



College of Europe
Collège d'Europe



Natolin

European Legal Studies
Etudes Européennes Juridiques

RESEARCH PAPERS IN LAW

2/2005

Koen Lenaerts

The Future Organisation of the European Courts

© *Koen Lenaerts, 2005*

The Future Organisation of the European Courts

(to be published in *30 Years of European Legal Studies at the College of Europe / 30 ans d'études juridiques européennes au Collège d'Europe : Liber Professorum 1973/74 – 2003/04*, P. Demaret, I. Govaere, D. Hanf (eds.), P.I.E.-Peter Lang - Presses Interuniversitaires Européennes)

Koen Lenaerts

I. The Division of Jurisdiction between the Community Courts: The Principles of the Nice Treaty

According to Article 220 of the EC Treaty, the Court of Justice and the Court of First Instance (hereinafter CFI) “each within its jurisdiction, shall ensure that in the interpretation and application of [the EC] Treaty the law is observed”.

The “pre-Nice” allocation of jurisdiction between the two Community courts can be summarized as follows. At Court of Justice level, mention should first of all be made of references for a preliminary ruling. A national court, in a case pending before it, can - or in some circumstances must - refer to the Court of Justice a question relating to the interpretation of provisions of the EC Treaty or of secondary Community law, or relating to the validity of provisions of secondary Community law.¹ Moreover, the Court of Justice ensures the observance of the law in the context of actions for annulment or failure to act brought before it by the Community institutions, the European Central Bank (hereinafter ECB) and the Member States.² These actions concern, respectively, the legality of an act of secondary Community law and the legality of the failure of the institution concerned to adopt such act. The Court of Justice also has jurisdiction in actions brought by the Commission or by a Member State relating to the infringement of Community law by a Member State (hereinafter infringement actions)³ and in actions relating to compensation for non-contractual damage brought by Member States against the Community.⁴ Finally, as regards the jurisdiction of the Court of Justice,

¹ Article 234 of the EC Treaty.

² Respectively Article 230, paragraphs 2 and 3, and Article 232, paragraph 1, of the EC Treaty.

³ Articles 226 to 228 of the EC Treaty.

⁴ Articles 235 and 288, paragraph 2, of the EC Treaty (such actions are generally lodged by natural or legal persons and not by Member States). For completeness sake the following actions should also be mentioned: actions based on Article 237 of the EC Treaty which concern the fulfilment by

mention should be made of appeals which can be lodged on points of law only against rulings of the CFI.⁵

The CFI has jurisdiction⁶ in actions for annulment and for failure to act and in disputes relating to compensation for non-contractual damage brought by natural and legal persons against the Community⁷ as well as in disputes between the Community and its servants.⁸ The CFI further hears and determines cases brought against the Office for Harmonisation in the Internal Market and which relate to Community trademarks⁹ and designs¹⁰ as well as cases brought against the Community Plant Variety Office relating to Community plant variety rights.¹¹

The Nice Treaty contains the embryo for a fundamental re-allocation of jurisdiction between the Community courts.¹² It is apparent from the Nice Treaty that the Court of Justice's role should be confined, in the future, to the examination of questions which are of essential importance for the Community legal order. In order to achieve this objective, the Treaty provides that the Court of Justice will be the competent court for infringement actions,¹³ for (the great majority of) preliminary references, for appeals against decisions

Member States of obligations under the Statute of the European Investment Bank (hereinafter EIB), the legality of measures adopted by the Board of Governors and the Board of Directors of the EIB, and the fulfilment by national central banks of obligations within the framework of the monetary Union; actions based on Article 238 of the EC Treaty brought by a Member State or an institution pursuant to an arbitration clause contained in a contract concluded by or on behalf of the Community, whether that contract be governed by public or private law; and actions based on Article 239 of the EC Treaty concerning any dispute between Member States which relates to the subject matter of the Treaty, submitted to the Court under a special agreement between the parties.

⁵ Article 225(1) of the EC Treaty.

⁶ Article 51 of the Statute of the Court of Justice, before amendment by Council Decision of 26 April 2004, O.J. (2004) L 132/5.

⁷ The CFI also has jurisdiction in actions pursuant to an arbitration clause brought by natural or legal persons (Article 238 of the EC Treaty).

⁸ Article 236 of the EC Treaty.

⁹ Council Regulation (EC) No. 40/94 of 20 December 1993 on the Community trademark, O.J. (1994) L 11/1.

¹⁰ Council Regulation (EC) No. 6/2002 of 12 December 2001 on Community designs, O.J. (2002) L 3/1.

¹¹ Council Regulation (EC) No. 2100/94 of 27 July 1994 on Community plant variety rights, O.J. (1994) L 227/1, amended by Council Regulation (EC) No. 2506/95 of 25 October 1995, O.J. (1995) L 258/3.

¹² See on this subject LOUIS, J.-V., "La fonction juridictionnelle de Nice à Rome", *Journal des Tribunaux*, Droit européen, 2004, Issue 103; VANDERSANDEN, G., "Le système juridictionnel communautaire après Nice", *Cahiers de droit européen*, 2003, Volume 2003, No. 1-2; VESTERDORF, B., "The Community Court System Ten Years from Now and Beyond: Challenges and Possibilities", *European Law Review*, 2003, Volume 28, No. 303.

¹³ According to Article 225(1), first paragraph, second sentence, of the EC Treaty, the Statute may provide for the CFI "to have jurisdiction for other classes of action or proceeding". This means that granting to the CFI jurisdiction in infringement actions (based on Articles 226 to 228 of the EC Treaty) would not require a Treaty amendment. An amendment of the Statute would suffice.

of the CFI in direct actions,¹⁴ and, exceptionally, for the review of preliminary ruling decisions of the CFI or of decisions taken by the CFI upon appeal in cases for which a judicial panel has jurisdiction at first instance.

The EC Treaty now contains a legal basis for the transfer of jurisdiction to the CFI with regard to preliminary references in - still to be determined - specific areas.¹⁵ As regards direct actions, the principle is that the CFI will have jurisdiction to hear at first instance actions for annulment¹⁶ and for failure to act,¹⁷ and actions relating to compensation for non-contractual damage,¹⁸ as well as disputes between the Community and its servants,¹⁹ regardless of the status of the applicant.²⁰ There are two exceptions to this principle. First, judicial panels may be created. They will hear and determine at first instance certain classes of action or proceeding brought in specific areas.²¹ Second, the Statute of the Court of Justice (hereinafter the Statute) may reserve certain actions at first and last instance to the Court of Justice.²² The new Statute which was attached to the Nice Treaty confirmed the *status quo* and, as far as direct actions were concerned, maintained - until a later amendment of the Statute²³ - the existing division of jurisdiction *ratione personae* between the Court of Justice and the CFI.²⁴

The Nice Treaty, which entered into force on 1 February 2003, thus proclaimed a significant reform of the system of judicial protection of the

¹⁴ Article 225 of the EC Treaty allows the introduction of a filter system for appeals. Article 225(1), second paragraph, of the EC Treaty indeed states: "Decisions given by the Court of First Instance [...] may be subject to a right of appeal to the Court of Justice on points of law only, under the conditions *and within the limits* laid down by the Statute" (emphasis added).

¹⁵ Article 225(3) of the EC Treaty.

¹⁶ Article 230 of the EC Treaty.

¹⁷ Article 232 of the EC Treaty.

¹⁸ Articles 235 and 288, second paragraph, of the EC Treaty.

¹⁹ Article 236 of the EC Treaty.

²⁰ Article 225(1) of the EC Treaty.

²¹ Article 225(1), first paragraph, and Article 225a, first paragraph, of the EC Treaty. The first application of this exception is contained in Council Decision of 2 November 2004 establishing the European Union Civil Service Tribunal, O.J. (2004) L 333/7.

²² Article 225(1), first paragraph, of the EC Treaty.

²³ The Nice Treaty introduced a simplified procedure for amending the Statute of the Court of Justice. Whereas until the entry into force of the Nice Treaty the provisions relating to Treaty amendments applied, Article 245 of the EC Treaty now provides: "The Council, acting unanimously at the request of the Court of Justice and after consulting the European Parliament and the Commission, or at the request of the Commission and after consulting the European Parliament and the Court of Justice, may amend the provisions of the Statute, with the exception of Title I".

²⁴ Before its amendment by Council Decision of 26 April 2004 (*supra* footnote 6), Article 51 of the Statute stated that the Court of Justice shall have jurisdiction in actions brought by the Member States, the institutions of the Union and the ECB.

Union.²⁵ The implementation of this reform, however, required first of all the amendment of the Statute in order to transfer jurisdiction from the Court of Justice to the CFI which is intended to become the Community court of general jurisdiction at first instance. However, in order to avoid an overburdening of the latter court, one or more judicial panels had to be created. The proposals which have been submitted to this effect will now be examined. The transfer of jurisdiction relates to direct actions but does not concern infringement actions. The Court of Justice and the Commission indeed consider that transferring jurisdiction to the CFI for infringement actions is not a priority at this stage. Nor do the Court of Justice and the Commission deem the time ripe for transferring to the CFI jurisdiction to give decisions on questions referred for a preliminary ruling in specific areas.

II. The Transfer of Jurisdiction to the CFI as regards Direct Actions other than Infringement Actions

The Court of Justice took the initiative to prepare a draft Council decision amending the Protocol on the Statute of the Court of Justice.²⁶ The guiding principle of this proposal was to leave the Court of Justice exclusive jurisdiction at first and last instance only in respect of basic legislative activity and in respect of the determination of inter-institutional disputes. The CFI would have jurisdiction to hear and determine at first instance all other categories of direct actions other than infringement actions. The proposal thus confirmed the constitutional role of the Court of Justice.

The Court's proposal sought to reconcile simplicity with the adjustments to the Statute necessary to follow as closely as possible the above-mentioned guiding principle. It set forth the following re-allocation of jurisdiction as regards direct actions.²⁷

²⁵ Declaration No. 12 to the Nice Treaty called on the Court of Justice and the Commission to give overall consideration to the allocation of jurisdiction between the Court of Justice and the CFI, in particular in the area of direct actions, and to submit suitable proposals for examination by the competent bodies as soon as the Treaty of Nice entered into force.

²⁶ See draft Council decision prepared by the Court of Justice amending the Protocol on the Statute of the Court of Justice (Articles 51 and 54). This document can be found on the website of the Court of Justice, <http://www.curia.eu.int>.

²⁷ The proposed new Article 51 of the Protocol on the Statute of the Court of Justice was drafted as follows:

First, actions which already fell within the jurisdiction of the CFI - i.e. direct actions brought by natural and legal persons - will continue to be heard and determined by this court.²⁸

Second, all inter-institutional disputes (including those affecting the ECB) will be heard and determined at first and last instance by the Court of Justice.

Third, as regards actions brought by Member States, the status of the defendant is favoured as the factor determining jurisdiction. The Court of Justice will have jurisdiction to hear and determine actions brought by Member States *against* acts and failures to act of *the European Parliament and the Council*, either in the exercise of the powers vested in each of those institutions or pursuant to the co-decision procedure. In principle, therefore, actions brought by Member States against the Commission and the ECB, would fall within the jurisdiction of the CFI since such cases do not normally involve review of the basic legislative activity of the institutions.²⁹

The Court's proposal, and thus the Council Decision, contain two *exceptions*. The first is based on the observation that the Council sometimes adopts acts which do not concern the basic legislative activity of the Community. Reserving actions in relation to such acts to the Court of Justice would not be in conformity with the basic guideline. Therefore, the CFI will

"By way of exception to the rule laid down in Article 225(1) of the EC Treaty and Article 140a(1) of the EAEC Treaty, jurisdiction shall be reserved to the Court of Justice in the actions referred to in Articles 230 and 232 of the EC Treaty and Articles 146 and 148 of the EAEC Treaty when they are brought by a Member State against:

* an act of or failure to act by the European Parliament or the Council, or by both those institutions acting jointly, except for

- decisions taken by the Council under the third subparagraph of Article 88(2) of the EC Treaty;
- acts of the Council adopted pursuant to a Council regulation concerning measures to protect trade within the meaning of Article 133 of the EC Treaty;
- acts of the Council by which it exercises implementing powers directly in accordance with the third indent of Article 202 of the EC Treaty;

* against an act of or failure to act by the Commission under Article 11a of the EC Treaty.

Jurisdiction shall also be reserved to the Court of Justice in the actions referred to in the same articles when they are brought by an institution of the Communities or by the European Central Bank against an act of or failure to act by the European Parliament, the Council, both those institutions acting jointly, or the Commission, or brought by an institution of the Communities against an act of or failure to act by the European Central Bank."

In its Decision of 26 April 2004 (*supra* footnote 6), the Council has adopted this proposal *ne varietur*, see Article 1(1) containing the new wording of Article 51 of the Protocol on the Statute of the Court of Justice.

²⁸ This means that it cannot be ruled out that some cases involving basic legislative activity will be heard and determined at first instance by the CFI.

²⁹ The Court of Justice states the following in its explanatory memorandum to the draft decision: "Of the 132 actions brought against acts of the Commission [in the years 1996-2000], in 122 cases there was no obvious reason why they should have remained within the exclusive jurisdiction of the Court

have jurisdiction to hear and determine at first instance actions brought by a Member State concerning the following acts: decisions of the Council in the field of State aid,³⁰ measures to protect trade, especially regulations by which the Council imposes definitive antidumping or countervailing duties, as well as implementing measures taken by the Council on the basis of an empowering provision in the basic legislative act.

Conversely, it may happen that the Commission's action involves basic legislative activity. The review of the legality of these acts or of the failure to act would therefore logically fall within the jurisdiction of the Court of Justice at first and last instance. Thus, the Court of Justice will have jurisdiction to hear and determine actions brought by Member States against acts of the Commission adopting a decision in the field of enhanced cooperation under Article 11a of the EC Treaty.

The division of jurisdiction proposed by the Court of Justice and adopted by the Council is based on simple criteria and led to a relatively important transfer of cases from the Court of Justice to the CFI.³¹

The Commission submitted its opinion on the Court's proposal.³² While endorsing the basic guideline of this proposal, the Commission pointed out that some acts of the Commission other than those based on Article 11a of the EC Treaty³³ as well as some acts of the ECB³⁴ also concern *basic legislative activity*. In accordance with the Court's own guideline, the Court of Justice should, in the Commission's view, have jurisdiction at first and last instance with respect to direct actions brought by Member States concerning these acts.³⁵

of Justice, while none of the 10 other cases could really be regarded as falling within the scope of review of the basic legislative activity of the institutions."

³⁰ Decisions of the Council based on Article 88(2) of the EC Treaty.

³¹ See, however, *infra* under V.

³² Commission opinion on the request for an amendment to Articles 51 and 54 of the Statute of the Court of Justice, presented by the Court in accordance with the second paragraph of Article 245 of the EC Treaty, in order to change the division of jurisdiction in direct actions between the Court of Justice and the CFI as referred to in Article 225(1) of the EC Treaty (COM/2003/660 final).

³³ Acts based on Articles 39(3)d, 86(3) and 99 to 104 of the EC Treaty.

³⁴ Acts based on Article 110(1) of the EC Treaty.

³⁵ The Commission also pointed out that the formulation in the Court's proposal reserving for its own jurisdiction "an act of [...] the European Parliament or the Council, or [...] both those institutions acting jointly" embraces not only basic legislative acts adopted by the Council alone or in co-decision with the Parliament but also acts adopted by those institutions regarding their operation, such as resolutions on the Parliament's seat or the location of its departments and acts such as the Code of Conduct on access to Council documents. The Commission approves this result but considers that the same must apply to all institutions. Provisions adopted by the institutions in the exercise of their

As regards *inter-institutional conflicts* which are, under the Court's proposal, reserved to the Court of Justice, the Commission considered that this court's jurisdiction should extend to *all* institutional disputes and therefore include actions brought by an institution, and possibly even a Member State, against bodies or agencies which are set up by, or on the basis of, the Treaty.³⁶

The European Parliament claimed that jurisdiction should be reserved to the Court of Justice as to actions brought by a Member of the European Parliament against an act of the latter concerning the performance of his or her electoral mandate.³⁷ At present, such cases are part of the jurisdiction of the CFI and yet they entail legal questions of a constitutional nature that would warrant exclusive competence on the part of the Court of Justice.³⁸

It is extremely difficult to find a simple criterion for the re-allocation of jurisdiction between the Court of Justice and the CFI which would guarantee that all actions of a constitutional nature fall under the jurisdiction of the Court of Justice. It is even harder to find a criterion which would reserve to the Court of Justice's jurisdiction *only* actions of that nature.

However, after the adoption by the Council of the proposal of the Court of Justice, the great majority of constitutional cases will continue to come directly to the Court of Justice. At the same time, a significant number of cases lacking such constitutional dimension and which are at present heard by the Court of Justice,³⁹ are transferred to the CFI. For the few constitutional cases which will be brought before the CFI or even a judicial panel, the provisions of the EC Treaty guarantee that the Court of Justice will be in a position to assert its role as a supreme court. Indeed, when a constitutional case is brought before the CFI by a natural or legal person, not only the parties concerned but

institutional autonomy and intended to have legal effects inevitably affect the balance of powers of the institutions. Jurisdiction in actions by the Member States challenging such acts should therefore be reserved to the Court of Justice.

³⁶ See Article 286(1) of the EC Treaty.

³⁷ Legislative resolution of 10 February 2004 on the Court's proposal.

³⁸ See Joined Cases T-222/99, T-327/99 and T-329/99, *Martinez and Others v. Parliament*, 2001, ECR p.II-2823; Case C-488/01 P, *Martinez v. Parliament*, 2003, ECR p.I-13355.

³⁹ E.g. European Agricultural Guidance and Guarantee Fund (EAGGF) cases and some State aid cases.

also the other institutions and the Member States⁴⁰ have the right to appeal against the decision of the CFI before the Court of Justice.⁴¹ Furthermore, the review procedure⁴² grants the Court of Justice the final say with respect to any constitutional issues which may arise in cases heard and determined at first instance by a judicial panel and on appeal by the CFI.

III. The Creation of Judicial Panels

Since the entry into force of the Nice Treaty, the Council is empowered to create judicial panels which will be attached to the CFI and which will hear and determine at first instance certain classes of action or proceeding brought in specific areas.⁴³

Decisions given by judicial panels may be subject to a right of appeal before the CFI on points of law only or, when provided for in the decision establishing the panel, a right of appeal also on matters of fact.

Recently, the Commission proposed the creation of two judicial panels: the European Union Civil Service Tribunal and the Court for the Community Patent. The former will take over all staff cases from the CFI⁴⁴ whereas the latter would hear and determine cases which in the absence of the creation of the judicial panel, would normally fall within the jurisdiction of the CFI.

A. *The European Union Civil Service Tribunal*

Declaration No. 16 attached to the Nice Treaty called upon the Court of Justice and the Commission “to prepare as swiftly as possible a draft decision establishing a judicial panel which has jurisdiction to deliver judgments at first instance on disputes between the Community and its servants”. The

⁴⁰ With the exception of cases relating to disputes between the Communities and their servants, an appeal may be brought by Member States and the institutions of the Communities which did not intervene in the proceedings before the CFI (Article 56 of the Statute of the Court of Justice).

⁴¹ Article 225(1) of the EC Treaty.

⁴² Article 225(2) and (3), of the EC Treaty.

⁴³ Articles 220 and 225a of the EC Treaty. The Council will decide unanimously on a proposal of the Commission after consulting the European Parliament and the Court of Justice, or at the request of the Court of Justice after consulting the European Parliament and the Commission.

⁴⁴ In 2003, 124 new staff cases were brought before the CFI out of a total of 438 new cases.

Commission took the initiative and submitted, on 19 October 2003, a proposal for a Council decision establishing the European Civil Service Tribunal.⁴⁵

The European Union Civil Service Tribunal (hereinafter EUCST) shall be attached to the CFI and have its headquarters at the CFI. It will exercise the jurisdiction currently exercised by the CFI to hear disputes involving the European Union civil service.⁴⁶ It shall consist of seven judges to be appointed for a period of six years by the Council⁴⁷ from among candidates submitting an application.⁴⁸ In order to facilitate the Council's task, a committee is set up, composed of former members of the Court of Justice and the CFI and lawyers of recognised competence, which gives an opinion on the candidates' suitability to perform the duties of judge at the EUCST.⁴⁹

The EUCST shall sit in chambers of three judges. In certain cases determined by its rules of procedure, it may sit in full court or in a chamber of five judges or of a single judge.⁵⁰ Astonishingly, by contrast to proceedings before the CFI,⁵¹ the proposal submitted to the Council did not allow cases to be heard and determined by a single judge.

The EUCST Decision further alleviates the existing procedure in staff cases with a view to settling disputes rapidly. It thus provides for one exchange of written submissions between the parties.⁵² When, exceptionally, the EUCST deems that a second exchange is necessary, it may decide to proceed to judgment without an oral hearing.⁵³ Furthermore, at all stages of the

⁴⁵ COM/2003/705 final. That proposal led to the adoption of Council Decision of 2 November 2004 establishing the European Union Civil Service Tribunal (hereinafter EUCST Decision), O.J. (2004) L 333/7.

⁴⁶ EUCST Decision, Article 1, specified in Article 1 of Annex I to the Statute of the Court of Justice.

⁴⁷ Acting unanimously in accordance with the fourth paragraph of Article 225a of the EC Treaty. Should the Court of Justice so request, the Council, acting by a qualified majority, may increase the number of judges. Every three years there shall be a partial replacement of the judges. Retiring judges may be reappointed. Any vacancy shall be filled by the appointment of a new judge for a period of six years.

⁴⁸ The Commission had proposed that candidates be presented by the Member States.

⁴⁹ See further Annex I to the Statute of the Court of Justice, Article 3.

⁵⁰ *Ibid.*, Article 4.

⁵¹ Article 50, second paragraph, of the Statute and Article 14(2) of Rules of Procedure CFI. The Court of Justice, in its opinion of 3 February 2004, criticized this point and proposed that cases at the EUCST can also be heard and determined by a single judge, which was finally accepted.

⁵² Annex I to the Statute of the Court of Justice, Article 7.

⁵³ *Ibid.* Presently, in the procedure before the CFI, a second exchange of written pleadings together with an oral hearing is the rule, with certain exceptions (see Articles 47(1) and 52(1) Rules of Procedure CFI). The Court of Justice, in its opinion of 3 February 2004, considered that there should be an oral hearing if one of the parties so requests. That solution was finally adopted. See *ibid.*, Article 7(3) second sentence, which reads as follows: "Where there is such second exchange, the

procedure the EUCST should examine the possibilities of an amicable settlement of the dispute and may try to facilitate such settlement.⁵⁴

An appeal may be brought before the CFI against final decisions of the EUCST and decisions of the EUCST disposing of the substantive issues in part only or disposing of a procedural issue concerning a plea of lack of jurisdiction or inadmissibility. The appeal is to be lodged within two months of the notification of the decision appealed against by any party which has been unsuccessful, in whole or in part, in its submissions.⁵⁵

Whereas Article 225a of the EC Treaty leaves the door open for appeals on points of law *and* fact, the EUCST Decision clearly opts for an appeal limited to points of law.⁵⁶ If the appeal is well founded, the CFI shall quash the decision of the EUCST and itself give judgment in the matter. Where the state of the proceedings does not permit a decision by the CFI, the case will be referred back to the EUCST which will be bound by the decision of the CFI on points of law.⁵⁷

B. The Community Patent Court

At present the protection conferred by patents is governed by national law and in case of dispute the patent rights have to be enforced before national courts. In order to increase the competitiveness of the Union's economy, the Commission put forward, on 1 August 2000, a proposal for a Council Regulation on a Community patent.⁵⁸ The holder of such a patent would enjoy protection based on Community law in all Member States of the Union.

The establishment of a Community patent jurisdiction which would ensure a uniform interpretation of the Community patent legislation and give rulings enjoying Community-wide effect, will be a two-step venture. First, the Council will have to adopt a decision based on Article 229a of the EC Treaty by which

Civil Service Tribunal may, with the agreement of the parties, decide to proceed to judgment without an oral procedure."

⁵⁴ *Ibid.*, Article 7(4).

⁵⁵ *Ibid.*, Article 9.

⁵⁶ *Ibid.*, Article 11.

⁵⁷ *Ibid.*, Article 13. The Court of Justice, in its opinion of 3 February 2004, suggested that the reference to the exceptional character of the referral back to the EUCST, contained in the Commission's proposal, be deleted, which was done.

⁵⁸ COM/2000/412 final.

jurisdiction is conferred on the Court of Justice in disputes relating to the Community patent. Since patent litigation concerns litigation of a nature different from the proceedings normally brought before the Community courts - namely litigation between private parties - such a decision of the Council will also have to be adopted by the Member States in accordance with their respective constitutional requirements.⁵⁹ The Commission recently submitted to the Council a proposal for a decision conferring jurisdiction on the Court of Justice in disputes relating to the Community patent.⁶⁰

As a second step, a Council decision based on Article 225a will have to be adopted which would create a judicial panel and transfer to that panel the jurisdiction, at first instance, conferred upon the Court of Justice with respect to the Community patent. In this respect, the Commission prepared a proposal for a Council decision establishing the Community Patent Court (hereinafter CPC) and concerning appeals before the CFI,⁶¹ which will now be examined.

According to the Commission's proposal, the CPC will consist of seven judges, appointed for a period of six years.⁶² The judges will be chosen from candidates presented by the Member States having an established high level of legal expertise in patent law. They shall be appointed by the Council⁶³ on the basis of their expertise after consultation of an advisory committee which will give an opinion on the adequacy of the profile of candidates.⁶⁴

The CPC will sit in chambers of three judges. In special circumstances provided for in the Rules of Procedure, the CPC could sit in an enlarged

⁵⁹ Article III-364 of the Constitution for Europe simplifies this procedure. According to this provision a "European law may confer on the Court of Justice, to the extent that it shall determine, jurisdiction in disputes relating to the application of acts adopted on the basis of the Constitution which create European intellectual property rights". Such European law would be adopted pursuant to the ordinary legislative procedure (Articles I-34 and III-396 of the Constitution).

⁶⁰ COM/2003/827 final. Under this proposal, the Court of Justice would have jurisdiction in disputes relating to the infringement or the validity of a Community patent and a Community supplementary protection certificate, the use of the invention after the publication of the Community patent application, the right based on prior use of the invention, interim and evidence-protection measures in the subject matters conferred, damages or compensation in the situations referred to above and the ordering of a penalty payment in case of non-compliance with a decision or order constituting an obligation to act or to abstain from an act (Article 1).

⁶¹ COM/2003/828 final.

⁶² COM/2003/828 final, Article 2: Every three years there shall be a partial replacement of the judges. Retiring judges may be reappointed.

⁶³ Acting unanimously in accordance with the fourth paragraph of Article 225a of the EC Treaty.

⁶⁴ COM/2003/828 final: Articles 2 and 3 of Annex II to the Statute of the Court of Justice.

composition, for example in cases where fundamental questions of patent law are concerned or in a reduced composition (single judge) in simple cases.⁶⁵

The judges will be assisted by seven technical experts named assistant *rapporteurs*⁶⁶ who will be appointed for renewable periods of six years.⁶⁷ The assistant *rapporteurs*, who will be specialised in different technical fields and have the “necessary legal qualifications”,⁶⁸ will actively participate in the preparation, the hearing and the deliberation of a case. They will have the right to put questions to the parties but they will not have the right to vote on the decision to take. Their input would be important in helping the judges to focus from the start of proceedings on the essential technical questions involved.⁶⁹

The proposed decision also modifies and adds some specific provisions to the Statute in order to take into account the special nature of litigation before the CPC. Thus, in contrast to other actions brought before the Community judicature, the competence of the CPC to prescribe any necessary interim measures will not be conditional upon main proceedings having already been instituted before it. Furthermore, where there is a demonstrable risk that evidence may be destroyed even before the commencement of proceedings on the merits of the case, the CPC may, in the event of an actual or imminent infringement of a Community patent, authorise in any place either the detailed description, with or without the taking of samples, or the physical seizure of the infringing goods, and, in appropriate cases, the documents relating thereto. Where interim or evidence-protection measures are revoked the CPC will order the applicant, at the request of the defendant, to provide the defendant adequate compensation for any injury caused by these measures.⁷⁰

⁶⁵ COM/2003/828 final: Article 8 of Annex II to the Statute of the Court of Justice.

⁶⁶ See Article 13 of the Statute of the Court of Justice.

⁶⁷ COM/2003/828 final: Article 7 of Annex II to the Statute of the Court of Justice and legislative financial statement added to the COM document.

⁶⁸ See Article 13 of the Statute of the Court of Justice; according to the Commission, “a thorough experience in patent law would seem necessary since the assistant *rapporteur* must have a good understanding of what technical aspects are relevant for a legally sound decision of the CPC” (COM/2003/828 final).

⁶⁹ COM/2003/828 final: Article 7 of Annex II to the Statute of the Court of Justice.

⁷⁰ COM/2003/828 final: Article 14 of Annex II to the Statute of the Court of Justice.

The proposal also provides that, in contrast to other proceedings before the Community judicature, the proceedings before the CPC will not be free of charge. Indeed, since the CPC will hear litigation in which parties seek to enforce their private rights against competitors, they should adequately contribute to the court costs⁷¹ incurred thereby.

An appeal against a final decision of the CPC may be brought before the CFI within two months of the notification of the decision appealed against.⁷² In contrast to other appeal procedures,⁷³ the appeal against a decision of the CPC will have suspensory effect.⁷⁴ Furthermore, according to the proposal, the appeal may be based on points of law *and* matters of fact.⁷⁵

Appeals against decisions of the CPC would be heard and determined by a specialised patent chamber within the CFI composed of three judges and assisted by three technical experts (*assistant rapporteurs*).⁷⁶ The number of judges at the CFI would thus be increased to 28.⁷⁷

If the appeal is well founded, the CFI will quash the decision of the CPC and give final judgment. The CFI may only in exceptional circumstances and in accordance with the Rules of Procedure refer the case back to the CPC for judgment. Indeed, in order to ensure efficient and swift patent proceedings, it is essential to avoid unnecessary referrals of cases back to the CPC. Where a case is referred back to the CPC, it will be bound by the decision of the CFI on points of law.⁷⁸

It is the intention of the Commission that the CPC will be operational by 2010 at the latest.

⁷¹ COM/2003/828 final: Article 23 of Annex II to the Statute of the Court of Justice.

⁷² COM/2003/828 final: Article 26 of Annex II to the Statute of the Court of Justice.

⁷³ Appeals before the Court of Justice in cases for which the CFI has jurisdiction at first instance; appeals before the CFI against decisions of the EUCST.

⁷⁴ COM/2003/828 final: Article 22 of Annex II to the Statute of the Court of Justice.

⁷⁵ COM/2003/828 final: Article 27 of Annex II to the Statute of the Court of Justice.

⁷⁶ COM/2003/828 final: Article 61a of the Statute of the Court of Justice and legislative financial statement added to the COM document.

⁷⁷ COM/2003/828 final: Article 48 of the Statute of the Court of Justice.

⁷⁸ COM/2003/828 final: Article 28 of Annex II to the Statute of the Court of Justice.

IV. The Review of Decisions of the CFI

From the point of view of parties concerned, the Member States and the institutions, the CFI's decisions on appeal as well as its decisions on preliminary references cannot be challenged. Exceptionally, however, such decisions may be subject to review by the Court of Justice where there is a serious risk of the unity or consistency of Community law being affected.⁷⁹ Only the First Advocate-General of the Court of Justice can take the initiative for the review of decisions of the CFI when he or she considers that such a risk exists.⁸⁰ The review should thus be distinguished from an appeal which, in principle, is brought by one of the parties to the case⁸¹ and which may be based on any error of law which the CFI may have committed in the judgment under appeal.⁸²

The proposal of the First Advocate-General must be made within one month of delivery of the decision of the CFI and the Court of Justice must decide within one month of receiving the proposal whether or not the decision should be reviewed.⁸³

It is clearly not the intention that the review procedure should be a mere appeal *dans l'intérêt de la loi* along the lines of procedures existing in French and Belgian law. Indeed, it is apparent from Declaration No. 13 to the Nice Treaty that the parties concerned would be involved in the review procedure and that any such procedure could affect their rights and obligations. According to this Declaration, the Statute of the Court of Justice should, in particular, specify the role of the parties in the review procedure in order to safeguard their rights, the effect of the review procedure on the enforceability

⁷⁹ Article 225(2), second paragraph, and 225(3), third paragraph, of the EC Treaty. In preliminary proceedings the CFI may avoid a review in a case by referring a case which falls under its jurisdiction to the Court of Justice. Article 225(3), second paragraph, of the EC Treaty indeed provides that "[w]here the [CFI] 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".

⁸⁰ Article 62, first paragraph, of the Statute of the Court of Justice.

⁸¹ With the exception of cases relating to disputes between the Communities and their servants, an appeal may also be brought by Member States and the institutions of the Communities which did not intervene in the proceedings before the CFI (Article 56 of the Statute of the Court of Justice).

⁸² Article 225(1) of the EC Treaty.

⁸³ Article 62 of the Statute of the Court of Justice.

of the decision of the CFI and the effect of the decision of the Court of Justice on the dispute between the parties.

Declaration No. 13 led the Court of Justice to submit a proposal for a Council Decision inserting new provisions into its Statute concerning the review procedure. According to this draft, the launching of the review procedure would not have suspensory effect.⁸⁴ The parties to the decision under review and, in the case of a preliminary decision, all interested parties within the meaning of Article 23 of the Statute, would be permitted to submit written observations. Unless the Court of Justice were to decide otherwise, there would not be an oral hearing under the review procedure.⁸⁵

If the decision of the CFI is effectively reviewed, the effects of the decision will be as follows. In preliminary proceedings the “new” interpretation of the Court of Justice will be binding for the national judge. It is not therefore surprising that the Court of Justice will have to act under an expedited procedure in the exceptional cases in which it decides to review a decision of the CFI on a question referred for a preliminary ruling.⁸⁶

As regards a decision given on appeal by the CFI and which has been reviewed by the Court of Justice, the Court of Justice will, after having given a correct interpretation of the law, refer the case back to the CFI. The CFI will be bound by the decision of the Court of Justice on points of law. If necessary, the Court of Justice will state which of the effects of the decision of the CFI will be considered as definitive in respect of the parties to the litigation.⁸⁷ Alternatively, the Court of Justice may itself give final judgment where the outcome of the case results from the facts on which the decision of the CFI is based.⁸⁸

It thus follows from the proposal of the Court of Justice that the most important difference between an appeal procedure and the proposed review procedure is the way in which these procedures are initiated respectively.

⁸⁴ However, interim relief could be granted (proposed Article 62a of the Statute).

⁸⁵ Proposed Article 62b of the Statute.

⁸⁶ Declaration No. 15 to the Nice Treaty.

⁸⁷ Proposed Article 62c of the Statute.

⁸⁸ When the appeal before the CFI is limited to points of law, the facts on which the decision of the CFI is based will necessarily be the facts on which the decision of the judicial panel is based.

V. Practical Effect of the Reforms: Interconnecting Vessels and Further Transfer of Jurisdiction

Taking a look at the statistics of the Court of Justice and the CFI, one notes that the number of cases brought before the Community courts exceeds, year after year, the number of cases decided by these courts. At the end of 2003, the number of pending cases thus amounted to 974 at the Court of Justice and 999 at the CFI. Under these circumstances, it would be unwise to transfer jurisdiction from the Court of Justice to an already overburdened CFI if this transfer is not coupled with the creation of one or more judicial panel(s).

The first question to be addressed is the following: will the proposed transfer of jurisdiction from the Court of Justice to the CFI allow the former court to concentrate on its essential constitutional function? In 2003, 561 new cases were brought before the Court of Justice and 494 cases were decided. Of the total number of new cases, 210 were preliminary references and 214 were infringement actions. Leaving further aside the appeals and some special procedures, the direct actions which fall within the scope of the transfer to the CFI amount, for 2003, to a maximum of 63 cases, or about 12% of the new cases brought before the Court. In our view such transfer would merely give the Court of Justice the opportunity to reach an equilibrium between the yearly input and output of cases but may not be sufficient to allow the Court to eliminate its judicial backlog.

It may thus be expected that in the future other steps will have to be taken to further alleviate the workload of the Court of Justice. In this respect, there are only two remaining options: the transfer of jurisdiction to the CFI to hear references for a preliminary ruling and/or to hear infringement actions.

As regards the first option, the CFI can, according to the EC Treaty, only be granted jurisdiction in "specific areas laid down by the Statute".⁸⁹ Since the preliminary rulings of the CFI will be final - the exceptional cases of review excepted - the Community legislator, when defining the "specific areas", should take into account the necessity to safeguard the unity and consistency

⁸⁹ Article 225(3), first paragraph, of the EC Treaty.

of Community law.⁹⁰ However, there seem to be very few areas of Community law which constitute a separate body of law, the interpretation of which by the CFI is unlikely to affect other areas of Community law.⁹¹

As regards the possible transfer of jurisdiction to the CFI relating to infringement actions,⁹² one could argue, on the one hand, that such cases often require an appraisal of complex facts. At first sight the CFI therefore seems to be the natural forum for hearing such cases. On the other hand, one could also argue that the Court of Justice should retain its jurisdiction for such cases since they often are of great importance for the development of European law and, in any event, are always important for the uniform application of this law in the Member States. However, in contrast to the other direct actions, it seems to be impossible to elaborate a criterion for the division of jurisdiction between the Court of Justice and the CFI which would direct the infringement actions raising constitutional issues immediately to the former court. For this reason, if one day the increasing workload of the Court of Justice were to make a transfer of infringement actions to the CFI unavoidable, a provision could be inserted in the Statute according to which the CFI - acting on its own motion or upon a request of both the applicant and the defendant - could refer an infringement case to the Court of Justice, especially where it required a decision on a point of principle likely to affect the unity or consistency of Community law.⁹³

As far as the CFI is concerned, in 2003, 466 new cases were brought before this court and 339 cases were decided. The transfer of direct actions might simply overburden the CFI even further unless it is accompanied by the creation of (a) judicial panel(s) to hear and determine at first instance certain cases which at present fall within the jurisdiction of the CFI. The CPC will not be created in the nearby future and will in any event - since it concerns a legal instrument which has not yet entered into force - merely prevent a further increase in the CFI's workload which would be, in the absence of a judicial

⁹⁰ The concern to avoid risks for the unity and consistency of Community law is apparent from Article 225(3) of the EC Treaty.

⁹¹ This does not mean that no jurisdiction could be transferred to the CFI to hear preliminary references. If e.g. the CFI had jurisdiction to hear preliminary references relating to the interpretation of the tariff headings of the Customs Combined Nomenclature, there seems to be no perceptible risk that the CFI's decisions might affect the unity or consistency of Community law.

⁹² See *supra* footnote 13.

panel, the natural forum for hearing Community patent cases. The setting up of the EUCST implies a transfer of between 25 to 30% of the cases currently brought before the CFI.⁹⁴ Such a transfer could compensate - in terms of workload - for the direct actions being transferred from the Court of Justice to the CFI. The transfer of jurisdiction coupled with the creation of the EUCST would, however, not appear to be sufficient for the CFI to eliminate its judicial backlog. The creation of a judicial panel for Community intellectual property rights in general (and not just for the Community patent) to which the present caseload of trademark cases could be transferred (about 100 cases per year) would be a possible solution to this problem. The creation of such a panel would in any event seem to be appropriate if in the future a more substantial transfer of cases from the Court of Justice to the CFI were to be envisaged.

⁹³ See, per analogy, Article 225(3), second paragraph, of the EC Treaty.

⁹⁴ In 2003, 124 new staff cases were brought before the CFI.



RESEARCH PAPERS IN LAW

1/2003, Dominik Hanf et Tristan Baumé, “Vers une clarification de la répartition des compétences entre l'Union et ses Etats Membres? Une analyse du projet d'articles du Présidium de la Convention”.

2/2003, Dominik Hanf, “Der Prozess der europäischen Integration in Belgien. Voraussetzung und Rahmen der Föderalisierung eines ehemaligen Einheitsstaats”.

3/2003, Dominik Hanf, “Talking with the “pouvoir constituant” in times of constitutional reform: The European Court of Justice on Private Applicants' Access to Justice”.

4/2003, Horst Dippel, “Conventions in Comparative Constitutional Law”.

5/2003, Ludwig Krämer, “Access to Environmental Information in an Open European Society - Directive 2003/4”.

6/2003, Ludwig Krämer, “Überlegungen zu Ressourceneffizienz und Recycling”.

7/2003, Ludwig Krämer, “The Genesis of EC Environmental Principles”.

8/2003, Takis Tridimas, “The European Court of Justice and the Draft Constitution: A Supreme Court for the Union?”.

1/2004, Dominik Hanf et Pablo Dengler, “Accords d'association”.

2/2004, David Mamane, “Reform der EU-Wettbewerbsregeln für Technologietransfer-Verträge: Einfahrt in den sicheren Hafen?”.

3/2004, Donald Slater and Denis Waelbroeck, “Meeting Competition : Why it is not an Abuse under Article 82”.

4/2004, Jacques Bourgeois and Tristan Baumé, “Decentralisation of EC Competition Law Enforcement and General Principles of Community Law”.

5/2004, Rostane Mehdi, “Brèves observations sur la consécration constitutionnelle d'un droit de retrait volontaire”.

1/2005, Jacques Pelkmans, “Subsidiarity between Law and Economics”.

2/2005, Koen Lenaerts, “The Future Organisation of the European Courts”.