

THE REFORM OF THE EU COURTS

THE NEED OF A STRATEGIC APPROACH

F. DEHOUSSE

All opinions expressed are strictly personal.

OUTLINE

1. Some new challenges
2. The objectives of a reform
 - Efficiency
 - Costs efficiency
 - Adaptability
 - Long term coherence
3. The options of a reform
 - Less applications ? Better management ? More personnel ? Better personnel ? Structural solutions ?
4. The structural solutions : a very big General Court or specialized courts ?

1. SOME NEW CHALLENGES

- 1.1. A new Treaty
- 1.2. New EU legislations
- 1.3. An enlarged Union
- 1.4. An increase of applications
- 1.5. A growing backlog in the General Court
- 1.6. Increasing budget constraints

1.1. A new Treaty

- 1.1. Simplification of ordinary decision process
- 1.2. New EU areas of competence
- 1.3. Transfer of internal security matters towards the Community method
- 1.4. More human rights (the Charter of fundamental + the mandatory EU adherence to the ECHR)

1.1. A new Treaty



Most probably, more judicial work.

1.2. A bunch of new EU legislations

- Climate
- Energy (new regulator and codes)
- Telecoms (new regulator)
- REACH (new agency – strong integration of the chemicals' authorizations)
- Financial services and supervision (3 new regulators)
- Immigration
- Agriculture

1.2. A bunch of new EU legislations



Most probably, more judicial work.

1.3. An enlarged Union

- 27 Member States
- Other adhesions likely
- Generally, the judicial workload post-enlargement follows a J curve

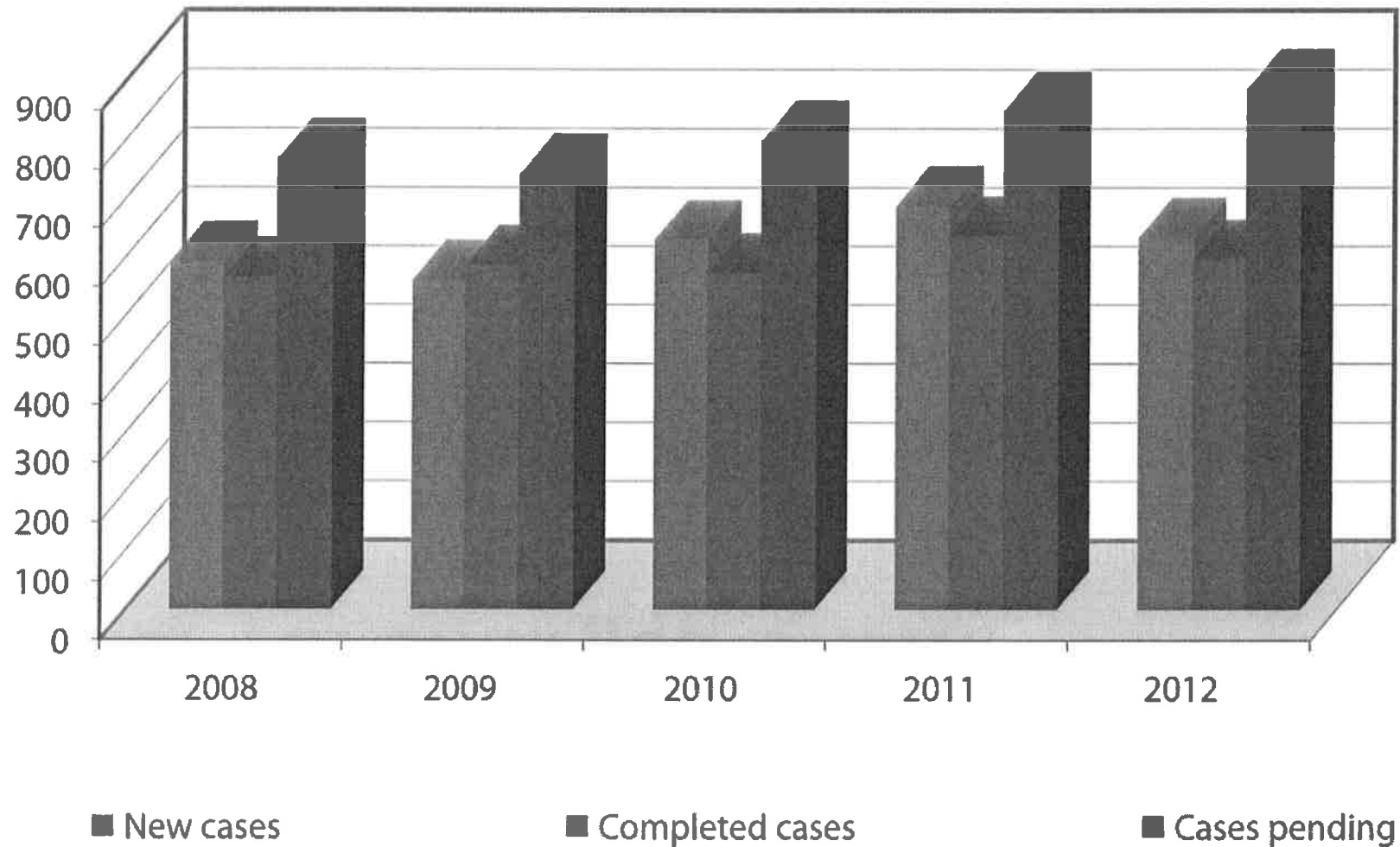
It takes a few years for applications to rise). As happened before, the 2004-2007 enlargements have brought immediately important new means (from 15 to 27 cabinets in both the CJ and the GC). In a first period, the number of cases increased more moderately. Progressively, this number will increase.

1.3. An enlarged Union



Most probably, more judicial work.

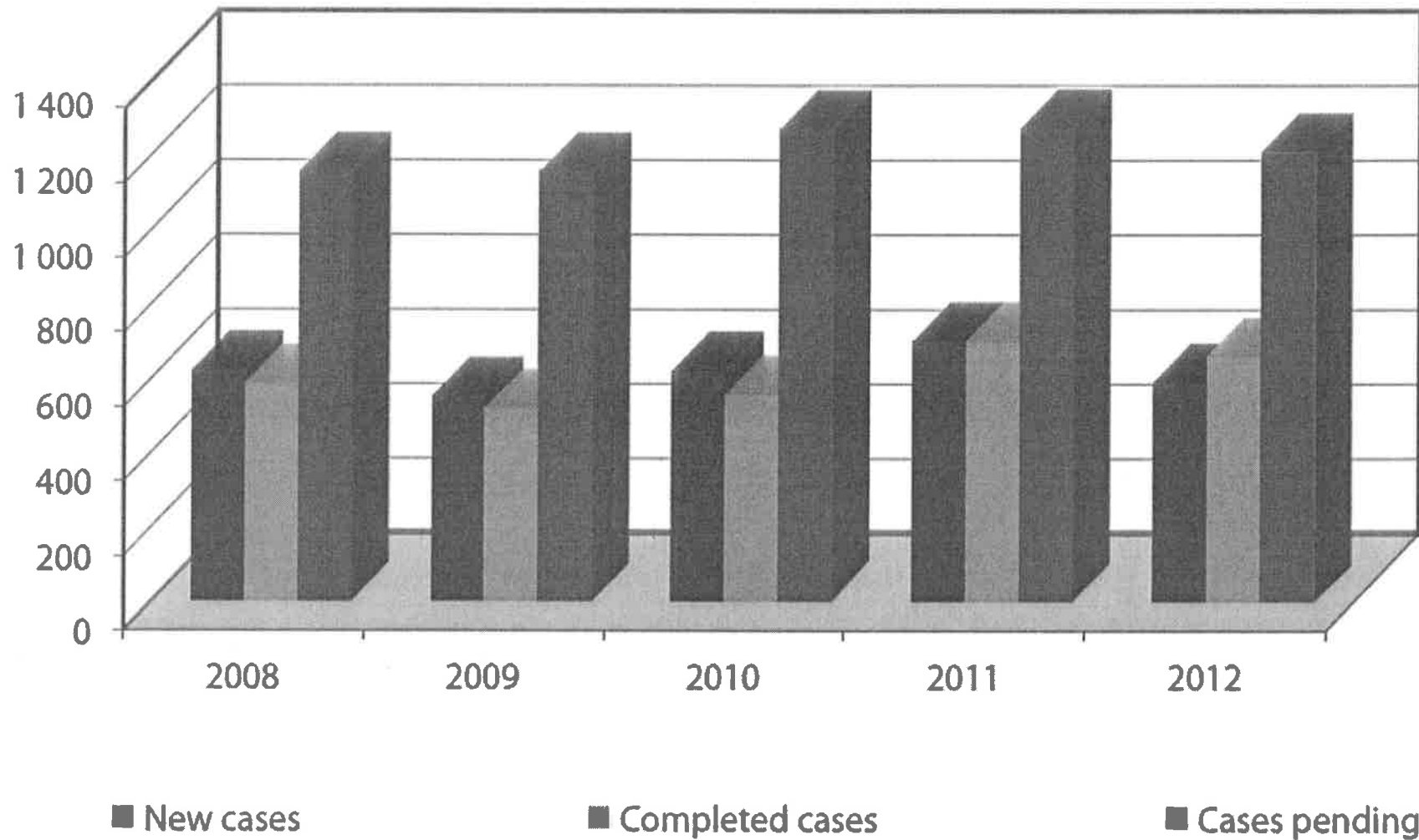
1.4. An increase of applications (CJ)



1.4. A slow decrease of productivity

	2008	2009	2010	2011	2012
New cases	593	562	631	688	632
Completed cases	567	588	574	638	595
Cases pending	768	742	799	849	886

1.4. An increase of applications (GC)



1.4. A slow decrease of productivity

	2008	2009	2010	2011	2012
New cases	629	568	636	722	617
Completed cases	605	555	527	714	688
Cases pending	1 178	1 191	1 300	1 308	1 237

1.5. A growing backlog in the GC

	2008	2009	2010	2011	2012
State aid	185	161	153	179	152
Competition	236	247	288	227	200
Staff cases	2	1	1		
Intellectual property	316	355	382	361	389
Other direct actions	371	358	416	458	438
Appeals	46	46	32	47	25
Special forms of procedure	22	23	28	36	33
Total	1 178	1 191	1 300	1 308	1 237

19. Miscellaneous — General trend (1989–2012)
New cases, completed cases, cases pending

	New cases (¹)	Completed cases (²)	Cases pending on 31 December
1989	169	1	168
1990	59	82	145
1991	95	67	173
1992	123	125	171
1993	596	106	661
1994	409	442	628
1995	253	265	616
1996	229	186	659
1997	644	186	1 117
1998	238	348	1 007
1999	384	659	732
2000	398	343	787
2001	345	340	792
2002	411	331	872
2003	466	339	999
2004	536	361	1 174
2005	469	610	1 033
2006	432	436	1 029
2007	522	397	1 154
2008	629	605	1 178
2009	568	555	1 191
2010	636	527	1 300
2011	722	714	1 308
2012	617	688	1 237
Total	9 950	8 713	

1.5. A growing backlog in the GC

Many factors are involved :

- Limited stability of judges
- Limited stability of personnel
- No productivity incentives for personnel
- Complexity of procedural constraints
- 23 languages in complex procedures take time
- Limited use of ICT

1.6. Increasing budgetary constraints

Can the institution do more with the same ?

1.6. Increasing budgetary constraints

A small reflection on costs.

- Budget CJEU = 0,35 Bo Euros
- A judgment = 400,000 Euros/piece
- There are more or less now 1300 applications/year (in a system of nearly 500,000,000 persons !).
- What do we do if the number of applications rises to 10,000/year ?

2. THE OBJECTIVES OF THE REFORM

- 2.1. The constraints of some fundamental choices
- 2.2. Efficiency
- 2.2. Costs
- 2.3. Adaptability
- 2.4. Long term coherence

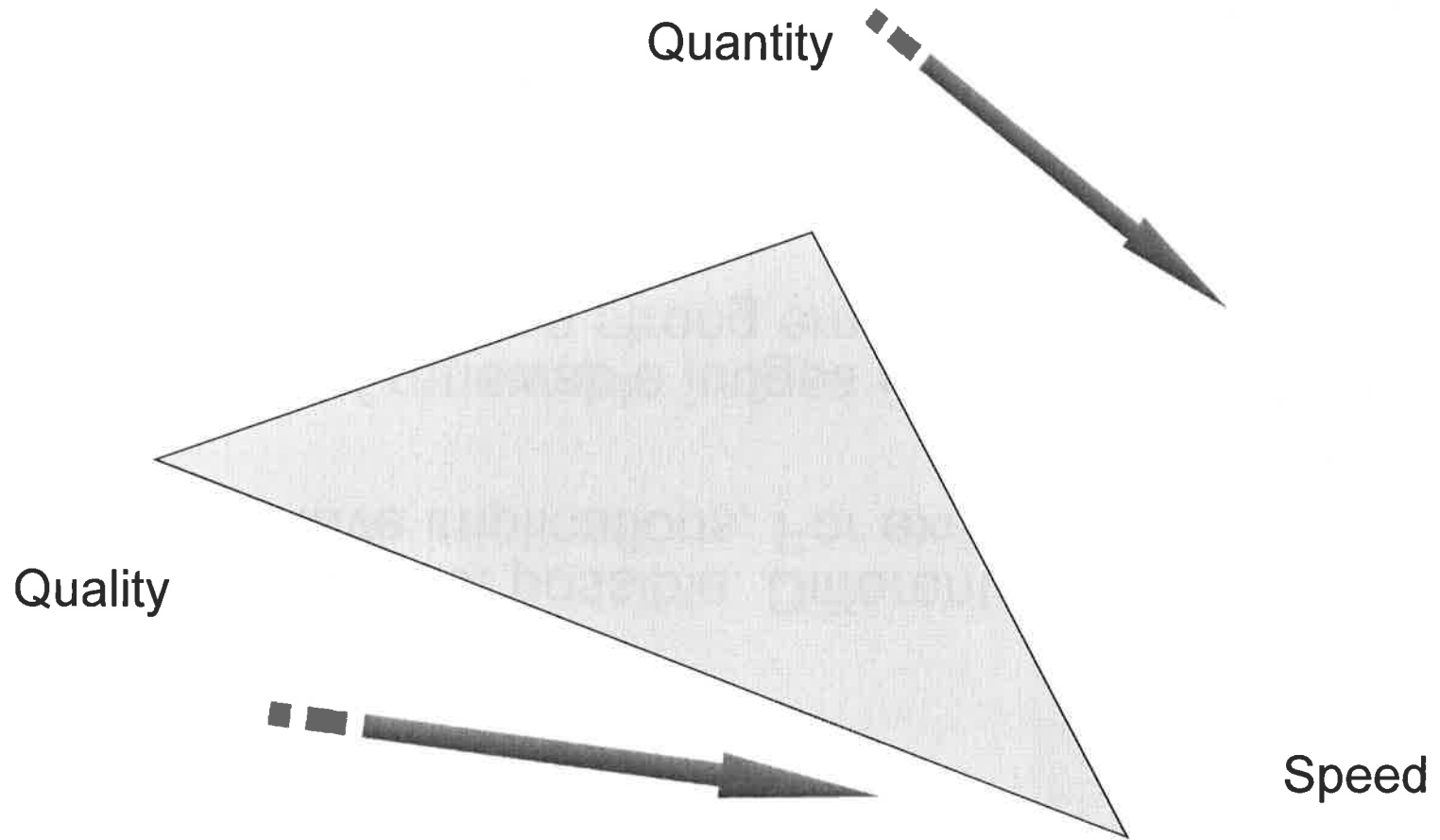
2.1. The constraints of some fundamental choices

- *Judges with a 6 years mandate when heavy cases take 4 years is certainly no optimal solution.*
- *Working in 23 different languages is certainly no optimal solution.*

Miracles are not possible. Different strategic choices have implications. For example :

- A system of renewable judges (for understandable reasons) requires a strong emphasis on previous EU experience.
- Judges with one mandate only – or sometimes less – are necessarily less efficient.
- Having proceedings in 23 languages (for understandable reasons too) increases strongly the length and costs of the proceedings. This is especially true when a lot of facts must be verified.

2.2. Efficiency : a complex concept



2.3. Costs

A serious analysis is complex.

- The previous arguments (see 2.1) apply.
- Some costs are inevitable.
- However, improvements can be brought, especially in the field of human resources.

2.4. Adaptability

- Legislative procedures have become complex.
- And Treaty changes extremely difficult.

2.5. Long term coherence

What does the Court of justice say in 1995 ?

- Increasing the number of courts would be unlikely to endanger the unity of the case-law provided there is still a supreme court to ensure uniformity of interpretation through appeals or preliminary rulings as the case may be (§ 15).

What does it say in 2011 ?

- Increasing the number of courts would endanger the coherence of the case-law.

3. THE OPTIONS OF THE REFORM

3.1. A reduced number of cases

3.2. More personnel

3.3. Better personnel

3.4. Structural solutions

- More judges in the General Court
- Specialized courts (beginning with trademarks)

3.1. A reduced number of cases

- This is not the trend of the Treaties and the legislations (see § 1)
- The General Court has no margin.
- The only possible measures could be for the Court : (a) a limitation of prejudicial questions or (b) a certiorari limiting the possibility of appeal.

3.2. More personnel

- This should be contemplated on a **CONDITIONAL** basis.
- The solution is proportionally less costly and quicker than others.
- However, it requires some productivity incentives to deliver serious results.
- There are however limits (more personnel in the cabinets = less control of the judges). 4 legal secretaries (référendaires) is a maximum.

3.2. More personnel

A better human resources management is the heart of the matter. Otherwise, ANY increase of resources (judges included) will produce limited results.

3.3. Better personnel

There is only ONE category of legal secretary. So you pay a 25 years or a 35 years collaborator with 10 additional years of experience the same !

3.4. Structural solutions

More judges in the GC
(the CJ plan)

.....

Or a specialized trademark court ?
(the GC plan)

4. WHICH IS THE BEST STRUCTURAL SOLUTION ?

- 4.1. Efficiency
- 4.2. Costs
- 4.3. Adaptability
- 4.4. Coherence

4.1. Efficiency

"The division of labor ... occasions, in every art, a proportionable increase in the productive powers of labor" (Adam Smith).

- Recruitment can be more selective (judges, collaborators, registrar) with specialized courts.
- At the EU level, recruitment is more objective with specialized courts.
- Procedural rules, functioning, training can be focused with specialized courts.
- Overheads are somewhat reduced.

4.1. Efficiency - conclusion

PPPU = Productivity Per Personnel Unit
[ratio cases closed / judges + cabinets' personnel]

The efficiency criterion favours clearly the specialized courts.

PPPU = 2 for the Court of Justice, 3 for the General Court, ... and 5,5 for the Civil Servant Court.

CST is thus **STRONGLY** more productive per head of personnel.

4.2. Costs (more)

In the domain of trademarks, costs could still be reduced more. This domain benefits presently from two administrative levels, which is a huge luxury (governments and enterprises which must retribute 250 millions Euros in cartel or EU subsidies cases do not benefit paradoxically from the same protection).

One administrative level at the OHIM (Alicante) could thus be suppressed. The organization of the trademark court could even be financed with the trademark royalties.

Even if the two administrative levels are kept, there is still a possibility to finance largely a specialized court with the trademarks royalties.

4.2. Costs (more)

More fundamentally, the institutions need to think in depth about the European justice costs, especially if the number of applications keeps on rising (Results 2010 : 1230 settled cases / 330 millions Euros).

This was done at the creation of the CST (the rule about costs was fortunately modified).

This approach could certainly be extended and expanded in other specialized courts. As in trademarks, the litigation costs should be anticipated.

4.2. Costs - conclusion

The costs criterion favors very clearly the creation of specialized courts.

4.3. Adaptability

Pros and contras

- Contra specialized courts : creation of a new organ (a new court).
- Pro specialized courts : it is easier to increase/reduce the number of judges and collaborators than in the General Court (where politics will always require a balance).
- Pro specialized trademark court : special adaptability since this court could be extended later to other intellectual property rights (patents for example).

4.3. Adaptability - conclusions

Globally, the adaptability criterion favors the creation of specialized courts (unless the Member States consider their representation in the General Court is henceforth a secondary question).

4.4. Coherence

- It would be better to deal identically with all intellectual property rights (which are linked by similar horizontal questions).
- Creating specialized chambers in a General Court is contradictory. This mixes artificially two approaches (what about recruitment ? And stability of personnel ?)
- In the long term, some CJ's competences will have to be transferred to the General Court.

4.4. Coherence

- The refusal of specialized courts is one of the reasons of the creation of the Unified patent Court outside the EU framework (which is highly regrettable).
- If we do not accept this flexibility inside the EU framework, other structures will be created outside it.

4.4. Coherence

- Specialized courts could allow more adaptations to the present rules (since the impact would be foreseeable and limited).
 - Specific qualifications of judges
 - Term of judges' mandate
 - Simplification of procedural rules
 - Simplification of language rules

4.4. Coherence

- More specifically on trademarks :

- Specific qualifications of judges
- Term of judges' mandate
- Simplification of procedural rules
- Simplification of language rules

... could

- Improve both quality and quantity of judgments
- Reduce the length of procedure
- Reduce costs when the authorities will want more contribution from the enterprises

4.4. Coherence (more)

In the middle term, the (still unanswered) question for the Court is :

- o What is the maximum level of cases that the CJ can accept ?
- o When this level will be reached, what must be transferred to the General Court ?

... the last thing we need is a reform that will need a serious correction in a few years. “Wisdom consists of the anticipation of consequences”. (N. Cousins)

4.4. Coherence (more)

In the middle term, the Court will have to choose between keeping all appeals and all prejudicial rulings. The emphasis presently put on the need to keep the prejudicial rulings at one level is justified. But it requires flexibility on other aspects.

Conclusion : all this shows the coherence of the Nice system

The best long term project is :

- A constitutional court
- A general court
- Different specialized courts

FINAL RECOMMENDATION

- Each step in the EU integration requires a judicial control. The legislative authorities must take this into consideration in the decision process. New steps will require either more means or more decentralization.
- The easier, quicker and less expansive solution for the present problem is to increase the volume of personnel (provided some guarantees are provided regarding productivity).
- There is a need to develop incentives in the personnel of the General Court. A three tier system would be the best one.
- The present backlog can be reduced by short term measures... but preferably not at the price of additional difficulties in the long term
- Specifically in the trademarks' domain, the best solution would be to create a specialized court
- A contingency plan is needed in case of a sudden overload. From this point of view, the Court's proposition is useful.

FINAL RECOMMENDATION

In any case, adding new means without taking anterior measures to increase their productivity is a sure recipe for inefficiency.