

## JUDICIAL REFORM AND THE TREATY OF NICE

ANGUS JOHNSTON\*

### 1. Introduction

The judicial system of the European Union has always been a central focus in any study of the process of European integration. However, until comparatively recently, most attention has been paid to the substantive content of the cases decided by the European courts, whether in particular fields of law or as a more general reflection of the Courts' own perception of their role and its limitations. Today, few would dissent from the proposition that a serious reform of the very system itself is necessary, if the Union's desire to become a first-rate world economy is to be matched by a first-rate administration of justice. After slow beginnings, "judicial architecture" has become a fashionable field of study and now even the Inter-governmental Conference at Nice has got in on the act. The purpose of this article is to examine the changes that will be brought about once the Treaty of Nice<sup>1</sup> is ratified and to speculate on the likely impact of these new provisions, as well as to suggest some areas where further reform may still be necessary.

\* Trinity Hall, University of Cambridge (e-mail: acj29@hermes.cam.ac.uk). My thanks go to Prof. Alan Dashwood for his insights into many aspects of this field and to the participants in various conferences and seminars held under the auspices of the Centre for European Legal Studies of the University of Cambridge for the lively and stimulating discussions that have contributed to my interest in this area. This culminated in the publication mentioned *infra* note 2, from which some of the ideas discussed here are drawn. Any errors and inaccuracies that remain are solely my responsibility. I have endeavoured to reflect the current state of play with regard to these developments as of March 2001.

1. Treaty of Nice Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts O.J. 2001, C 80/1, 10 March 2001.

## 2. Background<sup>2</sup>

As the European political and legal community began to wind itself up for the Inter-governmental Conference process of the year 2000, many were sceptical about the prospects for reform of the judicial system. The “Amsterdam leftovers” of the weighting of votes in the Council, the possible extension of Qualified Majority Voting and the size and composition of the Commission, all in the context of preparation for future enlargement, seemed to have “occupied the field”. The tight negotiation deadline set by the planned signing of the envisaged Treaty at the Nice European Council also seemed to militate against any serious consideration of these matters. Furthermore, the lack of any reference to the role of the Court of Justice in the development of “the Union as an area of freedom, security and justice”<sup>3</sup> (especially in the context of the Charter of Fundamental Rights) did not augur well for progress on the judicial reform front.

In May 1999, the Court of Justice and the Court of First Instance presented a paper entitled “The Future of the Judicial System of the European Union (Proposals and Reflections)”<sup>4</sup> and this galvanized the Commission into setting up a Working Party under the Chairmanship of the former President of the Court of Justice (Mr Ole Due) which reported its findings in late January 2000.<sup>5</sup> This laid the foundations for the Commission’s contribution<sup>6</sup> to the Inter-governmental Conference concerning the functioning of the European Courts (although certain divergences of opinion from the Working Party were apparent). During this period, a political consensus seemed to be emerging among the Member States that something had to be done about the position of the European judicature: the Conference asked a special group (known as the “Friends of the Presidency”, consisting of legal experts from the Member States and the European institutions) to prepare draft conclusions on these

2. For a more in-depth discussion of the various possible models for reform, see the forthcoming publication Dashwood and Johnston (Eds.), *The Future of the European Judicial System*. (Oxford, Hart Publishing, 2001), especially the Chapter entitled “Synthesis of the Debate”.

3. Which was declared by the Tampere European Council to be at the top of the political agenda: see Presidency Conclusions, Tampere European Council, 19 Oct. 1999, paras. 2 and 3 of the introductory section: see the summary on the Council’s website at <http://ue.eu.int/en/Info/eurocouncil/index.htm>.

4. Available on the Court’s website: <http://www.curia.eu.int/en/txts/intergov/ave.pdf> (hereafter, the “Courts’ Paper”).

5. “The Report by the Working Party on the Future of the European Communities’ Court System” (Jan. 2000), reproduced in Dashwood and Johnston, op. cit. *supra* note 2.

6. Additional Commission contribution to the Intergovernmental Conference on institutional reform – Reform of the Community courts (March 2000), reproduced in Dashwood and Johnston, op. cit. *supra* note 2.

issues as a basis for further discussion among the Member States.<sup>7</sup> The discussion of this matter at the Feira European Council in June 2000 made clear that all were now well aware of the need to deal with the functioning of the Courts at Nice. In the end, therefore, and much against earlier expectations, there were very good grounds for the hope that the Conference would tackle some of the pressing problems being experienced by the European Courts.

These problems have been documented well and at length elsewhere,<sup>8</sup> so I will just provide a brief summary at this point, for the purposes of assessing the results of the amendments made at Nice. The Courts' Paper referred to the "dangerous trend towards a structural imbalance between the volume of incoming cases and the capacity of the institution to dispose of them".<sup>9</sup> Clearly, there is a serious workload problem for the Courts, due to a number of factors. These include the increasing number of Member States (and the associated growth in the number of languages that needs to be accommodated by the Courts and their staff), the increasing scope of European law and the concomitant increase in the areas under the Courts' jurisdiction (witness the 1992 programme, the recent "Communitarization" of the Brussels I and II Conventions<sup>10</sup> and the drive to harmonize and provide European level rights in the Intellectual Property field) and the increasing complexity and often urgency of the issues brought before the Courts. This has all resulted in a steady increase in the time it takes for the European judicature to process cases and while this is partly a reflection of a more general trend in litigation over the past few decades, it is particularly serious in the context of references for a preliminary ruling, given that such references form only one stage in

7. An interesting step along the way was provided by a Presidency Note to the Government Representatives Group of 31 March 2000 (CONFER 4729/00), summarizing the preliminary discussions of the Friends of the Presidency Group, undertaken in the first few weeks of March 2000. This shows general consensus on the urgent need for reform of the Community's judicial system, but equally betrays certain disagreements on key matters such as appeals against CFI determinations of appeals from lower instances (such as an OHIM Board of Appeal or a judicial panel) and docket control (or an American-like *certiorari* system) by the ECJ of appeals from the CFI.

8. See e.g. the stinging attack delivered by Rasmussen, "Remedying the crumbling EC judicial system", 37 CML Rev. (2000), 1071, at 1081–1083, who includes the ECJ's development of its own jurisdiction among the "roots of the malaise" (e.g. the excessively limited *acte clair* strategy in Case 283/81, *CILFIT*, [1982] ECR 3415; the Court's general "activism" and the *Dzodzi* line of Cases (joined Cases C-297/88 and C-197/89, *Dzodzi v. Belgium*, [1990] ECR I-3783); see also Case C-28/95, *Leur-Bloem v. Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2*, [1997] ECR I-4161).

9. The Courts' Paper, p. 3.

10. Council Regulation (EC) No 44/2001 of 22 Dec. 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 12/1 (16 Jan. 2001); Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses O.J. 2001, L 160/19 (30 June 2000).

the whole national procedure. Taking into account these influencing factors, it seems clear that there is little chance of any natural future reduction in the number of cases finding their way on to the Register at the Kirchberg; indeed, quite the reverse trend seems more likely.

The response of the Nice Conference to these matters has, perhaps, been largely unsurprising. Most of the interesting points of debate seem to have been smoothed out long before start of the intense politicking that was so gleefully seized upon by the media. This may in itself be an interesting precedent for future Inter-governmental Conferences: if such general agreement can be reached without the metaphorical bloodshed of late night skirmishes, is there not something to be said for a change in the whole preparation and negotiation procedure? But I digress: on judicial reform, certain areas proved uncontroversial and contained issues on which it was easy to reach political consensus, while other problems have remained more contentious and thus scope has been left for their discussion and resolution at a future date. The changes are, for the most part, not momentous, but they do indicate a willingness on the part of Member States to address serious judicial reform issues, both now and in the future.

### **3. Textual reorganization<sup>11</sup>**

There has been an extensive reorganization of the provisions of primary law texts on the Community Courts. The Protocols on the Statute of the Court of Justice, annexed to the EC Treaty and the Euratom Treaty, are to be repealed and replaced by a uniform Statute annexed both to those treaties and to the TEU.<sup>12</sup> Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European

11. On a general note, the author would like to express the frustration of academics and practitioners at the apparently rapid departure from the Amsterdam renumbering scheme, which claimed to intend to avoid the messy use of Art. 000a and Art. 999b (remember the provisions on the environment after the Maastricht IGC, which went up to Art. 130u(!)). Yet here, the IGC has re-embarked upon this process, where it might well have been possible to accommodate all of the proposed amendments by slightly more judicious drafting. No doubt the next IGC will embark upon a "re-simplification", especially if it seeks to develop any kind of basic statement of competences. Those who must draw up cross-reference tables to make sense of such changes are no doubt left in a state of trepidation . . .

12. The attachment of the Statute to the Treaty on European Union is an appropriate reflection of the limited, but increasingly important jurisdiction of the Court of Justice in areas covered by that Treaty.

Communities, as amended,<sup>13</sup> is also to be repealed.<sup>14</sup> Provisions relating to the composition, organization and jurisdiction of the CFI are now juxtaposed with those relating to the ECJ, either in the Treaties themselves or in the Statute. Transitional arrangements will apply to the ECSC Treaty until its expiry in 2002.<sup>15</sup> Alongside all of this, there are the usual amendments to tidy up cross-references between provisions to ensure coherence in the light of the amendments that have been made.<sup>16</sup>

#### 4. The “status” of the Court of First Instance

Under Article 225 EC (ex 168a), the Court of First Instance is described as being “attached to the Court of Justice”, which always seemed to imply that it had the status of a dependant and rather an afterthought of a dependant at that. This almost “second class citizen” status was underlined by Article 225’s explicit bar against the CFI acquiring jurisdiction to provide rulings under Article 234 EC. The outcome of the Treaty of Nice has provided specific articles concerning the CFI’s composition (Article 224 EC) and jurisdiction (Article 225 EC), has provided for the possibility of the attachment of judicial panels to the CFI and has granted the CFI a distinct identity as a Community judicial organ under Article 220 EC: it, too, “within its jurisdiction” is entrusted with ensuring “that in the interpretation and application of this Treaty the law is observed”. This elevation from mere “appendage” status is commensurate with the increasing responsibility borne by the CFI in dealing with the cases generated by EC law and reflects the greater confidence reposed in the CFI by the participants in the European legal community in general: it is widely regarded to have “won its spurs”. This respect may further be reflected in the next expansion of its jurisdiction effected by the Treaty of Nice, to which I shall return below.

13. Originally published in O.J. 1988, L 319/1, but the text contained many errors so a corrected version was published in O.J. 1989, C 215/1. Further amendments brought extensions to the jurisdiction of the CFI: see Decisions 93/350, O.J. 1993, L 144/21 and 94/149 O.J. 1994, L 66/29.

14. As provided for by Art. 10 of the Treaty of Nice, which constitutes an interesting example of the use of what is effectively the constitution-making power of the Member States at an IGC to repeal a legislative measure.

15. By retaining in force Art. 3 of Decision 88/581/ECSC, EEC, Euratom, insofar as the CFI exercises the jurisdiction of the ECJ under the ECSC Treaty. Meanwhile, the provisions of the new single Statute are made applicable to ECSC matters and Arts. 1 to 20, 44, 45, 46 (second and third paras.), 47 to 49, 51, 52, 54 and 55 of the ECSC Statute of the Court are repealed (Art. 8 of the Treaty of Nice).

16. For a detailed commentary on both the Treaty amendments and the new Statute, see Dashwood and Johnston, “The Outcome at Nice: B. Annotated Texts” in Dashwood and Johnston, *op. cit. supra* note 2.

## 5. Jurisdictional structure

In all of the discussions concerning the future shape of the European judicial architecture, it is this area that has perhaps provoked the widest debate and the widest range of proposed designs.<sup>17</sup> However, the IGC's response has been very restrained: it focuses on enabling some difficult decisions to be taken at a later date by means of Community legislation, rather than relying upon repeated Treaty amendments. Given the range of proposals that was canvassed in the various documents made available in the run-up to the IGC, this caution is not remarkable, but the question remains whether or not these measures are likely to prove adequate to address the problems identified above.

### 5.1. *Direct actions*

Perhaps the most significant immediate impact of the reforms will be felt in the sphere of direct actions before the Community Courts. The Member States have decided to provide a Treaty basis for the establishment of "judicial panels to hear and determine at first instance certain classes of action or proceeding brought in specific areas".<sup>18</sup> The details concerning this development will be discussed below under "Court structure"; for now, it should be noted that under Article 225(2) EC, the CFI will be competent to hear appeals from such panels on points of law only, unless the Decision establishing the panel also allows the factual determinations of the panel to be challenged.

This clear recognition of the jurisdiction of the CFI in a Treaty article is given more general expression in Article 225 EC, where the full extent of its current jurisdiction is recorded.<sup>19</sup> After the last amendment, the CFI now has jurisdiction to hear all direct actions brought by natural and legal persons. Previously, this information had been contained only in the various decisions that had established and then increased the CFI's role.

17. See, for a selection of views, the seminal article by Jacqu  and Weiler, "On the road to European Union – A new judicial architecture: An agenda for the Intergovernmental Conference", 27 *CML Rev.* (1990), 185, the summary and suggestions of Scorey, "A new model for the Communities' judicial architecture in the new Union", 21 *EL Rev.* (1996), 224 and Rasmussen's recent critique and proposals, *op. cit. supra* note 8.

18. Art. 225a EC.

19. These fields are listed in Art. 225(1) EC as the "actions or proceedings referred to in Articles 230, 232, 235, 236 and 238" of the EC Treaty, covering actions for annulment, actions for failure to act, damages claims under Art. 288 EC, staff cases and cases concerning arbitration clauses in contracts, respectively. Excepted from this are those cases assigned to a judicial panel and those reserved in the Statute for the ECJ.

In December 1998, the Court had proposed the extension of the jurisdiction of the CFI to cover certain actions brought by Member States.<sup>20</sup> As is apparent from the changes wrought by the Treaty of Nice, however, this list of fields has not been extended so as to open the possibility for actions under Articles 226 and 227 EC to be brought before the CFI.<sup>21</sup> This is underlined by a proposed amendment to the Statute of the Court of Justice (whose Article 225(1) expressly permits to lay down exceptions to these basic fields of CFI competence). This amendment emphasizes that any action brought by an EC institution, the ECB or a Member State will fall within the jurisdiction of the ECJ, even in those fields stated by Article 225 EC to fall within the CFI's competence.<sup>22</sup> Thus, it seems that the IGC was reluctant to countenance any such extension, although it should be noted that the definition of such exceptions in the Statute will allow any future amendments to be made by the Council by unanimous vote. Furthermore, a statement by the Conference "calls on the Court of Justice and the Commission to give overall consideration as soon as possible to the division of competence between the Court of Justice and the Court of First Instance, in particular in the area of direct actions, and to submit suitable proposals for examination by the competent bodies as soon as the revised Treaty enters into force".<sup>23</sup> Perhaps, then, in the medium term,<sup>24</sup> we may expect some progress in this area, although given the clear message sent by the IGC concerning such an extension of CFI competence and the Member States' apparent inability to reach agreement on this issue (especially since the matter has been with the Council since late 1998), this may prove difficult to achieve.

20. Covering Commission decisions relating to the clearance of accounts under the European Agricultural Guidance and Guarantee Fund, implementation decisions under the common transport policy, decisions relating to funds, financial instruments or Action Programmes providing for the grant of Community financial support, and all actions based on arbitration clauses (as such clauses are commonly included in contracts entered into by a Community institution (usually the Commission) with a third party).

21. This had been one proposal to relieve the ECJ of the burden (especially time- and translation-wise) of the numerous Art. 226 EC enforcement actions that Member States do not even contest; another suggestion had been the conferment of the power on the Commission to adopt a binding determination of a Member State's failure to fulfil its obligations under the Treaty, subject to an appeal to a European Court. For political reasons, this seems not even to have been considered by the IGC, despite the obvious benefits that such a procedure could bring for the speedy administration of justice.

22. Art. 51 of the Statute.

23. Declaration No. 12 to the Final Act of the IGC on Art. 225 of the Treaty Establishing the European Community, O.J. 2001, C 80/1, p. 79.

24. And yet, will the medium term be soon enough in judicial reform terms? Rasmussen, *op. cit. supra* note 8, certainly does not believe so and he may well be proved right, hence the stress laid here upon the need for the Council to act quickly in the negotiation of the implementation of the Nice reforms.

There has been no attempt by the IGC to address the many calls for a relaxation of the standing criteria for private parties under Article 230 EC. This is both unsurprising politically and quite logical from the angle of the reform discourse, given the clear focus in the majority of the reflection documents concerning the Courts on the need to equip it with the means to bear its workload more effectively: increased access to those courts by direct actions could well have absorbed and indeed engulfed any of the improvements that might have been made. Furthermore, the definition of such criteria would have been a highly technical and potentially difficult issue, with which the IGC may not have been able to deal satisfactorily given the time pressures on its agenda. Nevertheless, a European Union that professes to attach the highest value to establishing an area of “freedom, security and justice” will undoubtedly need to pay greater attention to such fundamental issues of access to justice in the future, especially as the power of European law to influence the daily lives of individuals continues to increase. In the context of the new Charter of Fundamental Rights, the denial of adequate and effective judicial protection due to strict standing criteria may yet be another element that could precipitate a crisis of national judicial confidence in the ability of the European judicial system to live up to its own rhetoric (especially when placed alongside the lengthy and lengthening duration of the Article 234 EC procedure).<sup>25</sup>

There is, however, one significant change to Article 230 EC. The European Parliament has been made a “privileged applicant”, on the same footing as the Member States, the Council and the Commission. The Parliament’s right of *légitimation active* is thus no longer restricted to the protection of its own prerogatives. Ironically, this in itself could lead to a not insignificant increase in the workload of the Court of Justice, given the European Parliament’s increasing assertiveness in both the political and judicial spheres, on the back of its increasing voice in the legislative process.

Finally under this heading, there is a new provision (Article 229a EC) enabling the Council to adopt provisions “to confer jurisdiction, to the extent that it shall determine, on the Court of Justice in disputes relating to the application of acts adopted on the basis of this Treaty which create Community industrial property rights”. The potential significance of this provision in the specific area of judicial competence allocation is that it could empower

25. See the ECJ’s development of the Community’s general principles of fundamental rights in cases such as Case 4/73, *Nold*, [1974] ECR 491 and Case 5/88, *Wachauf*, [1989] ECR 2609, which many perceive to be a response to the reluctance of the German and Italian Constitutional Courts to accept the doctrines of direct effect and supremacy of EC law, at least without some guarantee that Human Rights protection would also be forthcoming on a Community level.



the Council to confer jurisdiction on the European Courts<sup>26</sup> to hear disputes between private parties. The intention would seem to be to save individuals from having to vindicate a European-level intellectual property right by proving infringements in the different Member States. For that purpose, the Council is to act by the so-called “organic law” procedure: the Council must act unanimously on a proposal from the Commission and after consulting the European Parliament; it must then recommend the provisions to the Member States “for adoption in accordance with their respective constitutional requirements”. It should be stressed that this provision is also revolutionary in general institutional terms: perhaps the novelty of the jurisdiction thus proposed explains this requirement for a national ratification, but it may well set the scene for future developments where it is felt that more extensive national participation and approval is needed.

## 5.2. Preliminary rulings

The wording of Article 234 EC itself has been left untouched by the IGC, so those who have advocated that the only sensible way to deal with the flood of cases from national courts is to send the appropriate signals by means of a redrafting of the Treaty will be disappointed. Suggestions<sup>27</sup> such as the confinement of the power to refer to national courts of a higher level or even of last instance, the codification of some of the signals sent out by the Court’s development of its own power to refuse to accept a reference<sup>28</sup> and other alterations to the Article 234 EC procedure have not been followed at Nice. However, an enabling provision of much potential significance has been included in the new provisions on the CFI. Article 225(3) EC provides that “[t]he Court of First Instance shall have jurisdiction to hear and determine questions referred for a preliminary ruling under Article 234, in specific areas laid down by the Statute”. It would seem that the Declaration concerning the division of jurisdiction between the ECJ and the CFI is also intended

26. I.e., this could cover the conferment of jurisdiction on the ECJ, the CFI or on a judicial panel: see Declaration No. 17 to The Final Act of the IGC on Art. 229a of the Treaty Establishing the European Community, which states that “Art. 229a does not prejudice the choice of the judicial framework which may be set up to deal with” such disputes (O.J. 2001, C 80/1, p. 80).

27. For a summary of some of the ideas in circulation, see Dashwood and Johnston, “Synthesis of the Debate”, op. cit. *supra* note 2.

28. See the *Foglia* saga (Case 104/79, *Foglia v. Novello*, [1990] ECR 745 and Case 244/80, *Foglia v. Novello* (No. 2), [1981] ECR 3045) and cases such as Case C-83/91, *Meilicke* [1992] ECR I-4871 and Case C-343/90, *Lourenco Dias*, [1992] ECR I-4673, as well as the ECJ’s own “Information Note on References by National Courts for Preliminary Rulings” (9 Dec. 1996) [1997] 1 CMLR 78; [1997] EuLR 55 (or see the Court’s website at: <http://www.curia.eu.int/en/txts/others/txt8.pdf>).

to allow debate about the allocation of Article 234 EC jurisdiction;<sup>29</sup> thus, it is not unlikely that movement on removing at least some types of case from the immediate remit of the ECJ can be expected after the ratification of the amended version of the Treaty. The question for debate will then become: in which “specific areas” should the Statute allow the CFI to make preliminary rulings?<sup>30</sup> The current obvious candidate would appear to be cases in national courts concerning EC-level intellectual property rights,<sup>31</sup> such as the Community Trade Mark and the Community Design Right and a possible future Community Patent. However, there has been little discussion of other possible areas of limited scope that might be suitable for transfer; it may prove more difficult to build this jurisdiction up step by step in the way employed when the CFI’s direct actions jurisdiction was developed.

However, this apparently substantial gain in flexibility for the European Courts in allocating their workload may be tempered by the possibility provided for by Article 225(3): “[w]hen the Court of First Instance considers that the case requires a decision of principle likely to affect the unity or consistency of Community law, it may refer the case to the Court of Justice for a ruling”. In its defence, this mechanism is likely to operate as a sensible procedural safeguard and should not add greatly to any delays in the national court receiving its answer. Under Article 225(3), however, decisions actually taken by the CFI on a reference from a national court may “exceptionally” be reviewed by the ECJ: it will be for the First Advocate General to determine (within one month of the delivery of the CFI’s judgment) whether or not there is a serious risk of the uniformity or consistency of Community law being affected: if he does find such a risk, then he may propose that the ECJ should review the decision of the CFI. The ECJ must decide within one month of its receipt of that proposal whether or not it will review the decision. The Conference has expressed its view that, in such exceptional cases, the ECJ

29. Declaration No. 12 to The Final Act of the IGC, cited *supra* note 23.

30. 30 Since the Statute, as annexed to the various Treaties at Nice, does not yet make any attempt to specify such areas.

31. Especially in the light of the possible use of the new Art. 229a EC: it is submitted that care will need to be taken to ensure that the problems of parallel proceedings on similar matters before different courts at the European level are avoided. Indeed, if this becomes a relevant consideration in this sphere, it may be difficult to resist its logic when it comes to the general consideration of the extension of the jurisdiction of the CFI in direct actions brought by Member States. For a useful discussion of the “parallel actions” issue, see the Thirteenth Report of the House of Lords Select Committee on the European Communities, Session 1998–1999, *Enlarging the Jurisdiction of the Court of First Instance* (5713/99 of 6 July 1999) (available on the House of Lords’ website, at the following address: <http://www.parliament.the-stationery-office.co.uk/pa/ld199899/ldselect/ldcom/82/8201.htm> (N.B. now the Select Committee on the European Union)).

should “decide by an emergency procedure”.<sup>32</sup> It is not yet clear whether this refers to existing emergency procedures, or whether the Court, Commission and Council will need to devise a special emergency procedure for this particular purpose. This ECJ review procedure, under Article 62 of the Statute, is to apply both to references by the CFI under Article 225(2) EC and to assessments of CFI judgments delivered under Article 225(3) EC. It is clear, therefore, that the Chamber of the First Advocate General will need to establish its own mechanism for ensuring a speedy and systematic assessment of this material, with a view to providing the Court of Justice with the necessary advice.

The extent to which such a procedure could threaten the possible gains of granting this jurisdiction to the CFI will depend upon how regularly it appears necessary to use it. The aim of a further review by the ECJ is obvious: there are fears that entrusting the CFI with even a limited preliminary rulings jurisdiction may have detrimental effects upon the uniformity of the interpretation and application of European law. The Working Party report came out strongly in favour of such references under Article 234 EC only being heard once, subject to the possibility of an appeal by the Commission “in the interests of the law”, which would not have affected the course of the case in the national court at all:<sup>33</sup> this suggestion has much to commend it, although it seems that the Member States remain nervous about granting the Commission such a role. The risk of causing unacceptable delays to national actions must be avoided, but even if this can be achieved, there is still the danger that such a procedure could undermine the authority of preliminary rulings made by the CFI, having a detrimental effect on the respect paid to them by national judges. The IGC showed that it was aware of these issues by adopting a Declaration on “the essential provisions of the review procedure”, which are to be defined in the Statute. Those provisions should, in particular, specify: the role of the parties in any proceedings before the ECJ, any impact of this review on the enforcement of the CFI’s decision in the case and the effect that the ECJ’s review might have on the dispute between the parties to the case.<sup>34</sup> It is a pity that the IGC did not take the opportunity to resolve these matters at Nice. Nevertheless, the Conference did declare that any measures taken in the Statute to implement Articles 225(2) and (3) must include a procedure that will ensure that their practical working will be made subject to an evaluation

32. Declaration No. 15 to The Final Act of the IGC on Art. 225 of the Treaty Establishing the European Community O.J. 2001, C 80/1, p. 80.

33. A similar debate arises regarding the new judicial panels, where a CFI decision on appeal from such a panel is then heard on appeal before the ECJ. We will return to this below.

34. Declaration No. 13 to The Final Act of the IGC on Art. 225(2) and (3) of the Treaty Establishing the European Community O.J. 2001, C 80/1, p. 79.

within three years of their entry into force,<sup>35</sup> so there will be scope for a trial period and a thorough assessment of its consequences, provided that the Council moves quickly to adopt such procedures. Indeed, the Council should be given the strongest encouragement to embark upon these negotiations now, so that when the ratification process for the Treaty of Nice is complete, action can be taken immediately.

Overall, therefore, there is much to support in the changes made to the framework covering the jurisdictional structure of the Courts. While the IGC itself has not dealt in any real detail with the issues of exactly which areas may be moved, it has at least put in place a system for analysing these issues once the amended Treaty is ratified and enters into force. However, some of the new provisions contain worrying indications about the possible course of such future developments, which could undo some of the good work. Special vigilance and wide discussion will be necessary to ensure that these dangers are avoided when the relevant parties begin to assess the possibilities in this area.

## **6. The structure of the Community courts**

The general structure of the Community Court system will clearly be influenced as the jurisdictional arrangements discussed above are developed in the coming months and years. On a basic level, as noted above, the CFI is now acknowledged separately in the EC Treaty, reflecting its increasingly important role and growing status. There have also been responses to some of the proposals concerning the composition and internal organization of the European judicature, which are dealt with in what follows.

### **6.1. “One Member State, one judge”**

Article 221 EC provides that the “Court of Justice shall consist of one judge from each Member State”.<sup>36</sup> Finally, a clear and straightforward principle on this potentially thorny issue has been incorporated into the Treaty. This formulation is welcome, as it is clearly drafted with an eye to future enlargement:

35. Declaration No. 14 to The Final Act of the IGC on Art. 225(2) and (3) of the Treaty Establishing the European Community (*ibid.*).

36. As a result, during the accession process there may come a point when the ECJ has an even number of judges. Any difficulty that some had thought might be posed for fulfilling the requirement that decisions can only validly be taken when there is an *uneven* number of judges sitting in deliberation (hence the 1995 enlargement problems when Italy was to have an extra judge to prevent this) is of course dealt with by fixing the appropriate *quorum*: if eleven judges are sitting, then the Full Court can rule on the matter (*cf.* Art. 17 of the Statute).

now, there will be no need to alter the rules concerning the number of judges on every new accession. Also, the very nature of the enlargement process will ensure that an increasing number of judges will be available to deal with the new cases that will surely be generated by the arrival of any new Member State. It is submitted that it is not wrong to make an express link between the number of judges and the number of Member States: for the Court to have legitimacy, it is essential that the jurisdictions of all the Member States be represented within it. The important point that must be stressed is that the judges should *in no way* be seen as any kind of *political* representation, nor as a bargaining counter. For their legitimacy to be enhanced and upheld, their selection must depend upon professional criteria alone. These increased numbers, however, could have made the plenary formation of the Court too large and unwieldy to operate effectively. The new provisions also seek to provide guidance on this matter. Under the redrafted Article 221 EC, the Court will, as a general rule, sit in Chambers, with the alternative possibility of sitting as a “Grand Chamber”<sup>37</sup> or in plenary formation (the latter where the Statute so provides): this is a reversal of the previous default position. This change is a welcome recognition of already established practice as well as a logical response to the difficulties of managing an increasingly heavy caseload.

The detailed implementation of this change of focus can be found in Articles 16 and 17 of the Protocol on the Statute of the Court of Justice. A Chamber will be the normal formation, consisting of either three or five judges,<sup>38</sup> where the quorum will be three. However, in cases involving a Member State or a Community Institution as a party (i.e. as an applicant or defendant only), they can require the Court to sit as a Grand Chamber of eleven judges, where the quorum will be nine. Only in exceptional cases will the plenary formation (which will have a quorum of eleven) be used: Article 16 of the Statute requires this in cases under Article 195(2), 213, 216 and 247(7) EC, which cover the dismissal of the Ombudsman of the European Parliament, the dismissal of or removal of pension or other benefits from a European Commissioner, serious misconduct by a member of the Commission and the dismissal of or removal of pension or other benefits from a member of the Court of Auditors respectively, all of which have been of little practical significance. Furthermore, under Article 16 the Grand Chamber can refer a case to the plenary session when it considers it to be “of great importance”, although only after hearing the advocate general on the question. Thus, the

37. A term quite possibly borrowed from the last amendment to the structure of the European Court of Human Rights in Strasbourg: cf. Art. 27(1) ECHR and the discussion in Dashwood and Johnston, “Synthesis of the Debate”, op. cit. *supra* note 2.

38. And seemingly sounding the death knell of the seven-judge Chamber, presumably because it was not thought to offer any significant advantages over the combination of five-judge chambers and the Grand Chamber.

clear basic rule is that in the vast majority of cases it is the Court itself that must decide whether the issue is one of sufficient importance to merit such a plenary hearing, which is an important step in securing the flexibility of the Court's jurisdictional arrangements.

At present, these bits of fine-tuning do not seem to be of much practical significance, as they largely reflect current practice and are a logical response to the guaranteed continuation of each Member State having one judge at the ECJ. However, in the longer term, the composition of the Grand Chamber may be rather significant. After all, in a European Union of 25 Member States, it would become possible for two Grand Chambers to sit simultaneously.<sup>39</sup> This could be a further significant improvement on the Court's ability to deal with many important cases at once and is a possibility whose potential should be welcomed. For those that criticize the reduction in collegiality that this expansion in the number of judges will doubtless entail, it should perhaps be accepted that the reality of the political situation must be conceded and that the initiation of the Chambers and Grand Chamber system offers the most practical solution. This system seeks to increase the Court's capacity to handle its case load, while maintaining as much collegiality in discussion and deliberation as possible of the issues at stake. There may well come a time when more detailed internal procedural arrangements will be necessary to ensure the consistency of the case law of the various Chambers *inter se*. If this does prove to be an issue, there is much comparative material that could provide a useful basis for discussion.<sup>40</sup>

As to size of the CFI, Article 224 EC provides that the "Court of First Instance shall comprise at least one judge from each Member State", the precise number to be fixed by the Statute. The possibility of increasing the number of CFI judges,<sup>41</sup> without the need to amend the Treaty, is thus explicitly recognized. That is a welcome acknowledgement of the request by the Courts to secure greater judicial resources for the CFI to deal with its increasing workload. For the time being, however, Article 48 of the Statute provides

39. Although this would require the amendment of the rule that the President of the Court must preside over the Grand Chamber, since this rule is contained in the Statute, such a change would require simply the unanimous approval of the Council (Art. 245 EC). Under the current provisions, where only one Grand Chamber will operate, the Working Party Report envisages that consistency and continuity in the case law will be preserved by the creation of a "permanent core" of members, *viz.*: the President of the Court and the Presidents of the five-judge Chambers (for the Working Party Report, see *supra* note 5).

40. Such as the system of "referral up" to the highest organ after consultation between Chambers where one proposes to depart from the case law of another, as used in Germany (with the Great Senate) and under the ECHR.

41. Who, after the amendment to the qualifications required of a CFI judge, must now (under Art. 224, second paragraph) possess the ability for appointment to "*high* judicial office": a welcome reflection of the practice of Member States and a further (perhaps symbolic, but nevertheless important) underlining of the CFI's growing status.

for only 15 judges for the CFI, in spite of the recent consensus on the need to increase its numbers by a further 6 judges:<sup>42</sup> clearly, the precise modalities of this increase are still the subject of political dispute, but the CFI's need for more personnel is becoming ever more keenly felt, so rapid progress here in the Council is vital. This is especially the case, since the rationale for the increase in the basic jurisdiction of the CFI may well include the point that it is not subject to the same restrictions on personnel as the ECJ. If, as is likely, the current delay in securing this increase is due to petty wrangling over which Member States will get a share in the "extra representative" on the CFI, this is to be deplored and may well be a catalyst for the introduction of a system of judicial appointments that is less beholden to such political in-fighting between the Member States. Once again, it should be stressed that there is a need to end the idea of "representation" in any quasi-political sense and to realize that the only representative function that such judges perform is one of being acquainted with their own home jurisdiction. Perhaps all Member States could nominate an additional CFI judge and then the current body of judges could find a means of selecting six to fill the agreed places. This would have the added benefit of re-emphasizing the independence of the European judiciary from the Member States which are increasingly its political driving force, adding to judicial legitimacy in the process.

## 6.2. *Specialization*

While the focus on Chambers noted in the preceding section might impact somewhat on this area, no concrete arrangements are currently in place for using Chambers in specialized areas of Community law. A much more significant development in this area has been made by the introduction of Articles 220 and 225a EC, which provisions enable the establishment by the Council of judicial panels. Article 225a requires the Council to act unanimously to establish such panels and both the Court and the Commission are granted the right of legislative initiative in this area, with the concomitant obligation on the Council to consult whichever of the two did not make the proposal (called a "request" in the case of the Court!), as well as consulting the European Parliament. Appointment to such a panel requires independence and the ability required for appointment to judicial office; the Council will need to agree unanimously on such appointments. The rules of procedure of any such panels must be drawn up in agreement with the ECJ and can be approved by a qualified majority vote in the Council. Most importantly, the determinations of such panels in their "specific areas" may be subject to appeal to the CFI

42. In response to the Courts' proposals with regard to the new intellectual property cases (see the Court's website, at: <http://www.curia.eu.int/en/txts/propositions/intelcourt.pdf>).

on points of law only, unless the decision establishing the panel also provides for appeals on matters of fact.

This new provision reflects the wide consensus reached on the need for a new way of dealing with cases involving Community staff. Indeed, the Conference has called upon the ECJ and the Commission “to prepare as swiftly as possible a draft decision establishing a judicial panel which is competent to deliver judgments at first instance on disputes between the Community and its servants”,<sup>43</sup> suggesting the firm intention to make very early use of these new powers. Other potential areas that have been mooted for such coverage are the various EC-level IP rights, perhaps particularly the possibility of an EC Patent (although it is clear that the European Patent Office in Munich under the current Patent Convention will not give in to such a development without a fight!), but for now this must remain mere speculation.<sup>44</sup>

A potentially more difficult issue arises by virtue of Article 225 EC: the CFI is clearly granted jurisdiction to hear appeals from such judicial panels. However, there “may exceptionally” be a review of the CFI’s decision by the ECJ “where there is a serious risk of the uniformity or consistency of Community law being affected” (Art. 225(2) EC). Article 62 of the Statute explains that it will be for the First Advocate General to determine (within one month of the delivery of the CFI’s judgment) whether or not there is such a serious risk: if he does so consider, then he may propose that the ECJ should review the decision of the CFI. The ECJ must decide within one month of its receipt of that proposal whether or not it will review the decision. It is clear that these stringent time limits are intended to mitigate the risk of serious extensions to what might already have been a rather lengthy court process on the European level in such cases, while the involvement of the First Advocate General is included to avoid tying up too much of the President of the Court’s time in making such determinations. Overall, this filtering system is designed to deal with the problem in staff cases that, since costs are not awarded against staff in such proceedings, there is a tendency for the aggrieved servant

43. Declaration No. 16 to The Final Act of the IGC on Art. 225a of the Treaty Establishing the European Community O.J. 2001, C 80/1, p. 80.

44. Although, in an interesting unilateral Declaration made by Luxembourg, a hint is given that the IP rights are indeed the next main contenders for this treatment. Luxembourg made clear that, if judicial panels were to be set up to replace the OHIM Boards of Appeal (which were established pursuant to the Community Trade Mark Regulation), it would not seek to claim the seat of such panels (O.J. 2001, C 80/1, p. 80). Presumably, this was to appease Spanish fears, but it also seems to provide a clear indication of things to come: not only delegation, but also (further) decentralization of judicial functions may be on the future agenda. This starts to move, albeit tentatively, towards some of the more radical proposals for root and branch reform of the judicial architecture of the Union (e.g. Jacqu  and Weiler’s suggestion of the establishment of “Community Regional Courts”, *op. cit. supra* note 17, 192–195).



of the Community to go on appealing any decision as far as possible. Some Member States were nevertheless still concerned that allowing such appeals would amount to a negation of the benefits of removing the burden of staff cases from the ECJ in particular and were in favour of appeals to the CFI as a court of last instance (perhaps subject to an appeal “in the interests of the law” to the ECJ, on application by the Commission and without affecting the actual result reached in the case itself).<sup>45</sup> The operation of this appeal to the ECJ remains to be worked out, although given the need declared by the Conference for such proposals to be brought forward urgently,<sup>46</sup> the controversy surrounding this mechanism needs to be resolved by the Council and resolved quickly.

### 6.3. *The role of the advocate general*

Article 222 EC maintains eight advocates general to serve the Court of Justice, although a unanimous Council vote on a proposal from the ECJ could increase that number in future, as under the previous Article 222. The details concerning the partial replacement of advocates general (and judges) every three years have been moved to the Statute from the old Article 223 EC, allowing the potential for greater flexibility in determining these conditions in the future without the need for Treaty amendments. Unfortunately, an annoying inaccuracy in the wording of the Treaty has been perpetuated, as Article 222 still refers to the “submissions” of the advocate general, instead of the Opinion that is actually delivered, independently of the parties’ submissions. However, a significant change is the recognition under the new Article 222 that it is no longer required that an advocate general must deliver an Opinion in all cases before the ECJ. Article 20 of the new single Statute (ex Article 18 EC Statute) now provides that, after hearing the advocate general on the subject, the Court may decide to dispense with such an Opinion where it considers that the case “raises no new point of law”. This is clearly aimed at saving

45. The existence of these divisions between the different Member State delegations has been clear from the outset. The Presidency Note to the Government Representatives Group of 31 March 2000 (CONFER 4729/00) records (point III.5, pp. 4–5) this disagreement and suggested that the ECJ’s proposal to deal with such details in the drafting of the Statute might be the best way forward. The inclusion of this possibility in Art. 225a reflects a significant level of support for such an appeal, while the use of a permissive “may” when describing the availability of such review and the restriction thereof to “the limits laid down in the Statute” both suggest that an equally significant number of delegations had grave doubts about the frequency with which the Court should be involved in such reviews. It should be remembered, of course, that staff cases are often an interesting proving ground for general principles of law, which are then later applied in other administrative areas. Thus, to exclude *all* possibility of ECJ involvement is perhaps too strict an approach.

46. Declaration No. 16, cited *supra* note 43.

resources in obvious cases, avoiding the need for an extra Opinion to be translated and published: provided that the procedure is used sensibly, it has much to commend it. The prime candidate for its operation will undoubtedly be enforcement actions under Article 226 EC, where the Member State has no intention of justifying its alleged failure to fulfil its obligations under the Treaty.

In a similar vein, the reduced possibilities of appeal from the CFI to the ECJ (due to the filtering mechanism of a “serious risk of the uniformity or consistency of Community law being affected” concerning appeals from the new judicial panels or from a CFI decision on a reference for a preliminary ruling) may also serve to reduce the overall contribution of the advocates general to the process of the development of Community law, even though the First Advocate General is involved in the operation of that very filter. Ultimately, this more efficient use of the available resources is necessary, yet it is difficult not to feel a certain unease at casting aside the useful and informative Opinion in too many cases. Indeed, one of the matters often overlooked in the reform debate has been the fact that many of the proposals concerning direct actions and preliminary rulings were also implicitly about the role and influence of the advocates general. Certainly, the current proposals may not have any significant impact in this area given its case-by-case operation, but care should be taken lest this amounts to the first step on a slippery slope towards the total abolition of the role without clear consideration of the costs of such a move, as well as its possible benefits.

## **7. Procedural matters**

As has been pointed out in a number of contributions to the judicial reform debate,<sup>47</sup> much time could well be saved in the European Courts by changing certain procedural rules and general practices. Indeed, a significant contribution could be made were the Council to approve a substantial increase in the Courts’ budget to cover translation and ancillary services: this is one of the more time-consuming aspects of the progress of a case in Luxembourg and the Court of Justice’s own report on translation<sup>48</sup> will repay closer study. Its repeated requests for staff increases cannot go unheeded for very much longer, especially as the same factors that militate against any stabilization of the Courts’ general work load under the current arrangements are the reasons

47. See, e.g. Rasmussen’s recent article, *op. cit. supra* note 8, 1095–1098 and some of the contributions in Dashwood and Johnston, *op. cit. supra* note 2.

48. Available on the Court’s website at: <http://www.curia.eu.int/en/txts/others/trad.pdf>.

behind the increasing burden placed on its translation services.<sup>49</sup> As the Court points out, its budget amounts to only 2.7% of all the administrative budgets of the institutions and only 0.14% of the entire EU budget; in the current climate, the Court has no power to influence the budgetary process on the political level and this passive recipient status is beginning to show in the resources made available to it. At the same time, politicians are willing to emphasize the importance that they place on the proper functioning of the two courts – the Treaty of Nice itself shows an increased attention to this matter – and yet find it difficult on a political level to argue for an increase in the Courts' resources, when the pressure on all sides is to *reduce* the overall outlay of the Union wherever possible. On the other hand, the Member States' commitment in the Treaty of Nice to the rapid establishment of judicial panels in certain areas might run counter to this generally accepted trend. Indeed, it may suggest a more realistic approach to the true extent of resources needed to secure the judicial function within the EU. Either way, this dilemma will need to be faced very soon if the reforms of jurisdictional and structural elements are to have any impact upon the working of the European judiciary.

As far as the Treaty of Nice is concerned, the most significant developments in this sphere concern the changes to the way in which future amendments to the procedural rules governing the Courts will be possible. Previously, the Court's Rules of Procedure required the unanimous approval of the Council under the old Article 245 EC, while the Statute was in a Protocol to the Treaty and thus could be altered only by the same process as any other Treaty amendment. This inflexibility was worsened by the fact that there was no clear division of matters falling under the Statute and the Rules of Procedure, so that even the possibility of making such amendments within the normal EC political process was often skewed due the location of the various rules. Now, under the new Article 223 EC, the Council need only agree by qualified majority vote to change the Rules of Procedure, and a similar rule applies to the CFI (Article 224 EC) and will apply to any Rules of Procedure that may be adopted for the new judicial panels (Article 225a EC). Furthermore, the Statute is declared by the new Article 245 EC to be open to amendment by the Council by unanimous vote, with the exception of Title I (concerning the conditions of service of the members of the ECJ), thus removing the need for an IGC to secure any alterations. A similar right of initiative and consultation procedure applies here as under Article 225a concerning the new judicial panels, giving both the Court and the Commission a central role.

49. Indeed, in their proposals regarding the new intellectual property cases (see *supra* note 42, 8–9), the Courts made clear that the increased burden required not only an increase in the number of judges at the CFI, but also the creation of a task force of legal secretaries and a strengthening of the Registry and the translation service. While the new judges are in the pipeline (so to speak), little has been heard about the key issue of support staff and resources.

These developments are to be welcomed, as they provide an increased measure of flexibility to respond to difficulties that may arise in the operation of the Community judicial system, while providing a framework within which a future hierarchy of rules could be worked out, ensuring at the same time that adequate safeguards can be maintained for certain provisions considered fundamental to the working of the Courts.<sup>50</sup> It should be noted, however, that decisions concerning the Courts' linguistic regime must still be taken by a unanimous vote in the Council.<sup>51</sup> Previously, the Rules of Procedure regulated the question of which languages were used in the Court.<sup>52</sup> Had this remained the case, the matter would now be amenable to qualified majority voting in the Council. However, through the combined effect of Article 290 EC and Article 64 of the Statute, the linguistic regime is to be transferred to the Statute: until the relevant provisions have been adopted, Article 64 of the Statute explicitly provides that the existing rules may only be amended or repealed by the procedure for amending the Statute. This arrangement is clearly motivated by a desire to protect certain languages that some Member States may feel might be under threat, in response, for example, to the pressures of future enlargements of the Union.

At all events, it must not be forgotten that quite significant progress has also been made without the need for any Treaty revisions: the Court's recent proposals in this regard are to be welcomed and commended to the Council.<sup>53</sup> Indeed, the Council has recently adopted a number of amendments to the

50. Of course, this begs the question: which provisions *are* considered "fundamental"? I am here concerned to provide an assessment of the outcome of the Treaty of Nice and its potential, while in no way denying that its approach to the deep structural questions of jurisdiction and court levels and instances is open to challenge (both by current scholars and by the rapid pace of future developments).

51. As noted in the Introductory note to the Court's proposals for procedural reform included in Dashwood and Johnston, *op. cit. supra* note 2, the unanimous vote required can often lead to a "re-opening" of the bargaining process when the Council comes to approve amendments proposed by the Court to its Rules of Procedure, which can prove detrimental to the coherent updating of such provisions in some cases. One must trust that future Council deliberations will not indulge in such tactics on a regular basis with regard to the single Statute, now that the Rules of Procedure fall under the qualified majority voting rules.

52. See Arts. 29–31 of the ECJ Rules of Procedure and Art. 35–37 of the CFI Rules of Procedure.

53. Most recently, the Court has made a further specific proposal in relation: (a) to the transmission of documents to the European Parliament (as well as the Council) under Art. 16(7) of the ECJ's Rules of Procedure, where an act adopted under the co-decision procedure is claimed to be inapplicable in proceedings to which neither the Council nor the Parliament are a party; and (b) to the agreement allowing Iceland and Norway to lodge written statements with the Court in relation to the Schengen acquis and its development (under Art. 103(4) ECJ RoP). See the Court's website for the text and fuller explanation of these proposals: <http://www.curia.eu.int/en/txts/propositions/txt5a.pdf>.

Rules of Procedure of the ECJ,<sup>54</sup> in response to the ECJ proposal of mid-1999. The text of these amendments includes a number of changes to those proposals,<sup>55</sup> which entered into force on 1 July 2000.<sup>56</sup> Furthermore, the CFI has recently adopted certain changes to its Rules of Procedure, aimed at expediting proceedings by various means.<sup>57</sup> Meanwhile, some of the proposed amendments to the Rules of Procedure and the jurisdiction of the CFI have been incorporated into the legal framework by the Treaty of Nice itself. The IGC amendments to the procedure for altering these rules augurs well, if the Council can approach these matters in a manner similar to that shown in dealing with the current round of changes.

Overall, these procedural developments are really as much as could have been expected from this IGC, given its avowedly “Amsterdam leftovers” focus. Significant progress has been made in readying the system to adapt itself as is required to the future challenges of the European Community and this is warmly to be welcomed. However, the precise content, form and detail of these future changes is uncertain to say the least, so the character of the European judicial system “to come” still rests in the hands of the Member States and their response to the needs and requests of the Courts, their representatives and interlocutors. On a more negative note, the IGC does not appear to have heeded Judge Meij’s view<sup>58</sup> that the “reservation of basic principles to basic texts, and a little political confidence in the ability of magistrates to organize their own work” should be the key tenets of procedural progress. Perhaps future negotiations may show greater trust of the Courts in this regard.

54. Amendments to the Rules of Procedure of the Court of Justice O.J. 2000, L 122/43, of 24 May 2000.

55. See the Introductory note to the Court’s proposals included in Dashwood and Johnston, *op. cit. supra* note 2, which details the amendments made by the Council and juxtaposes them with the Court’s original proposals.

56. See *supra* note 54, Art. 2.

57. A summary is available on the Court’s website at [http://www.curia.eu.int/en/txts/com20001206\\_en.pdf](http://www.curia.eu.int/en/txts/com20001206_en.pdf), while the text of these amendments was published in O.J. 2000, L 322 (19 Dec. 2000). Briefly, the changes allow the use of a fast-track procedure where cases do not lend themselves to the use of interim measures (new Art. 76a of the Rules of Procedure of the CFI), the possibility of dispensing with the second exchange of pleadings (amended Art. 47 Rules of Procedure), the shortening of the time limit for interventions (amended Art. 115(1) and new Art. 116(6) Rules of Procedure) and the rationalization of the rules on time allowances for distance from the Court in the light of modern means of communication (new Art. 43(6), amended Articles 44(2), 100 and 102(2) Rules of Procedure). These rules entered into force on 1 Feb. 2001.

58. Guest Editorial by Meij, “Architects or judges? Some comments in relation to the current debate”, 37 CML Rev. (2000), 1039, at 1040.

## 8. The role of the national courts

As noted above, one of the areas conspicuous by its absence from the Treaty of Nice is the role of the national courts within the European judicial system. Of course, the flip-side of any reforms on the European level is the extent of their impact upon the national courts, especially under Article 234 EC. While it seems unlikely that national courts will be inclined to disrespect possible future rulings of the CFI under Article 234 EC, every effort should be made to ensure the relative consistency of its output to prevent even the possibility of such a development. This will be a matter for the CFI's internal procedure for dealing with such references and their possible inter-relationship with the ECJ as discussed above.

This section is more concerned with the type of measures that could be taken at national level to ease the growing burden on the European courts. Following the maxim that "prevention is better than cure", the association of the national courts with this process would seem to be a vital component of any successful reform strategy. In some respects, the Court of Justice's more recent jurisprudence has suggested a growing awareness of this issue,<sup>59</sup> although the "from on high" aspect of such refusals to accept a reference is treading a very delicate path along the boundaries of damaging the co-operation of national courts. This is especially problematic when these rejections of references are placed alongside cases such as *Dzodzi* and *Leur-Bloem*,<sup>60</sup> where the Court has seemed happy to answer questions concerning national fact scenarios due to the link between national law and EC law (whether word-for-word, or by the incorporation of its concepts). Thus, one might be led to ask not so much whether the spirit of Article 234 EC is "under attack",<sup>61</sup> but whether it *should* be changed to reflect both the increasing maturity of the national courts in dealing with EU law and the need to ensure that the European judicature can continue to perform its functions under acceptable conditions.

This matter was canvassed in the Working Party's Report in some detail; that Report proposed a programme that would encourage the national courts to be bolder in their application of European law and would strengthen their capacity to deal with such questions.<sup>62</sup> This would have included better training

59. See the cases cited *supra* note 28.

60. See *supra* note 8. Even more startling is the Court's acceptance of the reference concerning the interpretation of TRIPS in Case C-53/96, *Hermès International v. FHT Marketing Choice*, [1998] ECR I-3603. See Weatherill and Beaumont, *EU Law*, 3<sup>rd</sup> ed. (London: Penguin, 1999), p. 319. See also, more recently, Cases C-300 & 392/98, *Parfums Christian Dior SA v. Tuk Consultancy BV (C-300/98)* and *Assco v. Layher BV (C-392/98)*, Judgment of 14 Dec. 2000, nyr.

61. See O'Keeffe, "Is the spirit of Article 177 under attack? Preliminary references and admissibility," 23 EL Rev. (1998), 509.

62. See Point II.A.2(e) of the Working Party Report, cited *supra* note 5.

programmes and information technology systems and support staff. Judge Meij (among others) has lent his strong support to this approach;<sup>63</sup> however, the representatives of the Member States seem to have responded less positively. While the delegations at the preparatory discussions “took note” of the Working Party’s ideas, it was recorded that a “majority of delegations . . . expressed grave reservations at the idea that such a measure should be dealt with in the framework of the Conference, and stressed that this was a purely national matter”. In the current defensive climate as regards the question of competences, this attitude is unsurprising and it is accurate in the sense that such institutional requirements have not yet been the subject of Community harmonization. Yet it is submitted that this view is also very short-sighted. Such measures could only have beneficial effects and undoubtedly would be improved by the inclusion of an element of linkage to the Research and Documentation Division of the Court of Justice. This linkage would clearly require action at the European level and the strength of the message that the IGC could have sent to (what are, after all, their “own”) national courts would have been a valuable step towards increasing self-reliance by the national courts in European law matters.

Perhaps the best way to ease both Member States (politically) and national courts (practically) into the development of such a system would be to encourage national courts to propose their own answers to the questions that they submit for a preliminary ruling. Fears have been expressed that this may unsettle the delicate balance of the co-operation between national courts and the ECJ under Article 234 EC: some national courts are likely to be more comfortable with such a system than others, while certain systems might feel compelled to give too thorough a judgment on the matter, given the forthcoming scrutiny of the ECJ. Further, such proposed answers might be an excessive influence on the procedure before the ECJ itself.<sup>64</sup> However, this all assumes that the current balance is weighted correctly; it is submitted that the structure now erected is made of sterner stuff and is unlikely to suffer any serious damage if such a process were implemented. It seems that this could be achieved by a fuller specification of the requirements of a reference in a form of Practice Direction by the Court, which could also apply to the CFI, if and when it begins to receive references under Article 234 EC. This could well lay the foundations for the development of a system of *certiorari* in one form or another, perhaps by encouraging the national courts to deliver a “judgment *nisi*” that would become definitive unless the ECJ/CFI accepted

63. See *supra* note 58, 1044–1045.

64. See Dashwood and Johnston, “Synthesis of the Debate”, *op. cit. supra* note 2, for a discussion of this line of argument.

a reference within a specified period of time.<sup>65</sup> This type of flexibility and basis for future development must be put in place very soon if the difficulties being experienced by the European judicial system are not to spiral out of control. "Time . . . is definitely running out" (Meij).

## 9. Conclusions

One should probably be grateful for small mercies. IGC-led progress on the issue of judicial reform seemed an unlikely hope just two short years ago as the Member States struggled to develop a consensus on other weighty matters widely regarded as of high political significance. Yet the Treaty of Nice has made some significant contributions to the improvement of the European judicial system. Indeed, one of the most encouraging aspects is the manner in which the issues were debated and the extent of agreement that was reached. This bodes well for the next, difficult phase of reform, when the practical implementation of some of the schemes approved at Nice must take place.

Some clearly important steps have been taken. The provision empowering the Council to create judicial panels is likely to be the change of the most immediate importance, especially if the call for urgent consideration is heeded. Equally, the proposals to transfer certain areas of jurisdiction to the Court of First Instance may prove vital to taking the pressure off the Court of Justice in the medium term. There is a strong case for respecting the Court of Justice's 1998 proposal and making the CFI the general first port of call for direct actions, while the incremental granting of areas of preliminary ruling jurisdiction to the CFI also seems likely, if a little more difficult to negotiate. Of course, the improvements that could be realized by such measures are dependent upon an early resolution of the political impasse concerning the extra judges for the CFI: the Member States must not drag their feet on this issue. Further, the precise operation of these innovations is as yet unclear, as much implementing legislation (in the form of procedural rules) will be needed. If too great a measure of caution is evident, then the ECJ may end up continuing to exercise supervision of a greater case load than it can reasonably be expected to bear. Meanwhile, the baby of the role of the advocate general should not be thrown out with the bathwater of time delays in the ECJ's proceedings: as the need to operate an increasingly comprehensively

65. *Ibid.*, thus allowing a continued spirit of co-operation while providing the opportunity for the European receiving Court to reject the case, where the rejection would effectively close the national procedure, thus not contributing to any further delays in the overall procedure: an ingenious idea that was suggested during the CELS conference of 3 July 1999, which was held to discuss the Courts' Paper of May 1999.



two-tiered system is more keenly felt, the advocates general may prove a vital means of maintaining a critical attitude and a striving for consistency.

On the procedural level, the new focus on the Chamber as the normal Court formation is a welcome legal recognition of current practice, which should maintain a more efficient use of judicial resources in the future. Equally, as the Union's enlargement process continues, the benefits of the Grand Chamber structure will become apparent, although vigilance will be needed to ensure that any nascent inconsistencies in the ECJ's case law are preempted or ruthlessly weeded out by the operation of internal consultation procedures. One of the most important changes may well prove to be the way that the Courts' Statute and Rules of Procedure can be amended in future: the Statute may now be amended by the unanimous vote of the Council and need no longer wait for an IGC, while the Rules of Procedure are subject to the even more flexible mechanism of qualified majority voting (and, it must be said, all of its vote-weighting, population-reflecting complexities after the amendments at Nice). Much will depend upon how the Council goes about using these powers in the future and upon the extent to which the necessary financial resources can be secured to pay for these jurisdictional, structural and supporting developments, especially with regard to translation and bureaucratic facilities. In this respect, the general attitude towards the inclusion of such changes in the new EC Treaty suggests that the Member States are coming to realize that, if you want a world-class judicial system, you have to be prepared to pay for it.

One of the greatest disappointments is the Conference's refusal to give more detailed consideration to the vital role of national courts in the whole European judicial system. The Court of Justice has been acutely aware of their importance from the outset and more attention needs to be paid to this side of the process if the massive increase in judicial work on the European level is to be contained. In this respect, the flexibility inherent in the largely "enabling" nature of the Treaty of Nice must be exploited to the full. In an increasingly complex Europe that presents ever more complex problems, this multi-faceted and flexible approach must be maintained if European Union's desire to become a world-class economy and an "area of freedom, security and justice" is to be fulfilled. Under Article 220 EC, the European Courts must ensure "the law is observed". They must be given the resources to be able to fulfil this task.