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CCBE

**PAPERS FROM THE
COLLOQUIUM
ON
THE JUDICIAL ARCHITECTURE
OF THE EUROPEAN UNION**

15 NOVEMBER 2004

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**ADDRESS BY THE PRESIDENT OF THE COURT OF JUSTICE
Vassilios SKOURIS**

THE EUROPEAN COURT OF JUSTICE AFTER ENLARGEMENT: Current trends and future challenges

A) INTRODUCTION

First of all, I would like to thank the Council of the Bars and Law Societies of the European Union for their kind invitation to participate in this colloquium and deliver an address before such a distinguished audience. We are here today to discuss the future of the judicial architecture of the European Union, a subject which is of particular interest after the recent enlargement and in view of the future entry into force of the European Constitution signed last week in Rome. My intervention today simply being an opening address, I do not wish to enter into details. Therefore, I opted for a more general presentation of the Court's current state of affairs as regards its internal organisation and working methods, in order to provide a reference point for our discussions.

As some of you may already know, during the last 18 months, the European Court of Justice has undergone a number of very significant changes and has been preparing to face some of the greatest challenges in its 52-year history. These changes came mainly as a result of three events: first, the entry into force of the Treaty of Nice and the amendments it introduced to the Statute of the Court, second, the enlargement of the European Union and, third, the decision, by the Court itself, to adopt certain measures that would improve the efficiency of its working methods.

Hence, I considered it useful to devote the main part of my presentation to these developments in order to point out the context in which the Court is facing the reality of an enlarged Europe and the perspective of the entry into force of the European Constitution.

B) THE INNOVATIONS INTRODUCED BY THE TREATY OF NICE

Allow me to start with the Treaty of Nice, which entered into force on the 1st of February 2003. The Treaty of Nice was characterised by three key innovations with regard to the organisation and internal functioning of the Court. The first one was the introduction of the Grand Chamber. Comprised of 13 judges [(the President of the Court, the 3 Presidents of the Chambers of 5 judges and 9 other judges (by rotation))] the Grand Chamber is now essentially the formation that hears the cases that are considered most important. Following the enlargement, the Full Court, now composed of up to 25 judges, will most probably sit on rare occasions, although that still remains to be seen. In that respect, one has to take into account that the Court has been developing its case-law for approximately 52 years. Consequently, legal issues likely to justify a formation of 25 judges will not be occurring very frequently.

The second major innovation introduced by the Nice Treaty was the election of the Presidents of the Chambers of 5 judges for 3 years. In addition, the Presidents of the Chambers of 5 judges necessarily sit, along with the President of the Court, on all the cases brought before the Grand Chamber and on all the cases pending before their respective Chambers. The period of time for which they are elected and the number of cases they sit on confer on the Presidents of these Chambers a very important institutional role within the Court, especially with regard to the coherence and uniformity of the case-law.

The third innovation of the Treaty of Nice I would like to discuss today concerns the role of the Advocate General. As you probably know, although the Treaty of Nice maintained the principle "one judge per Member State", it did not provide for an increase in the number of Advocates General. Therefore, notwithstanding the enlargement of the European Union, there are still only 8 Advocates General serving at the Court.

Taking into account that the recent enlargement will eventually lead to a surge of incoming cases, there was a risk of considerable procedural delays due to a potential dramatic increase of the Advocates' General workload. For that reason, the Treaty of Nice introduced for the first time the possibility for the Court to render judgments without an opinion from the Advocate General on cases where no new points of law are raised. If one also considers the well-established practice of responding to certain requests for a preliminary ruling by way of a simple order (and therefore without

an opinion by the Advocate General), one cannot help but notice an important change in the institutional role of the Advocate general. Regardless of how these possibilities will be applied in practice, one can safely predict that Advocates General will be presenting opinions on less cases and, consequently, will concentrate on the more important cases brought before the Court.

C) *THE ENLARGEMENT OF THE EUROPEAN UNION: preparatory measures related to the linguistic aspects*

The Treaty of Nice amendments concerning the Court were of course introduced in view of the enlargement of the European Union. However, it was clear to us from the outset that these innovations would not be sufficient in order to deal with all the consequences of the enlargement. Therefore, the different divisions of the Court started preparing for it as early as 2 years before the 1st of May 2004. Presenting to you all the measures taken by the Court in view of the enlargement would certainly be superfluous for the purposes of our discussion. Hence, I will focus on the linguistic aspects which I believe are of particular importance.

Pursuant to the enlargement, it is now possible to bring proceedings before the Court in 20 languages. All judgments and opinions of Advocates General must be translated in all 20 languages. It is apparent that managing this multilingualism is not a simple task especially since it entails the risk of procedural delays. The Court has devoted considerable thought to this problem and it has taken a number of measures destined to limit delays due to translation. To be more precise:

- Lawyer-linguists from the Court's translation service have started taking intensive language courses in the 9 new languages some years ago. Therefore the Court can now ensure that submissions in those languages can at least be directly translated by qualified lawyer-linguists in French, which remains the internal working language of the Court.
- Ensuring direct translations of documents to all 20 languages was clearly not a realistic goal given the fact that these 20 languages amount to 380 linguistic combinations. Based on a survey carried out amongst the Court's lawyer-linguists, it was determined that the 5 most spoken languages (as foreign languages) were English, French, German, Italian and Spanish. Based on that, a "pivot" language translation system was introduced in order to provide the safeguard of relay translation when necessary.
- A new practice was introduced, whereby Advocates General now prepare their opinions if possible in one of the "pivot" languages at the same time as in their own language.
- The new linguistic divisions had to primarily ensure, on the one hand, that the Court's Rules of Procedure are translated in their respective languages as quickly as possible and, on the other hand, that judgments and opinions delivered after the 1st of May are also translated promptly in those languages. Given the fact that the recruitment of qualified lawyer linguists is not always easy, the new divisions were not immediately in a position to provide the new Member State governments with translations of the orders for reference. Therefore, as was the case during the previous enlargement, those governments receive a copy of the original along with a translation in the older official language of their choice.

On a more general note now, I could claim with a degree of certainty that the Court is coping and will be able to cope with its multilingual regime in the foreseeable future. In fact, it is noteworthy that in the majority of judgments delivered last month, all linguistic versions were available either on the date of delivery or just a few days later. Notwithstanding the fact that, already in 2007, the European Union will be experiencing yet another enlargement, I do believe strongly that we will be able to guarantee access to justice and access to the case-law in all the official languages of the Union without gravely compromising the efficiency of the Court.

D) THE ADOPTION OF MEASURES TO IMPROVE THE EFFICIENCY OF THE INTERNAL WORKING METHODS

Moving now to the next part of my presentation, parallel to the entry into force of the Treaty of Nice amendments and the enlargement of the European Union, the Court started, in October 2003, an in-depth examination of its internal working methods with a view of adopting all the necessary measures that could improve its efficiency. The main focus, as one could expect, was the preliminary reference procedure. The statistics of the Court indicated a constant increase in the time taken to render judgments on requests for a preliminary ruling during the last few years. In 2003, that time was an average of 25.5 months. Clearly such a delay is unacceptable especially since the main cases pending before the national courts are suspended during that time.

I would like to clarify from the outset that the reasons for the lengthiness of the preliminary reference procedure are multiple and that these delays are not only attributable to the Court's internal working methods. I will limit myself to mentioning the mere increase in the Court's caseload and the fact that 2003 was a record year for incoming cases. As my esteemed colleague Advocate general Jacobs very eloquently points out, the published case-law of the Court of Justice for the year 2001, takes up the same shelf space as that for the 19 years from 1953 to 1972. Notwithstanding that fact, the Court did decide to take action and adopted a series of internal measures with the purpose of drastically improving the efficiency of its working methods.

The most fundamental of those measures was the introduction of a detailed timetabling for all preliminary reference cases. This detailed timetable is established automatically by a software application upon the arrival of the order for reference and it includes specific deadlines for the completion of each phase of the procedure (translation of the order for reference, notification to the Member States, written procedure, translation of observations, presentation of the preliminary report, hearing, opinion of the Advocate General, presentation of the draft judgment, delivery of the judgment in all languages). The timetable for every case is established based on the default time-limits set out by the Court. And the deadlines (calculated in weeks) are the same for all preliminary reference cases. However, not all cases are the same. And this is primarily the reason why the deadlines are considered indicative and not imperative and the President of the Court and the Presidents of Chamber intend to apply and monitor the timetable with some degree of flexibility.

In addition, to the timetabling of cases, it was also decided to keep judgments and opinions as short as possible without of course compromising their clarity. The purpose of this measure is to render more concise and readable judgements by shifting the focus to the actual legal reasoning of the Court.

Another measure concerns the report for the hearing presented by the Judge-Rapporteur. Given that the drafting of these reports was extremely time-consuming for the chambers of the Judge-Rapporteur, a decision was taken to draft these documents in a more succinct form, outlining only the main arguments of the parties. Moreover, if there is no hearing, the report of the Judge-Rapporteur will not be drafted at all.

Lastly, after careful consideration the Court decided to introduce a system of selective publication of its judgments. The purpose of that system is to allocate more efficiently the limited translation resources of the Court and to, consequently, reduce delays in translation and in the publication of the Court Reports. Besides, the mere volume of the Court Reports (12 092 pages in 2002 for the Court of Justice only) must be considered excessive. Given the fact that a similar initiative taken back in 1989 had to be abandoned, particular thought was given to the details of the system. In principle, judgments in direct actions or appeals delivered by a 3-judge Chamber, or by a 5-judge Chamber without an Advocate's General opinion will no longer be published in the Court Reports. The Chamber of course has always the option of deciding otherwise. It is important to note that these judgments will be accessible in electronic format via the Court's internet site in all the languages that are available (i.e. normally in the language of the procedure and French).

Parallel to these internal measures, the Court also decided to propose to the Council certain amendments to its Rules of Procedure always with the intention to simplify and accelerate the

treatment of cases. Given the fact that the Court must always function within the framework of its Rules of Procedure, there are limits as to what it can do on its own in order to improve the efficiency of its procedures. I will take advantage of the presence here today of several agents and representatives of the governments of the Member States in order to discuss one of these proposals which the Court considers extremely important.

As you probably know, article 104, paragraph 1, of the Rules of Procedure, provides that all orders and judgments of national courts requesting a preliminary ruling must be notified to the Member States in their respective languages. This of course means that the Court's translation service actually translates these often lengthy and complicated documents in all the official languages of the European Union.

After the enlargement and the addition of 9 new languages, it is projected that the volume of these translations will be close to 53 000 pages per year. Therefore one can imagine the considerable resources that the Court has to allocate for this purpose. Furthermore, one has to take under consideration that the notification of preliminary reference cannot take place until all the translations are available and that it is inevitable that some of these documents will be subject to relay translation. Therefore, delays will be unavoidable.

Taking these elements under consideration the Court has decided to propose that only the actual preliminary questions submitted by the national courts be translated in all official languages. It was of course to be expected that the governments of the Member States would have certain reservations regarding this quite radical proposal. Most branches of the national governments are not used to working in such a multilingual environment. In addition, the integral translation of the orders for reference at a national level would not be an efficient solution either. Nevertheless, it is quite encouraging that a spirit of cooperation and understanding has prevailed in the discussions of the ad hoc group of the Council. After all, a speedy and efficient judicial process before the Court of Justice is not only of interest to the Court itself also to the governments of the Member States and to national courts.

This is why I believe that an acceptable compromise could be reached on that point. We could for example envisage that the Court's services prepare a short summary of the order for reference that could then be translated in all 20 languages. It goes of course without saying that such summaries would be of equally high quality as the translations that the Court has been providing all these years.

E) CONCLUDING REMARKS

Having outlined all these legislative and internal measures concerning the Court, allow me to submit to you some concluding thoughts destined mostly to provoke a constructive debate:

- These developments are likely to ameliorate considerably the efficiency of the judicial process before the Court. In fact, we have some encouraging indications already this year. According to provisional statistics, it appears that 2004 will be the most productive year in the Court's history with close to 600 cases terminated by way of judgments or orders. Moreover, it appears that the length of procedures will be reduced by almost 2 months.
- However, any prediction or assumption we can make for the future is always conditioned on the rate of incoming cases. At this stage, we are not in a position to foresee the consequences of the enlargement in that respect. We could safely say that, given its present structure, the Court could, in the near future, handle up to 750 incoming cases annually without important delays. Nonetheless, a dramatic surge in incoming cases will inevitably bring the Court back to the pre-2004 situation.
- Therefore, the reflection on the future of the judicial architecture of the European Union must continue at all levels. The role of the Court of Justice, the Court of First Instance and that of

the specialised Chambers must be reviewed as a whole in order to achieve a more efficient system of justice.

- It is imperative though to maintain the multilingualism, as it applies to the Court and the Court of First Instance today, especially with regard to the language of the procedure and the availability of judgments and opinions in all languages. I strongly believe that measures related to efficiency must not create a distance between the Court of Justice and EU citizens.

Topic 1

“The role of the Court of Justice, Court of First Instance and specialised tribunals in the long-term”

Prof Koen LENAERTS

Judge at the ECJ

I. THE ROLE OF THE COURT OF JUSTICE

1. The Court of Justice plays the role of the Community's supreme court, that is to say, as the guardian of the objectives and rules of law laid down in the Treaties. The Court rules on applications in cases in which constitutional issues come to the fore, such as the legality of Community secondary legislation, the preservation of institutional equilibrium, the demarcation of Community and national spheres of competence and the development of protection of fundamental rights. At the same time, the Court of Justice – on a request from a national court for a preliminary ruling or upon appeal against a ruling of the CFI – ensures the uniform application of Community law. There is also a constitutional aspect to that function performed by the Court inasmuch as disparate interpretation of Community law would run counter to the achievement of the objectives laid down in the Treaties.
2. The Nice Treaty underscores the Court of Justice's constitutional role. Its role should be confined to the examination of questions which are of essential importance for the Community legal order. The Nice Treaty, however, only contains the embryo for a fundamental re-allocation of jurisdiction between the Community courts by providing that the Court of Justice will be the competent court for infringement actions, for (the great majority of) preliminary references, for appeals against rulings of the CFI, and, exceptionnally, for the review of preliminary ruling decisions of the CFI or of decisions taken by the CFI upon appeal in cases for which a judicial panel has jurisdiction at first instance.
3. Council Decision 2004/407/EC of 26 April 2004 amending Article 51 of the Statute¹ partly implemented the principles of the Nice Treaty by transferring jurisdiction from the Court of Justice to the CFI as regards direct actions, other than infringement actions. The modifications of the Statute which aimed at leaving the Court of Justice jurisdiction at first and last instance only in respect of basic legislative activity and in respect of the determination of inter-institutional disputes, can be summarized as follows.

First, actions which already fell within the jurisdiction of the CFI will continue to be heard and determined by this court. This means that it cannot be ruled out that some cases involving basic legislative activity will be heard and determined at first instance by the CFI.

Second, all inter-institutional disputes (including those affecting the ECB) are heard and determined at first and last instance by the Court of Justice.

Third, as regards actions brought by Member States, the Statute favours the status of the defendant as the factor determining jurisdiction. The Court of Justice has jurisdiction to hear and determine actions brought by Member States against acts and failures to act of the European Parliament, of the European Parliament and the Council, or of the Council (except in the latter case the acts and failures to act in relation to the exercise of the executive responsibilities of the Council expressly listed in Article 51 of the Court's Statute). In principle², therefore, actions brought by Member States against the Commission and the ECB, fall within the jurisdiction of the CFI since such cases do not normally involve review of the basic legislative activity of the institutions.

¹ O.J. 2004, L132/5.

² Article 51 of the Statute contains one exception. It provides that the Court of Justice will have jurisdiction to hear and determine actions brought by Member States against an act or a failure to act of the Commission under Article 11a of the E.C. Treaty (relating to enhanced cooperation).

4. A transfer of jurisdiction to the CFI with regard to references for a preliminary ruling in specific areas has not yet been envisaged. Indeed, neither the Court of Justice, nor the Commission has tabled a proposal to that effect³.
5. As regards judicial panels which will hear and determine at first instance certain classes of action or proceeding brought in specific areas, the Commission proposed the creation of the European Civil Servant Tribunal⁴ and the Court for the Community Patent⁵. The former would take over all staff cases from the CFI⁶ whereas the latter would hear and determine cases which in the absence of the creation of the judicial panel, would normally fall within the jurisdiction of the CFI. Decisions of the judicial panels will be subject to a right of appeal before the CFI⁷. From the point of view of parties concerned, the Member States and the institutions, the CFI's decisions on appeal cannot be challenged. Exceptionally, however, such decisions may be subject to review by the Court of Justice where there is a serious risk of the unity or consistency of Community law being affected⁸. The review procedure thus grants the Court of Justice the final say with respect to any constitutional issues which may arise in cases heard and determined at first instance by a judicial panel and on appeal by the CFI⁹.
6. Will the recent transfer of jurisdiction brought about by Council Decision 2004/407/EC of 26 April 2004 and the envisaged creation of judicial panels allow the Court of Justice to concentrate on its essential constitutional function? In 2003, 561 new cases were brought before the Court of Justice and 494 cases were decided. Of the total number of new cases, 210 were preliminary references and 214 were infringement actions. At the end of 2003, 974 cases were pending before the Court of Justice. If in 2003, the recent transfer of jurisdiction had already entered into force, about 60 cases which have been lodged before the Court of Justice would have been brought before the CFI. It is thus apparent from the statistics that the latest transfer of jurisdiction will merely give the Court of Justice the opportunity to reach *at present* an equilibrium between the yearly input and output of cases but may even not be sufficient to allow the Court to eliminate its judicial backlog.
7. Furthermore, with a mathematical certainty it can be said that *in the future* the Court of Justice's workload will still increase, not only because of the fact that with the latest enlargement there is a substantial increase in jurisdictions which can make a reference for a preliminary ruling¹⁰, but also due to the fact that the reach of Community law becomes ever more extensive.
8. In order to allow the Court of Justice to concentrate on its essential constitutional role, a further re-allocation of jurisdiction between the ECJ, on the one hand, and the CFI and still to be established judicial panels (specialised courts), on the other hand, may seem appropriate. Since the provisions of the Constitution do not differ from the provisions of the Nice Treaty as

³ See Article 245 of the E.C. Treaty.

⁴ COM (2003) 705 final.

⁵ COM (2003) 828 final.

⁶ In 2003, 124 new staff cases were brought before the CFI out of a total of 466 new cases.

⁷ Articles 220 and 225a of the E.C. Treaty. The Council will decide unanimously on a proposal from the Commission after consulting the European Parliament and the Court of Justice, or at the request of the Court of Justice after consulting the European Parliament and the Commission.

⁸ Article 225(2), second paragraph, and 225(3), third paragraph, of the E.C. Treaty. In preliminary proceedings the CFI may avoid a review in a case by referring a case which falls under its jurisdiction to the Court of Justice. Article 225(3), second paragraph, of the E.C. Treaty indeed provides that "[w]here the [CFI] considers that the case requires a decision of principle likely to affect the unity or consistency of Community law, it may refer the case to the Court of Justice for a ruling".

⁹ The Court of Justice submitted a proposal for a Council Decision inserting new provisions into its Statute concerning the review procedure: see www.curia.eu.int.

¹⁰ Furthermore, whereas Article 68 of the E.C. Treaty entitles only national courts in last instance to make a reference for a preliminary ruling in matters relating to visas, asylum, immigration and other policies related to the free movement of persons, the Constitution abolishes all such restrictions on the exercise by the Court of Justice of the European Union of its competences in matters concerning freedom, security and justice. The only reservation lies in the fact that, in accordance with Article III-377 of the Constitution, the Court should, in relation to police and judicial cooperation in criminal matters, abstain from "review[ing] the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon the Member States with regard to the maintenance of law and order and the safeguarding of internal security".

regards the allocation of jurisdiction between the courts which compose the Court of Justice, it has to be examined how such future re-allocation can be organised efficiently on the basis of the current Treaty provisions.

II. TRANSFER OF JURISDICTION FROM THE COURT OF JUSTICE TO THE COURT OF FIRST INSTANCE

(a) *References for a preliminary ruling*

9. With respect to references for a preliminary ruling, the CFI can, according to the E.C. Treaty, only be granted jurisdiction in “specific areas laid down by the Statute”¹¹. Since the preliminary rulings of the CFI will be final – the exceptional cases of review excepted – the Community legislator, when defining the “specific areas”, should take into account the necessity to safeguard the unity and consistency of Community law¹².
10. In his opinion in the *De Coster* case, Advocate-General Dámaso Ruiz-Jarabo Colomer pleads against the transfer of jurisdiction to the CFI as regards preliminary references¹³. He explains:

“The key to the success of the preliminary-ruling procedure has lain in the centralisation of the interpretative function, which promotes uniformity. If other bodies are invited to participate, there is a risk that the unity will be destroyed. The day that two different interpretations are given by the two Courts in respect of the same precept of Community law, the death knell will sound for the preliminary-ruling procedure. The risk of confusion is not avoided by the fact that Article 225 states that the Court of First Instance is to be given jurisdiction to give preliminary rulings in ‘specific matters’, since any jurist knows that ‘different matters’ share common categories, institutions and legal principles, so that the possibility of disagreements does not disappear. The preliminary-ruling procedure seeks to protect the law, in the manner of a court of cassation, and there must be only one court of cassation in each legal order”¹⁴.
11. The concern expressed by the Advocate-General is justified. Indeed, there seem to be not many areas of Community law which constitute a separate body of law, the interpretation of which by the CFI is unlikely to affect other areas of Community law. However, this does not mean that no jurisdiction at all could be transferred to the CFI to hear preliminary references. If, for example, the CFI had jurisdiction to hear preliminary references relating to the interpretation of the tariff headings of the Customs Combined Nomenclature, there seems to be no perceptible risk that the CFI’s decisions might affect the unity or consistency of Community law¹⁵. It could also be contended that the transfer of “preliminary jurisdiction” with respect to the specific areas for which judicial panels have been established would normally not entail a risk for the unity of Community law¹⁶. Indeed, as regards these specific areas, the CFI is – apart from an exceptional review by the Court of Justice¹⁷ – judge in last instance. However, since at present, only the creation of the European Civil Servant Tribunal and the Court for the Community Patent is envisaged – the former having jurisdiction with respect to the interpretation and application of the staff regulation which does not give rise to preliminary references and the latter having jurisdiction with respect to the interpretation and application of a legal instrument which has not yet entered into force – a transfer of preliminary jurisdiction to the CFI in these areas would not affect the workload of the Court of Justice.

¹¹ Article 225(3), first paragraph, of the E.C. Treaty.

¹² The concern to avoid risks for the unity and consistency of Community law is apparent from Article 225(3) of the E.C. Treaty.

¹³ Case C-17/00 *De Coster* [2001] E.C.R. I-9445, para. 74 of opinion. See for a different point of view U. EVERLING, “Zur Fortbildung der Gerichtsbarkeit der Europäischen Gemeinschaften durch den Vertrag von Nizza”, in *Festschrift Helmut Steinberger*, Berlin, Springer, 2002, 1103-1127.

¹⁴ *Ibidem*.

¹⁵ In 2003 only 7 such references were made by national courts.

¹⁶ There could, however, be a risk relating to the consistency of Community law; see *infra* para. 30.

¹⁷ Article 225(2), second paragraph, E.C. Treaty.

12. Are there other examples of “specific areas” within the meaning of Article 225(3), first paragraph, of the E.C. Treaty ? What about the interpretation of the Sixth VAT Directive? Sometimes references relating to the interpretation of certain provisions of the Sixth VAT Directive also concern the interpretation of Treaty provisions (e.g. Articles 23, 25 and 90 EC Treaty)¹⁸ or have regard to legal concepts such as abuse of law¹⁹ which are also relevant for other areas of Community law. Granting the CFI jurisdiction to hear preliminary references with respect to the interpretation of the Sixth VAT Directive is thus not without any risk for the unity and consistency of Community law²⁰.
13. In any event “specific areas” should not automatically cover those areas in which the CFI developed considerable expertise in the framework of direct actions. Even if the CFI is often called upon to interpret Articles 81 and 82 of the E.C. Treaty, a transfer of “preliminary jurisdiction” for the interpretation of these provisions would entail a risk for the unity and consistency of Community law. Indeed, the competition rules are to be counted among the basic provisions of the E.C. Treaty. Moreover, preliminary questions relating to the interpretation of the competition rules are often inextricably linked to questions relating to the interpretation of other Treaty provisions such as the provisions regarding the free movement of goods and persons and the provisions relating to the free provision of services. But above all, the CFI is no “court of cassation” as to the direct actions brought in the field of competition law but a real first instance court whose decisions are subject to full appeals on points of law. If the CFI were to give preliminary rulings on Articles 81 and 82 of the E.C. Treaty, the Court of Justice would be restricted to exceptional review of these rulings, which would break the parallelism between direct actions and preliminary rulings in saying the law in this field.
14. Finally, there also exists a risk for the unity and consistency of Community law each time the CFI, pursuant to a reference for a preliminary ruling, would invalidate a general act²¹ of Community law. This risk, of course, also exists as regards actions for annulment. However, for this reason Article 60, second paragraph, of the Court’s Statute explicitly provides that “decisions of the CFI declaring a regulation to be void shall take effect only as from the date of expiry of the period [during which an appeal can be lodged] or, if an appeal shall have been brought within that period, as from the date of dismissal of the appeal”.
15. It follows from the above analysis that the necessity to safeguard the unity and consistency of Community law seems to be incompatible with a substantial transfer of jurisdiction to the CFI with respect to preliminary references. This is normal since the Treaty granted a “preliminary jurisdiction” to the Court of Justice notably with a view to safeguarding the unity and consistency of Community law. If one seeks to alleviate the workload of the Court of Justice so that it will continue to be able to concentrate on its essential functions – including the treatment of almost all preliminary references – the transfer of jurisdiction to the CFI will have to relate to direct actions, in particular infringement actions.

(b) *Infringement actions*

16. According to Article 225(1), first paragraph, second sentence, of the E.C. Treaty, the Statute may provide for the CFI “to have jurisdiction for other classes of action or proceeding”. This means that granting to the CFI jurisdiction in infringement actions (based on Articles 226-228 of the E.C. Treaty) would not require a Treaty amendment. An amendment of the Statute would suffice.
17. Would such transfer be compatible with the guideline which is apparent in the Nice Treaty and the Constitution according to which the allocation of jurisdiction between the different Community courts should allow the Court of Justice to concentrate on its essential function of

¹⁸ See e.g. Case C-387/01, *Weigel*, 29 April 2004, not yet reported.

¹⁹ See e.g. Case C-255/02, *Halifax*, pending.

²⁰ Many other examples of “specific areas” could be tested on their severability from general Community law, e.g. the Brussels I and II Regulations, third pillar instruments, etc.

²¹ For a definition of a general act of Community law, see Case C-171/00 P *Libéros v. Commission* [2002] E.C.R. I-451.

safeguarding the unity and consistency of Community law ?

18. In this respect, one has to admit that infringement actions, by their very nature, have a constitutional dimension. Indeed, in the context of such action, the Commission will contend that, according to the relevant provision(s) of Community law, the Member State was not entitled to act the way it has acted or that it was not entitled to remain inactive and the Member State will have to justify the exercise of its sovereign powers. Furthermore, infringement cases often are of great importance for the development of European law and, in any event, are always important for the correct application of this law in the Member States. This constitutional dimension of infringement actions pleads against the transfer of such cases to the CFI. It should be added that the Member States consider the jurisdiction of the Court of Justice in this field as a "privilège de juridiction". Only the highest Court hears and determines cases in which the Member States act as a defendant. Finally, a transfer of jurisdiction to the CFI would, given the two-tier court system, slow down the definitive finding of an infringement.
19. There are, however, also important factors which plead in favour of a transfer of jurisdiction to the CFI. Infringement cases often require an appraisal of complex facts. The CFI therefore seems to be the natural forum for hearing such cases. A two-tier court system also undoubtedly improves the quality of legal protection. Finally, the transfer of jurisdiction in infringement cases to the CFI would not entail a risk for the unity and consistency of Community law. The possibility for the Member States and Community institutions for bringing an appeal against the rulings of the CFI excludes such risk.

Taken into account the limited scope of a possible transfer of jurisdiction with respect to references for a preliminary rulings, on the one hand, and the unavoidable increase of the Court of Justice's workload in the future, on the other hand, a transfer of jurisdiction to the CFI with respect to infringement actions may have to be considered, if one seeks to maintain the quality and effectiveness of judicial review in the Community legal order and to enable the Court to concentrate its activities on its fundamental task of ensuring uniform interpretation of Community law.

20. However, in contrast to the other direct actions, it seems to be impossible to elaborate a criterion for the division of jurisdiction between the Court of Justice and the CFI which would direct the infringement actions raising constitutional issues immediately to the former court. For this reason, if one day the increasing workload of the Court of Justice were to make a transfer of infringement actions to the CFI desirable, a provision could be inserted in the Statute according to which the CFI – acting on its own motion²² or upon a request of the defendant – could refer an infringement case to the Court of Justice.

III. Other measures which could alleviate the workload of the Court of Justice

(a) *A filter system for appeals*

21. Article 225 of the E.C. Treaty allows the introduction of a filter system for appeals. Article 225 (1), second paragraph, of the E.C. Treaty indeed states: "Decisions given by the Court of First Instance [...] may be subject to a right of appeal to the Court of Justice on points of law only, *under the conditions and within the limits laid down by the Statute*"²³.
22. At the end of 2003, 121 appeals were pending before the Court of Justice. If the appeals which the Court now declares, by order, manifestly inadmissible or manifestly ill-founded were to be filtered out – these cases represent about 25 % of the appeals²⁴ – the effects of the introduction of a European *certiorari* system on the workload of the Court of Justice would be substantial.

²² See, per analogy, Article 225(3), second paragraph, of the E.C. Treaty.

²³ Emphasis added.

²⁴ Statistics for 2003.

(b) *The creation of judicial panels*

23. The Council is empowered to create judicial panels which will be attached to the CFI and which will hear and determine at first instance certain classes of action or proceeding brought in specific areas. Decisions given by judicial panels will be subject to a right of appeal before the CFI.
24. The creation of a judicial panel automatically has ramifications for the workload of the Court of Justice. Indeed, in the absence of the judicial panel, cases falling within the jurisdiction of the panel, would be heard at first instance by the CFI and the appeal against such decision would then have to be brought before the Court of Justice. Admittedly, the Court of Justice can review a decision taken by the CFI in an area for which jurisdiction has been granted at first instance to a judicial panel. However, such review is intended to be exceptional and cannot be applied for by the parties to the main proceedings.²⁵

IV THE TRANSFER OF JURISDICTION FROM THE COURT OF JUSTICE TO THE CFI HAS TO BE COUPLED WITH MEASURES ALLEVIATING THE WORKLOAD OF THE CFI

25. Taking a look at the statistics of the CFI, one notes that the number of cases brought before it exceeds, year after year, the number of cases decided. Thus, in 2003, 466 new cases were brought before the CFI and 339 cases were decided. At the end of 2003, the number of pending cases amounted to 999. Under these circumstances, it would be unwise to transfer jurisdiction from the Court of Justice to an already overburdened CFI if this transfer is not coupled with the adoption of other measures with a view to alleviating the workload of the CFI.

(a) *The creation of judicial panels*

26. The creation of one or more judicial panel(s) which would hear and determine at first instance cases which at present fall within the jurisdiction of the CFI would manifestly alleviate the workload of the CFI. However, in order to safeguard the unity and consistency of Community law, such panels can only be granted jurisdiction in "specific areas"²⁶. Thus, the same demarcation problems arise as with respect to a possible transfer of jurisdiction with regard to references for a preliminary ruling²⁷.
27. So far the creation of two judicial panels has been considered. The – recently decided – establishment of the European Civil Servant Tribunal will not entail a risk for the unity and consistency of Community law. The staff regulations are indeed a separate body of law. Since national courts do not have jurisdiction in this field, they never give rise to preliminary references. In the rare staff cases which may have ramifications for other areas of Community law (e.g. staff cases in which a violation of a fundamental right is put forward), the Court of Justice could use its review power when a decision of the CFI upon appeal would present a serious risk for the unity or consistency of Community law.
28. The creation of the European Civil Servant Tribunal will imply a transfer of between 25 to 30 % of the cases currently brought before the CFI.²⁸ Such a transfer could compensate – in terms of workload – for the recent transfer of jurisdiction to the CFI as regards direct actions which entered into force on 1 June 2004. This recent transfer coupled with the creation of the European Civil Servant Tribunal will, however, not appear to be sufficient for the CFI to eliminate its judicial backlog and *a fortiori* not be sufficient for coping with a possible future extension of its jurisdiction.

²⁵ Article 225(2) of the E.C. Treaty.

²⁶ Article 225a, first paragraph, E.C. Treaty.

²⁷ Thus, for the reasons stated *supra*, para. 13, the creation of a judicial panel on competition law does not seem to meet the test of being a "specific area" for the purpose of application of Article 225a, first paragraph, E.C. Treaty.

²⁸ In 2003, 124 new staff cases were brought before the CFI.

29. As regards the Court for the Community Patent, this judicial panel will not be created in the near future and will in any event – since it concerns a legal instrument which has not yet entered into force – merely prevent a further increase in the CFI's workload which would be, in the absence of a judicial panel, the natural forum for hearing Community patent cases. The creation of a judicial panel for Community intellectual property rights in general (and not just for the Community patent)²⁹ to which the present caseload of trademark cases could be transferred (about 100 cases per year) would substantially alleviate the workload of the CFI. The creation of such a panel is not yet proposed (although it is now being examined, in a first stage relating to trademarks and designs) but may seem to be unavoidable if in the future a more substantial transfer of cases from the Court of Justice to the CFI were to be envisaged.
30. However, the setting up of a judicial panel for Community intellectual property rights would not be without any risk for the unity and consistency of Community law. Indeed, at present, references are regularly made by national courts to the Court of Justice with respect to the interpretation of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trademark.³⁰ If a judicial panel were to be created for Community intellectual property rights, it cannot be excluded that the interpretation given by the Court of Justice upon a preliminary reference contradicts a decision of the CFI given upon appeal against a decision of the panel. Whilst the risk for the unity of Community law might be attenuated by also granting jurisdiction to the CFI with respect to the interpretation of the instruments creating Community intellectual property rights, the same cannot be said with respect to the risk for the consistency of Community law. The preliminary rulings given by the Court of Justice in which Regulation No 40/94 played a role prove this. They tend to address much larger and fundamental issues of Community law³¹. Moreover, the exercise of intellectual property rights and thus the interpretation of the provisions granting such rights often have to be reconciled with the requirements of the internal market and the competition rules of the Treaty.

(b) The increase in the number of judges at the CFI

31. The CFI comprises at least one judge per Member State. The number of judges is determined by the Statute³². Since the CFI normally sits in chambers of three judges, the increase in the number of judges at the CFI would increase that court's capacity to hear cases and could counterbalance a future transfer of jurisdiction from the Court of Justice to the CFI. The risk for the unity and consistency of Community law would not be more important than that under the present system. The risk would be largely eliminated by the possibility for the parties to the proceedings, the Member States and the institutions to appeal against the decision of the CFI.

²⁹ At present, that would concern Community trademarks (Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trademark (1994) O.J. L11/1), designs (Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (2002) O.J. L3/1) and plant variety rights (Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights (1994) O.J. L227/1, amended by Council Regulation (EC) No 2506/95 of 25 October 1995 (1995) O.J. L258/3).

³⁰ O.J. 1994, L11/1.

³¹ See e.g. Case C-53/96 *Hermès International* [1998] E.C.R. I-3603.

³² Article 224, first paragraph, E.C. Treaty.

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Observations on judge LENAERTS' Report

General observations

Contrary to what is widely said, the "Constitutional Treaty" will have an impact on the Judicial architecture, in 2 ways:

- Quasi-full extension of normal jurisdictional rules to the area of JHA.
- very beneficial effect on the possibility to reform:
 - QMV + co-decision – for the creation of judicial panels
 - jurisdictional issues on intellectual property
 - QMV for the Statute of the Court (except Title I + language regime)

This includes almost all the issues discussed to-day:

- repartition of competences between the Court and the CFI; number of CFI judges;

- reform of preliminary rulings

So, the good news is that at last, it will be possible to focus on what is needed, not only on what is politically correct.

K. Lenaerts' "constructive pessimism" (according to which presently considered changes "will only maintain the backlog of cases"), is technically right:

the only real overall short term impact will be a result of the creation of the civil servant tribunal.

in the medium-term, the new domains of JHA (asylum) will certainly have an effect

But we should not forget that the number of judges is up by 66%, both at ECJ and CFI. They will be come increasingly productive, while experience shows that litigation from new Member States will take several years before reaching its cruising speed; and most new States are sufficiently small to trigger not too many cases.

So, take advantage of the years to come to reduce the backlog. There is a window of opportunity to reduce it. President Skouris just mentioned encouraging, yet tentative, figures for 2004.

Can some preliminary rulings be transferred?

It is a central procedure. But vulnerable to the delays.

If we go back to the basics (the “Due” report), it would seem that for reasons of consistency, it is feasible to give the competence on preliminary rulings to the CFI where it is also “juge de cassation”, i.e. where

- (a) really “specific area”
- (b) area sufficiently large to justify the creation of a special judge of First Instance (intellectual property? asylum, as asked for by the Council?)

Is it possible to transfer further to the CFI? tend to agree with Mr Lenaerts prudence:

what could be transferred is either

- insignificant (customs Tariff)
- or a radical change in the system, both in terms of uniformity of interpretation and in terms of cooperation with the national judges.

(In the long term, many think of a “certiorari” system for the selection of preliminary rulings. But premature, and difficult: would sit uncomfortably with a system where national Courts have stayed their own procedure pending the ruling).

Maybe a solution is within the existing system: Adv. Gen. Jacobs describes a system of “Green Light”, whereby the National Court would be asked to propose a solution to its own questions. And the Court would either “green-light” or issue a judgement. [But would the gain be significant? And is it not contradictory to ask the author of a question to provide for the answer?]

Infringements

There, any transfer would imply a two-tier system, and this must be thoroughly thought through, because:

1. the respect by the Member States of the decisions is at stakes, and is linked to credibility of the procedure (for example, financial penalties of 228 is probably only for Court)
2. also there is a need for a fast procedure, because it is also the functioning of the legal order which is at stakes

- Non-communication of transposing measures (“Non-Comm.’s”) is probably feasible. I do not see any “constitutional character” here. But is this a real, significant gain? Would seem mainly administrative...

- I agree with Mr Lenaerts that it seems uneasy to have a proper criterion for transfer in some more “constitutional” cases, not in others, or to rely on the initiative of the CFI (it is even difficult to support that some would be one-tiered and other two-tiered: there exist differences in the decisions, inherent to a 1 or a 2-tiered system).

- On the other hand, not too convinced about the “Constitutional content” of any infringements case see the late ECSC, where the High Authority was establishing the infringements under control of the Court!

Other measures

“Judicial panels” or new Courts – 2 observations on their possible domains:

1. intellectual property: why not? But when really needed (Reminder that the single judge at the CFI was initially justified by the prospect of trades marks flows, grossly over evaluated to 400/year at the time)
2. Judge Lenaerts does not mention “competition”. Rightly so, because the very creation of these “special panels” was designed to allow the CFI to focus on its main mission, viewed as including “Competition”.

Increase the number of judges at CFI

Agree with Judge Lenaerts that this is necessary; the risk of contradiction between chambers should be dealt with, by adequate changes in structure (cannot rely solely on the appeal to the Court).

Back to where we started.

Conclusion: Adequate means must be given to the Court. It will soon at least have its new grand building...

normally, human resources follow suit.

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I. INTRODUCTION

Koen Lenaerts, famous judge at the European Court of Justice, gives us a detailed and realistic picture of what the present and future challenges for the ECJ are and what could be done, *de constitutione lata*, to deal with the problems to come. While he highlights the constitutional role of the ECJ, he also stresses the increasing workload for the Court, as it will be for the Court of First Instance, as the most serious issue. He does not touch upon the – serious – question of languages³³ and does not comment on the provisions on the Court of Justice in the Treaty establishing a Constitution for Europe as it was signed the 29th of October 2004 in Rome (TCE). The cautious solutions proposed would enhance the role of the Court of Justice as „the Community’s Constitutional Court“³⁴, while the role of the CFI and even more that of the Judicial Panels to which certain areas of jurisdiction are proposed to be passed over, seem to become that of a general and specialised character, but by far not secondary or auxiliary: The CFI may be entrusted with the power to give preliminary rulings in certain areas, while its increasing workload may be alleviated by giving specialised JP’s jurisdiction in areas such as staff regulation or intellectual property rights. Koen Lenaerts, nevertheless, rightly draws attention to the risks of such changes for the unity and consistency of Community law.

Judge Lenaerts, in these days, acts as a practitioner, and addressing prominently the question of the work overload of the ECJ he knows what he talks about. Let me take more the perspective of academics and an “only”-professor who has the liberty to argue on a broader basis and use his imagination with the natural risk of thinking beyond realism. To do so, I shall first explain the criteria (see II. below) on which I shall than base my comments on some specific proposals of Judge Lenaerts (see III. below) to conclude with some further ideas on how the role of the European Courts in Luxembourg might be defined for the coming periods (see IV. below).

II. CRITERIA FOR THE DEFINITION OF THE ROLE OF THE EUROPEAN COURTS

The leading criteria for designing and defining the role of the ECJ, the CFI and the JP’s in the long term should be seen in the context of the structure, values and objectives of the European Union (1. below), the specific responsibilities of the European judges and the national judges respectively in the composed/composite judicial system of this bi- or multilevel polity (2. below) and with due regard to the need for effective judicial review and coherence of jurisprudence in EU matters (3. below). Let me explain:

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³³ The increasing number of languages may not be just a logistical problem, it will prolong the procedures, may also adversely affect the clarity of Court decisions and contribute to the ‘fuzziness’ of European law, see on this I Pernice and FC Mayer, in: E Grabitz and M Hilf (eds), *Das Recht der Europäischen Union, Kommentar* (2002), Art 220 EC, paras 86 *et seq.*; FC Mayer, *The language of the European Constitution – beyond Babel?* in: A Bodnar *et al* (eds): *The Emerging Constitutional Law of the European Union* (2003) 359; see also FC Mayer, *Europäisches Sprachenverfassungsrecht, Der Staat* (2004), forthcoming (Issue 4).

³⁴ See on this role also J Schwarze (ed), *Der Europäische Gerichtshof als Verfassungsgericht und Rechtsschutzinstanz* (1983); O Due, *A Constitutional Court for the European Communities*, in: D Curtin and D O’Keeffe (eds), *Constitutional Adjudication in European Community and National Law* (1992) 3; K Alter, *Establishing the Supremacy of European Law* (2001) 225.

1. Specific character, values and objectives of the EU

As opposed to states, including federal states, the EU is a composed constitutional system which consists of a limited supranational public authority common to Member States which basically maintain their original powers. Such powers regard not only such important policy-areas like foreign, defence, home, economic and social policies, but above all, the monopoly of legitimate physical coercion – according to *Max Weber*, the key element of statehood – rests with the national authorities. It is established, furthermore, that European judges do not have the power to nullify acts of national authorities, and the national judges are not entitled to review the validity of European measures. Hence, there is a clear separation of power and responsibilities, and in practice it is only for the national judges in applying European law to give it primacy over national law. While the ECJ has the power to establish whether or not a national measure is in line with European law, again, to remedy the situation is the responsibility of the national authorities.

The European Union is a „Community of law“, as *Walter Hallstein* has made clear and as the Court rightly emphasises again and again. This means that the Union is based upon, and is constituted by law, is acting through and by means of law and it is guided by the ideas of justice and equity. Giving effect to the fundamental rights and the rule of law in a system of effective legal remedies, therefore, is a basis and a prominent value of the Union, and this may be the reason for the confidence peoples and states have in this joint venture and why new States apply for membership, one after the other, notwithstanding the loss of national sovereignty such membership implies for each individual Member State. A strong and efficient judiciary, therefore, is the condition and essential for the functioning of the European Union whatever policy it may be responsible for and it may choose to follow.

2. Division of powers and cooperation in the multilevel judicial system

Yet, the European Courts are not alone in exercising this judicial function in the EU. The system of judicial review in the Union is decentralised and based upon an active role of the national judges. Article I-29 TCE underlines this shared responsibility by stressing that „Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law“; the role of the ECJ, the General Court (CFI) and the specialised Courts continues to „ensure that in the interpretation and application of the Constitution the law is observed“. In such a composed judicial system, where European law is given effect mainly by the national authorities, including the judges who act, insofar, as agents for the EU and may, insofar, even be titled „European judges“ in functional meaning, the role of the Luxembourg judges must be defined with due regard to the complementary function of the national judges³⁵. Also with regard to the principle of subsidiarity the question is what can only – or more effectively – be done at the European level, and what may remain the prerogatives of the national judges who act more closely to the citizens and to the facts on the spot.

Clearly, the unity of European law, its uniform application and implementation is not only a condition for the functioning of the whole system; above all it is required by the principle of equality under the common rule. Accordingly, Article 17 § 2 EC states that the citizens of the Union enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby. What this means is: equal rights and equal duties. It is an expression of the principle of non-discrimination, and more

³⁵ On the issue of complementarity see I Pernice, *Die Dritte Gewalt im europäischen Verfassungsverbund*, *Europarecht* (1996) 27; FC Mayer, *The European Constitution and the Courts*, *Jean Monnet Working Paper* 9/03 (2003), also published in A von Bogdandy (ed), *European Constitutional Law* (forthcoming); FC Mayer, *Wer soll Hüter der europäischen Verfassung sein?*, *Archiv des öffentlichen Rechts* (2004) 411.

explicitly stated in Article I-45 TCE, stating that the „Union shall observe the principle of the equality of its citizens...“. This equality is the basis for the reciprocal recognition of the validity of Community law by all citizens under what I would call the „European social contract“, and closely linked to the principle of primacy: It does not allow the setting aside of any of the provisions of European law in any of the Member States.

An essential, if not the prominent role of the European judges, therefore, is to ensure the complete and uniform application of European law throughout the Union, and on the other side effectively to protect the fundamental rights of the individual and to ensure that the limits of the powers conferred to the institutions of the Union are respected. So, only the European judges can be entitled to judge on the legality and validity of European measures, to ensure that Union law is interpreted in a uniform way, and to review the compliance with European law in judging infringements to it by national authorities. Wherever a national judge is confronted with questions of European law, close cooperation is needed between the two levels of jurisdiction, and in a given case it may be also the responsibility of the lawyers involved to raise such questions and give the national judges such materials as necessary to ensure that this cooperation works.

3. Effective judicial review and coherence of jurisprudence in European matters

The cooperation between the two judicial levels is crucial in a composed/composite judicial system where courts are competent at both levels, and the effectiveness of legal remedies provided largely depends on how this cooperation is organised. Time is as important as substance. References to the ECJ should not prolong excessively the time until a case is finally decided. Where, in order to allow the Court to decide timely the cases are distributed to different chambers or even to different – general or specialised – Courts the risk of inconsistencies in what one or the other chamber or one or the other Court may find will increase. And it is clear that the number of cases will increase with the increasing number of Member States and citizens in the EU, the enlarged scope of European competence and action and with the growing awareness of the impact European law has on the daily life of the citizens. The transfer of policies under the third pillar to the Community method with the extended jurisdiction of the ECJ, which will, under the Constitution even cover the decisions of the European Council which are, as Article III-356 § 1 TCE says, „intended to produce legal effects vis-à-vis third parties“ adds to the problem of overload and consistency.

Failing efficiency of the judicial system would put at risk the functioning of European law and the Union altogether. Failing coherence and consistency would, at least, be a threat to legal certainty, equality and justice. Though we will have to live up with this increasing risk to a certain degree, the solutions proposed by Koen Lenaerts may allow some redress.

III. SOME PROPOSED SOLUTIONS REVISITED

Among the proposals of Koen Lenaerts let me pick up and develop upon the most challenging, as are: The ECJ as a Constitutional Court (see 1 below), the introduction of a „filter system“ (see 2 below) and some thoughts on the setting up of Judicial Panels for special areas of Community law (see 3 below).

1. The ECJ as a Constitutional Court ?

Would it be appropriate and helpful to further develop the ECJ to a real Constitutional Court and to concentrate its role on questions of a real constitutional character? The ECJ, *Koen Lenaerts* says,

already plays this role, „that is to say, as the guardian of the objectives and rules of law laid down in the Treaties“. I share this view. His analysis, however, shows that the ECJ simply will not be able to fulfil even this role any more with the increasing workload. He rightly hesitates to confer to the CFI the power to give preliminary rulings in *specific areas*, as this could endanger the unity and consistency of Community law. On the other hand, would the power of the CFI, as proposed instead, to deal with infringement actions be a better solution? Indeed, where an appraisal of complex facts is needed, the CFI would be the better instance to do it. But such cases may also be more complex in legal terms, and it is true that infringement actions by their nature have a constitutional dimension. In such cases, the Member State involved would often pass the case to the ECJ anyway.

Regarding infringement cases, no „constitutional“ question or even, no real legal problem exists where the Court is only asked to state that necessary measures to transpose or apply a directive have not been taken or communicated by a Member State to the Commission. Such cases could easily be decided by the CFI. Also preliminary rulings exclusively on questions like the headings of the Customs Combined Nomenclature, or on the application of the Community Patent could be dealt with by the CFI or even by specialised Courts, the JC's.

My proposal is even to go much further: As the future „General Court“, could the CFI not be given a *general competence* to give preliminary rulings, with the exception of very specialised areas which are conferred to JC's ? And should the ECJ not only be competent for appeals against such judgements based on arguments such as manifest inconsistencies in such rulings and the non-respect or violation of fundamental rights and other constitutional principles? The consequence in these cases may well be a prolongation of the procedure, but the ECJ would have to deal with less cases, concentrate on important constitutional issues and be able to decide more speedily.

The same should apply for infringement procedures. While they have a constitutional dimension with a view to the relationship between the Union and its Member States and the general duties of the Member States under the Treaty (or the Constitution), they are not all of great importance to the core of the Constitution: Whether or not Article 2 of the bird's Directive has been implemented by a Member State is rather a question of secondary law. The „*privilège de juridiction*“ for Member States stressed by Koen Lenaerts may have been an important point for the past, but with the upgrading of the CFI to the „General Court“ as it is envisaged in the new Constitution, to consider its competence to judge upon infringements to European law would be inconsistent with the central, general role of this Court.

This leads to a quite radical revision of the judicial architecture in the European Union: The CFI and future General Court should be generally competent for all matters, except such „constitutional“ questions as are expressly reserved to the jurisdiction of the ECJ. While it may be difficult, in a given case, to decide whether or not it is of a constitutional nature, for defining what are the core constitutional issues to be decided by the ECJ, we can learn from the law and practice of the Member States: At first sight, only cases

- of inter-institutional litigation on whatever substantial issue it may be,
- relating to the choice of legal basis for Union legislation, and the applicability and scope of Union competencies including proportionality and subsidiarity,
- regarding of compliance with the procedural requirements in the adoption of European, directives, regulations and decisions
- on the relationship of Union law to national constitutions and legislation and, in particular, on the primacy of Union law, and

- on questions regarding the compliance of Union legislative acts with European fundamental rights and general principles of European law

should be referred to and heard by the ECJ. This includes, of course, appeals against judgements of the CFI or JC's, which are implicitly dealing with such questions. In addition, the validity of Union legislative acts should always be regarded as a „constitutional“ issue and under the jurisdiction of the ECJ only. Finally, with a view to the principles of harmonious and unified application of European law, also appeals against judgements based on alleged inconsistencies with prior judgements of any of the European Courts or divergent views taken by them should be heard by the ECJ.

2. A Filter System for Appeals

Where such a re-allocation of roles and powers of the diverse Courts at the European level would still not suffice to alleviate the workload of the ECJ, the idea discussed by Koen Lenaerts to introduce a *certiorari*-System should be considered as an additional means. This idea is obviously inspired by the procedural law of the US Supreme Court, and maybe we can learn a lot about the benefits and the risks of systems of ‚docket-control‘ by having a closer empirical look at the US experience. I shall not explore that here in more detail and may just refer to the brilliant book of Koen Lenaerts on „Le juge et la constitution aux Etats Unies d'Amérique et dans l'ordre juridique européen“ (Brussels 1988).

Would it be more adverse to the confidence in the efficiency of the judicial system at the European level to allow the ECJ to filtering out the cases in which it finds that there is no relevant „constitutional“ question raised – in the meaning explained above – and rejecting the appeal or even the application as inadmissible, than maintaining a situation where the applicant would have to wait years and years until a final judgement is given by the ECJ? Cases which the ECJ may have filtered out may well be admissible at and decided by the CFI, and, preliminary references for the interpretation of Union law, in particular, should never remain without a ruling.

3. Setting up of Judicial Panels for special areas of Community law

With the increasing workload of the CFI due to the alleviation of the workload of the ECJ it is proposed to pass over competence for adjudicating cases in certain special areas of Community law, such as customs, staff cases and intellectual property. This would considerably alleviate the workload of the CFI and give it room for hearing all the cases which – with the exception to those cases of constitutional character which will be admissible at the ECJ – are to be passed over from the competence of the ECJ to the CFI. Judicial Panels could be given the right – on its own motion or upon request of the parties – to refer cases, where inconsistencies with the jurisprudence of the CFI or the ECJ are possible, to those Courts, as it should be possible or even required for cases in which constitutional questions are raised. With this proviso, problems of consistency may be dealt with in an appropriate manner, and the ECJ would be confronted with files which are already worked through and prepared by the other Courts.

IV. CONCLUSIONS

While Koen Lenaerts proposes steps which may largely be given effect without new amendments to the Treaty – or to the Constitution – it is clear that changing the role of the ECJ to a real – and only – Constitutional Court would require new amendments at that level. In some way, the General Court would take over the ECJ's present role, while the ECJ would concentrate its work on the key

constitutional questions as they may arise under the diverse procedures and in whatever field of Union law. The definition of its jurisdiction, therefore, will not depend on either who is the applicant or the type of procedure (infringements, preliminary rulings, direct actions, or non-contractual liability), nor would any specific area, such as staff cases or competition be excluded by itself. Its jurisdiction would rather be defined by the specific constitutional character of the matter and the need for an ultimate instance having the capacity and time to ensure unified and consistent application of Union law, the respect of the constitution and its basic principles, including the fundamental rights, the power-sharing system of the EU, national identity, subsidiarity and the rule of law.

The CFI or, as the Constitution for Europe calls it, the General Court consequently will be at the core of the European judicial architecture and cover all legal remedies for all areas of European law. As this would imply a considerable increase of work for the Court, three measures should be considered further to ensure that the General Court will have the capacities necessary to fulfil its tasks:

1. Setting up specialised Courts for special areas of Community law which require, with a view to their technical nature, special expertise for the appraisal of complex facts. Not only staff regulations, customs and intellectual property may be such areas, but also asylum, civil and criminal law, competition or even agriculture. If the specialised Courts were located in different Member States or regions in the Union, this step could even in some way bring the Union closer to its citizens.
2. A drastic increase of the number of judges and the appointment of advocate generals at the General Court should be considered in addition. While it is important, that the legal cultures and traditions of all the Member States are represented, some recognition should be given to the different size of the Member States and workload coming from each of them, and legal qualification should be the most important criterion for the choice of the judges.
3. The invitation – or even duty – of the national Courts to prepare preliminary references more carefully, giving the reasons of their doubts and even proposals for an answer in a clear and concise way. This would underline their responsibility and function as European judges, when applying European law, and allow the ECJ, the General Court and the specialised Courts more rapidly to give their rulings on the questions. The shorter and concise the reference is drafted, the lighter would be the technical workload for translation and the shorter would be the delay for answers.

The judicial dialogue and cooperation between the two levels of jurisdiction in the European judicial system and an effective judicial protection offered by it to individuals, Member States and their regions – the key-stone for the functioning of the EU as such – should not suffer from an overload of the Courts at the European level. Nobody shall be denied access to justice in the EU simply for reasons of workload. Excessive delays of the procedures are not only intolerable, but equate to such a denial. Taking seriously this issue, means taking seriously the EU as a Community of law, which is the basis for the Union as our common device for peace and prosperity in Europe.

James FLYNN, QC

Barrister, Brick Court Chambers, London and Brussels Member of the CCBE Permanent Delegation to the ECJ and CFI

1. There are many comments that could be made on the clear survey that Judge Lenaerts has made. The title given to this session could give rise to a discussion of many wider possibilities for the judicial architecture and operation of the Union's court system, depending on how forward-looking one's perspective (such as the old chestnut of regional or circuit courts for the EU). However, this note is confined to what is on the immediate horizon, although, since it includes references to the Constitutional Treaty, it may be thought to anticipate the outcome of what may be a difficult series of national referenda.

2. The nomenclature will change if the Constitutional Treaty does come into force: the CFI will become the High Court (or in some parts of the current translation of the Constitutional Treaty, the "General" Court, an ugly term surely to be discouraged) and the "judicial panels" will become "specialised courts".

3. This note has three broad headings, namely preliminary references, infringement actions and judicial panels, and makes summary comments on each.

PRELIMINARY REFERENCES

4. It is easy to understand reluctance to "delegate" the function of answering requests for a preliminary ruling down from the ECJ and in a perfect world perhaps it would not happen. It is also clear that there are bound to be great difficulties in identifying discrete areas of law that can be treated as a separate class for entrusting to the CFI (and, as Judge Lenaerts notes, carving out the most obvious class, the customs classification cases, would hardly amount to any saving for the ECJ). This suggests that such delegation should not be effected until it becomes unavoidable.

5. But there is a real tension between the need for unity and the ability of the ECJ (whose membership must be kept within strict numerical bounds if it is to operate properly) to process the number of references that will be made and give coherent and compelling answers to them all within acceptable time limits. Severely delayed or obscure answers will undermine the ECJ's authority and deter the making of references. Overload, if not actually present, is certainly on the horizon with the effects of the recent substantial accession to be felt in two years or so. In any event, the output of the ECJ, commendable though it is in terms of the members of the court shouldering the considerable burdens put upon them, is in fact unmanageable at over 12,000 pages of judgments a year. The handing down of any judgment of the Court should be a matter of importance to the legal community. One cannot avoid thinking that a court with this output is dealing with too many cases which are not of such significance.

6. From the perspective of a practitioner (and perhaps of many referring courts), the two most important questions regarding the transfer of primary responsibility for references from the ECJ to the CFI are: will the time within which the answer is to be expected be any shorter? and how often and with what impact would there be "exceptional" reviews?

7. The ultimate principle, which surely must take precedence and be safeguarded over others, is that the ECJ should have the final and the authoritative word. If that final word is given to correct deviations from the true path by lower courts along the way, that does not of itself undermine the authority of the ECJ or of EU law. It is what happens in all developed systems of law. In short, the risk of loss of consistency inherent in transfer to the CFI (especially if, as seems inevitable, the membership of that court were to be significantly expanded) may be outweighed by the need to ensure that the status and authority of the ECJ's rulings are never called into question.

8. An urgent reconsideration of the structure and utility of the preliminary reference procedure is in any event urgently needed in relation to new classes of jurisdiction that are about to be conferred upon the ECJ in respect of references in sensitive areas concerning vulnerable individuals. Answers to such references will be needed in what at present seem extremely rapid, not to say unachievable, time scales.

9. The first so-called Brussels II Regulation covers civil proceedings relating to divorce, legal separation or marriage annulment and to civil proceedings relating to parental responsibility for the children of both spouses on the occasion of those matrimonial proceedings. The new Brussels II Regulation applies from 1 March 2005. It has a substantially broader scope and deals, *inter alia*, with jurisdiction, recognition and enforcement of judgments in all civil proceedings concerning parental responsibility (widely defined) for children. References in respect of all questions relating to children should be answered very swiftly indeed. The Regulation itself requires intra-EU child abduction cases to be fast tracked (the national court must act “expeditiously” and “shall” issue judgment within 6 weeks).

10. Article III-369, the version of Article 234 EC in the Constitutional Treaty, requires the ECJ to “act with the minimum of delay” where the preliminary question is raised in proceedings in a national court “with regard to” a person in custody. The so-called Hague programme calls on the Commission to make the necessary proposals, after consultation with the Court of Justice, for a formal solution to the handling of requests for preliminary rulings in the area of freedom, security and justice, in particular by amending the Statute of the Court.

11. One wonders how these objectives are to be achieved. It might be said that speed could be the enemy of the ideal construction of the relevant law, but that delay for the perfect answer could be the worst outcome for the vulnerable individuals involved (and also tends to reduce the real options open to the court). A two year or even one year delay in such cases may often be intolerable and may affect fundamental rights.

12. Despite the great importance of the individual cases, it might therefore be argued that decisions on such references should be taken speedily by a lower jurisdiction, with the ECJ intervening where necessary on an exceptional basis to correct undesirable developments.

INFRINGEMENT ACTIONS

13. Judge Lenaerts’s views that infringement proceedings should generally be heard in the CFI should be supported. Many infringement cases are fairly routine, and even where they are not, the State’s actions are reviewed first at one level in the administrative courts, with the possibility of appeal in most, if not all, national systems. There is no reason why it should be different in the European system, and Member States should renounce the view that they are entitled to a hearing at first and last instance before the ECJ in respect of infringements.

14. Judge Lenaerts suggests that there could be safeguards for infringement cases truly raising constitutional issues. That may be a sensible reserve, but there should be some protection against abuse, and the question of whether the case is to be transferred to the ECJ should not be put as of right in the hands of the member states. The CFI and ECJ should have discretion in this respect.

JUDICIAL PANELS

15. In addition to the staff and intellectual property cases mentioned by Judge Lenaerts, the topic of competition has been suggested as a suitable one for entrusting to a panel. There have been suggestions that the CFI itself has recognised that urgent review of merger cases under the streamlined procedure has not worked as well as hoped. But could panels do any better? And how would panels be staffed? Are they going to have the status and authority to assess controversial decisions in cases like *Airtours* or *GE/Honeywell*, where the Community’s international credibility may be at stake? The “visibility” of the issues with which a competition panel would have to grapple is

entirely different from, say, the proposed staff tribunal (which is, unequivocally, a good thing and should have been done years ago).

16. The desirability of a specialised competition court (which was what most practitioners thought the CFI was intended to be) is also affected by one's view of whether the ECJ should retain jurisdiction over preliminary references in competition cases, as Judge Lenaerts argues that it should, and as this writer would agree it should if there is not to be a wholesale transfer of responsibility for references along the lines discussed above.

17. If the ECJ were the first port of call for references concerning the competition rules, the creation of a panel for competition law would lead to there being two levels of jurisdiction below the ECJ that might (each) take a different view of the interpretation of the competition rules from that ultimately declared by the ECJ. The scenario is far from fanciful: there was a sharp difference in approach between that taken by the CFI and the ultimate position of the ECJ (after some flirtation with the CFI's approach,) as regards the analysis under the state aid rules and Article 86 EC of state payments for the discharge of public service obligations (contrast Case T-106/95 *FFSA* [1997] ECR II-229 and Case C-280/00 *Altmark Trans*, judgment of 24 July 2003; for a discussion of the respective approaches, see the opinions of Advocate Generals Léger in *Altmark Trans* and Jacobs in Case C-126/01 *GEMO*).

18. It is a similar risk to that identified by Judge Lenaerts in respect of the possible creation of a judicial panel for all EC intellectual property rights (paragraph 30 of his paper).

19. On one view, such differences may not matter. Certainly, in the English system, it is not unknown for the High Court to take one view and the Court of Appeal another, only for the House of Lords to conclude that they were both wrong. However, on balance, my conclusion is that, whether or not the competence to determine references in relation to competition is left with the ECJ, expansion and possibly specialisation within the CFI represents a better solution at this stage than the creation of a competition court.

20. If a national footnote may be permitted, an interesting legal issue is whether, in the absence of any transfer of competence under Article 234 to the CFI, a national court is bound by its interpretation of provisions of Community legislation relating to competition, which has been given in cases which do not involve the parties to the national proceedings. This has been raised in a pending appeal to the House of Lords in *Crehan v Inntrepreneur*.

CONCLUSION

21. Perhaps the question on which we should all reflect is suggested by Judge Lenaerts's starting point. Of course the ECJ is and should be a constitutional court. But should it be the only constitutional court within the Union's system, or should it rather be the ultimate constitutional court?

Topic 2

“What do the national judges and parties in the national courts require of the European Courts in order to enforce Community law effectively, and where are these needs not being met?”

Leif SEVÓN

President of the Supreme Court of Finland

The question I am expected to answer is the following: what do national judges and parties in national courts require from the Court of Justice of the European Communities (ECJ). In answering that question it is difficult to avoid entirely what national courts would not like to see.

If I would limit myself to expressing a unanimous view of all judges in the Member States I could stop here and relieve you of the pain of hearing more. All judges in the Union are probably not unanimous on any question. Consensus is even less likely to prevail among those who have appeared or may appear before the national courts. There may be broad agreement that measures are needed in order to ensure the proper functioning of the ECJ. There seem to be an equally broad disagreement on what those measures ought to be.

Therefore I can only express my own views. I am not convinced that I raise any point that has not been raised before.

I shall mainly discuss preliminary rulings. To my great relief I am not supposed to indicate how the needs of national courts could be met. Knowing the difficulties inherent in speeding up preliminary rulings, I am happy to leave it to others to provide the constructive proposals.

Preliminary rulings serve two basic purposes. They are the main tool for achieving a reasonable degree of coherent interpretation of Community law. Equally important is that they also serve as an indirect control of the fulfilment by the Member States of their obligations under the Treaty. Preliminary rulings are essential for both purposes and therefore for the functioning of the European Union as a Common market and an area of justice.

Formulating the modest needs of national courts and parties in my usual subtle way, I say that all that is needed is more speed, greater clarity and more information.

The overwhelming concern from the point of view of national courts is *speed*. It appears from the annual report 2003 of the ECJ that in 1999 the preliminary rulings procedure took in average 21.2 months.³⁶ That was already far too much. In 2003 the average time was 25.5 months. During the same period the number of new references fell from 255 to 210.³⁷ The total backlog of the Court increased from 896 to 974 cases.³⁸ Even if a positive development can be noted so far in 2004, that is still not entirely satisfactory.

A possible consequence of the increased delays is that it may seduce national judges to see the light when looking for an *acte clair*. The light might shine clearer if it is urgent to decide the case. The delays might also provoke advocates not to raise issues of Community law before national courts where that is permitted under the applicable legal system.³⁹

New measures can consist in restricting the input to the ECJ or in increasing the output. I do not think that any single measure can do the job. Therefore also moderate improvements should be considered. I shall comment on some of the alternatives from a purely national perspective.

In my view it would be a mistake to *restrict the right to make references* to courts of last instance. Requiring individuals and economic operators to spend time and money on appeals in order to assess their rights under Community law would seriously weaken those rights. I welcome the opposite development according to which: the right to make a reference would

³⁶ The Court of Justice of the European Communities. The Annual Report 2003, p.222.

³⁷ Ibid, p.223.

³⁸ Ibid, p.227.

³⁹ In several of the references recently made by the Supreme Court of Finland the issue of Community law has been raised ex officio by the Supreme Court not having been noted at earlier stages.

be extended to all courts and tribunals where it is presently restricted. That would, in particular, be useful in areas where the right to (a uniform) legal protection is of particular importance. However, that is a question for the next revision of the Treaty.

The obligation under Article 234(3) of courts of last instance to make a reference was defined in *CILFIT*⁴⁰ in 1982. The criteria laid down were probably necessary at that time. Today they raise several questions. Firstly, if taken literally, they would rapidly cause chaos in a Union of 25 or more with 20 or more languages. To compare 20 language versions might pose greater problems to national courts than to compare four versions, as was the case in the initial Community. Secondly, after the judgments in *Köbler*⁴¹ and *Kühne & Neitz*⁴² courts of last instance might consider twice whether to refrain from making a reference. This should not be construed as a criticism of those Judgments, just as a speculation on the effects they may produce at the national level. Thirdly, it is not necessarily appropriate for courts of last instance to be under an obligation that it is most desirable that they do not meet.

If, on the other hand, the courts of last instance would continue to apply the CILFIT-test as they have done so far, a modification of that test would probably not lead to such a reduction of the workload of the ECJ that a modification would be worthwhile.

One may further ask what the substance of a modification might be. Certainly, a comparison of all language versions is today impossible at the national level and might require modification. Nor is the requirement in CILFIT⁴³ operational according to which the national court should be convinced of two facts. Firstly, it should be convinced that the interpretation of Community law is obvious. Secondly, the national court should also be convinced all courts in the Member States share the view that the interpretation is obvious.⁴⁴ Finally, the criteria do not permit national courts of last instance to refrain from making a reference where the case are such that a ruling by the ECJ would be of no consequence beyond that case.

However, all these aspects must be considered in the light of whether modified criteria could be introduced without endangering a uniform interpretation and without amending Article 234(3).

A third method to restrict the input to the ECJ would be to *transfer preliminary rulings to other courts*. I assume that regional Community courts are no longer under discussion. What remains would be to activate Article 225(3) enabling a transfer of certain preliminary rulings to the CFI, or to enable eventual new Community courts as the Patent court to make preliminary rulings in limited fields.

From the point of view of a referring court the following aspects might be borne in mind when considering transfer of preliminary rulings. Firstly, the distribution of competencies ought to be clear. The risk of addressing the wrong court when making a reference should not be borne by the referring court. In addition, the criteria for distribution of competencies should be clear in order not to lose time in finding the competent court. Secondly, neither should any transfer of competencies cause an additional delay for any other reason. Consequently, any system, even limited, of control, by the ECJ, of preliminary rulings by other courts cause concern. Indeed that is the case with the procedure envisaged in Article 225 EC. Then again, one must ask how a coherent interpretation of Community law could be achieved under such circumstances. Thirdly, the prospect of having to make two or more references to different courts in a case, is not an attractive one.

Turning to measures *increasing the output* of the ECJ it may be noted that the *simplified procedure* provided for in Article 104(3) of the Rules of Procedure was used in eleven cases

⁴⁰ Case 283/81 *Srl CILFIT et al. v Ministry of Health* [1982] ECR 3415.

⁴¹ Case C-224/01 *Gerhardt Köbler v Republik Österreich* [2003] ECR I-10239.

⁴² Case C-453/00 *Kühne & Neitz v Productshaap voor Pluimvee en Eiren*, judgment 13.1.2004, not yet published.

⁴³ At point 16.

⁴⁴ It may be noted that in certain jurisdictions the court may vote on these criteria.

in 2003. It does thus not provide a significant reduction of the workload of the ECJ. That might also be the case with *the simplified or green light procedure*. That procedure would obviously reduce the time needed by the ECJ. One would dispense with the opinion of the Advocate-General. Less time might be needed in drafting the judgment of the ECJ. That could not imply a more superficial analyse of the case, nor a Judgement that would not set out sufficiently clearly the facts of the case and the reasons why the ECJ could agree with the answer proposed by the referring court. It would not suffice merely with the questions and the answers proposed by the referring court. Nevertheless, judgments would probably be shorter and thus contain less to translate. Combining that procedure with an obligation for the referring court to propose an answer would be unfortunate. In many jurisdictions it would probably be felt awkward to take a stand, in the form of a reference, on issues to be later decided in the case. Courts of last instance may also be more sensitive in getting answers pointing out that they are entirely wrong.

Reducing the need for translations is contemplated in a number of contexts as a means to increase the output of the ECJ. Transferring preliminary rulings, for instance to the CFI, would in this respect not be of any great help since the same translation services serve both the ECJ and the CFI.

Coming finally to the requirement of *clarity and information* it might be noted that the amendments to the Rules of Procedure presently under discussion in the Council would entitle the ECJ to limit translation and communication of references to the referred questions, with or without a short summary of the reference prepared by the services of the ECJ. The rest of the reference by the national court would be translated only into French.

This proposal may produce two adverse effects. It would make it more difficult both for national courts and those entitled to submit observation in a case to assess what a reference actually concerns. It might also affect the way in which references are formulated. That question, as well as the question whether references are too detailed and contain unnecessary elements, might merit a dialogue between the ECJ and national judges. For instance, might it not be preferable that the referring court structures the reference in such a way that it contains a summary of some 3-5 pages?

As to clarity the massive case law makes it increasingly difficult to find cases that are pertinent. That problem could to some extent be diminished by the ECJ itself by being more outspoken when overruling, in fact, previous case law or otherwise taking a new direction in the interpretation of Community law. In that respect could a transparent method of quoting previous case law also be helpful.

Lastly I raise a minor technical point. To what extent does the ECJ really need the *national courts file* in the case? How often is the file actually studied and could the information sought be found more easily?

The Hon Ms. Justice Mary FINLAY GEOGHEGAN

Judge at the Irish High Court

What do the national judges and parties in the national courts require of the European Courts in order to enforce Community law effectively and where are these needs not being met?

My brief is to comment in ten minutes on the paper given by Judge Sevón. As he did, I propose confining my few words to preliminary rulings and also can only express my personal views.

I admire the clarity of Judge Sevón's answer to the first part of the question and agree that what we need is more speed, greater clarity and more information. I would also add an improved oral procedure.

The contradictory nature of these demands is obvious. My belief is that the greatest difficulty lies with the excessive time currently taken and may even put in jeopardy the preliminary ruling procedure. Any period for preliminary rulings must be viewed as part of national proceedings which may have already been through two or three national courts and on its return a further hearing. It is difficult to envisage that an average period of more than twelve to fifteen months could be considered to be reasonable.

National courts are acutely aware of the case law of ECHR in relation to the Article 6⁴⁵ right to a hearing within a reasonable time and the corresponding duty on the State to organise its legal systems so as to comply with such reasonable time.⁴⁶

The right to a hearing within a reasonable time is also currently provided for in Article 47 of the Charter of Fundamental Rights. Following the entry into force of the Treaty establishing a Constitution for Europe it will be contained in Article II 2-107 and have legal status. The Institutions of the Union, including ECJ and Member States (when implementing Union law) will be obliged to respect the right. At latest at that stage it is envisagable that a national court of final appeal may be faced with conflicting obligations both emanating from Union law: the obligation to respect the right to a hearing (and determination) within a reasonable time and an obligation to make a reference for a preliminary ruling. How will this conflict be resolved? Will it jeopardise preliminary rulings?⁴⁷

The significant reduction in time required to avoid such a conflict is unlikely to be achieved by simply procedural changes and additional resources for the ECJ so long as one court is asked to deal with the present or any increased number of preliminary rulings from 25 Member States.

The arguments for and against courts other than the ECJ deciding preliminary rulings are beyond the scope of these comments. They have been well debated over the past five years.⁴⁸

⁴⁵ European Convention on Human Rights

⁴⁶ See for example *Robins v UK* [1997] 26 EHRR 527, *O'Reilly v Ireland* 54725/00, decision of 29th July 2004 and many more.

⁴⁷ Whilst the ECHR has taken a generous view of the time required for Art. 234 references see for example *Pafitis and Ors v. Greece* (163/1996/782/983) It is unclear whether this will continue in particular when the Constitution comes into force.

⁴⁸ Report by the Working Party on the Future of the European Communities Court System (Jan. 2000) *The Future of the Judicial System of the European Union (Proposals and Reflections)* Rasmussen "Remedying the Crumbling EC Judicial System" CML Rev. 2000.

If preliminary rulings remain with the ECJ alone then inevitably there must also be a reduction in the number of preliminary rulings if the time is to be significantly reduced. The challenge appears to be to find a filter at the level of national courts which will let through references of importance to preserving the consistent and uniform interpretation of Community law and exclude those which primarily relate to a specific factual situation or are unlikely to be of wider relevance than the specific case.

As a national judge of first instance, I would like to retain a right to make a reference. I agree with Judge Sevón that there are cases where it is desirable in the interests of the parties that the reference is made without necessity of national appeals. However I can readily accept that I should no longer have the luxury of sending off to Luxembourg all questions envisaged by Art. 234. Consideration might be given to imposing preconditions on the ability of national courts (other than courts of final appeal) to refer. These might include that the proposed question raises a point of Community law of general or exceptional importance and that it is desirable in the interest of the parties and of the uniform application of Community law that the reference be made. This would of course require Treaty amendment.

Expanding the CILFIT criteria to give the national courts of final appeal greater discretion and thereby further reduce the number of appeals whilst not jeopardising the uniform application of Community Law is more delicate but may be done without Treaty amendment. Judge Sevón has identified some possibilities. Such expansion appears necessary if the potential conflict identified above is to be avoided.

On a practical note it would be helpful if the ECJ on its website indicated the current probable time for a preliminary ruling. For national judges who have discretion this should be an important consideration and might deter references of lesser importance.

The Oral Hearing in Preliminary Rulings

In 1999, Judge Edward stated:

“There is a cultural divide between those who value the oral hearing and those who do not. In terms of usefulness, some oral hearings contribute greatly to the judge’s understanding of the case and serve to clarify the questions to which an answer is required. Some however do not. They amount to little more than a ritual in which the parties (especially, it must be said, governments) readout memoranda repeating, sometimes word for word, what has already been said in their written pleadings and summarised in the report of the hearing.⁴⁹

The oral hearing is the only opportunity for the parties to the national proceedings to deal with the written observations of the Commission, Council and Member States. The ability to do so effectively is often crucial to the outcome of the reference. It should also be the opportunity for the members of the ECJ to clarify with the advocates relevant issues. This opportunity is not often taken. Even for an advocate from an oral tradition, making a submission in a very limited time directed immediately to important issues arising from the observations of the other parties, Institutions and Member States is a difficult form of advocacy. Where there is no real participation from the judges it can be soul destroying. I recall cases where the oral hearing was of great benefit and may even have determined the outcome however I also recall coming away from oral hearings asking whether it warranted the journey to Luxembourg. One cannot predict.

Whilst undoubtedly there are faults on the side of advocates in relation to oral hearings I would respectfully suggest that there is also room for improvement in the ECJ’s preparation for and participation during an oral hearing in a preliminary ruling. A meaningful oral hearing is often important to the clarity of the ruling. It is also important for parties who attend the hearing in order to avoid a sense of alienation from a non national court which is taking an important decision in relation to him/her/it.

⁴⁹ The Preliminary Reference Procedure Constraints and Remedies CCBE/College of Europe Colloquium Bruges, November 1999.

Attorney – Pels Rijcken & Droogleever Fortuijn – The Hague

It looks a little bit like the world upside down: normally the Court tells what it expects Member States and their courts to do; now we may say what we expect the Court to do. The question is very appropriate though, because it is in the interest of all to have a Court of Justice that is able to continue doing the excellent job it has been doing for more than 50 years.

I agree entirely with the analysis made by Judge Sevón in his outstanding paper and many of the comments made by the previous distinguished panellists. The input /output model is particularly helpful to focus the discussion.

Looking at the *input side*, as a lawyer practising before the Dutch courts I see often a certain eagerness among parties to have cases referred. Parties may expect a positive outcome or, less helpfully, they believe to have an interest in delaying the case or, worse, lawyers think an appearance in Luxembourg will boost their prestige. Some national judges too give me the impression to be quite keen on making a reference. In other countries one may see opposite tendencies. I am saying this to illustrate that in practice subjective or tactical reasons may trigger or precisely prevent preliminary references. There is probably very little one can do about that. It seems extremely difficult to develop precise and objective criteria that should guide judges in making the decision to refer or not to refer.

There is clearly no single magic solution to reduce the input. A first way might be to require national courts to set out in their reference order what in their view the answer should be. This is a practice followed already by German courts and, occasionally, in the Netherlands by the Council of State. In his interesting paper Advocate-General Jacobs takes this idea a step further and elaborates a 'green light procedure': a national court proposes itself the answers to the questions it raises and asks the Court a *nihil obstat*. It is definitely an interesting concept. The speakers preceding me however pointed to the risks it involves and the questions it raises. Indeed one may wonder in what form the green light would be given and what would be its status and effect, compared to a "normal" preliminary ruling. I also wonder what happens if the Court does not agree with the proposed answers. Would that mean a 'red light procedure'?

A second way of reducing the input, although modestly, would be to relax the *CILFIT* criteria but the big question is how. They cannot be complied with *à la lettre*. I should add that the *Köbler* ruling may well be an incentive for the courts of last instance to be very cautious. I have already seen a party referring to *Köbler* to pressurize a court of last instance to make a reference. The alternative would be not to change the criteria but accept a reasonable (i.e. flexible) interpretation. A helpful suggestion was made by A.G. Jacobs in *Wiener* (C-338/95), better known as the 'pyjama case'. I honestly think we have reached the stage where one may be confident that courts of last instance are able to give a proper interpretation of Community law and that they have a talent for distinguishing the cases that really do raise new or sensitive questions. Should things go wrong, the Commission with its satellite view may decide to act (cf. the recent letter to the Swedish government).

Turning now to the *output*, everyone on the demand side obviously wishes speed, clarity and, preferably, a favourable judgment. The duration of the preliminary procedure is a common concern. One should not exaggerate the problem though. For the majority of cases it does not make a great deal of difference whether a procedure takes 6 months or 3 years. If money is involved, interests will accrue. This is wholly different for cases involving people (family law, criminal law and asylum law), as was rightly stressed by James Flynn and by Ms Finlay.

⁵⁰ Attorney, The Hague (bj.drijber@prdf.nl). Formerly member of the Legal Service of the Commission (1988-1998) and legal advisor to the Netherlands Permanent Representation to the EU (1998-2002).

Any measure capable of reducing the duration of the preliminary procedure would nevertheless be very welcome. The question is where to cut or what to cut. In my view, each judgment shall be published. There has been a short period, at the beginning of the 90ties, where only a summary publication was made of certain judgments. A full text was not available in any single language. A notorious example is the *Sandoz* case, which 14 years later is still relevant in competition law. One could certainly live with the limited exceptions to the rule to publish all judgments that were announced this morning by President Skouris.

If the huge translation burden is to be reduced, one could think of limiting the number of languages in which the opinion of the Advocate-General will be published to the most commonly understood languages (plural !) and the language of the procedure. Perhaps the Court should also decide not to translate reference orders into 20 languages. I am much more hesitant about the proposal to translate into all languages the questions only. This measure of course respects the equality of languages, but for a proper understanding of the questions the factual setting of a case is absolutely crucial. Language questions are, we all know, extremely sensitive. *Ceterum censeo*: French should remain the drafting and (first) working language in the Court.

Clarity is of utmost importance. But as consumers of the Court's learned output we also have to be reasonable and realistic. In controversial cases, it may simply happen that the statement of reasons is a little succinct (e.g. C-450/93, *Kalanke*). In sensitive cases, there may be a natural tendency to send the ball back to the national court. If I am allowed to make a suggestion than it would be that in free movement cases the Court may perhaps try to make more clearly a choice between deciding cases on their merits and leaving that for the national court to do. Sometimes the Court avoids the issue, sometimes it decides the preliminary question on the merits by adding factual elements not included in the reference order but raised by intervening parties such as the Commission, and sometimes it says that it is for the national judge to decide while giving rather compelling guidance on what the outcome should be. Clearly, much depends on the facts of the case, the state of the file and, who knows, the *juge rapporteur*. I still believe that a slightly more predictable attitude could perhaps also help national judges in deciding whether or not to refer and would therefore also have a beneficial effect on the input side

**ADDRESS BY THE PRESIDENT OF THE COURT OF FIRST INSTANCE
Bo VESTERDORF**

Dear colleagues, ladies and gentlemen!

After the interesting interventions this morning, I think I should tell you about a dream I had last night. I dreamt that, on a beautiful morning, I was standing on the plateau de Kirchberg 20 years from now. I was looking at a magnificent and impressive building. It was the house of the Court of Justice of the European Union.

Inside the building 29 judges and a small number of advocates general were working quietly and efficiently with their cases. When asking them why they seemed so content, the uniform answer was that "we only have to decide very important cases and only a fairly limited number every year".

The Court in fact only had to deal with cases of a type appropriate for a supreme and constitutional court. They only had to deal with a limited number of cases of a constitutional character dealing with the relationship between Member States and the Institutions of the Union and between Institutions of the Union, questions dealing with the distribution of powers between Institutions and Member States and between Institutions. Furthermore, these judges had from time to time to decide on cases brought exceptionally on appeal to the court. Their other task was to decide a number of references for preliminary rulings from national courts but only as far as these did not concern some specific areas of Community activity, these areas having been outsourced, transferred to a lower court.

Having taken in the sight of this magnificent building and having learnt about their activities, I turned my eyes to some other, slightly less magnificent building below the first one. It appeared that this slightly less magnificent building housed 4 courts of first instance: one staff court, one court for IP-rights, one competition court, and finally a general court of first instance dealing with all other direct cases in the first instance.

Another building housed the General Court of the European Union which was largely a court of appeal but also had competence to decide, in the first instance, infringement cases. This was a court which had started out 35 years earlier as a small court of first instance responsible for treating staff cases, competition cases and a few other direct cases for damages.

In my dream I was struck by the similarity of this judicial structure compared to what we find in a large number if not almost all of the Member States of the European Union. A structure in which there are two levels of what we might call ordinary courts below the very highest court. These ordinary courts deal with all ordinary cases leaving to the highest court constitutional issues and other cases of major importance for the coherence and unity of the law, the national rules allowing the highest court to be seized in various ways.

I then woke up to reality on a very foggy morning in Luxembourg.

What is then the reality, the present situation.

In this respect I can largely refer to what president Skouris said this morning.

I think it can be described this way:

We have two courts, the ECJ and the CFI, which are faced with a very heavy workload; a workload which is constantly increasing and which will most certainly increase even more once the courts of the new Member States start referring cases to the ECJ and once the citizens and companies of those countries start introducing direct cases to the CFI. We know from experience that this will take some time, probably between two and four years, before it becomes significant, but it will come. On top of that there will be another increase which will be due to increased legislative and other regulatory activity of the Union, not least in the new areas of activity such as immigration, asylum, cooperation in the fields of police and home affairs, judicial cooperation in civil matters and so on.

The major problem for both courts is the average time it takes to deal with the cases. This is particularly a problem for the preliminary rulings cases but it is obviously also a problem for the parties who appear before my own court.

Another and perhaps even more important, but closely related, problem is the problem of how much time the judges have individually and in the chambers to discuss and reflect upon the problems the cases present and the solutions which should be given to those problems. For a court like the ECJ which has the extremely important task of being the court finally responsible for assuring the unity and coherence in the interpretation, and to the degree possible, in the application of Community law it would be particularly regrettable if judges do not have sufficient time to reflect and consider all the various aspects and consequences of the important cases. I do not know whether the judges of the ECJ feel that way, but I can assure you that if I were a judge on that court, I would feel that this would be a problem, simply because I would have to sit in court hearings several times a week, be responsible for a large number of cases in which I would have to deliver the various reports and draft judgments within very short time limits, even in very important cases, and, on top of that, I would have to study very closely what my fellow judges produce and follow what happens in the other chambers. I would be very hard pressed for sufficient time for careful reflection in all cases.

It is in this respect telling that the ECJ now deals with in average 75% of all cases in chambers of three or five judges whereas some ten to fifteen years ago it was the other way round. This is simply because otherwise the average time it takes to deal with the cases would be much longer. This is neither a desirable nor a tenable situation in the long run.

In my own court we feel the same kind of pressure. The number of cases each judge must deal with at the same time is steadily increasing. The number of cases is constantly increasing – this year it will be up by another 20% or so reaching more than 500 new cases – and, at the same time, the cases tend to become heavier and more complex.

This situation must be dealt with. Luckily the Treaty of Nice gives us a number of tools in that regard and it is now up to us to make use of those tools. The President of the ECJ and advocate general Francis Jacobs have already mentioned a number of measures which the ECJ has adopted and others which are being considered. I feel fairly confident that these measures will bring about some, and perhaps even a considerable, reduction of the average time it takes to decide preliminary rulings cases.

Fortunately the Nice Treaty has also given the Council competence to establish lower courts of first instance to deal with special areas of law. On proposal from the Commission, after having heard the ECJ, the Council, as late as last week, formally adopted the proposal to establish a new staff court.

This is definitely a step in the right direction. It will represent a very much desired alleviation of the case load of my own court. This year we shall in all probability receive around 160 staff cases which is around 25 % more than last year. If the staff court had been there this year, the CFI would only have received some 40 to 50 appeal cases instead of 160 cases. The CFI would then instead of being short for Court of First Instance stand for Court of Final Instance. It means consequently also that the ECJ will be spared these 40 to 50 appeal cases, cases which are manifestly not cases which should be decided by the highest court but should be left for ordinary lower courts. The ECJ would only very exceptionally have to decide in such cases if the first advocate general within one month after the CFI's judgment finds that the judgment gives rise to a serious risk for the unity and coherence of Community law.

Another step in the right direction would be taken with the creation of a Trade Marks Court, an idea – I am informed – which is being seriously considered by the relevant services of the Commission. Trade mark cases last year represented 23% of all cases before the CFI, a

percentage which seems to be the same this year but with an increase from 100 cases to some 120 to 125 such cases in 2004.

With the creation of such a court the CFI would only have to decide on appeals which would amount to some 30 to 35 cases a year, and the ECJ would be spared that number of appeals and only be seized of such cases exceptionally in the same way as mentioned regarding the staff cases. Together with no appeals in staff cases to the ECJ the total reduction of appeal cases for the ECJ would be some 70 to 85 cases less a year. That would represent a not insignificant reduction of the case load. I am, as you may have deduced, strongly in favour of such a development which would be very important for the CFI in terms of fewer cases and the same for the ECJ.

In this context I think it should be mentioned that such a new court should deal not only with trade marks cases but also cases regarding models and design. Furthermore I think it would be logical that such a court, at a later stage, when the Commission proposals regarding the Community Patent are finally adopted by the Council, also becomes competent to deal with patent cases, thereby transforming into the IP-Court of the Union.

You will remember from my dream that there was also a Competition court of first instance. Some of you will be aware that I am personally in favour of the establishment of such a court. That is not because I prefer not to treat competition cases, on the contrary. It is because it is a fact that every important competition decision taken by the Commission, and in particular all cartel decisions taken so far, are being brought before the CFI, and because every single judgment by the CFI in cartel cases and most of the other competition judgments by the CFI go on appeal to the ECJ. Probably for two reasons, the magnitude of economic interests involved and a desire, on the part of companies, to try everything to obtain a reduction of the often extremely heavy fines imposed.

Even though the ECJ only has to decide on questions of law, it is a fact that points of fact can and are often being disguised as points of law and, in any event, a clear line between fact and law is not always easy to draw. These appeal cases are no doubt very burdensome for the ECJ and do not, at least anymore, normally raise questions of principle; the case-law is in fact, in most areas, well established.

Add to that the effects of the decentralisation of the policing of Community competition law, which is the purpose of Regulation 1/2003. This will undoubtedly within a fairly short time have two specific and perhaps important effects for the ECJ and the CFI. There will come more, probably many more references for preliminary rulings addressed to the ECJ from national courts regarding in particular the interpretation of article 81 (3) and, since the decentralization, as intended by the Commission, will allow the Commission to concentrate of the larger cases of violation of article 81, more cartels cases will be brought before the CFI with inevitable later appeals to the ECJ.

I therefore think that the time is ripe for considering seriously the establishment of a new court of first instance responsible for competition law, i.e. cases regarding articles 81 and 82 as well as the merger regulation. Since these questions are difficult and important, sufficient time should be taken to examine them. The creation of such a new court is, however, not the first priority; that should be the creation of a trade marks court. Let me stress again that I am personally, as you will have noticed, in favour of the creation of a competition court. That is, however, not the position of all of my colleagues and it is not a formal position of my court, it is my personal view shared by some of my colleagues.

As regards the references for preliminary rulings for which the Nice Treaty allows a transfer of competence to the CFI for certain specific areas of law, I should like to make three points:

- First, a transfer – even a limited one – to the CFI should not take place until it is certain that the CFI would be able to deal with such cases within shorter time limits than the

- ECJ; otherwise we are just transferring a problem from one court to another without solving it.
- Second, if the ECJ, as a result of the ongoing efforts, manages to reduce considerably the average time for the preliminary cases there will be no specific or immediate reason to transfer competence to the CFI;
 - Third, when the CFI becomes an appeal court, i.e. when the trade marks court has been established, it would seem logical and reasonable to transfer competence to decide art. 234-cases regarding that area of law to the CFI. If a competition court of first instance, at some later stage, is established and the CFI becomes the appeal court for these cases, it would follow logically that references for preliminary rulings for these cases too should be decided by the CFI.

You will remember that in my dream I also noticed the existence of a general court of first instance responsible for direct cases in all areas of law not allocated to specialised courts. This is, of course, not something of immediate interest or necessity. I do, however, believe that it is not at all excluded that such a court will see the light of day within the timeframe of which I am speaking; that is within twenty years. Time will show. It would seem a natural and indeed, at least in the long run, a necessary development to create a normal judicial hierarchy at Union level in a Union now comprising more than 450 million people, a number that within twenty years most likely will be more than 500 million.

Let me now turn briefly to the subject of the discussions of this afternoon.

I think that my remarks concerning the modification of the judicial structure in the short term, in particular by the creation of the Staff Court and hopefully very soon thereafter of a Trade Marks Court, combined with the important increase in the number of judges at the CFI as a consequence of enlargement, will make it possible to reduce the average length of proceedings hopefully in a not insignificant way. I think that we can be confident in that respect. It should, nevertheless, not be forgotten that the number of new cases continues to go up every year and that the new Member States will soon start to generate a further increase. Secondly, a larger number of cartel cases will tend to increase the average time to deal with cases. Nevertheless, I think we shall see a reduction in the average time over the next couple of years.

In order to further speed up proceedings we have adopted other measures, some to alleviate the work load for our translation services, such as an attempt to reduce the length of our judgments and selective publication of judgments. Another important, if not yet completely successful, measure is the Practice Instructions, inviting lawyers to accept limiting their written pleadings and to present the annexes in a useful manner. Let me profit from this occasion to underline how important it is for us that you, the lawyers, respect these instructions. A good, precise, short and well structured brief gives you a better chance of winning your case and of getting a judgment more speedily.

As to the coordination of the work of the chambers and formations of the five chambers, we have, since last year, introduced monthly meetings of the presidents of chambers precisely in order to allow for coordination. My own cabinet regularly distributes notes of information to all the judge rapporteurs with a short analysis of new important judgments of either chambers of the CFI, the ECJ, the EFTA Court, or the Court of Human Rights. In other words, we are aware of the increased need for coordination since we do decide the vast majority of our cases in three-judge chambers, five-judge chambers being the exception. It remains to be seen how often the grand chamber will be used, most probably rarely, at least until the CFI becomes an appeal court.

Finally, am I optimistic about the future? Yes, I am. We only have to make full use of the opportunities, the tools which the Treaty of Nice has given us.

Thank you very much for your attention.

Topic 3

**“What do the parties to direct actions require of the Community Courts,
and where are these needs not being met?”**

Anthony ARNULL

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I shall concentrate on natural and legal persons ('individuals') bringing direct actions other than intellectual property and staff cases, though some of what I say will have wider relevance.

Individuals bringing direct actions are entitled to expect the Community Courts to comply with Article 47 of the Union's Charter of Fundamental Rights, which lays down a right to an effective remedy and to a fair trial. I would like to deal with those rights in reverse order, beginning with the right to a fair trial.

The right to a fair trial

The first sentence of the second paragraph of Article 47 provides: 'Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.' To what extent does the Court of First Instance (CFI), where direct actions brought by individuals commence, satisfy the requirements of that sentence?

It is the reference in Article 47 to 'a reasonable time' that is particularly problematic. The latest judicial statistics show that, in 2003, direct actions took an average of 21.5 months to conclude, an increase over 2001 and 2002.⁵¹

Is an average of 21.5 months excessive? It is hard to generalise, because the reasonableness of the length of proceedings can only be assessed in the light of the circumstances of particular cases. However, there are three reasons for thinking it a cause for concern.

1. If a case is taken on appeal to the European Court of Justice (ECJ), it would in 2003 have taken on average an additional 28.7 months to resolve.⁵² A total of 50.2 months – well over four years – looks unacceptable on any view, even though the number of appeals remains relatively low (67 out of 254 – 26.38 per cent, just below average - in 2003).
2. The ECJ (not immune from criticism itself) has already had occasion to criticise the CFI for the excessive duration of the proceedings in a case (decided at a time when the CFI did not publish statistics on the average length of its proceedings).⁵³
3. The Due Report suggested in January 2000 that the objective for preliminary rulings should be to return to the situation in 1983, when references were on average dealt

⁵¹ Because that figure is an average, some cases will have taken longer than 21.5 months. The statistics have not included a breakdown of the average figure since 2001, but in that year 57 direct actions (out of 161) took more than 24 months. Since the average, as well as the number of cases pending and brought, is higher now than it was then, the situation is unlikely to have improved.

⁵² Under the case law of the European Court of Human Rights on the corresponding provision of the ECHR (Art 6(1)), the relevant period is taken as lasting until the final determination of the case and therefore includes any appeal proceedings: see Ovey and White, *Jacobs and White's European Convention on Human Rights* (3rd ed, 2002) 167.

⁵³ See Case C-185/95 P *Baustahlgewebe v Commission* [1998] ECR I-8417. A period of about five and a half years elapsed between the date on which the application was lodged and the date on which the CFI gave judgment. The force of the Court's criticism was somewhat blunted by the facts that the Advocate General's Opinion was not given until over two and a half years after the appeal was brought and there was then a further delay of over 10 months before the Court gave judgment, a total of more than 42 months.

with in 12 months. In that year, direct actions were on average dealt with in 14 months.⁵⁴

Is there any prospect of an improvement of the time taken by the CFI to deal with direct actions?

Factors likely to have a neutral or positive effect

1. Enlargement has brought with it an increase in the number of Judges to 25. The new Judges will face a settling-in period before they reach cruising speed, but there will inevitably be some delay before the new Member States start to generate cases in significant numbers, so in the short term at least productivity might start to improve. It has been pointed out⁵⁵ that the increase in the number of Judges is proportionally greater than the increase in the Union's population, so a longer lasting gain in productivity might also be envisaged. In addition, the Treaty now provides for the appointment of more Judges in the CFI than there are Member States.⁵⁶
2. On 7 October 2004, the Council reached agreement on the establishment of a Civil Service Tribunal (CST).⁵⁷ The CST will be a judicial panel within the meaning of Article 225a EC and will exercise jurisdiction at first instance in staff cases in place of the CFI.

In 2003, staff cases represented 26.61 per cent (124 out of 466) of the new cases brought, the second largest category, so the establishment of the CST will make a significant dent in the CFI's case load. True, there will be a right of appeal to the CFI, but only on points of law. Moreover, if the CST is successful in promoting the amicable settlement of disputes,⁵⁸ appeals on points of law may turn out to be relatively rare.

3. In the context of the proposed regulation on the Community patent, the Commission has also proposed⁵⁹ the establishment, by 2010 at the latest, of a judicial panel to be called the Community Patent Court (CPC), the case load of which could be substantial. Appeal from the CPC would lie, on questions of law and of fact, to the CFI.

However, the Commission's proposal envisages the appointment of three additional Judges, assisted by technical experts ('Assistant Rapporteurs'), to form a specialised patent appeal chamber. Depending on the case load, the new chamber might also take responsibility for cases on the Community trade mark. The effect of the CPC on the work load of the CFI might therefore be neutral, perhaps even positive.

Factors likely to have a negative effect

1. The vast majority of the cases decided by the CFI are dealt with by chambers.⁶⁰ The greater number of permutations in the membership of the chambers since enlargement may exacerbate the difficulty of coordinating the CFI's case law. This may in turn require the intervention of the Grand Chamber, or even the plenary, more often than would previously have been necessary, with adverse consequences for productivity.

⁵⁴ See T Millett, *The Court of First Instance of the European Communities* (1990) 2.

⁵⁵ See FG Jacobs, 'Recent and ongoing measures to improve the efficiency of the European Court of Justice' (2004) 29 ELRev (December).

⁵⁶ See Art 224 EC: 'The Court of First Instance shall comprise at least one Judge per Member State.'

⁵⁷ See 2003/0280 (CNS).

⁵⁸ See Statute of the Court of Justice, Annex I, Art 7(4) (annexed to the Council's decision establishing the CST).

⁵⁹ See COM(2003) 828 final. See also the proposal for a Council decision conferring jurisdiction on the Court of Justice in disputes relating to the Community patent, COM(2003) 827 final.

⁶⁰ 93.21% in 2003, 81.71% by chambers of three Judges, 11.50% by chambers of five Judges.

2. The CFI now has to cope with the direct actions brought by Member States over which it has had jurisdiction since 1 June 2004.⁶¹ The aim of this innovation, which originated in a request from the ECJ, was explicitly 'to achieve the transfer of a significant number of cases' to the CFI.⁶² (It can be expected to have a beneficial effect on the time taken by the ECJ to decide appeals from the CFI.)⁶³

There seems no immediate prospect that the Council will be asked to amend the Statute to confer on the CFI a preliminary rulings jurisdiction because of the difficulty of identifying suitably discrete categories of case.

3. The growth in the number of official languages.⁶⁴

On balance, there is some prospect of an improvement in the average amount of time taken by the CFI to deal with direct actions as a result of the increase in the number of Judges and the establishment of the CST, notwithstanding its new jurisdiction over some actions brought by Member States and the language problem.

The right to an effective remedy

I turn now to the right to an effective remedy, enshrined in the first paragraph of Article 47 of the Charter. Here there are perhaps fewer grounds for optimism. I shall concentrate on actions for annulment, since they are very much more numerous than other forms of direct action brought in the CFI.⁶⁵

The present position

A major obstacle to securing an effective remedy for individuals in annulment proceedings remains the standing rules of Article 230 EC. The restrictive nature of those rules was underlined by the ECJ's decisions in *Unión de Pequeños Agricultores v. Council*⁶⁶ and *Jégo-Quéré v. Commission*.⁶⁷ There the ECJ emphasised the role of the national courts in providing effective judicial protection of the rights of individuals under Community law.⁶⁸ However, it seemed impossible for the contested acts to be challenged indirectly in the national courts because they did not require implementation. None the less, the Court refused to allow the applicants standing under Article 230.

This is not the place for a detailed analysis of the judgments in those cases. It is worth emphasising, however, that in its judgment at first instance in *Jégo-Quéré*,⁶⁹ the CFI referred to Article 47 of the Charter⁷⁰ in arguing that it was necessary to consider whether a finding of inadmissibility 'would deprive the applicant of the right to an effective remedy.'⁷¹ It came to the 'inevitable conclusion' that the other remedies for which the Treaty provided could 'no longer be regarded, in the light of Articles 6 and 13 of the ECHR and of Article 47 of the Charter of Fundamental rights, as guaranteeing persons the right to an effective remedy...'⁷²

⁶¹ See Dec 2004/407 of 26 April 2004 amending Arts 51 and 54 of the Protocol on the Statute of the Court of Justice, OJ 2004 L 132/5.

⁶² See 2003/0805 (CNS), p 2.

⁶³ The ECJ's new power to dispense in simple cases with an Opinion from the Advocate General (Statute, Art 20) should also help. Omitting the hearing (ECJ Rules of Procedure, Art 44b) and the use of reasoned orders where an appeal is, 'in whole or in part, clearly inadmissible or clearly unfounded' (ECJ Rules of Procedure, Art 119) are devices that need to be used with caution because of their potentially adverse effect on the right to a fair hearing.

⁶⁴ See Art 35(1), CFI Rules of Procedure: 'The language of a case shall be Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovak, Slovene, Spanish or Swedish.'

⁶⁵ Annulment actions represented 37.34 per cent of the new cases brought in 2003 (174 out of 466) as against 5.15 per cent (24) for damages actions and 2.79 per cent (13) for actions for failure to act.

⁶⁶ Case C-50/00 P [2002] 3 CMLR 1 (hereafter *UPA*).

⁶⁷ Case C-263/02, judgment of 1 April 2004.

⁶⁸ Cf Art I-29(1), second subparagraph: 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.'

⁶⁹ Case T-177/01 [2002] ECR II-2365.

⁷⁰ See also Case T-54/99 *max.mobil v Commission* [2002] ECR II-313, para 57.

⁷¹ Para 43.

⁷² Para 47.

When it considered the Commission's appeal against the CFI's judgment, the ECJ did not dissent from AG Jacobs' view that the case law showed 'that the traditional interpretation of individual concern, because it is understood to flow from the Treaty itself, must be applied regardless of its consequences for the right to an effective judicial remedy.'⁷³

The effect of the Constitutional Treaty

In *UPA*, the ECJ said that reform of the system currently in force would require an amendment to the Treaty. Article III-365(4) of the Constitutional Treaty accordingly provides:

'Any natural or legal person may...institute proceedings against an act addressed to that person or which is of direct and individual concern to him or her, *and against a regulatory act which is of direct concern to him or her and does not entail implementing measures*' (emphasis added).

Thus, in order to challenge regulatory acts which are not addressed to them, individuals would only have to show that they were directly concerned by the act and that it did not require implementation. Part I of the Constitutional Treaty contains an elaborate hierarchy of acts, but oddly the crucial term 'regulatory act' is nowhere defined. The *travaux préparatoires* indicate, however, that it means any act other than a legislative act.⁷⁴ Legislative acts may only be adopted by the European Parliament and the Council acting jointly under the so-called ordinary legislative procedure or by either institution 'with the participation of' the other under special legislative procedures.⁷⁵

Article III-365(4) will cause a sea change in the approach of the Union Courts. The absence hitherto of a hierarchy of norms has prevented the Courts from treating the legislative or regulatory character of an act as relevant to the question of standing under Article 230 EC.⁷⁶ The effect on the workload of the Courts will be potentially severe, as '[t]he vast majority of EC law-making takes the form of executive [i.e. regulatory] as opposed to (normative) legislative measures.'⁷⁷

Particularly affected will be the Commission, whose acts will always be regulatory under the Constitutional Treaty, so it will no longer be necessary for an individual to show individual concern in order to challenge them. This will be especially significant in actions for the annulment of European regulations⁷⁸ adopted by the Commission in the form of what we now call regulations.⁷⁹

⁷³ Para 46 of the Opinion. The ECJ declared that, 'even if it could be shown' (para 33) that the applicable national procedural rules did not offer the individual applicant an alternative remedy, he should not be permitted to challenge a measure of general application if he did not satisfy the standard test of individual concern. The Court's conclusion was unyielding: 'an action for annulment before the Community Court should not on any view be available, even where it is apparent that the national procedural rules do not allow the individual to contest the validity of the Community measure unless he has first contravened it' (para 34).

⁷⁴ See the final report of the Discussion Circle on the Court of Justice, CONV 636/03, para 22: 'A majority of those members who wanted the fourth paragraph of Article 230 to be amended would prefer the option mentioning "an act of general application". However, some members felt that it would be more appropriate to choose the words "a regulatory act", enabling a distinction to be established between legislative acts and regulatory acts, adopting, as the President of the Court had suggested, a restrictive approach to proceedings by private individuals against legislative acts (where the condition "of direct and individual concern" still applies) and a more open approach as regards proceedings against regulatory acts.' The term 'non-legislative act' could not be used in Art III-365(4) because that is just one of the categories of act identified in the hierarchy which are not legislative: see Arts I-34 to I-37. The term 'regulatory' is also employed in Art III-315(6), but in relation to national provisions.

⁷⁵ Art I-34.

⁷⁶ See A Ward, 'Locus standi under Article 230(4) of the EC Treaty: crafting a coherent test for a "wobbly polity"' (2003) 22 YEL 45.

⁷⁷ Ibid, 56.

⁷⁸ The fourth subparagraph of Art I-33(1) provides: 'A European regulation shall be a non-legislative act of general application for the implementation of legislative acts and of certain provisions of the Constitution. It may either be binding in its entirety and directly applicable in all Member States, or be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.'

⁷⁹ See e.g. Joined Cases 789 and 790/79 *Calpak v Commission* [1980] ECR 1949; *Jégo-Quéré*, above; Case C-142/00 P *Commission v Nederlandse Antillen* [2004] 2 CMLR 41; Case C-258/02 P *Bactria v Commission* [2004] 2 CMLR 42.

Legislative acts would not be open to challenge by natural and legal persons unless, as now, they could establish direct and individual concern.

The difficulty confronting an individual wishing to challenge such an act which is of direct concern to him without the need for implementation is likely to lead to continuing pressure for relaxation of the test for individual concern, particularly where fundamental rights are alleged to have been violated.

It may also make it difficult for a clear distinction to be maintained between legislative and regulatory acts. Compare *UPA* with *Jégo-Quéré*.

- The regulation concerned in the latter case, which was adopted by the Commission to conserve fish stocks, would have been a regulatory act had the Constitutional Treaty been in force.
- However, the Council regulation in issue in *UPA*, which reformed the common organization of the olive oil market, would probably have been legislative, with the result that the less stringent test applicable to regulatory acts would not have applied to it.

It is doubtful whether such a fine distinction should produce such a radical effect on the availability of judicial remedies.⁸⁰

The reference to direct concern without the need for implementing measures is also unsatisfactory, because it is not clear what the reference to implementing measures adds to direct concern.

The Court said in *Les Verts v. Parliament*⁸¹ that a measure would be of direct concern to an applicant where it constitutes 'a complete set of rules which are sufficient in themselves and which require no implementing provisions'. However, the case law also establishes that a measure which requires implementation may still be of direct concern to an applicant if:

- the implementing authority has no discretion,⁸² or
- it is substantially certain how the authority would exercise any discretion conferred on it.⁸³

According to the final report of the Discussion Circle on the Court:

'The addition of the words "without entailing implementing measures" aims to ensure that the extension of a private individual's right to institute proceedings would apply only to those (problematical) cases where the individual concerned must first infringe the law before he can have access to a court. This wording enables private individuals to contest before the Court (CFI) an act containing, for example, a prohibition, but no implementing measure, as the individual concerned can apply for its annulment if he can demonstrate that he is directly concerned by the regulatory act in question.'⁸⁴

This implies that the special test laid down in the Constitutional Treaty for regulatory acts is intended to apply only where no alternative remedy is available to applicants in the national courts. Such a remedy would exist where implementing provisions had to be adopted by a Member State, regardless of any discretion it might have in the matter. In order to challenge European regulations adopted in the style of what we now call directives,⁸⁵ it would therefore remain necessary for an individual to establish direct and individual concern.

If the Constitutional Treaty enters into force, it therefore seems unlikely to put an end to arguments over standing. There will be several new elements in the equation:

⁸⁰ See J Usher, 'Direct and individual concern – an effective remedy or a conventional solution?' (2003) 28 ELRev 575, 599. Cf Ward, above.

⁸¹ Case 294/83 [1986] ECR 1339, para 31.

⁸² See e.g. Case 113/77 *NTN Toyo Bearing Company v. Council* [1979] ECR 1185.

⁸³ See e.g. Case 11/82 *Piraiki-Patraiki v. Commission* [1985] ECR 207.

⁸⁴ See CONV 636/03, para 21. *Jégo-Quéré* was a 'problematical case' of the type alluded to by the Discussion Circle.

⁸⁵ See the fourth subparagraph of Art I-33(1), quoted above.

- Encouraging restraint in the case of legislative acts will be the enhanced democratic legitimacy which the Constitutional Treaty seeks to confer on them.⁸⁶
- Encouraging activism will be the need to police the constitutionally reinforced principles of conferral and subsidiarity.⁸⁷
- Also encouraging activism will be the incorporated Charter.

Will the ECJ's approach be affected by the enhanced status of Article 47 (renumbered II-107)? The authors of the Constitutional Treaty have tried to ensure that the answer to that question is 'no'.

An updated version of the 'explanations' intended to provide guidance on the interpretation of the Charter⁸⁸ says of Article II-107 (ex 47) that it is not:

'intended to change the system of judicial review laid down by the Treaties, and particularly the rules relating to admissibility for direct actions before the Court of Justice of the European Union. The European Convention has considered the Union's system of judicial review including the rules on admissibility, and confirmed them while amending them as to certain aspects, as reflected...in particular in Article III-365(4).'

According to Article II-112(7), the explanations 'shall be given due regard by the courts of the Union and of the Member States.' However, the explanations themselves acknowledge that they do not 'as such have the status of law,' so there must be some doubt about the weight likely to be accorded by the Union Courts to the statement quoted above. Indeed, in its report on the draft Constitutional Treaty, the House of Lords EU Committee questioned the extent to which the explanations would 'withstand the development of case law by the ECJ.'⁸⁹ If the Committee proves correct, the ability of the Union Courts to contribute through effective judicial review to the Union's accountability and legitimacy would be immeasurably enhanced.

⁸⁶ See Art I-46(2).

⁸⁷ See Art I-11.

⁸⁸ See Declaration no 12 concerning the explanations relating to the Charter of Fundamental Rights.

⁸⁹ See 'The Future of Europe – The Convention's Draft Constitutional Treaty' (Session 2002-03, 41st Report, HL Paper 169), para. 257.

Georg BERRISCH

Member of the CCBE Permanent Delegation to the ECJ and CFI

I shall first make a few comments on the importance of the oral hearing and the reasoning of the judgments. The rest of my remarks will focus on three issues concerning the length of the proceedings and access to justice:

- interim relief in direct actions before the CFI;
- interim relief in cases challenging the validity of a Community act through the Article 234 reference procedure;
- the strict rules on conducting cases and whether there could be ways to organize the procedure differently and more efficiently.

I. The importance of the oral hearing and the reasoning of judgments

Applicants in direct actions (as well as the parties in reference cases) do not expect that they can predict the outcome of their case and accept that litigation before the European Courts, and indeed any court, involves an element of uncertainty. Also, no applicant expects to win every case. However, two things are important to any applicant. First, when he leaves the court room, he wants to feel that the Court gave him the opportunity to properly set out his case and address the arguments of the other side, listened to his arguments, and was genuinely interested in the case. Second, when he receives a judgment that tells him he lost, he expects that judgment to explain the reasons why he lost and to address his arguments.

I think that by and large, these expectations are met as far as proceedings before the CFI are concerned. But, I also believe that there is room for improvement with respect to proceedings before the ECJ.

- Other speakers already alluded to the fact that there is basically no exchange between the parties and the bench at the hearing. It is indeed frustrating for lawyers to plead before silent judges, and it is very difficult for a party to understand why, after often very controversial pleadings, there are no questions by the judges. I also believe that that has nothing to do with the ECJ being a constitutional court because examples in the Member States and in third countries show that hearings before constitutional courts can be conducted as a dialogue or debate between the bench and the lawyers.
- The rather cryptic style of the reasoning is also well known. There is of course nothing wrong with irrelevant arguments being dismissed without detailed reasoning. But the arguments concerning the central issues of a case should be properly addressed. Particularly worrying is, in my view, the often very brief reasoning with respect to the application of general Community law principles such

as the principles of non-discrimination and proportionality, notably if the Court finds that the principles are not violated although the Advocate General had presented a detailed reasoning that they were violated.

In my view, that is not only an issue of access to justice but also an issue of perception of the Court by the EU citizens and, indeed, perception of the EU in general. And I would add that the fact that there are no appeals against ECJ judgments does not relieve the court from providing a proper explanation in its judgments. To the contrary, it should result in the Court to be particularly vigilant with respect to its reasoning.

II. Interim relief in direct actions

Currently, a three-prong test applies:

- *prima facie* case;
- urgency; and
- balance of interest.

Clearly, the prong most difficult to meet for any applicant is urgency because it requires the applicant to show that the immediate enforcement of the measure causes grave and irreparable harm to him. There are several reasons why this prong is so difficult to meet. The most important is that financial harm is not considered irreparable because any financial damage could be made good in a subsequent damage action.

The three-prong test was developed at a time when direct actions took significantly less time than today. In my view, one can apply a very strict test on interim relief if the final judgment can be expected in a rather short time. But when it takes 3-4 years to obtain a final judgment (not taking into account the possibility of an appeal), denial of interim relief can amount to denial of justice. Indeed, potential applicants are discouraged when you explain to them how long it takes to get a judgment, but they are devastated if you add how difficult it is to get interim relief.

As regards possible modifications to the test, I would suggest the following:

- First, I believe the test should be construed as a sliding scale test. In other words: the findings with respect to one prong should influence the standard required under the other prongs. To a certain extent, this has already happened as there are orders which suggest that if the applicant has a particularly strong *prima facie* case, it is possible to be less strict with respect to urgency. I believe that one should go further in this respect.
- Second, I would suggest to shift the emphasis from the urgency prong to the other two prongs: *prima facie* case and balance of interest. I recognize that this means

that the judge deciding on interim measures would have to deal with the merits of the case in more detail as he does now, and that this could conflict with the idea that he should not pre-empt the decision of the judge dealing with the main action. But I don't see that as such a problem and I believe that, considering the time it will take to obtain a judgment on the merits, this is justified. I also recognize that in some cases this can have the effect of making it more difficult to obtain interim relief, but I believe that an applicant is more likely to accept that he does not get interim relief because his arguments on the merits are weak (i.e., he is told that he is likely to lose on the merits), than if he is told that the harm he suffers is not serious enough.

- Finally, I would suggest to lessen the test for urgency. In particular, one should also recognize that damage of a mere financial nature can be sufficient to give rise to urgency. I don't need to explain to this audience that there are many cases where an applicant can obtain the annulment of a Community act but he will not be able to obtain damages pursuant to Article 288 EC because the mistake, which the institutions committed, was not sufficiently serious or because the institutions violated a norm that did not protect the applicant's interest. In such a case, the financial damage will be irreparable, despite the existence of the damages action. In *Euroalliges*, the President of the CFI recognized this. On appeal, however, the president of the ECJ held that the judge deciding on interim measures could not decide on whether a damage action would be available, and thus maintained that financial damages are never irreversible. I think this ignores the problem. Nobody would expect the judge deciding on interim measures to pre-empt a decision on whether damages are available -- but what should be recognized is that there are many cases where financial damages are irreversible.
- I should add that the balance of interest test provides sufficient opportunity for the judge deciding on interim measures to prevent any undesired results. But as with the *prima facie* prong, I believe that an applicant is more likely to accept that he does not obtain interim relief if the court explains that the interests of others prevail over his interests than if he is told that his financial damage is not serious and always recoverable.

III. Interim measures in Article 234 reference cases challenging the validity of a Community act

One may wonder why I address this point, considering that the topic of this panel is direct actions. But there are two reasons:

- First, I believe the problem illustrates that the critique of the *UPA* case-law and the rule on standing in the new constitution is justified and that the *UPA* case-law raises serious concerns as regards access to justice.
- Second, I believe that Article 234 reference cases, which concern the legality of community measures only and not their interpretation, are direct actions, which, however, have to be initiated before the wrong court, namely a court which cannot grant the relief sought by the applicant and whose function is limited to sending the case to the competent Community courts.

Reference cases today also take on average more than 24 months. While the national court can ask the ECJ to deal with a reference under the accelerated procedure, recent cases suggest that the ECJ is extremely reluctant to apply the procedure. Indeed, orders I have seen do not give any guidance when and under which conditions the ECJ believes a case is sufficiently urgent to be dealt with under the accelerated procedure.

If someone is concerned by a Community measure, for example, a regulation, in one member state only, he can seek interim relief in the national court pursuant to the *Zuckerfabrik Süderdithmarschen* and *Atlanta* criteria. The situation, however, changes dramatically if he is concerned by the measure in multiple Member States, as is very often the case. What options does he have in such a situation?

- He can seek interim relief from the court which submitted the case to the ECJ. But the jurisdiction of that court, and therefore also the effect of any judgment it will render, does, at best, extend to the territory of the Member State only.
- He could ask the ECJ to order an interim measure. However, the case law suggests that the ECJ is likely to find that it does not have jurisdiction.
- He could also introduce a damages action before the CFI (no need to show individual concern in that respect) and in the context of that action ask the CFI to suspend the operation of that measure. While in the *Lehrfreund* case the CFI did not dismiss such an application outright as inadmissible, there are serious doubts as to whether it can be done.

Thus, in order to be on the safe side, an applicant will have to start actions in every member state. Of course, this can be done, but it requires a disproportionate logistic and financial effort, which many applicants simply cannot afford.

What could be the solution?

- The most appropriate would be, of course, to allow a direct challenge. But we probably have to accept that this will not happen, at least not through internal reform.
- Thus, I would advocate to introduce into the statutes a procedure where applicants can request the ECJ to suspend a Community act, once a national court has submitted to the ECJ a question as to the validity of the act. The advantages would be twofold: first, the applicant would have to go to one court only; second, the question of suspension would be decided at Community level, thus ensuring uniform application of Community law.
- An alternative solution would be that any decision of a national court suspending the application of a Community act pending the outcome of a reference case automatically has effect in the whole Community. This would be a sort of multiple recognition procedure for national judgments. I realize that there could be problems in case of conflicting national judgments, but they may be solved through a reference to the ECJ which would not be decided by the Court, but by the president

pursuant to the rules for interim measures applications (i.e., involving the author(s) of the act).

- A third alternative would be to allow an applicant who obtained a suspension of the measure in one Member State, to request the ECJ to declare that this suspension order has effect throughout the Community.

IV. Organization of procedure

Today, the procedure follows very strict rules: application, defence, reply, rejoinder, oral hearing (with or without measures of enquiry).

Also, an applicant must put forward all arguments and all evidence with his application. This puts every applicant in an awkward position, as he has to decide at the beginning whether to mount every possible attack or to put his eggs into one basket. Having learned as a young lawyer that in litigation brooms sometimes can shoot (and having seen this shooting-broom-theory confirmed since then), this is a very difficult choice indeed. The effect is, of course, that cases are sometimes unnecessarily long and voluminous, putting a heavy burden on the Court and the parties.

I wonder whether this cannot be avoided through a more flexible handling of the procedure, which would include a more active and continuous involvement of the judges, or at least the reporting judge. I recognize that the proposals I have in mind may be difficult to implement in practice, and might also require broader reforms, for example with respect to the internal working language and/or the language of procedure. But I still think it is worth reflecting:

- One solution might be that, before lodging a full application, the applicant submits a summary application, which includes only the most important evidence/documents. The defendant then lodges a summary defence. Shortly thereafter, there will be a hearing, either before the reporting judge or the chamber, where both parties briefly explain their positions with respect to the points raised and where the judge can tell the parties what he thinks about the various issues, based on the information available, and on which points he wants the parties to focus. The idea behind this proposal would be to front-load the work in order to reduce the overall amount of the work.
- A more far reaching solution would be to implement a system as it is applied in the UK where parties initiating an administrative review have to request permission to bring the case. They have to persuade the Court that they have an arguable case. I must admit that I am not in favour of this solution, because in order to ensure adequate judicial protection it would have to be coupled with a right to appeal against any decisions finding that there is no arguable case. Moreover, the CFI can already at present dismiss by order actions that are manifestly clearly unfounded or inadmissible.

Alexander V. MÜHLEND AHL

Vice-President Office for Harmonization in the Internal Market (Trade Marks and Designs)

1. Introduction

1.1. Community trade marks and Community design are unique creations of Community legislation – unitary intellectual property rights, in their nature private rights belonging to the assets of an individual or a company – valid everywhere in the European Union, administered by the Office for Harmonization in the Internal Market (Trade Marks and Designs), generally, in English, called OHIM, located in Alicante on the Mediterranean coast southwest of Valencia. Trade marks are distinctive signs – words, devices, letters, numerals, three-dimensional shapes, sounds, ... - which are or which are designed to be used to indicate the commercial origin of goods and services. Designs are made up of the new visual appearance of a product having individual character. Community trade marks and Community designs do not replace or substitute rights of the same type at the national level. Rather these Community and national rights coexist, with a substantial degree of harmonisation having been achieved by the Trade Marks Directive and the Designs Directive respectively.

1.2. Enforcement of Community trade mark and design rights is a matter for the national courts. In civil proceedings, which constitute the norm, the competence is attributed to Community Trade Mark Courts and Community Design Courts. These courts are courts of the Member States having been designated by the Member States as Community courts, and they are exclusively competent to hear infringement cases. These courts, if the issue is properly invoked by means of a counterclaim, also have the power to declare the rights granted by the OHIM to be invalid, a unique situation in Community administrative law where national courts normally do not have such a power, but a reflection of the fact that the intellectual property rights granted by the OHIM are private rights. The OHIM also has invalidity jurisdiction. The regulations governing Community trade marks and Community designs contain a set of complicated provisions which seek to govern (and preclude) possible conflicts between OHIM's jurisdiction and that of national courts.

1.3. So far, OHIM has dealt with some 400.000 Community trade mark applications, and, since the beginning of these additional tasks in 2003, with some 80.000 design applications. We have carried out some 75.000 inter-partes opposition proceedings, adding some 10.000 each year. Our Boards of Appeal, independent administrative second-instance tribunals established within OHIM, have handled more than 6.000 appeals against first-instance decisions of the OHIM, and currently some 1.000 new appeals are filed each year.

1.4. The court of First Instance is competent to hear appeals against decisions of OHIM's Boards of Appeal, and further appeal on points of law lies to the European Court of Justice.

1.5. The cases brought to the Court of First Instance have grown from 1 case in 1998 to 99 cases in 2003, altogether 272 cases until the end of 2003. The number of cases pending in the Court of First Instance at the end of 2003 was some 160 cases. We are likely to add 120 to 125 new cases this year 2004.

1.6. The number of new cases is a function of appealable decisions taken by our Boards of Appeal, which is again related to the number of appealable first-instance decisions taken in OHIM. The latter rate is currently between 20 and 25 %, and the rate of appeals to the Court of First Instance 8 to 10 %.

1.7. The European Court of Justice has been seized with some 30 appeals against Court of First Instance decisions, of which some 10 cases are still pending. Furthermore, the European Court of Justice has been called upon in some 45 cases to give preliminary rulings

pursuant to Article 234 EC to interpret the Trade Marks Directive (not yet the Community Trade Mark Regulation).

1.8. OHIM has represented itself in all of these proceedings, through its own staff.

2. Main features of proceedings against OHIM

What are the main features and the main differences between actions against OHIM and other direct actions against the Institutions? I will limit myself to two such differences, although many others could be mentioned.

2.1. OHIM has its own internal administrative review system. The Boards of Appeal are administrative tribunals with substantial autonomy – they are not subject to any instructions as far as their decision-making activity is concerned. This is an entirely unique feature not found elsewhere in Community law (with the exception of the Angers Plant Variety Office, which has not seen any litigation before the Court of First Instance). Therefore, the Court of First Instance actually receives cases which have already been thoroughly reviewed. One might have thought that the Court should have been able to develop a doctrine of administrative expertise or of deference to the administration, limiting its annulment of OHIM decisions to cases of “obvious” mistakes or “clear” error. The Court, as is well known, has not done so but rather exercises a full control of the legality of the decisions of OHIM’s Boards of Appeal. Perhaps in substance there is not much difference because the Court, with the exception of few cases, has confirmed the Boards’ decisions much more often than not.

2.2. The review of the first-instance decision before the Boards of Appeal takes place without the presence or the input of those having taken the decision, which leads to a curiously one-sided “ex parte” situation when the only party before the Board is the applicant, or to a truly “inter partes” situation when the two (or more) parties before the Board are the parties to an opposition or invalidation action.

In accordance with the prevailing approach to administrative litigation, when the case reaches the Court of First Instance, it is the OHIM which is the party defendant (respondent).

When an ex-parte case is involved, this does not present any particular problems as far as the position of party defendant is concerned. However, it may happen – and it has actually happened – that the OHIM as an office does not agree with the position taken by the Board and is thus faced with the question whether it can choose not to defend the Board decision or to defend it with other grounds or reasons. While the Court has accepted the OHIM as a kind of “amicus curiae” in opposition cases, the question of the OHIM’s role in ex parte cases is still open.

When an inter-partes case reaches the Court of First Instance, the OHIM is again the party defendant, but the true party that has an interest in the outcome is obviously the other party to the proceedings before the Board. The Rules of Procedure of the Court of First Instance seek to take this into account by attributing to the other party the role of a privileged intervener.

Still, procedurally this presents an awkward situation when the other party to the proceedings before the Board chooses not to make an appearance.

Here again, the question arises whether the OHIM is obliged to defend the position or at least the result of the decision taken by the Board. We have so far claimed the right to be “free” in the positions we take, and the Court, after some initial hesitation, has finally granted us the right to defend or not to defend the Board’s decision.

2.3. Finally, as regards languages, the OHIM has its own language rules – the Office’s languages are only five – Spanish, German, English, French, and Italian. These languages are also the languages for inter-partes cases. Whereas for ex-parte cases all of the – currently 20 – official languages of the European Community may be used. Before the Court, the applicant may choose any of the Court’s 21 languages, and it is only in inter-partes cases

that the other party (not OHIM) has the right to object to the chosen language, in which case the language used for the initial procedure before the OHIM – one of 20 – will by default become the language of the proceedings.

3. Consequences for the parties and for the review system

The parties to the proceedings before the Court of First Instance and the Court of Justice on further appeal are the applicants or plaintiffs, and OHIM as the party defendant, as well as the special interveners in inter-partes cases. What are the consequences to be drawn from what was explained earlier, both for the parties and for the review system itself?

Again, I will limit myself to two aspects, although many more could be mentioned.

3.1. From the OHIM's side one of the most important issues is whether it must be maintained that OHIM as a party to the proceedings must or should always defend the Board decision.

We see ourselves much more in the position of an "amicus", explaining to the Court the practice of the OHIM and the background for individual decisions. In most situations, this will necessarily coincide with a defense of the Board decision. But this will not always be so, in particular when the Boards have taken contradictory views on an issue where it is impossible for the OHIM to defend more than one of these positions before the Court. It would seem appropriate for the Rules of Procedure to reflect this appropriately.

As for inter-partes cases, it would seem appropriate to treat the other party to the proceedings before the Board as a necessary party to the proceedings before the Court. This would take some of the "pressure" away from the OHIM in its approach to the defense (or not) of the attacked decision of the Board. Again, this would require a rule change.

3.2. Currently cases in the Court take more or less 24 months to be closed, which in the opinion of many, including those dealing with trade mark matters, is much too long. Furthermore, the Court is of course not a specialized intellectual property rights court, but is nevertheless required to take up as much as 25 % of its case load with appeals against OHIM decisions.

With currently some 100 to 125 new cases a year we have in my opinion now reached a "critical mass" for the establishment of judicial panels pursuant to Article 225a EC with competence to deal with appeals from OHIM (and the Angiers office). Probably some seven judges (two chambers) would be required for the current case load.

I am therefore echoing and fully supporting the proposals made in this respect by the President of the Court of First Instance for an establishment of these judicial panels as soon as possible.

Having a separate IP Court would serve the interests of all the parties, the OHIM and the applicants or interveners, in a coherent, more rapid procedure with specialized judges leading to "professional" solutions of conflicts. It would also be in the interest of the specialized IP public (trade mark and design owners as well as their professional representatives and the organisations representing these interests) as well as of the public at large in a functioning and coherent European court system.

Finally, creating these judicial panels which would convert the Court of First Instance into the reviewing court for the panel's decisions offers the unique opportunity of combining the Court's appellate jurisdiction with the jurisdiction in references pursuant to Article 234 EC when the interpretation of the Trade Marks Directive and the Designs Directive as well as of the Community Trade Mark Regulation and the Community Designs Regulation are involved. This could lead with modest means to a concentration of the law of trade marks and designs at the Court of First Instance, relieving this Court from some 100 to 150 cases annually and the Court of Justice from some 10 to 20 cases per year.

Nicholas FORWOOD

Judge at the CFI

DIRECT ACTIONS

What are the needs and how can they be met?

N Forwood

November 2004

Fair hearing in a reasonable time

- Principle not in doubt
- Background of doubling of case load since 1998
- Despite this, current trend stable for several years
 - 17.8 months for staff cases
 - 16.2 months for trade mark cases
 - 20.5 months for "other" direct actions (Jan – June 2004, judgments and orders)

The Present Position

- Growth trend more strongly upwards in some current competences (e.g. trade marks)
- New judges, reorganisation of chambers (now nine 3-judge chambers instead of 5) and reduced use of 5 judge chambers have improved capacity
- Further significant improvements through procedural changes unlikely.

Prospects 2005-6

- Continuing increase in areas of traditional competences
 - Trade marks and designs
 - Competition (emphasis on enforcement)
 - State aids
- Increases related to enlargement
- Increases through transfers of direct actions by MS
- Benefits from transfer of staff cases will not appear until after 2006.

Prospects post 2006

- Noticeable improvements for both CFI and ECJ from transfer of staff cases to CST
- But remaining direct actions likely to increase further in both number and scope
 - Competition (effects of deregulation)
 - State Aids (enlargement)
 - wider variety of actions at Community level directly affecting individuals (e.g. terrorism – asset freezing)
 - new competences (MS direct actions, JHA)
 - enlarged scope for validity review under Art III.365(4)?

Longer term changes

- More specialist courts, with consequent benefits for both CFI and ECJ
 - Trade marks
 - Patents
 - Competition (in longer term)
- Preliminary ruling competence
 - Initially, only where CFI is already a court of appeal from a specialised court (e.g. trade marks)
 - In due course, in other self-contained areas (CCT, “Brussels 1” regulation etc.)
- Other direct actions (infringements)

LOCUS STANDI

The twin functions of the EU Courts

- Validity / Interpretation of EU law
- Preliminary rulings predominantly concern interpretation, validity only rarely (less than 10%)
- Validity issues are core work of CFI (annulment, damages, exception of illegality)
- Validity competence is exclusive to EU courts (c.f. interpretation)
- Validity criteria are common to all EU acts (whether legislative, regulatory or individual)

Twin functions (conclusion)

- Permit review of all validity questions by CFI (or specialised courts) irrespective of locus standi under current tests.
- Enlarge scope of informal (legitimate interest) as well as formal (direct and individual concern) locus standi criteria.
- Saving of time/effort before national courts, at least where used only as indirect access to EU judge to determine validity (e.g. dumping, state aids)
- Continue to allow preliminary ruling requests on validity
- TWD Deggendorf?

Topic 4

“Practical and political constraints on the functioning of the Courts”

Giorgio MAGANZA

Legal Service of the Council

A preliminary comment

1. 1Difficulty of drawing the "practical/political" line: apparently practical constraints may have political implications.

A few points on the outline of introduction

2. As a result of Nice (and Constitution), case load to increase ; in particular, more appeals to ECJ, which will therefore have to successfully resist temptations to go beyond points of law.
3. Case-load may also result from case-law, in the light of which possible plaintiffs may feel encouraged/discouraged to bring action (see admissibility decisions).
4. More judges and specialized courts may affect consistency of case-law. Important role for ECJ to play in ensuring such consistency.

Some specific constraints from the defence point of view

5. European Parliament and Council co-defending.
6. Cases involving scientific/technical aspects, therefore requiring expert support.
7. Difficulty for agents representing institutions to defer to requests in oral proceedings, e.g. to accept an amicable settlement or simply to produce a document.

General Paper

Francis JACOBS

Advocate-General at the ECJ

Possibilities for further reforming the preliminary ruling procedure

Introduction

The central importance of the preliminary reference procedure to the development of Community law has been widely and rightly emphasised. The Due report 90 characterised it as the keystone of the Community's legal order, permitting a direct dialogue between each national court and the Court of Justice. Its reform has been described as undoubtedly the most important issue currently confronting the Community Courts. In its 1995 Report, the Court of Justice stressed the importance of the procedure to the operation of the internal market, on account of its role in ensuring the uniform application and interpretation of Community law throughout the Union 91.

The continued effectiveness of the procedure is, however, particularly vulnerable to the delays that result from the increasing size and sophistication of the Court's caseload. The willingness of national courts other than those of final instance to exercise their discretion to refer questions to the Court of Justice may partly depend on the speed with which an answer is likely to be offered. Even those courts which are obliged to refer may err in favour of finding a given issue to be *acte clair* in order to avoid having to make a reference. The parties to litigation before national courts may seek to avoid a reference because of the resultant delays 92. In addition to such practical considerations, the fact that individual rights will frequently be in contention in national proceedings involving Community law heightens the need for expedition.

In recognition of the problem, some measures have already been introduced. Whilst such reforms have produced beneficial results, it appears doubtful that they will be sufficient to meet the scale of the challenge facing the Court in the coming years. The number of preliminary references received is likely to increase as questions are referred from courts in the new Member States, and as new legislative initiatives generate litigation across the Union, even without taking account of the substantial increase in the Court's jurisdiction which might arise under the proposed Constitution. It therefore appears timely to consider again what other options might be available.

Reforms aimed at preserving the efficient operation of the preliminary reference procedure can be broadly classified into two categories. First, there are those which aim to control the number of references which arrive at the Court, thereby limiting the demand for the Court's services. Secondly, there are those measures which aim to increase the efficient handling of references once received, effectively increasing the supply of such services.

In each case, care must be taken not to undermine the features of the preliminary reference procedure which have made it so successful as an instrument in the development of the Community legal order. This renders reform a difficult and delicate task, given that the problems with that procedure arise directly out of the features which have been central to its success to date.

⁹⁰ 'Rapport du Groupe de Réflexion sur l'Avenir du Système Juridictionnel des Communautés Européennes', (the 'Due Report') January 2000, p. 11.

⁹¹ 'Report of the Court of Justice on Certain Aspects of the Application of the Treaty on European Union', May 1995, pp. 6-7.

⁹² It is noteworthy that the number of preliminary references in fact fell year on year between 1998 and 2003 (from 264 in 1998 to 210 in 2003). The fall could be attributable to a number of factors, including greater familiarity with and confidence in the application of Community law on the part of national lawyers and judges, and greater self-restraint by national courts exercising their discretion to refer and selecting only those cases where a reference is most appropriate. It is also possible, as Kapteyn suggests, that the delays involved may have served to deter some references which would otherwise have been made. See J Kapteyn, 'Reflections on the symposium', in *The Uncertain Future of the Preliminary Rulings Procedure – Symposium of the Council of State, the Netherlands*, 30 January 2004, at p 42 of the published proceedings.

For example, the high level of demand for the Court's services is attributable in part to the basic structure of the preliminary ruling procedure, and in particular, (1) the fact that any national court can refer, broadly, any question of Community law and, as a rule, the Court of Justice must answer all those questions, and (2) the obligation upon final courts to refer such questions. That structure has served as an extremely effective conduit for dialogue between national courts and the Court of Justice.

Equally, some of the problems of supply are an inevitable corollary of the fact that all cases are dealt with by one central body, which is limited in its size. If the body were to be expanded or if cases were to be transferred away from it, the quality and consistency of the case-law might be jeopardised.

The present paper first examines the steps taken to date to reform the preliminary ruling procedure, and then canvasses the merits of possible further measures. One such measure, which appears particularly deserving of consideration, is the so-called green light system, whereby national courts would be encouraged, or required, to supply their own proposed responses to the questions referred, enabling the Court of Justice to expedite proceedings where the national court has arrived at the correct solution.

The purpose of this paper is not to make any proposals or recommendations, but to promote discussion by outlining a number of options and making a preliminary assessment of some of the considerations which might be useful in evaluating them.

Steps taken to date

In its interpretation of the third paragraph of Article 234, the Court of Justice has consistently identified limits to the obligation upon national courts of final instance to refer all relevant questions of Community law that arise before them. Such courts need not make a reference where the answer to their questions is apparent from previous cases or is in any event obvious⁹³. Similarly, the Court of Justice has asserted its authority to refuse to admit references which are inadequate in various respects⁹⁴. Such doctrinal developments have limited unnecessary or inappropriate demand for the Court's services. The Court has summarised the relevant case-law in an information note on references by national courts for preliminary rulings.

The Court's rules of procedure have also been reformed in an effort to improve its efficiency in supplying answers to questions referred. Since 2000, Article 104(3) of the Rules of Procedure permits the Court to respond to a question referred by means of reasoned order where that question is identical to a question on which the Court has already ruled, where the answer to such a question may be clearly deduced from existing case-law or where the answer to the question admits of no reasonable doubt. The advantage of such an order is that it dispenses with the need for an Advocate General's Opinion, and may also be made without a hearing. A new rule has also been introduced, in Article 104a, which permits an accelerated procedure to be applied, in exceptional cases, at the request of the national court.

In addition an amendment to the Statute of the Court introduced by the Treaty of Nice enables the Court to proceed to judgment without an Advocate General's Opinion where a case raises no new point of law; the decision to use that procedure is taken however after hearing the Advocate General.

Finally, the Court has recently conducted a comprehensive review of its practice, procedure and working methods with a view to improving its efficiency, and many reforms of a relatively minor character are now being implemented.

The measures outlined above are already exerting some beneficial effect in streamlining the Court's procedures, avoiding the waste of judicial resources on straightforward references, and allowing a case to be considered urgently where necessary. Further reforms would nonetheless appear to be

⁹³ See in particular Joined Cases 28-30/62 *Da Costa* [1963] ECR 31 at 38 and Case 238/81 *CILFIT* [1982] ECR 3415, at paragraphs 14 to 20 of the judgment.

⁹⁴ See, for example, Cases C-320-2/90 *Telemarsicabruzzo* [1993] ECR I-393; Case C-157/92 *Banchero* [1993] ECR I-1085.

necessary. In 2003, for the first time, the average time taken to respond to a reference for preliminary ruling passed the two year mark. Although in the wake of recent reforms that may prove to be a high water mark, any reduction in the time taken might increase still further the demand for preliminary rulings, which seems set to increase for other reasons also.

It is therefore appropriate to consider what further measures might be introduced to deal with the delays which risk undermining the preliminary reference procedure. Three possibilities may be identified. First, there is the option of putting into effect the transfer of some references for preliminary ruling to the Court of First Instance which was made possible by the Treaty of Nice. Secondly, there are various more radical reforms which would require further amendment to the Treaty to put into effect. Finally, there are measures which would reform the present system less radically and without the need for Treaty amendment, including in particular different versions of a "green light" system.

A transfer of competence to the Court of First Instance?

The Due Report concluded that it should basically still be for the Court of Justice to give preliminary rulings, at least while the development of the Union so permits⁹⁵. It recommended, however, that at some stage in the future the power to deliver such rulings might need, in certain special categories of case, to be transferred either to the Court of First Instance or to specialised Community tribunals. It cited in particular cases involving the competition rules, judicial cooperation in civil matters, cooperation in the fields of police and home affairs, and those concerned with visas, asylum and immigration⁹⁶. Similarly, in its contribution to the Intergovernmental Conference prior to Nice, the Commission proposed that the Court of First Instance should be given exceptional jurisdiction to give preliminary rulings in specialised areas of Community law, such as intellectual property⁹⁷.

In the event Article 225(3) of the EC Treaty as amended by the Treaty of Nice provides that the Court of First Instance may be given jurisdiction to rule on preliminary references in specific areas laid down by the Statute of the Court. Provision is made for the Court of First Instance to refer to the Court of Justice cases requiring a decision of principle likely to affect the unity or consistency of Community law. Decisions of the Court of First Instance would also be subject to exceptional review by the Court of Justice, but such a review could be set in motion by the Court of Justice only on a proposal from the First Advocate General of the Court of Justice where he considers that there is a serious risk to the unity or consistency of Community law⁹⁸.

It is questionable whether it would currently be opportune to exercise the power conferred at Nice to expand the jurisdiction of the Court of First Instance. It is by no means easy to determine which categories of cases are appropriate for transfer. Indeed it would not be easy to define water-tight categories. Cases frequently raise questions in different areas, and even where a reference appears to be confined to a particular topic, it may raise much more wide-ranging and fundamental problems. Moreover, since the Court of First Instance is itself over-burdened, the transfer of cases might simply shift the problems of delay from one Court to the other. It is true that the membership of the Court of First Instance, unlike the Court of Justice, could be expanded, but only at some risk to the uniformity of Community law.

Transfer of cases to the Court of First Instance would not bring with it the advantages which accompanied the transfer of direct actions – and which justified the establishment of that Court – namely a closer scrutiny of the facts, improved judicial protection, and the availability of a right of appeal.

Finally, it may be thought that one of the most serious problems with the system of preliminary rulings – and one which may become more serious in the future – is an excess on the demand and supply

⁹⁵ At p. 22.

⁹⁶ At pp. 29-37.

⁹⁷ 'Additional Commission contribution to the Intergovernmental Conference on institutional reform – Reform of the Community courts', p. 3.

⁹⁸ Article 62 of the Statute.

side, resulting in some areas in an unmanageably large body of case-law, and threatening the quality of the system. The output of the Court of Justice is now very great – some 12 000 pages in the Reports in 2002. The difficulties are greater now that the Reports have to be published in no fewer than 20 languages. It would seem that such problems can better be resolved by limiting the demand and supply rather than by transfer of cases to the Court of First Instance.

Reforms involving further amendment to the Treaty

In the process leading up to Nice, a number of other, more radical, proposals for the reform of the preliminary reference procedure were canvassed, the implementation of which would involve further amendment to the EC Treaty.

Limiting the courts and tribunals which may refer

One such proposal, advanced in particular by the German government, would restrict the demand for the Court's services by limiting references to courts of final instance. However, the objections identified to such a measure in the Due Report appear compelling. The Report referred to 'the perverse effect at national level of encouraging litigants, or at least the richer ones, to pursue their cases right through to the very highest courts in order to gain access to the Court of Justice by referring a question for a preliminary ruling'⁹⁹, thereby causing delay and creating congestion in appellate courts at the national level. It would also close off a significant part of the dialogue between national courts and the European Court of Justice made possible under Article 234 EC as it stands. Many important questions have been referred by national courts at lower levels of the national judicial hierarchy, sometimes enabling errors of interpretation to be corrected which might otherwise not have arisen before the Court of Justice.

An appeal system

More radical still was the suggestion that national courts should lose the power to refer altogether, and that the parties to national litigation be permitted instead to bring the national judgment before the Court of Justice in a sort of longstop appeal claiming breach of Community law. The proposal would in effect replace the current system of dialogue, which has proven its worth over the last five decades, with a hierarchical model, and was for that reason rejected by the Due Report¹⁰⁰.

A filtering system

A third demand-limiting solution would involve granting to the Court of Justice the power to determine which references it wished to take, akin to the system of certiorari which operates in the United States. By that method, the Court could confine its work to those preliminary questions which it considered were sufficiently important for Community law. All others would be remitted to the referring courts, possibly with observations to assist them. Again, however, the proposal was seen to undermine the cooperation and dialogue between Community and national courts, and was therefore ruled out by the Due Report¹⁰¹. A filtering system is also difficult to accommodate within a preliminary ruling procedure, where *ex hypothesi* the national court has not yet given judgment but has stayed its own proceedings to no purpose, if the reference were rejected by the Court of Justice. A filtering system works better where a lower court has given judgment, which becomes definitive when the higher court decides not to review it.

The devolution of the preliminary rulings jurisdiction to specialist national or regional courts

⁹⁹ At pp. 12-14.

¹⁰⁰ At pp. 12-14.

¹⁰¹ At p. 21.

A fourth proposal, which sits somewhere between a demand-limiting and a supply-boosting measure, would involve the establishment of national or regional Community courts which would respond to preliminary references, only passing on to the European Court of Justice those which were of special interest and importance. One important difficulty with such a proposal lies in the risks which it entails for the uniform application of Community law 102. Moreover, in the important cases, delay would be exacerbated by the establishment of an additional stage to the judicial process.

It is therefore apparent that all the main, more radical proposals considered prior to the Treaty of Nice have their drawbacks, and it is perhaps unsurprising that they were neither adopted by the drafters of that Treaty nor revisited by the subsequent Constitutional Convention. In addition to their specific shortcomings, such proposals share an additional disadvantage which arises from the very fact that they require Treaty amendment, with all the risks, delays and uncertainties which that brings with it.

Possibilities for reform not requiring Treaty amendment: the green light procedure

It may, therefore, be preferable to consider possible reforms of a less radical nature, which could be introduced without the need for Treaty amendment, with the aim of enlisting the help of national judges in improving the preliminary ruling procedure. The Due Report clearly perceived great merit in proposals of that kind, emphasising the need to help national courts to be bolder in applying Community law themselves 103.

One such possibility would be to provide further and more forceful indication to national courts of the benefits of self-restraint when considering whether to refer questions to the Community courts. A proposal to amend the text of Article 234 EC with a view to encouraging national courts to refer only those questions giving rise to reasonable doubt and/or of importance to the Community legal order was made in the Due Report but ultimately not adopted. Nonetheless, the possibility remains that at some stage the Court might be minded to develop further its case-law limiting the obligation of courts of final instance to refer, or to expand it to incorporate guidance applicable to other courts when exercising their discretion whether to refer. Any risk that such doctrinal development might undermine the uniformity of Community law may have been lessened by recent case-law confirming the possibility of infringement proceedings in respect of judicial acts 104, and recognising the possibility under Community law of claiming damages in the national courts in respect of such acts 105. However, it is arguable that at the present time, some caution may be needed when encouraging judicial self-restraint. It would clearly be inappropriate too strongly to discourage national courts in the new Member States from taking advantage of the dialogue with the Court of Justice which courts elsewhere in the Community have long enjoyed.

A more promising possibility may be to institute a system, sometimes referred to as the 'green light' procedure, whereby national courts would supply proposed answers to the questions which they are referring, probably in conjunction with the analysis underlying their responses 106. The Court of Justice could, if it agreed with the proposal contained in the order of reference, give a 'green light' to the national court, without needing to proceed to judgment itself, or in any event without having to follow the full procedure. It is to this idea that the remainder of this paper is devoted.

There is at present much variety in the form which preliminary references take. Some national courts, in particular those in Germany, already often give an indication of their own thinking on the Community legal issues raised in the main proceedings 107. The system under examination would aim to

¹⁰² The Due Report, p. 21.

¹⁰³ At p. 14.

¹⁰⁴ Case C-129/00 *Commission v. Italy*, judgment of 9 December 2003.

¹⁰⁵ Case C-224/01 *Köbler*, judgment of 30 September 2003.

¹⁰⁶ See for an early reference J.H.H. Weiler in Schermers and Others, *Article 177 EEC: Experiences and Problems*, Amsterdam 1987, 366 at 375.

¹⁰⁷ It may be that German courts are influenced by the domestic procedure for referring questions to the Bundesverfassungsgericht, under which the referring court apparently supplies proposed answers to the questions which it

generalise that practice, and to use it in selecting those cases deserving of more detailed and thorough consideration before the Court of Justice.

A number of different versions of the green light system have been proposed at various times and by various authors¹⁰⁸. The configuration of such a system would vary depending on how it combined various of the following elements:

It could either be confined to courts of final instance, or it could extend to all referring courts; Referring courts could either be encouraged to provide answers, or alternatively they could be required to do so; National courts could simply append to the order for reference the proposed answers, or (more realistically) could also supply an indication of the reasoning whereby they arrived at those answers; The decision to give a green light could be made by the Reporting Judge in consultation with the Advocate General or by a group of members; The Court of Justice might give a green light to the national court whenever it agreed with the answer proposed by the referring court; or when it considered that the issue was not one of importance to the Community legal order; or when both those conditions were satisfied. The decision to give a green light might be taken before the order for reference had been translated into the various official languages of the Community and sent out to the Member States; alternatively, it might be taken after the written procedure but prior to the oral phase; In cases in which the Court of Justice gave a green light, the national court could be told that there was no need to proceed with the reference, or alternatively the Court of Justice could proceed to give a brief ruling, confirming that the national court's proposed solution was correct, possibly in the form of a reasoned order under (an amended) Article 104(3) of the Rules of Procedure; Orders for reference might be published on the internet either in all cases, when received, or in those cases in which a green light had been given, especially if no formal decision of the Court of Justice resulted; It might even be possible to envisage at some stage switching to a 'red light' system, whereby the national court would issue a judgment nisi at the same time as it made its reference. The judgment would then become absolute after a certain time limit if the Court of Justice failed to respond to the reference¹⁰⁹.

There are therefore many points open for discussion in implementing such a system. In principle, however, it does appear to offer a number of advantages, which would be felt on both the 'demand' and 'supply' sides of the equation.

The advantages of the system would arise at different stages in the procedure. First, upon analysing in detail the Community legal issues raised before them, national courts having a discretion to refer might feel more confident of their own capacity to apply Community law without the need for a reference in the first place.

Secondly, the national court's analysis would be likely to assist those submitting observations to address the relevant issues.

Thirdly, some of those references which were made, and in which the national court's analysis appeared correct, could be dealt with rapidly, either by informing the national court that the proceedings need advance no further, or alternatively by reasoned order. Such a possibility would be particularly helpful, perhaps, in dealing with the reasonably straightforward questions which courts of final instance are nonetheless obliged to refer.

refers. See H Schermers, 'Problems and Prospects', in A Dashwood and A Johnston eds., *The Future of the Judicial System of the European Union* (Hart, 2001), at p. 34.

¹⁰⁸ See, for example, A Dashwood and A Johnston, 'Synthesis of the Debate', in A Dashwood and A Johnston eds., *The Future of the Judicial System of the European Union* (Hart, 2001), at pp. 68-9; A Meij, 'Thème: La qualité de la législation communautaire, sa mise en oeuvre et son application dans l'ordre juridique national', paper presented at the Colloque 2004 de l'Association des Conseils d'Etat et des Juridictions administratives suprêmes de l'Union Européenne.

¹⁰⁹ That possibility is mentioned in Dashwood and Johnston, cited in note 108.

Fourthly, the green light system would enable national courts to contribute more directly and substantially in the development of Community law by encouraging them not merely to identify and pass on the relevant questions of Community law which arise before them, but also to contribute their own analysis of those questions which might then be endorsed by the Court of Justice. That would be a particular advantage in the case of the highest national courts, which might be able to contribute substantially to the development of Community law but which may currently see themselves having the role of a judicial post-box.

By contrast with the other, more radical reforms, considered above, such benefits could be gained without either restricting or subverting the dialogue between national courts and the Court of Justice which is generally agreed to have been central to the success of the preliminary ruling procedure to date. Unlike an appeal system, it would still be for national courts to decide whether to make a reference and which questions to refer. Unlike the filtering system discussed above, the Court of Justice would not turn away references unanswered. Unlike either an appeal or a filtering system, all courts would retain the facility to refer, while courts of final instance would still be bound to do so. The core structural features of the preliminary ruling procedure to date would therefore be preserved intact. But those cases in which the national court had already supplied a satisfactory answer would be dealt with more rapidly.

As regards the 'supply' side of the equation, the 'green light' system would allow the Court to increase the efficiency of its working practices by winnowing out at an early stage those cases in which national courts clearly did not require more detailed assistance. The Court could thus boost the supply of its services whilst retaining its own central position as guardian of the uniformity of Community law.

It is arguable that the 'green light' system represents a logical extension of the trend, already apparent, towards a greater flexibility in the procedures available to the Court. Preliminary ruling cases may now be dealt with by reasoned order or judgment without Opinion or under the accelerated procedure.

The system might be thought to have certain disadvantages, depending upon how it was implemented. First, doubts have been raised as to how much work the Court would actually be saved.¹¹⁰ This would vary according to the stage of the proceedings at which the green light was given and the method by which a reference was then disposed of. Significant time would be saved if references which met with the Court's approval were withdrawn prior to circulation for observations by the Member States. Even if such references were dealt with by reasoned order, without Advocate General's Opinion or hearing, some time savings would follow. It is true that additional time would need to be devoted to the task of sorting references, on their arrival at the Court, into those which could receive a green light, and those which would require further attention. However, the time savings at later stages of the procedure would almost certainly compensate for the initial delay.

A second and more serious potential disadvantage concerns the reaction of national courts to a green light system. Some such courts may not feel sufficiently confident in matters of Community law to offer their own assessments. They might even be more reluctant to exercise their discretion to refer, despite the uncertainties raised in a given set of proceedings.

Such a difficulty could be avoided if, at least for an initial period, national courts were only encouraged, rather than required, to express their own view as to how the questions which they were referring should be answered.

Another aspect of the same problem concerns the resentment which might be generated in those cases where the Court of Justice felt it necessary to reject the solution proposed by the national court.

In that regard, the Court of Justice could be expected to use diplomacy and tact. It would be generally understood that any case in which a national court considered a reference to be appropriate would necessarily involve uncertainties. No criticism could attach to a court whose view was not shared by the Court of Justice, which uniquely enjoys the Community perspective on a given legal problem.

¹¹⁰ See the Report of the EC Advisory Board of the British Institute of International and Comparative Law chaired by the Rt. Hon. Lord Slynn of Hadley, 'The Role and Future of the European Court of Justice', of 1996, at p. 82.

A third possible disadvantage of the green light system is the risk which it might be thought to pose to the uniformity of Community law. If the outcome of the Court's approval of the answers proposed in a reference were to be the withdrawal of the reference, those answers would not be generally available for other national courts to consult.

One solution to that difficulty would be for the Court of Justice to give a brief judgment, confirming the national court's solution, at least in those cases which were of more general importance. More generally, a system could be established for publishing some or all orders for reference received by the Court on the Internet with an indication of those in which the green light procedure had been used. This would have the added advantage of exposing national courts to each other's case-law and style of reference.

The extent to which a reference which had received a green light from the Court of Justice would create a precedent would depend upon the manner in which the proceedings were resolved. If the national court withdrew the reference, the reasoning contained in the order for reference might constitute persuasive authority for other national courts in later proceedings, but would not be binding as such. By contrast, a brief ruling from the Court of Justice would presumably have full precedential value.

It only remains to consider whether one or another version of the green light system could be implemented without the need for Treaty amendment. For some versions, changes would be needed to the Court's rules of procedure and perhaps to its Statute. Amendments to the former would now require only a qualified majority in Council 111, whilst the latter would need unanimous support 112. However, there is nothing obviously in the Treaty which would stand in the way of introducing a green light procedure. The Court has, it is true, taken the view that, subject to certain well-known but limited conditions, it is obliged to rule on any question within its jurisdiction. But that view can properly be explained on the ground that there is no provision in the Rules of Procedure enabling the Court to respond to such a question other than by a formal ruling. The position would of course be different if the Rules were amended.

Conclusion

Whilst there are many possible permutations to the green light system discussed above, it would appear to have advantages both in managing the demand for the Court's services and in increasing the available supply of such services. It accomplishes those goals without either restricting the scope for dialogue between national courts and the Court of Justice or risking the uniformity of Community law by transferring competence away from that Court. It could probably also be implemented without the need for Treaty amendment, thereby allowing the Court to take the initiative.

Clearly, such a measure would constitute a radical reform to the Court's procedures, and might carry with it unforeseeable risks to the system in addition to the potential disadvantages which have already been identified and considered above. It might therefore be appropriate to consider the possibility of a phased introduction. In an initial stage, national courts could be encouraged, rather than required, to offer their own proposed solution, and the reasoned order procedure could be used in those cases where the solution was considered acceptable 113.

¹¹¹ Article 223 EC.

¹¹² Article 245 EC.

¹¹³ Such a suggestion is made by Judge Meij in his paper cited in note 108.

**Colloquium on the judicial architecture of the European Union
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