

COMMENT

A DESIRED BIRTH: THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES

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I. INTRODUCTION

The greatest merit of the Single European Act¹ (the Act) is to have made the public and decision makers aware of the necessity of proceeding with European integration and, more particularly, with the integration of the European internal market. Even if the awareness results purely from media infatuation with "1992" and not from the intrinsic legal qualities of the Act, the mere aspiration to complete the internal market will have been beneficial. Realizing this universal consciousness will have been a worthy achievement even if the deadline of 31 December 1992 is not met, in light of the enormity of the task of European integration and of the inevitable political opposition to certain policy objectives. But, the Act did not only promote the idea of an integrated and dynamic Europe. It also succeeded in modifying the institutional landscape of the European Communities (EC)—once considered to be sacrosanct—by providing for the creation of the Court of First Instance of the European Communities ("the Court" or "the Court of First Instance").²

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¹ Single European Act, 30 O.J. EUR. COMM. (No. L. 169) 1 (1987).

² Article 4 of the Act inserts Article 32d into the European Coal and Steel Community (ECSC) Treaty; Article 11 inserts Article 168a into the European Economic Community (EEC) Treaty; and Article 26 inserts Article 140a into the European Atomic Energy (Euratom) Treaty. Each new provision (being essentially identical) states:

1. At the request of the Court of Justice and after consulting the Commission and the European Parliament, the Council may, acting unanimously, attach to the Court of Justice a court with jurisdiction to hear and determine at first instance, subject to a right of appeal to the Court of Justice on points of law only and in accordance with the conditions laid down by the Statute, certain classes of action or proceeding brought by natural or legal persons. The court shall not be competent to hear and determine actions brought by Member States or by Community Institutions or questions

The creation of the Court is a true milestone. Henceforth, the judiciary power within the EC will be divided and graded between the Court of Justice of the European Communities ("the Court of Justice"), which remains the highest trial and appellate jurisdiction, retaining certain exclusive subject matter jurisdiction, and the Court of First Instance, which is charged principally with alleviating the tasks of the Court of Justice in specific and strictly limited areas.

The creation of such a "booster jurisdiction" has been a priority of the Court of Justice as it confronted from year to year an ever increasing caseload whose administration had become problematic. Consider the following: from 1975 until 1987 the total number of cases instituted with the Court of Justice each year rose from 135 to 395. Most alarmingly, the number of cases pending on December 31, 1987 was 527, the time separating the date of filing a case and its judgment having reached eighteen months or more for cases submitted for a preliminary ruling. The time required for disposition was six months in 1975 and nine months in 1980.

With the goal of exorcising the spectre of judicial delay, which affected the very credibility of the European institutions, the Court took the initiative of lobbying for the creation of a lower court to facilitate its task of controlling the interpretation of EC law with care and with the prestige which it is due. The articles of the Single European Act with respect to the creation of the Court of First

referred for a preliminary ruling [under Article 41 ECSC, Article 177 EEC, or Article 150 Euratom].

2. The Council, following the procedure laid down in paragraph 1, shall determine the composition of that court and adopt the necessary adjustments and additional provisions to the Statute of the Court of Justice. Unless the Council decides otherwise, the provisions of this Treaty relating to the Court of Justice, in particular the provisions of the Protocol on the Statute of the Court of Justice, shall apply to that court.

3. The members of that court shall be chosen from persons whose independence is beyond doubt and who possess the ability required for appointment to judicial office; they shall be appointed by common accord of the Governments of the Member States for a term of six years. The membership shall be partially renewed every three years. Retiring members shall be eligible for reappointment.

4. That court shall establish its rules of procedure in agreement with the Court of Justice. Those rules shall require the unanimous approval of the Council.

Instance are the echo of initiatives already undertaken by the Court of Justice.

As of November 26, 1986, the Court of Justice, expressing its fear as well as its political initiative, sent draft proposals to the Council of the EC to create a jurisdiction of first instance, in the form of a working document, with copies also transmitted to the Commission of the EC and the European Parliament. However, it was not until September 29, 1987, after the entry into force of the Act (July 1, 1987), that a formal request was delivered by the Court to the Council, together with the legal texts already drafted: a draft Council Decision creating the Court of First Instance and modifying the Statute of the Court of Justice, and a proposed modification to the Rules of Procedure of the Court of Justice.³

In November 1987, in accordance with the procedure established by the Act, the Council officially requested that the Commission and Parliament submit their opinion on the proposed jurisdiction "as soon as possible." The Commission published its first directions for the elaboration of the opinion on the draft Council Decision on May 5, 1988. The EEC Ministers of Foreign Affairs, assembled within the "General Affairs" Council, as well as the Intergovernmental Conference of the Twelve, also examined the file with respect to the founding of the Court of First Instance during their meeting of June 13-14, 1988. As for the European Parliament, on June 20 it adopted the resolution contained in Ms. Vayssade's Report and thereby approved the objective of the draft Council decision, while deviating from certain positions of the Commission regarding the jurisdiction of the new court. Finally, after having enquired into the position of the Parliament, the Commission formally adopted its final opinion on June 20, 1988. The procedure of initiative and previous consultation thus being closed, the Council made its decision to form the Court of First Instance on October 24, 1988.⁴ The general jurisdiction of the Court, which began its activities in mid-September 1989, are as follows:

³ For the original Rules of Procedure of the Court of Justice see 17 O.J. EUR. COMM. (No. L. 350) 1 (1974).

⁴ Council Decision of 24 October 1988 establishing a Court of First Instance of the European Communities, 32 O.J. EUR. COMM. (No. C. 215) 1 (21 Aug. 1989), as amended by corrigendum published in 32 O.J. EUR. COMM. (No. L. 241) 1 (17 Aug. 1989).

1. Composition and Organization

The Court has its seat in Luxembourg, in an annex to the Palace of the Court of Justice. Its members are chosen "from persons whose independence is beyond doubt and who possess the ability required for appointment to judicial office[.]"³ The Court thus shall consist of law "professionals" and, hopefully, of EC law "professionals."

While the requirement of independence is a natural one, and while the Court bears all the characteristics of a permanent jurisdiction, its judges do not sit for life. Their tenure is limited to six years, and a partial renewal of the bench takes place every three years.

This system is identical to that applied to the Court of Justice. Deviation therefrom is inconceivable, whatever the inconveniences of the system, without simultaneously adapting the regime for appointing the judges of the Court of Justice. The outgoing judges, however, may be reappointed.

It is regrettable that the selection of the judges remains within the competence of the governments of the Member States, and, moreover, that appointments must be approved unanimously. The selection process of the candidates poses a genuine source of delay and of politicization which may lead to a neglect for the qualifications required for the post and hinder the proper functioning of the institution. This fear did not escape the attention of the Commission, which expressed the desire that the Court of Justice be consulted with respect to the appointments proposed by the Member States in order to guaranty the prestige and the authority of the new jurisdiction. To this effect the number of candidates approved by the Member States should be double the number of posts to be filled.

Indeed, the opinion of the Commission can be justified for three reasons. First, the Court was the initiator of the project. Second, the Court of First Instance is intended to be an "assistant" to the Court of Justice. And finally, the Justices are naturally in a better position to appreciate the specialized competence of a candidate than the national political authorities. The opinion of the Court of Justice should therefore be decisive with respect to the selections to be made by the national authorities.

The number of judges on the Court are fixed at twelve. The numbers seven and twelve had been proposed. For evident political reasons, the number twelve is less subject to controversy ("a judge for each

³ 30 O.J. EUR. COMM. (No. L. 169) at arts. 4(3), 11(3), 26(3).

Member State’’). It seems that only the German delegation, preoccupied with reducing the costs of functioning of the new court, wanted to reduce the number of judges to seven.

Other arguments plead in favor of a court of twelve members. On one hand, it seems certain that the workload which the Court will carry will be considerable: probably 130 to 150 cases a year. Creating a court with an insufficient number of judges would defeat the purpose of alleviating the burden on the Court of Justice.

On the other hand, Article 2(3) of the Council decision provides that “[t]he members of the Court of First Instance may be called upon to perform the task of an Advocate General.”⁶ That formula, whose original character must be underscored, is the result of a compromise between the adversary (the Court) and the proponent (the Commission) of the presence of Advocate Generals within the court. The consequence of including these positions is to reduce the number of judges, which is an additional argument for setting the number of judges at twelve.

The necessary specialization of the judges sitting on the Court is, as a general matter, controversial. It seems reasonable to approach the question by considering the nature of the Court’s jurisdiction and the general competencies with which it is entrusted.⁷ How could it not be desirable—if not indispensable—under such circumstances, for the efficiency as well as for the prestige of the Court, that its members possess the highest legal qualifications befitting the nature of the duties they assume? By definition, the Court of First Instance is a specialized jurisdiction. It follows naturally that this be reflected in the education and the professional experience of its members. The judges of the Court must be chosen among highly and duly experienced lawyers, either in the field of the community public function or in the field of the economic law of the European Communities, more particularly in the domain of antitrust law.

The court sits in specialized chambers of three or five judges each, the competence of which are determined in the rules of procedure of the Court. A plenary session of the court shall be possible in certain cases, as determined by the Rules of Procedure of the Court.⁸

⁶ 32 O.J. EUR. COMM. (No. C. 215) at art. 2(3).

⁷ However, as we shall see later, the limitation of the competencies of the Court of First Instance to very strictly limited areas is one of the essential characteristics of that jurisdiction.

⁸ The first en banc decision of the Court was handed down in July 1990. See *Tetra Pak Rausing S.A. v. EC Commission*, No. T-51/89, slip op. (E. Comm. Ct. F.I. 10 July 1990).

2. *The Jurisdiction of the Court*

The jurisdiction of the Court is undoubtedly one of the most delicate questions to have been considered and debated.

There is, indeed, no strict rationale in this respect. The purpose behind the Court of First Instance was not to create a specialized, hierarchic judicial system in the European mold, since the lower jurisdiction (by definition) exercises full powers subject to appeal to the higher court.

On the contrary, the lodestar of the allocation of competencies has been the entrustment of the so-called "assistant" jurisdiction with the management of that part of the caseload which appears to be the most onerous, a strict and delicate examination of the facts being of necessity. One example of its jurisdiction is the action brought by Community functionaries against community institutions. To this were added several types of actions relating to Community economic disputes. Since these actions represent an important part of the caseload of the Court of Justice, their allocation to the Court of First Instance considerably lightens the task of the former. Since 1953, when the Court of Justice began its functions under the ECSC Treaty, until December 31, 1987, it had decided 846 cases involving community public servants (through judgments or orders), representing 25.2% of its entire caseload. As for judgments rendered on matters of competition and public subsidies, they represented 9.42% of the total number of judgments rendered during the same period. This figure would be reduced by 8% if one were to exclude the litigation with respect to public aids which will not fall within the competence of the Court of First Instance.

The Court of Justice has thus been relieved from one-third of the caseload it has traditionally handled. This allows it to focus upon questions regarding interpretation of the EC treaties (the Single European Act likely engendering abundant litigation) and actions for failure to act by the Member States. This will ensure its continued oversight of "community legality" vis-à-vis the institutions entrusted with implementing community policy.

If there is general agreement on the allocation of litigation involving Community functionaries to the Court of First Instance, it appears to be a more delicate issue to limit the scope of jurisdiction over economic law to be entrusted to the new court. The Act does not provide very much direction in this respect. It does refer in an intentionally vague manner to the basis of jurisdiction of the Court as

“certain classes of action or proceeding brought by natural or legal persons.”⁹

This jurisdiction does not encompass those cases submitted by the Member States or the Community institutions. Nor does it include preliminary questions submitted on the basis of Article 41 of the ECSC Treaty, Article 177 of the EEC Treaty, or Article 150 of the Euratom Treaty.

Incidentally, it should be noted that the field of competence granted by the Act is broader than the field to which the Court of First Instance is limited by the proposals which were submitted, at least during the first years of its functioning. This does not foreclose the subsequent extension of the jurisdiction of the Court without the necessity of revising the Treaties.

In addition, the Court of Justice also wished to entrust the Court of First Instance with litigation addressing issues of competition and commercial defense measures, including countervailing duties, and other cases within the purview of the ECSC (quotas, prices, and levies).

The Commission, however, rejected the proposal that the new court deal with actions in matters of commercial defense because it feared the exercise of dual judicial review in the majority of such cases.

The European Parliament generally shared the opinions of the Court of Justice. It stressed the importance of considering the essential task of the Court—of guaranteeing a consistent interpretation of Community law. Consequently, it is important to relieve the Court of Justice of as many “time-consuming” appeals as possible. Furthermore, the consensus in the Parliament seems to have been to forgo submitting cases addressing state subsidies to the Court of First Instance, even if these cases are submitted by undertakings, because of their similarity to the actions which may be introduced in the same field by the Member States.

In addition to litigation involving Community functionaries, the jurisdiction allocated to the Court by the Council decision of October 1988 includes the following areas:

First, the Court may hear actions in annulment for failure to act brought against the Commission by undertakings or associations of undertakings on the basis of ECSC law under Articles 33 and 35 of

⁹ Article 32d(1) of the ECSC Treaty; Article 168a(1) of the EEC Treaty, and Article 140a(1) of the Euratom Treaty.

the ECSC Treaty; against decisions regarding levies under Article 50 of the ECSC Treaty; and litigation with respect to production quotas and pricing, undertakings, and concentrations under Articles 57 and 66 of the ECSC Treaty.

Second, it may decide actions in annulment for failure to act against an institution of the Community by natural or legal persons under Articles 173 and 175 of the EEC Treaty concerning the application of the rules of competition applicable to undertakings.¹⁰

Thus, it is a narrow jurisdiction—strictly limited to the rules of competition under the EEC and ECSC Treaties—with which the Court of First Instance has been entrusted. This allows the Court of Justice to exercise solely appellate review of such cases.

It should be noted that the Court of First Instance is also competent to decide on compensation for damages caused by a Community institution as a result of the act or the failure to act which is the subject of the action which is brought.

The overly limited nature of this transfer of jurisdiction may be regrettable, since the ultimate purpose of the transfer is to lighten the caseload of the Court of Justice. The Community institutions could have agreed to put the development of the jurisdiction of the Court of First Instance in an evolutionary perspective, thus leaving open the possibility of extending the jurisdiction of the Court for later decisions. One example would be to permit the Court of First Instance to concentrate on the litigation resulting from the application of subsequent regulations addressing Community trademarks.

3. The Procedure of Appeal

The holdings of the Court may be in the nature of a final judgment, may partially decide cases on the merits, or may dismiss a case on the procedural grounds of incompetence or inadmissibility. Such decisions may be appealed before the Court of Justice up to two months after the decision is rendered.

The same two month limit will apply to motions for an injunction which the Court denies with respect to the performance of challenged acts, other provisional measures, and judgments rejecting requests of suspension of forced performance.

Where a motion to intervene is made and rejected by the Court, the decision will also be subject to appeal within the same two month

¹⁰ Articles 85 to 90 of the EEC Treaty.

period. An appeal may be lodged by any party who partially or entirely lost at the trial level. Any party other than a Member State or a Community institution, however, may only have standing to intervene in an action where the decision of the Court is of direct concern to that party.¹¹

As a result, unlike natural or legal persons, Member States and Community institutions do not have to prove any specific interest to intervene. This principle corresponds to the recognition that they are allowed to act solely in the interest of the law.

Some have argued in favor of extending this privilege to Member States and Community institutions which had not intervened in the litigation before the Court of First Instance, thus allowing them to bring an appeal to the Court of Justice without having appeared at the trial level. This position is entirely unjustified. The opinion of the Commission is the better one to the extent that it would allow a third party to question a judicial decision satisfying the original parties to the action and allow for judicial efficiency. Indeed, the EEC Treaty entrusts the Commission with the essential task of ensuring the performance of Community obligations subject to the review of the Court of Justice. Could this task be extended, in the context of appellate review, to other institutions of the Community as well as the Member States? In such a scenario, the risk would be great—and regrettable—of essentially political conflicts being arbitrated in the Court of Justice. Such a task would be beyond the means and mission of the Court of Justice.

It should be further noted that the right of Member States and Community institutions to present their interests before the Court of Justice is, in any case, guaranteed by the chance to intervene in the application for appellate review brought before the Court of Justice, notwithstanding their failure to intervene when the case was pending before the Court of First Instance.

In accordance with the purpose of lightening its caseload, appeals before the Court of Justice are restricted to questions of law. The appeal may be based on grounds of lack of jurisdiction of the Court of First Instance, procedural irregularities before the Court affecting the interest of the party concerned, or the incorrect interpretation or application of Community law by the lower court. The latter ground is quite important for this analysis. On one hand, it expressly rec-

¹¹ Only a voluntary intervention is possible.

ognizes the right of the Court of First Instance to interpret and apply Community law with regard to matters falling within its jurisdiction. In this context the Court of Justice and the Court of First Instance exercise concurrent jurisdiction. But, on the other hand, that allocation is hierarchized and, in that respect, the Court of Justice is the final authority competent to interpret and apply Community law. As a result, the Court of First Instance will have to respect the jurisprudence of the Court of Justice.

In light of this respect for authority, the role of the Advocate General may be critical. This does not, however, prevent the Court of First Instance from exercising the independence guaranteed by the "empowering act," to fill in gaps in the law, or to note the ambiguities of previous judgments of the Court of Justice, and even to propose new approaches and solutions without dissenting from the principles established by the Court of Justice. Indeed, this approach would be nothing less than pragmatic and realistic. One should note that if there are large numbers of appeals in the beginning of the tenure of the Court, it is most likely that its decisions on issues of fact in matters where the complexity of fact-finding is extreme will be nearly decisive on the ultimate resolution of legal issues. Whereas the Court of Justice is limited to reviewing questions of law, the importance of fact-finding below will give the Court of First Instance greater authority and prestige with respect to the litigation before it.

On appeal, the petitioner may only request either the total or partial annulment of the decision of the Court of First Instance. The issues on appeal must be limited to those presented in the pleadings submitted in first instance, to the exclusion of any new argument. The parties on appeal may modify neither the relief demanded nor the grounds for the claim before the Court of First Instance. If the object of the litigation encompasses the arguments submitted to support the appeal, which seems normal, the use of new arguments on appeal should be excluded.

If the grounds for review are well founded, the Court of Justice will annul the decision of the Court of First Instance. In this case the Court of Justice itself can make a final decision on the merits of the litigation if the case is in a stage to be judged; or the Court can remand the case to the Court of First Instance for final disposition. In the event of a remand, the Court of First Instance is bound by the points of law decided by the Court of Justice.

II. FINAL CONSIDERATIONS

This comment has addressed only the genesis and the essential aspects of the functioning of the Court of First Instance. Quite a

few other aspects of the relationship between the Court of First Instance and the Court of Justice bear examination, to wit, the procedure by which to bring an action for appeal, the representation of the parties, and the allocation of expenses.

The writer hopes to have underscored the original nature, and the unique properties of this new jurisdiction in the judicial order, not only under Community law but also internationally. The contribution which the Court of First Instance is making to the exercise of the judicial function within the European Communities is extremely positive in several respects. First, it is permitting the Court of Justice, confronted by an ever increasing caseload, to focus upon matters of important institutional and constitutional implication. The high court is thus better equipped to forge the very basis of the Community legal order, ensure its unity, and further its respect by the Member States. Second, the new court is contributing to the protection of private parties by providing for a dual system of judicial review. Finally, the Court of First Instance is the conceptual base of a hierarchic Community judicial system at the apex of which sits the Court of Justice. In the future, this base may be enlarged, either by expanding the jurisdiction of the Court of First Instance or by creating other tribunals of specialized jurisdiction.

