ENLARGING THE JURISDICTION OF THE COURT OF FIRST INSTANCE

CCBE POSITION ON THE PROPOSAL OF THE COURT OF JUSTICE OF 14 DECEMBER 1998 TO TRANSFER FURTHER JURISDICTIONS TO THE CFI

1. The Council of the Bars and Law Societies of the European Union (CCBE) has considered the proposals from the Court of Justice of the European Communities (ECJ) and the Court of First Instance (CFI) that would transfer to the CFI jurisdiction in certain of the direct actions that are at present brought directly before the Court of Justice. The CCBE is the representative body at the European level of all the Bars and Law Societies in the European Community.

2. An effective judicature is essential to the proper functioning of the European Union. One of the primary roles of the Community Courts is to control the legality of the acts of the Community Institutions, and in particular to protect the rights of the Community citizen. The CFI was created precisely because, even in 1988, the ECJ was increasingly unable effectively to discharge that role, particularly in relation to cases that involved detailed examination of complex factual and legal issues. Despite successive transfers of jurisdiction from the ECJ to the CFI over the last ten years, the case load of the Court of Justice in the remaining areas has continued to grow so that the latter Court still remains in an even more critical condition than when the CFI was first established.

3. The present proposals would – albeit to a limited extent – relieve the unacceptable pressure on the Court of Justice. However they would do so at the price of increasing still further the pressures on the Court of First Instance, which is also in a critical position. The CFI's jurisdiction has been significantly enlarged in recent years, and the cases it has to handle are becoming both more numerous, and more complex. The new jurisdiction which the CFI has acquired in relation to the Community trade mark will make its situation impossible, unless significant further steps are taken. But even apart from the trade mark cases, there is real concern among lawyers practising before the CFI that the present situation is producing a serious deterioration in the quality of justice at the CFI, particularly through excessive delay. This has been recognised by the Court of Justice which, only last month, has proposed to the Council that the membership of the CFI be increased in size by six judges to handle, inter alia, the backlog of cases and the expected flood of trade mark cases.

4. **The present proposal should therefore be seen as part of a wider package of measures that need to be adopted immediately. In the view of the CCBE, the proposed transfer of jurisdiction should be made only together with the increase in judges and other measures proposed by the Court in that further proposal.**

Moreover, both measures should be adopted as a matter of great urgency. A delay comparable to that taken by the Council to adopt the proposal for single judges in the CFI (26 months) would be wholly unacceptable. The Court itself has recently stated[1] that, absent such measures, the inevitable result will be "delays on a scale which cannot be reconciled with an acceptable level of protection in the Union".

5. **The two proposals should not, however, divert attention from the clear and immediate need for greater resources (both judicial and administrative) in the ECJ and CFI to deal effectively with a caseload that, over all areas of their work, is growing in volume, range and complexity, and also the need to find longer term solutions.**

6. The Court, the CFI and CCBE (with many others) have repeatedly drawn those problems to the attention of the Council and Member States in recent years. The Community Institutions should now take action, in the first instance by allocating the CFI the resources immediately needed and, in the longer term, by undertaking in consultation with all interested parties - including in particular the CCBE - a more radical review of the whole of the Community's judicial architecture.

7. The CCBE's more detailed observations on the present proposal are set out below:

DETAILED OBSERVATIONS ON THE PROPOSAL

8. The CCBE particularly welcomes the proposal for the enlargement of the jurisdiction of the Court of First Instance. Already in its submission for the inter-governmental conference 1996, the CCBE had voiced concern at the inadequate current allocation of jurisdiction between the ECJ and the CFI and the particular difficulties which this entails in case of parallel proceedings before the two courts. The CCBE considers therefore the proposals now made by the Court to be an important step in favour of a more coherent allocation of jurisdiction between the two courts. In particular, this proposal will duly preserve the rights of private litigants in case of parallel proceedings.

9. The CCBE has accordingly only relatively few observations of detail on the proposal. Generally, the CCBE would raise for consideration whether, in the interest of coherence, the proposal should be broadened so as to cover also other forms of actions which present largely the same characteristics as those for which a transfer has been proposed, and for which a risk of parallel actions cannot either be excluded.

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[1] See the Paper from the ECJ recently presented to the Council of Ministers of Justice and Home Affairs.

10. In this respect, the CCBE first notes that the proposal concerns only actions for annulment and not actions for failure to act brought by Member States. The reason for this exclusion is said to be that the latter actions "are infrequent and have not so far given rise to parallel actions". The CCBE feels that, even if these actions are infrequent, it might be more coherent to transfer them also to the Court of First Instance. Indeed, it is well-established that both the action for annulment and the action for failure to act "prescribe one and the same method of recourse" (Case 15/70 *Chevalley* [1970] ECR 978). There is therefore no apparent logic in including one type of action and not the other in the proposal. The fact that actions for failure to act have not given rise to parallel actions so far does not mean that they may not do so one day (for example in the field of State aids). In addition, the frontier between the action for failure to act and the action for annulment is often unclear so that parties very often file simultaneously both types of actions.[2] This may be so, for example, in cases of "partial inaction" by an institution where it may be necessary to request the annulment of some provisions in an act and to obtain a declaration simultaneously that the institutions has failed to act in other aspects. In practice therefore, both actions should logically be brought before the same court. The CCBE accordingly supports a transfer of jurisdiction not only for actions for annulment but also for actions for failure to act, where the act requested is one that, if taken, would be subject to challenge in the Court of First Instance.

11. Secondly, the CCBE would question the appropriateness of restricting the proposal to certain fields of law only (i.e. transport, competition, State aids, trade protection, financial instruments, clearance of accounts, …). It appears to CCBE that the fields concerned cover in any event the main areas where Member States have been used to file actions before the Court. *A priori*, there does however not seem to be any reason to exclude other areas of the law such as agriculture, pharmaceutical law, energy, culture, steel, etc. In all these matters, the risk of parallel actions exists, even if this risk has not yet significantly materialized. In any event, such an extension of the jurisdiction of the Court of First Instance to direct actions brought by Member States in any field of Community law would probably not bring about a substantial further increase to the workload of the Court of First Instance beyond that already envisaged. It would however have the merit of simplicity.

12. Thirdly and finally, the Court states that its proposal is intended to be confined to actions for annulment against "decisions" and not against "actions against normative acts of general application" (except in the case of trade measures). The CCBE queries whether

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[2] See e.g. CFI, 22 May 1996, *AITEC v. Commission*, T-277/94, [1996] ECR II-351; CFI, 29 November 1993, *Koelman v. Commission*, T-58/92, [1993] ECR II-1267; CFI, 15 September 1998, *Gestevision Telecinco v. Commission*, T-95/96, not yet reported; CFI, 18 September 1992, *Asia Motor France v. Commission*, T-28/90, [1992] ECR I2285; CFI, 27 June 1995, *Guérin Automobiles v. Commission*, T-186/94, [1995] ECR II-1753; CFI, 24 January 1995, *Ladbroke Racing Deutschland v. Commission*, T-74/92, [1995] ECR II-115; ECJ, 17 January 1980, *Camera Care Ltd. v. Commission*, 792/79 R, [1980] ECR 199; ECJ, 15 December 1988, *Irish Cement Ltd. v. Commission*, 166/86, 220/86, [1988] ECR 6473.

the nature of the act, and in particular its title should be the determining consideration in this area. Indeed, the Court itself has consistently taken the position that the title given to an act is not the decisive consideration in determining the nature of an act and thus the admissibility of an action. In this respect, experience shows that an increasing number of normative acts in Community law also contain individual provisions. The exclusion of actions against acts other than "decisions" could therefore in some cases lead to added uncertainty as it may sometimes be difficult to distinguish between the latter and true normative acts. In addition, it is now well established case-law that private parties may attack before the Court not only individual decisions but also true normative acts of general application, at least as long as they are "individually concerned" by them (see Case C-69/89 *Codorniu* [1994] ECR I-1853 at paragraph 19). There appears therefore to be a continued risk of parallel proceedings as regards normative acts.

13. In any event, if Member States have the benefit of having their case heard at first and second instance as regards the less important acts (i.e. the decisions), it is not clear why they should be deprived of such a benefit for the more important acts (i.e. the normative acts). It is not clear either why they should be treated less well in that regard than private parties, who benefit from two degrees of jurisdiction when they challenge normative acts. The CCBE therefore wonders whether the limitation in the present proposal for normative acts is really justified, or in the interests of Member States. In any event, the CCBE does not believe that, if this limitation were to be removed from the proposal, this would in itself lead to any major increase in the number of cases transferred to the Court of First Instance.

14. Moreover, the exclusion of actions against normative acts will not, in the CCBE's view, achieve the Court's stated desire to avoid the transfer of cases raising institutional questions. Indeed, the CCBE would like to observe that institutional questions are in any event regularly raised in cases already actually brought before the Court of First Instance, in actions by individuals both against normative and non-normative acts. In addition, the Court of First Instance has in any event already today the power to rule over the validity of normative acts both in direct actions by private litigants and whenever a plea of illegality against a normative act is raised in accordance with EC Article 241 (ex Article 184) in the context of an action against an individual decision.

15. In conclusion, the CCBE therefore believes that it would be in the interest of coherence and simplicity to enlarge the Court's proposal to all actions of Member States against Community acts, most of which are in any event covered by the present proposal.[3] In this context, the CCBE even believes that, at least in the longer term, it may be necessary

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[3] This might even indeed imply a transfer of any claims for damages brought by Member States, since such claims may be ancillary to actions for annulment (although such actions for damages have never been brought hitherto by Member States against institutions, they are in theory possible and it would appear more coherent to let the Court of First Instance hear them also).

to transfer also to the Court of First Instance direct actions brought by institutions. Indeed, while it is true that these actions have until now generally been institutional in character, the risk of parallel actions exists also in their respect,[4] and there appears in any event not to be any fundamental reason why institutions should be treated differently from Member States or private parties. The CCBE therefore believes that a rational division of tasks between the Court of Justice and the Court of First Instance would ultimately require that all direct actions (for annulment, failure to act or damages) should be brought before the Court of First Instance, independently of whether they have been filed by a private applicant, a Member State or a Community institution. This indeed is no more than was already contemplated when the Court of First Instance was established – see Article 225 EC (ex Article 168A) last sentence.

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[4] E.g. if the European Parliament has not been consulted on an act, which is then challenged by both the private parties concerned and by the Parliament, the two actions would go to different courts; also the Commission, as a guardian of the legality of the Community, may attack an act of another institution which is simultaneously challenged by private parties.