

## **EDITORIAL COMMENTS**

### **The future development of the Community's judicial system**

The Court of First Instance of the European Communities (CFI) has recently published a paper entitled “Reflections on the future development of the Community judicial system”. The paper has been transmitted to the Intergovernmental Conference (IGC) and now forms part of the documents which the IGC is considering.

The CFI points out that the European Court of Justice (ECJ) seems structurally to have reached the limit of its capacity to hear and decide cases. The creation of the CFI was intended to bring about an improvement but that objective has, it states, been only partly achieved. The CFI notes that once the initial running-in period has been overcome, it will have excess capacity for dealing with cases.

The CFI suggests the creation of a unitary and hierarchical system of courts as the most appropriate way of ensuring that the principle of the uniform interpretation of Community law is observed. It envisages the ECJ remaining at the apex of this structure but does not rule out the creation of specialized courts in highly technical fields. Concretely, it proposes that the general judicial architecture of the Community should consist of three tiers:

- 1) a single constitutional court and court of last resort in the Community legal order. This role would belong to the ECJ.
- 2) a lower Community court subject in principle to review by the ECJ on points of law and vested with a wide general jurisdiction. This role

would belong to the CFI. The CFI rules out the creation of other Community courts at the same level; it does not wish to confine the present CFI to the role of a "specialized [and ancillary] commercial court".

- 3) several specialized Community courts charged with the conduct of new judicial business of a highly technical nature, whose decisions are subject to review on points of law by the Community courts of general jurisdiction (for example, in intellectual property cases).

As regards the allocation of jurisdiction between the ECJ and the CFI, the CFI makes a number of proposals. It sees the ECJ retaining its present jurisdiction as a constitutional court, in proceedings whose object or effect is to define the distribution of powers between the Community and the Member States and between the various institutions, those that put in issue the fundamental principle of the Treaties or the protection of fundamental rights, and those that enable the ECJ to ensure the uniform interpretation of Community law.

The ECJ would retain jurisdiction in all actions brought by the institutions, in preliminary rulings concerning the constitutional matters of the sort mentioned in the last paragraph, actions brought by Member States against a Community institution in so far as they raise genuinely constitutional issues (thus to the exclusion of, for example, actions relating to the clearance of European Agricultural Guidance and Guarantee Fund, or EAGGF, accounts), in all the new areas of jurisdiction which may come to be assigned to the ECJ by the Inter-Governmental Conference, in particular reviewing compliance with the principle of subsidiarity, and in certain cases where the ECJ is charged with guaranteeing the uniform interpretation of EC law such as by adjudicating on appeals against judgments of the CFI. The CFI also interestingly suggests that a new jurisdiction might be created whereby the ECJ could give judgment "in the interests of the law" on appeals by an institution or a Member State, if the future judicial organization of the Communities were to confer on the CFI the task of deciding certain cases, whether preliminary references or direct actions, at first and last instance.

Under such a scheme, new areas of jurisdiction would be entrusted

gradually to the CFI subject to a review by the ECJ on points of law. These would include, in the short and medium terms, all proceedings in the field of measures of commercial protection, including dumping and subsidies, cases relating to the non-contractual liability of the Communities and direct actions brought by natural or legal persons. In the longer term, the CFI should have jurisdiction in those actions brought by the Member States or the institutions which do not raise for decision any problem of a truly constitutional or fundamental nature.

The CFI also suggests that certain areas of jurisdiction might be assigned to it as a court of first and last instance, subject to the possibility for the Member States and the Commission to request that the case be heard by the Court of Justice itself. These actions would include questions raised for a preliminary ruling which do not concern any problem of a truly constitutional nature. The CFI should also have jurisdiction in all references for preliminary rulings arising under conventions concluded between the Member States, all proceedings related to trademarks, which as at present provided, are to be assigned to the ECJ, and proceedings concerning the contractual liability of the European Communities.

The CFI suggests that Article 168a of the EEC Treaty should be amended so that the Council may be enabled to transfer to the CFI all or some of the various areas of jurisdiction mentioned above, and in particular so that the CFI may be enabled to hear and determine actions other than those brought by natural or legal persons. At the time of writing, it is understood that this is being considered by the IGC and that the ECJ has been asked to comment on such an amendment of Article 168a by the President in office of the IGC.

One cannot examine here all of the points raised by the CFI, and other proposals have recently been dealt with at length in this Review.<sup>1</sup> However, a number of points should be made.

As a preliminary remark, it should be stated that since the ECJ is best placed to appreciate the difficulties it faces, it is to be hoped that it will also make known its views on the developments of the judicial architec-

1. See Jacqué and Weiler, "On the Road to European Union – A New Judicial Architecture: An Agenda for the Intergovernmental Conference" 27 CML Rev. (1990), 185–207.

ture of the European legal system. This can only serve to enrich the debate and provide the IGC with valuable input.

On the substantive issues, as we have had occasion to remark before, the ECJ is a unique judicial institution, and is perceived to be perhaps the most effective of the Community Institutions.<sup>2</sup> Our concern is that the ECJ should function optimally. Delays threaten the good administration of justice and it is ominous that the average length of cases is now beginning to increase again, after a temporary improvement caused by the transfer of cases to the CFI upon its establishment.

However, it seems only sensible that before embarking on elaborate proposals, the ECJ itself should first or contemporaneously consider institutional changes which would make it more efficient. The ECJ's own internal procedure should be looked at. Seen from the outside, and particularly from the point of view of a common lawyer, it seems extremely cumbersome. It seems wasteful of judicial person-power that the Judge Rapporteur should draft Reports for the Hearing; this sort of task could surely be done by a Court service. The parties could also be formally asked to provide the Court with statements of agreed and disputed facts which would assist the drafting of the Report for the Hearing. The Preliminary Report could be altered and the over-elaborate written procedure in direct actions could be simplified, to the extent that a Reply/Rejoinder would only be possible by special permission. Oral procedures could be made more efficient by a more frequent use of posing prior questions to the parties and indicating in advance areas of interest on which counsel should concentrate in their oral pleadings. The reading of the full texts of the Opinions of Advocates General, though now much reduced, is surely not necessary, particularly in view of the fact that Court judgments themselves are not read out in public, the presiding judge merely reading the operative part of the judgment.

It might also be considered whether more cases might not be referred to chambers of 3 and 5 judges. It could also be examined whether some cases could not be decided by a single judge, sitting alone, as happens

2. See Editorial Comments, "A Different Sort of Balance Sheet", 19 *CML Rev.* (1982), 3-4 and "Guardian of the Treaties", 24 *CML Rev.* (1987), 601-604.

in some jurisdictions. The argument for a panel of judges of several nationalities has surely lost its force as the Community legal system has matured. The nationality of the sitting judge should not be a criterion. There is a valid point to be made that at the appellate level, panels are usual and desirable, but it would be precisely in cases in the nature of first instance proceedings where a single judge procedure might be appropriate.

The ECJ could also reconsider its attitude towards the non-specialization of its chambers – this would surely lead to considerable economies.

An obvious question is whether the number of members of the ECJ should be increased. The ECJ might also examine whether it would be useful to nominate Assistant Rapporteurs. This possibility already exists under Article 12 of the Statute and Article 24 of the ECJ Rules of Procedure but has never been utilized.

However, it is doubtful whether purely internal changes of this sort can on their own totally alleviate the problem. It seems that the pressure on the ECJ will increase as it acquires a host of new competences. If the IGC culminates in inserting a special subsidiarity clause in the Treaty, and competence to interpret this clause is attributed to the ECJ, that court will become a genuine federal constitutional court, one of whose principal functions will be to determine the division of State-Federal competences. Likewise, the ECJ is increasingly being attributed competence under other conventions: the examples of the Rome, Brussels and Lugano Convention and the Community Patent Convention spring to mind, but there is also the possibility of jurisdiction under the Community Trademarks Convention and under the agreement to be concluded with the EFTA countries to create a European Economic Area.

It seems wise therefore to consider solutions of a more far-reaching nature. It is in this context that one should consider the transfer from the ECJ to another forum of jurisdiction in certain classes of action (though not perhaps all those suggested by the CFI). These could include dumping (originally proposed by the ECJ to be attributed to the CFI), state aids cases, cases based on the extra-contractual liability of the Communities, cases involving the EAGGF and tariff classification. All these cases involve determinations of fact, varying in complexity.

More adventurously, "routine" infringement cases brought under Article 169 of the EEC Treaty could be brought before the ECJ as could some or all preliminary ruling cases.

Whether the competence to be subtracted from the ECJ should be attributed to the CFI is another matter. This depends upon one's vision of the development of the European legal system, and of the respective roles of the ECJ and the CFI within it. Nothing should detract from the crucial position of the ECJ as the guardian of the uniform interpretation of Community law. Keeping this objective in mind, a limited transfer of competence to the CFI of the sort mentioned above seems not unobjectionable. This solution avoids the creation of a federal structure of European courts which, at least in today's climate, seems unreasonably optimistic and, arguably, unnecessary in the present stage of European integration. Cost would also be a factor in making this unlikely. On the other hand, such a solution should not be ruled out for the future, when the CFI's new-found competences could be attributed to lower courts, and it could function as an appellate court in a chain leading to the ECJ.

Another concern is that the present mechanism of appeals from the CFI to the ECJ may be too wide, as appeals may be made on points of law on the grounds stated in Article 51 of the Statute. There is no filter, no System of certiorari, leave to appeal or cassation. The result may be that at least in commercially important cases, there will be almost automatic appeals. In the context of any changes to be made, it may be appropriate to reconsider the rules on appeals.

A filter could also be imposed on preliminary references. In this connection, a possibility, though a controversial one, would be to limit the *right* to make preliminary references to courts of appeal and the *duty* to make references to courts of last instance, as under the model provided by the Protocol to the Brussels Convention, but it is submitted that such a course, although organizationally attractive, in fact would do much to limit the uniform application of Community law. A system such as that suggested by the CFI, whereby the ECJ would remain seised of all preliminary references but could refer those of minor importance to the CFI, seems far preferable at this stage.