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'I/A' ITEM NOTE

From: General Secretariat of the Council
To: Permanent Representatives Committee (Part 2)/Council
Subject: Amendment of Protocol No 3 on the Statute of the Court of Justice of the European Union
- General approach

1. On 30 November 2022, the Court of Justice transmitted a request under Article 281 of the Treaty on the Functioning of the European Union (TFEU) for an amendment of Protocol No 3 on the Statute of the Court of Justice of the European Union¹. The request aims, first, to lay down the specific areas in which the General Court is to have jurisdiction, pursuant to Article 256(3) TFEU, to hear and determine questions referred for a preliminary ruling under Article 267 TFEU, and, second, to extend the material scope of the mechanism for the determination of whether an appeal is allowed to proceed, which entered into force on 1 May 2019.
2. The draft Regulation is based on Article 281, second paragraph, TFEU (ordinary legislative procedure).

¹ Document 15936/22.

3. The Commission delivered a favourable opinion on the request by the Court of Justice on 10 March 2023².
4. The Working Party on the Court of Justice examined this proposal at its meetings on 3 February, 17 March and 5 May 2023 and has agreed on the text in the annex to this note.
5. In the European Parliament, the Committee on Legal Affairs (JURI) has the lead responsibility. Ms. Ilana CICUREL (Renew, FR) was appointed rapporteur. The report will be tabled shortly.
6. The Permanent Representatives Committee is invited to
 - a) confirm agreement on the text of the general approach, as set out in the annex to this note, and
 - b) recommend that the Council reach a general approach as set out in the annex to this note, through an ‘A’ item in one of its next meetings, to enable the Presidency to conduct negotiations with the European Parliament.

² Document 7321/1/23 REV 1.

REGULATION (EU, Euratom) 2022/... of THE EUROPEAN PARLIAMENT AND OF THE
COUNCIL

of ...

amending Protocol No 3 on the Statute of the Court of Justice of the European Union

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular
Article 256(3) and the second paragraph of Article 281 thereof,

Having regard to the Treaty establishing the European Atomic Energy Community, and in particular
Article 106a(1) thereof,

Having regard to the request of the Court of Justice of 30 November 2022,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Commission¹,

Acting in accordance with the ordinary legislative procedure²,

Whereas:

¹ Opinion of 10 March 2023 (OJ C .../ not yet published in the Official Journal)

² Position of the European Parliament of ... [(OJ ...)/(not yet published in the Official Journal)]
and decision of the Council of

- (1) At the invitation of the European Parliament and the Council of 16 December 2015,³ on 14 December 2017 the Court of Justice submitted to the European Parliament, the Council and the Commission a report on possible changes to the distribution of jurisdiction to receive preliminary rulings under Article 267 of the Treaty on the Functioning of the European Union (TFEU). In that report, the Court of Justice took the view that there was no need, at that time, to propose changes as regards the manner of dealing with requests for preliminary rulings under Article 267 TFEU. Nevertheless, in that same report, it pointed out that a subsequent transfer of jurisdiction to the General Court to give preliminary rulings in certain specific areas could not be ruled out if the number and complexity of requests for a preliminary ruling submitted to the Court of Justice were to be such that the proper administration of justice required it. Furthermore, such a transfer is in line with the intentions of the authors of the Treaty of Nice, who sought to strengthen the efficiency of the judicial system of the Union by providing for the possibility of the General Court being involved in dealing with those requests.
- (2) The statistics of the Court of Justice highlight the fact that both the number of pending preliminary ruling cases and the average duration to deal with those cases are increasing. That situation is attributable not only to the high number of requests for a preliminary ruling of which the Court of Justice is seised each year, but also to the great complexity and particularly sensitive nature of a growing number of questions put to that court. In order to allow the Court of Justice to continue to fulfil its mission, it is necessary, in the interests of the proper administration of justice, to make use of the possibility provided for in the first subparagraph of Article 256(3) TFEU and to transfer to the General Court jurisdiction to hear and determine questions referred for a preliminary ruling under Article 267 TFEU, in specific areas laid down by the Statute.

³ See Article 3(2) of Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union (OJ L 341, 24.12.2015, p. 14).

- (3) The General Court is currently in a position to be able to deal with the increase in workload that will follow from that transfer of jurisdiction, as a result of the doubling of the number of its Judges and the measures taken in the context of the reform of the judicial framework of the Union resulting from Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council.⁴ Nevertheless, since the workload of the General Court is closely related to developments in the Union's activity, it is important to ensure that the General Court remains capable of fully exercising its powers of review in respect of the institutions, bodies, offices and agencies of the Union, if necessary by means of increasing the number of its staff.
- (4) For reasons of legal certainty, it is essential that the areas in which jurisdiction to give preliminary rulings is conferred on the General Court be clearly defined and sufficiently separable from other areas. Furthermore, it is also important for those areas to have given rise to a substantial body of case-law of the Court of Justice which is capable of guiding the General Court in the exercise of its jurisdiction to give preliminary rulings.
- (5) The specific areas should moreover be determined taking into account the need to relieve the Court of Justice from having to examine a sufficiently high number of preliminary ruling cases so as to have a real impact on its workload.
- (6) It is on the basis of those parameters that the determination of the specific areas in which jurisdiction to give preliminary rulings is conferred on the General Court should be made. Having regard to the developing nature of Union law, that determination should be made having recourse to the wording most frequently used to designate those specific areas, accompanied by a description of their main components.

⁴ Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union (OJ L 341, 24.12.2015, p. 14).

- (6a) The common system of value added tax, excise duties, the Customs Code and the tariff classification of goods under the Combined Nomenclature meet all of the abovementioned criteria to be classified as specific areas within the meaning of the first subparagraph of Article 256(3) of the Treaty on the Functioning of the European Union. Those specific areas are clearly defined and separable from other areas. They cover, at present, questions such as the determination of the tax base for the assessment of value added tax or the conditions for the exemption from payment of that tax, the interpretation of the general arrangements for excise duty and of the framework relating to duties on alcohol, alcoholic beverages, tobacco, energy products and electricity, the elements on the basis of which import or export duties are applied in the context of the trade in goods (the common customs tariff, the origin and customs value of goods), import and export procedures, in that it comprises the incurrance, determination and extinction of a customs debt, specific customs arrangements, the system of relief from customs duties, as well as the interpretation of specific tariff headings and the criteria for the classification of certain goods in the Combined Nomenclature which currently appears in Annex I to Council Regulation (EEC) No 2658/87.⁵
- (7) The same is true of compensation and assistance to passengers where transport services are delayed or cancelled or where passengers are denied boarding.⁶

⁵ Council Regulation (EEC) No 2658/87, of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1987 L 256, p. 1).

⁶ Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (OJ 2004 L 46, p. 1), Regulation (EU) 2021/782 of the European Parliament and of the Council of 29 April 2021 on rail passengers' rights and obligations (new version of Regulation (EC) N° 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations, applicable as of 7 June 2023); Regulation (EU) N° 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) N° 2006/2004; Regulation (EU) N° 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) N° 2006/2004

- (7a) The situation is identical as regards the scheme for greenhouse gas emission allowance trading. This specific area is, for its part, governed at present by Directive 2003/87 establishing a scheme for greenhouse gas emission allowance trading within the European Union, ⁷ and by the acts adopted on the basis of that directive.
- (8) Having regard to the substantive criterion applicable to the distribution between the Court of Justice and the General Court of jurisdiction to give preliminary rulings, it is necessary, for reasons of legal certainty and expedition, for the referring courts not to take it upon themselves to decide which of the EU Courts has jurisdiction to hear and determine a request for a preliminary ruling. Every request for a preliminary ruling should therefore be submitted to a single court, namely the Court of Justice, which will determine, in accordance with detailed rules to be set out in its Rules of Procedure, whether the request falls exclusively within one or several specific defined areas laid down in the Statute of the Court of Justice of the European Union (“the Statute”) and, accordingly, whether that request must be dealt with by the General Court. The Court of Justice will continue to have jurisdiction to adjudicate on requests for a preliminary ruling that, notwithstanding the fact that they may be connected to those specific areas, also concern other areas, since the first subparagraph of Article 256(3) TFEU does not provide any possibility to transfer to the General Court jurisdiction to give preliminary rulings in areas other than the specific areas.
- (8a) The Court of Justice should also continue to have jurisdiction where the request for a preliminary ruling, notwithstanding the fact that the legal context of the case in the main proceedings falls within one or more of the specific areas, raises autonomous questions of interpretation of primary law, public international law, general principles of law or the Charter of Fundamental Rights.

⁷ Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community (OJ 2003 L 275, p. 32).

- (9) In order to provide the national courts and the interested persons referred to in Article 23 of the Statute with the same guarantees as those provided by the Court of Justice, the General Court should adopt procedural rules equivalent to those applied by the Court of Justice when dealing with requests for a preliminary ruling, in particular as regards the designation of an Advocate General.
- (10) Having regard to the specific features of preliminary ruling proceedings as compared with direct actions over which the General Court has jurisdiction, it is appropriate to assign requests for a preliminary ruling to chambers of the General Court designated for that purpose.
- (11) In addition, in order to maintain in particular the consistency of preliminary rulings given by the General Court, and in the interests of the proper administration of justice, provision should be made for a formation of the court the size of which is between that of chambers of five Judges and the Grand Chamber.
- (12) The statistics of the Court of Justice also highlight a high number of appeals brought against the decisions of the General Court. With a view to maintaining the efficiency of appeal proceedings and allowing the Court of Justice to focus on the appeals that raise important legal questions, the mechanism for the determination of whether an appeal is allowed to proceed should be extended, whilst ensuring that the requirements inherent in effective judicial protection are met.
- (13) With this in mind, that mechanism should first be extended to appeals whose subject matter is a decision of the General Court concerning the decision of an independent board of appeal of a body, an office, or an agency of the Union which, on 1 May 2019, had such an independent board of appeal but to which Article 58a of the Statute does not yet refer. Such appeals concern cases which have already been considered twice, initially by an independent board of appeal, then by the General Court, with the result that the right to effective judicial protection is fully guaranteed.

- (14) The abovementioned mechanism should also be extended to disputes relating to the performance of contracts containing an arbitration clause, within the meaning of Article 272 TFEU, which most frequently merely require the General Court to apply to the substance of the dispute the national law to which the arbitration clause refers. Where the General Court is required to apply Union law to the substance of the dispute, appeals brought against the decisions of the General Court delivered in this area should be allowed to proceed where they raise issues that are significant with respect to the unity, consistency or development of Union law.
- (15) Protocol No 3 on the Statute of the Court of Justice of the European Union should therefore be amended accordingly.

HAVE ADOPTED THIS REGULATION:

Article 1

Protocol No 3 on the Statute of the Court of Justice of the European Union ('the Statute') is hereby amended as follows.

- (1) Article 50 is replaced by the following :

'Article 50

The General Court shall sit in chambers of three or five Judges. The Judges shall elect the Presidents of the chambers from among their number. The Presidents of the chambers of five Judges shall be elected for three years. They may be re-elected once.

The General Court may also sit in a Grand Chamber, or in a chamber of an intermediate size between the chambers of five Judges and the Grand Chamber, or be constituted by a single Judge.

The Rules of Procedure shall govern the composition of the chambers and the cases in which and conditions under which the General Court shall sit in its different formations.'

(2) the following Article is inserted :

'Article 50b

1. The General Court shall have jurisdiction to hear and determine requests for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union that come exclusively within one or several of the following specific areas:

- the common system of value added tax;
- excise duties;
- the Customs Code;
- the tariff classification of goods under the Combined Nomenclature;
- compensation and assistance to passengers in case of delay or cancellation of transport services or denied boarding;
- the scheme for greenhouse gas emission allowance trading.

2. Every request for a preliminary ruling made under Article 267 of the Treaty on the Functioning of the European Union shall be submitted to the Court of Justice. After verifying, in accordance with the detailed rules set out in its Rules of Procedure, that the request for a preliminary ruling comes exclusively within one or within several of the areas to which paragraph 1 refers, the Court of Justice shall transmit that request to the General Court.

3. The requests for a preliminary ruling that the General Court hears and determines under Article 267 of the Treaty on the Functioning of the European Union shall be assigned to chambers designated for that purpose in accordance with the detailed rules set out in its Rules of Procedure. In those cases, an Advocate General shall be designated, in accordance with the detailed rules set out in the Rules of Procedure.'

(3) Article 58a is replaced by the following:

Article 58a

1. An appeal brought against a decision of the General Court concerning a decision of an independent board of appeal of one of the following bodies, offices, and agencies of the Union shall not proceed unless the Court of Justice first decides that it should be allowed to do so:

- (a) the European Union Intellectual Property Office;
- (b) the Community Plant Variety Office;
- (c) the European Chemicals Agency;
- (d) the European Union Aviation Safety Agency;
- (e) the European Union Agency for the Cooperation of Energy Regulators;
- (f) the Single Resolution Board;
- (g) the European Banking Authority;
- (h) the European Securities and Markets Authority;
- (i) the European Insurance and Occupational Pensions Authority;
- (j) the European Union Agency for Railways.

2. The procedure referred to in paragraph 1 shall also apply to appeals brought against:

– decisions of the General Court concerning a decision of an independent board of appeal, set up after 1 May 2019 within any other body, office, or agency of the Union, which has to be seised before an action can be brought before the General Court;

– decisions of the General Court relating to the performance of a contract containing an arbitration clause, within the meaning of Article 272 of the Treaty on the Functioning of the European Union.

3. An appeal shall be allowed to proceed, wholly or in part, in accordance with the detailed rules set out in the Rules of Procedure, where it raises an issue that is significant with respect to the unity, consistency or development of Union law.

4. The decision as to whether the appeal should be allowed to proceed or not shall be reasoned, and it shall be published.’

Article 2

1. Requests for a preliminary ruling made under Article 267 of the Treaty on the Functioning of the European Union and pending before the Court of Justice on the first day of the month following the date of entry into force of this Regulation shall be dealt with by the Court of Justice.

2. Appeals against decisions of the General Court concerning a decision of a board of appeal of one of the bodies, offices, or agencies of the Union referred to in Article 58a(1), points (e) to (j), of the Statute, and against those referred to in Article 58a(2), second indent, of the Statute, of which the Court of Justice is seised on the date of entry into force of this Regulation, are not covered by the mechanism by which it is determined whether an appeal is allowed to proceed.

Article 3

This Regulation shall enter into force on the first day of the month following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at

For the European Parliament

For the Council

The President

The President
