

# COMMISSION OF THE EUROPEAN COMMUNITIES

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## EXTENDING THE JURISDICTION OF THE COURT OF FIRST INSTANCE (CFI)

Commission opinion on the draft Council Decision, prepared by the Court of Justice, amending the Decision establishing a Court of First Instance of the European Communities.

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**EXTENDING THE JURISDICTION  
OF THE  
COURT OF FIRST INSTANCE  
(CFI)**

**Commission opinion on the draft Council Decision, prepared by the Court of Justice, amending the Decision establishing a Court of First Instance of the European Communities.**

1. By letter dated 5 February 1992<sup>(1)</sup> the Council referred to the Commission a request made by the Court of Justice on 17 October 1991<sup>(2)</sup> for an extension to the jurisdiction of the CFI and asked the Commission - as well as Parliament - for an opinion on the request.

Council discussions began at a meeting of its Court of Justice Working Party on 27 January 1992; the Presidency wishes to see a decision by the end of June, but believes that progress should be dependent on the opinions requested.

2. Amending the 1988 Decision establishing the CFI as requested by the Court would make it possible to extend the CFI's jurisdiction to all actions brought by individuals for annulment, for failure to act or to establish liability, bringing in all possible matters as referred to in Article 168a of the EEC Treaty.

In the Community legal system there is little scope for actions by individuals; the effect of the proposed transfer of jurisdiction from the Court to the CFI in relation to the actions for annulment would be significant in only two areas:

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(1) SG(92)A/2064, 10.2.1992.

(2) Council document 9286/91 (JUR 111, COUR 15), 8.11.1991, annexed to the letter cited at note 1.

- state aid;
- measures to protect trade (dumping and subsidies): the 1988 Decision expressly stated that the possibility of transferring jurisdiction in this area should be reviewed after two years of operation of the CFI.

The Court's request extends to the full range of actions to establish liability (Articles 178 and 215 of the EEC Treaty), the CFI currently having jurisdiction only in applications which are brought before it for damages connected with actions for annulment or failure to act (Article 3(2) of the Decision).

3. There is no denying the validity of the Court's objectives, which the Commission fully shares. The aim is to improve the protection available to litigants by extending the field in which the two-tier judicial system applies and to relieve the Court of the largest possible number of time-consuming direct actions so that it can concentrate on its primary role of interpreting Community law for the national courts.

4.1 Since the Decision which the Court now wishes to see amended was adopted, there have been substantial changes as a result both of the Maastricht agreements and of the prospect of future enlargement.

The workload of the Court will obviously expand as the Community acquires new functions and new members. The Treaty on European Union reflects this double constraint by removing one of the restrictions on the CFI's jurisdiction imposed by the current Treaty. The only area expressly reserved for the Court of Justice itself is the interpretation and review machinery of Article 177; all direct actions could now be transferred to the CFI, including those brought by Member States and institutions, subject always to a right of appeal to the Court of Justice.

There is every likelihood that once the Union Treaty has come into force the Court will ask for certain categories of actions brought by Member States (particularly those relating to state aid) or the institutions (including certain classes of infringement proceeding) to be transferred to the CFI.

At any rate it was clear from the Conference of the Representatives of the Member States that there was a general intention to turn the CFI into a Community court with overall jurisdiction for direct actions, leaving the Court of Justice with its role of guaranteeing the uniform application of Community law (via the preliminary ruling procedure of Article 177) - although certain classes of direct action would still be reserved for the Court of Justice.

This short-term prospect has conditioned the Commission's reaction to the Court's request, which, while staying within the four corners of the Treaties as currently drafted, takes a major step in the right direction by moving on from the limited conferment of specific functions on the CFI and making a significant extension to the two-tier judicial structure.

4.2 Against all these elements it is necessary to set off the potential objection to the Court's request that it might involve transferring to the CFI matters relating to economic policy decisions of general impact.

That in fact is being done already, both in actions for damages (a decision as to the liability of the Community depends on the validity of the act complained of, which will commonly be a Council or Commission regulation) and in cases concerning Council and Commission policy on trade protection and Commission policy on state aid.

But the Court of Justice has constantly held that decisions involving several economic objectives at the same time are subject to review by the courts: they can be set aside (and damages may sometimes be awarded

to an individual) only where there is abuse of power or a manifest error as to the law or facts.

The Commission assumes that the law as thus stated will not be affected by the proposed reform.

In any case an appeal from a judgment of the CFI can always be brought in the Court of Justice; all the parties and interveners and all Member States or Institutions that were not involved in the case in the CFI can bring an appeal for want of jurisdiction or for violation of a material rule of procedure or substance.

5. In the trade protection area more particularly, better protection for litigants through the changeover to a two-tier judicial system would in the main safeguard the interests of non-Community producers - and indeed of importers established in the Community. However, this is a statement of fact based on the case law of the Court and may not be set against the general concern for natural justice.

Under current provisions which there is no proposal to amend, where the CFI is to annul an instrument of general scope - which would always be the case in the trade protection area, where the regulation is the standard form of instrument - the action has suspensory effect. So if the CFI were to annul a trade protection measure, the regulation would stay in force for the full two-month period allowed for an appeal and, if an appeal were brought, until the Court of Justice gave judgment confirming the annulment ordered by the CFI. This would help to secure the operational nature of Community measures but would also lengthen the period of uncertainty, both for firms and for the institutions.

The need to go through a second stage of judicial proceedings would simply lengthen the procedure for the adoption of a measure to protect Community industry, which is best described as an obstacle course and is quite unlike the decision-making machinery of the Community's principal trading partners. In the USA or Canada, to give two examples, anti-dumping duties are imposed by executive action. But in the Community, the Member States have to be consulted before the Commission can issue a decision, and that decision is only provisional since the final measure has to be submitted for adoption by the Council.

There is a real danger that certainty as to the law for all interested parties and the effectiveness of the Community's trade protection policy may be adversely affected not by the establishment of a first instance as such but by the addition of a second tier to the judicial system which would render the decision-making process even more cumbersome than it already is.

The Commission therefore feels that a remedy should be found to the additional problems which will be created in the decision-making process. This could be done by replacing the current specific machinery - adoption of a Commission regulation setting a provisional duty, followed by a Council regulation setting a definitive duty - by a system that would be more efficient and also accord with the principle that executive powers are to be delegated to the Commission (third indent of Article 145 EEC).

The Commission will accordingly lay before the Council a proposal for changes to the existing rules, providing for duties to be established by one of the procedures provided in Decision 87/373/EEC.

6. On the whole, the transfer of jurisdiction to hear actions brought by firms in respect of state aid raises no major problems in the overall context of the general extension of the CFI's jurisdiction.

There is one specific feature here that would result from the suggested reform: jurisdiction in the same type of proceeding would be shared between the Court of Justice (which, until the Maastricht Treaty enters into force, retains sole jurisdiction over actions brought by Member States) and the CFI (hearing actions brought by individuals).

However, since consistency in the case law can be maintained, if need be, by means of appeals brought in the Court of Justice, the Commission takes the view that, in spite of the procedural difficulties involved, the planned transfer will entail no significant drawback.

7. The Commission has no objection to the idea of transferring jurisdiction to hear all actions for damages to the CFI as it considers that the case law of the Court concerning the admissibility of actions of this sort is sufficiently well established.

It is quite possible that a request for a preliminary ruling referred to the Court of Justice may raise similar questions to those dealt with by the CFI in an action for damages on a previous occasion.

But this consideration is not confined to actions for damages: it will apply to all matters within CFI jurisdiction except staff cases, since Article 177 proceedings are reserved for the Court of Justice and will be even when the new Treaty comes into force. The institutions should bear this point in mind when deciding whether it is worth appealing against a CFI judgment ordering the Community to pay damages.

8. The Commission reiterates the suggestions it made when issuing its opinion in 1988:

- Actions brought by individuals whose relations with the Community are governed by contracts containing arbitration clauses conferring jurisdiction on the Court of Justice (Article 181) should be

transferred to the CFI. The fact that actions brought by the Commission will remain within the jurisdiction of the Court until the new Treaty comes into force is not really an obstacle since only a few individual cases will be concerned.

- Actions brought by individuals against decisions taken by bodies enjoying legal personality set up by an instrument of Community law should also be transferred to the CFI within the limits of the jurisdiction conferred on the Court of Justice by the instrument setting up the body. Insertion of a provision to this effect in the Decision relating to the CFI would make it possible to avoid the routine use of a dual decision-making procedure (conferment on the Court of Justice in the instrument setting up the new body followed by an amendment of the Decision applicable to the CFI).

9. The Commission hereby gives a favourable opinion on the Court's request, subject to the following:

- in the area of trade protection, changes to the judicial review arrangements will require changes to be made to the decision-making procedure: power to implement the relevant regulations should be delegated to the Commission in accordance with one of the procedures set out in Council Decision 87/373 of 13 July 1987, and a formal proposal to this effect will shortly be presented;

- the Commission would like the additional suggestions at point 8 to be taken into consideration.