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Gordon Slynn

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# Court of First Instance of the European Communities\*

*The Honorable Sir Gordon Slynn\*\**

The Court of Justice of the European Communities (“Court of Justice”) deals with questions arising under the Treaties establishing the European Economic, the European Coal and Steel, and the European Atomic Energy Communities (collectively the “Treaties”).<sup>1</sup> In 1962, its law reports ran to 512 pages, already double the number in 1959. In 1985, they comprised 4,050 pages. In 1962, 62 cases were brought before the Court; in 1985, the number had risen to 433. Not surprisingly cases coming before the Court took longer to resolve—the period from lodging the action to judgment had slipped from nine months to twenty months in 1985 and to thirty months or more in 1988 for actions brought directly by the applicants before the Court; it had slipped from six months to fourteen months to twenty-four in the same years for references by national courts asking the Court of Justice in Luxembourg to rule on questions of interpretation or validity of Community legislation.

The reasons for this increase are plain. There were more Member States and with the accession of Spain and Portugal, further cases would come from those Member States. A vast number of regulations and directives had been made as effect was gradually given to the principles and objectives set out in the Treaties. With the large number of further rules to be adopted to give effect to the so-called “Single Euro-

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\* At the author’s request, this Article was published in its original form.

\*\* Judge, European Court of Justice. The views expressed in this note are those of the author alone.

<sup>1</sup> Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, arts. 31-45, 261 U.N.T.S. 140, 165-73; Treaty Establishing the European Economic Community, Mar. 25, 1957, arts. 164-88, 298 U.N.T.S. 3, 73-78, [hereinafter EEC Treaty]; Treaty Establishing the European Atomic Energy Community, Mar. 25, 1957, arts. 136-60, 298 U.N.T.S. 167.

pean Act,"<sup>2</sup> in order to implement the Internal Market without frontiers by 1993, new series of direct actions to interpret or challenge the validity of this legislation, or contending that Member States had not fulfilled their obligations under them, were bound to arise. As the citizens of Member States found that Community law affected their business transactions and their personal affairs, national courts were likely to have to consider and to refer more questions for ruling by the Court of Justice. Perhaps even the confidence in its judgments, which the Court had inspired, encouraged rather than discouraged parties to come to it.

The limit of what the Court of Justice could reasonably achieve had, by 1985, already been passed; the backlog of cases waiting to be heard was bound to increase with a consequential lengthening of the period between start and finish.

At the same time, doubts were felt as to whether the Court of Justice was the right forum for some of the cases which came before it because there was nowhere else to go. Claims by the officials and other employees of the institutions of the Community that their Staff Regulations had not been complied with, or that proper procedures had not been followed, accounted for a significant part of the Court's work. They were not dealt with by the full Court but by a chamber of three judges. Even so, and despite the fact that they were always important to the individual and sometimes raised general principles of law, the feeling grew that they should not go directly to the Court. Some other forum, with more time and facilities to investigate issues of fact; perhaps with members having experience of industrial relations; perhaps with a greater opportunity to induce a compromise, even to bang the parties' heads together, was called for and the Court of Justice itself put forward this idea many years ago.

There were, moreover, criticisms by lawyers of the procedures adopted in other areas. In competition matters it was said to be unsatisfactory that the Commission, which investigated and prosecuted claims that the provisions of the Treaty<sup>3</sup> had been violated, was also the judge and, so far as issues of fact were concerned, it was largely final. The Court of Justice was itself conscious that it was not in the best position to review those cases where serious issues of fact or economic assessment were involved. Its procedures are largely written, it rarely hears oral evidence, and, when it does, it is at times obliged to refer issues of fact to members of a chamber for report, the full Court having to rely on the conclusions of those members when the case comes back to the Court,

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<sup>2</sup> 31 O.J. EUR. COMM. (No. L 319) 1 (1988).

<sup>3</sup> EEC Treaty, 298 U.N.T.S. at 3.

without the latter having heard the witnesses. In other areas there are comparable problems. Cases under the Coal and Steel Treaty involving challenges to the grant of quotas, levies or fines for non-compliance, can involve considerable investigation of details. Challenges to decisions of the Commission or the Council that companies outside the Community have dumped their products, to the detriment of Community producers, and the consequential anti-dumping duties have produced hundreds, indeed thousands, of pages of written pleadings and annexes said to be relevant to the legal issues involved.

Something plainly had to be done. One possibility was to increase the size of the Court of Justice so that there could be more chambers and two plenary sessions: advantage — everything remains under one roof and members of the Court could have more time for detailed investigation; disadvantage — the risk of divergence between chambers and plenary sessions. Another possibility was to empower the Court to say summarily that cases were not only inadmissible but also hopeless, or, more radically, to pick those cases which raised questions of principle and to refuse to take the others. The first could have been, and perhaps should be, adopted but, in view of the number of cases likely to be eliminated, it would not solve the basic problem; the second, if acceptable in for example the Supreme Court of the United States because parties have already had at least one day in court, had the insurmountable disadvantage that for direct actions, which might not involve new questions of principle but which were important for the traders concerned, there would be no adjudication, the Court of Justice being the one and only court of first and last instance.

Eventually the nettle was grasped. The Court of Justice made a proposal; after consulting the Commission and the Parliament, the Member States agreed in the Single European Act that there should be attached 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 conditions to be laid down, "certain classes of actions or proceedings" brought by natural or legal persons.<sup>4</sup> The Act left the details of what classes of cases should be within the jurisdiction of the new Court to be defined by the Council acting unanimously, save that it reserved to the Court of Justice the jurisdiction to hear cases brought by the Member States or by the Community institutions under the Treaties and the jurisdiction to determine questions referred for preliminary rulings under Article 177 of the European

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<sup>4</sup> 31 O.J. EUR. COMM. (No. L 319) 1 (1988).

Economic Treaty.<sup>5</sup> These exceptions were intelligible if not inevitable. As to the latter since the facts of each case and the ultimate application of Community law are for the national court, and since the ruling is one of interpretation or validity, the matter should go to the final Court if conflict is to be avoided. As to the former, the status of the applicants and the absence, by and large, of issues of fact pointed, even if not inevitably, to the issues being left with the Court of Justice itself.

Subsequent to the Act being adopted there has been much discussion in the Member States, in the institutions of the Community and in a special committee set up to consider the new Court as to (a) its jurisdiction; (b) its composition; (c) its procedures; and (d) its relationship with the Court of Justice.

No one doubted that "staff cases" should go. The Council also accepted that cases brought by natural and legal persons against an institution of the Communities—the Commission or the Council—relating to the implementation of the competition rules applicable to undertakings, should go. In future, therefore, challenges to the validity of a decision that there has been a breach of Article 85<sup>6</sup> (agreements and concerted practices between undertakings which aim to, or which do in fact, prevent, restrain or distort competition within the common market: for example, price fixing agreements) or Article 86<sup>7</sup> (abuse of a dominant position within the common market) of the EEC Treaty, and challenges to the penalties imposed, will go to the new Court of First Instance. So will claims that the institutions have failed to act when called upon to do so in these areas.

The third category of cases, so far referred, comprises claims brought against the Commission under the European Coal and Steel Treaty by undertakings alleging that decisions concerning them, which impose levies on the production of coal and steel, fix prices or quotas or which rule that restrictive practices have been adopted or that there has been an abuse of a dominant position, were invalid because, for example, they were *ultra vires*, or illegal or involved a misuse of power.

It is good that these cases should go to the Court of First Instance so that a fuller investigation of factual issues can take place. Increasingly, however, the Commission has been required, of late, to investigate claims by industries in the Community that dumping has taken place in the Community — electronic equipment from Japan, low priced refrigera-

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<sup>5</sup> EEC Treaty, art. 177, 298 U.N.T.S. at 76-77.

<sup>6</sup> *Id.* art. 85, at 47-48.

<sup>7</sup> *Id.* art. 86, at 48-49.

tors and minerals from Eastern Europe and the Soviet Union.<sup>8</sup> These cases, where the exporter challenges the Commission's findings before the Court of Justice, involve considerable detail and large numbers of documents. There are strong arguments that these cases too should begin in the Court of First Instance. Other factors, however, have prevailed: that the Court of Justice has not yet fully developed a jurisprudence in the matter and that the Community itself is still at a relatively early stage of dealing with these cases. Fortunately, since in my view the balance is strongly in favor of their going to the new Court, the Council has not closed the door and the question will be looked at again after two years' further experience.

It seems likely that the Council, no doubt on a proposal from the Court, will need to review the "classes of action or proceeding" from time to time. Steel cases may become less frequent as policies are reviewed; sectors of agriculture, for example milk or milk powder controls, may produce a crop of cases likely, for a sufficiently long period, to add to the work of the Court of Justice. Because of the detailed investigation involved, these other classes of case may need to go to the new Court of First Instance. It is to be hoped that the new Court will be seen as being sufficiently flexible to take over appropriate classes of case when the pressure on the Court of Justice has to be relieved.

The composition of the Court produced no less debate. In view of the amount of work likely to be involved at the beginning, it seemed to some sufficient to have seven judges, including a president, so that there could be two chambers of three or one chamber of five judges, allowing for the administrative burdens on the President, the occasional absence and the possibility that one judge could be released for detailed research or drafting of a judgment in a heavy case. It may well be desirable that one chamber should specialize in the competition cases though there is no doubt an argument of equal weight that all judges should see something of each class of case. The difficulty of only having seven judges for twelve Member States is that Member States do not like to see themselves without a nominee on the Court, though a proper system of rotation should have relieved this anxiety. In the result, the Court is to have twelve "members" though, as with the Court of Justice, there is no provision that one shall be a national of each Member State. Whether this

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<sup>8</sup> See, e.g., *Technointors v. E.C. Commission*, 3 Comm. Mkt. L.R. 491 (1987)(freezers from U.S.S.R.); *Tokyo Elec. Co. Ltd. v. E.C. Council*, 1 Comm. Mkt. L.R. 169 (1988); *Celestri & Co. SpA v. Amministrazione Delle Finanze Dello Stato*, 3 Comm. Mkt. L.R. 181 (1985)(zinc-coated steel sheets from East Germany); *Re Anti-Dumping Proceeding Concerning Imports of Certain Tubes of Iron or Steel Originating in Rumania*, 1 Comm. Mkt. L.R. 504 (1980); *Nashua Corp. v. E.C. Commission*, 1985 E. Comm. Ct. J. Rep. 3467.

Court should have full time advocates general or indeed advocates general at all was no less controversial: in the Court of Justice there are six advocates general, requiring the same qualifications as the judges but with the function, not of deciding the outcome of a case, but, "with complete impartiality and independence," of giving in open court an opinion to assist the Court in its task of seeing that in the interpretation and application of the EEC Treaty "the law is observed."

It seems to be thought that the advocates general in the Court of Justice have, from the beginning, assisted the Court both in their analyses of the facts and, even more, in the development of the Court's jurisprudence. Their role in having a first run at the problem was thought to be particularly important in a court of first and last resort. The new Court is in a different position. On matters of law there is the possibility of an appeal to the Court of Justice; the new Court will thus not be "final" on law. It could thus be said that it is not necessary to have an advocate general at all with, to some extent, the inevitable duplication of effort involved—a duplication found acceptable in the Court of Justice where the advocate general's opinion can be compared in some ways (save as to its actual effect) with a first instance judgment. A compromise solution has been reached. The new Court is to have twelve "members" who are, it seems clear, to be "judges" but they are all eligible to be called on to perform the task of an advocate general.

It will, of course, be for the new Court to work out how this system operates. It may be in the beginning that the Court will nominate an advocate general in each case. Another possibility is that an advocate general will only be appointed for cases involving very heavy investigation of fact or new or difficult issues of law since, even though subject to appeal, the new Court will clearly have to resolve new and difficult issues of law. It may thus not be thought necessary for an advocate general to be appointed in, for example, every staff case or in cases where merely the application of well-established principles is at stake.

Whatever criteria are adopted, the advocate general will give an opinion in open court (which may be given in writing, with no doubt a summary given in open court) but will not then take part as a judge in the judgment of the case. That plainly means that he cannot vote; quare whether it will be thought right, as in the Conseil de'Etat in France but not in the Court of Justice, for the advocate general to take part in, or assist at, the deliberation before the judgment is finally agreed.

This experiment may have its lessons for the Court of Justice, not least in cases such as those where it is alleged that a Member State has failed to give effect to a directive and where there is no answer but merely

an explanation as to why the delay has occurred. In these cases a full opinion by an advocate general is an act of supererogation and indeed where a summary or default procedure ought too be available without national sensitivity being offended.

Whatever practice is adopted with regard to the advocate general's role, the fact finding functions of the Court are going to be fundamental to its work. This may point to the selection of members who have had substantial experience of trial work as judges or as practicing lawyers. Members of the Court must clearly be persons of standing in the legal profession "whose independence is beyond doubt and who possess the ability required for appointment to judicial office." The conditions of appointment and service of the members shows the importance and status of the new Court in the eyes of the Member States, a matter which the Court of Justice itself has always stressed. It would have been self-defeating to set up a new Court which did not have the status or which did not command the respect necessary for it to be really effective.

Many other rules of procedure which govern the Court of Justice have been adopted for the new Court. Others will have to be worked out by the new Court, no doubt in consultation with the Court of Justice, once the members have been appointed later this year. The new Court will have its own Registrar, partly because it would be impossible for the Registrar of the Court of Justice to act for both Courts and partly to underline its separate identity. Its staff, however, will consist of officials and other servants attached to the Court of Justice who will work for the new Court on terms to be agreed between the Presidents of the two Courts. Some will be made directly responsible to the Registrar under the authority of the President of the new Court, others will in fact provide services to both Courts. It seems, at any rate at the beginning, neither necessary nor desirable to set up separate library, research, or documentation divisions. It may be possible for personnel and security matters, translation and interpretation, to be dealt with on a joint basis rather than that new corps of personnel should be set up for this purpose. The two Courts will clearly work together in a framework comparable with some other courts of first instance and appeal.

In the early days, parties may begin in the wrong one of the two Courts since there may be doubt as to where they should begin, and each Court is empowered to send to the other proceedings or documents which should properly be before it. If a case is brought before the new Court when a case is already pending before the Court of Justice raising the same issues or challenging the validity of the same act, the new Court may, after hearing the parties, stay its proceedings until the Court of

Justice has ruled. Conversely, the Court of Justice may decide that the proceedings before it should be stayed with the result that the proceedings before the Court of First Instance continue.

The relationship between the two Courts is obviously at its most critical in relation to appeals. Part of this relationship can be laid down by rules; part will depend on practice and experience as the Court of Justice develops its own role as an appellate court. Some of the rules appear in the Council Decision establishing the Court of First Instance. Thus an appeal lies where a final decision or a ruling on competence or admissibility is made by the new Court within two months of its decision being notified. Unsuccessful parties may appeal. So may intervening parties, who join in because of their interest to support one side or the other (except Member States and institutions of the Community), where the decision directly affects them. That the institutions and Member States, which were parties or which intervened below and whose submissions were rejected, should be allowed to appeal is apparent. No less would it seem right that, if the parties or interveners appealed, Member States which had not intervened at first instance should be allowed to intervene on the existing appeal. Less obvious is that they should have an independent right to appeal when not parties and when they did not intervene below. They have, however, been given that right, which may be important if decisions are taken on points of principle by the Court of First Instance which are of far-reaching importance and which may not have been anticipated before judgment of the Court of First Instance. It seems unlikely that Member States will wish to use this right to launch appeals independently of the parties unless issues of importance or of wide-ranging effect are at stake. The same may be true of the institutions, though the Commission as guardian of the Treaties may well wish, particularly in the early days, to take to the Court of Justice cases developing a line of approach which the Commission considers to be wrong or contrary to the interests of the Community.

Certain procedural matters can also be appealed, though not an award of costs alone. The overriding rule is that appeals to the Court are to be limited to points of law. These are specified: (a) lack of competence of the new Court, *i.e.* it has dealt with issues as to which it had no jurisdiction; (b) a breach of procedure which can be shown adversely to affect the interests of the appellant—a formula which *prima facie* gives a wide discretion to the Court of Justice; (c) “infringement of Community law by the Court of First Instance.” What this latter phrase means may have to be worked out. At first glance, it seems to mean error of law—the new

Court got the law wrong—and perhaps that it has erred in law by drawing an untenable inference from established facts.

The new Court has power to declare decisions void. To prevent the confusion which would result if the Court of First Instance declared an act void and the Court of Justice declared it valid, it has been provided that such a decision of the Court of First Instance does not have effect until the time for appealing has passed, or, if there is an appeal, until the Court of Justice has ruled. Subject to that, an appeal does not suspend the effects of a decision declaring an act void unless the Court of Justice on application so orders or it adopts other interim measures.

After hearing the appeal, the Court of Justice may quash the lower Court's decision and either give judgment (for example when it has all the necessary factual material found by the new Court) or send it back for that Court to deal with the case on the basis of the Court of Justice's ruling on the law. Whether the latter's decision is binding on the new Court in other cases is not stated. To a common lawyer, it would seem right, or at least desirable, that it should follow the Court's decision in later cases. It can resort to the agreeable exercise of "distinguishing" the earlier decision, but where that does not work, rather than go off on a different route because of further arguments in a later case or a disagreement with the Court of Justice, there seems much to be said for the Court of First Instance adopting the time-honored formula of "but for the Court of Justice's decision in Case X we would have ruled . . . but we follow the earlier decision" and then leave it to the Court of Justice to sort the matter out. What happens in this situation, and whether the new Court adopts the Court of Justice's practice of following its own earlier decisions, whilst rejecting any doctrine of binding precedent, remains to be seen.

It seems necessary that written pleadings on appeal should be confined as far as possible to the issues of law since the facts will normally be found in the new Court's judgment and it is perhaps desirable that pleadings should be limited to an appeal and a reply, unless further written pleadings are expressly authorized in particular cases. The Court of Justice must have a right to reject appeals as being inadmissible and may well need to have a wider right to declare them manifestly ill-founded where the grounds advanced, even if within the Court's jurisdiction, are plainly not capable of serious or sustained argument.

As with all procedures before the Court of Justice, the written pleadings provide the core of the case; there may well be cases where the parties are satisfied to accept that no oral hearing on the appeal is needed. In other cases, conversely, there may be reasons why justice

compels an oral hearing. Whether the Court of Justice should in other cases have a discretion to refuse an oral hearing on an appeal may be debatable. Oral hearings are in any event short, do give the parties a chance to punch home the crucial arguments and the Court of Justice an opportunity to test and elucidate what is being said. For one used to the English system, the advantages and the parties' right to have an oral hearing if they want one are clear. It is only where it is obvious from the beginning that a hearing would be a complete waste of time (which should rarely be the case) that a hearing should be refused. The exercise of the Court's discretion, if it is to have one, however, will inevitably depend to some extent on the number and the quality of the appeals which are brought.

And so, much remains to be worked out in practice. It is to be hoped that the transfer of certain cases to the Court of First Instance will enable the Court of Justice to reduce the backlog and to give priority to rulings on preliminary issues of law, upon which decision in cases before national courts depend. Then the appeals will begin to arrive so that again the Court's work will increase, particularly where decisions in competition cases have substantial commercial and financial effects and where understandably the parties who have lost will not want to give up without exhausting the remedies available to them.

Overall, however, the position should be much improved and will at least be prevented from becoming wholly unmanageable so far as the European Court of Justice is concerned. Some cases will not be appealed; others will arrive with all the facts found and with well-defined issues of law for resolution. The volume of documents to be copied, translated and read by the Court ought, if the procedures are properly implemented, to be considerably reduced. Time will be saved and decisions given with less delay. In the development and administration of Community law this is an important step forward. It is, however, not impossible that in the time other categories of cases will have to be transferred, a different procedure for staff cases adopted, perhaps a general discretion to refer given to the Court of Justice itself (a discretion, which its history shows, could be expected to be sensibly exercised and which in any event could have built into it the possibility of appeal), even a provision requiring leave to appeal in certain classes of cases to be adopted.