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THE COMMUNITY JUDICIARY AT THE DAWN OF THE THIRD MILLENIUM: A REVOLUTION OR A SIMPLE FACE-LIFT?*

Dr Marie-Pierre F. Granger*

IEP Lyons, Maîtrises (Lyons and Thessaloniki), DEA (Montpellier), PhD (Exon)

Tutor

School of Law, University of Exeter

M.F.Granger@exeter.ac.uk

Introduction: The Wind of Change Blowing on the EU Judicial System

The reform of the European Community judicial system had been notably missing from the table of negotiations of most of the Intergovernmental Conferences (IGC) until last year. The institutional reform appearing on the program of the 1996 IGC had given way to politically more urgent matters, and in the end, the Treaty of Amsterdam did not tackle the question of the reorganisation of the Community judiciary. Despite some rather pessimistic predictions,¹ the year 2000 has turned out to be profitable for the Community judiciary in many respects.

First of all, the 2000 IGC negotiators finally took into hands the long awaited reform of the European judicial system, which had over time become a matter of urgency, not only because of the need of adaptation to the future enlargements, but also because of the threat of complete congestion of the system.² The case load of the Community Courts has grown rapidly, mostly due to the increasing size of the European Union (hereinafter EU) the new fields of competence of the European Community (hereinafter EC) and of the EU³ and the increased control of the Court over it,⁴ and a general phenomenon of 'judicialisation'. It results in delays

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¹ Meij 'Guest Editorial: Architects or Judges? Some Comments In Relation to the Current Debate?' (2000) 37 *CMLRev.* 1039, at 1089

² '...the Court is in need of urgent reform...in order to enable it to adapt to current and changing circumstances so that it can continue doing that which it has been doing since the European Communities were set up: to ensure the respect for the law' (*The EC Court of Justice and the Institutional Reform of the European Union*, April 2000, at 1, available at <http://www.curia.eu.int>).

³ The EU is composed of three pillars: the Communities (EC, ECSC and Euratom) pillar, the Common Foreign and Security Policy pillar and the Justice and Home Affairs pillar. As the Court's jurisdiction covers mostly the first pillar, this article will focus on Community issues, although the Court has a limited jurisdiction over third pillar issues, which will not be examined here. However, for the sake of convenience, when the distinction is not necessary, EU and EC will be used alternatively. For example, I will talk about the EU judicial system although technically this system is built within the structure of the Community pillar.

⁴ The focus of this article is procedural. Therefore, the changes made with regard to the substantive scope of the Community courts' jurisdiction will not be examined in this paper, although the Treaty of Nice, when (and if) ratified, will bring some changes in that respect. See the Treaty of Nice Amending the Treaty on the European Union, the Treaty Establishing the European Communities and Certain Related Acts (OJ [2001] C 80/1, 10 March 2001).

in the delivery of judgments which are hardly acceptable in a democratic society.⁵ The gradual transfer of some of the workload of the Court of Justice (hereinafter the Court or the ECJ) onto the Court of First Instance (hereinafter the CFI)⁶ was not sufficient to prevent the whole system from slowly collapsing under its ever increasing burden. Further devices needed to be designed in order to avoid the demise of the EU judicial system. The Treaty of Nice, signed on the 26 February 2001, amends and introduces provisions in the EC Treaty which make significant changes with regard to the Community judicial architecture, and to the efficiency, flexibility and autonomy of judicial system of the European Union.

Secondly, the Courts have been endowed with a new single Statute (see the Protocol on the Statute of the Court of Justice), amending and replacing the previous ones.⁷ Its new structure and content is the product of an attempt to reorganise the provisions regulating the EU judicial system, whereby the Treaty determines the fundamental principles thereof and the Statute organises the basic rules implementing them.⁸

Thirdly, both courts have obtained the unanimous agreement of the Council to various amendments to their Rules of Procedure (RP),⁹ which introduce significant alterations in the Court and CFI's internal decision-making processes. These apparently minor modifications, overshadowed by the Treaty reform process and often neglected by scholars, should nevertheless not be overlooked, for they can greatly improve the working conditions of the European judges.

Many would complain that these changes are too timid and lack a vision for the future.¹⁰ Yet one needs to question whether there is such a need to rush in a complete revolution of the

⁵ On 1 January 2000, 896 cases were pending before the ECJ and 732 before the CFI. The average time for the Court to deal with preliminary references is 23.1 months (6 months in 1975, 17 months in 1988), and around two years for direct actions.

⁶ The CFI was established by a *Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities* (OJ [1988] L 319/1, OJ [1989] C 215/1). Its jurisdiction was gradually extended by *Decisions 93/350* (OJ [1993] L 144/21) and *94/149* (OJ [1994] L 66/29). *Decision 88/591/ECSC, EEC, Euratom* will be repealed by Article 10 of the Treaty of Nice, once in force.

⁷ Article 7 of the Treaty of Nice provides that this new single statute replaces the former European Atomic Energy Community (EAEC) and European Community (EC) Statutes. Moreover, Article 8 of the Treaty of Nice provides that Articles 1 to 20, Article 44, Article 45, Article 46 paragraphs 2 and 3, Articles 47 to 49 and Article 51, 52, 54 and 55 of the European Coal and Steel Community (ECSC) Statute are to be repealed, since it will expire in 2002, and that the new Statute is applicable to the provision of the ECSC Statute that are not repealed (transitional measures). The new single statute contains five titles: Judges and Advocates-General (I), Organisation (II), Procedure (III), the CFI (IV) and Final Provisions (V). It applies to the ECJ, CFI and the future judicial panels.

⁸ The merger of the previous statutes and the amendments brought by the new Protocol have led to a renumbering of some of the provision of the former EC Statute, likely to create some confusion, and which has been deplored by many commentators. See Johnston 'Judicial Reform and the Treaty of Nice' (2001) 38 CMLRev. 499, at 503 footnote 11.

⁹ On the 10 May 1999, the Court and the CFI addressed to the Council a discussion paper in which they suggested a set of modifications to their Rules of Procedure, which could be adopted immediately, without waiting for a reform of the Treaty. See the document entitled *The Future of the Judicial System of the European Union (Proposals and Reflections)*, Luxembourg, 10 May 1999. On 1 July 1999, the Court sent to the Council a draft of the proposed amendments, which were approved unanimously by the Council on 13 April 2000 and which entered into force on 1 July 2000 (OJ [2000] L 122/43). On 26 January 2000, the CFI submitted a proposal for reform of its own Rules of Procedure, co-ordinating its action with the Court which issued, on 4 July 2000, a new draft proposing further amendments to its own Rules of Procedure. Both proposals were unanimously approved by the Council on the 16 November 2000 and entered into force on 1 February 2001 (OJ [2000] L 322/1). For a codified version of the new Rules of Procedure of the ECJ, see OJ [2000] C 34/1.

¹⁰ See Rasmussen 'Remedying the Crumbling EC Judicial System' (2000) 37 CMLRev 1071.

system, while a clear consensus on the nature and extent of European integration does not at present exist among the participants in the institutional reform process. It is submitted that one should welcome the 'wind of change' brought by the 2000 'Big' and 'Small' reforms, in that they pave the way for more substantial changes to come. A pragmatic and modest approach may turn out to be more efficient in the long run than 'radical grand designs'.¹¹ Judicial reform, like Treaty reform, should be seen as a step-by-step process, in which outcomes are shaped to a great extent by the discursive structures on which and within which the many actors of that process interact¹² and by the capacity for adaptation of the organisational structures of the Community judicial system.

In order to understand judicial reform in the EU, it is thus necessary to examine the influence of the discursive community which shapes that process. In that respect, the role of academics must be emphasised, as they have, over the last decade, multiplied calls for changes and provided a pool of ideas for the EU new judicial organisation.¹³ The members of the Community courts also have had an important, and according to some,¹⁴ excessive influence. They participated to the debate on judicial reform not only as individuals, sharing their personal experience and submitting their views, but also as members of the judicial institution, by drafting reform proposals.¹⁵ The EU political institutions (e.g. the European Parliament and the EC Commission) have also been considerably involved in the

¹¹ Meij 2000 *op.cit* footnote 1, at 1041

¹² With regard to the Treaty reform process, see Christiansen and Jørgensen 'The Amsterdam Process: A Structurationist Perspective on EU Treaty Reform' (1999) 3 *European integration online Papers*, Paper No1, available at <http://www.eiop.or.at/eiop/> and Christiansen, Jørgensen and Wiener 'The Social Construction of Europe' (1999) 6:4 *Journal of European Public Policy* 528. These social perspectives on the reform process are inspired by Giddens' structuration theory. See Giddens, *The Constitution of Society: Outline of the Theory of Structuration*, Cambridge: Polity Press, 1984).

¹³ See *inter alia*, Arnall 'Judicial Architecture or Judicial Folly? The Challenges facing the European Union' (1999) 24 *ELRev.* 516; Arnall 'The European Union and its Court of Justice', New-York: Oxford University Press, 1999; Da Cruz Vilaça 'Editorial: la nouvelle architecture judiciaire européenne et la conférence intergouvernementale' (1996) 32 *CDE* 2; De la Mare 'Article 177 EC in Social and Political Context: Perspectives on the Key Procedure for EC Legal Integration' in Craig and De Búrca (Eds) *The Evolution of EC Law*, Oxford: Oxford University Press, 1999, at 215; Grévisse 'A propos de quelques institutions' (1998) 422 *Revue du Marché Commun et de l'Union Européenne* at 529; Harlow 'Towards a theory of Access for the European Court of Justice' (1992) 12 *YEL* 213; Jacqué 'L'avenir de l'architecture juridictionnelle de l'Union' (1999) 35 *RTDEur.* 443; Jacqué and Weiler 'On Road to European Union- A New judicial Architecture- An Agenda for the Intergovernmental Conference' (1990) 27 *CMLRev.* 185; Koopmans 'The Future of the Court of Justice of the European Communities' (1991) 11 *YEL* 15; Meij (2000) *op.cit.* footnote 1; Neuwahl 'Article 173 paragraph 4 EC - Past, Present and possible Future' (1996) 21 *ELRev.* 17; O'Keefe 'Is the Spirit of Article 177 under Attack? Preliminary References and Admissibility' (1998) 23 *ELRev.* 509, Rasmussen *On Law and Policy in the European Court of Justice: A Comparative Study in judicial Policy Making*, Boston, Lancaster: Dordrecht, M/Nijhoff, 1986; Rasmussen *European Court of Justice*, Copenhagen: Gadjura Publishers, 1998; Rasmussen (2000) *op.cit.* footnote 10; Scorey 'A New Model for the Communities' Judicial Architecture in the New Union', (1996) 21 *ELRev.* 224; Strasser 'The Development of a Strategy of Docket-Control for the European Court of Justice & the Question of Preliminary References' (1995) 3 *Jean Monnet Working Papers* (URL: <http://www.law.harvard.edu/programs/JeanMonnet/papers/95/95503ind.html>) and Van der Senden (Ed) *La réforme du système juridictionnel communautaire*, Bruxelles: Etudes Européennes, Université de Bruxelles, 1994.

¹⁴ Rasmussen 2000, *op.cit.* footnote 10.

¹⁵ The Court of Justice, *The Report by the Court of Justice on Certain Aspects of the Application of the Treaty on the European Union* (Luxembourg, May 1995); The Court of Justice and the CFI, *The Future of the judicial System of the European Union (Proposals and Reflections)* (Luxembourg, 10 May 1999); and The Court of Justice and the CFI *Contribution of the Court and the CFI to the Intergovernmental Conference* (Luxembourg, March 2000); The Court of Justice, *The EC Court of Justice and the Institutional Reform of the European Union* (Luxembourg, April 2000). Documents available on the Courts' website (URL: <http://www.curia.eu.int>).

discussions,¹⁶ as have some interested bodies, such as the Council of the Bars and Law Societies of the European Union (hereinafter the CCBE).¹⁷ However, the ultimate decision-makers are the governments of the Member States, and as such, their submissions require some attention too.¹⁸ Some Member States (*e.g.* France and Greece) have actively contributed to the judicial reform process, making detailed and public proposals on the reform of the Community courts.¹⁹

The aim of this article is to present and analyse the institutional and procedural changes brought to the EC judicial system in 2000, in particular the granting of a greater organisational autonomy and flexibility to the Community judiciary, the modification of the EU judicial architecture and the increased flexibility, efficiency and transparency of the Courts' procedures. To be true, such matters are far from being the most entertaining in the life of legal academics and other legal specialists. However, institutional and procedural structures have a great influence on outcomes. It is through them that substantive issues are channelled. As such, they are worth some consideration. Contrary to the existing literature on the topic,²⁰ this article deals not only with amendments of a constitutional nature, but also with smaller scale changes which have a direct and immediate impact on the daily work of the Community Courts. All these developments will be assessed in the light of the positions of the various participants to the reform process.

Greater Organisational Autonomy and Flexibility for the Community Judiciary

¹⁶ Their contributions can be found on the Presidency for the 2000 IGC website (URL: http://europa.eu.int/igc2000/index_fr.htm). The Commission played a very active part in the reform process by setting up a Reflection Group, composed mostly of former members of the Court and presided by former judge O. Due, to make proposals for reform. The work of this group resulted in a report entitled *The Report by the Working Party on the Future of the European Communities' Court System*, published in January 2000 and known as the 'Due Report'. See also the 2000 Additional Commission Contribution to the IGC. See also the *Additional Commission Contribution to the Intergovernmental Conference on Institutional Reform: Reform of the Community Courts* (1 March 2000, COM (2000) 109 final) and the European Parliament's various proposals (*Report on the European Parliament proposals for the IGC* (27 March 2000, FINAL A-50086/2000, PE 232.748/fin./Part 1).

¹⁷ See the *Contribution from the CCBE for the Intergovernmental Conference* 18 May 2000, CONF/VAR 3966/00).

¹⁸ For individual positions of the various Member States, see the 2000 IGC website (URL: http://europa.eu.int/igc2000/index_fr.htm). For overviews of the various positions, see Presidency Notes entitled *Interim Report on Amendments to be made to the Treaties regarding the Court of Justice and the Court of First instance* (31 March 2000, CONF 4729/00), *IGC 2000: Other amendments to be made to the Treaty with regard to the institutions* (19 May 2000, CONF 4743/00) and the *Progress report on the Intergovernmental Conference on institutional reform* (3 November 2000, CONF 4790/00).

¹⁹ See the IGC 2000 *Contribution from the French delegation on reform of the judicial system of the EU: Memorandum on reform of the judicial system of the EU* (27 March 2000, CONF/4726/00) and the IGC 2000 *Greek Memorandum on the Reform of the judicial system of the EU* (February 2000, CONF/4730/00), available on IGC 2000 website (http://europa.eu.int/igc2000/index_fr.htm). Surprisingly, the UK delegation made no detailed submissions with regard to the EU judicial system. See *IGC Reform for Enlargement - The British Approach to the European Union Intergovernmental Conference 2000*, Feb 2000, Cm 4595, available at www.files.fco.gov.uk/eudi/igc.pdf. This appears strange as in the previous IGC (1996-1997 IGC, leading to the Treaty of Amsterdam), the UK had put forward various significant amendments to the Court's jurisdiction. This may demonstrate a pacification of the 'war' between the ECJ and the UK government that seemed to take place in the mid-1990s. See *Memorandum by the United Kingdom on the European Court of Justice* (1996, London), CONF/3883/96, 25 July 1996.

²⁰ See Johnston (2001) *op.cit* footnote n 8; Yataganas "The Treaty of Nice: The Sharing of Power and the Institutional Balance in the European Union - A Continental Perspective" *Harvard Jean Monnet Working Paper* 01/01.

The EU Courts' system will enjoy from now on a greater organisational autonomy and an increased flexibility, thanks to modifications made to the various procedures for amending the rules which regulate judicial decision-making at the Community level (*i.e.* the Statute and the Rules of Procedure) and to the reorganisation of these provisions, which made such evolution acceptable for the negotiating Member States.

A New Hierarchy of Norms for the Judicial System

The Treaty of Nice, the Protocol on the Statute and the new Rules of Procedures introduce a new hierarchical organisation among the norms regulating the EU judicial system. Such a development had been suggested by various participants to the reform process.²¹ As a result of this reorganisation, the fundamental principles dealing with the Community judiciary are now contained in the Treaty (*i.e.* provisions regulating the composition of the Court, powers and jurisdictions of the Courts, judicial procedures and the general judicial architecture), while the Statute comprises the basic organisational and procedural rules, and the Rules of Procedure deals merely with internal procedures.

Amendment Procedures: Towards a Better Capacity of Adaptation

The requirement of unanimous decision within the Council for the approval of the Court and the CFI's Rules of Procedure is dropped and replaced by the less constraining rule of qualified majority (new Article 223 (6) and Article 224 (5) EC). This amendment, while not going as far as the Court and some scholars had wished,²² nevertheless grants a greater autonomy to the European judiciary, to the extent that it makes it easier for the Courts to obtain approval on their proposals for amendment and therefore enables more frequent changes of procedural rules at the initiative of the European judiciary. This alteration was acceptable for the Member States, since they have ensured that they keep control over the basic rules and principles of the EU judicial system which from now on will be contained in the Treaty and the Statute.

Some flexibility is also injected in the procedure for amending the Statute. Indeed, the Statute (except Title I on Judges and Advocates General) can be now amended by the Council acting unanimously, at the initiative of either the Court of Justice or the Commission (new Article 245 EC), and after consultation of the European Parliament and the organ which did not initiate it (*i.e.* the Court or the Commission). Previously, only Titles III (Procedures) and IV (CFI) could be amended by the Council. The other provisions could be modified only through the heavy and cumbersome Treaty reform procedure. More frequent recourses to revisions of the Statute will now be possible, which should improve the quick adaptation of the procedural framework of the Community judicial process to new developments, thereby avoiding some damaging delayed-reactions.

²¹ See the 2000 CCBE Contribution, *op.cit* footnote n 17, point 11; *Contribution from the Dutch Government: An agenda for internal reforms in the European Union*, 6 March 2000, CONFER 4720/00, point 13; and *2000 IGC: Italy's Position*, 3 March 2000, CONFER 4717/00, at 5. The CCBE made a detailed proposal regarding the reorganisation of these rules. The CCBE suggested to organise them in four categories: the Treaty provisions (to be amended by Treaty Reform Procedure), the Basic Act (to be amended by unanimous Council), the Rules of Procedures (to be amended by the Council at the qualified majority) and the Internal Rules (to be adopted and amended by the ECJ itself).

²² The Court, supported by some academics (e.g. Arnulf (1999a), *op.cit.*, footnote n 13) would have preferred to be able to adopt or modify its Rules of procedure independently from the Council, like it is the case for the European Court of Human Rights. This was not acceptable for the negotiators of the Treaty. See *The EC Court of Justice and the Institutional Reform of the European Union*, *op.cit.* footnote n 15; the Presidency Interim Report, *op.cit.* footnote n 18, point 3.

Yet the procedure for amending the Statute remains constraining, because of the requirement of unanimity within the Council. It enables Member States to keep control over the basic rules contained in that document and makes it possible for only one of them to block amendments. This reorganisation of the EC norms dealing with the EU judiciary could nevertheless set a significant precedent with regard to the hierarchy of norms and legal change within the EU as a whole. Indeed, one could suggest that this hierarchical reorganisation of norms combined with more or less constraining procedures for amendments could be adopted in relation to the Treaty reform process. According to such system, only the core principles would require the convening of an IGC, while other provisions could be amended through 'lighter' methods.²³

Member States' Control over the Court's Composition

The new Article 221 (1) EC endows legal force to what was until now only a political convention. Indeed, it incorporates into the Treaty the principle that the Court should consist of one judge per Member States. Since many suggestions had been made to alter this system in order to prevent the Court from becoming a 'deliberative assembly',²⁴ the codification of this 'One State - One Judge' principle may appear surprising. It should however be interpreted as a way to put an end to the on-going debate on that issue, and to avoid the need for Treaty amendment each time a new Member State accede to the EU, in a context where the need for representation of all the legal systems in the Court is widely acknowledged. This is not to say that the judges are representing their Member State of origin in the Court, but it stresses the need for the representation of every legal system of the EU in its judiciary. It appears indeed from national positions in the IGC that this principle of national representation is considered as a fundamental element of the system,²⁵ for 'each Member State should and can contribute equally to the shaping of the Community legal system'.²⁶ The EC itself seems to agree on that point.²⁷

These developments testify that concerns regarding the unmanageable size of the Court have been pacified by the creation of the Grand Chamber and the limitation of the size and use of the plenary session.²⁸ It remains that, while the decision-making capacity of the judicial institution is preserved, the increased use of chambers may constitute a threat to the unity of interpretation and application of EC law. Mechanisms should be devised so as to improve communication and co-ordination within the Community Court itself, in order to guarantee case law consistency. As to the growing number of judges and the diversification of their background, it may affect the '*esprit de corps*' that has prevailed until now, and which is believed to have contributed to the strong stance taken by the Court on many issues. This could lead to Court to a greater judicial self-restraint in the future.

The pros and cons of the Court's current membership system had to be weighed, and it seems that, in the eyes of the negotiators, the political arguments of pluralist representation won against the legal concerns of consistency, coherence and judicial capacity. An alternative -

²³ This idea has been put forward by Shaw, during an UACES conference entitled 'Nice and After: Enlargement and Reform of the European Union, 1-2 March 2001, (London).

²⁴ See 1995 ECJ Report, *op.cit.* footnote n 15, point 16.

²⁵ See 2000 Presidency Interim Report, *op.cit.* footnote n 18, point 15; 2000 CCBE Contribution, *op.cit.* footnote 17, point 45.

²⁶ See 2000 Greek Memorandum, *op.cit.* footnote n 19, at 2.

²⁷ See 1999 Report 'The Future of...', *op.cit.* footnote n 9.

²⁸ See below.

more political - explanation would be that the Member States wanted to maintain a tight control over the Court by keeping for themselves the possibility of future 'court-packing' (i.e. political appointment of the judges), should the Court become too 'reckless' in their eyes. This vision is reinforced by the fact that the Member States refused to modify the procedure for appointment of the judges, although many scholars and some EU institutions had called for a dilution of the governments' control over the process and for a greater involvement of the Court itself, or of other bodies, such as the European Parliament. Besides, it has been reported that the Member States are engaged in 'petty wrangling over which Member States will get a share in the "extra representative" in the CFI,'²⁹ thereby testifying of the persistence of the political perception of the representative role of the judges among governments' negotiators.

The Foundations of the New Judicial Architecture of the EU

The architecture of the EC judicial system has been substantially modified by the new Treaty of Nice and the attached Protocol on the Statute, in particular through the redefinition of the respective jurisdictions of the CFI and the Court, the possibility of creating specialised judicial panels, the establishment of a one, two or three-tiered judicial system and the setting-up of a review procedure.

The Redefinition of the Court and the CFI's Jurisdictions: The CFI's General Jurisdiction and the Court's *Domaine Réservé*

With the Treaty of Nice, the CFI reaches full and independent judicial status, while until then, it was nothing more than a dependant entity, 'attached' to the ECJ (ex-Article 225 EC). These 'autonomisation' and 'up-grading' of the CFI are demonstrated by new Article 220 EC which provides that the CFI is, 'within its jurisdiction,' entrusted with ensuring that the interpretation and application of the law is observed. The transfer of interpretative jurisdiction to the CFI had been suggested by the Reflection Group, although apparently without much enthusiasm. It had nevertheless been incorporated to the ECJ and CFI's Additional Proposal for the IGC and ended up gathering a wide consensus at the table of negotiations.³⁰ This testifies of the greater confidence of Member States and other parties towards an institution which has demonstrated its ability to absorb a great share of the Community case load while maintaining high standards of judicial decision-making and a great degree of consistency of jurisprudence at EC level. However, it was made clear that this transfer had to be combined with supervisory mechanisms by the ECJ.

Until Nice, the functions of the CFI were circumscribed into those of a first instance court with limited jurisdiction, only dealing with the application of the law of the Communities in cases considered as relatively minor. It had no general first resort jurisdiction in direct actions, and had no competence with regard to preliminary rulings (Article 234 EC),³¹ thereby being deprived of the normative opportunities attached to the function of interpretation. However, the difficulty to distinguish between the function of application and interpretation had

²⁹ Johnston 2001, *op.cit.* footnote n 8.

³⁰ See French Memorandum *op. cit.* footnote n 19, at 9; Greek Memorandum, *op.cit.* footnote n 19, at 4; CCBE Contribution, *op.cit.* footnote n 17, point 25; Commission Contribution, *op.cit.* footnote n 16; at 3).

³¹ Procedure by which national courts may require the ECJ to give a preliminary ruling on issues of interpretation and validity of EC law. It is generally accepted that this procedure has enabled the Court contribute actively to legal integration in Europe, for it gave the Court the opportunity to elaborate the fundamental doctrines (i.e. direct effect, supremacy, pre-emption and the protection fundamental rights) that now regulate the EC legal order and its relationship with national law (i.e. 'constitutionalisation'), and for it was used by individuals to indirectly challenge national legal provisions which were incompatible with EC law.

rendered this 'division of labour' between the two courts rather difficult to justify. In addition, many references which are not particularly interesting with regard to the task of ensuring consistency and unity of the Community case law continued to burden the Court's docket.

It was therefore decided to go one step further in the transfer of competence to the CFI, which has been granted nearly full jurisdiction over the application of the law (see new Article 220 (1) EC) and some competence over the interpretation of the law, as it may now decide on preliminary references in specific and limited cases (Article 225(3) EC). In order to make the system more transparent, so as to identify easily which court will be competent for which type of case, the Conference requested the Court and the Commission to make proposals with regard to the division of powers to be established between the Court and the CFI, in particular concerning direct actions.³² This will not be an easy task, in particular with regard to preliminary references, for important issues dealing with the unity and consistency of EC law cannot always be predetermined on the basis of certain categories of cases. For that reason, safeguard mechanisms have been set up. It is thus possible for the CFI to refer to the ECJ a case which normally falls under its competence, if it considers that decision on that case may 'affect the unity and consistency of Community law'. In addition, review of decisions given on preliminary reference by the CFI could be exceptionally reviewed by the ECJ (see New Article 225(3) EC).³³ In such cases, in order to prevent further damaging delays in proceedings, an emergency procedure should be used.³⁴ It will be for the Statute to determine in which 'specific areas' could preliminary reference jurisdiction be transferred to the CFI. Some have suggested that areas such as EC intellectual property rights (i.e. Community Trademark, future Community Patent) would be particularly suited for transfer to the CFI.

With the Treaty of Nice, the CFI thus becomes the ordinary Community court endowed with a general jurisdiction, which excludes only the ECJ's *domaine réservé*. The ECJ retains indeed exclusive jurisdiction for actions brought by the Commission (or a Member State) against a Member State under the Articles 226-228 EC procedure for infringement and other minor specific procedures,³⁵ as well as a general competence for Article 234 EC preliminary references. In addition, actions brought by institutions of the EC, the European Central Bank and the Member States are for the moment still reserved to the Court, although only by the Statute (new Article 51 Statute). This may be a sign that this could change in the near future.³⁶

³² See Declaration on Article 225 EC to be included in the Final Act of the Conference on Article 225 EC, OJ [2001] C-80/79.

³³ For further details, see below.

³⁴ Declaration to the Final Act of the IGC on Article 225 EC, OJ [2001] C 80/80. On the recent availability of such emergency procedure, see below.

³⁵ These specific procedures are those regarding disputes between Member States relating to the subject matter of the Treaty submitted under a special agreement between the parties (Article 239 EC), actions assimilated to actions for infringement of EC law under Article 88(2) and (3) EC (relating to State's aids), Article 298 clause 2 EC (disruption in the Internal Market functioning) and Article 237d EC (involving the European Investment Bank); petitions for an opinion submitted by the Council, the Commission and the Member States pursuant to Article 300(6) EC; applications for judicial review of decisions taken by the Council in case of excessive public deficit (Article 104 (11) and (12) EC), application for judicial review of the authorisation granted by the Council to Member States intending to institute greater co-operation (Article 11(2), application for judicial review of a Council decision to suspend certain rights of a Member State pursuant to Article 309(2) and (3) EC, application for judicial review of actions establishing the Community budget and referrals to the Court to decide on disputes between Member States or between Member States and the Commission in the field of police and legal co-operation in criminal matters pursuant to Article 35 (7) EU

³⁶ This provision seems to be a temporary concession made to the Member States, which were not yet ready to see 'their' affairs being decided by an 'inferior' court. In support of this assertion, see 2000 French Memorandum *op.cit.* footnote 19, at 7 and 9).

This 'New Deal' between the two courts should enable the Court to concentrate on constitutional decision-making, a task that can not be fulfilled properly when overloaded by technical and time consuming cases that it cannot reject, in the absence of official docket-control devices. It reinforces the Court's function as a federal adjudicator and a supreme constitutional court, for most 'interinstitutional' and 'constitutional' disputes will be heard by the ECJ, while the more ordinary and rather technical cases will be directed towards the CFI.

The Specialised First Instance Jurisdiction of Judicial Panels

The Treaty of Nice introduces provisions which officially enable the Council to set up more such specialised judicial panels. This option had been suggested by the Reflection Group and accepted by the Court which integrated it into its Additional Proposal, having in mind the creation of specialised tribunals for intellectual property and staff cases. The various delegations have been receptive to this idea, but stress the need to strictly define the scope of the powers of these panels.³⁷ The new Article 220 (2) EC thus envisages the creation of judicial panels which may be 'attached' to the CFI in some specialised areas of law and endows the Council with the responsibility for creating these panels, deciding by unanimity, on a proposal from the Commission or at the request of the Court (new Article 225a EC). These panels would hear certain classes of action or proceedings brought in specific areas of law. Their decisions could be appealed before the ECJ and exceptionally further reviewed by the ECJ.³⁸

Until Nice, there was no legal basis for the creation of specialised courts. However, it did not prevent the creation of the Boards of Appeal of the Office for the Harmonisation in the Internal Market (OHIM)³⁹ dealing in first instance with cases involving trade marks and designs, which are located in Alicante,⁴⁰ and which decisions can be appealed before the CFI and further appealed before the ECJ. It could be suggested that were the OHIM Boards of Appeal transformed into such panels, this would contribute to alleviate the ECJ from a substantial amount of cases, as these cases could be filtered under the new three tiers system set up by the new Treaty and Statute.⁴¹ Indeed, under the current system, the amount of litigation created by this new Community competence is threatening to overwhelm the two Community courts' docket and undermine their judicial capacity.^{42]}

By a Declaration No 16 on Article 225a EC,⁴³ the Conference requests that the Council decides as soon as possible on a judicial panel competent to hear disputes between the Community and its servants. The extension of this solution to other specific categories of

³⁷ See 2000 Interim Report, *op.cit.* footnote n 18, point 6.

³⁸ See below.

³⁹ By a Regulation No 40/94 of 20 December 1993 on the Community Trademark (OJ [1994] L 11/1) the Council set up a system to deal with this specific category of cases. Decisions of the OHIM registering or refusing to register a Community trade mark may be first subject to an internal opposition procedure (Opposition Division) and then appealed to a Board of Appeal of the OHIM.

⁴⁰ In that respect, it is worth noting that, were the OHIM Appeal Boards to be transformed into judicial panels, Luxembourg will not claim the seat of these judicial organs which could remain in Spain (Declaration by Luxembourg of which the Conference took note, OJ [2001] C 80/87).

⁴¹ See below.

⁴² The number of request for registered trade marks amounted to around 30 000 a year. During 1998, a total of 231 appeals had been lodged before the Board of Appeals of the OHIM. Around 200 to 400 decisions a year are expected to go to the CFI, and considering that around 25% of the decisions of the CFI are appealed before the ECJ, one could expect that the Court would receive between 50 and 100 Community trademark cases a year (See *Proposal submitted by the Court of Justice and the Court of First Instance with regard to the new intellectual property cases*, available at <http://www.curia.eu.int>)

⁴³ OJ [2001] C 80/80.

disputes (e.g. intellectual property cases, conflicts of law cases, etc.) will have to be thoroughly discussed, for if specialised jurisdictions were to multiply, the consistency of the Community case law, seen by many as a fundamental principle, could be undermined.⁴⁴

A New Jurisdiction for the Community Courts?

The Treaty of Nice tackles the issue of who will be the judicial bodies competent to deal with disputes between parties with regard to the Community trade mark. It seems that the new Article 229a EC grants the Council's the power to adopt, in Community industrial property case law, provisions conferring jurisdiction on the Community courts (ECJ, CFI and judicial panels)⁴⁵ to hear disputes between private parties concerning the Community trademark.

The One, Two and Three- Tiers Judicial Architecture

The new Article 225 EC establishes a judicial system with one, two or three- tiers, depending on the subject-matter. For some specific categories of cases (see above), specialised judicial panels will be the first instance courts, with a right of appeal to the CFI on points of law and an exceptional right of review by the Court. With regard to such situations, it appears that the CFI does not deserve its name of Court of 'First Instance' anymore, and that a change of denomination should be envisaged, so as to avoid dangerous confusion for the layman. However, it is true that in most cases,⁴⁶ the CFI will be the first instance court, with a limited right of appeal to the Court (in direct actions) or a possibility of reference to or review by the Court (in preliminary references). Finally, in its *domaine réservé*, the Court acts as first and last instance court. The CFI has therefore gained acceptance as the ordinary Community court,⁴⁷ while specialised first instance courts may be set up to deal with specific areas of the law and the Court concentrates on its constitutional and federal jurisdictions. This new architecture reflects the new maturity of the Community legal order.

New Exceptional Review Procedures

The old system of appeal is maintained where the CFI acts as a first instance court. In such cases, decisions by the CFI can be appealed to the Court on points of law only, and under the conditions defined in the Statute. Changes have been made with regard to the possibility of appeal against decisions of the CFI, in cases where the CFI would have already acted as an appeal court on decisions of specialised jurisdictions and in cases where the CFI has jurisdiction to deal with preliminary references.

The Treaty of Nice provides that decisions taken by the CFI on appeal of decisions of judicial panels (new Article 225(2) EC) and on questions referred for a preliminary ruling (new Article 225(3) EC) may be 'exceptionally' subject to review where there is a 'serious risk of

⁴⁴ The strict imperatives of consistency and uniformity have however been recently challenged by authors adopting pluralistic approaches to European Community law. See for example Harlow 'Voices of Differences in a Polyphonic Community. The Case for Legal Diversity within the European Union' *Jean Monnet Working Paper* No3, Harvard University, 2000; Rasmussen 2000 *op.cit* footnote n 10, at 1107.

⁴⁵ Declaration No 17 to the Final Act of the IGC on Article 229a EC (OJ [2001] C 80/80), which provides that this 'should not prejudge of the system to be set up to deal with the Community industrial property case law'.

⁴⁶ Namely Articles 230, 232, 235, 236 and 238 EC procedures.

⁴⁷ Many academics were in favour of such developments, and so were the Reflection Group and various delegations of the Member States, the Commission and the EP.

the unity or consistency of Community law being affected'.⁴⁸ The mention in Article 225(2) and 225(3) EC of the adverb 'exceptionally' (absent from Article 225(1) EC), emphasises the exceptional nature of the review procedure, which needs to be distinguished from the appeal system.

The organisation of the filtering of reviews had been subject to many debates during the reform process. While generally accepted in common law and Nordic law countries, the idea of a filter of litigation does not fit well within the civil law traditional conceptions of the judicial system. The solution adopted appears nevertheless satisfactory, to the extent that it creates a necessary internal system of docket-control (e.g. between the CFI and the Court), while maintaining some guarantees by setting-up a double assessment system.

The functioning of the review procedure is detailed in the new Article 62 Statute. The initiative of the procedure belongs to the First Advocate General. If he considers that 'there is a serious risk of the unity or consistency of EC law being affected', he may, within a month, propose to the Court that it reviews the decision of the CFI. Then, the Court must decide within a month whether to review or not. While it leaves a great discretion to the First Advocate General and the Court, this procedure should guarantee the right to a fair trial as well as the unity of application and interpretation of EC law, as one would expect the Court to follow the Advocate General views, and it cannot be disputed that he or she is the most competent person with regard to this task, due to the role of Advocates General in ensuring the consistency and development of case law.⁴⁹ The main drawback of the review procedure consists in a lengthening of the proceedings, for the national court may have to wait two months in order to know whether it should apply the preliminary rulings given by the CFI.

In that respect, a Declaration No13 on Article 225(2) and (3) EC states that the Statute should be amended so as to define more precisely the modalities of the review procedure, in particular the role and rights of the parties in proceedings before the Court, the effect of the review procedure on the enforceability of the CFI decision and the effect of the Court's decision on the dispute between the parties.⁵⁰ The Conference also specifies that in case of review by the Court of a CFI decision on a preliminary reference, the emergency procedure should be used before the Court, in order to avoid further delaying of proceedings which are meanwhile pending before the national court.⁵¹ Another declaration on those paragraphs request that an assessment system be set up for the review procedure,⁵² which confirms that judicial reform is taking place within a process of experimentation, assessment and adjustment, intended at designing the most appropriate tools for the Community judicial system.

The Reorganisation of the Formations of Judgment: Safeguarding the Judicial Decision-Making Capacity of the Community Courts

⁴⁸ This solution is inspired by the idea of an appeal 'in the interest of the law' ('*dans l'intérêt de la loi*') which had been brought forward by France (see 2000 French Memorandum *op.cit.* footnote n 19) and by the Commission (2000 Commission Contribution *op.cit.* footnote n 16).

⁴⁹ See Tridimas 'The Role of the Advocate General in the Development of Community Law: Some Reflections' (1997) 34 *Common Market Law Review* 1349; Jacobs 'Judicial Process in the European Court and the Role of the Advocate General' *Dominik Lasok Lecture in European Community Law* (2 Feb. 1990) and Dashwood 'The Advocate General in the Court of Justice of the European Communities' (1982) 2 *Legal Studies* 202).

⁵⁰ OJ [2001] C 80/79.

⁵¹ Declaration No15 (OJ [2001] C 80/80).

⁵² Declaration No14 (OJ [2001] C 80/79).

As mentioned earlier, considerations of pluralism, equal representation and perhaps more political motivations have led the Treaty makers to maintain the present system of appointment of the Court's judges. With the enlargements to come, the Court could have run the risk to become a 'deliberative assembly' incapable of reaching consistent and coherent judgments on a consensual basis. The reorganisation of the formations of judgment has been designed so as to avoid the Court's losing its judicial decision-making capacity.

The Article 16 of the new Statute reverses the traditional situation whereby the plenary was the rule and the chamber the exception and explicitly calls for a greater use of chambers (three or five judges). It also creates a new formation of judgment, called 'Grand Chamber', which is composed of eleven judges and presided by the President of the Court. The use of the Grand Chamber, a more 'linguistically correct' version of the 'small *plenum*', appears as the exception and not the rule, in that it is required to sit only if a Member State or a Community institution party to the proceedings requires it. It may nevertheless sit in important cases, if the Court believes it is appropriate. The Court is required to sit in proper plenary sessions only in cases brought pursuant to Article 195(2), 213, 216 or 247(7) EC,⁵³ but the *plenum* may also sit in cases of exceptional importance. Article 17 of the new Statute determines the minimum number of members needed to be present for a decision to be valid, i.e. three for a small chamber, nine for a Grand Chamber and eleven for the full Court.⁵⁴ Like the Court, the CFI should sit in chambers of three or five judges, and exceptionally in Grand Chamber. The composition of chambers and the assignment of cases would be laid down in the CFI Rules of Procedures (Article 50 of the New Statute).

These amendments codify what was already a reality in the Court's practice. The small chambers (in particular the five judges' chambers) thus becomes the ordinary formations of judgment. As to the creation of the Grand Chamber, it is submitted that it paves the way for the constitution of two 'small plenums' after the future enlargements (i.e. when the EU will consist of 25 Member States), provided that the issue of who would preside the two 'plenums' (currently the President of the Court according to the Statute) is addressed. This could be done by a simple modification of the Statute. Examples exist in the national legal systems of such arrangements (see, for example, the First and Second Senate of the German *Bundesgerichtshof*). The Working Party had suggested that, under such a system, the continuity and consistency of the case law could be preserved by having a 'permanent core' of members.⁵⁵

A Greater Procedural Flexibility

The 2000 reforms, and the new Rules of Procedure in particular, have injected a much greater procedural flexibility and have increased the control of the members of the Courts (in particular the Advocate General) over case management, making it possible to adapt procedures to the circumstances of the case, thereby optimising the judicial decision-making capacity of the Courts.

⁵³ Article 195(2) EC deals with the dismissal of the Ombudsman, Articles 213 EC and 216 EC with compulsory retirement or deprivation of the rights of members of the Commission and Article 247(7) EC with the deprivation of office or of the right to a pension and other benefits of members of the Court of Auditors.

⁵⁴ The greater use of chamber and the constitution within the Court of smaller *plenums* attracted the consensus of all the delegations, probably because it made it possible to preserve the system of one judge per Member States.

⁵⁵ See the 'Due Report', *op.cit.* footnote n 16.

Focusing the Advocate General's Activity on Legal Developments: For a Better Allocation of Human Resources and Time Savings

Once the new Treaty signed at Nice is ratified, the Court will be able to omit the Opinion of the Advocate General, 'where it considers that the case raises no new points of law' (Article 222 EC and Article 20 of the new Statute, amending former Article 18 of the EC Statute). Advocates General, relieved from insignificant affairs, will be able to concentrate their activity on the development of the Community case law. In addition, the length of proceedings should be significantly reduced in 'clear' cases. One may wonder how often the Court will use this option. It must be noted that some delegations insisted on this possibility being used only in limited cases,⁵⁶ thereby positioning themselves against the suggestion made by the Reflection Group that the Advocate General should deliver his Opinion only in 'important' cases.⁵⁷ This is a welcome cautious attitude, which should prevent any attempt towards a pure and simple elimination of the function of the Advocate General, in particular when one looks at the incomparable contribution made by the Advocates General to the building of Community law. Besides, one cannot neglect the informative role of the Opinion, which help clarifying the many issues of facts and law at stake in the case at hand.

The CFI may also now be assisted by Advocates General (new Article 224(1) EC). Until Nice, opinions could only be delivered on an *ad hoc* basis by judges of the CFI acting as Advocates General. This system did not work satisfactorily and the Reflection Group had suggested that it should be modified, so as to institute 'permanent' Advocates General. The new provision makes this institution possible, by modification of the Statute. It has not been realised yet, probably due to the fact that there is no urgency, since the new interpretative functions of the CFI have not been defined. One can expect that once the jurisdiction of the CFI regarding preliminary reference would have been determined, the establishment of 'proper' Advocates General will follow, because they play an essential part in the development of case law within the framework of Article 234 EC procedure.

The Omission of 'Unnecessary' Oral Hearings and Second Pleadings: More Time Saving Measures

Too often, the oral procedure consists merely in a repetition of written submissions. The Court's new Rules of Procedure address that problem, enabling the Court to dispense more easily with the oral hearing.⁵⁸ The former Article 44a ECJ RP enabled the Court to omit the oral hearing, but only 'with the express consent of the parties', while the new Article 44a ECJ RP allows the Court to dispose of the oral procedure, on the ground that it is simply unnecessary. It provides that the Court, 'acting on a report of the *Juge-Rapporteur* and after hearing the Advocate General, and if none of the parties has submitted an application setting out the reasons for which he wishes to be heard', may decide not to hold the oral hearing. To some extent, this amendment codifies the practice of the Court to systematically ask the parties whether they would agree to an omission of the oral phase in the case the Court

⁵⁶ French Memorandum *op.cit.* footnote n 19, at 16; Greek Memorandum *op.cit.* footnote n 19, at 3).

⁵⁷ Due Report, *op.cit.* footnote n 16.

⁵⁸ This solution, suggested by the Reflection Group (see Due Report *op.cit.* footnote n 16, at 40) was strongly supported by some member States delegations (see 2000 French Memorandum *op.cit.* footnote n 19.). This does not come as a surprise since in the French legal system, unlike in the common law one, the emphasis is placed on the written phase. The omission of the oral stage would therefore not be considered as a significant loss for French lawyers. It is however surprising that it did not encounter more resistance from delegations of Member States where oral pleadings are more important, as well as from the parties and their lawyers (e.g. the CCBE), to the extent that it limits their right to a contradictory debate.

decides to use the possibility offered by Article 44(1) ECJ RP. In that way, hearings which consist only of repetitions of written arguments should be eliminated and oral pleadings should focus on important issues that have not been sufficiently addressed in the written phase. New Article 104(4) ECJ RP provides a similar provision regarding the preliminary reference procedure. Yet this option should be used parsimoniously in the context of Article 234 EC procedure, for it may encroach on parties' rights, to the extent that the oral hearing is the only 'touch' of *débat contradictoire* present in that procedure.⁵⁹

A similar type of measures has been adopted regarding proceedings in the CFI. As the second exchange of pleadings often consists only in repetition of arguments already presented in the first exchange, Article 47(1) CFI RP has been amended so as to enable the CFI to dispense with the second exchange of pleadings if, after hearing the Advocate General, it decides that it is not needed because the case file contains the necessary information.⁶⁰ In order to preserve the contradictory nature of the procedure and the right to a fair hearing of the parties, these may be authorised to supplement the documents if they present 'a reasoned request' to that effect.⁶¹ This reduction of the written phase is compensated by the possibility to engage in more elaborated pleadings during the oral procedure. These changes should bring about a significant reduction of the length of proceedings and an improvement of the quality of participants' contributions.

Fast-Track Procedures: Prioritising Cases

New 'fast-tracks' or emergency procedure have been created which enable the Court to give priority to the treatment of urgent cases, by dealing with them in an expedited manner.

The new Article 104(a) ECJ RP introduces an 'accelerated procedure' for preliminary references. According to this provision, the President of the ECJ, upon request of the national court, may 'exceptionally' decide, after hearing the *Juge-Rapporteur* and the Advocate General, to apply an accelerated procedure, where there is a matter of 'exceptional urgency'. He may immediately fix the date for the hearing, which should be notified to any possible participants, who may lodge statements of cases or observations within a determined period of no less than 15 days. The President has the right to require that these observations be restricted to essential points.

In the last set of amendments, this new 'fast-track' system was completed by the creation of an 'expedited procedure' for direct actions. The new Article 62a of the Court's Rules of Procedure provides that on application by the applicant or the defendant, the President may exceptionally decide on the basis of a proposal by the *Juge-Rapporteur* and after hearing the other party and the Advocate General, that a case is to be determined pursuant to a derogatory expedited procedure, where the 'particular urgency'⁶² of the case requires the Court to give its ruling with the minimum of delay. This expedited procedure puts the emphasis on the oral stage, which becomes mandatory, the written part being limited to a single exchange of

⁵⁹ Rasmussen (2000) *op.cit.* footnote n 10, p 1096.

⁶⁰ A similar provision already existed in the ECJ Rules of Procedure (Article 117(1) ECJ RP)

⁶¹ The CFI had not envisaged, in its proposals, this possibility to add written arguments, considering that the right to a fair hearing of the parties would be guaranteed by the oral proceedings. However, since Article 48 RP states the principle that no new plea can be brought during the course of proceedings, the impossibility to bring new written arguments could have undermined the right to a fair hearing.

⁶² One may wonder whether the use of a different terminology ('exceptional urgency' in Article 104(a) ECJ RP and 'particular urgency' in Article 62a ECJ RP) refers to two different assessments of the urgent nature depending on the procedure involved.

pleadings (which may be supplemented by a reply or rejoinder, if the President of the Court considers it necessary).⁶³

The written procedure should state the pleas in law and main arguments, as the framework of the proceedings is determined by the pleas established in the written application (Article 42(2) ECJ RP). However, a party applying for this procedure must submit concise and brief written submissions, for they will have the opportunity to develop their argument and even offer further evidence during the oral hearing.⁶⁴ Interveners may not submit written statements, unless the President considers it necessary, because they can always present their views at the oral hearing. This expedited procedure completely alters the balance between the oral and the written parts of proceedings before the ECJ. Indeed, the written phase had traditionally been more important, for cultural (e.g. French influence) and technical (e.g. languages) reasons. With these fast track procedures, the oral part is called upon to play an increasing role.

While the creation of such fast-track procedures appears as a necessary development,⁶⁵ their use should nevertheless remain exceptional and carefully managed so as not to be abused. Some uncertainties in relation to these procedures need yet to be clarified. It is not clear which criteria the Court should use in order to assess the ‘urgent’ nature of a particular case, which will be given priority over others. On the basis of the wording of the provisions, it seems that the distinction should not be made on the importance of the legal issue at stake but on the emergency of a decision on the matter.⁶⁶ It remains to be confirmed by the Court’s practice. The 2000 ICG seemed to be implied that such emergency procedures could be used for the review of decisions by the CFI on appeal of decisions of judicial panels or on preliminary references.⁶⁷ In any case, these new provisions give greater flexibility to the Court, enabling it to adapt procedures to the circumstances of a case. One should nevertheless keep in mind that they do not reduce the caseload of the Court, but just speeds up the treatment of certain urgent cases.

Simplified Procedure for Unnecessary References: An Embryo of Filtering System

The extension of the use of the simplified procedure for preliminary references realised by the new Article 103(3) ECJ RP indicates the development of a minimal filtering system. Indeed, the Court already had the possibility to use reasoned orders referring to previous case-law for cases where the question was identical to a question already ruled upon by the Court (former Article 104(3) ECJ RP). This provision has been amended to extend the use of such reasoned orders to references ‘where the answer thereto may be clearly deduced from existing case-law’ (see the *acte éclairé* doctrine)⁶⁸ or where ‘the answer to the question admits of no

⁶³ The new Article 76a CFI RP sets up similar derogating procedure before the CFI. In proceedings before the CFI, the parties may supplement their arguments and bring further evidence during the course of the procedure, only if they give reasons for the delay in offering that evidence (new Article 76a (3) CFI RP).

⁶⁴ They must however provide reasons for delays in offering such further evidence (Article 62a (4) ECJ RP)

⁶⁵ Legal authors have called for a system allowing the Court, if not to reject, at least to set aside momentarily less urgent cases in order to give priority to urgent affairs. See for example De la Mare (1999) *op.cit* footnote n 13.

⁶⁶ In its July 2000 amendment proposal, the Court commented on that issue, stating that this procedure should be used only in ‘exceptional circumstances’ and that the ‘urgency of the matter must be particular to the case in question’ and ‘necessitate the delivery of a final decision by the Court with the minimum of delay’ (2000 Amendment Proposal, point 4).

⁶⁷ See above.

⁶⁸ On the *acte éclairé* doctrine, see C- 328-3062 *Da Costa en Schaake NV, Jacob Meijer NV and Hoechst-Holland NV v Nederlandse Belastingadministratie* [1963] ECR 31.

reasonable doubt' (counterpart of the *acte clair* doctrine).⁶⁹ On one hand, the fact that the Court can do so only after having heard possible observations and the Opinion of the Advocate General should prevent the ECJ judges from disposing of cases too hastily, on the grounds that they appear to be *acte clair*. On the other hand, these reasoned orders require a minimum of considerations to be given to the case, which may not amount to saving significant time and resources.

This new provision contributes to the elaboration of a system of docket-control. The Court cannot reject a reference sent by a national court on the ground that it believes that it is *acte clair*, but it can deal with it in a simplified manner. This modification may be double-edged. On one hand, it is possible to assume that national courts would not wish to see 'their' reference treated in such a 'dismissive' manner and would feel incited to interpret Community law themselves, when it appears possible, therefore referring only cases which pose real problems of interpretation. This would fit well within a so-called 'education programme' designed to encourage national judges to fulfil their task as ordinary judges of EC law.⁷⁰ On the other hand, the wording of the provision - 'reasonable doubt' - appears to be modelled on that of the *CILFIT* case.⁷¹ Considering the strict criteria set up in that judgment in order to establish an *acte clair*,⁷² the indirect allusion to that decision by the use of a similar wording may have the effect of encouraging national courts to refer systematically, to the extent they would not feel able to carry out the tasks imposed on them by *CILFIT*, and would be aware that, if the reference was not necessary, the Court could decide it by reasoned order. Another point worth noting is that the new provision ushers in a greater hierarchical relationship between the Court and its national counterparts, which may not be the most appropriate way to encourage national judges towards a greater responsibility in the application and interpretation of Community law.

While this extension of the use of reasoned orders empowers the Court to dispose quickly of references which have little significance in its eyes, the meaning of the expression 'reasonable doubt' needs to be more clearly defined. The Court may decide for example to relax the apparent link between that provision of the Rules and the *CILFIT* precedent. It is possible to predict that the 'responsible' attitude of national courts and the subsequent effect on the workload of the Court and the uniform application of EC law will depend on the practice of the Court in the delivery of such reasoned orders.

Standing before the ECJ to Challenge the Legality of Community Action: The Up-Grading of the European Parliament to the Rank of Privileged Applicants under Article 230 EC Procedure

⁶⁹ On the *acte clair* doctrine, see C- 283/81 *CILFIT v Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR 3415. The revision of that rule of procedure was proposed by the Reflection Group (see 'Due Report' *op.cit.* footnote n 16). It received an explicit support from the French delegation (see 2000 French Memorandum *op.cit.* footnote n 19).

⁷⁰ The Reflection Group had made a proposal which consisted in amending Article 234 EC in a way to encourage national judges to apply themselves EC law. National courts should refer questions to the Court only after having considered the importance of the question for EC law and if there is a reasonable doubt on the solution to be given (see Due Report, *op.cit.* footnote n 16, p 13-15). Rasmussen refers to this double requirement as the 'thinking-twice recommendation' (Rasmussen (2000) *op.cit.* footnote n 10, at 1088).

⁷¹ *CILFIT* case, *op.cit.* footnote n 59, at 3430 paragraph 16.

⁷² *e.g.* the need to compare the different language versions, the need to consider the terminology specific to EC law, the need to place provisions of EC law in their context and to interpret them in the light of the provision of Community as a whole, with regard to the objectives of EC law and to its state of evolution (*ibid.*, para 17, 18, 19 and 20).

A symbolically and politically important modification introduced by the Treaty of Nice is the full accession of the European Parliament to the status of privileged applicants under Article 230 (2) EC procedure for annulment of EC law (alongside with the Council, the Commission and the Member States), while the European Central Bank and the Court of Auditors remain 'semi-privileged' applicants, for they can only bring action for 'for the purpose of protecting their prerogatives'. The Parliament was also granted the power to ask the Court for an opinion on the compatibility with the Treat of an international agreement (new Article 300 (6) EC).

With regard to actions challenging the legality of Community acts, one could regret that the Conference did not tackle the issue of opening the access of individuals to the ECJ *prétoire* in order to challenge the legality of Community acts (under Article 230 EC) and did not relax the standing requirements for private parties (i.e. direct and individual concern) imposed by the Treaty provision, despite calls by many scholars⁷³ to address that issue in order to create a real '*Communauté de droit*' according to the rule of law principle. However, as most of the 2000 Reforms are aimed at dealing with the problems created by an increasing workload, it would have appeared rather strange to open the floodgates to individual litigants seeking to challenge actions by the Community. In that respect, one cannot but notice the irony in granting privileged applicant status to the Parliament. Indeed, one would expect that organ to make full use of its new standing rights, which could lead to an important increase in the number of cases dealing with institutional issues (i.e. cases with a federal dimension) brought by that institution to the Court.

One could be tempted to say the active campaign of the European Parliament to acquire this right, in particular through court actions⁷⁴ and during IGC negotiations⁷⁵ has been more fruitful than those of individuals. However, this assertion should be qualified. Indeed, it appears logical that the Parliament, as co-legislator, should be able to keep an eye on the normative activity of other organs of the Community, while the right to challenge Community action should be carefully circumscribed in order to prevent abuse of the procedure by self-interested individuals.

A More Transparent and Better Informed Judicial Decision-Making Process

Members of the Court are now endowed with a greater capacity of control over the quantity, the quality and the substance of the information available for the judicial decision-making process.

Access to Information and Documents: Transparency v. Confidentiality

Members of the Court are now given a greater responsibility in collecting the information necessary for the judicial decision-making process (new Article 54a ECJ RP), which testifies of a slight evolution towards a more inquisitorial procedure.⁷⁶ The *Juge-Rapporteur* and the Advocate-General can request the parties to submit within a specified period all such information relating to the facts, and all such documents or other particulars, as they may

⁷³ See in particular Neuwahl (1996) *op.cit.* footnote n 13.

⁷⁴ See cases C-302/87 *European Parliament v Council* 'Comitology' [1988] ECR 5615 and C-70/88 *European Parliament v Council* 'Chernobyl' [1990] ECR I-2041.

⁷⁵ 2000 EP Report *op.cit.* footnote n 16, point 18.

⁷⁶ This change, suggested by the Due Report (*op.cit.* footnote n 16), was strongly supported by some delegations (e.g. see 2000 French Memorandum, *op.cit.* footnote n 19).

consider relevant. This information and documents must be communicated to the other parties.

Some rules had to be formulated regarding transparency in judicial proceedings, in particular with regard to the new proceedings dealing with access to administrative documents. The new Article 67(3) CFI RP provides that, where it is necessary to verify the confidentiality of a document that may be relevant to rule on the case, the CFI may exceptionally decide not to communicate it to the parties, and that a document to which access has been denied by a Community institutions in proceedings regarding the validity of such refusal shall not be communicated to other parties. This new provision codifies the case law of the CFI which, in order to protect public or private interest, happened to refuse to display documents and, after having acquainted itself with the document, produced instead a description of its content to the parties.⁷⁷

Mandatory Practice Directions

New Article 125a ECJ RP, building on the existing practice of the Court to issue guidelines for counsel, empowers the Court to issue formal and mandatory practice directions regarding the preparation and conduct of hearings, as well as the lodging of written statements of case or observations.⁷⁸ These amendments should improve the comprehensiveness and relevance of the information available to the Court and to all the participants to proceedings before the ECJ.

Request for Clarification to National Courts

The Court has now the power to engage in an informative dialogue with national judges and can request clarifications from the referring national courts (new Article 104(5) ECJ RP). This amendment should not only prevent preliminary references being declared inadmissible for lack of clarity, contextual information or relevance, cases which have multiplied over the recent years and which threaten the ‘spirit’ of the Article 234 EC procedure.⁷⁹ It should also achieve a greater focus of arguments and pleadings, to the extent that it allows the participants in judicial proceedings to concentrate on the important and relevant issues (provided that the clarifications offered by the national court are made available to the various parties to the proceedings). Unnecessary delays due to imperfect information may be avoided, while the co-operative and participative nature of the preliminary reference procedure is preserved. In that way, the Court should have access to more complete *Brandeis* briefs,⁸⁰ which is a welcome step in the direction of a better informed judicial decision-making process.⁸¹

⁷⁷ Orders in cases C-204/97 *Portugal v Commission*, [2000] nyr and C-155/79 *AM&S Europe Ltd v Commission* [1982] ECR 1575 .

⁷⁸ This amendment was first presented by the Reflection Group (see Due Report *op.cit* footnote n 16, at 17).

⁷⁹ O’Keeffe criticises the recent Court’s case law on the admissibility of preliminary references and emphasised that it threatens the co-operative nature (the ‘spirit’) of the procedure. He suggests to establish an ‘inter-registry dialogue’ between the ECJ and national courts, in order to improve the factual and legal information provided in references. See O’Keeffe (1998) *op.cit.* footnote n 13. The new Article 104(5) RP creates such a dialogue mechanism.

⁸⁰ The expression ‘*Brandeis* brief’ refers to a brief containing economic and sociological information (and sometimes historical experience and expert opinions) often used in constitutional cases in the United-States. They were called after United States Supreme Court’s Justice Louis Brandeis who, when he was a lawyer, made extensive use of such briefs.

⁸¹ De la Mare (1999) *op.cit* footnote n 13.

Cutting Down Time Limits

Various provisions have been introduced which cut down unnecessarily long time limits, the aim of which is to reduce the overall length of proceedings. These amendments may look like cheeseparring economies, but they may lead to significant time-saving when added up.

Shorter Time-Limits for Application for Interventions

It is well known for those who are familiar with the Community courts' activities that interventions may substantially delay judicial proceedings. The new Article 93(1) of the Court's Rules cuts down the prescribed time-limit to make application for intervention in direct actions from three months down to six weeks from the publication of the notice in the *Official Journal*. The new provision however provides a 'catching-up' time limit, which allows interveners who have not submitted an application before the deadline to still be able to present observation at the oral pleading, if it is to take place. Similar rules have been imposed by the CFI Rules of Procedures (Articles 115(1) and 116(2) of the CFI RP). These measures are aimed at encouraging interveners to submit an application as quickly as possible in order not to miss out.

Do these shorter time-limits infringe on interveners' rights and threaten the pluralist and participative nature of the procedure? It is submitted that it does not. One should emphasise that, due to delays resulting from the drafting, translation and publication of the notice in the OJ, a period of five months usually elapses between the application initiating the proceedings and the expiry of the time limit for application for intervention. Potential interveners are indeed aware of a procedure before its official publication and their right of participation is therefore safeguarded in practice. Moreover, the application for intervention does not require much work, since it does not include a statement of reasons and it can be written in the interveners' own language. The problem is that applications for intervention are usually sent at the last minute, even if they are, or could be, ready before.

The new rules should prevent the unnecessary waste of time provoked by inadequate and rigid time regulations, thereby reducing significantly the overall length of proceedings, without encroaching on the contradictory nature of the procedure.

Limitation of Extension on Account of Distance

The use of modern communication means, such as faxes or e-mails, as well as the growing speed of transports which make it possible to communicate documents instantaneously or very rapidly, have rendered obsolete the former rules regarding the extension of deadlines on the account of the physical location of parties. The new Rules of Procedure establish a single ten days period extension on account of distance.⁸² The idea to abolish completely such extensions was considered by the Court but was finally rejected, in order to preserve the rights of parties who may still want to use traditional means.

The Modernisation of Communication Means

⁸² New Article 81(2) of the ECJ RP and 102(2) of CFI RP.

Addressing the European Parliament's concerns,⁸³ amendments to the Rules of Procedures adapt the Court's internal organisation to the availability of faster technical means of communication (i.e. fax and e-mail), with the view to facilitate and speed up the treatment of cases. Pleadings can now officially be submitted by fax⁸⁴ and the Court can also use fax and other means of communications (such as e-mails and e-mail attachments) to service documents to the parties, if the nature of the documents allows it and if the addressee has expressly agreed upon it.⁸⁵ The Courts' staff has stressed the positive impact of these apparently minor changes on their daily work.

Some Concerns regarding the Language Regime

Provisions regulating the use of languages used to be contained in the Rules of Procedure.⁸⁶ The Treaty of Nice moves them up to the Statute,⁸⁷ which testifies of their sensitive nature and may reflect the fear that some Member States may have with regard to the threat posed on some languages. This change of location notwithstanding, the current language arrangements are maintained for the moment, until new ones are included in the Statute. Amendments regarding the language regime of the Court have been envisaged by the participants to the reform process, but it seems that no agreement could be reached at this stage. The matter has therefore been left for further consideration.

It is a fact that the current system imposes a heavy burden on the Court's resources. One third of the procedural time is indeed spent on translation and the Court resources have not been increased so as to cover for its growing translation needs. However, radical solutions to these workload problems created by linguistic pluralism may threaten the right to a fair hearing of parties before the Court. Yet a compromise will have to be found between the right of the parties and the right to access information on one side and the Court's capacity to function properly on the other side, for the current system, already overburdened, will not survive further enlargements. Technical arrangements, such as the translation in all languages of only the important cases, the obligation for institutional actors to provide translations of their pleadings, and so on could nevertheless be considered.

Concluding Remarks: The EC Judicial System after 2000, Appraisal and Perspectives

The significance of the changes brought by the Treaty of Nice, the Protocol on the Statute of the Court and the new Rules of Procedure should not be underestimated, though they are not necessarily evident at first sight. Even though the 2000 reforms may not have gone as far as some had wished or expected, they must be considered as a major step in the history of the Court and one of the greatest achievements of the 2000 IGC. This past year has seen the building of the foundations for the judicial architecture of tomorrow's Union, with the creation of a one-, two- or three- tiers system of jurisdiction, characteristic of a mature legal

⁸³ 2000 EP Report, *op.cit* footnote n 16, point 17.

⁸⁴ New Article 37(6) ECJ RP. The date at which the signed original of a pleading and the schedule of documents are received by fax is deemed to be the date of lodgment for the purpose of compliance with deadlines, provided that the signed original is received by the Court within the next ten days. This provision will have the effect of expanding the current practice to cover strict time-limits and shall apply to the lodgment of all procedural documents, including the submission of written observations in the preliminary reference procedure.

⁸⁵ New Article 79 ECJ RP. The CFI Rules of Procedure contain similar provisions: Article 43(6) CF RP, replacing Article 10(3) of the Instructions to the Registrar of the CFI of 3 March 1994 (OJ [1994] L 78/13), Article 100(2) and Article 44(2) CFI RP.

⁸⁶ Articles 29-31 ECJ RP and Articles 35-37 CFI RP.

⁸⁷ New Article 290 EC and Article 64 of the new Statute.

order. The pluralist nature of the judicial system, necessary in the European context to ensure the balanced development of case law and secure better acceptance of the Court rulings, has been maintained while preserving the Courts' judicial capacity by the establishment of the Grand Chamber. The European judiciary has been awarded a greater autonomy, in particular in relation to the determination of its organisational structures. The efficiency of the judicial process has been enhanced by a better use of modern communication technologies, by an increased control of the Court over case-management, by the use of 'fast-track' or simplified procedures, allowing a better adaptation of procedures to the circumstances of the cases, as well as by more elaborated information mechanisms.

Yet the year 2000 is only the beginning of a reform process on which all EU institutions have embarked, which aims at adapting the European Union to the exigencies of a Greater Europe and to the new directions taken in the path towards European integration. While much is left to be done, what is important is that the process has started. Among the issues that should be tackled in the very near future, one finds the creation by the Council of judicial panels for disputes between the EC and its servants, the organisation of a filtering system for appeals in specific cases⁸⁸ and the definition of the competence of the CFI regarding preliminary references. There should also be further debates on the creation of other specialised panels (e.g. intellectual property and conflicts of law cases). In addition, the issue of access to the Community courts needs to be addressed in particular regarding actions for annulment of EC acts, so as to improve the pluralist nature of the judicial decision-making process.⁸⁹

Finally, a further and deeper reflection needs to be pursued in relation to the preliminary reference system, in order to prevent the procedure from being the victim of its own success and the caseload from becoming unmanageable. Reforms should aim at encouraging national courts to play their role as '*juges de droit commun du droit communautaire*'.

It could be achieved by restricting the national courts' right or obligation to refer. Since three quarters of the preliminary references come from lower courts, it had been suggested to limit those courts which may refer by withdrawing from courts other than last instance ones the right to refer.⁹⁰ The participants to the reform process were not very enthusiastic towards this option, despite the fact that it could be accompanied by a stricter obligation to refer from last resort courts,⁹¹ not the least because it would 'kick out' of the picture some of the greatest

⁸⁸ A proposal has been submitted by the ECJ and the CFI regarding the new intellectual property cases, which needs to be examined by the Council.

⁸⁹ See Harlow (1992) and Neuwahl 1996 *op.cit.* footnote n 13. The CCBE made an interesting proposal redrafting Articles 230(4) EC and 232 EC, which aimed at improving citizens' access to the Community courts (CCBE Contribution, *op.cit.* footnote n 17 points 33 and 42). The French delegation also mentioned the need to tackle this issue (see French Memorandum, *op.cit.* footnote n 19, at 25).

⁹⁰ This system has been introduced for preliminary reference under Article 68 EC (Title IV on Visas, Asylum, Immigration and other policies related to the Free Movement of Persons). While such measure could undermine the right of access to the Court and the integrity of the Community legal order, it must be underlined that it would increase the quality and importance of references (because the matters would have been 'filtered' by the national courts system) as well as substantially decrease the Court's workload. Some authors submit that this could be a valid solution. See Rasmussen (2000) *op.cit.* footnote n 10, at 1093 and Strasser (1995) *op.cit.* footnote n 13, at 15.

⁹¹ The judges position themselves strongly against this idea (see 1995 ECJ Report, *op.cit.* footnote n 15, point 11; 'Due Report', *op.cit.* footnote n 16, at 12). Some national delegations, such as the French ones, show reluctance to the idea of a filtering system for preliminary references (see 2000 French Memorandum, *op.cit.* footnote n 19, at 10), and most of them are strongly opposed to any restriction to the national courts rights to refer (2000 French Memorandum, *op.cit.* footnote n 19, at 19; 2000 Greek Memorandum, *op.cit.* footnote n 19,

contributors to European integration by judicial means, i.e. judges in lower courts. An alternative solution would be to increase national courts' discretion to refer. This would not necessarily require Treaty reform, for it could be done by the Court overruling the *CILFIT* case⁹² and continuing its control on the admissibility of references. It could also be realised formally, by amending Article 234 EC.⁹³

Another idea which is suggested is to grant to higher courts the power to interpret Community law, with a possibility of referral or review by the Court. Alternatively, decentralised judicial panels, located in the Member States, could be created, which would be responsible for the filtering of references, or for deciding in first instance on preliminary references. They would have the possibility to refer any important question of interpretation (e.g. questions rising legal issues of general interest) to the Court, or an appeal in the interest of the law would be allowed before the Court against the decisions of these panels.⁹⁴ In order to save time, other have put forward the idea that national courts sending references should propose their own answers to the questions that they submit.⁹⁵ These measures, while offering the advantage of offloading a significant amount of cases from the Court and saving time, would nevertheless pose problems regarding the uniformity of interpretation of Community law. The value granted to that principle would therefore need to be reconsidered, if such solution were to be envisaged.

The filtering task could also be entrusted to the Court. It has been proposed that a formal filtering system, modelled on the *certiorari* system operating in the United-States' Supreme Court,⁹⁶ should be introduced in the EU judicial system. This type of measures would however alter the nature of the relationship between national courts and the EC, introducing a formal hierarchy between them. This cannot be undertaken lightly, without further thoughts not only regarding the role and nature of Article 234 EC procedure, but also regarding the whole architecture of the EC legal system and the political nature of the EU. A discretionary power to select cases would place the Court in the position of a Supreme Court within a centralised federal structure, an evolution that could be at odds with current centrifugal tendencies in the European process of integration. In that respect, it is worth noting that, at the moment, one observes a widespread reluctance among the participants to the reform process to alter the 'delicate balance' of the preliminary reference procedure.

It is submitted that judicial reform is an evolutionary, rather than revolutionary process. This understanding of the process seems to be shared by its participants. There appears to be a consensus on the fact that the reform is more likely to succeed if it involves step-by-step changes, based on practice and experience, followed by assessment and adjustment phases,

at 4 and 2000 CCBE Contribution, *op.cit.* footnote n 17 point 12). The Commission does not support this idea either (2000 Commission Contribution, *op.cit.* footnote n 16, at 4).

⁹² Rasmussen (2000) *op.cit.* footnote n 10, at 1107-1110.

⁹³ The Reflection Group has proposed to amend Article 234 (3) EC by adding that 'in assessing the appropriateness of submitting the question to the Court, the national court shall take into consideration the importance of the matter for Community law and the existence of a reasonable doubt as to the response to the question.' (Due Report', *op.cit.* footnote n 16, at 15)

⁹⁴ ECJ 1999 Reflection Document, *op.cit.* footnote n 9, point IV.3).

⁹⁵ See Johnston (2001), *op.cit.* footnote n 8, at 521

⁹⁶ The United States Supreme Court gives full consideration to only a small fraction of the cases it has authority to review. Parties seeking the Supreme Court review do so by petitioning the Court to issue a 'writ of *certiorari*'. The decision to grant or to deny *certiorari* is discretionary, but Rule 10 of the Supreme Courts Rules lists some considerations that may lead the Court to grant *certiorari*.

rather than complete U-turns.⁹⁷ The fact that some academics call for radical change⁹⁸ should not surprise anyone, for it is part of the game. It is the role of Academia to bring about new ideas and push for change, as it is the role of politicians to be pragmatic. IGCs are the occasion to select new ideas among the pool created by the discursive process. If a consensus emerges among participants to the reform debates, negotiators have little choice but to follow the trend. Judicial reform is therefore the result of an intensive process of persuasion. There should be no doubt that the ‘revolution’ will take place, but it will do so gradually...when the moment is favourable. In relation to that, the relaxing of the provisions for amending the Rules of Procedure and the Statute should accelerate the process of reorganisation of the EU judicial structures.

To conclude, it is submitted that the ‘left-overs’ should not hide the achievements. In many ways, the 2000 Reforms have not only fulfilled the desires of the Community Courts and of many academics, but have also gone further than expected by the Judiciary.⁹⁹ More importantly, it frees the road and paves the way for future reforms.

⁹⁷ The French government spoke of ‘modest and practical improvements’ and declared that a radical change in a system is ‘premature’ (2000 French Memorandum, *op.cit.* footnote n 19, at 7).

⁹⁸ Rasmussen 2000, *op.cit.* footnote n 10, at 1072.

⁹⁹ *cf.* the creation of a shared preliminary competence or the possibility to omit the Opinion of the Advocate General in some cases.