French Memorandum on reform of the European Union's judicial system (22 March 2000)

Caption: On 22 March 2000, the French authorities issue a memorandum on the reform of the European Union's judicial system ahead of the Intergovernmental Conference on institutional matters.

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CONFERENCE OF THE REPRESENTATIVES OF THE GOVERNMENTS OF THE MEMBER STATES

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LIMITE

INFORMATION NOTE

Subject :	***IGC 2000 : Contribution from the French delegation on reform of the judicial system of the European Union***

Delegations will find attached a memorandum by the French authorities on reform of the European Union's judicial system.

MEMORANDUM

ON REFORM OF THE

JUDICIAL SYSTEM

OF THE EUROPEAN UNION

Reform of the European Union's judicial system is one of the key issues currently facing the Union, as European institutions seek to increase their efficiency and adapt to the challenges of enlargement. The objective at this stage is not to launch a debate on extending the powers of the Community courts or redefining their purpose, but rather to consider – as the Court of Justice itself has suggested – how to improve the way the Union's courts operate in practice, on the one hand by offering solutions to the increasing problem of congestion and, on the other hand, by contemplating changes to the institutions which successive enlargements will make necessary.

France attaches particular importance to reform of the Union's judicial system in view of the central role played by the system in affirming and upholding Community law. Increasing the effectiveness of the Union's judicial system is thus regarded by the French Government as a major challenge.

Accordingly, at the Council meeting of Justice and Home Affairs ministers of the European Union held on 27 and 28 May 1999, during which Mr Carlos RODRIGUEZ-IGLESIAS, President of the Court of Justice of the European Communities, presented a working document drawn up by the Court and entitled "The future of the judicial system of the European Union", the French Government – represented by its Minister for Justice (*Garde des Sceaux*), Ms Elisabeth GUIGOU – announced that it would submit a memorandum on the issues raised by the Court's working document.

This memorandum sets out France's proposals for increasing the efficiency of the Union's judicial system.

CONTENTS

INTRODUCTION

1. The need for reform

There are at least two reasons why the Community's judicial system is currently in need of reform:

* On the one hand, there is increasing congestion in the Community courts. Increased caseloads for both the Court of Justice and the Court of First Instance have been apparent for several years now, with the result that it is taking longer and longer to deliver judgments. According to statistics produced by the Court of Justice, and taking all forms of proceedings into consideration, there was a backlog of 748 cases pending as at 31 December 1998, which on the basis of the 420 cases dealt with by the Court in 1998 represents two-years' work. The situation is worrying insofar as it leads to an automatic increase in the number of outstanding cases with the result that those seeking justice, whether natural or legal persons, States or Community institutions, are faced with a disturbing increase in the time taken to conduct proceedings. For instance, in 1998 the Court took an average of 21 months to decide on references for preliminary rulings or direct actions, and 20 months to deal with appeals. The situation with regard to the Court of First Instance can scarcely be said to be any better. If all forms of proceedings are taken into consideration, 1003 cases were still pending before the CFI as at 31 December 1998, representing a backlog of over 3 years, since judgments were delivered in 319 cases during that same year.

Indeed, despite the efforts made by both Courts and the introduction of new types of proceedings designed to speed up the handling of the simplest cases (Council Decision of 26 April 1999 enabling the Court of First Instance to give decisions in cases when constituted by a single judge), the prospects for improvement in the medium term appear to be even poorer in view of the number of supplementary tasks conferred on the Community courts by Council Decisions (especially in relation to trademark disputes), and by the Treaty of Amsterdam, such as references for preliminary rulings that will arise in relation to visas, asylum, immigration and judicial cooperation in civil matters (Title IV of the Treaty establishing the European Community) and to police and judicial cooperation in criminal matters (Title VI of the Treaty on European Union).

* On the other hand, there is the prospect of European Union enlargement. The entry of new Member States into the Union will affect the Union's judicial system in two ways. Firstly, it will automatically increase the number of people subject to Community law, the most likely

consequence of which will be a rise in the number of cases brought before the Community courts. It is reasonable to suppose that the number of references for preliminary rulings lodged by courts in the new Member States - still relatively unfamiliar with Community law – will be quite considerable; and yet proceedings of this kind are precisely those which constitute the main part of the Court's workload and which are taking the longest to settle.

Finally, and perhaps above all, enlargement of the Union will have a direct impact on the composition of the Community courts and the way they work. If the principle which has applied until now is maintained, whereby each of the Community courts is composed of at least one judge per Member State, the Court of Justice will comprise, in the medium term, 27 or 28 judges. And yet no-one disputes the fact that such a figure would be incompatible with the way the Court currently operates, particularly when it sits in plenary session.

2. Inadequacy of the reforms currently under consideration

The Court of Justice has submitted to the Council a number of proposals for reform which are currently under consideration by the Council Working Party on the Court of Justice. These concern:

– a series of changes to the Court's Rules of Procedure;
– two important reforms: an increase in the number of judges at the Court of First Instance and an extension of the CFI's responsibilities.

* On the whole, the changes to the Rules of Procedure of the Court of Justice and the Court of First Instance appear useful and have been broadly welcomed by the Member States. The proposals aim to enable the Court of Justice to give decisions without an oral procedure, unless the parties object by means of an express request (amendment of Articles 44a, 104(5) and 120); to extend the number of cases in which the Court is able to give a decision on a reference for a preliminary ruling by reasoned order (amendment of Article 104(3)); to provide for the possibility of dealing with certain urgent references for preliminary rulings by means of an "accelerated" procedure (new Article 104a); to entitle the Judge-Rapporteur or Advocate General to request the parties to provide information and documents (new Article 54a) or request the national court which referred a matter to the Court for a preliminary ruling to provide "clarification" (new paragraph 5 under Article 104). Similarly, the Court of First Instance submitted to the Council a proposal for amendments to the Court's Rules of Procedure.

3. Desirability of short-term improvements at both Community and national level

Other reforms to ensure more effective proceedings within both the Court of Justice and the Court of First Instance could be considered. **The French Government therefore suggests that consideration be given to a number of modest but practical improvements** which could make a significant impact:

– whilst not denying the particular complexity of the work undertaken by a court such as the Court of Justice, it would certainly be highly desirable to **reduce the amount of time which elapses between the hearing and the delivery of the Advocate General's Opinion, and between the delivery of that Opinion and the deliberations**. If the case is a simple one and the oral procedure stage has added nothing new in relation to the written stage, consideration should even be given to enabling the Advocate General to deliver his Opinion as soon as the hearing is over and allowing deliberations to start immediately;
– in addition to the existing clerks attached personally to each judge, **the introduction of a team of clerks attached to the Court** could be considered so as to increase its staff numbers;
– it should also be pointed out that providing national judges with better training in Community law and more information on the subject should lead to a fall in the number of references for preliminary rulings and better presentation of those references. A number of proposals along these lines have already been made, notably those aimed at setting up or developing national documentation centres. It could also be worthwhile to consider **the attachment of lawyers, especially judges, to the Court of Justice and the CFI to act as correspondents for national courts of law**. France would like to see a comprehensive study conducted into reforms of this kind – which are matters for each Member State – so that concrete action can be taken as soon as possible.

* Increasing the number of judges at the Court of First Instance by a further six, thus enabling two new chambers to be created, is a more substantial reform which could provide the Court with resources more appropriate to the size of its task. An increase of this kind would thus appear necessary. It should allow the creation of specialised chambers, particularly to cover trademark law, which would be helpful in view of the anticipated increase in the number of trademark disputes and their highly specialised nature.

Care should however be taken to avoid the same judges being permanently attached to the above chambers, thus threatening to create a division between trademark disputes and the rest of Community law, especially competition law, freedom to provide services and the free movement of goods. It is important not to isolate such disputes from other areas of Community law which might affect trademark law. A system of rotating judges within the specialised chambers might be the right solution.

* an extension of the CFI's jurisdiction is considered in the Court of Justice's proposals to the Council. The draft decision proposes to transfer to the Court of First Instance the Court of Justice's jurisdiction in respect of certain applications for annulment lodged by Member States or Community institutions (agricultural expenditure, transport, competition, State aid, external trade policy, decisions adopted by bodies qualifying for financial support from the Community). The proposal would involve introducing an exception to the current distribution of jurisdiction between the Court of First Instance and the Court of Justice in the case of direct actions, since contrary to the general principle Member States and EU institutions would have to lodge their applications with the Court of First Instance rather than the Court of Justice.

While broadening the jurisdiction of the Court of First Instance appears to be one of the most interesting directions of reform of the Union's judicial system, it is important to maintain the principle of the clearest and simplest possible distribution of jurisdiction between the two courts. The French Government does not believe this to be the case under the current proposal. The scope of the proposal also seems very modest in practical terms, since it would only involve transferring around twenty cases a year from the Court of Justice to the Court of First Instance, a figure which would be further reduced by an inevitable number of appeals lodged by Member States or EU institutions in some of those cases. In any event, this proposal can only be considered in the context of a global analysis of the consequences of redistributing jurisdiction between the Community's two courts.

I. NEW DIVISION OF JURISDICTION BETWEEN THE COURT OF JUSTICE AND THE COURT OF FIRST INSTANCE

The question of whether to alter the current balance of jurisdiction between the Court of Justice and the Court of First Instance lies at the heart of the reform of the Union's judicial system. France believes that the answer to that question will have a crucial impact on the system's future and that this issue should therefore be considered in the light not only of the current congestion in both courts, but also of the role each of them should be given in future.

Accordingly, France would like to see the Court of First Instance given a greater role and broader powers in order to strengthen its status as the Community's court of first instance. Its jurisdiction could be extended to cover references by Member States' courts for preliminary rulings in specific areas, thus combining jurisdiction on annulment proceedings with jurisdiction on preliminary rulings in order to encourage the emergence of spheres of jurisdiction. France also continues to support the key role played by the Court of Justice, specifically in matters concerning international jurisdiction and as a guarantor of the unity of Community law. Consequently, **the Court of Justice should retain its specific power to act as the court of first and final instance in respect of applications lodged by Member States and EU institutions, and to have the final say on Community law as a whole,** even in those areas in which the Court of First Instance is recognised as having the power to deliver a preliminary ruling.

1. References for preliminary rulings

The procedure for handling references for preliminary rulings plays a vital role in establishing Community law. It also lies at the heart of the issues facing the Court of Justice, since such references make up over half of all cases. The procedure is to some extent a victim of its own success, since national judges often make use of it and the time the Court takes to deal with cases is already far too long. Yet the efficiency of the Community courts will be assessed in terms of the efficiency of the procedure used to handle references for preliminary rulings, chief among which are questions of interpretation, since questions requiring an assessment of validity arise much less frequently.

A number of reforms designed to reduce the time taken to handle references for preliminary rulings may be considered, but the French Government regards some of the proposed solutions as unacceptable, such as the possible limitation of the national courts empowered to make references to the Court of Justice, the prior filtering of questions referred or even the idea of obliging or inviting national courts to suggest a ruling to the Court in the Annex to the question submitted. However, **the French Government does believe that the idea of a clearly defined, limited transfer, in certain areas, of jurisdiction on preliminary rulings to the Court of First Instance is a solution worthy of serious consideration, providing it is accompanied by a system which allows the Court of Justice to have the final say and thus retain its role in guaranteeing the unity of Community law.**

(a) The French Government regards some of the proposed solutions as unacceptable

* Restricting the courts empowerment to make referrals is inconceivable. There can be no question of imposing a reduction on the number of references by reducing the categories of national courts empowered to submit them, mainly by restricting that right to the supreme courts. On the one hand, such a solution would be likely to deprive the Court of Justice of the opportunity to rule on the most fundamental questions, those which – on past experience – have most often been submitted by lower courts; on the other hand and above all, it would result in litigants pursuing their cases as far as the highest national court and thus being entitled to refer them to the Court of Justice. Finally, in the context of the judicial cooperation now available to all national courts, it is important to maintain the principle whereby a court giving a decision as the court of final instance is theoretically bound to refer to the Court of Justice any questions of interpretation, within the limits of the CILFIT case-law (Judgment of the CJEC of 6 October 1982 in Case 283/81).

* Nor would it be acceptable to introduce a "filtering" process on references for preliminary rulings, which might go so far as to allow their preliminary admission by the Court on the basis of how much interest they provoke or how important they seem. Indeed, it is inconceivable that the Court should be able not to rule on questions which are useful to the national judge, even if this simply involves pointing out, by reasoned order, that the answer to the judge's question is to be found in existing case-law, as provided for in Article 104(3) of the Rules of Procedure.

* Nor would it seem desirable to invite national judges to propose replies to their own questions. On the one hand, it seems unrealistic to impose further formalities on national judges by expecting them to include in their ruling a proposed reply to the question referred. Above all, any move by the Court of Justice to reject a solution proposed by a national judge might be interpreted as interference and would damage the climate of cooperation which currently exists between national judges and the CJEC.

(b) *The French Government would be in favour not only of simplifying the method used to examine references for preliminary rulings, but also of transferring a proportion of such references to the CFI.*

* Simplifying the method used to examine references for preliminary rulings is a positive step. This would involve establishing a procedure for determining as early as possible which questions could be dealt with by reasoned order. One possibility would be to refer all questions to a specialised chamber which would conduct a preliminary examination before opting either for the procedure involving a reasoned order or the one leading to a judgment. It will be possible to make greater use of reasoned orders once the Council has adopted the Court's proposal for a revised version of Article 104(3) of the Rules of Procedure.

*** Transferring jurisdiction to the CFI in a number of clearly defined areas – with the aim of creating spheres of jurisdiction – appears to be the best solution, providing a mechanism is set up to ensure that the Court has the final say.**

The French Government thinks consideration should be given to the question of whether to maintain the Court's monopoly in proceedings for preliminary rulings; it feels that reform of the Union's judicial system, which involves strengthening the role of the CFI, also involves challenging that monopoly and transferring some of the questions referred to the CFI. However, care will be needed to ensure that the Court continues to have the final say, even in areas which have been transferred to the CFI.

The areas in which the jurisdiction to issue preliminary rulings could be conferred on the Court of First Instance would have to be precisely determined and limited in number, probably on the basis of a proposal by the Court of Justice and a Decision unanimously adopted by the Council. Basically, the areas could be those which fall within the CFI's jurisdiction as a court of first instance in annulment proceedings. The areas transferred would thus constitute spheres of jurisdiction under the CFI's responsibility, covering both direct actions and references for preliminary rulings. It would then be possible to consider transferring jurisdiction to the CFI in preliminary ruling proceedings on, for example, trademark law and civil law matters arising out of the Brussels II Convention and Title IV of the TEC.

In any event, the consequence of such transfers must not be to undermine the unity of Community law and it will therefore be necessary to provide for a mechanism enabling the Court of Justice to have the final say. However, it will obviously be important to avoid any lengthening of proceedings which would be prejudicial to the legitimate interests of those seeking justice.

To ensure that the partial transfer to the CFI of jurisdiction on preliminary rulings is compatible with maintaining the consistency of Community law, without excessively prolonging proceedings, a number of solutions may be considered:

– provide for the right to appeal against decisions by the Court of First Instance on preliminary rulings. However, this solution has the serious disadvantage that it adds an ancillary proceeding to proceedings which are themselves already incidental to the main proceedings. If such a solution seemed likely to be adopted, the possibilities for appeal would then have to be strictly limited, for instance by restricting the right of appeal to the Commission or the Member States.
– if the possibility of lodging an appeal in this area is dismissed, consideration could be given to a way of mitigating the effects of transferring the jurisdiction concerned to the CFI by means of two alternative or complementary approaches: either by making provision for the Court of First Instance to refer back to the Court of Justice any question which it considers involves fundamental points of Community law; or by providing that all references for preliminary rulings, including those within the CFI's jurisdiction, pass through the Court of Justice, which would be entitled, up until the CFI delivers judgment, to give a ruling itself on the matter. The two approaches could in fact be combined. However, it would not be advisable to allow the Court of Justice to examine a case once the CFI has delivered its judgment.

– introducing a form of appeal based on "referral in the interests of the law", which exists, for example, in French law, does not seem feasible, given the specific nature of references for preliminary rulings. Judgment in an appeal of this kind is intended to establish the law for the future, but does not have an effect on the dispute which currently gave rise to the appeal; proceedings of this kind are not suitable for deciding on references for preliminary rulings, which are themselves intended to enable the court addressed to administer the law. Since appealing to the Court of Justice cannot but affect the consequences of the reply given by the Court of First Instance in the main proceedings, the inevitable result would be that referral to the Court of Justice would prolong suspension of the judgment in the proceedings before the national court, thus lengthening the overall procedure.

2. Annulment proceedings

Annulment proceedings represent only a limited proportion of the Court of Justice's business (about 5% of cases), but are extremely important in qualitative terms, both to the Court, which thus remains competent to rule as the court of first and final instance, that is to say fully empowered to deliver judgment, in disputes which challenge the legality of what are often high-level acts of secondary legislation and which arise between Member States and the institutions, or indeed between Member States or the institutions themselves. The current division of jurisdiction is quite simple: annulment proceedings lodged by Member States and the institutions are brought before the Court of Justice, while those lodged by natural or legal persons are brought before the Court of First Instance. Although not perfect in theoretical terms, this division of annulment proceedings between the two Community courts has the huge advantage of being extremely simple and extremely clear. It also has the advantage of perfectly matching the Court's role as international arbiter, one of the roles which France believes the Court should retain. Both the Member States and the Community institutions are a particular type of applicant and it seems to match the logic of the institutions for them to be able to bring disputes between them before the highest instance in the Community, namely the Court of Justice itself.

If first instance competence for some of the annulment proceedings brought by Member States and the institutions were transferred to the CFI, a number of sensitive issues would arise. On the one hand, a transfer of this kind would be unlikely to have much effect in numerical terms on congestion within the Court of Justice, since annulment proceedings are relatively uncommon, and

would certainly lead to appeals being lodged more or less automatically, given the nature of the issues involved in such cases. On the other hand, it would also result in an unsatisfactory degree of legal instability, insofar as the CFI's judgment in most cases would be followed by an appeal. In this way, the Court of First Instance might first annul a Regulation or Directive before having its judgment quashed in turn by the Court of Justice.

It would of course be possible to envisage only a partial transfer to the CFI of annulment proceedings brought by Member States and the institutions, leaving the Court of Justice jurisdiction as the court of first and final instance in certain cases. While such a solution is attractive in theory, it also presents a number of major difficulties, particularly in terms of drawing a clear and satisfactory dividing line between the two types of proceedings. One idea would be to give the Court of Justice jurisdiction only for appeals against certain decisions – which would be exceptional – which had an obvious constitutional dimension, such as decisions to suspend a Member State in the event of a serious and persistent breach of fundamental rights (Article 7 TEU), decisions authorising (or refusing) closer cooperation (second subparagraph in Article 40(4) TEU – ex Article K.7, as amended – and Article 11 in new TEC), and interinstitutional disputes. The Court could retain wider powers by basing its jurisdiction on the nature of the act concerned; thus acts of a legislative nature would fall within the Court's jurisdiction, while executive acts would fall within that of the Court of First Instance, but since the concept of legislative acts is still of course very poorly defined, dividing jurisdiction between the two courts would be a precarious matter. One way would be to refer acts of general application to the Court of Justice and acts of individual application to the Court of First Instance, but this would virtually mean a return to the present situation, but without its advantages of simplicity and comprehensibility.

In the light of all these considerations, which indicate the significant benefits of the existing arrangements in terms of simplicity and coherence as well as the major disadvantages of any alternative solution, **the French Government believes that the current basis for sharing jurisdiction on annulment proceedings between the Court of Justice and the Court of First Instance is satisfactory and should be maintained.**

3. Cases involving a State's failure to fulfil an obligation

Proceedings for failure to fulfil an obligation (under Articles 226, 227 and 228 of the EC Treaty) account for an excessive proportion of the work of the Court of Justice (a quarter of its caseload), in view of the fairly minor legal issues raised in most instances. Proceedings for such failure nevertheless lie at the heart of the Community integration process and provide a powerful tool for the implementation of Community law; the full effectiveness of that tool has to be preserved, particularly with the prospect of an enlarged Union, in which there is bound to be a greater risk of failure to transpose Community law. For these cases there is a need to arrive at arrangements whereby the proportion of the Court's work for which they account can be reduced, while ensuring that such proceedings are fully effective.

Three avenues can be explored: extension of the ECSC procedure, transferring initial jurisdiction to the Court of First Instance and improving the existing procedure. Given the drawbacks of the first two courses, the French Government favours a more modest solution, yet one which may in the end prove more effective, involving the streamlining of the present proceedings before the Court of Justice, at least for undisputed failure to fulfil obligations.

* General application of the ECSC procedure is not to be desired. The procedure specific to the ECSC Treaty empowers the Commission to rule on failure to fulfil an obligation, by means of an enforceable decision reviewable by the Court of Justice, which has full jurisdiction to do so. While general application of this procedure for all three Communities might somewhat lessen the relevant caseload for the Court of Justice, it does not seem desirable for a number of reasons. Firstly, the fact is that a decision by the Commission does not carry the same "moral" authority as a judgment by the Court of Justice. In most cases, then, the Member State found by the Commission to have failed to fulfil an obligation would be very likely to institute proceedings before the Court of Justice against that decision, which would run counter to the desire for effectiveness and a less heavy caseload for that Court. Nor does it seem consistent with the role of a non-judicial authority like the Commission to be taking enforceable decisions designed merely to establish a State's failure to fulfil its legal obligations.

* Transferring to the Court of First Instance initial jurisdiction to hear proceedings brought by the Commission for failure to fulfil obligations does not seem desirable either. It is true that such a transfer would fit in with the extension of that Court's jurisdiction. It would relieve the Court of Justice of a large number of cases often involving issues of limited significance, particularly in legal terms. However, as judgments by the Court of First Instance could be appealed against, this would have the potential to lengthen unnecessarily proceedings which already take too long. Admittedly, it would be possible to impose a very demanding procedure for leave to appeal, in order to cut out use of appeals as a delaying tactic. However, the merits of such a transfer do not seem apparent.

* In view of the drawbacks of the above two courses, **the French Government considers streamlining proceedings before the Court of Justice to be the most realistic solution**, so as both to limit the proportion of that Court's work accounted for by proceedings for failure to fulfil obligations and to make such proceedings effective. It would accordingly be **possible to introduce a streamlined procedure for such failures, where clear-cut and not seriously disputed**, with, for instance, written proceedings confined to just one round – the Commission's application and the defence (no reply and rejoinder) – and the Advocate-General's opinion given more swiftly, or even omitted altogether.

4. Appeals

At present, under the Community judicial system, two-tier judicial review applies only where the Court of First Instance has initial jurisdiction and appeals to the Court of Justice are confined to points of law. That principle should be upheld; all judgments by the Court of First Instance should be open to appeal, with the possible qualification of the comments made above concerning preliminary rulings, which are not contested proceedings.

However, care should be taken to avoid unduly increasing the number of appeals, which would detract from the authority of the Court of First Instance and adversely affect the workload of the Court of Justice. **In order to cut out a proliferation of appeals, particularly appeals used as a delaying tactic, the French Government thinks it desirable to introduce a filtering procedure in the form of prior leave to appeal.**

A specially composed cross-section of the Court of Justice, having examined the application, could rule on leave to appeal in the light of the customary admissibility criteria (time limits, capacity to act, etc.) and, above all, of the seriousness of the arguments put forward. In order for leave to be given, an appeal would have to meet both requirements: being admissible and putting forward serious arguments. Leave would not, on the other hand, be given for any appeal found inadmissible or putting forward no serious arguments. Only appeals for which leave had been given would be notified to the other parties. This leave procedure should be subject to very tight time limits. The Court of Justice would have to rule on leave to appeal within, say, two months of registration of the application.

5. Special proceedings

In general terms it appears **desirable to encourage the establishment of specialist chambers within the Court of First Instance** (with the proviso that judges sit in rotation), with some spheres of jurisdiction being singled out: trade marks, designs, plant varieties and patents, public service, civil law issues and judicial cooperation in civil matters.

Community staff cases account for an excessive proportion of the work of the Court of First Instance. The suggestion, made in the discussion paper from the Court of Justice on the future of the judicial system of the European Union, for the establishment within the Community administration of non-judicial interinstitutional tribunals, to deal with staff disputes initially, has the French Government's support. The decisions of those tribunals should be appealable against to the Court of First Instance. It would also be conceivable to create an administrative court separate from the Court of First Instance, with specialist jurisdiction in staff cases to hear appeals against tribunal decisions, whose rulings could be referred to the Court of Justice.

II. THE COMPOSITION AND OPERATION OF THE COMMUNITY COURTS IN THE CONTEXT OF ENLARGEMENT

The enlargement of the Union presents a challenge to the Community courts in relation to their composition and operation as it does to the other institutions of the Union. The prospect of a Union enlarged to 27 or 28 Member States calls into question the current principles governing the composition of the Court of First Instance and, in particular, the Court of Justice.

A. The composition of the Community courts in the context of enlargement

1. The composition of the Court of Justice

If the current unwritten principle of "one Member State – one judge" is applied, the increase in the number of Member States of the European Union will lead to an automatic increase in the number of judges. While it has hitherto been possible to reconcile the application of that principle with the proper functioning of the Community courts, we are now approaching the threshold beyond which the courts will degenerate into deliberating assemblies. A choice must therefore be made between retaining the principle of one judge per Member State or setting a definitive upper limit on the composition of the Court of Justice. If it were decided to retain the principle of one judge per Member State, the necessary steps would have to be taken to maintain the proper functioning of the Community courts.

The French Government considers that the principle of one judge per Member State can be retained only if the Court's operation undergoes radical reform in order to maintain its effectiveness despite an increase in the number of its staff, so that it can continue to function as a homogeneous and consistent court. This will involve **establishing a select senior composition and strengthening the role of the President of the Court and the Presidents of Chamber** (see below).

The Advocates-General are useful precisely because they help safeguard the consistency and uniformity of case-law. While it is acknowledged that the Advocate-General's conclusions can lengthen proceedings and are not always necessary in straightforward cases, it would therefore seem preferable to retain the principle that the Advocate-General submits conclusions in all cases with limited exceptions (uncontested proceedings for failure to act). This would mean increasing the current number of Advocates-General after enlargement, although such an increase would have to be limited.

2. The composition of the Court of First Instance

The issues affecting the composition of the CFI are rather different from those affecting that of the Court of Justice. As the CFI is not the supreme court and will have to cope with both a general increase in its caseload and a probable expansion of its powers, allowing the number of its members to increase substantially so that they eventually exceed the number of Member States would seem both possible and desirable.

The Court of Justice's proposal to add six judges to the strength of the CFI, a proposal which is currently under examination (see above), already goes some way towards increasing the number of members of the CFI so that the number of judges exceeds the number of Member States. The French Government regards this as an acceptable prospect and considers that an increase in the number of the CFI's judges should be encouraged as it will be vital for coping with the increase in both general and special proceedings (staff cases, trade marks and other disputes in connection with intellectual property, judicial cooperation in civil matters). Unlike the Court of Justice, it is not the CFI's principal duty to ensure the uniformity of Community law. Its main task is to deal with the maximum number of cases by handing down high-quality decisions as quickly as possible, depending on the complexity of the questions raised. In the long term, a CFI comprising 40 or even 50 judges could be envisaged.

Although the CFI has no body of Advocates-General at present, it may in certain cases decide to ask a judge to act as Advocate-General. Little use has been made of this option, and it appears to have fallen into abeyance owing to the extremely heavy workload placed on judges. It would certainly be inadvisable to establish the same system at the CFI as at the Court of Justice. On the other hand, given the CFI's increasing role, in particular concerning references for preliminary rulings, a body of Advocates-General (the number of which would certainly be restricted) should be established there. The Advocates-General would become involved only in more complex cases by decision of the CFI.

3. Length of the term of office of judges

The question of the length of the term of office of judges is currently being discussed at various levels. Some propose replacing the current system of a six-year renewable term with a nine-year or twelve-year non-renewable term on the grounds that a renewable term provides Member States, which each put forward one judge to be appointed by common accord (Article 223 (ex Article 167) TEC), with an opportunity to exert pressure on a judge who is approaching the end of his term and who wishes it to be renewed. Judging by the independence from the Member States which the Court of Justice has always shown from the very beginning, as illustrated by its case-law, there is clearly no justification for such a fear. The present system is therefore satisfactory and can readily be retained.

B. The operation of the Community courts in the context of enlargement

The principle of one judge per Member State can be retained only if profound changes are made to the way in which the Community courts operate in order to maintain their full effectiveness. Such reform will be necessary in respect of the Court of Justice in particular as that body guarantees the uniformity and consistency of Community case-law.

1. The Court of Justice

Pursuant to Article 221 (ex Article 165) TEC, "the Court of Justice shall sit in plenary session ... It may, however, form chambers, each consisting of three, five or seven Judges, ... to adjudicate on particular categories of cases". In practice, however, most cases are adjudicated on by chambers. The increase in the number of judges and the need to maintain the uniformity of case-law will probably necessitate certain reforms.

First, **the role of the chambers should be strengthened**: they will be responsible for adjudicating on most cases, as only the most important cases and cases which call into question the case-law of the Court of Justice should fall within the scope of the plenary session. The principle would therefore be for all cases to be submitted to the chambers, which would refer them on to the larger formation if they were of sufficient importance. The President of the Court could also decide to refer cases to the plenary session. There might even be scope for the plenary session to "request" certain cases.

Above all, the composition of the plenary session will have to be reviewed. With 25, 27 or 30 judges, the Court's plenary session would become an unwieldy body totally unsuited to performing the tasks assigned to it. **In the opinion of the French Government, the composition of the Court's "plenary" session must therefore be changed so that it includes only some (between 11 and 15) of the judges rather than all of them.** There are several possible ways to achieve this. The senior composition could consist of:

– the President of the Court, all the Presidents of Chamber and the Judge-Rapporteur,
– the President of the Court and the Presidents of Chamber up to a maximum of five judges, together with the Judge-Rapporteur and the other members of the chamber to which a case is initially referred.

Under either option, the Court of Justice judge who "represents" the relevant national judicial system could also be invited to join the body hearing a case.

In both possible scenarios, **the duties of the President of Chamber will have to be upgraded**. They would no longer be based on an annual rotation of judges, as at present, but should be exercised for a longer period. The preferred solution would surely be for **the Presidents of Chamber to be appointed for a three-year term like the President of the Court himself**. They would thus have the special responsibility, together with the President of the Court, of monitoring the consistency of all the Court's case-law, and could decide to refer to the plenary session any case likely to change or develop the Court's case-law.

2. The Court of First Instance

At the CFI, cases are generally adjudicated on by chambers consisting of three or five judges (Articles 10 and 11 of the Rules of Procedure). In certain circumstances, where a case is either highly complex or extremely straightforward, the chamber may decide to refer it to the CFI's plenary session or to a judge sitting alone. While the reform relating to the single judge took place only recently, the relationship between the chamber and the plenary session has existed since the CFI was established. The system operates well and does not need to be changed.

The increase in the number of judges at the CFI will lead to an increase in the number of chambers but not in their size; it will not therefore lead to any significant change in the CFI's operation in most cases. However, a problem will arise in the event of cases being referred to the plenary session as it will no longer be possible for that session to comprise all the CFI judges. **On the basis of the solution adopted for the Court of Justice, provision should therefore be made for a restricted plenary session** which could consist of the President of the Court, the Presidents of Chamber, the Rapporteur and the other members of the chamber to which a case is initially referred.

III. Prospects in the longer term

A number of more radical proposals have been presented, in particular in the Court's working paper on "the future of the judicial system of the European Union". In any event, such solutions should be contemplated only at a later stage if the effect of the reforms soon to be decided proves inadequate. At present, the prospects outlined in the Court's working paper appear extremely premature. Other issues, such as giving citizens seeking justice greater direct access to the Community judge, will also arise in the long term. While it may not seem appropriate to move in that direction for the moment, a discussion will have to be initiated on those issues in due course.

1. Increasing the number of Community courts of first instance

First, on the assumption that the present court system – even if reinforced – would be unable to cope with the anticipated increase in caseload, the Court of Justice is considering creating additional courts. It speaks of establishing Community courts of first instance with their own geographical jurisdictions which would hear all cases within their jurisdictions, including (probably) questions referred for a preliminary ruling. All the decisions taken by such courts could be referred to the Court of Justice, whose role in maintaining the consistency and uniformity of case-law would become even more important.

The French Government considers that such a reform, while in any case premature, would entail substantial risks. On the one hand, the geographical criterion would be extremely difficult to specify and implement: one could proceed either on the basis of zones of territorial continuity (at the risk of perpetuating the diversity of legal traditions within the Union and threatening the unity of Community law), or by creating relatively homogeneous courts, combining the considerable diversity in size of the Member States with the diversity of their judicial systems, in which case – quite apart from the difficulty of such an exercise – those seeking justice would find it hard to make sense of the allocation of jurisdiction between such regional courts. On the other hand, even assuming that all decisions could be referred to the Court of Justice, it is not certain that the Court could properly perform its task of unifying Community law, even if provision were made for a system of appeal by the college of advocates-general in the interests of Community law. There is a high risk that such a system could split up into judicial sub-units, thereby threatening the consistency of EU law.

2. A radical change in the system is in any case premature

The Court considers another solution whereby Member States' courts would be fully empowered to adjudicate on the interpretation and validity of Community law. Parties to proceedings or any other interested authorities could refer the judgments thus delivered to a "supreme Community court", which would examine whether there were any grounds for quashing them. Such a hierarchical organisation would constitute a complete break from the cooperation-based form of relationship which currently exists between the national courts and the Court of Justice.

In any event, such a solution seems extremely premature. It would involve a substantial change in the very nature of the Community, turning it into a clearly federal organisation, and would have repercussions far beyond a mere reform of the EU's judicial system.

3. The position of citizens seeking justice in the EU's judicial system

In the long term, questions concerning the EU's judicial system will arise with regard to issues other than those referred to by the Court in its discussion paper. One such issue will be the position of citizens seeking justice in the EU's judicial system.

In the long term, the conditions of eligibility which limit the ability of natural and legal persons other than the Member States and institutions to institute proceedings are likely to present a problem of legitimacy for the Community courts, especially if those courts are given a greater role with regard to the protection of fundamental rights. Compared to proceedings for action ultra vires under French law, for example, the institution of Community proceedings for annulment seems relatively restricted.

It is true that the present system permits access to a Community judge through the filter of a question referred for a preliminary ruling. Natural or legal persons may raise an objection of illegality before a Community judge or prompt a national judge to raise a question referred for a preliminary ruling where such a question relates to the validity of Community acts of a legislative nature, thereby guaranteeing access to a judge either directly (in the first case) or through the intermediary of the national judge (in the second case). Furthermore, it is important to realise that any relaxation of the restrictive conditions which Article 230 TEC places on proceedings for annulment brought by natural or legal persons could lead to an increase in such proceedings and hence even greater congestion in Community courts.

Some of the criticism levelled at the current system in terms of the access of citizens seeking justice to the Community courts therefore seems excessive. Nonetheless, the fact remains that the present situation is not wholly satisfactory, and discussions should be held in due course on ways to improve the access of such citizens to the Community judge. A filtering procedure, or perhaps even the provision of mediation (e.g. through the European Ombudsman or indeed national Ombudsmen), will certainly be necessary in order to alleviate the burden on the Community judge. An increase in the number of members of the CFI and the expansion of its role could prove a helpful development in this respect.