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General Court (role in IP cases)

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History and jurisdiction

While calls for a Court of First Instance in the EU date back to 1978, it was only in 1986, with the Single European Act, that the founding Treaties were amended to allow for the creation of such court (EEC Treaty, art. 168a), which was ultimately established in 1989, though the transfer of functions was completed only in 1992 (Naôme, 2018).

To recognise its role a more than mere first instance court, the Treaty of Lisbon transformed it into the General Court in 2009. Currently, the Court is composed of two judges per Member State, with cases being normally heard by chambers of three to five judges, in some cases by individual judges, and exceptionally by the fifteen judges composing the Grand Chamber. The Court has jurisdiction on a variety of matters identified by the Treaty on the Functioning of the EU (TFEU, art. 256) and by the Statute of the Court of Justice (CJEU) (Protocol No 3, art. 51). To limit oneself to those most closely related to IP, one can mention: (i) actions relating to IP brought against the EU Intellectual Property Office (EUIPO) and against the Community Plant Variety Office; (ii) actions brought by the Member States against the Council about acts in the field of State aid and state protection measures. The main focus of this entry will be on the former and in particular on the role that the General Court has in cases concerning trademarks and design rights.

IP actions before the General Court

Actions can be brought before the General Court against decisions of the Boards of Appeal in relation to appeals on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the TFEU, infringement of EU Trade Marks (EUTM) Regulation, the Community Designs Regulation, or of any rule of law relating to their application or misuse of power (Community Designs Regulation, art. 61; art. 72).

The action is open to any party to proceedings before the Board of Appeal adversely affected by its decision, but it has to be filed within two months from the notification of the contested decision (art. 61(4)(5); art. 72(4)(5)). If successful, the General Court will annul or alter the decision and the EUIPO shall put in place the necessary measures to comply (art. 61(3) and (6); art. 72(3) and (6)).

Of the 3252 IP cases the General Court has handled so far, the vast majority (2700) were the outcome of an action for annulment and were found unfounded (Eur-Lex data, 2023). Only 667 such actions were successful, and 200 inadmissible. Less popular are other actions e.g. the action for damages (5 unfounded, 2 inadmissible) and the application for interim measures (2 unfounded).

The decisions of the General Court in IP cases normally take the form of a judgement (3038) and more rarely of an order (213). Only one opinion of Advocate General (AG) could be identified, in line with the fact that – unlike the CJEU – the General Court does not have AGs, but in the complexity of the case warrants it, a judge can be temporarily appointed as AG under

TFEU Protocol No 3 on the Statute of the CJEU (CJEU Statute), art. 49, and Rules of Procedure, arts 30-31.

In terms of applicants or appellants, most actions come from persons (2244), with only 4 actions coming from Member States. It will not come as a surprise that the EUIPO (and previously the Office for the Harmonisation of the Internal Market or OHIM) is the main defendant (3199) followed by the Institutions (2245), and the Community Plant Variety Office (17). Finally, most IP actions originate from Germany (1756), followed by Spain (614), third countries (568), Italy (390), and France (329).

In substantive terms, many General Court decisions have shaped IP Law in Europe. One need only think of *JOOP! v OHIM* (ECLI:EU:T:2009:374), *Coca-Cola v OHIM* (ECLI:EU:T:2016:94), *Bang & Olufsen v OHIM* (ECLI:EU:T:2011:575), and *Crocs v EUIPO* (ECLI:EU:T:2018:137), key authorities in the fields of lack of distinctiveness, acquired distinctiveness, shapes giving substantial value to the goods, and design novelty, respectively.

Procedure

The Statute of the CJEU entails provisions on the procedure before the CJEU that apply also to the General Court (Title 3, art. 53) as well as rules specific to the latter (Title IV). The General Court has its own Rules of Procedure that have to be read in conjunction with the Practice Rules for their implementation; both were adopted in 2015 and revised in 2016, and finally in 2018. In replacing the previous Rules of Procedure, dating back to 1991 (albeit repeatedly amended until 2013), the new Rules ‘led to substantial changes regarding disputes relating to [IPRs]’ (Walicka, 2016 p. 64). These changes included single judge rulings; clarifications about the rights of interveners, with the EUIPO (then OHIM) remaining the defendant in inter-partes proceedings; and a simplification in the procedures e.g. the abolition of the second exchange of pleadings.

Currently, the key stages of IP proceedings before the General Court are as follows. First, a lawyer lodges an electronic application at the Registry (e-Curia) and its main points are published in the Official Journal of the EU. The application shall contain the name and address of the applicant, status and address of their representative, the defendant Office, the names and address of the parties in the original proceedings, the subject matter (the same as the proceedings before the Board of Appeal), the pleas in law, arguments relied on, and summary of those pleas in law, the order sought (Rules of Procedure, arts 177 and 188; Practice Rules, point 80). The applicant can in principle choose the language of the case (Rules of Procedure, art. 45). Second, the Registrar informs the defendant (typically the EUIPO) and the parties to the original proceedings of the lodging. Non-compliance with certain requirements will prevent the serving of the application, namely (i) the certificate of the lawyer’s authorisation to practice, (ii) recent proof of the existence in law of a legal person governed by private law (in which case authority to act must be produced), (iii) the contested decision and when it was notified; (iv) names and addresses of the parties to the original proceedings (Annex 1 to the Practice Rules). Third, the defendant and the interveners – parties to the original proceedings and their successors in title – have two months to submit a response (Rules of Procedure, arts 174-176, 178-179). To speed up the process, pleadings in IP cases are shorter i.e. twenty pages for application and responses, as opposed to fifty (Practice Rules, point 107). Fourth, within the same time limit, the parties to the proceedings before the Board of Appeal other than the applicant may submit a cross-claim; in this case, the other parties have two months to submit a response to the cross-claim (Rules of Procedure, arts 182-187). The oral part of the procedure

and the judgement are not specific to IP cases. At the oral hearing, after the lawyers' opening statements, the judges ask questions also relying on the Judge-Rapporteur's report for the hearing (chapter 8). Finally, the judges deliberate on the basis of the Judge-Rapporteur's draft judgement, and deliver it at a public hearing (chapter 9).

IP case load

The role of the General Court in IP cases has visibly increased over time, going from 2–6 yearly IP cases between 1990 and 2000, through 25-71 between 2001 and 2007, to 121-163 between 2008 and 2013, and 205-256 between 2014 and 2021 (Eur-Lex data 2023). The highest number on record in 314 cases in 2015, which is in line with the overall workload increase of the EU judiciary, and corresponds to the reform of the EU's judicial structures, including the doubling of the General Court judges and the entering into force of the Rules of Procedure in July 2015 (CJEU 2015).

It is also interesting to note how staff cases constituted the main form of litigation before the Court until 2005, whereas IP overtook staff cases in 2006 and remained the main workload heading ever since, as a diachronic analysis of the CJEU's *Annual Reports* shows.

The 2019 reform: the filtering system

The importance of IP for the General Court emerges with clarity from all the key relevant reports and procedural documents (e.g. the Practice Rules were adopted after consulting the OHIM, see recital 13). IP was at the centre of the 2015 reform of the Rules of Procedure and is at the centre of the most recent reform i.e. the amendment of the CJEU Statute under Regulation 2019/629 amending Protocol No 3, effective as of May 2019, introducing the so-called filtering system (Gentile, 2020).

Thirty years ago, an appeal before the CJEU was introduced against the decisions of the then Court of First Instance. This became a significant part of the former's case load – between 20% and 30% of decisions are appealed, 22% relate to IP (CJEU 2022) – and has attracted specific scholarly attention (Naôme, 2018). The 2019 reform has addressed this by removing the automatic right of appeal against the General Court's decisions about decisions of certain independent boards of appeal of EU offices and agencies, including the EUIPO and the Community Plant Variety Office. Under the new regime, it is no longer possible to appeal these decisions – and therefore the General Court will become a court of last resort, IP's Supreme Court in certain cases – unless an appeal would raise 'an issue that is significant with respect to the unity, consistency or development of Union law' (CJEU Statute, art. 58a(3)). The decision to allow the appeal has to be reasoned and published (art. 58a(4)).

The rationale of the reform is twofold. First, these cases have already been considered twice, initially by an independent board of appeal, then by the General Court. Second, many appeals against General Court decisions in IP cases are dismissed by the CJEU because 'they are patently unfounded or on the ground that they are manifestly inadmissible' (CJEU Statute, recital 4). It is not entirely clear whether the CJEU has discretion as to when allow an appeal. On the one hand, under the new provision an appeal shall not proceed 'unless the [CJEU] first decides that it should be allowed to do so' (art. 58a(1)). On the other hand, an appeal 'shall be allowed [when it would affect] unity, consistency or development of Union law (art. 58a(3)). While the this seeming conflict would leave it open to the CJEU to allow appeal on grounds that go beyond unity, consistency or development, the preamble of Regulation 2019/629 points

in the direction of limited discretion as to when an appeal is allowed, in the interest of the proper administration of justice (recital 4). So far, the CJEU has been rigorous in the enforcement of the filtering system (Gentile, 2020).

The future

Looking ahead, the Council of the EU is considering the General Court's proposal from September 2022 to create specialised chambers for IP and civil service cases. Finally, in January 2023 a request from the CJEU to the Council to amend its Statute was published (doc. 15936/22); if approved, it would further increase the role of the General Court in IP cases by removing the automatic right of appeal in a number of scenarios, including the judgements handed down pursuant to an arbitration clause (TFEU, art. 272). While the CJEU remains the 'EU Court of greatest importance for IP' (Pila and Torremans, 2019 p. 66), it seems clear that IP scholarship can no longer ignore the role of the General Court in this field.

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Dominika Walicka, 'New Rules of Procedure of the General Court of the European Union as of 1 July 2015' (2016) 11(1) *JIPLP* 64