to the greatest extent possible, to invite the parties to focus on specific issues by means of written questions for the oral hearing or in person at the court immediately prior to the oral hearing.\textsuperscript{109} This is, however, not always possible since many cases involve a great number of unclear issues, mostly factual in nature.\textsuperscript{110} Before the oral hearing, the parties may also comment on the report summarising the facts, pleas, and arguments, which aims to safeguard the accuracy of the court decision.\textsuperscript{111} Also, although measures of inquiry are rarely ordered, it is the court’s well-established practice to take evidence informally at the oral hearing.\textsuperscript{112} The interviewees have generally confirmed that it is common for judges to change their opinion on a case, even radically, after the oral hearing.\textsuperscript{113} Also, one interviewee observed that very few cabinets tend to draft judgments before the oral hearing.\textsuperscript{114}

The ‘measure of organisation of procedure’ is an additional procedural tool enabling parties to make further submissions and influence the court’s decision-making. This usually takes the form of written questions to the parties regarding specific issues that need to be addressed. Whether this tool is used is fully a matter for the judges to decide. Under Article 89 RPGC, any such measure should serve to clarify contentious issues and promote the efficiency of the proceedings, which again directs our attention toward the balance between accuracy and procedural economy. Of 717 cases closed by a judgment or an order of admissibility in the period under consideration, the General Court adopted such measures in no fewer than 520 cases.\textsuperscript{115}

**Participation and the Right to a Hearing**

The President of the General Court, writing extra-judicially, has opined that accuracy and timely decisions are primary process values for the General Court, whereas providing the parties with an opportunity for a genuine hearing must be relegated to the status of secondary value.\textsuperscript{116} Nonetheless, an opportunity to be heard, especially in the course of oral hearings, i.e. facing the judges deciding the case, seems to be a recurring and important theme of the claims of applicants who sometimes allege

\begin{itemize}
\item \textsuperscript{107} Respondents 4, 6, 7, 9.
\item \textsuperscript{108} EGC Registry, supra n. 92.
\item \textsuperscript{109} See Article 98(4) RPGC.
\item \textsuperscript{110} Respondents 4 and 7.
\item \textsuperscript{111} Practice Rules for the Implementation of the RPGC of 20.5.2015, OJ L 152/1, paras. 187-189.
\item \textsuperscript{112} ECJ 12 June 2014, Case C-578/11 P, *Deltafina v Commission*, paras. 57-68; Castillo de la Torre and Gippini Fournier, supra n. 54, p. 247-248.
\item \textsuperscript{113} Respondents 3, 6, 8, 11.
\item \textsuperscript{114} Respondent 11.
\item \textsuperscript{115} Due to the diversity and frequency of the said measures, not all of them were registered by the EGC Registry as informed by EGC Registry, supra n. 52.
\end{itemize}
before the Court of Justice that, by giving up the oral hearing, the General Court has breached the right to a fair trial.\textsuperscript{117} Interestingly, certain elements of the procedural practice of the General Court – its generous approach to oral hearings and lengthy pleadings – could suggest that it actually recognises the intrinsic value of a genuine hearing. It is not clear, however, whether it would allow that intrinsic value to prevail over procedural economy if it were not so closely coupled with the instrumental value of accuracy.

The first illustration of this is provided by the General Court’s approach to oral hearings. The current RPGC has eased the requirement to hold oral hearings, which had previously been organised automatically in all annulment cases.\textsuperscript{118} At present, within three weeks of being notified of the close of the written procedure, each of the parties may apply for an oral hearing.\textsuperscript{119} The party applying for the oral hearing must ‘state the reasons for which that party wishes to be heard’. Also, the Practice Rules stipulate that the application for an oral hearing ‘must be based on a real assessment of the benefit of a hearing to the party in question and must indicate the elements of the case file or arguments which that party considers it necessary to develop or refute more fully at a hearing.’\textsuperscript{120} This would seem to imply that judges can scrutinise the reasons supporting a request for an oral hearing and dismiss it if, in their view, an oral hearing would not make an instrumental contribution to the accuracy of decision-making.\textsuperscript{121} However, the same provision of the RPGC also states that the General Court may dispense with an oral hearing ‘if there is no request’ from the party. This, in turn, would seem to imply that the judges are bound by the application for an oral hearing. That interpretation is confirmed by the motives of the draft RPGC\textsuperscript{122} and the extra-judicial writings of the General Court’s President.\textsuperscript{123}

This issue has stirred up doubts among judges and litigators.\textsuperscript{124} But, in line with an internally adopted standard, an application for oral hearing is binding on the General Court and there is no substantive scrutiny of the supporting reasons. ‘Literally one sentence of justification’ added to the request for an oral hearing declaring that the applicant simply wishes to discuss things further will suffice.\textsuperscript{125} There seems to be a conviction at the General Court that oral hearings have an intrinsic value. As one interviewee put it: ‘it is important to give to every applicant a day in court’.\textsuperscript{126} And another interviewee said that oral hearings are important for achieving ‘justice which the applicants and the public can see from the outside’.\textsuperscript{127} Far from being a mere formality, oral hearings are often lengthy and complex. Thanks to the judges’ insightful questions, it is evident to the parties that all the cards are still on the

\textsuperscript{117} For instance, ECJ 4 June 2015, C-682/13 P, Andechser Molkerei Scheitz v Commission, paras. 43-47.

\textsuperscript{118} Draft RPGC, Council doc. 7795/14, \textit{supra} n. 12, at 6. This rule did not apply to intellectual property cases and appeals from the rulings of the Civil Service Tribunal.

\textsuperscript{119} Article 106 RPGC.

\textsuperscript{120} Practice Rules, \textit{supra} n. 105, para 180.

\textsuperscript{121} This reading seems to be shared by Biavati, \textit{supra} n. 95 at p. 299.

\textsuperscript{122} Draft RPGC, Council doc. 7795/14, \textit{supra} n. 12, p. 107.

\textsuperscript{123} Jaeger, \textit{supra} n. 17, p. 26.


\textsuperscript{125} Respondents 6, 9 and 11.

\textsuperscript{126} Respondent 4.

\textsuperscript{127} Respondent 6.
table and this is the stage at which the case will actually be settled.\textsuperscript{128} Statistical data confirm the General Court’s generosity with regard to oral hearings. Following the new RPGC’s entry into force, not a single request for oral hearing has been denied.\textsuperscript{129}

Another illustration of the General Court’s possible recognition of the intrinsic value of participation is arguably provided by the General Court’s flexible approach to lengthy written pleadings. One of the current RPGC’s novelties is the authorisation it gives to the General Court to dictate a maximum length for written pleadings. Lengthy pleadings tend to be seen as a smokescreen for concealing a lack of convincing legal arguments.\textsuperscript{130} Another reason for submitting lengthy pleadings could be, as observed by one interviewee, the practice observed by certain law firms of calculating lawyers’ fees based on the number of drafted pages.\textsuperscript{131} In any case, lengthy pleadings invariably slow down the proceedings and generate additional costs, mainly because translations also need to be prepared.\textsuperscript{132} However, a formal decision to set a maximum length for written pleadings has yet to be adopted. It has, however, been considered that the issue is closely related to the right to a genuine hearing and an applicant’s right to plead its case freely.\textsuperscript{133} Hence, the General Court has opted to give ‘soft’ instructions in this respect, which are contained in the Practice Rules.\textsuperscript{134} It has, however, refrained from enforcing them by ‘hard’ means, e.g. rejecting the pleadings.\textsuperscript{135} In an attempt to deal with failures to put a curb on lengthy pleadings, the General Court has entertained the possibility of charging parties for ‘avoidable’ costs due to processing and translation.\textsuperscript{136} However, there are doubts as to whether that mechanism could be used, given the intrinsic value of participation including the right to present one’s case before a court freely and the fact that the Practice Rules are not binding.\textsuperscript{137}

Nevertheless, it is difficult to assess whether the intrinsic value of participation could prevail over procedural economy if participation did not have such a strong instrumental value in nearly every case. In other words, judges might simply assume that it is fairly certain that an oral hearing will always make some sort of instrumental contribution and that it would actually require more effort to enforce attempts to curb lengthy written pleadings than to simply accept them. One could however argue that the General Court’s approach to oral hearings is, at present, excessively generous, assuming that an applicant’s fundamental right to be heard before a court can also be realised by written means.\textsuperscript{138}

\textsuperscript{128} Respondent 4.
\textsuperscript{129} Data provided by EGC Registry, supra n. 92.
\textsuperscript{130} Respondents 3 and 5.
\textsuperscript{131} Respondent 7.
\textsuperscript{132} Article 75 RPGC.
\textsuperscript{133} Respondents 3, 4, 6, 7, 12.
\textsuperscript{134} Practice Rules, supra n. 105, para. 115. The ECJ has also refrained from adopting a formal decision indicating the maximum length of written pleadings. However, the ECJ’s decision does seem to follow from the variety and complexity of cases lodged at the ECJ, including those lodged via the preliminary reference procedure.
\textsuperscript{135} Respondents 3 and 7.
\textsuperscript{136} Article 139(e) RPGC.
\textsuperscript{137} Respondent 11.
\textsuperscript{138} Respondent 4 observed that certain judges have a different view on the usefulness of oral hearings.
The Court of Justice

The Limited Value of Participation

Under Article 256(1), para 2, TFEU, decisions given by the General Court may be subject to a right of appeal to the Court of Justice, on points of law only, however.\(^{139}\) Around a quarter of the General Court’s rulings are appealed before the Court of Justice, and less than a quarter of those appeals are successful.\(^{140}\) The structure of the appellate procedure resembles the first-instance procedure; both consist of two exchanges of written pleadings (one mandatory and one optional) and an oral hearing.\(^{141}\) However, the Court of Justice’s procedural practice differs significantly from that of the General Court inasmuch as it increasingly leaves little space for participation by the parties.

This could, on the one hand, be due to the Court of Justice’s jurisdiction in appellate proceedings, which is limited, in principle, to questions of law. The Court of Justice seems to adopt rulings in a fashion more akin to adopting a piece of legislation, i.e. focussing on abstract questions of principle. It does not need to take advantage of the active participation of the parties and information they provide because its role is usually not to settle fact-intensive cases.\(^{142}\) On the other hand, however, the scant importance attached to the participation of parties might mean that the Court of Justice applies a deferential standard of review to the General Court’s rulings, perhaps wishing to discourage the frequent submission of appeals.\(^{143}\) As reported elsewhere, the judges of the Court of Justice are said to have an aversion to appeals, which are considered to carry less weight in enhancing the Court’s authority than do preliminary references.\(^{144}\)

This approach to appeals is demonstrated by the frequency with which the Court of Justice uses optional procedural tools. As opposed to the first instance procedure, there is only one exchange of written pleadings in the default appellate procedure, pursuant to Article 175 RPCJ. The Court of Justice’s President\(^{145}\) must actively decide whether a second exchange is needed, based on a duly reasoned application submitted by the appellant. The President may also prescribe the length of the pleadings and indicate the points on which the parties should focus.\(^{146}\) Requests for a second exchange are subject to scrutiny by the reporting judge and the advocate general. In practice, such requests are not accepted

---

\(^{139}\) Article 256(2) TFEU. Appellants may not raise new pleas before the ECJ. See, article 170 RPCJ and ECJ 18 February 2016, Case C-176/13, Council v Bank Mellat, para 116.


\(^{141}\) Articles 167ff. RPCJ.

\(^{142}\) J. Komárek, ‘Reasoning with Previous Decisions: Beyond the Doctrine of Precedent’, 61 The American Journal of Comparative Law (2013) p. 149-172, at p. 158. The Court of Justice is, in this respect, similar to continental supreme courts that were established to make authoritative pronouncements on what the law is rather than settle concrete legal disputes. \textit{Ibid.} at p. 170-171.

\(^{143}\) Proving this assertion would, however, require different research methods.

\(^{144}\) Huyue Zhang, supra n. 22 at p. 121ff.

\(^{145}\) In the appellate procedure, procedural decisions in the written procedure are taken by the ECJ’s President. Cases are allocated to chambers only after the written procedure and a discussion of the general meeting of judges.

\(^{146}\) Article 177(1) RPCJ.
unless there is a need to respond to new issues raised in defence. According to the available data, no second exchange of written pleadings has taken place in the period under examination.

The Court of Justice assumes a similar approach to oral hearings. Pursuant to Article 76 RPCJ, the Court of Justice may decide not to hold an oral hearing if ‘on reading the written pleadings or observations lodged during the written part of the procedure’ it decides that ‘it has sufficient information to give a ruling.’ Parties may submit a reasoned request for an oral hearing but, as opposed to the practice adopted by the General Court, the final decision rests with the Court of Justice. In the period under consideration, of 230 cases on appeal, oral hearings were held in 94 (40.86%). In 92 cases on appeal (40%), the Court of Justice rejected the party’s application for an oral hearing.

The general assumption is that, at the Court of Justice, oral hearings do not strive to realise the parties’ right to participation. Oral hearings should always contribute some instrumental added value. If a hearing is organised, the Court of Justice will invite the parties to concentrate on one or more specified issues in their oral pleadings. The course of an oral hearing is also more inquisitorial in nature than at the General Court. After opening statements, at which parties should ideally respond to the questions set for the hearing, they are subject to individual questioning by members of the Court of Justice. In contrast to the adversarial nature of oral hearings before the General Court at which parties can, in principle, immediately comment on their opponent’s statements, parties appearing before the Court of Justice are only able to reply to each other’s answers in very brief closing remarks. This seems not particularly effective; responses are often given several hours after the original question was asked and a few minutes before the hearing draws to a close.

**Filtering Appeals**

Ongoing procedural developments at the Court of Justice suggest that the function of the appellate procedure may in future be to uphold the uniformity of case law rather than maximise the legal accuracy of every contested ruling, let alone provide an opportunity for a genuine hearing. The Court

---

147 Draft RPCJ, Council doc. 11147/11, *supra* n. 12, p. 123. The ECJ may be bound by a request for an oral hearing in the preliminary reference procedure. See Article 76(3) RPCJ.

148 ECJ Registry, Email of 28 July 2017, on file with the author.


150 Article 76 RPCJ.

151 ECJ Registry, Email of 31 July 2017, on file with the author.

152 Draft RPCJ, Council doc. 11147/11, *supra* n. 12, at 66. See also Lenaerts, *supra* n. 5, p. 774-775; Practice directions to parties concerning cases brought before the Court, OJ L 31/1 of 31.1.2014, para. 46.

153 Article 61(2) RPCJ.


155 Practice Directions, *supra* n. 152, para 50; Rosas, *supra* n. 149, p. 609.

156 As noted in Section 2, the uniformity of case law results from or is equivalent to the systemic accuracy in the application of law: if all rulings are accurate, the application of law is uniform.

157 Article 62 of the Statute, regarding the procedure for extraordinary review of the EGC’s appellate or preliminary rulings, suggests that the main task of the ECJ is to maintain the ‘unity and consistency of Union law’. N. Jääskinen, A. Sikora, ‘The Exclusive Jurisdiction of the Court of Justice of the European Union and the Unity of the EU Legal Order’, in M.
of Justice is exploring the use of simplified appeals procedures and, most recently, a filtering device meant to concentrate its resources on the most important cases.

The Court of Justice frequently relies on the use of the Article 181 RPCJ simplified procedure. Pursuant to that provision, the Court of Justice may dismiss appeals as ‘manifestly unfounded’, even without notifying the other party of the appeal, and, hence, without giving the parties any further opportunity to participate in the decision-making process. In fact, internal procedural guidelines issued by the Court of Justice’s President explicitly instruct Court of Justice judges that ‘as regards the appeals, the application of Article 181 of the rules of procedure should be fully exploited’.\(^{158}\) The difference in the wording of Article 181 RPCJ - which mentions appeals that are ‘manifestly unfounded’ - and Article 126 RPGC - which mentions actions ‘manifestly lacking any foundation in law’ - suggests that the Court of Justice enjoys greater (albeit self-granted) leeway to dismiss appeals on substantive grounds in the simplified procedure.\(^{159}\) Accordingly, in the period under consideration, the Court of Justice dismissed 81 appeals (35.21% of all appeals) as manifestly unfounded.\(^{160}\)

In January 2016, the Court introduced a further simplification to its procedures by means of the said internal procedural guidelines,\(^{161}\) applicable in three areas: intellectual property, public procurement, and access to documents. In the period under consideration, those appeals accounted for approximately half of the appeals docket. The President’s guidelines established a preparatory procedure leading to the application of the Article 181 RPCJ simplified procedure. First, the Directorate for Research and Documentation singles out appeals which can be dismissed as manifestly unfounded (on substantive grounds) and the Registry singles out those which can be dismissed as manifestly inadmissible (on procedural grounds). Both entities provide proposals for the reasoning used to dismiss an appeal.\(^{162}\) Second, only if at least one member of the Court of Justice believes that a case should go through the full appellate procedure will the case be discussed at a weekly general assembly of the members of the Court of Justice; the discussion cannot relate to the motives of the order dismissing an appeal only.\(^{163}\) Third, the advocate general drafts an opinion based on the proposals of the Directorate, which the reporting judge integrates into the order. Finally, the draft is subject to deliberation by a chamber of three judges.\(^{164}\) One might have doubts as to whether the chamber’s members would carry out fully independent scrutiny of the contested first-instance ruling, having already been offered the draft of an order.

\begin{flushleft}

\(^{158}\) President of the ECJ, Guide Pratique relative au traitement des affaires portées devant la Cour de Justice: Document interne de la Cour – Applicable à compter du 01/03/16 [Practical guidelines relating to the processing of cases brought to the Court of Justice: The Court’s internal document – Applicable from 1 March 2016], para 23 – the ECJ’s internal document received in response to a request for public access to documents on 29 and 30 November 2017, on file with the author.

\(^{159}\) As observed by Respondent 6. For a contrary opinion see, Barents, *supra* n. 21, at p. 689.

\(^{160}\) Data obtained from the search engine on the Court’s website – www.curia.europa.eu. – on the basis of a list of appeals closed by the ECJ provided by ECJ Registry, *supra* n. 148.

\(^{161}\) ECJ President, *supra* n. 158.


\(^{163}\) *Ibid.*, para. 45.

\end{flushleft}
The transfer of tasks to the advocate general - and especially to the Directorate - has raised controversy. The General Court’s Vice-President has recalled that one of the original ideas behind the introduction of two-tier annulment proceedings before the General Court and the Court of Justice was that such a judicial structure would ensure a more in-depth judicial review of cases involving private applicants. At present, the Court of Justice seems to be moving away from this idea.\textsuperscript{165} Controversy also surrounds the idea of employing the Directorate of Research and Documentation to review the General Court’s rulings. This Directorate is an internal service, responsible for, among other things, drafting comparative law notes. In some cases, it assists the General Court; in others, it monitors the General Court’s rulings. Moreover, the Directorate recruits its officials mainly as experts in national rather than EU law.\textsuperscript{166} Finally, the question of whether actual decision-making could be transferred to advocates general should be considered, as the Treaties give them a different task.\textsuperscript{167} It is evident that the reasoning provided by advocates general often seems more concise than that provided in standard orders drafted by reporting judges. Moreover, reporting judges tend not to contribute anything that goes beyond the advocate general’s opinion.\textsuperscript{168}

The Court of Justice has, however, recently taken a further step by requesting an amendment to the Statute that would introduce a fully-fledged filtering device for cases in which the dispute has already been considered by an independent administrative board of appeals, such as those established for the European Union Intellectual Property Office, Community Plant Variety Office, the European Chemical Agency or the European Union Aviation Safety Agency.\textsuperscript{169} The underlying assumption is that such bodies are quasi-judicial in nature; by the time the Court of Justice adjudicates in such a dispute with one of the said agencies, it is already the third instance to do so.\textsuperscript{170} The amendment process has just been completed\textsuperscript{171} and the Court of Justice can now select only appeals that raise significant issues regarding the ‘unity, consistency and development of EU law’.\textsuperscript{172} It is now necessary for the party challenging the decision of the General Court to establish, by means of a document annexed to the appeal, its interest

\textsuperscript{165} M. Van der Woude, ‘Pour une protection juridictionnelle effective: Un rappel des objectifs de 1988’, Concurrences (2014) p. 4 at p. at 11. Admittedly, according to the recitals of Council Decision 591/88 of 24 October 1988 establishing a Court of First Instance of the European Communities, OJ L 319, p. 1, one of the purposes was to ‘improve the judicial protection of individual interests.’ But another purpose was to ‘to enable the Court to concentrate its activities on its fundamental task of ensuring uniform interpretation of Community law.’

\textsuperscript{166} As observed by Respondent 12.

\textsuperscript{167} Article 252 TFEU.

\textsuperscript{168} For instance, ECJ 16 January 2018, Case C-570/17 P, Lackmann v EU IPO.

\textsuperscript{169} Court of Justice, ‘Amendments to Protocol No 3 on the Statute of the Court of Justice of the European Union’, 26 March 2018, Council doc. 7586/18. Under Article 256(1), para 2, TEU, the rulings of the General Court ‘may be subject to a right of appeal... under the conditions and within the limits laid down by the Statute.’ However, in the course of the amendment process, committees of the European Parliament were concerned about the impact of the selection device on the right to effective judicial protection. Committee on Constitutional Affairs of the European Parliament, ‘Draft Opinion of 20 September 2018 on the Regulation amending Protocol no 3’ [2018] 02360/2018 – C8-0132/2018 – 2018/0900(COD).


\textsuperscript{171} Council, ‘Amendment of Protocol No 3 on the Statute of the Court of Justice of the European Union - Confirmation of the final compromise text with a view to agreement’ [2019] Council doc. 5190/19, received in response to a request for public access to documents on 1 April 2019, on file with the author.

\textsuperscript{172} Proposed Article 58a of the Statute.
in the light of the importance of the issue that it raises with respect to the unity, consistency or
development of EU'.

Further details about the filtering device have been hammered out in the RPCJ. The decision on
accepting the appeal is taken, on a proposal from the reporting judge and after hearing the advocate
general, by a Chamber specially established for that purpose, presided over by the Vice-President of the
Court and including also the reporting judge and the President of the Chamber of three Judges to which
the reporting judge is attached. The decision is taken in the form of a reasoned order. It is still unclear
whether the Court chamber that decides on the substance of the appeal will also be able to dismiss the
appeal as manifestly unfounded, pursuant to the Article 181 RPCJ simplified procedure, regardless of
the initial decision to accept it. It is also unclear to what extent the new filtering device will fulfil its
stated objective since, according to the proposal of the Parliament, the Court of Justice must state and
publish its reasoning not only when rejecting an appeal but also when allowing one.

Conclusions: Monitoring EU Procedural Law and Practice

In reporting their activities, the EU Courts attach great importance to the efficiency of judicial
proceedings. Expectations of efficiency – with a greater emphasis on a reasonable timeframe and costs
of the proceedings rather than their quality – are also expressed by other EU institutions, Member States
and private litigants. Hence, in recent years, the EU Courts have carried out major procedural reforms
oriented mostly toward increased efficiency but much less explicit about fair trial requirements, such as
the procedural rights of parties. Little is known about how the EU Courts attempt to strike a balance
between procedural economy and the right of parties to meaningfully participate in the judicial
proceedings, both factors crucial to achieving judicial legitimacy. This article has attempted to address
this issue by exploring the trends regarding the participation of the parties in annulment proceedings
brought before the General Court and the Court of Justice by private applicants pursuant to Article
263(4) TFEU.

In the adversarial system of annulment proceedings, which assigns a large portion of responsibility for
the case to the applicant’s lawyer, the procedural opportunities for participation are particularly salient.
Following recent efficiency-oriented reforms, parties still enjoy broad opportunities for participation in
first instance annulment proceedings before the General Court. Focussed on the legal protection of
individual applicants, the General Court still broadly applies optional procedural tools enabling
participation by written and oral means. The significance of party participation decreases when it comes
to appellate proceedings before the Court of Justice. The latter rarely uses the optional participation-
enhancing tools and dismisses a considerable portion of appeals as manifestly unfounded or
inadmissible. Adhering to differing procedural practices, the two EU Courts focus on partly different
tasks. The procedural device for filtering appeals currently being introduced at the Court, in particular,
reflects a concept of EU judicial architecture in which the General Court is responsible for the legal
protection of private applicants against unlawful conduct by EU institutions and bodies while the Court

173 Article 170a RPCJ.
174 Article 170b RPCJ.
175 Court of Justice, supra n. 169 at p. 7-8.
of Justice focusses on the unity, consistency and development of EU law, concentrating its resources on interaction with national courts via the preliminary reference procedure.

Be that as it may, EU judges have the instruments to decide, fairly autonomously, on the course of EU judicial proceedings, although this could raise doubts in light of the principle of the separation of powers\textsuperscript{176} and democratic legitimacy.\textsuperscript{177} Since various kinds of power – i.e. the power to legislate, apply, and rule on the legality of procedural rules – are concentrated in the hands of EU judges, scholars should closely monitor how those powers are exercised and how the procedural rights of parties are secured, especially before the General Court which deals with private applicants. Questions also arise about the extent to which certain comparatively exalted procedural standards of the General Court, such as the right to an oral hearing, should be made subject to debate. As noted by one of the interviewees, procedural practice is dynamic, and the judges come from very different national backgrounds; a similar research project in future might turn up very different results.\textsuperscript{178}

\textsuperscript{176} Keppenne, \textit{supra} n. 4.

\textsuperscript{177} Eckes and Abazi, \textit{supra} n. 16.

\textsuperscript{178} Respondent 4.