CCBE

SUBMISSION OF THE CCBE FOR THE INTERGOVERNMENTAL CONFERENCE 2000

I. INTRODUCTION

1. The Council of the Bars and Law Societies of the European Union (CCBE) is the European Representative Body for practising lawyers throughout the Union. In this capacity, the CCBE - and more in particular its Permanent Delegation to the European Court of Justice and the Court of First Instance of the EC and the EFTA Court - is closely following the IGC discussions and decision making concerning amendments to the Treaties regarding the Court of Justice and the Court of First Instance.

2. The CCBE sees it as its task to provide a meaningful contribution to this debate, as changes regarding the Court of Justice and the Court of First Instance inevitably concern access to justice and the effective judicial protection of citizens of the EU. There should be no need to stress that the Court of Justice and the Court of First Instance constitute a cornerstone of the Community legal order and continue to play a crucial role in ensuring that the European Union is a community based on the rule of law, i.e. a community characterised by enforceable legislation which is subject to review and providing effective and adequate judicial protection to the citizens of the Union.

3. The CCBE has had the opportunity to consider the Interim Report of the Friends of the Presidency Group (Presidency's report dated 31 March 2000, CONFER 4729/00), the contribution from the Commission to the IGC on the reform of the Community Courts (contribution dated 1 March 2000)[1], the contribution by the Court of Justice and the Court of First Instance to the IGC (contribution submitted on 1 March 2000), the contribution from the Dutch government on institutional reform (contribution dated 6 March 2000, CONFER 4720/00),the Report of the Working Party on the Future of the European Court of Justice, hereinafter referred to as "Due Report[2]" (report dated January 2000) and the letter of 18 April 2000 sent by the President of the Court of Justice to the IGC (FT 18 April 2000).

4. Having examined these reports and contributions, the CCBE would like to bring the following observations to the attention of the IGC and those involved in the IGC discussions.

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1 website http://europa.eu.int/igc2000/offdoc/index_en.htm

2 The Report can be found on the Legal Service's Europa site http://europa.eu.int/en/comm/sj/hmesjfr.htm

II. GENERAL REMARK

5. As indicated above, the Court of Justice and the Court of First Instance have a pivotal role to play in the legal order of the European Union as well as its democratic status. The CCBE submits that the importance of and need for this role of the Courts will only become more pronounced with the increase of competences of the European Union and with the envisaged enlargement of the European Union to the East. The existence of a judicial system and procedures providing effective judicial protection and proper guarantees for the uniform application of Community law, are of paramount importance for the (future) functioning and acceptance of the European Union.

6. The CCBE submits that the debate on the reform of the Community courts should therefore not only be focussed on the workload of these courts but should also fully take into account this critical role of the judicial system for the future evolution of the European Union.

III. PROCEDURAL AUTONOMY OF THE COURTS AND REORGANISATION OF LEGAL BASIS

7. **The CCBE supports the reorganisation of the legal provisions governing the Court of Justice and the Court of First Instance and would suggest that such reorganisation should be inspired by the aim of avoiding excessive rigidity in the rules governing their amendment. At the same time, it is essential that public debate and democratic control are guaranteed as regards the (amendment of) rules that may affect the judicial protection of the citizen and the effective application of Community law.**

8. The Court of Justice and the Court of First Instance have suggested introducing changes to the procedure for amending their respective Rules of Procedure, in order to enable amendments to be made by qualified majority in the Council and not, as currently required by the third paragraph of article 245 of the EC Treaty, on the basis of unanimity.

9. In its Interim Report of 31 March 2000, the Friends of the Presidency Group has indicated that delegations of the Member States have expressed reservations about giving the Court of Justice and the Court of First Instance themselves the power to take independent decisions on any amendments to their Rules of Procedure. Moreover, a number of delegations seem to have indicated that it would be useful to reorganise all the legal provisions governing the Court of Justice and the Court of First Instance, especially the statutes and the Rules of Procedure, in order to achieve more logical coherence and a proper hierarchy between the various provisions.

10. The CCBE shares the view that such reorganisation of the legal instruments governing the Court of Justice and the Court of First Instance would be useful and suggests that such reorganisation indeed be guided by the aim of avoiding excessive rigidity in any changes in the rules, provided that public debate and democratic control are

guaranteed as regards the (amendment of) rules that may affect the judicial protection of the citizen and the effective application of Community law.

11. The CCBE submits that it would therefore be worthwhile considering the reorganisation of the legal instruments in such a way that:

    (i) the *Treaty* would only contain the provisions governing the Community courts;
    (ii) a *Basic Act*, e.g. a Regulation, would be enacted, containing the basic rules and key provisions concerning the procedures before the Community Courts (e.g. possibility of direct actions, preliminary ruling procedures, etc.), to be amended on the basis of unanimity;
    (iii) *Rules of Procedure*, adopted by qualified majority in the Council, would contain more detailed and specific rules of procedure (e.g. possibility of intervention, right of reply, oral hearing etc.);
    (iv) *internal rules* to the Courts would contain rules of a purely internal and organisational nature (e.g. certain rules as currently published in the format of instructions to the Registrar), adopted by the Courts themselves.

IV. PRELIMINARY RULING PROCEDURE (ARTICLE 234)

12. **The CCBE believes that the delicate balance established by Article 234 EC (ex Article 177) should not be modified and that this Article of the Treaty should therefore not be amended. The CCBE has in particular very strong reservations against amendments that would discourage national courts from referring questions of interpretation of Community law to the Community courts or which would take away explicitly or as a matter of practice the obligation for national courts of final instance to refer questions of Community law raised before them.**

13. The Report of the Working Party on the Future of the European Court of Justice, the "Due Report", sets out a number of proposals in relation to the different actions introduced before the Community Courts in order to bring about a reduction in the workload before these Courts. In relation to EC Article 234 (ex Article 177), the Due Report points out that appropriate means must be found to prevent the European Court of Justice ("ECJ") from being swamped by the large number of questions referred to it.

14. While most of its proposals in relation to Article 234 are relatively uncontroversial, the CCBE is worried by some of the proposed redrafting of current paragraphs 2 and 3 of Article 234.

15. The CCBE would like first to recall that the preliminary ruling procedure assumes a role of primary importance in the field of judicial review. It is used to open up an additional channel (albeit an indirect one as the case must go through the intermediary of a national court) through which individuals may challenge the validity of Community acts and more indirectly acts taken by Member States before the European Court of Justice. By means of this procedure, national courts can refer the problem to the European Court of Justice which is better placed for the task, not only

because it has been charged to perform this function by other articles of the Treaty (actions for annulment and infringement procedures respectively) and therefore can guarantee uniformity, but also because of its supranational character (so that its rulings will apply throughout the Community and that diverging case-laws in the various Member States are thereby avoided).

16. EC Article 234 (2) in its current wording states that where a question of Community law "is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon". The Due Report proposes to add a provision to the effect that in deciding on whether it is necessary to refer, the national court must take into account the importance of the question for Community law and the existence of a reasonable doubt as to the reply to be given to it.

17. EC Article 234 (3) in its current wording states that courts of last instance are under an obligation to refer questions of Community law to the European Court of Justice. Moreover, in *CILFIT*[3], the European Court of Justice has accepted that this obligation may disappear where the response to a given question is "obvious". The CILFIT test however requires that before a national court can conclude that it is in no doubt as to the correct application of Community law, it should first be convinced that the matter is equally obvious to the courts of other Member States and to the European Court of Justice. This test is to be construed narrowly and this seriously limits the discretion of the courts of last instance under Article 234 (3).

18. The Due Report proposes not only to incorporate the CILFIT exception in the text of the Treaty itself but also to widen it. The obligation to refer would exist only where the question is sufficiently significant from an EC law perspective and if there is a reasonable doubt as to the reply to be given to it. According to the Due Report, this rule would not compromise the *Foto Frost*[4] case-law regarding the national courts' duty to make a reference to the European Court of Justice before taking a decision to declare invalid any Community act.

19. The CCBE considers that in so far as this redrafting refers to the concept of "reasonable doubt", the proposed new text is only a codification of the CILFIT case-law[5], and should therefore not be opposed, provided that it is made clear that the

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3 Case 283/81, *CILFIT v Ministry of Health,* [1982] ECR 3415.

4 Case 314/855, *Foto Frost (Firma) v. Hauptzollamt Lübeck-Ost,* [1987] ECR 4199.

5 Indeed, in that judgment the European Court of Justice has decided that EC Article 234 (3):

"Is to be interpreted as meaning that a court or tribunal against whose decisions there is no judicial remedy under national law is required, where a question of Community law is raised before it, to comply with its obligation to bring the matter before the Court of Justice, unless it has established that the question raised is irrelevant or that the Community provision in question has already been interpreted by the Court or that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt. The existence of such a possibility must be assessed in the light of the specific characteristics of Community law, the particular difficulties to which its interpretation give rise and the risk of divergences in judicial decisions within the Community". (emphasis added)

exception is to be construed in the narrow sense defined by the European Court of Justice. On the other hand, it is not clear why the *CILFIT* case-law needs to be incorporated in the text of the Treaty itself, particularly when the emphasis is put only on the words "*reasonable doubt*" rather than on the whole formula ("*so obvious as to leave no scope for any reasonable doubt*"). Moreover, it is important to stress that the *CILFIT* case-law - rightly - *never refers to the "significance" or "importance" of the question for Community law*. The CCBE fears that this criterion is itself *unclear* and opens *excessive discretion* to national courts not to refer.

20. In the majority of Member States, it is practising lawyers' experience before national courts in cases raising EC law issues that it is already today extremely difficult to obtain references to the European Court of Justice and that in the rare cases where references are made, they often relate to the wrong questions. It shows also that very often, national courts take decisions which are questionable from an EC law perspective, arguing that they are *acte clair.* The CCBE wonders, in these circumstances whether it is wise to encourage them to do so even more frequently. In this respect, it is felt that the Due Report fails to take these difficulties into account as well as the importance of this obligation on courts of last instance to refer questions under Article 234:

- First, EC Article 234 (3) is the only means by which private parties are guaranteed that at least at one stage of their procedure they will have access, albeit indirectly, to the European Court of Justice. Restricting this obligation would bring about a reduction in the *protection of the individual* who would no longer be guaranteed indirect access to the European Court of Justice in a case involving Community law.

- Second, it should be recalled that according to the European Commission on Human Rights, the refusal by a highest national judicial court to refer a question to the European Court of Justice could in certain circumstances affect the right to a fair hearing, as enshrined in Article 6 (1) of the ECHR[6]. While it may be compatible with this provision to deny access to the European Court of Justice where the question "*is so obvious as to leave no scope for any reasonable doubt*" as to the interpretation of the Community law provision concerned, it is very doubtful that a right of access to a judge could depend on a subjective assessment of the *importance* of a question for the Community legal order.

- Third, an obligation on the courts of last instance to refer provides an *incentive for the lower courts* to do so in that if referral is not made at an early stage then the case may be appealed until a court of last instance is obliged to refer. As a result, the lower court is aware that it is less time-consuming and less costly for it to make the referral. Removing that strict obligation may render referrals cases more

[6] Decision of 12 May 1993, req. N°20.631/92. In Germany, the Constitutional Court also accepted that the European Court of Justice is a "statutory court" ("*Gesetzlicher Richter*") within the meaning of Article 101 (1) of the German Constitution and that whenever a high German Court fails to make a reference, where it is obliged by the Treaty to do so, it is in breach of Article 101 (1), second sentence of the Federal Constitution and the judgment may be quashed by the Constitutional Court for unconstitutionality. B Verf G, 2 BvR. 197/83, 22 October 1986, [1987] CMLR 225.

difficult. It should in this context be remembered that similar preliminary ruling procedures (such as the certification system in the US) - have failed where they do not contain an obligation for last instance courts to refer (in the US, one or two questions are referred per year to the Supreme Court).

- Finally, the obligation to refer is an important part of the preliminary mechanism system for ensuring the *uniform interpretation* and application of Community law. The proposed reform would lead to a breach of the uniformity of Community law. The possibility of diverging case-law would arise, first, from the fact that lower courts may not refer as often and second, that courts of last instance would no longer be under an obligation to do so.[7]

21. The CCBE does not share the view of the Due Report that the proposals made by it would not affect the uniformity of application of EC law.

    - As to the fact that lower courts may always "rebel" against their highest national court and in later cases refer the matter to the European Court of Justice, this may be true in theory but is unlikely in practice. It will in any event not satisfy the interests of the parties in the initial case.

    - As to the possibility of infringement actions by the Commission under EC Article 226 (ex Article 169) against a State whose Courts infringe EC law, the CCBE can only observe that this is more theoretical than a real possibility, as is shown by the fact that no such actions have ever been filed in practice.

22. A final point to be made is on the impact this proposal would have on alleviating the main problems which the European Court of Justice faces in relation to preliminary rulings at present. Would the removal of the obligation on the courts of last instance to refer greatly reduce the number of preliminary rulings brought before the European Court of Justice thereby reducing the average length of proceedings? It is the CCBE's belief that this would probably not have a significant effect on the number of preliminary rulings. Indeed, roughly three quarters of the references for preliminary rulings are in any event brought by lower national courts.

23. On the other hand, in so far as the changes proposed would have the effect, as feared, of reducing the number of rulings from lower courts, this will most likely lead to litigants not having the EC point dealt with at all (or in the alternative to an increase in the number of references from courts of final appeal).

24. For all these reasons, the CCBE firmly believes that the proposed changes should not be made to EC Article 234. Great care should in any event be exercised before any change is made to that provision which has often been described - rightly - as the most important provision in the EC Treaty. The CCBE notes with satisfaction that the

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[7] According to the European Court of Justice: "In the context of Article 177 [now Article 234], whose purpose is to ensure that Community law is interpreted and applied in a uniform manner in all the Member States, the particular objective of the third paragraph is to prevent a body of national case-law not in accordance with the rules of Community law from coming into existence in any Member State (see case 107/76, *Hoffman La Roche*, 24 May 1977, para 5, [1977] ECR 974).

Commission in its proposals has not taken over this proposal from the Due Committee. It notes also with satisfaction that proposals to delete Article 234 (3) have met with a great deal of opposition within the government representatives group.

V. DIVISION OF COMPETENCES BETWEEN THE COMMUNITY COURTS

25. **The CCBE supports the suggestion made by the Court of Justice and the Court of First Instance to include a special provision in article 225 of the EC Treaty allowing for preliminary ruling procedures in specific areas to be transferred (upon unanimous decision by the Council) to the Court of First Instance. A possibility to request review by the Court of Justice of preliminary judgments of the Court of First Instance should be open to all parties to the proceedings, but be subject to leave of appeal by the Court of Justice.**

26. **As regards the competence for direct appeals, the CCBE is of the opinion that the Court of First Instance should be granted forthwith general jurisdiction in respect of <u>all</u> direct appeals. The CCBE has reservations in introducing, as suggested in the Due Report, a generally applicable system of filtering appeals on the basis of a criterion as strict and difficult to operate as "requiring the appeal to have major importance for the development of Community law or for the protection of individual rights".**

27. In their contribution to the IGC, the Court of Justice and the Court of First Instance have proposed that the Treaty should be amended so as to allow for the possibility that preliminary ruling procedures in certain specific areas would fall within the competence of the Court of First Instance. A certain review mechanism would have to allow the Court of Justice to review the preliminary rulings of the Court of First Instance, if that would appear to be necessary to safeguard the uniformity and coherence of Community law.

28. In its Interim Report of 31 March 2000, the Friends of the Presidency Group noted that the suggestion by the Court was analysed with interest but that concern was voiced in some quarters regarding the guarantee of unity and of consistency of interpretation of Community law. Moreover, the Group remained divided with regard to the question as to whether a review of the preliminary rulings of the Court of First Instance should be possible. The Group remained divided between those who challenged the added value of such review for the sake of the credibility of the Court of First Instance and the legal certainty of its decisions and those who, for the sake of the consistency of Community case-law, owned to the need for corrective procedures, whether through a request by the Member States and/or the institutions or at the instigation of the Advocates-General of the Court of Justice.

29. The CCBE supports the suggestion made by the Court of Justice and the Court of First Instance to include a special provision in article 225 of the EC Treaty allowing for preliminary ruling procedures in specific areas to be transferred (upon unanimous decision by the Council) to the Court of First Instance.

30. The CCBE shares the view that in order to safeguard the consistency of Community case-law, a review of decisions of the Court of First Instance should be possible (in the interests of the law). The CCBE expresses however a serious reservation with regard to any proposal that such review would only be possible through a request by the Member States and/or the Institutions. The CCBE is of the opinion that it should also be possible for private parties to request such a review, but that any request for review (i.e. irrespective as to whether the request is made by a Member State, an Institution or a private party), should be subject to a leave of appeal by the Court of Justice.

31. As regards the competence for direct actions, the CCBE has in particular considered the discussion and suggestions in the Due Report concerning the criteria on the basis of which certain direct actions would still have to be reserved for the jurisdiction of the Court of Justice. The CCBE feels that none of the criteria is at the end of the day sufficiently convincing to justify departure from the fundamental position, also shared in the Due Report, that henceforth the Court of First Instance should become the first judicial forum for all direct actions (i.e. even where the applicant is a Member State or a Community Institution).

32. The CCBE has reservations in introducing, as suggested in the Due Report, a generally applicable system of filtering appeals, as - in the view of the CCBE - an unconditional right of appeal on points of law should be provided for in cases brought by citizens/private parties against decisions subject to appeal and acts of the EU institutions, on the basis of a criterion as strict and difficult to operate as "requiring the appeal to have major importance for the development of Community law or for the protection of individual rights".

VI. LOCUS STANDI IN DIRECT APPEALS

33. **The CCBE believes that adequate judicial protection of private parties require a redrafting of EC Article 230 (4) (and of the corresponding EC Article 232) so as to allow for a wider range of appeals against all Community or EU acts (or failures to act).**

34. It is indeed generally believed – in the CCBE's opinion rightly - that in their current wording, the EC Treaties do not give individuals adequate remedies in case of infringement of their rights by Institutions of the European Communities.[8] The Court of Justice itself thus repeatedly has recognised that – in the absence of direct remedies before it, the applicant would be deprived of any legal remedy. The Court nevertheless took the view that this does not allow it to modify on its own the restrictive provisions of the Treaty.

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[8] See e.g. C. Arlow, "Access to justice as a human right : the European Convention in the European Union" in Alston (ed.); *The EU and Human Rights*, Oxford, Oxford University Press, 1999, p. 187; D. Waelbroeck & A.-M. Verheyden, "Les conditions de recevabilité des recours en annulation des particuliers contre des actes normatifs communautaires à la lumière du droit comparé et de la Convention Européenne des Droits de l'Homme", *Cah. Dr. Eur.*, 1995, p. 1399.

35. Under EC Article 230(4), private parties may only attack individual decisions of EU Institutions addressed to them. Any other acts may only be challenged exceptionally by private parties when they are able to demonstrate that they are "individually and directly concerned" by them. Generally, this is interpreted to mean that the applicant must demonstrate that the act, though not formally addressed to him, is in fact an individual decision taken in the form of a regulation or of a decision addressed to others of which he is the *de facto* addressee. This very strict criterion makes it almost impossible for private parties to ever challenge any act of which they are not the formal addressee (e.g. general acts, or acts addressed to others) even if these acts affect very specifically their situation and produce grave and irreparable harm to them. The European Court of Justice itself, in its 1995 Report for the Inter-Governmental Conference of 1996, has indicated that the provisions of Article EC 230(4) may not be sufficient to guarantee an adequate judicial protection against violations of fundamental human rights by EC Institutions.[9] In the recent Inter-Governmental Conferences, EC Article 230(4) has nevertheless not been modified accordingly.

36. Hence, judicial protection of private parties in the EC remains today very difficult and undoubtedly offers much less protection than the judicial systems of the Member States. Arguably, it is in itself inconsistent with the requirements expressed by the ECHR in that regard.

37. Since on the other hand the European Court of Justice and Court of First Instance have *exclusive competence* to declare EC acts invalid, it follows that private parties have no remedies either before any other courts even in their own Member State against acts of EC Institutions which may infringe their fundamental rights (or indeed any other of their rights).[10] As often indicated, the indirect possibility for national courts to refer questions of validity of Community acts to the European Court of Justice under the preliminary ruling procedure is not a satisfactory substitute for the strict conditions of admissibility of direct actions for annulment before the Court. Indeed, the preliminary ruling procedure is not a direct remedy which private parties may exercise at their discretion but depends on the willingness of the national courts to refer the requested questions to the European Court of Justice. Experience shows that it is in general extremely difficult to obtain references under the preliminary ruling procedures and may take many years until - if at all – the case is heard by the highest judicial body of the Member State who is then in *principle* obliged to refer the matter to the European Court of Justice.

38. Attacking Community acts by way of preliminary rulings on their validity is therefore relatively difficult as the challenge can be successful only if both the national and Community courts co-operate. They must each play their part :

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9 See para. 20 of this report.

10 See ECJ, *Foto-Frost*, (314/85), [1987] ECR 4199. See ECJ, *International Handelsgesellschaft* (11/70), [1970] ECR 1125, 1134 : "the validity of the Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or to principles of a national constitutional structure".

- In the first place, national law must provide for judicial proceedings. In some legal systems, particular decisions are taken by the administration without appeal to a court. In such cases, no preliminary ruling can be sought. Moreover, in many national legal systems, the legality of acts of parliaments cannot be challenged at all. Accordingly, the ability of private parties to challenge EC acts by this indirect route may vary from one Member State to another and there will therefore be discrimination between them depending on their Member State, which is unacceptable. Moreover, the only remedy offered will often be the illegality of the law as a defence once a party is prosecuted for infringement of the law, which is hardly a very attractive remedy.

- Furthermore, Article 234 does not require that preliminary rulings be requested in all cases where Community law is to be applied. It is only where the national court has doubts on the validity of a Community act that it must refer the matter to the Court of Justice or if the matter is raised before a court of last instance (which may take many years of lengthy and costly procedure before the relevant question is asked). However, even where there is an obligation to refer, there is no sanction against courts infringing this obligation. In arbitration procedures, *inter alia*, no possibilities of preliminary rulings are provided for.

- In many cases, challenging a Community act which has to be implemented in fifteen (and soon more) Member States will require actions in multiple fora which is certainly not in the interests of economy of procedure.

- Once the national court has asked for a preliminary ruling, the Court of Justice can decide on the question of validity according to the special procedure of Article 234 which permits the individual only a limited right to argue why the act should be considered illegal as well as limited rights for Institutions to defend themselves. Normally, the Court of Justice will not rule on the validity of an act when it has not been expressly asked to do so. If it regards the question as not being properly put, it may declare it inadmissible, or may often not really reply to the questions asked.

39. In any event, the procedure for obtaining a preliminary ruling through national courts is much longer than a direct action before the European Court of Justice. A ruling may therefore come too late.

40. Finally, the logic of obliging the parties to go to national courts while the European Court of Justice simultaneously prohibits national courts to rule on the validity of Community act is far from evident[11].

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[11] Since the question has necessarily to be referred back to the European Court of Justice under EC Article 234, it is in any event unclear why a system opening the gates for actions under EC Article 230 before the Court of First Instance would entail a flood of cases for the European Court of Justice (which logically, if the system worked as it should, should be referred at one point to the Court under EC Article 234).

41. In addition, it should be stressed that the deficit in judicial protection is particularly acute in the areas of justice and home affairs (the former "Third Pillar") which are subject to an incomplete and different judicial control to that prevailing in other areas.

42. The CCBE therefore concludes that adequate judicial protection of private parties would require a redrafting of EC Article 230(4) (and of the corresponding EC Article 232) so as to allow more widely appeals against all Community or EU acts (or failures to act)[12].

VII. SPECIALISED JUDICIAL BOARDS OF APPEAL

43. The CCBE supports the suggestion made by the Community Courts to include in the EC Treaty a new provision that provides the legal basis for the Council to set up (at the request of the Court and after consultation of the European Parliament and the Commission, and deciding unanimously) Judicial Boards of Appeal which would be responsible for determining, in the first instance, disputes relating to clearly defined subjects. In the interest of the uniform application and consistency of Community law, a review on points of law of judgments rendered by the Court of First Instance (delivered after hearing an appeal against the decision by a Judicial Board of Appeal), should be possible but subject to a well-considered system of leave of appeal by the Court of Justice.

44. The CCBE also supports the proposal made by the Courts that a new provision is included in the EC Treaty setting up a Judicial Board of Appeal that would hear and determine actions brought by Community staff, subject to appeal before the Court of First Instance. The CCBE hesitates as to whether these judgments on appeal of the Court of First Instance should be subject to a possibility of review before the Court of Justice.

VIII. COMPOSITION OF THE COURTS

45. **As regards the Court of Justice, the CCBE is of the opinion that:**

- **the link between the number of judges and Member States should be retained. It believes that it is of crucial importance to the legitimacy of the Court of Justice and the acceptable development of Community law in all Member States that each Member State retain the possibility of nominating one Member of the Court;**
- **Members of the Court should be appointed for a term longer than present (e.g. nine or more years);**
- **the suggestion that appointments of judges to the Court should be made non-renewable must be queried. It is accepted that if the term were extended, the practice of renewing appointments might be less frequent.**

[12] This would moreover be in line with recent developments of the case-law. It is thus settled case-law since *Codorniu* (C-308/89), 18 May 1994, ECR I-1853 that any EC act may be challenged by a private party provided the latter is "directly and individually concerned".

However, it appears desirable that it should be possible, inter alia in the interest of continuity. Moreover, it is important that the President of the Court can be an experienced judge of that Court. Also, if the appointments were to be non-renewable, a decision would have to be made as to whether a person might still be entitled to serve separate terms as a judge of the Court of First Instance, an Advocate General and a Judge of the Court of Justice. It would appear undesirable to exclude this possibility and if such possibility existed, then why should an appropriate person be prevented from being appointed for two terms to any one of these posts?;

- **the composition of the plenary formation of the Court of Justice should be decided by the Court itself;**
- **it should considered, as suggested in the Due Report, that the appointment of members of the Court of Justice is scrutinised on the basis of a comprehensive file submitted by each Member State and that an Advisory Committee consisting of highly qualified independent lawyers should be set up, to assist the Member States in their deliberations on the appointment and to secure the legal competence of candidates**.

46. **As regards the Court of First Instance, the CCBE is of the opinion that:**

- **in the light of its increased powers and the foreseeable increase of its workload, it is very important to increase by at least six judges the number of judges of the Court of First Instance;**
- **the same applies as indicated above for the Court of Justice, with regard to the system of appointment of the judges, the term of appointment and conditions governing the renewal of appointments of the judges;**
- **the Court of First Instance should decide itself on its (plenary) formation.**

47. As regards the function of Advocate-General, the CCBE is of the opinion that:

- **the function of Advocate-General should be maintained before the Court of Justice. The appointment of the Advocates-General, the term of appointment and the renewability of the appointment should be the same as for the judges (see supra);**
- **The CCBE questions the need for Advocates-General at the Court of First Instance.**

IX. NEED FOR ACCELERATED PROCEDURES

48. **The CCBE stresses the need to establish accelerated procedures for certain types of cases, such as for example Merger Control cases and transparency cases**.

X. INTERVENTIONS

49. **The CCBE believes that Article 37 of the EC Statute of the Court should be modified so as to also allow intervention of interested parties in cases between Member States, between institutions of the Community or between Member states and institutions of the Community as well as in procedures for preliminary rulings**.

50. The present provisions of the Statutes of the Court concerning interventions in direct actions are anomalous and can give rise to serious injustice by excluding the right of interested parties to be heard in cases in which their interests are clearly and directly affected. For example, a Commission decision authorising state aid to an undertaking might be challenged under Article 230 by a competitor company or by another Member State[13]. In the former case, the recipient of the aid would clearly have the right to intervene to protect its interests (maintaining the right to receive the aid). In the latter case, since the litigation is "between Member States and institutions of the Community", Article 37 of the Statute (EC) would preclude any intervention. Similar situations can arise in relation to decisions applying Articles 81 and 82[14] or other areas, such as the eligibility of payment under the EAGGF schemes. Likewise, in many public procurement cases where the Commission, under Article 226 is attacking a Member State, the interested parties have no possibility of intervening.

51. The CCBE draws attention to the fact that at present Article 34 of the ECSC Statute allows parties to intervene in all cases, even those between Member States, between institutions of the Community or between Member States and institutions of the Community.

52. In the CCBE's view, these anomalies should be eliminated by deleting the limitation in the second paragraph of Article 37 of the EC Statute of the Court, which excludes the right of intervention "…in cases between Member States, between institutions of the Community or between Member States and institutions of the Community". The removal of this limitation would avoid the anomalous situation that exists at present, where parties directly interested in the result of a case may be deprived of the rights to be heard at all. There is no reason to fear that this modification would be abused, since would-be interveners would still have to satisfy the requirement that they "establish an interest in the result" of the case. The Court's existing case-law shows that this requirement is sufficient to limit interventions to instances where the outcome of the case had a direct and actual effect on the economic or legal position of the intervener[15] and that this effect must flow from the precise subject matter of the dispute to be settled in the operative part of the judgment, rather than a more abstract interest such as the success or otherwise of a particular legal argument. Moreover, experience to date of interventions in cases where the limitation does <u>not</u> apply (e.g. annulment cases brought by private parties) shows no reason to fear that this

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[13] As in Case 84/92, *Germany v. Commission,* (1984) ECR 1451, where Germany challenged a Commission decision authorising Belgium to grant state aids to its textile industry.

[14] See e.g. Case 41/83, *Italy v. Commission,* (1985) ECR 873

[15] See e.g. Cases 116, 124 and 143/77, *Amylum v. Council,* (1978) ECR 893.

modification would result in an undesirable proliferation of interventions, and such interventions can even be beneficial[16].

53. Consideration should also be given to modifying Article 37 of the EC Statute of the Court so as to permit in some cases a similar right of intervention in Article 234 references concerning the validity or interpretation of a Community Act, where the ruling will have direct and actual effects on third parties. While concerns have been expressed (a) that allowing interventions by individuals or groups that are not parties to the national litigation would be inappropriate in a reference, since it is merely a step in the national proceedings and (b) that opening the door to more interventions would significantly add to the burden on the European Court of Justice, the CCBE believes these concerns to be unfounded. The rulings of the European Court of Justice in Article 234 references, like any pronouncement of a Supreme Court, are (and should be) treated as of general application and will be followed by national courts and Member States and individuals alike. It is therefore particularly important that, on an issue of wide reaching importance, the European Court of Justice should be as fully informed as possible of the competing arguments, and of the likely consequences of its decision. The system of "*amicus*" briefs in the Supreme Court of the United States shows that such views can be received without significant disruption to the judicial process and to the benefit of the final judgment.

54. If a broad right of intervention cannot be accepted, then consideration should at least be given to allowing interventions by those persons who are already parties to other proceedings before the Community or national courts which raise the same or similar questions. At present, Member States and institutions may make observations in Article 234 references. Individuals have no such right. Proceedings in two different Member States may raise similar but not identical issues in such a way that judgment of the Court of Justice on the first Article 234 reference would have a substantial effect on the issue to be determined in the second set of national proceedings. If, as is often the case in Article 234 references, the second national proceedings are between an individual and the Member State, then the Member State but not the individual has the opportunity of making observations to the European Court of Justice in the first Article 234 reference. It is clear that this may result in an injustice and an "inequality of arms" in the second national proceedings.

XI. ESTABLISHING A LEGAL BASIS TO ENABLE THE EU TO ACCEDE TO THE ECHR

55. **The CCBE believes that it should be a priority to provide for an explicit legal basis within the Treaty for the accession of the EU to the ECHR**.

56. Neither the European Communities nor the European Union are parties to the ECHR or to other European or international instruments for the protection of human rights.

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[16] For example, in Case 177/79, *AM&S v. Commission*, the CCBE was permitted to intervene in the interest of establishing the existence, and extent, in Community law of the deontological principle of legal professional privilege ("secret professionnel"). The CCBE believes that such intervention was of significant value to the Court in providing an analysis of the scope, and legal basis, for the principle in the national law of the Member States.

57. In the EU legal system, the only remedy for an infringement of fundamental human rights by Community institutions lies before the European Court of Justice (and/or the EC Court of First Instance). There are no direct remedies before the European Court of Human Rights. This in itself is in the CCBE's view a serious lacuna, which is rendered more serious by the fact that private parties in general do not have standing to challenge EC acts before the Community courts (see above). In many cases of possible infringements of their fundamental rights, individuals are therefore deprived of any possibility of remedy.

58. Moreover, even where there is a remedy, it is not excluded that the European Court of Justice itself will adopt views on the interpretation of fundamental human rights which depart from those which may later be taken by the European Court of Human Rights[17].

59. It is certainly not satisfactory that along with the progressive transfer of powers to the European Communities, individuals lose the guarantees offered by the judicial system set up by the ECHR.

60. In addition, it is particularly paradoxical that, in accordance with Article 49 of the Treaty on the European Union, accession to the ECHR is today regarded as a pre-condition for accession to the European Union and that at the same time the European Union itself should not be a party to the ECHR.

61. While it is true that there may still be certain indirect remedies for interested parties before the ECHR in case of infringement by the European Communities of fundamental rights, such remedies are at best very uncertain and indirect. Indeed, the only remedy currently open appears to be an action against EU Member States before the ECtHR for infringement by the EC Institutions of the provisions of the ECHR.[18]

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17 For instance, in the *Orkem Case* (ECJ, judgment of 18 October 1989, *Orkem v. Commission*, Case 374/87, [1989] ECR 3283, para. 30.), the European Court of Justice indicated that the rights of any party accused of an infringement of the law to remain silent and not to incriminate itself was not guaranteed by the ECHR. Four years later, the European Court of Human Rights on the contrary indicated that this right was guaranteed by Article 6(1) of the ECHR (ECHR, judgment of 25 February 1993, *Funke v. France*, A. No. 256-A, para. 44). Over the years, there have been several such discrepancies between the case-law of the European Court of Justice and that of the European Court of Human Rights (With regard to these discrepancies, see e.g. the question as to whether antitrust procedures should – already at the administrative level – be subject to the guarantees of Article 6 ECtHR, see *Stenuit*, *M&Co* and *Bendenoun* in the ECHR v. *Fedetab*, *Pioneer* and *Polypropylene* in the European Court of Justice or the question as to whether Article 8 ECHR applies at all to undertakings; see *Chappel* and *Niemietz* in the ECtHR v. *Hoechst* in the ECJ). To quote Advocate General Darmon, the European Court of Justice is generally of the view that it may "adopt, with respect to the provisions of the Convention, an interpretation which does not coincide exactly with that given by the Strasbourg authorities" (*Orkem Case*, at pp. 3337-3338). As recently as 4 February 2000, the European Court of Justice again decided to depart from the case-law of the ECHR in *Vermeulen (*ECJ, 4 February 2000, *Emesa Sugar* (C-17/98), yet unreported). As illustrated by these discrepancies, there is in the CCBE's view a clear need that the EU should – in the same way as its Member States – be subject to possible control with regard to the compatibility of its acts with the ECHR.

18 See e.g. ECtHR, judgment of 18 February 1999, *Matthews v. United Kingdom*, at para. 33.

Nevertheless, it is not clear whether Member States can always be held liable for infringements of the ECHR by acts of EC Institutions, nor whether such actions should be filed against all 15 Member States collectively or against only one of them. It is also not clear to what extent Member States can be held liable for infringements of the ECHR by EC Institutions or whether it would be fair to hold them liable. Finally, it is not satisfactory for the EC Institutions that they may be indirectly condemned by the ECtHR without having had the opportunity to defend themselves.

62. The CCBE therefore takes the view that to protect fundamental rights adequately in the EU, it is essential to provide for an explicit legal basis within the Treaty for the accession of the EC to the ECHR.[19]

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[19] As is well-known, the European Court of Justice held in its Opinion 2/94 of 28 March 1996, [1996] ECR I-1759, that there was no legal basis in the Treaties for an accession of the EC to the ECHR.