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EDITORIAL COMMENTS

The IGC 1996 and the Court of Justice

The preparations for the Intergovernmental Conference of 1996 are in full swing. Following the request made by the European Council at Corfu (June 1994), each of the Institutions has produced a report on the functioning of the Treaty on European Union. These reports are now in the hands of the Reflection Group which was established to help prepare the IGC. This group held its inaugural session on 3 June of this year at Messina. The date and place coincided with the commemoration of the 1955 Messina Conference, which so successfully prepared the ground for the change-over from the limited integration concept of the ECSC to the wider ambitions and accomplishments of the EEC Treaty. The symbolic value of this venue is certain not to have been lost on the Reflection Group, which is made up of Governments' representatives, two members of the European Parliament and a member of the Commission.

As indicated in Article N2 of the EU Treaty, the IGC will have to examine Treaty provisions for which revision is provided.[1] Furthermore the EP, the Commission and the Council have agreed that matters concerning budgetary procedure and comitology should be included in the agenda for the IGC. The thorny problem of the blocking minority in cases where the Treaty provides for qualified majority voting

1. E.g. in Art. 189B(8) (extension of sope of application of the procedure of co-decision), Art. J.4(6), and J.10 (Common Foreign and Security Policy), Declaration No. 16 to the EU Treaty (classification of Community acts with a view to establishing an appropriate hierarchy between different categories of act).

(Ioaninna compromise)[2] will also have to be considered and so will a host of other shortcomings of the European Union. Of course, the main challenge lies in the need to reconcile deepening with enlargement. The IGC must bring about the institutional conditions for ensuring the proper development of a Union with more than 20 members and which must accommodate patterns of integration and cooperation of variable intensity and geometry.

This Review will have ample opportunity in future issues to publish material on the progress of the IGC. At the present stage it may be of interest to readers of the Review to be informed of the views expressed by the Court of Justice[3] in its report presented to the Reflection Group.

As is to be expected, the Court's report first reaffirms that the European Union is governed by the rule of the law and that if the essential features of the Community legal order are to be maintained, the functions and prerogatives of its judicial organs must be safeguarded in the forthcoming process of revision. Any decision affecting the structure of the judicial system must therefore ensure that the courts remain independent and their judgments binding. The Court specifically draws the attention of the IGC to the legal problems created by the exclusion of Court jurisdiction over activities of the Union which fall within the spheres of the common foreign and security policy and of cooperation in the field of justice and home affairs. The Court is sensitive of its role in dealing with the concomitant problems of overlap and delimitation. Judicial protection of individuals affected by activities in these areas must be guaranteed and structured in such a way as to ensure consistent interpretation and application both of Community law and of the provisions adopted in the framework of such cooperation. In cases where it is necessary to determine the limits of the powers of the Union *vis-à-vis* the Member States, and of those of each of the institutions of the Union, or in other cases which are constitutional in character, the obvi-

2. See Ed. Comments in 31 CML Rev. (1994), 453–457.

3. The Court of First Instance submitted on 17 May 1995 its own "Contribution for the purposes of the 1996 Intergovernmental Conference". Although this report contains valuable and intersting suggestions, and deserves to be studied in depth, the main focus of our comments is on the Report of the Court of Justice.

ous need to ensure uniform interpretation and application of the rules "presupposes the existence of a single judicial body such as the Court of Justice, which can give definitive rulings on the law for the whole of the Community." In the views of some people, the rules expressed in the Treaties about the division of powers are regarded as unfit for review by the Court of Justice, since these rules are seen as essentially political in nature and since the Court cannot be deemed to be an impartial body for adjudicating such matters;[4] the Court rejects this unambiguously.

In the Court's view there is little room for revision of the judicial system. The system of preliminary rulings (Article 177 EC) must remain the veritable cornerstone of the operation of the internal market. Any restrictions on access to the Court and any weakening of the uniform application and interpretation of the Community law throughout the Union would be liable to give rise to distortions of competition and discrimination between economic operators. However, as the Court acknowledges, the effectiveness of this procedure depends on the *time* it takes. From a technical point of view the request for a preliminary ruling is merely a step in the national proceedings and excessive delays may discourage national courts from submitting questions.

An important reduction of the time taken to deal with preliminary references may be expected to result from the recent transfer to the Court of First Instance of all direct actions brought by individuals,[5] which allows the Court more time for handling cases referred under Article 177, and from the implementation of the amendments to Article 165(3), which were introduced by the Maastricht Treaty. Under this provision the court of Justice may now assign any case to a Chamber, unless a Member State or an Institution which is a party to the proceedings requests that the case be heard in plenary session. The Court makes regular use of this new possibility in cases which previously had to be heard by the plenary. The combined effect of these two innovations is positive. Recent statistics show that between 1993 and 1994 the average

4. See for such views e.g. Vibert, *A core agenda for the 1996 Inter-Governmantal Conference*, European Policy Forum (London, May 1995).

5. Concil Dec. 93/350, O.J. 1993, L 144/21 and Council Dec. 94/149, O.J. 1994, L 66/29.

length of proceedings went from 22.9 months to 20.8 months for the direct actions before the Court and from 20.4 to 18.0 months for preliminary rulings. However, owing to the relative increase in the number of appeals in the field of competition, the average length of appeals from CFI judgments has gone up from 19.2 to 21.2 months.

The results of the above-mentioned measures are not spectacular enough to dispense with other measures for increasing the Court's productivity. The Court suggests that it will take steps of procedural simplification which fall within the framework of the Court's Statute and its Rules of Procedure. Even though there is no need to amend the Treaty, the Council is required to approve amendments to the Rule of Procedures. The Court shows itself worried by the long delays which this may entail. Adaptation of these Rules in line with the Treaty on European Union was not possible until February 1995.[6] Therefore, the Court suggests relaxing the rule in Article 188(3) of the Treaty which requires the unanimous approval of the Council for any amendment to the Rules of Procedure. This could be done by authorizing the Court to adopt its Rules of Procedure without the Council's approval. Alternatively, such approval might be deemed to be given on expiry of a specific period in the absence of amendments by the Council to the Court's proposed changes to its Rules of Procedure.

Could delays further be shortened and the Court's productivity increased by applying the two-tier Court system to preliminary ruling procedures? The Court says no. Giving the CFI authority to handle requests for preliminary rulings would be likely to lead to unacceptable procedural delays and would raise problems as to the authority of judgments given at first instance and as to the identification of the parties entitled to lodge an appeal. Furthermore, as the Court notes, it is hard to see how the Court's jurisdiction to give preliminary rulings could be split up on the basis of pre-established criteria relating to the subject matter of the case or the status of the referring court, without jeopardizing the consistency of the case law. Similarly, a split-up of jurisdiction on the basis of a flexible system of case-by-case referrals from the Court

6. O.J. 1995, L 44/61 (Court of Justice) and L 44/64 (CFI).

to the CFI would run counter to certain conceptions of the "lawful judge" (juge legal).

At the present state of development the Court feels that the structure of the judicial system should not be altered. There is no need for the time being, to contemplate amendments to Article 168A with regard to the allocation of tasks between the Court of justice and the CFI. However closer integration in certain fields and a concomitant increase in the volume of litigation may make it desirable for the Chambers of the CFI to become specialized "or perhaps for new specialized Community courts to be established."

The latter option does not seem particulary attractive to the CFI. In its own report to the Reflection Group, the CFI points out that the creation of specialized Community courts would be a costly operation in terms of budgetary and administrative resources. Moreover, such a solution does not sit too well with the concept of a system of Community courts of general jurisdiction, "since it might jeopardize the unity not merely of that judicature but of its case law". On this point the Court and the CFI do not appear to see eye to eye. The Court of Justice keeps its options open. This becomes especially evident where it observes: "Once the principle of the two-tier system is accepted, there is a certain logic in having the vast majority of direct actions dealt with by one or more courts of first instance and in subjecting certain appeals to the Court of Justice to a filtering system. Increasing the number of courts would be unlikely to endanger the unity of the case law provided there is still a supreme court to ensure uniformity of interpretation through appeals or preliminary rulings as the case may be."

If the above statement does not exclude the possibility of establishing additional courts of first instance – be they specialized or of general jurisdiction – neither does it rule out the possibility of creating *regional* Community courts of first instance. The idea is not new and is rejected in the CFI's report just as energetically as the possible establishment of specialized Community courts, and on about the same grounds. It is true that the CFI bases its opposition to these ideas on the stage of development which the Community has now reached. Nevertheless, in discussing options for adapting the structure of the Community judicial

system to the requirements of a dynamic process of integration, the Court of Justice seems prepared to enter an area where the CFI fears or refuses to tread. Of course this does not mean that the Court of Justice is unaware of the dangers indicated by the CFI. If regular CFIs were given jurisdiction in different regions of the Union, differences in legal cultures, and maybe in social, economic and political interests, could lead to divergent jurisprudence which it might be difficult for the Court of Justice to correct. It is interesting to speculate how the *Bananas* case would have fared before the CFI for the German or the Low Countries region, on the one hand, and before the CFI for the French or that for the Iberian region, on the other. The suggestion of establishing regional Community courts may have been influenced by the organization of the federal jurisdiction in the United States.[7] However, many instances of what appeared to be transatlantic analogies have turned out to be false friends.

The Court, although it does not make any specific suggestion regarding the knotty problem of the link between the number of judges and the number of Member States, regards its constantly expanding size with misgivings. Like everybody else, the Court knows that it would be unrealistic to expect Member States to renounce their "right" to a judge of their own nationality, even though the Treaties do not provide for any link between nationality and membership of the Court. The Court merely points out that two factors must be balanced. On the one hand, a significant increase in the number of judges might mean that the plenary session of the Court would cross the invisible boundary between a collegiate court and a deliberative assembly. Moreover, as the great majority of cases would be heard by Chambers, this increase could pose a threat to the consistency of the case law. On the other hand, the presence of members from all national legal systems on the court enhances the legitimacy of the Court and is conducive to the harmonious development of case law and to the acceptability of the solutions arrived at.

It is common knowledge that the composition of the Court and the

7. See Jacqué and Weiler, "On the Road to Europan Union – a New Judicial Architecture: An Agenda for the Intergovernmemtal Conference", 27 CML Rev. (1990), 185–207.

CFI has always had little to do with any objective assessment of the Community's jurisdictional needs. In the early years, the effective link between the number of judges and the number of Member States made it usually difficult for the Court to cope with an ever increasing workload. New accessions in the not so distant future may lead to over-expansion of the Court and the CFI, and to a corresponding loss of judicial productivity and effectiveness. It could therefore be termed progress if the 1996 IGC would recognize that the only relevant consideration in fixing the size of the two Courts should be that of ensuring efficient and speedy justice. Nationality should not be a decisive consideration in the appointment of members of the Courts. What matters most is that the Courts are fully representative of the Union's diverse legal traditions. In this respect, it is even conceivable that nationals of third countries (e.g. Switzerland, Canada) could fit this description.

One of the ideas which, if acted upon, could make it easier to abandon the principle that there is a judge for every Member State is the proposal to give a Judicial Appointments Board a role in the selection process. In such a system, the governments of the Member States should draw up a list of candidates from which judges would be chosen for appointment, up to the requisite number, by a body composed of the most senior members of the judiciary in each of the Member States.[8] The Court does not express any opinion with regard to the method of appointment of its members except for two points. Firstly, it does not object to a reform which would involve an extension of the term of office (from 6 to 9 years) with a concomitant condition that the term of appointment would be non-renewable.

Secondly, the Court flatly rejects the suggestion made in the Report of the European Parliament[9] to subject all nominations to the Court and the CFI to the assent of the EP. The Court does not see any merit in confirmation hearings because prospective appointees "would be unable adequately to answer the questions put to them without betraying the discretion incumbent on persons whose independence must, in the

8. See on this idea, Koopmans in 11 YEL (1991), p. 15.
9. Report by Bourlanges and Martin for the EP Committee on Institutional Affairs and Resolution adopted on 17 May 1995 (PE 212–450/fin).

words of the Treaties, be beyond doubt and without prejudging positions they might have to adopt with regard to contentious issues which they would have to decide in the exercise of their judicial function". This is another example of a situation where an analogy with transatlantic rules or practices is not welcome in the Community.

The EP, in its Report, has suggested that it should be allowed to bring appeals under Article 173 not only in situations where it considers that its prerogatives are infringed but in all cases where it holds another Institution to have acted contrary to the Treaty. The EP also wishes to be given the right to solicit opinions form the Court under Article 228(6) on the compatibility of contemplated international agreements with the Treaty. The Court does not think that this is a good idea. Such reforms would "remove to the judicial arena disputes which could just as satisfactorily be settled at a political level, given the mechanisms provided for that purpose". It may be presumed, although the Court remains silent on this point, that the EP's proposal to write into the Treaty a right for national parliaments to seek annulment of Community acts on the grounds that the EU Institutions have acted "ultra vires", will be viewed by the Court with the same lack of enthusiasm.

In the final part if its report the Court touches briefly on various other issues which may have repercussions on the judicial system. Among these are the question of the introduction of fundamental rights into the text of the Treaty and the effects of making changes to the hierarchy of legal norms in the Community. In relation to both questions the Court points to the consequences which such changes may have for the system of remedies, in particular the right of individuals to challenge the legality of Community acts. As to the inclusion in the Treaty of a written catalogue of fundamental rights, the Court recalls that it already examines whether fundamental rights have been respected by the Community authorities and by the Member States when their actions fall within the field of Community law. The Court would not be taking on a new role in reviewing respect for fundamental rights set out in the Treaties in written form. Interestingly enough, the Court points to another aspect of the mechanism for reviewing respect for fundamental rights, and which can be dissociated from the question whether these rights are protected as unwritten or as written law of the Community.

The question which the Court raises in this connection is "whether the right to bring an action for annulment under Article 173 of the EC Treaty (and the corresponding provisions of the other Treaties), which individuals enjoy only in regard to acts of direct and individual concern to them, is sufficient to guarantee for them effective judicial protection against possible infringements of their fundamental rights arising from the legislative activity of the institutions". Obviously, it is not difficult to give a negative answer to this question. In fact, coming from the Court itself this question is rather suggestive and may indicate that the Court desires to secure a further relaxation of *locus standi* requirements for private appeals under Article 173. At all events, it will be interesting to see whether the opinion which the Court is soon to deliver under Article 228(6), on the matter of the compatibility with the EC Treaty of accession by the Community to the European Convention of Human Rights, will give further clarification of the Court's thinking on this issue.

In the final paragraph of its Report, the Court reserves the possibility of submitting to the Reflection Group its observations on the reports of the other Institutions insofar as they concern the judicial system. One wonders whether the Court would also feel inclined to make known its views on the suggestions made by the CFI in the document which the latter has transmitted to the Reflection Group. This contribution contains many interesting ideas, such as the appointment of deputy rapporteurs, the introduction of a single judge ruling in certain cases and the creation of specialized chambers for "repetitive disputes". But such reforms, which need to be enacted in conformity with the procedures set forth in Article 168a, cannot be carried out against the wishes of the Court of Justice. Apart from the points on which the Court evidently disagrees with the CFI, as indicated above (regional or specialized courts), it is not possible to conclude from reading the Court's Report that it agrees with the CFI's proposals or that it rejects those views. This is a rather confusing state of affairs. The fact that the Community judicial system is structured as a two-tier system should not lead to a situation where the higher and lower levels of jurisdiction make statements on important questions of policy that are contradictory or, at best, uncoordinated. It might not be such bad idea if the IGC could come to a

clearer definition of the concept "Court of Justice". As the CFI rightly observes in its contribution, Article 4 EC only mentions a Court of Justice covering both jurisdictions. The omission of the name of the CFI from Article 4 is not in conformity with the demands of clarity and transparency. To remedy this deficiency it seems a good idea to give support to the CFI's wish to include in Article 4 a reference to the Court of First Instance "in appropriate form". But even if this suggestion is acted upon, it remains desirable for the constituent parts of a two-tier Community judiciary to coordinate their positions in relation to matters such as amendments of the Treaties.