



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):
Krajewski, M. A. (2019). The Many-Faced Court: The Value of Participation in Annulment Proceedings. *European Constitutional Law Review*, 15(2), 220-246.

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 judiciary retains dominant control over its creation and application. First of all, the EU judiciary dictates the

* PhD Researcher, Department of Law, European University Institute (Florence, Italy). This research has been enabled by a grant from the Polish Ministry of Science and Higher Education. I have greatly benefited from discussions with Deirdre Curtin, Marise Cremona, Jeffrey Dunoff, Jan Komárek, François-Xavier Millet, Laurent Pech, Urška Šadl, Michał Ziółkowski, as well as participants of the EUConst Colloquium in Amsterdam on 5 October 2018 and the seminar at the Department of European Law, University of Warsaw on 11 October 2018. I am also grateful to the members and staff of the EU Courts for information they provided. Any errors or inaccuracies are mine alone.

¹ M. Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale University Press 1986) p. 8-11.

² L. Fuller, 'The Forms and Limits of Adjudication', 92 *Harvard Law Review* (1978-1979) p. 353.

³ L. Solum, 'Procedural Justice', 78 *Southern California Law Review* (2004) p. 181.

⁴ J.-P. Keppenne, 'Les procédures de révision du cadre réglementaire des juridictions de l'Union', *Cahiers de Droit Européen* (2017) p. 343.

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.⁶ Moreover, the Court of Justice has the right to propose amendments to the Statute of EU Courts, a protocol attached to the Treaties⁷ that can, however, be modified via the ordinary legislative procedure.⁸ The Court of Justice has, in practice, a considerable impact on the amendment process.⁹ 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).¹⁰ While the rules of procedure need approval by the Council,¹¹ the Council largely seems to follow the EU Courts' proposals.¹² 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.¹³ Finally, there is no external review of fair trial standards applied by the EU Courts.¹⁴ It is the EU Courts that must occasionally rule on the compliance of procedural rules – enacted by themselves – with fundamental rights.¹⁵ The cumulation by the EU judiciary 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.¹⁶

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.¹⁷ 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.

⁹ A. Alemanno and L. Pech, 'Thinking Justice Outside the Docket: A Critical Assessment of the Reform of the EU's Court System', 54 *CMLR* (2017) p. 129; L. Coutron, 'The Changes to the General Court', in M.-P. Granger and E. Guinchard (eds.), *The New EU Judiciary: An Analysis of Current Judicial Reforms* (Wolters Kluwer 2018) p. 143. However, the Commission and the Council quite recently opposed the ECJ's proposal for an amendment of the Statute that would transfer jurisdiction in infringement proceedings to the EGC. They highlighted the need to await assessment of the EGC enlargement in late 2020. See, Commission, 'Opinion on the draft amendments to Protocol No 3 on the Statute of the Court of Justice of the European Union, presented by the Court of Justice on 26 March 2018' [2018] COM 534 final; Court of Justice, 'Draft Amendment to Protocol No 3 on the Statute of the Court of Justice of the European Union - Letter of the President of the Court of Justice' [2018] Council doc. 11180/18.

¹⁰ Rules of Procedure of the General Court [2015] OJ L 105/1; Rules of Procedure of the Court of Justice [2012] OJ L 265/1. The EU Courts also adopt other decisions, practice directions and internal guidelines.

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.

¹² Available sources indicate that in the process of approving recent procedural reforms the Council has focussed on selected issues relating to the procedural rights and interests of the Member States. Compare successive versions of the Draft RPCJ [2011] Council doc. 11147/11, 5140/11, [2012] 6422/12, 8020/12, and Draft RPGC [2014] Council doc. 7795/14, 15628/14, 16522/14. A Court insider gives assurances, however, about intense scrutiny by the Council, M. A. Gaudissart, 'La refonte du règlement de procédure de la Cour de justice', 48 *Cahiers de Droit Européen* (2012) p. 603 at p. 610.

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 awaiting 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 ECtHR 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.

¹⁶ C. Eckes and V. Abazi, 'Closed Evidence in EU Courts: Security, Secrets and Access to Justice', 55 *CMLR* (2018) p. 753.

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,¹⁸ 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.¹⁹ Also, other EU institutions and the Member States have been calling upon the EU judicature to improve efficiency and expedite proceedings.²⁰

The effects of multiple efficiency-oriented reforms of EU procedural law²¹ – 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.²² 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.²³ The participation of the parties is enabled by means of several procedural tools: two exchanges of written pleadings,²⁴ an oral hearing,²⁵ measures of organisation of procedure (e.g. written questions)²⁶ or comments on evidence.²⁷ It can also be curtailed if the case is promptly dismissed as manifestly bound to fail.²⁸ 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

[legacy-and-the-skouris-court/](#), visited 28 October 2018; E. Sharpston, 'Making the Court of Justice of the European Union More Productive', 21 *Maastricht Journal of Comparative and European Law* (2014) p. 763; M. Jaeger, '25 Years of the General Court: Looking Back and Forward', in V. Tomljenović *et al.*, *EU Competition and State Aid Rules: Public and Private Enforcement* (Springer 2017) p. 3 at p. 24, where he declared: 'all my mandates as the President of this court have been directed at improving efficiency in dealing with cases... This is the priority I have set'.

¹⁸ The second round of written pleadings has become optional and certain procedural time limits have been shortened. See, Draft RPGC, Council doc. 7795/14, *supra* n. 12, p. 6; See also, Draft RPCJ, Council doc. 11147/11, *supra* n. 12, p. 2-3.

¹⁹ Draft RPGC, *ibid.* p. 5-6.

²⁰ Ch. Krenn, 'The European Court of Justice's Financial Accountability: How the European Parliament Incites and Monitors Judicial Reform through the Budgetary Process', 13 *EUConst* (2017) p. 453; Alemanno and Pech, *supra* n. 9 p. 138.

²¹ See an overview in R. Barents, *EU Remedies and Procedures* (Wolters Kluwer 2016) p. 873-875.

²² See voluminous guidebooks of EU procedural law: *ibid.*; B. Waegenbaur, *Court of Justice of the EU: Commentary on Statute and Rules of Procedure* (Hart Publishing 2013); Lenaerts *et al.*, *supra* n. 5; K.P.E. Lasok, *European Court Practice and Procedures* (Bloomsbury 2017). See also the emerging scholarship regarding the impact of social relations at the Court on its decision-making: A. Huyue Zhang, 'The Faceless Court', 38 *University of Pennsylvania Journal of International Law* (2016) p. 71; U. Šadl and S. Sankari, 'The Elusive Influence of the Advocate General on the Court of Justice: The Case of European Citizenship', 36 *Yearbook of European Law* (2018) p. 421; K. McAuliffe, 'Behind the Scenes at the Court of Justice', in F. Nicola, B. Davies (eds), *EU Law Stories* (Cambridge University Press 2017) p. 35; M. Cohen, 'Judges or Hostages: Sitting at the Court of Justice of the European Union and the European Court of Human Rights', in *ibid.* p. 58.

²³ ECJ 17 December 1998, Case C-185/95 P, *Baustahlgewebe v Commission*, paras. 19-20.

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.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 2016.³⁰ 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 2017.³¹ 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.

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.

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

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.³² 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.³³

First, procedures should guarantee *accuracy* in the application of law to the facts of the case.³⁴ 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.³⁵ 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.³⁶ Acting in their own interest, applicants contribute to the public interest³⁷ by enabling courts to provide law, rule or decision-making bodies with instruction for the future and ensure uniformity in the application of law.³⁸

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.³⁹ 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.⁴⁰ 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.⁴¹ 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.⁴²

³² For more elaborate taxonomies of procedural justice or due process models, see, Solum, *supra* n. 3; D. Hovell, *The Power of Process. The Value of Due Process in Security Council Sanctions Decision-Making* (Oxford University Press 2016) p. 63ff.

³³ J. Mendes, I. Ventzke, ‘Introducing the Idea of Relative Authority’, in *id.* (eds), *Allocating Authority: Who Should Do What in European and International Law?* (Hard Publishing 2018) p. 1 at p. 4.

³⁴ Rawls calls this model ‘perfect procedural justice’. J. Rawls, *Theory of Justice* (Harvard University Press 1971) p. 85.

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).

³⁶ A. Kavanagh, ‘Participation and Judicial Review: A Reply to Jeremy Waldron’, *22 Law and Philosophy* (2003) p. 456-486.

³⁷ J. Mendes, *Participation in EU Rule-Making: A Rights-Based Approach* (Oxford University Press 2011) p. 32.

³⁸ Galligan, *supra* n. 35 p. 10 and 130-162.

³⁹ Solum, *supra* n. 2 p. 262. See also, L. Mashaw, *Due Process in the Administrative State* (Yale University Press 1985); L. Mashaw, ‘Administrative Due Process: The Quest for a Dignitary Theory’, *61 Boston University Law Review* (1981) p. 885; R. B. Saphire, ‘Specifying Due Process Values: Toward A More Responsive Approach to Procedural Protection’, *127 University of Pennsylvania Law Review* (1978) p. 111.

⁴⁰ Solum, *supra* n. 2, p. 259.

⁴¹ *Ibid.*, p. 260. Rawls calls this model ‘pure procedural justice’. Rawls, *supra* n. 34 p. 86.

⁴² A. Harel and A. Shinar, ‘Between judicial and legislative supremacy: A cautious defence of constrained judicial review’, *10 International Journal of Constitutional Law* (2012) p. 950.

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.⁴³

Evidently, none of the three process values can serve as an exclusive guiding value of procedural law.⁴⁴ Nor are the said process values mutually exclusive. Rather, they should be conceived of as optimisation requirements⁴⁵ 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'.⁴⁶ The system of pleas intends to strike a fair balance between the process values related to the parties' participation and procedural economy.⁴⁷ 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.⁴⁸ 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*).⁴⁹ 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.⁵⁰ 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.⁵¹

Nevertheless, the system of pleas does not reduce the role of EU Courts to passive observers of proceedings.⁵² The EU Courts are not bound by specific arguments advanced by the parties in support

⁴³ 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.

⁴⁴ Solum, *supra* n. 3 p. 264.

⁴⁵ Values that should be realised to the greatest extent possible, R. Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2010) p. 47.

⁴⁶ R. Barents, 'EU Procedural Law and Effective Legal Protection', 51 *Common Market Law Review* (2014) p. 1437.

⁴⁷ 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.

⁴⁸ 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.

⁴⁹ ECJ 14 December 1962, Case 46 & 47/59, *Meroni v High Authority*.

⁵⁰ 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.

⁵¹ 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.

⁵² 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 pleas⁵³; they have developed a thorough standard of review, applicable even to legal acts based on complex technical or scientific assessments.⁵⁴ 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.⁵⁵ In fact, the EU judiciary had in the past been criticised for not adopting a sufficiently active approach to fact-finding.⁵⁶

The EU judiciary 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 than those of only the persons directly concerned.⁵⁷ This concept encompasses pleas relating to the competence to adopt the impugned act⁵⁸ and essential procedural requirements,⁵⁹ e.g. motivation⁶⁰ and adoption rules.⁶¹ 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 judiciary 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.⁶²

The system of pleas is complemented by the adversarial principle, pursuant to which the EU judiciary 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.⁶³ This principle is enforced strictly and must be applied even if the EU judiciary raises a plea relating to public policy on its own motion.⁶⁴

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.

⁵³ EGC 16 March 2016, Case T-586/14, *Xinyi v Commission*, paras. 29-35 and the case law cited.

⁵⁴ J. Mendes, 'Discretion, Care and Public Interest in the EU Administration: Probing the Limits of Law', 53 *CMLR* (2016) p. 419; M. Prek, S. Lefèvre, "'Administrative Discretion", "Power of Appraisal" and "Margin of Appraisal" in Judicial Review Proceedings Before the General Court', 56 *CMLR* (2019) p. 339.

⁵⁵ ECJ 14 September 2016, C-419/15 P and C-505/15 P, *Ori Martin v Commission*, para. 108.

⁵⁶ F. Castillo de la Torre, E. Gippini Fournier, *Evidence, Proof and Judicial Review in EU Competition Law* (Edward Elgar 2017) p. 225-264. The EU Courts used to be criticised for not adopting a sufficiently active approach to fact-finding, E. Barbier de la Serre, A.-L. Sibony, 'Expert Evidence before the EC Courts', 45 *CMLR* (2008) p. 941 at p. 952.

⁵⁷ Opinion of AG Jacobs in ECJ 13 July 2000, Case C-210/98 P, *Salzgitter v Commission*, paras. 141-142.

⁵⁸ For instance, EGC 4 February 2016, Case T-676/13, *Italian International Film v EACEA*, para. 40 and the case law cited.

⁵⁹ ECJ 16 June 1993, Case C-325/91, *France v Commission*, para. 26.

⁶⁰ ECJ 15 March 2017, Case C-415/14 P, *Quimitecnica.com and de Mello v Commission*, para. 57.

⁶¹ EGC 4 December 2008, Case T-284/08, *PMOI v Council*, paras. 25-27.

⁶² The ECJ held that the breach of procedural rights did not relate to public policy, ECJ 7 February 2012, Case C-421/11 P, *Total and Elf Aquitaine v Commission*, para. 35. See, however, Opinion of AG Bot rejected in ECJ 8 November 2016, Case C-43/15 P, *BSH v EUIPO*; and EGC 15 September 2016, Case T-17/14, *U4U et al. v Parliament and Council*, paras. 95-96; EGC 15 September 2016, Case T-456/14, *TAO-AFI et al. v Parliament and Council*, paras. 151-152; EGC 17 November 2017, Case T-263/15, *Gdynia and Kossakowo v Commission*, paras. 70 and 89. See, also, F. Clausen, *Les moyens d'ordre public devant la Cour de justice de l'Union européenne* (Bruylant 2018) p. 235-243.

⁶³ Articles 65 RPGC 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.’⁶⁵ 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.⁶⁶

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),⁶⁷ although an equivalent concept of ‘lawyer as an independent officer of the court’ is not common to all EU member states.⁶⁸ 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.⁶⁹ 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 pleas⁷⁰ and that it can admit new pleas provided they can merely be qualified as ‘amplifying’ those already raised by the initial application.⁷¹ 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.⁷²

⁶⁵ 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.

⁶⁷ For instance, EGC 20 November 2017, Case T-702/15, *BikeWorld v Commission*.

⁶⁸ ECJ 6 September 2012, Case C-422/11 P and C-423/11 P, *PUKE & Poland v Commission*, para. 23. See also, EGC 13 June 2017, T-137/16, *Uniwersytet 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 *Xinyi 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.⁷³ In certain domestic jurisdictions, administrative courts indeed play a more active role.⁷⁴ 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.⁷⁵ Moreover, they are required to carry out all necessary factual investigations on their own motion.⁷⁶ The system of pleas adopted in EU annulment proceedings is just one of several existing models of administrative justice.⁷⁷

Given the EU judiciary'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,⁷⁸ the Court of Justice could initiate its amendment.⁷⁹ 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.⁸⁰ 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.⁸¹ As noted by Barents, the system of pleas had been adopted in the early days of European integration and never fundamentally revised.⁸² In those early days, the Court functioned in an emerging legal order without fully-fledged standards of public law at its disposal.⁸³ Courts cannot be active in a legal vacuum, i.e. without certain pre-existing normative standards for their decisions.⁸⁴ 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.

⁷³ Barents, *supra* n. 21, p. 873-885. See, also, one of many criticisms expressed by competition law scholars, U. Soltész, 'Due Process and Judicial Review – Mixed Signals from Luxembourg in Cartel Cases', 33 *European Competition Law Review* (2012) p. 241-247.

⁷⁴ For an overview, see, F. Castillo de la Torre, 'Le relevé d'office par la juridiction communautaire', *Cahiers de Droit européen* (2005) p. 395-463, at p. 398-400 (footnote n. 2).

⁷⁵ M. Eliantonio, *Europeanisation of Administrative Justice? The Influence of the ECJ's Case Law in Italy, Germany and England* (Europa Law Publishing 2009) p. 160-161.

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.

⁸³ A. M. Donner, 'National Law and the Case Law of the Court of Justice of the European Communities', 1 *CMLR* (1963) p. 8.

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.⁸⁵ 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.⁸⁶ 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.⁸⁷ 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.⁸⁸ 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.⁸⁹ Besides, the General Court can apply Article 126 RPGC at any stage of a procedure,⁹⁰ even shortly after an action has been lodged.⁹¹ The collected data demonstrate, however, that Article 126 RPGC is used quite moderately. Between 2014 and 2016, 104

⁸⁵ M. Rassmussen, 'The Origins of a Legal Revolution – The Early History of the European Court of Justice', 2 *Journal of European Integration History* (2008) p. 77.

⁸⁶ M. Fromont, 'L'influence du droit français et du droit allemand sur les conditions de recevabilité du recours en annulation devant la Court de justice des Communautés européennes', *Revue Trimestrielle de Droit Européen* (1966) p. 47.

⁸⁷ Opinion of AG Jääskinen in ECJ 21 January 2016, Case C-603/13 P, *Galp v Commission*, para. 36; Opinion of AG Mengozzi in *British Airways v Commission*, *supra* n. 47, paras. 82-92.

⁸⁸ ECJ 11 December 2008, Case C-308/07 P, *Atxalandabaso v Parliament*, paras. 36-38.

⁸⁹ For instance, A. Arnall, 'Judicial Review in the European Union', in D. Chalmers, in *id.* (eds.), *The Oxford Handbook of European Union Law* (Oxford University Press 2015) p. 377-401.

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.

⁹¹ EGC 25 June 2009, C-580/08 P, *Srinivasan v Ombudsman*, paras. 33-36.

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.⁹² 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,⁹³ or where the applicant’s pleas have already been examined by the EU judicature in another case with regard to the same decision.⁹⁴ The collected data also suggest that this option is used sparsely – in at most 19 cases.⁹⁵ Interviewees have mentioned proposals to broaden the scope of the Article 126 RPGC procedure to include cases requiring a legal assessment of fact.⁹⁶ 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.⁹⁷

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.⁹⁸ 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

⁹² The EGC Registry, Email of 8 August 2017, on file with the author.

⁹³ ECJ 1 July 1999, C-155/98 P, *Alexopoulou v Commission*, paras. 11-13.

⁹⁴ ECJ 14 October 1999, C-437/98 P, *Infrisa v Commission*, paras. 16-24.

⁹⁵ 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.

⁹⁶ Respondents 6, 8, 10.

⁹⁷ 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, *Kohrener v Commission*.

⁹⁸ 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.

to hold oral hearings.⁹⁹ Despite predictions of an increasingly moderate use of the second exchange of written pleadings and lesser importance being accorded to oral hearings,¹⁰⁰ the General Court was still holding these procedural stages in nearly every annulment case through late 2016¹⁰¹; 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.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.¹⁰³ Making it dependent on the court’s appraisal and a party’s request¹⁰⁴ 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.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.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

⁹⁹ Draft RPGC, Council doc. n. 7795/14, *supra* n. 12, p. 6.

¹⁰⁰ See the predictions presented by P. Biavati, ‘The General Court’s New Rules of Procedure’ in M.-P. Granger and E. Guinchard (eds.), *The New EU Judiciary: An Analysis of Current Judicial Reforms* (Wolters Kluwer 2018) p. 293 at p. 296 and 299.

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.

¹⁰² Draft RPGC, Council doc. 7795/14, *supra* n. 12, p. 80.

¹⁰³ But not intellectual property cases.

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

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.

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.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.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 hearing¹⁰⁹; this is, however, not always possible since many cases involve a great number of unclear issues, mostly factual in nature.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.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.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.¹¹³ Also, one interviewee observed that very few cabinets tend to draft judgments before the oral hearing.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.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.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

¹⁰⁷ Respondents 4, 6, 7, 9.

¹⁰⁸ EGC Registry, *supra* n. 92.

¹⁰⁹ See Article 98(4) RPGC.

¹¹⁰ Respondents 4 and 7.

¹¹¹ Practice Rules for the Implementation of the RPGC of 20.5.2015, OJ L 152/1, paras. 187-189.

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.

¹¹³ Respondents 3, 6, 8, 11.

¹¹⁴ Respondent 11.

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.

¹¹⁶ M. Jaeger, 'The Court of First Instance and the Management of Competition Law Litigation', in H. Knninen et al (eds.), *EU Competition Law in Context* (Hard Publishing 2009) p. 1-16 at p. 7.

before the Court of Justice that, by giving up the oral hearing, the General Court has breached the right to a fair trial.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.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.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.'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.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 RPGC¹²² and the extra-judicial writings of the General Court's President.¹²³

This issue has stirred up doubts among judges and litigators.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.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'.¹²⁶ And another interviewee said that oral hearings are important for achieving 'justice which the applicants and the public can see from the outside'.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

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

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

¹¹⁹ Article 106 RPGC.

¹²⁰ Practice Rules, *supra* n. 105, para 180.

¹²¹ This reading seems to be shared by Biavati, *supra* n. 95 at p. 299.

¹²² Draft RPGC, Council doc. 7795/14, *supra* n. 12, p. 107.

¹²³ Jaeger, *supra* n. 17, p. 26.

¹²⁴ See, the President of the Council of Bars and Law Societies of Europe, 'Letter to the GC Registrar of 12 May 2015', http://www.cbbe.eu/fileadmin/speciality_distribution/public/documents/PD_LUX/PDL_Position_papers/EN_PDL_20150512_CCBE-comments-on-the-draft-Practice-Rules-for-the-Implementation-of-the-Rules-of-Procedure-of-the-General-Court.pdf, visited 31 March 2019.

¹²⁵ Respondents 6, 9 and 11.

¹²⁶ Respondent 4.

¹²⁷ Respondent 6.

table and this is the stage at which the case will actually be settled.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.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.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.¹³¹ In any case, lengthy pleadings invariably slow down the proceedings and generate additional costs, mainly because translations also need to be prepared.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.¹³³ Hence, the General Court has opted to give 'soft' instructions in this respect, which are contained in the Practice Rules.¹³⁴ It has, however, refrained from enforcing them by 'hard' means, e.g. rejecting the pleadings.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.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.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.¹³⁸

¹²⁸ Respondent 4.

¹²⁹ Data provided by EGC Registry, *supra* n. 92.

¹³⁰ Respondents 3 and 5.

¹³¹ Respondent 7.

¹³² Article 75 RPGC.

¹³³ Respondents 3, 4, 6, 7, 12.

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.

¹³⁵ Respondents 3 and 7.

¹³⁶ Article 139(c) RPGC.

¹³⁷ Respondent 11.

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 President¹⁴⁵ 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.

¹⁴⁰ Court of Justice, 'Annual Report 2017 – Judicial Activity', available at <https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-04/ra_2017_en.pdf> visited 29 March 2019, p. 222-225.

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. *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.¹⁴⁷ According to the available data, no second exchange of written pleadings has taken place in the period under examination.¹⁴⁸

The Court of Justice assumes a similar approach to oral hearings.¹⁴⁹ 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.¹⁵⁰ In the period under consideration, of 230 cases on appeal, oral hearings were held in 94 (40.86%).¹⁵¹ 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.¹⁵² 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.¹⁵³ The course of an oral hearing is also more inquisitorial in nature than at the General Court.¹⁵⁴ 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.¹⁵⁵

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 law¹⁵⁶ rather than maximise the legal accuracy of every contested ruling, let alone provide an opportunity for a genuine hearing.¹⁵⁷ 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.

¹⁴⁹ Article 76(2) RPCJ. A. Rosas, ‘Oral Hearing Before the European Court of Justice’, 21 *Maastricht Journal of Comparative and European Law* (2014) p. 596-610, at p. 599.

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.

¹⁵⁴ See on the history of a change from the adversarial to inquisitorial style of hearings at the ECJ, S. O’Leary, *Employment Law at the European Court of Justice: Judicial Structure, Policies and Processes* (Hart Publishing 2002) p. 25-62.

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.

Cremona, A. Thies, R. A. Wessel, *The European Union and International Dispute Settlement* (Hart Publishing 2017) p. 101 at p. 103. See, on the so-called ‘revision model’ of supreme courts, M. Bobek, ‘Quantity or Quality? Reassessing the Role of Supreme Jurisdictions in Central Europe’, 57 *American Journal of Comparative Law* (2009) p. 33 at p. 36.

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.

¹⁶² *Ibid.*, paras. 2, 7-8, 13 and 39.

¹⁶³ *Ibid.*, para. 45.

¹⁶⁴ *Ibid.*, paras. 49-52.

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.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.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.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.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.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.¹⁷⁰ The amendment process has just been completed¹⁷¹ and the Court of Justice can now select only appeals that raise significant issues regarding the 'unity, consistency and development of EU law'.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

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.'

¹⁶⁶ As observed by Respondent 12.

¹⁶⁷ Article 252 TFEU.

¹⁶⁸ For instance, ECJ 16 January 2018, Case C-570/17 P, *Lackmann v EUIPO*.

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).

¹⁷⁰ A board of appeal – the EGC – the ECJ. See, for more on administrative remedies in EU law, P. Chirulli, L. de Lucia, 'Specialised adjudication in EU administrative law: the Boards of Appeal of EU agencies', 40 *European Law Review* (2015) p. 832-857.

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.

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'.¹⁷³

Further details about the filtering device have been hammered out in the RPCJ.¹⁷⁴ 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.¹⁷⁵ 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 powers¹⁷⁶ and democratic legitimacy.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.¹⁷⁸

¹⁷⁶ Keppenne, *supra* n. 4.

¹⁷⁷ Eckes and Abazi, *supra* n. 16.

¹⁷⁸ Respondent 4.