# THE FUTURE OF THE JUDICIAL SYSTEM OF THE EUROPEAN UNION

(Proposals and Reflections)

# OUTLINE

## INTRODUCTION

The Court of Justice and the Court of First Instance have already, very recently, had to alert the Council to a dangerous trend towards a structural imbalance between the volume of incoming cases and the capacity of the institution to dispose of them. [1]

It is particularly important for appropriate solutions to be found since recent institutional developments risk further worsening the current state of the Community system of justice.

The third stage of Economic and Monetary Union ("EMU") began on 1 January 1999. The Treaty of Amsterdam entered into force on 1 May 1999. The two Courts will therefore be faced with an intensification of their judicial tasks. In addition, the various Conventions which the Council has adopted under the third pillar of the European Union (Justice and Home Affairs) provide for an extension of the jurisdiction of the Court of Justice.

The prospect of enlargement of the European Union also forms part of the framework for this discussion, since an intergovernmental conference is to be convened "in order to carry out a comprehensive review of the provisions of the Treaties on the composition and functioning of the institutions" at least one year before membership of the Union grows to more than 20 States, in accordance with Article 2 of the **Protocol on the institutions with the prospect of enlargement of the European Union** annexed to the European Treaties by the Treaty of Amsterdam.

In that context, it seems essential to set out the ideas and proposals of the Court of Justice and the Court of First Instance on the problems that need to be resolved so that the courts of the European Union can continue, within the scope of their own jurisdiction, to ensure effective enforcement of the law in the Union.

In this document the Court of Justice and the Court of First Instance have focused principally on a number of specific measures which can be realised immediately. They are, however, aware that an in-depth examination of the role and structure of the judicial component of the Union is needed to find solutions sufficiently wide-ranging to provide a lasting response to the difficulties which are to be expected, and that such an examination must be undertaken as a matter of urgency.

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[1] — See the "Proposals submitted by the Court of Justice and the Court of First Instance with regard to the new intellectual property cases".

Having summarised the current difficulties encountered by the Community courts in the exercise of their jurisdiction, the first chapter of the document identifies the additional consequences which the developments mentioned above will have for the exercise of judicial power in the Union.

The second chapter reviews the measures which could be adopted immediately by means of simple amendments to the Rules of Procedure.

The third chapter sets out reforms which do not affect the Community judicial structure and could therefore be decided on rapidly, but which do require amendment of the institutional rules of the Treaties or the Statutes.

The fourth and final chapter contains reflections of a more general and more fundamental nature on the future of the judicial system. They do not embody specific proposals at this stage but are intended to clarify the issues on certain points which appear important for the decisions to be taken by the intergovernmental conference.

# Chapter I

## The problems facing the Community judicial system

### 1. *Current position*

At the present time, the number of cases brought before both Courts shows a continuous, steady increase (in 1998, 485 cases were commenced before the Court of Justice and 238 before the Court of First Instance). [2] That trend points to the growing importance of Community law in the everyday life of Community citizens and companies and in the work of the national courts. The number of references for a preliminary ruling thus increased by roughly 10% in 1998 compared with the previous year and by more than 85% compared with 1990. References for preliminary rulings now account for more than half of the new cases brought before the Court of Justice (264 references out of 485 cases).

Since the two Courts have no control over the number of cases brought before them, they are faced with a structural increase in the number of pending cases. The constant increase in the number of cases dealt with by the Court of Justice and the Court of First Instance (768 cases were disposed of in 1998) is evidence of the efforts made to cope with the situation.

Despite the steps taken to improve the efficiency of working methods and procedural practices, such an increase inevitably entails a lengthening of proceedings. This situation is particularly regrettable in the case of references for preliminary rulings. In order for the rights of individuals to be safeguarded and for cooperation between national courts and the Court of Justice under the preliminary reference procedure to function properly, replies to the questions asked must be given as quickly as possible. The system of preliminary references is a key factor in the proper functioning of the internal market.

[2] — See the tables reproduced in Annex I.

**2. *Foreseeable developments***

The commencement of the third stage of EMU and the entry into force of the Treaty of Amsterdam and certain Conventions established under the third pillar of the European Union are expected to result in a considerable increase in the near future, if not immediately, in the number of cases brought before the Court of Justice and the Court of First Instance.

Enlargement of the European Union will also eventually bring an increase in the number of cases brought before the two Courts, even though experience shows that a certain lapse of time generally occurs before any significant number of cases originating from or concerning a new Member State are brought before the Community courts.

(i) As regards the Court of Justice, an increase is to be expected, in particular, in the number of preliminary reference proceedings concerning:

— Title IV of the EC Treaty (visas, asylum, immigration and other policies related to free movement of persons);

— the legislation relating to the third stage of EMU, particularly on the introduction of the Euro;

— Title VI of the Treaty on European Union (police and judicial cooperation in criminal matters);

— the provisions of a number of Conventions concluded between Member States on the basis of the former Article K.3 of the Treaty on European Union (the new Article 31). [3]

As regards direct actions, the right conferred on the Court of Auditors and the European Central Bank to initiate proceedings, as well as the similar right of Member States under Title VI of the Treaty on European Union, will probably also lead to an increase in the number of cases brought before the Court.

The growth in proceedings commenced before the Court of First Instance will result in a corresponding increase in the number of appeals to the Court of Justice. At present, appeals are taken against 20% to 25% of the Court of First Instance's decisions. This percentage is rising.

The Court of Justice will also have to tackle sensitive new fields such as those just mentioned, relating to police and judicial cooperation in

[3] — See Annex II.

criminal matters, the external aspects of the free movement of persons and problems linked to the third stage of EMU. It will additionally have to concern itself with new areas in the field of private international law, and in particular interpret the Rome Convention of 19 June 1980 on the law applicable to contractual obligations and the Convention of 28 May 1998 on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters (the "Brussels II" Convention).

There will be a pressing need to deal with cases rapidly where preliminary rulings are sought on the interpretation of the "Brussels II" Convention and on the provisions of the EC Treaty relating to the external aspects of freedom of movement for persons (Title IV). In the first case (Brussels II), the urgency stems from the need for a prompt reply in the interests of the individuals concerned. In the second (Title IV), it is to be expected that at national level there will be a tendency to stay proceedings before lower courts, pending a ruling from the Court of Justice on questions referred by supreme courts. Such proceedings must, given their nature, be decided swiftly not only in the interests of those concerned but also in the public interest.

(ii) The Court of First Instance will have to contend with an increasing number of cases concerning:

- trade marks and the protection of plant variety rights;
- access of natural and legal persons to documents of Community institutions and bodies (Article 255 EC);
- penalties imposed by the European Central Bank on undertakings (Article 34.3 of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank);
- audits carried out by the Court of Auditors on natural and legal persons in receipt of Community funds (Article 248 EC);
- the legal remedies available to officials of the European Central Bank and of Europol;
- the fight against fraud.

Nor can the possibility be ruled out that the Court of First Instance will eventually hear proceedings relating to the Community patent which, under certain proposals, would be governed by rules similar to those relating to Community trade mark proceedings.

It will be essential for the Court of First Instance, like the Court of Justice, to dispose of certain cases rapidly. In particular, the "Proposals submitted by the Court of Justice and the Court of First Instance with regard to the new intellectual property cases", recently submitted to the Council, indicate that the success of the Community trade mark will depend in part on setting short procedural time-limits, which presupposes that the institution has the means to act expeditiously in that regard without sacrificing the rest of its work.

## 3. ***Capacity of the institution***

It follows from the foregoing that immediate consideration must be given to the adoption of measures to deal with the numerous problems, both quantitative and qualitative, which arise from the impending changes in Community law.

The organisational and procedural framework must be revised to enable the Court of Justice and the Court of First Instance to shorten existing time-limits and deal with further increases in the number of cases brought. Failing that, the new areas of jurisdiction will inevitably result, for both Courts, in delays on a scale which cannot be reconciled with an acceptable level of judicial protection in the Union.

Furthermore, in the case of the Court of Justice, the extra case-load might well seriously jeopardise the proper accomplishment of its task as a court of last instance which, in addition, has a constitutional role. The Court would then no longer be able to concentrate on its main functions, which are to guarantee respect for the distribution of powers between the Community and its Member States and between the Community institutions, the uniformity and consistency of Community law and to contribute to the harmonious development of the law in the Union. Such a failure on the part of the Court would undermine the rule of law on which, as stated in Article 6(1) EU, the Union is founded.

It is, of course, necessary, whenever considering the resources which must be allocated to the institution, to take account of the opportunities offered by new technology. Such technology quite clearly cannot take the place of the structural reforms and resource allocation that will be necessary, but it may affect the apportionment of costs in ways which call for specific studies.

## 4. ***Problems of translation***

The Court also considers it necessary to draw particular attention to the crisis resulting from the lack of resources for its translation service. That situation may cause the functioning of the institution to break down. Reference is made to the report dealing with this particular problem which the Court recently sent to the European Parliament and the Council.

## Chapter II

## Proposed immediate amendments to the Rules of Procedure

Without having to await the adoption of Treaty amendments, the Court of Justice and the Court of First Instance wish to set out a series of measures which the Council could adopt now. All of these are designed to introduce greater flexibility in the application of the Rules of Procedure, so as to enable the adaptation of procedures to the degree of complexity and urgency of each case.

The specific proposals are concerned with the procedure generally and in particular the procedure relating to questions submitted for a preliminary ruling.

They supplement the amendments which have recently been adopted by the Council (introduction of a single judge to hear a case in the Court of First Instance) or are currently before it (transfer of areas of jurisdiction from the Court of Justice to the Court of First Instance).

### 1. *Procedure generally*

(i) Recourse to accelerated procedures

The Court of Justice is sometimes faced with cases whose features would justify particularly speedy disposal. While such circumstances remain the exception, they could arise in more acute form in cases where a preliminary ruling is sought on the interpretation of the "Brussels II" Convention and the provisions of the EC Treaty relating to the external aspects of freedom of movement for persons (Title IV); on the validity and interpretation of decisions and framework decisions; and on the interpretation of conventions concerning police cooperation and cooperation in criminal matters which, in the future, could be adopted by the Council or concluded by the Member States under Article 34 EU.

At the moment, neither the Statute of the Court of Justice nor its Rules of Procedure allow for an accelerated procedure which would enable the Court to decide, on an *ad hoc* basis, to deal with certain cases under a separate procedure derogating from the general rules normally applicable.

The first sentence of Article 55(2) of the Rules of Procedure merely provides that the President may, in special circumstances, order that a case be given priority over others. However, that power does not allow the Court to dispense with certain procedural steps.

It would therefore be desirable to include in the Rules of Procedure a provision under which an accelerated procedure could, subject to certain conditions, be applied to cases of manifest urgency. Under such a procedure, the Court would be empowered, in accordance with the particular features of each individual case, to omit or to accelerate certain stages of the procedure, without having to follow an inflexible rule to be applied automatically to any particular category of cases.

It is likewise desirable for specific procedures to be introduced enabling the Court of First Instance to rule rapidly on the substance of cases in which there is a degree of urgency. Such procedures would reduce the written pleadings to the essential minimum and assign greater importance to the hearing, and should result in decisions being reached more swiftly. They would meet the legitimate and pressing expectations which arise in areas as diverse as the merger of undertakings and public access to administrative documents.

(ii) Changes in the oral procedure

In proceedings before the Court of Justice, the hearing must not become a ritual where the parties concerned merely repeat word for word the arguments which they have already presented during the written procedure.

While the Court of Justice recognises the usefulness of the oral procedure and does not wish to deny the parties concerned their right to a hearing, it considers that more careful consideration should be given to its use. To that end, it would be appropriate to provide, in Articles 44a and 104(4) of the Rules of Procedure, that a hearing is to take place either if the Court so decides of its own motion or if a reasoned application is made by one of those parties or one of the persons referred to in Article 20 of the EC Statute of the Court of Justice, setting out the points on which that party or person wishes to be heard. The condition that the application must be reasoned will require the party or the person concerned to identify the points to be raised at the hearing and will therefore make the hearing more useful.

In proceedings before the Court of First Instance, which is called on to carry out in-depth examinations of complex sets of facts, the value of hearings is more fundamental and could even be reinforced under the accelerated procedures referred to above.

(iii) Directions and information

In order to render the proceedings more efficient and better suited to the circumstances of each individual case, the Court should be able, in addition, to use two procedural instruments which are available to the European Court of Human Rights. First, the Court should have the power to issue practice directions, particularly in relation to issues such as the holding of hearings and the filing of pleadings and other documents (see Rule 32 of the Rules of Court of the European Court of Human Rights). Second, it should be open to the Judge-Rapporteur, in consultation with the Advocate General, to request the parties to submit, within a given time-limit, any factual information, documents or other material which he considers relevant (see Rule 49).

**2. *Preliminary reference procedure in particular***

(i) Requests for clarification

In many orders for reference, the national court does not set out the factual and/or legal context in sufficient detail or fails to provide enough information as to the relevance of the questions raised. The ambiguities with which the Court is faced in such cases can have the effect of lengthening proceedings. An appropriate solution would be to insert in the Rules of Procedure a provision comparable to Article 96(4) of the Rules of Procedure of the EFTA Court (OJ 1994 L 278, p. 1), under which the latter may ask the national court for clarification.

(ii) Simplified procedures

Where a question submitted for a preliminary ruling is manifestly identical to a question on which the Court has already ruled, Article 104(3) of the Rules of Procedure allows the Court to give its ruling by reasoned order, but only after the persons referred to in Article 20 of the Statute have submitted their observations.

That provision is concerned with exceptional cases only, whereas a number of preliminary reference proceedings are such as to warrant the application of a simplified procedure. It would therefore be desirable to extend the possibility of deciding by order questions which have been submitted for a preliminary ruling.

For that purpose, the Court proposes that Article 104 of the Rules of Procedure should be amended to allow it to give preliminary rulings by order on simple questions to which the answer is straightforward and on questions

which, having regard to the existing case-law, do not raise any new issue. However, the simplified procedure would be applied only on condition that the persons referred to in Article 20 of the Statute of the Court are first consulted on the matter.

## 3. ***Conclusions***

Adoption of the amendments to its Rules of Procedure proposed above would help to enable the Court to focus its attention on the really important cases and could also have a positive impact on the time required for judgments to be given.

The Court notes that the Council has already stressed the urgent need for an examination as soon as possible of ways of reducing the time required to decide orders for reference which are submitted to it. [4]

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[4] — Declaration, annexed to the minutes of the Council, adopted during the Justice and Home Affairs Council on 28 and 29 May 1998 when drawing up the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters (OJ 1998 C 221, p. 18).

## Chapter III

## Proposed measures involving amendment of the Treaties or Statutes

In addition to improvements which can be achieved by amending the Rules of Procedure, several measures could be contemplated at once without awaiting the outcome of an overall discussion on the function and organisation of the system of justice in the Community.

The three proposals set out below involve conferring on the Court of Justice and the Court of First Instance the power to amend their Rules of Procedure themselves, introducing a system for filtering appeals and altering the way in which staff cases are handled.

### 1. *Amendment of the Rules of Procedure*

The foreseeable increase in the number of cases may necessitate more frequent modifications of the Rules of Procedure to enable the Court of Justice and the Court of First Instance to guarantee the proper conduct of proceedings before them.

Under Article 245 EC, any amendment to the Rules of Procedure of the Court of Justice requires the unanimous approval of the Council. The same applies in the case of the Rules of Procedure of the Court of First Instance, by virtue of Article 225 EC.

There is a risk, in an enlarged Union with a Council of 20 or more members, that maintenance of this requirement will paralyse the process of amending the Rules of Procedure.

For those reasons, both Courts wish Article 245 EC, the corresponding provisions in the ECSC and Euratom Treaties and Article 225 EC to be amended so as to empower them to adopt their own Rules of Procedure or, at the very least, so that the Rules require Council approval by a qualified majority only.

It should be borne in mind that, within the framework of the Council of Europe, the Member States have accorded the European Court of Human Rights, ever since it was set up in 1954, the power to adopt its own rules of procedure.

Provisions of such importance that they should continue to be a matter for the Council could be inserted in Title III ("Procedure") of the Statute of the Court of Justice.

**2. *Filtering of appeals***

Where questions raised in an appeal before the Court of Justice have already been considered and decided by an independent tribunal whose function is to establish the facts and apply the law in a dispute before that dispute is submitted to the Court of First Instance, the introduction of a filtering procedure for appeals to the Court of Justice could be justified. That procedure would involve the lodging of an application, on which the Court of Justice would rule without *inter partes* proceedings, before an appeal could be made.

Such a filtering procedure would seem appropriate in any event in the present situation of Community trade mark proceedings. Without prejudice to its possible adoption in other instances, it would also appear suited to staff cases, should the decision be made to set up interinstitutional tribunals with competence in this area, as proposed in section 3 below.

In view of the upward trend in the percentage of decisions of the Court of First Instance which are appealed and the considerable increase in the number of decisions made by that Court, such a measure, even if of limited application, would constitute a useful innovation.

The possibility of introducing a filter for preliminary reference proceedings is examined separately in section 3 of Chapter IV below.

**3. *Changes to the handling of staff cases***

It would be possible to alter the way in which staff cases are handled without denying access to the Community judicature. Interinstitutional tribunals could be set up to deal with applications. These could be composed of an independent lawyer and assessors enjoying the confidence of the administration and of the staff. They would be entrusted with the task of conciliation and, where appropriate, of ruling on disputes. Their decisions could be challenged in proceedings before the Court of First Instance. Any appeal to the Court of Justice would have to be subject to a very strict filtering procedure. It would also be appropriate, when carrying out such a reform of the means of redress available to staff, to examine the question of where the burden of costs should fall.

## Chapter IV

## Thoughts on possible changes to the judicial system

As constituted at present, the Court of Justice, to which a Court of First Instance has been attached, is required to ensure, pursuant to the powers conferred on it, that in the interpretation and application of the Treaties the law is observed (Article 220 EC). However, jurisdiction to give preliminary rulings continues to be reserved to the Court of Justice. In addition, the Court of Justice hears and determines actions against Member States for failure to fulfil their obligations and direct actions for annulment, particularly in so far as they concern disputes between institutions, actions for failure to act, actions brought by Member States challenging legislative measures of general application and appeals from judgments of the Court of First Instance.

Measures of an organisational and procedural nature may help the Court of Justice and the Court of First Instance to cope in the short term with the increase in the volume of cases caused by the developments mentioned in Chapter I. However, more fundamental measures must be considered. In a European Union possessing very extensive powers and covering a wider area, the volume of actions, appeals and references for preliminary rulings is bound to reach unprecedented levels, exceeding the capacity of the existing judicial structure.

All ideas on the future of the Community's judicial system must take into account three fundamental requirements:

- the need to secure the unity of Community law by means of a supreme court;
- the need to ensure that the judicial system is transparent, comprehensible and accessible to the public;
- the need to dispense justice without unacceptable delay.

The measures referred to below must be assessed in the light of those requirements. The following thoughts and ideas, which are intended at this stage to stimulate discussion, do not constitute proposals for reform in any strict sense.

### *1. The composition and organisation of the Court of Justice and the Court of First Instance*

(i) *The Court of Justice*

Although the link between nationality and membership of the Court of Justice or of the Court of First Instance is not provided for in the Treaty, it has always been tacitly agreed that there should be one judge from each Member State. Moreover, whenever the European Union has in the past been composed of an even number of Member States, an additional judge has been appointed in order to avoid the need for a judge to withdraw on account of the risk of a tied vote.

Five or six new States may accede to the Union in the not-too-distant future, to be followed, at a later stage, by at least five more. If the principle of "one judge per Member State" were to be maintained, the number of judges at the Court of Justice would increase from 15 to 21, and subsequently to 25 or more.

The Intergovernmental Conference will clearly need to consider whether the existing relationship between the number of judges and the number of Member States should be maintained following any enlargement of the European Union.

From the standpoint of maintaining a consistent body of case-law, a limit on the number of judges offers certain advantages which should not be underestimated. As matters stand, all the judges are still able to work together closely in the hearings and deliberations of the full Court.

As the Court of Justice pointed out in its 1995 Report [5] concerning this issue, two distinct considerations must be weighed in the balance:

*"On the one hand, any significant increase in the number of judges might mean that the plenary session of the Court would cross the invisible boundary between a collegiate court and a deliberative assembly. Moreover, as the great majority of cases would be heard by Chambers, this increase could pose a threat to the consistency of the case-law.*

*On the other hand, the presence of members from all the national legal systems in the Court is undoubtedly conducive to harmonious development of Community case-law, taking into account concepts regarded as fundamental in the various Member States and thus enhancing the acceptability of the solutions arrived at. It may also be considered that the presence of a judge from each Member State enhances the legitimacy of the Court."*

If the number of judges at the Court were greatly to exceed 15, questions would inevitably arise as to the organisational measures needed to guarantee the consistency and uniformity of its case-law.

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[5] — Report of the Court of Justice on certain aspects of the application of the Treaty on European Union, Luxembourg, May 1995, point 16.

The Court itself would need, at the appropriate time, to find practical and effective ways of eliminating the risk of inconsistency and lack of cohesion in its case-law. Consequently, it does not appear necessary or even desirable at the present time to seek to anticipate, by the adoption of inflexible measures, the changes in the organisation of the Court which might be needed if its composition were to be altered.

(ii) *The Court of First Instance*

An increase in the number of Members of the Court of First Instance would not create the same problems. Although the resulting increase in the number of Chambers would necessitate additional measures for the coordination of the case-law, the intervention of the Court of Justice as the court of last instance should make it possible to ensure its unity.

Consequently, adjusting the number of judges in line with the growing volume of cases would constitute an appropriate means of avoiding congestion in the first-instance Community court. It is in that context that the "Proposals submitted by the Court of Justice and the Court of First Instance concerning the new intellectual property proceedings" recommended that the number of judges of the Court of First Instance should be increased in order to handle the influx of cases concerning the Community trade mark.

As to the structure of the Court of First Instance, any need for particular specialisation can be catered for, where appropriate, by the existing power of that Court to decide on the allocation of judges to Chambers and on the criteria governing the assignment of cases to those Chambers; however, the growth of litigation in certain areas, and in particular the possible attribution of jurisdiction in the field of patents, may necessitate a review of the situation in the future.

Lastly, the current administrative and budgetary structure may prove incapable of meeting the requirements of the two Courts, and may need to be adapted accordingly.

***2. Transfer to the Court of First Instance of jurisdiction to hear and determine direct actions***

As regards direct actions brought by Member States and the institutions, there are no grounds at present for proposing the transfer of any heads of jurisdiction over and above those whose transfer has already been proposed by the Court of Justice. However, the possibility cannot be ruled out that

it may become necessary, if the volume of cases continues to grow, to review the basis on which jurisdiction is allocated between the two Community courts and to transfer further heads of jurisdiction to the Court of First Instance. Moreover, this could be done without amending the Treaty, pursuant to Article 225 EC.

It should be noted that the proposals for transferring jurisdiction which have recently been submitted to the Council are not aimed at reducing the volume of cases before the Court of Justice; they have been prompted solely by a concern to ensure the proper administration of justice.

### *3. Reform of the system of references for a preliminary ruling*

The constant growth in the number of references for preliminary rulings emanating from courts and tribunals of the Member States carries with it a serious risk that the Court of Justice will be overwhelmed by its case-load. If current trends continue without any reform of the machinery for dealing with cases, not only will proceedings become more protracted, to the detriment of the proper working of the preliminary ruling system, but the Court of Justice will also be obliged to conduct its deliberations with such dispatch that it will no longer be able to apply to cases the thorough consideration necessary for it to give a useful reply to the questions referred.

It is highly likely that the impact of its decisions will diminish as their number increases and as they deal more frequently with questions of secondary importance or of interest only in the context of the case concerned.

This would seriously undermine those functions have become most characteristic of its role within the Community legal order, namely to guarantee respect for the distribution of powers between the Community and its Member States and between the Community institutions, the uniformity and consistency of Community law and to contribute to the harmonious development of the law within the Union.

If the Court of Justice is to continue to fulfil those essential tasks, it will be necessary to reform the preliminary ruling system in such a way as to curtail the number of cases to be dealt with each year.

Various kinds of measures could be contemplated to reduce the number of references for preliminary rulings which the Court of Justice is called upon to determine.

(i) Limitation of the national courts empowered to make references to the Court of Justice

The two existing options would be (a) to reserve the power to make references to supreme courts alone or (b) to exclude only courts of first instance.

In its 1995 Report, referred to above, the Court of Justice stated that *"to limit access to the Court would have the effect of jeopardising the uniform application and interpretation of Community law throughout the Union, and could deprive individuals of effective judicial protection and undermine the unity of the case-law"*.

Although the specific nature of the rules contained in Title IV of the EC Treaty (visas, asylum, immigration and other policies related to free movement of persons) and of the Conventions adopted by the Council under the third pillar (justice and home affairs) justified derogations in the Treaty of Amsterdam from the principle that all courts and tribunals are to have the power to make references to the Court of Justice, that solution cannot be directly transposed to the rules concerning the internal market and to joint policies and actions.

In its Report, the Court of Justice stated: *"The preliminary ruling system is the veritable cornerstone of the operation of the internal market, since it plays a fundamental role in ensuring that the law established by the Treaties retains its Community character with a view to guaranteeing that that law has the same effect in all circumstances in all the Member States of the European Union. Any weakening, even if only potential, of the uniform application and interpretation of Community law throughout the Union would be liable to give rise to distortions of competition and discrimination between economic operators, thus jeopardising equality of opportunity as between those operators and consequently the proper functioning of the internal market.*

*One of the Court's essential tasks is to ensure just such a uniform interpretation, and it discharges that duty by answering the questions put to it by the national courts and tribunals."*

For those reasons, it seems necessary for all national courts and tribunals to retain the right to refer questions to the Court of Justice. Although national courts and tribunals against whose decisions an appeal may lie under domestic law should be encouraged to apply Community law themselves, and not to resort too hastily to the solution afforded by a reference to the Court of Justice, the fact remains that the uniform application of Community law frequently depends on the answer to a question of interpretation raised

before a national court not having to await the outcome of appeal proceedings but being given by the Court of Justice at the outset, so that the case-law can become established at an early stage in the Member States of the Union.

To deprive certain courts and tribunals of the right to refer questions to the Court of Justice would also be undesirable from the point of view of procedural economy. It would result in proceedings being brought before supreme courts in the Member States solely in order to enable the parties to seek a referral to the Court of Justice.

(ii) The introduction of a filtering system would enable the Court of Justice to decide which of the questions referred needed to be answered by it on account of, for example, their novelty, complexity or importance.

Such a mechanism, designed to weed out at a preliminary stage cases of lesser importance from the point of view of the uniformity and development of Community law, is radically different in nature from the procedure enabling the Court of Justice to rule by way of an order on certain questions referred for a preliminary ruling.

To confer on the Court of Justice the power to assess the expediency of examining questions referred to it for a preliminary ruling, and thus to reduce the number of answers to be given, would undoubtedly have a number of advantages.

The introduction of such a filtering system would prompt national courts and tribunals to exercise selectivity in choosing which questions to refer, and would thus encourage them to exercise yet more fully their functions as Community courts of general jurisdiction.

Moreover, the existence of a filtering mechanism would enable the Court of Justice to concentrate wholly upon questions which are fundamental from the point of view of the uniformity and development of Community law. Lastly, the ensuing reduction in the number of cases would help to reduce the translation work-load, by removing the need to translate observations lodged in written proceedings.

The effectiveness of such a power of selection would depend on its scope and on the conditions governing its exercise. In order effectively to stem the inflow of references for preliminary rulings, there would be a need for selection criteria capable of being applied in a flexible and prudent manner.

However, the introduction of a filtering mechanism in this area would involve drawbacks which should not be underestimated. Even if such a mechanism were applicable only to courts and tribunals which may, but are not bound to, refer questions to the Court of Justice, this might distort the "judicial cooperation" which has become established in the Community and which "requires the national court and the Court of Justice, both keeping within their respective jurisdiction, (...) to make direct and complementary contributions to the working out of a decision" (judgment in Case 16/65 *Schwarze* v *Einfuhr- und Vorratsstelle Getreide* [1965] ECR 877).

That cooperation is founded, in principle, on the assumption that the Court of Justice will answer any question referred by a national court or tribunal which fulfils the conditions of admissibility. If that assumption can no longer be made, national courts and tribunals might well refrain from referring questions to the Court of Justice, in order to avoid the risk of their references being rejected for lack of interest. Such a development would jeopardise the machinery for ensuring that Community law is interpreted uniformly throughout the Member States.

In order to mitigate the drawbacks of a filtering mechanism, a system could be set up whereby the national court would be requested to include in its decision a proposed reply to the question referred. That would lessen the adverse effect of the filtering mechanism on the cooperation between the national court and the Court of Justice, while the proposed reply could at the same time serve as the basis for deciding which questions need to be answered by the Court of Justice and which can be answered in the terms indicated.

A more radical variant of the system would be to alter the preliminary ruling procedure so that national courts which are not bound to refer questions to the Court of Justice would be required, before making any reference, first to give judgment in cases raising questions concerning the interpretation of Community law. It would then be open to any party to the proceedings to request the national court to forward its judgment to the Court of Justice and to make a reference for a ruling on those points of Community law in respect of which that party contests the validity of the judgment given. This would give the Court of Justice the opportunity of assessing, at the filtering stage, whether it needed to give its own ruling on the interpretation of Community law arrived at in the contested judgment.

Such a procedure, resembling an appeal in cassation, would facilitate the task of the Court of Justice. It would enable the Court to give its ruling on the reference in full knowledge of the national context, both factual and legal, in which the points of Community law raised in the case in question fall to be interpreted.

However, such a procedure would involve a fundamental change in the way in which the preliminary ruling system currently operates. Judicial cooperation between the national courts and the Court of Justice would be transformed into a hierarchical system, in which it would be for the parties to an action to decide whether to require the national court to make a reference to the Court of Justice, and in which the national court would be bound, depending on the circumstances, to revise its earlier judgment so as to bring it into line with a ruling given by the Court of Justice. From the point of view of national procedural law, this aspect of the system would doubtless raise problems which could not easily be resolved.

Lastly, a party who was not satisfied with a judgment given by a national court might well be more eager to seek a ruling from the Court of Justice — if only in order to defer enforcement of the judgment — than the referring court itself.

Thus, a system of filtering references for preliminary rulings — even one more flexible than that just envisaged — would not be easy to reconcile with the principle of mutual cooperation between the national courts and the Court of Justice which is a feature of the preliminary ruling procedure and which, by ensuring uniformity and consistency in the interpretation of Community law, has made such a major contribution to the proper working of the internal market. Nevertheless, a mechanism giving the Court of Justice the power to assess the appropriateness of a reference would constitute a possible solution to the problem of an excessive case-load. From that point of view, there is much to be said for a more thorough examination of such a mechanism and of the ways of implementing it.

(iii) Conferral on the Court of First Instance of jurisdiction in preliminary ruling proceedings

The difficulties attending a transfer to the Court of First Instance of jurisdiction in proceedings for a preliminary ruling have been indicated by the Court of Justice in its 1995 Report, referred to above. Despite those difficulties, the idea of such a transfer should not be rejected out of hand.

Conferral on the Court of First Instance of jurisdiction in this area would have the effect of transferring to it part of the work-load, even though it will itself have to contend with an influx of direct actions far exceeding the limits of its current capacity. Such a transfer would need to be accompanied by a corresponding increase in the number of judges.

It would also be necessary to ensure, by means of machinery for referrals and/or appeals in cases involving points of general legal interest, that the most important questions always come before the Court of Justice in the end.

Similar reasoning could apply to the idea of transferring jurisdiction in preliminary ruling proceedings to specialised courts, should such courts be set up in the future.

(iv) The creation or designation, in each Member State, of decentralised judicial bodies responsible for dealing with references for preliminary rulings from courts within their area of territorial jurisdiction

Such bodies, specialising in Community law, would be closer than the Court of Justice to the national legal system in which the questions referred were to be answered. Furthermore, they would operate in the language or languages of the State concerned, thereby affording the national courts and tribunals the widest possible access to the preliminary ruling procedure by avoiding the congestion resulting from the need for translation.

Those courts could have the status either of a Community or of a national body. Whatever the status chosen, the important factor would be to maintain the benefit gained from a substantial reduction in the translation burden borne by the Court of Justice.

A system of that kind, which would entail a very significant change from the existing mechanism, would undeniably involve major drawbacks as regards the maintenance of uniformity in the interpretation and application of Community law.

Any reorganisation of the preliminary ruling procedure on a national or regional basis, regardless of whether jurisdiction is conferred on national or on Community courts, involves a serious risk of shattering the unity of Community law, which constitutes one of the cornerstones of the Union and which will become still more vital and vulnerable as a result of enlargement of the Union. Jurisdiction to determine the final and binding interpretation of a Community rule, as well as the validity of that rule, should therefore be vested in a single court covering the whole of the Union.

However, certain measures may be envisaged which would reduce the risks inherent in a decentralised system. First, the national judicial bodies to be set up should have the power to refer to the Court of Justice any question of interpretation which raises legal issues of general relevance to the unity or development of Community law. Furthermore, provision would

need to be made for the possibility of appealing to the Court of Justice "on a point of general legal interest", in accordance with detailed procedures to be laid down, against preliminary rulings given by those bodies. This would, in effect, create a decentralised filtering system in this area which would nevertheless remain subject to review by the Court of Justice.

Certain problems could arise, however, as a result of the links between those courts and the various national legal systems, which diverge considerably from one another, at any rate if they are accorded the status of national courts. In order to ensure that their decisions are sufficiently authoritative in the national legal order, they would need to be established at the highest level of the judicial hierarchy of the Member States. Consequently, the Member States would have to decide to which of their supreme courts such a judicial body should be attached; alternatively, if that proved impossible to decide, it would be necessary to establish a forum common to the highest courts of the State concerned.

Subject to that, the Court of Justice considers that, whilst the difficulties connected with the implementation of a system for the decentralisation of the preliminary ruling procedure should not be underestimated, in-depth consideration should nevertheless be given to a system of that kind and to its various detailed aspects.

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Implementation of fundamental reforms of the judicial system, such as the introduction of a filtering mechanism or the creation of new judicial bodies, is not necessarily essential prior to the next round of enlargement. However, in so far as the Member States are able to agree on certain lines of approach with a sufficient degree of precision, they could profitably insert in the Treaty provisions enabling the institutions of the Union progressively to adopt the requisite measures as and when they are needed.

**Annex I**

# Court of Justice

## Cases brought - 1.1.90 to 31.12.98

| | **90** | **91** | **92** | **93** | **94** | **95** | **96** | **97** | **98** |
|---|---|---|---|---|---|---|---|---|---|
| **References for a preliminary ruling** | 141 | 186 | 162 | 204 | 203 | 251 | 256 | 239 | 264 |
| **Direct actions** | 221 | 140 | 251 | 265 | 125 | 109 | 132 | 169 | 147 |
| **Appeals** | 16 | 14 | 25 | 17 | 13 | 48 | 28 | 35 | 70 |
| **Special proceedings** | 6 | 3 | 2 | 4 | 10 | 7 | 7 | 2 | 4 |
| **Total** | **384** | **343** | **440** | **490** | **351** | **415** | **423** | **445** | **485** |

## Cases completed - 1.1.90 to 31.12.98

| | **90** | **91** | **92** | **93** | **94** | **95** | **96** | **97** | **98** |
|---|---|---|---|---|---|---|---|---|---|
| **References for a preliminary ruling** | 162 | 131 | 157 | 196 | 163 | 162 | 205 | 301 | 246 |
| **Direct actions** | 124 | 142 | 171 | 583 | 100 | 96 | 113 | 116 | 136 |
| **Appeals** | | 11 | 13 | 11 | 20 | 20 | 26 | 34 | 36 |
| **Special proceedings** | 6 | 4 | 3 | 2 | 9 | 9 | 4 | 5 | 2 |
| **Total** | **302*** | **288** | **344** | **792** | **292** | **287** | **348** | **456** | **420** |

* including 10 staff cases.

**Cases pending 1990 to 1998**

| | **90** | **91** | **92** | **93** | **94** | **95** | **96** | **97** | **98** |
|---|---|---|---|---|---|---|---|---|---|
| **References for a preliminary ruling** | 209 | 264 | 269 | 277 | 317 | 406 | 457 | 395 | 413 |
| **Direct actions** | 355 | 353 | 433 | 115 | 140 | 153 | 172 | 225 | 236 |
| **Appeals** | 16 | 19 | 31 | 37 | 30 | 58 | 60 | 61 | 95 |
| **Special proceedings** | 3 | 2 | 1 | 3 | 4 | 2 | 5 | 2 | 4 |
| **Total** | **583** | **638** | **734** | **432** | **491** | **619** | **694** | **683** | **748** |

**Duration of proceedings 1990 to 1998**[*]

| | **90** | **91** | **92** | **93** | **94** | **95** | **96** | **97** | **98** |
|---|---|---|---|---|---|---|---|---|---|
| **References for a preliminary ruling** | 17.4 | 18.2 | 18.8 | 20.4 | 18.0 | 20.5 | 20.8 | 21.4 | 21.4 |
| **Direct actions** | 25.5 | 24.2 | 25.8 | 22.9 | 20.8 | 17.1 | 19.6 | 19.7 | 21.0 |
| **Appeals** | | 15.4 | 17.5 | 19.2 | 21.2 | 18.5 | 14.0 | 17.4 | 20.3 |

[*] average duration, expressed in months and tenths of months.

# Court of First Instance

**Cases brought - 1.1.90 to 31.12.98**

| | **90** | **91** | **92** | **93** | **94** | **95** | **96** | **97** | **98** |
|---|---|---|---|---|---|---|---|---|---|
| **Staff cases** | 43 | 81 | 79 | 83 | 81 | 79 | 98 | 155 | 79 |
| **Other cases** | 12 | 12 | 36 | 506 | 316 | 165 | 122 | 469 | 136 |
| **Special proceedings** | 4 | 2 | 8 | 7 | 12 | 9 | 9 | 20 | 23 |
| **Total** | **59** | **95** | **123** | **596** | **409** | **253** | **229** | **644** | **238** |

**Cases completed - 1.1.90 to 31.12.98**

| | **90** | **91** | **92** | **93** | **94** | **95** | **96** | **97** | **98** |
|---|---|---|---|---|---|---|---|---|---|
| **Staff cases** | 71 | 48 | 76 | 79 | 78 | 64 | 79 | 81 | 120 |
| **Other cases** | 9 | 19 | 41 | 20 | 358 | 186 | 98 | 92 | 199 |
| **Special proceedings** | 2 | - | 8 | 7 | 6 | 15 | 9 | 13 | 29 |
| **Total** | **82** | **67** | **125** | **106** | **442** | **265** | **186** | **186** | **348** |

**Cases pending - 1.1.90 to 31.12.98**

| | **90** | **91** | **92** | **93** | **94** | **95** | **96** | **97** | **98** |
|---|---|---|---|---|---|---|---|---|---|
| **Staff cases** | 63 | 96 | 99 | 103 | 106 | 121 | 140 | 214 | 173 |
| **Other cases** | 80 | 73 | 68 | 554 | 512 | 491 | 515 | 892 | 830 |
| **Special proceedings** | 2 | 4 | 4 | 4 | 10 | 4 | 4 | 11 | 5 |
| **Total** | **145** | **173** | **171** | **661** | **628** | **616** | **659** | **1117** | **1008** |

**ANNEX II**

1. Council Act of 26 July 1995 drawing up the Convention on the use of information technology for customs purposes, Art. 27 (OJ 1995 C 316, p. 33).

2. Council Act of 23 July 1996 drawing up the Protocol on the interpretation, by way of preliminary rulings, by the Court of Justice of the Convention on the establishment of a European Police Office (OJ 1996 C 299, p. 1).

3. Council Act of 27 September 1996 drawing up a Protocol to the Convention on the protection of the European Communities' financial interests, Art. 8 (OJ 1996 C 313, p. 1).

4. Council Act of 29 November 1996 drawing up the Protocol on the interpretation, by way of preliminary rulings, by the Court of Justice of the Convention on the protection of the European Communities' financial interests (OJ 1997 C 151, p. 1).

5. Council Act of 29 November 1996 drawing up the Protocol on the interpretation, by way of preliminary rulings, by the Court of Justice of the Convention on the use of information technology for customs purposes (OJ 1997 C 151, p. 15).

6. Council Act of 26 May 1997 drawing up the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, Art. 12 (OJ 1997 C 195, p. 1).

7. Council Act of 26 May 1997 drawing up the Protocol on the interpretation, by the Court of Justice, of the Convention on the service in the Member States of the European Union of judicial and extrajudicial documents in civil or commercial matters, of the same date (Art. 17 of the Convention, signed on the same date) (OJ 1997 C 261, p. 17).

8. Council Act of 19 June 1997 drawing up the Second Protocol of the Convention on the protection of the European Communities' financial interests, Arts 13, 14 and 15 (OJ 1997 C 221, p. 11).

9. Council Act of 18 December 1997 drawing up the Convention on mutual assistance and cooperation between customs administrations, Art. 26 (OJ 1998 C 24, p. 1).

10. Council Act of 28 May 1998 drawing up the Protocol on the interpretation by the Court of Justice of the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters (Art. 45 of the Convention, signed on the same date) (OJ 1998 C 221, p. 19).

11. Council Act of 17 June 1998 drawing up the Convention on Driving Disqualifications, Art. 14 (OJ 1998 C 216, p. 1).

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