EU Judge Dehousse's Farewell Address, with a short introduction by Professors Alemanno & Pech

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Readers of this blog will find below the English translation of Judge Franklin Dehousse's farewell address, which he had hoped to give on the occasion of his departure from the EU General Court last month having served on its bench since 7 October 2003.

In an apparent break with tradition, no public ceremony was organised for the departing EU judges, and an internal meeting was arranged instead (see this article published in *Le Jeudi* on 22 September 2016). While regrettable, this is perhaps not surprising. Indeed, Judge Dehousse has been among one of the most outspoken critics of the controversial reform of the EU's court system, which is now encapsulated in Regulation 2015/2422 and Regulation 2016/1192 (and which we have ourselves critically analysed here and here).

Dehousse's assessment and alternative recommendations are comprehensively set out in three meticulously researched papers, which he published during the course of his judicial term:

– The Reform of the EU Courts. The Need of a Management Approach, *Egmont Paper 53*, 2011, December 2011;

– The Reform of the EU Courts (II). Abandoning the Management Approach by Doubling the General Court, *Egmont Paper 83*, March 2016

– The Reform of the EU Courts (III). The Brilliant Alternative Approach of the European Court of Human Rights, *Egmont Paper 86*, September 2016

Readers may also find of interest his paper dedicated to the Unified Court on Patents, published in 2013 (*Egmont Paper 60*), which explores *inter alia* the impact of the creation of a new European patent court on the EU's court system.

The address below, which Judge Dehousse kindly authorised us to publish on this blog, contains many valuable insights into the internal workings of the EU courts and, at times, the testing relationship between its (then) three constitutive judicial entities, particularly with respect to the controversial doubling in size of the General Court, and the recent dissolution of the Civil Service Tribunal. His address also offers some sound advice on how any structural reform of the EU's court system ought to be conducted in the future. Last but not least, the address explains how the CJEU should seek to better manage and conduct itself, failing which its authority may be fatally undermined, with potential negative consequences on the legitimacy of the EU as a whole. As such, this farewell address undeniably deserves, in our view, to be made easily accessible to EU scholars and interested readers. It is our pleasure to share it with you via this blog.

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Judge Dehousse's Farewell Address to the Court of Justice of the European Union

Ladies and gentlemen,

Dear colleagues,

To me, any holder of public office must always present a report at the end of her or his function. This seems all the more necessary than those years were sometimes fraught with conflict. It must be acknowledged honestly in an Institution whose mission is to ensure the transparency of all other Institutions.

When I arrived here 13 years ago, this office was my seventh profession and my fourth European Institution, after the Parliament, the Commission, and the Council. European affairs had been at the centre of my multiple activities, whether in the public or private sector, at the national or international level, in legal circles or in the media. I thus arrived with much curiosity and enthusiasm. To give away the plot at once, my curiosity has been steadily increasing over the years though, in many respects, my enthusiasm has been declining.

During the first three years, I built a good team, which is absolutely essential here. I learned what I ignored. And we eliminated a huge backlog: a stock of more than 100 cases initially. After that, I wondered how I could still help the Institution. Thanks to my previous experience, I could obviously assist other cabinets with backlog, which was done. After that, according to Adam Smith and Ricardo, I searched for my comparative advantage. Management, ICT, inter-institutional relations, and strategy seemed to be rather rare talents here. I thus invested in these domains.

On one hand, my initiatives focused on the management of the General Court, then in big trouble. For me, having followed many corporate restructurings, this required first a better evaluation of the production of the cabinets, and its production units. Moreover, before asking for any additional means, it seemed essential for the credibility of the Institution to show that it had exhausted all internal sources of productivity. To this end, I harassed the authorities to establish the first serious statistics on the backlog and its causes. This included concepts such as the infamous "PPPU" (the "productivity per personnel unit"), or the threatening "delays columns" (adding all delays for all cases) (for more comments on this, see my first report TEPSA / Egmont in 2011). Originally, all this was not popular at all. Often after long and painful discussions, these measures were nevertheless taken, to the honour of my colleagues. In my humble opinion, they played a vital role in the elimination of the backlog since 2011 – and without any additional resources.

On the other hand, my initiatives focused on the management of the Institution. There, almost immediately, the problems started. Quickly the local leaders saw my initiatives as interferences, and even usurpations. Without commenting on all the episodes of this long saga, four at least deserve a brief comment.

First, in 2007, just before the signing of the Treaty of Lisbon, some of us learned that the President of the Court had sent a letter to Council in order to ask for a series of changes, presented as essentially formal, in the new Lisbon Treaty. After reading, these changes on the contrary appeared quite essential. Basically, they aimed for a large substitution of the Court to the Institution in various provisions.

Everyone, of course, has personal sensitivities. Mine were certainly accentuated by my previous experiences in treaty revisions. For me, everything in this episode was shocking. These were not mere formal changes, but essential amendments. They did not result from any official position taken by the Court of Justice. They had no detailed motivation. There had been absolutely no official information within the Institution, to the public or to the Member States, though they remain the guardians of the treaties. And, finally, these provisions were not improving the adaptability of the Treaties. On the contrary, they would have imposed more treaty revisions in the future. This largely destroyed my trust in the Institution's management.

Secondly, information technologies (IT) became another conflict zone. From the beginning, this Institution had seemed to suffer from a strong problem in this area. Like many other institutions I have known, it had decided IT development in silos, uncoordinated from one another. However, unlike many others, it had never corrected this defect. For years, I tried to convince the people in charge in the IT committee of the need for a more global system of management. Though some understood that, it was impossible. A senior collaborator of the Court's President constantly imposed his personal vision, in defiance of all others. Consequently, the Institution went on implementing simultaneously different and uncoordinated strategies. For example, three different internal communication

systems were developed, without any study of possible synergies between them. Later, three different reference systems were simultaneously used for the jurisprudence.

In the name of hierarchy, this nonsense was maintained for many years. The Institution had not even a general plan of its IT systems until 2010! The "leaders" needed a half IT-crash to begin to see the need of one. Though the present managers try now to improve the situation, the legacy costs are extremely heavy, and the system is hardly optimal. As all experimented users know, even the research in jurisprudence encounters substantial problems.

With some administration officials, we have tried to stop this drift. Finally, after many debates, in 2010, the IT committee imposed a comprehensive analysis of the existing system before any new spending. Alas, the cabinet of the Court's President had simply the minutes of the committee modified, despite the formal opposition of the Court's registrar. This was my second shock. The next decisions were simply moved to a clandestine meeting. Meanwhile, the IT committee was still defining its own strategy, until finally, the IT committee was simply abolished.

This saga still leaves me startled. The suppression of the committee because simplistic instructions from above are debated reflects a very limited sense of debate. To do this while IT becomes absolutely central for all activity reflects a great managerial myopia. Finally, the episode shows the sometimes surreal character of an Institution where judges have apparently time to think about the choice of works of art, but not of IT solutions.

Third came in 2011 the legislative proposal to create new judges to the Tribunal. Let's make a long story short. From the beginning, my first objective was to defend, as required by the Treaties, an open and transparent process. However, the process degenerated. The transmission of various General Court's positions to Parliament and Council was blocked. There was absolutely no impact assessment or consultation process. As the press revealed, an unauthorized negotiation took place with one government only, and without the knowledge of the 27 other Member States. Questionable pieces of information were sent to Parliament and Council in an unsigned document, undated and unnumbered. (One suspects that if these pieces were so trustworthy one would have found someone to sign them in an Institution of 2,000 people.) Other secret letters in the Institution's name popped up in the press. To these problems one must still add a highly questionable ethical procedure opened against one of my colleagues who had provided accurate judicial statistics at the EP rapporteur's request. All this leading to a manifestly disproportionate doubling of the General Court, against its own repeated analyses from 2010 to 2014.

Again, this saga still leaves me speechless. Although I have seen in my career dozens of legislative procedures, that I had never seen. These events have convinced me to publish accurate and documented reports, to avoid their repetition in the future. (See the two reports TEPSA / Egmont 2016).

Fourth came the curious accelerated creation of high administrative positions in the terminal phase of one President's cabinet. Apart from other considerations, creating very quickly such a position, under the exclusive impulse of the Court's President, to manage a service of four people, without any general analysis of the services' organization, nor any written position from the Court's registrar (who is also responsible for all outlays), and based on vague projects (of which almost none were implemented thereafter) seemed to me strongly below the standards of good administration.

Many other topics could be mentioned, such as the specialization of the General Court, or the assignment of cases within it, both imposed by external interventions (something incredible for a judge); or the ability of the Courts' Presidents to take fundamental decisions for the external representation without any preliminary debate with members; the distribution of resources between the registries; the questionable nature of an external activity; the use of drivers; the rights of trade unions to inform the personnel about the legislative proposal; or the right of citizens to have access to administrative documents, etc.

In this context, I fully understand that one can legitimately ask the question: why devote so much importance, effort and energy to these administrative and legislative issues, often overlooked?

My answer is simple. Each time, it was impossible to do otherwise. I've thought very often about it, trust me, and the same conclusion always came back. Such episodes do not correspond, in any case for me, to the role and values assigned to that Institution by the Treaties. A judge does not have the sole mission to care about principles in her or his judgments; s/he must also worry about them in their own institution. This is the meaning of the texts. Basically, this Institution is a collegiate one. Also, when the Courts' Presidents have powers (which no one disputes), they are required to use them respecting a series of established principles by their own jurisprudence: (1) good administration, (2) transparency, (3) motivation, (4) compliance with judicial independence, and (5) accountability to the colleagues who elect them. This must be said here very clearly: according to the existing texts, this Institution is based on the principle of checks and balances, cherished by Montesquieu, and not the Keizer Prinzip, so loved by Wilhelm II.

In addition, this also results from the spirit of the texts. Indeed, in this Institution, if the judges, who are the most independent and privileged, do not control the management, then who will? Finally, this is also the price of our credibility as members of this Institution, especially in a great period of doubt. Each time, I thus first sought compromises to defend these principles. They were always refused in the name of the principle of hierarchy, constantly invoked here, though it is both incorrect legally and inefficient in terms of management. Reluctantly, I have had to defend these principles otherwise.

My growing disillusionment explains the drafting of many memos on various topics in the Institution. They were elaborated with three goals: (1) to inform my colleagues and the personnel (essential in my Institution's vision) about important and unexplained developments; (2) to impose as much as possible collective decisions, involving the responsibility of all judges; and (3) to leave behind me, and there appears my love of university and history, a description as detailed and documented as possible of the Institution's management. I have wanted to do this not only for my court, but also for future analysts, and ultimately for European citizens, who are now rightly tired of the opacity of their Institutions. These documents form now, as you can see, two strong green books, amiably bound by a bunch of friendly colleagues.

Some locals have sometimes spoken of all this with disdain. We'll see. We can note that, slowly, some local practices change. The judges whose collaborators are candidates for an appointment are now excluded from the selection process, even when they are presidents. This is surely an improvement. The simplification of the IT system is now an official objective. Article 52 of the Statute that requires an agreement between the Presidents of the two Courts about the administration has been suddenly rediscovered. An incredible appeal brought by the Court of Justice in front of itself to protect its financial interests has been withdrawn. There is in this Institution for the first time after 60 years a formal, detailed report, approved by the General Court, which covers the shortcomings and possible reforms of its governance. A reflection is slowly open on the weaknesses of the system of access to administrative documents. These changes prove already that with an open mind, we can easily do better.

And I leave this place with a smile at the thought that, as my memoranda cover essentially legislative and administrative issues, they are essentially accessible to citizens. As a lawyer, I wanted to build a complete file that illustrates in many ways the fundamental need to reform, for the first time since 1952, the governance of this institution during the next revision of the EU treaties. When you have a limited influence on the present, you can always at least prepare the future.

This was particularly necessary since the citizens' access to the Institution's legislative and administrative documents not related to judicial proceedings encounters serious difficulties. Article 15 TFEU guarantees that access, with exceptions of course, to citizens who request it. However, the Institution has at

times resorted to secret documents in key areas (such as the revision of the Treaties and the Statute). It has even distributed on one occasion at least a key document secret, unsigned, and not listed. (Additionally, most members had no idea about these documents, and they discovered them only thereafter in other institutions or in the press.) In such circumstances, it is in fact impossible to ensure the proper application of Article 15 TFEU. Furthermore, one can occasionally question the qualification of "judicial affairs" given to certain documents in the courts' minutes. (The definition of the Rules of procedure, for example, do not correspond to a judicial proceeding, but to a regulatory function.) In this context, I have sent, as a member of the Institution, 13 requests for information to the Institution's leaders during the last months, with answers still to come. I hope they will also stimulate improvements.

Finally, before leaving, I must make a *mea culpa*. Over time, disappointment made me occasionally acerbic. To give only one example, one evening after a disappointing visit where we had heard once again lessons from the direction about how to think about our own reform, I dropped to many friends: "the genius of the Carpathians now seems to have found his genius of the carpets". With exasperation, formulas easily come to me. On the one hand, in retrospect, I regret them. On the other, they constitute the inevitable consequence of the permanent rejection of any discussion. I can but ask for forgiveness. You must see there the reflection of the bitter stubbornness of a lawyer who had always defended a high ideal of this Institution in his multiple past roles, and who never accepted to abandon it once arrived here.

Ladies and gentlemen, dear colleagues, fortunately, my stay in this Institution was not monopolised by these conflicts. Besides these dark episodes, there were also luminous ones, especially at the judicial level.

However, I shan't speak much about these activities. In this too, I have always defended a collective vision. In this framework, one must try to listen to various opinions, and find the necessary compromises. Ironically, I was even reproached, occasionally, for being too flexible. With this modest approach, I have been happy to contribute to the jurisprudence of this Institution, which I have always defended with conviction during the whole period.

In the early years, I was also pleased to discover a General Court (then CFI) which, at the time, was making important and appreciated contributions to European law, that were seriously debated inside and outside. A court which, at the time, enjoyed an extremely strong external representation, as strong as the Court of Justice's. A General Court which, at the time, was not afraid of taking clear institutional positions and especially was not afraid to defend them whenever necessary.

The passage of time has allowed us, me and others, to measure even better the debt we had for this to Bo Vesterdorf, the President at the time, and beyond, to Jose Luis da Cruz Vilaca, the founding President. These men had great ambitions for their Court. They represented it brilliantly outside thanks to many high-level conferences and publications. And finally, they shared complete integrity with their colleagues. I wanted to tell them today my great friendship and respect.

My team has produced very good judicial results, both quantitative (many closed cases) and qualitative (very few contests thereafter). Nevertheless, I have been mainly an orchestra director. These very good results were possible only thanks to the contribution of many people.

First, the members of my cabinet, without which very little would have been possible. They know my esteem, and even my great friendship for them. But this is not the place to expand on this.

Second, the personnel of the other cabinets. I have forged with them many relationships of sympathy and even trust. They have sometimes discreetly encouraged me. I have been touched by this support, especially in difficult times. Whenever necessary, I tried to defend the qualified persons (but not necessarily the others), to provide them with the required IT tools, and to put an end to the long uncertainty over their future in which they are maintained.

Third, the registry personnel. It comprehends general highly qualified persons, well led by two successive, and very talented, registrars. The registry's personnel rendered many services to us. On my side, I always defended its staff needs, its IT needs (this provoked occasionally some kind of administrative Vietnam), its role as a full actor in procedural decisions, and finally its need for serious judges' attention. This is an essential synergy, still too little analyzed.

Fourth, the Institution's administrative services. They also comprise in general highly qualified persons, and they do not always work in easy conditions. We must have the courage to recognize that too often here the administrative personnel are first considered as an adjustment factor for the judges' comfort. Let us remember the very symbolic story of my colleague and friend Irena Wiszniewska on the day of her arrival when someone told her, "you are a judge, so you can do anything". Furthermore, local leaders pay much attention here to the high appointments (they make too many of them, and too often eugenic). However, they are less interested in the living conditions of the rest of the machine. Whenever necessary, I have tried to fight this tendency too, though this was far from being popular.

Fifth and last, I must acknowledge my great debt to my colleagues of the General Court. Dear colleagues, all these years, you have been drowned in memoranda and interventions on multiple issues (often administrative and legislative, but not exclusively). This transparent and participatory management did not correspond at all to the local genre. In fact, it was its complete opposite. Yet you have quickly tolerated this and even very often supported its administrative and legislative conclusions.

One of us said to me one day, and I suspect it reflects a prevailing sentiment, "You are a necessary evil". To be honest, this is not the formula that I should have preferred. Nevertheless, on the whole, it is better to be seen as a necessary evil than as a decorative invertebrate.

Today, I leave this place with satisfaction. Our court benefits from strong results, accurate statistics, a productive observatory, a position on the future of the EU judicial system, another one on the future of the Institution's governance, detailed analyses on the imperatives of intelligent legislative reform, a new streamlined organization, many IT advances, greater transparency in the allocation of cases, better awareness of the limits of external activities, and a detailed strategy for the registry in a new court. Future observers will have all necessary documents to determine where most of these changes came from. In any case, this would not have been possible without your individual and collective involvement.

Unlike many, it is our plenary deliberations that I shall miss the most. Although they were often long and sometimes difficult, they taught me immensely, and I cannot thank you enough for that. I tried to prepare them systematically. In fact, one of my great corridor neighbours accused me ritually of spending too much time in the office of my colleagues. To that I always replied, "I'm not like you, I do not hate my colleagues, and I even love them". And that's true. Beyond the individual characteristics of your personalities, you represent the diversity of Europe, which has always been one of the great charms of my life.

At this hour, I would like to express one hope. During the past year, the management of this Institution has seen some improvements. However, problems remain. Above all, the Institution's governance system remains out-dated, obscure, and devoid of sufficient controls. So I hope that others will continue to take initiatives in these multiple domains.

My grandfather, Fernand Dehousse, who provided my education, taught me a great lesson. He was in another era the first rapporteur of the first European Parliament on the first draft European Constitution. During the war, due to his previous writings, the Nazis forbade him from all professional activities. For four long years, he remained home, starved and wrote numerous tracts and documents (some of them advocating the integration of Europe). He always told me, "an idea never dies so long as it finds one defender". Today, I'd like to convey the same lesson.

There are many beautiful ideas in our European Treaties, even if this is less understood today. One of the most beautiful is precisely our Institution.

However, the European Treaties have not created the Court; they have created the Court of Justice. The Court is not, contrary to a popular local illusion, a value in itself. It is only the instrument of a value – justice. Judges are not above the law, or next to the law. They are, more modestly, its first servant. This must always be remembered, especially in a place when an official says on arrival, "you are a judge, you can do anything".

Especially, when judges hold exorbitant powers – as here – their legitimacy exists only if they impose on themselves the same constraints that they impose on others. Nothing is worse than a judge who ends up taking him(her)self for justice, except the same, when exercising administrative and legislative powers. Indeed, then, whatever his/her title and technical capabilities, such a judge becomes a subversion of the separation of powers.

Consequently, I hope that in the future, whenever necessary, some of you will go on defending my fundamental concern during this whole period. According to the European Treaties, it is judges who are the servants of justice, and not justice which is the servant of judges – and even less of some judges – and even less of a single judge, whoever s/he is.

With that, ladies and gentlemen, dear colleagues, it remains to wish good luck to everyone in this Institution, whatever their role, in work that remains essential, especially now, for the future of our European continent.

For your humble servant, it is now the time to say goodbye and express my gratitude to those who supported me (let's be honest, in all meanings of the word), but above all those who assisted me in many ways, encouraged me and upheld my multiple initiatives to build together a better institution. Frankly, this has not always been an experience which inspired enthusiasm. However, thanks to you, it has always been, and this is essential, a humanly pleasant one. Therefore, very sincerely, my deepest thanks to all of you.

Franklin Dehousse (19 September 2016)

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