Appeal and review

DECISIONS given by the Civil Service Tribunal are subject to an appeal before the Court of First Instance on points of law only. Decisions given by the Court of First Instance on such appeals may exceptionally be subject to review by the Court of Justice.

The provisions governing appeals from the Civil Service Tribunal to the Court of First Instance are similar in substance to those concerning appeals from the latter to the Court of Justice. The Court of First Instance has set up an appeal chamber specifically to deal with such appeals.

Review by the Court of Justice is a completely novel procedure, and its scope is narrower than that of an appeal. The review procedure applies only exceptionally, where there is a serious risk of the unity or consistency of Community law being affected. Review may be initiated only by a proposal from the First Advocate General, which must be made within one month of the decision of the Court of First Instance. The Court of Justice must also decide on the proposal within one month. Parties may not seek review, but are entitled to lodge written observations on the questions subject to review. The Court of Justice must give its ruling by means of an urgent procedure, and it may either give final judgment or refer the case back to the Court of First Instance.

With the establishment of the EU Civil Service Tribunal, history is in a sense repeating itself. The initial impulse which ultimately led to the setting-up of the Court of First Instance was the desire to hive off staff cases from the jurisdiction of the Court of Justice. Now staff cases are being hived off from the jurisdiction of the Court of First Instance.

However, the provisions for appeal from the Tribunal to the Court of First Instance and review of the latter by the Court of Justice give concrete form to a new 'judicial architecture'. There is no longer a two-tier structure, but a three-tier structure. The reforms introduced by the Treaty of Nice open up the prospect of specialised tribunals acting as courts of first instance, the Court of First Instance exercising appeal jurisdiction, with the Court of Justice as a supreme court. In this scheme of things, the 'Court of First Instance' of course needs to be renamed, which was proposed in the Constitution for Europe. The fate of the Constitution is subject to a more or less prolonged 'period of reflection'. In a more immediate future, we are likely to see the Civil Service Tribunal adopt its Rules of Procedure and thus put the finishing touches to the new arrangements for dealing with staff cases in the EU.

This article is based on a text which will appear as an update to Law of the European Union *eds. Vaughan and Robertson (Richmond Law & Tax), in section 2, 'Court of Justice and Court of First Instance', by Paul Lasok QC, Timothy Millett and Anneli Howard. The views expressed are the author's and do not engage the ECJ.* ❑

Double-headed Trojan horse

What is the future of the Community judicature? *Matej Accetto*, of the Ljubljana Faculty of Law and 2006 Partridge Visiting Fellow at Fitzwilliam College, Cambridge, considers the possibilities

THE debate on the functioning and reform of the Community court system is nothing new. It dates back at least to the 1970s, when the first tangible steps towards reform of the ECJ were taken (such as assigning cases to chambers instead of the plenary court) or contemplated (such as setting up an additional judicial body besides the ECJ). In the last two decades, a plethora of reform proposals have been put forward and a number of these turned into judicial reality. They have done little to stem the ever-increasing workload of the Community judicature, however. If 'tinkering' with the existing set-up will not do, a more profound change to the system might have to be introduced if its integrity is to be preserved.

I will endeavour to show the current state of the Community court system and to identify the reasons that have so far made serious change difficult or nearly impossible. Specifically, I believe that one can deduce a number of 'stalemate positions' on the proper role and functioning of the Community judicature, where change in either direction is perceived as disaster, thinly veiled as a gift. Hence the double-headed Trojan horse of the title.

The graphs opposite illustrate some of the pertinent facts.

The first Trojan horse dilemma — debilitating workload v. debilitating decisions

FIGURE 1 shows how the caseload of the ECJ and the CFI has changed over the years. From the first four cases lodged at the ECJ in 1953 — in the initial years every new application was a cause for celebration — its caseload has steadily grown, climbing to around 500 new cases lodged annually in the last few years. For the CFI, the growth has been even faster: established by the Single European Act (SEA), it saw 153 cases transferred to its docket from the ECJ in 1989 and then, after a few years of relative calm, it called for and received more areas of jurisdiction, the number of new cases quickly rising to a level comparable to that of the ECJ.

Figure 2 helps put this into perspective by comparing the increase in the number of decisions over five-year periods with the concurrent increase in the number of the judges at the ECJ. While the original seven judges issued 37 decisions in the period 1954–59, the same number of judges issued 157 decisions in 1965–69, and the increase continued until 15 judges were together responsible for 1,469 decisions in the period 2000–04. In other words, while in the first period (which is counted as six years) the Court issued a little over five decisions per judge, in the most recent (five-year) period the same Court, with little change in its working circumstances — and much of that for the worse — issued almost 98 decisions per judge.

This clearly illustrates the first double-headed threat facing the Court system, one in which it is very much a victim of its own success. On the one hand, despite wanting to do a proper job in guaranteeing Community rights and safeguarding the rule of law, it risks becoming clogged by an ever-increasing workload. On the other hand, while wanting to meet the demands of this expanding workload, the slipping quality of its increased output risks damaging the authority and credibility of its decisions. The first could spell an outright denial of judicial protection; the second would clash with the perception of the members of the Court as the infallible high priests of the Community legal order.

> 'Change in either direction is perceived as disaster, thinly veiled as a gift'

The second Trojan horse dilemma: manageable pragmatism v. unmanageable virtuousness

I HAVE already observed that reform proposals concerning the Community court system are nothing new. But it is precisely in this light that the current data should give us more cause for concern. The Court of First Instance was engineered by the SEA to alleviate the burdens that the Court of Justice had been facing in the 1970s and 1980s. It offered little help, however. Despite shifting important new areas of jurisdiction to the CFI (notably in 1993, 1994 and 2004), the ECJ itself is even worse off now than it was when the reform was first required, and it has only been

joined in this unenviable position by its saviour. Rather than one court, we now have two courts over-burdened by caseloads they cannot cope with, with about 2,000 pending cases carried over from one year to the next.

In part, this unfortunate situation can be attributed to the ever-growing workload: enlargement, new areas of jurisdiction and the aggrandisement of the Community courts' competences, an increase in the standing of private applicants, a growing awareness of Community law by national lawyers and the general tendency to judicialise political disputes are all highlighted as factors responsible for the increase in the number of applications lodged at the two Luxembourg courts. But a significant part of the problem surely also lies in the inability, or unwillingness, to undertake a more thorough reform of the court system itself. And it seems that much of that reluctance is due to a principled stand taken by those who would have the Luxembourg Court's virtues defended at all costs. Certain of its existing characteristics are considered to be the *sine qua non* of the Community court system; even if by sticking to them we may soon be left *sine* a workable Community judiciary at all.

Let me mention just three examples, which also show cracks in such reasoning. One is the issue of preliminary references, long considered to be the biggest concern of the Court's workload but also the particular competence that has been most jealously guarded by the ECJ. The preliminary references remain the paragon of the Court's jurisprudence, despite the fact that in the last few years it has taken between 20 and 25 months for a preliminary ruling to be issued, compared to six months in 1975, and despite the fact that voices of discontent have been heard from the national courts over the unhelpful vagueness of some of the Court's rulings.

Inasmuch as the burden may have been alleviated in the last few years, it has not happened by the timid steps towards allowing the CFI to issue preliminary rulings in limited areas but rather by the fact that, contrary to all predictions, the relative number of references in the caseload of the ECJ has diminished. Figure 3 shows the trend: in the mid-1990s, the preliminary references rose to account for 60 per cent of the total workload, and the common wisdom had it that the percentage would grow even further; as it turned out, the trend stopped and reversed, and they now account for less than 50 per cent.

The second issue concerns the number of judges: while the Community and the caseload grew, many within and without the Court spoke against increasing the number of judges in line with the enlargements, praising deliberation in the plenary and bemoaning its impracticability in a Court of 15, 20 or 25 judges. This is logically a tail-biting argument: inasmuch as the benefit of plenary deliberations lies in having the input of the entire Community, it is lost the moment one picks 13 (or another appealing number) out of 25 Member States to be represented in the Court's set-up. The Court is also precluded from playing the 'consistency card', by present examples such as the famous line of cases from *Dassonville* to

Source: Court of Justice of the European Communities

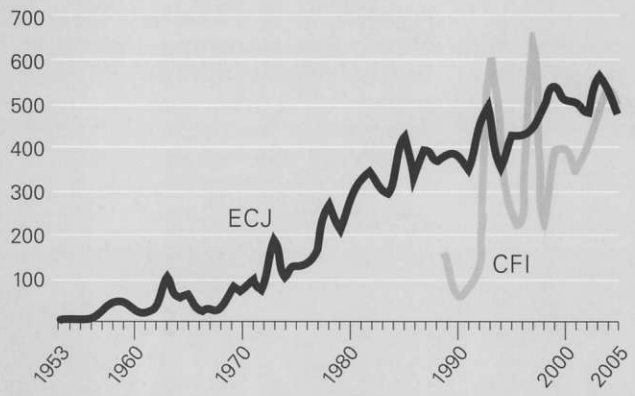


Figure 1: Cases introduced at the ECJ and CFI. (The ECJ graph adjusted for the 1,112 nearly identical staff cases lodged in 1979)

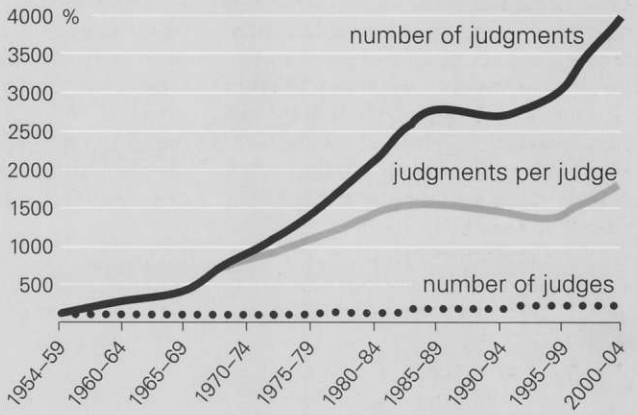


Figure 2: Increase in the number of judges and decisions in %, measured over five-year periods (the longer period 1954–59 allows for the slow build-up and equals 100%)

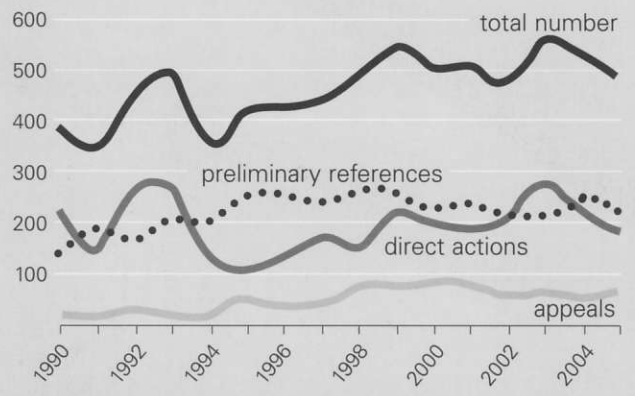


Figure 3: Nature of cases introduced at the ECJ (omitting special proceedings)

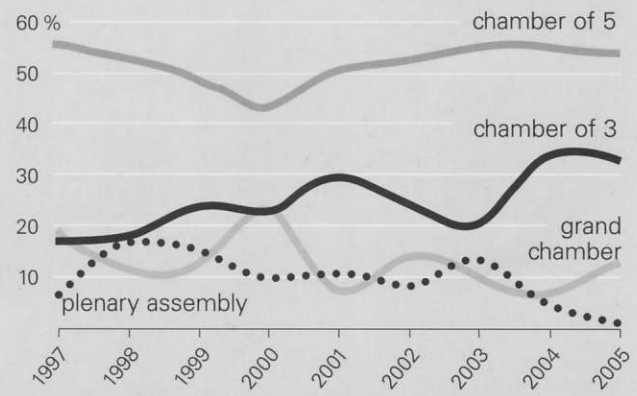
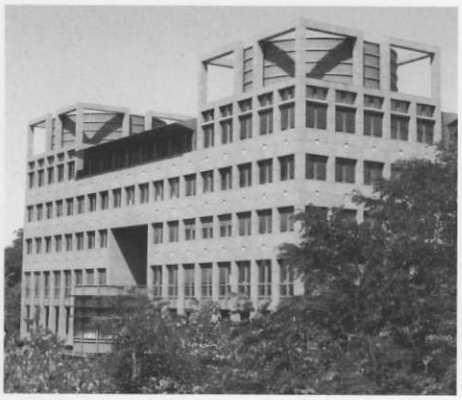


Figure 4: Bench distribution for decisions of the ECJ in % (omitting the few cases disposed of by the President of the Court alone)



The Court of Justice (Photo: ECJ)

Keck or the *Marshall – Marleasing – Faccini Dori* footwork on the horizontal effects of directives. Finally, it is factually incorrect: the Court managed to increase its output in the last year (the CFI did so by 37 per cent, not counting the transfer of cases to the newly established Civil Service Tribunal), and it did so largely thanks to the 10 new judges and the increased work in smaller chambers. As an example, Figure 4 shows the trend of the bench distribution at the ECJ, highlighting a near disappearance of the plenary assembly and the diminution of the grand chamber, offset by an increase in the number of decisions issued by three-judge chambers.

The third argument, in brief, is whether or not there should be any docket control or filtering system in relation to the incoming applications. While proposals to that effect have been made, their vocal critics speak against any limits imposed on national courts and other applicants as far as access to the Luxembourg courts is concerned.

All this is indicative of a wider problem outlined in the heading of this passage: many pragmatic and workable reform proposals are seen as betraying the virtues of the existing court system; remaining faithful to those virtues, on the other hand, hinders workable long-term solutions to existing problems.

Third Trojan horse dilemma: judicial federalisation v. nationalised chaos

BENEATH it all, one finds the final double-headed beast.

On the one hand, there is the perceived threat imposed every time the introduction of new judicial bodies is proposed. The idea of a proper two-tier or even three-tier Community judicial system with the ECJ and several (regional) courts of first instance or other variations on the theme, and perhaps even with a proper constitutional court, all smack of excessive judicial federalisation of the Union, much feared by the vulnerable Member States.

On the other hand, however, most Community lawyers share the fear that too much leeway for the national courts would destroy the coherence needed in the Community legal order if it is to remain effective. While national courts are already hailed as the proper Community courts of general jurisdiction, in practice their role is cornered between the *CILFIT* reference requirement and the *Foto-Frost* limits on legality review, and persuasive arguments are advanced as to why it should be so.

The problem lies in the fact that any serious change would seemingly have to go in one or the other of these two directions: either the Community court system must be further bolstered and become ever more like a proper federal judicature, or the national courts in the Member States must assume a more empowered role in exercising Community judicial review. One or other seems inevitable; both seem undesirable. The image is of a double-headed Trojan horse, impotently stuck in the *status quo*. And it is this image which needs to be overcome if any proper reform of the Community judicature is to be adopted.

But let me finish on a high note. While most commentators may not wish to leave the bedrooms of their established habits of mind and do not discuss what would happen if the reforms were to fail, I believe that an answer to the crisis can eventually be found within the existing court system. In that respect, no answer is also an answer, and the reform will take place where it can: at the national court level. And there are hints — from acknowledging that complete faithfulness to *CILFIT* is an undesired fiction to the unexpected relative decrease in the number of preliminary references — that such spontaneous reform may already be under way.

This article summarises points raised by the author in his address to the 2006 BEG Conference in Ljubljana. ❑