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GUEST EDITORIAL: ARCHITECTS OR JUDGES? SOME COMMENTS IN RELATION TO THE CURRENT DEBATE

Earlier this year, the President of the Court of Justice, Judge Rodriguez Iglesias, took the exceptional initiative to air in the press his serious concerns about the urgent need for reform of the Union's judicial institution. The IGC debate on Treaty reform tends to focus mainly on the political institutions and overlook the judiciary. In fact, for a long time it was uncertain whether reform of the Court would be on the IGC agenda at all, and it is certainly not amongst the three principal "boxes" of current IGC preparation. The reform of the Union's judicial system seems to be a minor part of the so-called "fourth box", containing rather divergent varia, for which no prime political or, for that matter, constitutional interest appears to exist. And yet, that judicial system, once praised and applauded as the unique basis and motor of European integration, is now gradually but definitely stammering.

Perhaps a certain lack of political interest is not entirely incomprehensible, since the need for reform is only partly related to the institutional consequences of enlargement. The President of the Court warns that maintaining the current practice of fixing the number of judges according to the number of Member States entails the risk of the Court being transformed from a collegiate judicial body into a deliberative assembly. It seems probable that the relative, even surprising, success of judicial decision-making within a reasonable time in the two Community courts is, unlike political decision-making, mainly due to a shared belief in judicial values. These pertain to basic principles of law and procedure, debated on the basis of intellectual argument, aware of (but aloof from) the issues of the day; in short, what has been characterized by a former president of the Dutch supreme court, S. Royer, as the professional attitude of the judge. Obviously, enlarging the deliberating formation ad libitum puts these key features of sound judicial decision-making increasingly under pressure. In fact, if one takes into account the considerable number of cases in which the Court decides in plenary session lately, one may wonder whether the transformation mentioned above is already beginning to take place. However, it is hard to imagine a Court in which not all the Member States' legal systems are represented, other than at the unacceptable cost of it becoming part of a political rotation carrou-

sel based on too brief mandates. A partial solution might be to include the advocates general in the number of posts to be distributed among the Member States, but such an approach would require a reappraisal of their role in order to be acceptable. I will come back to this point below.

What remains, is essentially a question of internal organization and coordination. On this score the report of the working group instituted by the Commission under the chairmanship of the Court's former president Ole Due[1] has made several interesting suggestions. In the context of the IGC, the most important issue seems to be to limit organizational regulation of the Court's functioning on Treaty and Statute level to the bare essence, e.g. the total number of judges and a quorum, also after enlargement, of at the very most 9 judges in plenary session, in order to leave as much room as possible for flexible approaches to the Court itself. For the rest, the existing prerogatives for privileged litigants (the Member States and the other institutions) to require the Court to hear a case in an enlarged chamber, or in plenum, have never turned out to be of much practical importance.

The real background of the need for reform is not specifically linked to enlargement, but is evident in the length of time needed for each judgment, particularly in preliminary proceedings – a problem which is already conspicuous for anyone who wants to see it. The problem is usually referred to as the ever growing number of cases to be dealt with by the two Community Courts. This is certainly true. However, it would appear to be only part of the story. National courts also have their portion of ever increasing workloads and lack of sufficient resources, confronted as they are with emancipated citizens and sometimes staggering administrative and legislative mechanisms. Yet, the work of the Community courts is not comparable to that of national courts in quantitative terms of input and output. There seems only one possible explanation of this phenomenon. Experience shows that typical features of international jurisdictions impose requirements which seriously restrict their production capacity. Cultural differences require prudent approaches, eleven possible languages of procedure require enormous qualified translation resources both at written and oral level, fifteen traditional legal backgrounds necessitate voluminous research efforts in order to enable each chamber to function properly as the mini-comparative law laboratory it essentially is. Add the necessity for two well-organized registries, able to cope with complicated files coming in from fifteen different countries, and it is clear that such features easily give rise to an ever increasing bureaucracy and severely restrict the possibilities for flexible case management. To this extent, the Community courts indeed cannot be compared to national courts. These characteristics,

1. Accessible on the Commission's website www.europa.eu.int.

exacerbated with each enlargement, definitely constitute inherent limits on any increase of the two courts' production capacity.

The reflection document presented by the two Community courts to the Council in May 1999,[2] and the above-mentioned Due report, have made numerous suggestions for some short term relief and longer term perspectives. They have given rise to a mini-debate in certain circles of European law protagonists on the future of the judicial system of the Union, in which some broad visions of a future judicial architecture of the Union are advanced. The two Community courts, conversely, have contributed to the IGC by putting forward a few relatively modest proposals,[3] mainly aiming at opening up the Treaty system for flexible further development. Interestingly enough, as compared to previous IGCs, the two courts have adopted a single, common point of view in both these documents. This may have forced the two organs of the institution to be relatively modest in their medium-term approach. However, in view of the relative immaturity of the debate, it may well turn out to be wise to have adopted a pragmatic approach instead of drafting grand designs.

In this perspective, a number of practical measures have already been taken or proposed under the existing Treaty rules, such as adaptation of the Court's rules of procedure in order to speed up in particular the preliminary reference procedure, and transfer of certain direct actions brought by Member States and institutions to the Court of First Instance. The proposals of the two courts to the IGC concentrate on three issues which require modification of the Treaties, viz. modification of the rules of procedure by the Court itself or by majority vote in the Council, provision for eventual transfer of preliminary jurisdiction to the Court of First Instance, and provision for the creation of tribunals for specific areas, such as staff cases and industrial and intellectual property cases.

The three documents mentioned so far are discussed by Rasmussen elsewhere in this *Review*.[4] In the meantime, a group of Friends of the Council Presidency, consisting of legal experts of the Member States and the political institutions, is preparing draft texts to be submitted to the IGC. Rumour has it that these texts, as far as the Treaty level is concerned, remain basically limited to the issues mentioned above. However, the creation of specialized tribunals and the transfer of preliminary jurisdiction to the CFI will eventually require implementation, as well as a legal basis. The impracticability of leaving implementing measures in the air seems to have led to a complex operation of redistribution of texts between the Treaty, the Court's Statute

2. Accessible on the Court's website www.curia.eu.int.
3. This document is also available on the Court's website.
4. H. Rasmussen, "Remedying the crumbling EC judicial system", this *Review*, 1071–1112.

and the two courts' Rules of Procedure. It remains to be seen whether this operation will leave sufficient room for manoeuver to the Court for it to adapt its organization and working methods to changing circumstances flexibly, with the possibility of modifying its rules of procedure itself. Or will it result in detailed regulation of the organization of the Court in the Statute, while the latter's status of protocol to the Treaty is further reduced to that of a Council decision, for the sake of easier adaptation? The reservation of basic principles to basic texts, and a little political confidence in the ability of magistrates to organize their own work would appear to be key notions in this context.

The idea of creating specialized tribunals was originally linked up with the boards of appeal for the Community trade mark, set up in the framework of the Office for Harmonization in the Internal Market, based in Alicante. These boards are of a somewhat hybrid nature as they are organically independent from the Office, but at the same time a functional part of it. As a consequence, it may be rather difficult to classify their decisions as either administrative or judicial, as lawyers love to do. However, after a somewhat cumbersome start, the system seems to work increasingly well. Similarly, independent boards of appeal established within the administration, but with external membership, might be able not only to decide legal issues, but also to mediate or reconciliate in staff cases, not on top of, but instead of the current administrative complaints procedure. The present tendency of preparatory deliberation, however, appears inclined to create specialized tribunals of a purely judicial nature, provided with an appeal to the CFI; on top of that, exceptionally, there may be a reexamination by the Court in cases where the unity or coherence of Community law is at stake. In a worst case scenario, including the administrative complaints procedure, the poor civil servant may thus end up with four instances. It seems that recent developments in the field of mediation, alternative dispute resolution, and administrative law variations on those themes, have escaped the European debate.

The second proposal, to make provision for the transfer of preliminary jurisdiction to the CFI, was initially greeted with scepticism, but gradually seems to be gaining ground. Clearly, such a transfer only makes sense if the CFI continues its practice of hearing cases only in chambers of three or five judges, also for preliminary references transferred to it. Otherwise, such a transfer would amount to nothing but shifting the problem from one court to another. Such a transfer can only concern relatively technical matters, for which in fact specialized assistance will be needed, as is currently taking shape within the CFI for Community trademark cases. Two major problems which remain are, on the one hand, how to select ex ante the cases to be transferred to the CFI and, on the other, how to preserve ex post the unity and coherence of Community law. On the first point, it would hardly make sense to convey to the Court itself preselection of transferable cases on a case-by-case basis.

Apart from more fundamental objections pertaining to the concept of the "juge légal",[5] the time and effort gained by a transfer would be partly lost in the careful consideration of transferability. After all, selection *prima facie* or, for that matter, based on proposals from another in-house service, would not do. It seems, therefore, that *a priori* regulatory definition of determined areas of jurisdiction (*blocs de compétence*) designated for transfer is inevitable. However, it will be hard to find a workable solution, providing at the same time an unambiguous definition of certain areas, and duly taking into account that any case in any area may raise fundamental questions concerning principles of legal protection or even the functioning of the internal market, which should be decided by the Court of Justice itself. The best approach, because most practical in the short term, would probably be to make a modest, relatively experimental start by transferring to the CFI preliminary references in an area already within its jurisdiction, concerning questions submitted by the so-called Community trade mark courts of the Member States,[6] relating to disputes on the infringement and validity of Community trade marks. The second point, the ex post preservation of unity and coherence of Community law, raises its own problems, although it seems common ground that appeal from a CFI judgment to the Court under the present general rules must be excluded. I make a further remark on this issue below in relation to the possible role of the advocates general. At this stage, it should be added on a more down to earth level that a transfer of preliminary jurisdiction requires, *vis-à-vis* referring national courts, the unequivocal appearance of the Community courts as one, single institution Court of Justice, albeit composed of two different branches. After all, national courts should not have to worry about which branch of the institution to address themselves.

Strikingly, the current debate appears to show two conspicuous blank spots, at least at the level of IGC preparation. The first concerns the role of the advocates general. At best, it is suggested that an opinion of an advocate general is not required in each and every case, and consequently that their number might as well be reduced. At worst, their number is considered as a convenient change in rotation schemes for the distribution of posts over the Member States. This state of affairs is a far cry from the original position of the advocate general, conceived as the principal advisor of the Court, giving scholarly guidance, in his opinions, in the general interest of coherent legal development. They are not, as some circles seem to have it, assistants to the Court, but independent legal opinion leaders. Whilst it is certainly true that many cases are simple enough not to require such an opinion, it would also

5. Or *gesetzlicher Richter*.

6. Within the framework of their jurisdiction, pursuant to Arts. 91 et seq. of Regulation (EC) 40/94 on the Community trade mark.

appear, in this original perspective, that the advocates general themselves are in the most appropriate position to decide which cases require an opinion and which do not. They may do so either individually in order of the distribution of cases or, perhaps more appropriately, on the basis of a collegiate decision, taken under the presidency of the first advocate general. Naturally, an opinion should also be required in a case for which the advocates general do not see the necessity to give an opinion, but the Court or, for that matter the CFI, finds an opinion appropriate and requests it. More importantly, however, bearing in mind the original perspective, it is surprising that the advocates general are not, apparently, more closely associated with the selection mechanisms to be established in view of the unity and coherence of Community law in cases where the CFI will ordinarily be the last resort. This situation is bound to occur in case of transfer of preliminary jurisdiction to the CFI as well as in case of appeal to the CFI from decisions of specialized tribunals.

Suggestions to introduce some sort of an appeal in the interest of the law, reserved to the Commission and/or the Member States, apparently inspired by Article 68 EC, have not as yet matured sufficiently to be practicable. An initiating role for the Commission or the Member States in this respect would appear highly inappropriate in any case. Certainly, the Commission has its role to play as guardian of the Treaty. This role is, however, of a political nature – as the practice concerning Treaty violations shows. On the other hand, an exceptional revision mechanism, indispensable for the unity and coherence of Community law, might benefit highly from close association of the Court's advocates general in the initiation process, provided that their role continues to be conceived as it originally was.

The second relatively blank spot in the debate relates to the role of national courts. Lip service is paid to their role as the ordinary courts of Community law in every possible way. Admittedly, recognition of this role by inserting it in a Treaty text would change nothing but appearances – even if, by the way, this itself could be of some use. For the rest, intellectual efforts for reform of the relationship between the Community judiciary and national courts appear to be primarily focused on management on the Community courts' side of the preliminary references flood. The national courts themselves are not associated with the ongoing discussion in any way. It may well be worthwhile, however, to take a closer look at the national courts' side of the preliminary cooperation process. In the light of the above-mentioned restrictions on production capacity, inherent to international judicial decision-making, it seems inevitable to turn attention to the sources from which the flood flows. At the present stage of development, it should be clear that the preliminary cooperation process is not conceived for the purpose of informing national courts of the current state of Community law, but should indeed be limited to cases in which the unity and coherence thereof is at stake. It would therefore appear

appropriate and inevitable to enlarge the autonomous role of national courts and to equip them accordingly, in order to allow the coordinating mechanism to survive. For information purposes, secondary coordinating mechanisms, such as expert assistance in readily available research and documentation centres, supported by IT networks linked to the Court's research division, seem to be of utmost importance. Incidental educational devices, such as those provided by the Commission under the Robert Schuman and Grotius Programmes, are necessary but insufficient. New instances in each Member State for the purpose of filtering preliminary references, however, would lead to an unsatisfactory doubling of proceedings; it is the national courts themselves which should be properly equipped to play their role in the common European judiciary.

Finally, it should be noted that the time in which legislative and administrative initiatives can be developed by the Community, without careful consideration of their consequences in terms of the required judicial organization, on Community as well as on national level, and the budgetary means appropriate thereto, is definitely running out.

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