THE COMMUNITY COURTS POST-NICE: A EUROPEAN *CERTIORARI* REVISITED

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I. INTRODUCTION

In December 2000 the European heads of government, gathered at Nice, took several important steps in the constitutional development of the European Union. Chief among them are the various provisions in the Treaty of Nice[1] disposing of the so-called 'Amsterdam leftovers', ie, those issues of institutional reform left unresolved by the Treaty of Amsterdam. The central focus of IGC 2000, and of the publicity surrounding its negotiations, was reform of the political institutions, notably the Commission and the Council, in preparation for enlargement. Reform of the Community courts was a less conspicuous but, ultimately, no less important item on the agenda. In the case of the judicial branch, the new provisions are inspired in large part by the well-publicised need to remedy overburdened dockets and the attendant inefficiencies in the administration of justice in Luxembourg.[2]

This article revisits an issue in the debate over judicial reform first raised several years ago, namely, whether the time is ripe to attribute to the Court of Justice a discretion to filter its caseload along the lines of the United States Supreme Court's *certiorari* jurisdiction. It begins, however, with an overview of the projected reforms contained in the Treaty of Nice.

II. THE TREATY OF NICE

A. IGC 2000

An eclectic range of judicial reforms was mooted in advance of IGC 2000.[3]

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[1] Treaty of Nice Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, [2001] OJ C80/1.

[2] For recent statistics in relation to judicial activity at the Community courts, See <http://www.curia.eu.int/en/pei/rapan.htm>; and C Turner and R Munoz, 'Revisiting the Judicial Architecture of the European Union' (1999–2000) 19 *YEL* 1. See generally A Dashwood and A Johnson (eds), *The Future of the Judicial System of the European Union* (Oxford: Hart Publishing, 2001); G de Burca and JHH Weiler (eds), *The European Court of Justice* (Oxford: Oxford University Press, 2001); A Johnson, 'Judicial Reform and the Treaty of Nice' (2001) 38 *CMLRev* 499; H Rasmussen, 'Remedying the Crumbling Judicial System' (2000) 37 *CMLRev* 1071.

[3] See generally C Costello, 'Preliminary Reference Procedure and the 2000 Intergovernmental Conference' (1999) 21 *DULJ* 40; A Arnull, 'Judicial Architecture or Judicial Folly? The

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Proposals ranged from modest tinkering with current practice and procedure to radical ideas for restructuring the system. The conference deliberations focused primarily on the submissions of the Community courts, the Commission and the individual Member States.[4] Two official reports proved particularly influential in shaping the reforms ultimately adopted, as well as those rejected, at Nice. The Community Courts published their views on the workload dilemma in a May 1999 paper.[5] Cast as a springboard for debate on the future of the judicial system, the paper is reflective rather than directive in tone, the courts discussing the pros and cons of various reforms without endorsing any one, much less presenting a vision of where they see themselves 10 or 20 years down the line. The Commission took up the reins by setting up an independent working party under the chairmanship of former president of the Court of Justice, Ole Due. The Due Report, published in Jan 2000, contains a more comprehensive and rigorous analysis but, ultimately, settles for a relatively conservative approach to reform.[6]

There are several drawbacks to the intergovernmental conference as a vehicle for reform of the judicial branch. Participation is limited to the Member States and issues are tabled and ultimately decided through barter and compromise among the national delegations. The mood is 'make or break': the participants must broker a deal within a designated time-frame or live with the status quo. The proceedings are less open and transparent than national parliamentary proceedings and lack the democratic credentials of procedures for the amendment of national constitutions. In addition, IGC 2000 followed a tradition of prioritising reform of the political institutions over reform of the courts. Notwithstanding the extent of the workload crisis, judicial reform was not tackled at Amsterdam nor included in the initial agenda of IGC 2000. Eventually, it was added to the miscellany of secondary items tackled at the Conference, but only after the judiciary publicised the issue, both officially and extra-judicially,[7] and the President of the Court took the unprecedented step of airing his concerns in the press.[8] Throughout the Conference, the future

Challenge Facing the European Union' (1999) 24 *EL Rev* 516; W van Gerven, 'The Role and Future Structure of the European Judiciary Now and in the Future' (1996) 21 *EL Rev* 211.

[4] The Friends of the Presidency Group was intimately involved in all stages of IGC 2000. See, eg, *IGC 2000: Interim Report on Amendments to be Made to the Treaties With Regard to the Court of Justice and the Court of First Instance*, CONFER 4747/00 (Mar 2000). The European Bar was represented in the guise of a report by the Council of the Bars and Law Societies of the European Union (CCBE) that shed some welcome light on the perspective of litigant and practitioner. See *Contribution from the CCBE to the Intergovernmental Conference*, CONFER/VAR 3966 (18 May 2000).

[5] Court of Justice and Court of First Instance, *The Future of the Judicial System of the European Union (Proposals and Reflections)* (1999).

[6] Commission, *Report by the Working Party on the Future of the European Communities' Court System* (2000).

[7] See, eg, J Cooke, 'European Judicial Architecture: Back to the Drawing Board' (1999) 5 *Bar Rev* 14.

[8] Statement of the President of the Court of Justice, *The EC Court of Justice and Institutional Reform of the European Union* (Apr 2000).

of the Community courts was overshadowed by controversy surrounding the fate of the Commission and Council. It is fair to say that, given the sum of tasks to be completed, the Conference was neither able nor disposed to give reform of the judicial system the attention it deserved.

Influenced in all likelihood by the cautious tenor of the Courts' Paper and the Due Report, the Conference eschewed radical reform. Indeed, a dramatic overhaul of the judicial system was rejected, virtually from the outset. The reticence to grasp the proverbial nettle is also explained in part by the procedural labyrinth of reform methodology. At issue for the Conference was not only the nature and extent of reform but also the means and the timing. At the end of the day, the Conference opted to renovate rather than redesign the judicial architecture and, at the same time, to make the system more adaptable to change in the future. Thus, it adopted some proposals, rejected many others, left to the Council the resolution of many of the details and, finally, declared the debate on-going.

B. The Nice Reforms

The following is a brief summary of the more significant changes to the judicial system contained in the Treaty of Nice.[9]

1. Flexibility

The reform philosophy underpinning the Treaty's provisions relating to the judicial system is aptly encapsulated by the term 'flexibility'. The changes crafted at Nice are not offered as an end in themselves but rather as a first, but by no means insubstantial, step. For example, the Treaty reorganises various provisions in the EC Treaty, the Statute of the Court of Justice[10] and the Rules of Procedure in a sensible bid to rationalise the judicial code. In the first place, certain provisions will be transferred from the Statute to the Rules and vice versa, to ensure a proper hierarchy. Secondly, the method of amending the Statute and Rules will be modified to facilitate future changes to the judicial code. An opportunity to give the Courts autonomy over their Rules was sadly lost: the Council will continue to have the final say over amendments, although its approval will be based on a qualified majority rather than unanimity.[11] Given the eclecticism of Community jurisdiction, it is in the Rules that

[9] This section is an abbreviated version of discussions that appear in 'The Treaty of Nice: Arming the Courts to Defend a European Bill of Rights?' (2002) 65 *Law and Contemp Probs* 189; and 'Judicial Reform Under the Treaty of Nice', in MC Lucey and C Keville (eds), *Irish Perspectives on EC Law* (Dublin: Round Hall Ltd), 51.

[10] The Statute is contained in a protocol attached to the Treaty.

[11] Some delegations were in favour of the change (or, at least, did not come out against it). See, eg, *Contribution from the Dutch Government—An Agenda for Internal Reforms in the European Union*, CONFER 4720/00 (6 Mar 2000); *Information Note from the Italian Delegation, 2000 IGC: Italy's Position, CONFER 4717/00* (3 Mar 2000).

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flexibility is needed most. This lament aside, these changes to the judicial texts will facilitate the introduction of substantial amendments to judicial system in the future without recourse to the cumbersome process of treaty amendment.

2. The Composition of the Court of Justice

The most controversial of the issues debated at IGC 2000 was the size of the Court of Justice in an enlarged Union. As the Court warned at the last enlargement, an increase in its current membership of fifteen could transform the plenary session from a collegiate court to a deliberative assembly, while extensive recourse to decision-making by chambers could pose a threat to the consistency of Community law.[12] Of course, the problem is not merely one of numbers. The composition of the Court is defined by the unwritten nationality requirement—one judge per member state. With the prospect of enlargement to a Union of twenty or even thirty Member States, the possibility of abandoning the requirement—in favour, for example, of a system of rotational appointments—had been mooted.

The issue of national representation in Community government is uniquely delicate and dominated negotiations on reform of each of the Community institutions at IGC 2000.[13] In deciding the future size of the courts, the Conference applied a model of automatic national representation. The new version of Article 221 entrenches the principle that the Court of Justice shall consist of 'one judge per Member State', but tempers its effect by providing that the Court shall sit in chambers and, only exceptionally, in plenary session. Whether this was a prudent compromise remains to be seen. The operation of the courts (as opposed to the other arms of government) is conditioned by its own special concerns, such as the quality and impartiality of judicial adjudication. In a fully enlarged Union, the benefit of a full panoply of nationalities must be balanced against the cost in terms of functional capacity and jurisprudential integrity.

At the very least, the Conference could have settled on a compromise: including the advocates general in the distribution of judicial posts at the Court of Justice. The role and stature of the office is such that the periodic substitution of an advocate general for a judge should not be too bitter a pill for the member states to swallow.[14] It would certainly make a difference to the numbers: the current arrangement of fifteen judges and nine advocates general

[12] *Report of the Court of Justice on Certain Aspects of the Application of the Treaty on European Union* (May 1995), at 16.

[13] All but a couple of the delegations were unwilling to relinquish the nationality requirement. See *Friends of the Presidency*, *Interim Report*, at 10.

[14] Advocates general are generally regarded as 'members' of the Court, even though they lack ultimate decision-making authority. See FG Jacobs, 'Advocates General and Judges in the European Court of Justice: Some Personal Reflections', in D O'Keefe and A Bavasso (eds), *Judicial Review in European Union Law: Liber Americorum in Honour of Lord Slynn of Hadley* (vol I) (The Hague: Kluwer Law International, 2000), 17, at 18.

could accommodate a membership of twenty-three states and, in all likelihood, the number of advocates general will increase at some point in the future.

To allay concerns over the Court's functional cohesion, the Conference established a new structure, designed to accommodate a uniquely large and potentially unwieldy bench. Under the new arrangement, the Court will sit in chambers of three and five judges, in a new *grand* chamber and in plenary session.[15] This is not a tremendous leap from the current structure but it involves two important modifications. In the first place, the *grand* chamber will serve as the storm centre in the new regime, handling cases currently heard in *petit* and *grand* plenum. Whereas privileged parties—a Member State or Community institution—will no longer have automatic access to the full court, they will be entitled to have their cases heard by the *grand* chamber. If the real judicial power is wielded in the *grand* chamber, one can expect that its composition will prove controversial.[16] Presided over by the President of the Court, it will comprise the presidents of the chambers of five judges and will function with a quorum of nine. Both the President of the Court and the presidents of the five-judge chambers will hold their offices for 3-year renewable terms and, aside from their tenure on the *grand* chamber, will carry out important tasks within their respective spheres of influence. Thus, there is a danger that the new arrangement will create a sense of judicial hierarchy at the Court.

The second significant development is that the plenary session will become very much the exception. The new version of the Statute provides that the Court will sit as a 'full court' in certain specified proceedings or where, after hearing the views of the advocate general, the Court considers that a case is 'of exceptional importance'.[17] Precisely how the full court will function is an open question. A packed plenary session is curiously at odds with the Court's valued tradition of collegiate decision-making. At the same time, adjudication of these exceptional cases by a number less than the full compliment may raise doubts about the unity of the bench and the equality of national representation. Looking at the overall structure, a more serious concern is whether the Court, sitting in its various satellite formations, will be able to maintain the jurisprudential integrity that is central to its constitutional mandate.[18]

[15] New version of the Statute, Art 16.

[16] The Conference sensed as much and whereas the *petit* plenum is currently constituted on an informal, *ad hoc* basis, the membership of the *grand* chamber will be imprinted in the Statute.

[17] New version of the Statute, Art 16.

[18] The composition of the CFI is far less controversial. Increasing its ranks is a less risky proposition, not least because any threat to the consistency of Community law can be tackled on appeal by the Court of Justice. Thus, the new version of Art 225 provides that the CFI will comprise 'at least one judge per member state'. Apparently, the Council has given the nod to an increase of six judges at the CFI, although a system for rotating the additional appointments has yet to be settled. See Commission, *Memorandum to the Members of the Commission: Summary of the Treaty of Nice* (Brussels, 18 Jan 2001), SEC (2001), 99, at 5.

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3. Direct Actions

One of the more attractive features of the Treaty of Nice is an enhanced role for the CFI. The jurisdiction of the CFI over direct actions has gradually increased over the years. At the current time, the CFI hears actions brought by private parties (individuals or corporations) and the Court actions brought by privileged parties (Member States or Community institutions). The new version of Article 225 states that the CFI shall have jurisdiction over most classes of direct action 'with the exception of those assigned to a judicial panel and those reserved in the Statute for the Court of Justice'. Although it falls short of declaring the CFI the first or primary judicial forum for all direct actions, the provision embodies an important change in emphasis: trial and adjudication by the CFI will become the rule rather than the exception. It is natural and desirable that, as the legal system matures, the CFI and the Court pursue their respective primary vocations, the former as a general trial court and the latter as an appellate court of final resort.

What does this reform mean in practical terms? The Treaty of Nice changes nothing in itself; the details will be thrashed out in the Council and implemented by way of amendment to the Statute. Thus, this is one of the important reforms sketched only in principle. When the CFI's jurisdiction is broadened, the change will affect its personal, as opposed to subject matter, jurisdiction. Thus, the CFI will continue to hear the same categories of cases but its competence will extend to at least some of the suits involving privileged parties, which are currently heard by the Court. The extent of the Court's residual jurisdiction over direct actions and the manner in which that jurisdiction will be defined are as yet unclear. A meaningful improvement in the working conditions at the Court will require a marked decrease in its responsibilities.[19]

4. Judicial Panels

The most innovative change to the current system is the introduction of a new form of judicial institution, the specialised judicial panel. Under a new treaty provision, Article 225a, the Council 'may create judicial panels to hear and determine at first instance certain classes of action or proceeding brought in specific areas'. The judicial panels will be attached to the CFI and their jurisdiction and *modus operandi* determined at a later date by a decision of the Council.

The concept of specialised judicial panels was inspired in part by the burden of staff cases that has dogged case management in Luxembourg over the years. Another likely candidate is trademark cases, currently adjudicated

[19] The Court of Justice has made an initial proposal on the issue in its *Working Document relating to the re-allocation of jurisdiction between the Court of Justice and the Court of First Instance in respect of direct actions*, posted on the Court's website.

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by the Alicante Boards of Appeals.[20] Specialisation within the judicial system is an attractive development and one familiar to continental lawyers. However, it should not be given free rein; most cases are not amenable to simple categorisation and it may be naive to assume that the factors that lend staff and intellectual property cases to specialised treatment apply to other, wide-ranging areas of Community law.[21]

(a) Appeals

The Treaty of Nice is conspicuously silent on the subject of appeals from the CFI's decisions relating to direct actions, so presumably the current system, whereby the parties and privileged interveners are automatically entitled to appeal any point of law, will continue unchanged. The introduction of a discretionary jurisdiction for the Court of Justice (a European *certiorari)* is a promising idea, sadly overlooked at IGC 2000. The Community should also consider limiting the right of privileged parties to lodge appeals. While it is appropriate that the Member States and the institutions retain the right to intervene in the first instance, it is questionable whether they should enjoy the right to appeal where they have not previously intervened.

The contribution of judicial panels to reform will depend in large measure on appellate procedures. Article 225a states that 'decisions given by judicial panels may be subject to a right of appeal on points of law only, or, when provided for in the decision establishing the panel, a right of appeal also on matters of fact, before the Court of First Instance'. This wording is somewhat ambiguous; it is not clear whether the Council, in establishing a panel, may opt to limit appeals altogether, for example, through a filer or leave to appeal mechanism.

Further uncertainty surrounds the possibility of subsequent review by the Court of Justice. The new version of Article 225(2) provides that decisions by the CFI on appeal from judicial panels may 'exceptionally' be subject to review by the Court 'where there is a serious risk of the unity or consistency of Community law being affected'. The assessment of this serious is made by the First Advocate General and the ultimate decision in favour or against review lies with the Court.[22] The gatekeeping role of the First Advocate General departs from the principle of party autonomy and places a uniquely judicial function in the hands of an official without ultimate decision-making authority. For example, it is somewhat incongruous that appellate options should end at the CFI in the case of a complex intellectual property dispute, but extend to the Court in any other commercial case. Notwithstanding these anomalies, the limitation will have the welcome benefit of forestalling lengthy appellate proceedings.

[20] See Council Regulation 40/94 on the Community Trademark [1994] OJ L11/1.

[21] See, eg, Due Report, at 29–35 (canvassing the possibility of specialised regimes in fields such as private international law, judicial cooperation, and competition).

[22] See new version of the Statute, Art 62.

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(b) Preliminary Rulings

Appropriately enough, the preliminary reference procedure dominated negotiations on judicial reform at IGC 2000. The strategic importance of the procedure can scarcely be overstated. In terms of caseload, preliminary references occupy half of the Court's docket and, on average, proceedings take over 21 months to complete.[23] Even within this protracted time-frame, the Court is in danger of ruling with undue dispatch, placing in jeopardy the quality of judicial discourse, the integrity of the institution and, ultimately, the rule of law within the Community. Yet, if preliminary rulings are the key to reform, the results of IGC 2000 are disappointing; given the range and depth of the various proposals mooted in advance of the Conference, the modesty of the projected changes is striking.

The significant step taken at Nice was to remove the exclusivity of the Court's jurisdiction. Under the new Article 225(3), the CFI 'shall have jurisdiction to hear and determine questions referred for a preliminary ruling under Article 234, in specific areas laid down by the Statute'. The envisioned role for the CFI marks a profound shift in traditional thinking that associates preliminary references with the Court's uniquely constitutional function. The Court itself had previously opposed the move, principally on the ground that it would threaten its special relationship with the national courts.[24]

It is too early to say whether the Treaty of Nice will lead to any demonstrable change in practice. It creates no more than a potential jurisdiction for the CFI; actual reform will follow later, if at all, in the form of an amendment to the Statute, on the basis of a unanimous vote in the Council. Thus, the future of the preliminary reference procedure remains very much on the drawing board. Assuming that the CFI is conferred with *de facto* competence, there is every reason to believe that its contribution will be limited. For a start, the CFI's functional capacity will already be stretched to meet its additional responsibilities over direct actions and appeals from judicial panels. In addition, staking out a distinct preliminary reference jurisdiction for the CFI is a testing conceptual puzzle. Article 235(3) speaks of 'specific areas laid down in the Statute', which suggests a substantive definition. The specific areas might include the more technical fields, such as competition, that the CFI routinely tackles under the rubric of direct actions or, indeed, the specialised fields that will comprise its appellate jurisdiction over judicial panels, such as trademarks. However, drawing jurisdictional boundaries through a system of subject matter categorisation may prove a double-edged sword. It would be difficult to devise a clear delineation of competence over hybrid requests, involving two or more subject areas. Moreover, subject matter categorisation

[23] See statistics on judicial activity at the Court of Justice for 2000, <http://www.curia.eu.int/en/pei/rapan.htm>.

[24] See *Courts' Discussion Paper*, at 25–6 (noting its previous objections but suggesting that the idea should not be dismissed out of hand).

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could subvert the natural judicial hierarchy insofar as an issue of primary importance—ideally destined for the Court—may lurk in a case of any stripe or hue.

The nub of the challenge is to devise an effective and efficient means of delegating the more routine requests for preliminary rulings to the CFI while retaining the defining controversies of the day for the Court. A possible solution is to identify the cases of primary importance *a priori*, at the time of filing, and assign them directly to the Court. Judge John Cooke has offered an interesting suggestion, grounded in Article 234's distinction between references emanating from lower national courts and those from national courts of last resort: give the CFI jurisdiction over the former and the Court jurisdiction over the latter.[25] Some such structural allocation may be as close as one can get to a workable formula of general application. The downside would be a potential double reference—first to the CFI and later to the Court—during the course of a single case with the consequent increase in the length and cost of proceedings. The possibility of a single preliminary reference to the CFI, copperfastened by an immediate right of appeal to the Court, would be only marginally more palatable.

The introduction of a centralised system for the allocation of preliminary references might prove a more pragmatic and effective solution. Under such a system, all requests for preliminary rulings would be filed at the Court of Justice and subjected to an expedited screening process. The Court would allocate the requests on a case-by-case basis, retaining for itself the cases it considers of primary importance and referring all others to the CFI.[26] Unlike the US Supreme Court's *certiorari* jurisdiction, the system would not operate as a discretionary filter; the mandatory character of the preliminary reference jurisdiction would remain unchanged and, consequently, any preliminary reference that crossed the current admissibility threshold would lead to a ruling, whether from the Court or the CFI.

Admittedly, there are drawbacks to this approach. *A priori* allocation might increase the margin of error. The importance of a case may be difficult to gauge from the face of the national court reference and may emerge only through its *denouement* before the Court of Justice or the national court. A further concern is the time-frame for the putative screening process. Speed and efficiency would be essential but not at the expense of a judicial, as opposed to purely administrative, allocation of preliminary references. At the end of the day, the additional cost in terms of time would have to be weighed against the overall savings of a more efficient system. In particular, if the burden of preliminary references were shared with the CFI, the Court might be free to issue its substantive rulings with greater care and dispatch. Finally, an allocation system

[25] See Cooke at 18.

[26] See Costello, at 53 (defending *ad hoc* allocation against the objection that it offends the principle of *judge legal* or *gesetzlicher richter* whereby the judge in a particular case must be preordained in advance by law).

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would rule out a two-tiered review of preliminary references in Luxembourg—the Court reviewing the rulings of the CFI—and the attendant delay in the underlying national court proceedings.

Regardless of how cases reach the CFI or, indeed, how many cases, it will be important to determine the circumstances in which they progress to the Court. The issue of supervising the CFI's jurisdiction over preliminary references is framed by competing concerns: the need to preserve a role for the Court versus the need to reduce the length of proceedings. The Treaty of Nice confronts the issue in two ways. In the first place, under the new version of Article 225, the CFI may refer a case to the Court for a ruling where the CFI considers that the case requires 'a decision of principle likely to affect the unity or consistency of Community law'.[27] This preview mechanism is reminiscent of the proposal for a system of allocating preliminary references, just discussed, with two important distinctions: it is intended as an exceptional safeguard rather than a routine allocation procedure and, in addition, the screening function will be conducted by the CFI rather than the Court.

Secondly, in exceptional circumstances, 'where there is a serious risk of the unity or consistency of Community law being affected', a decision of the CFI in response to a preliminary reference may be reviewed by the Court, under the same conditions as a decision of the CFI in response to an appeal from a judicial panel. The assessment that such a risk exists will be made by the First Advocate General within a month of the CFI's decision; within a further month, the Court will determine whether or not the decision will be reviewed.[28] Thus, here also, the parties lack standing to challenge the CFI's ruling before the Court.[29] In a declaration attached to the Treaty of Nice, the Conference expressed the view that where the Court of Justice reviews a CFI decision in response to a preliminary reference, it should act under an emergency procedure.[30]

These preview and review mechanisms share similar flaws. The initial decision whether the Court of Justice should decide a case is essentially subjective[31] and it is made by an entity other than the Court itself. It is highly unusual in modern legal systems that a court should lack control over its own jurisdiction and, in this instance, that the jurisdictional gatekeeper should be a subordinate court or an officer that lacks ultimate judicial decision-making authority.[32] At the risk of overstating the point, leaving the decision in the

[27] This provision was influenced, in particular, by a proposal from the Dutch Government. See *Contribution from the Dutch Government*, at 15.

[28] See new version of the Statute, Art 62.

[29] A change recommended by the CCBE. See *Contribution from the CCBE*, at 9.

[30] See *Declaration on Article 225* [2001] OJ C80/79.

[31] The First Advocate General, at least, will have the benefit of the CFI's decision on which to base her assessment of a serious risk to the unity or consistency of Community law.

[32] Indeed, there is an inherent contradiction between the Conference's willingness to attribute this authority to the First Advocate General and its refusal to count advocates general in the judicial tally for the composition of the Court.

hands of the CFI and the First Advocate General could in its own way threaten the uniformity, consistency and, indeed, objectivity of Community law. A further and more serious concern is that referral to the Court will become routine rather than exceptional and will increase the length and cost of proceedings. It will be important to ensure that the participation of the CFI does not simply add an additional tier of review, all the more so since the preliminary reference procedure stays national court proceedings.

The headaches do not necessarily end there. The finality of the CFI's decision will be crucial, and not merely as a matter of form. To hypothesise, where the CFI has delivered a preliminary ruling in response to a request from a lower national court, would it be possible for a national supreme court to effectively appeal the CFI's ruling by seeking a preliminary reference from the Court itself? The spectre of two distinct preliminary references during the course of a single action is equally apposite in this context. Thus, the success of the procedure will turn in no small measure on the CFI's ability to exercise a firm and decisive hand in responding to national court requests.

Regrettably, the Treaty of Nice makes no attempt to address the problem at source, namely by reducing the volume of requests for preliminary rulings emanating from the national courts. Notwithstanding the many and varied proposals of the Due Report and others, the Conference decided against altering the mechanics of the preliminary reference procedure. Thus, the role of the national courts and the terms and conditions under which cases are currently referred will remain unchanged.[33] Retention of the status quo will assuage the concerns of many, anxious to preserve automatic access to the Community courts but it will not lead to any significant reduction in the length and cost of proceedings. For the time being at least, we can assume that preliminary references will continue to be an enormous drain on resources at the Court.

C. Future Reform

While the Treaty of Nice does not alter the essential structure of the judicial system, comprising the Court of Justice, the CFI and the national courts, it does presage two related structural developments: increased responsibility for the CFI and the creation of specialised judicial panels. Both initiatives are welcome and should lead to a more equitable division of judicial labour within a strengthened system. Potentially, the CFI will become the primary forum for direct actions, a secondary forum for preliminary references and an appellate forum with respect to decisions from judicial panels. The CFI will no longer be simply 'attached' to the Court;[34] rather, ensuring that the law is observed will be the task of both courts, each within its own jurisdiction.

[33] See AWH Meij, 'Guest Editorial: Architects or Judges? Some Comments in Relation to the Current Debate' (2000) 37 *CML Rev* 1039, at 1043 (noting that the national courts were not associated with the reform negotiations in any way).

[34] In the words of the current version of EC Treaty, Art 220 (ex Art 164).

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The problem with the Treaty of Nice is not the emphasis on the CFI, or the addition of judicial panels, *per se*. Rather the Conference's legacy turns on the questionable assumption that modifying the role of the CFI will cure the ills of the entire system. Thus, quantitative change at the CFI is designed to produce a qualitative change at the Court of Justice. The promise will hold true, if at all, only if two conditions are met: the transfer of jurisdiction from the Court to the CFI must be real and substantial; and the CFI must be provided with adequate budgetary and administrative resources to equip it for the task. The fulfilment of either condition does not seem fanciful when applied to direct actions. The Council could make the CFI the *de facto* first judicial forum for direct actions and, presumably, marshal the necessary resources. Direct actions, however, account for far less of the judicial workload than preliminary references[35] and the gains for the Court must be counterbalanced against a projected increase in appeals.[36]

The fallacy of the Conference's reform strategy is revealed in its treatment of preliminary references. The Conference seised on the CFI as the key to reducing the length of preliminary reference proceedings and made no effort to attack the problem at source, namely, by taking steps to stem the flow of preliminary references from the national courts. Nor did the Conference offer a framework for the potential sharing of the preliminary reference burden between the Community courts. These fundamental deficiencies in the Treaty of Nice underscore a continuing need to discuss alternative reform measures *post* Nice. If the central objective is to render the legal system more efficient and to equip the Court of Justice to perform as a supreme court, (as the reformists, including the Courts and the Commission's Working Group contend), the Treaty falls short of the mark. The Nice reforms will undoubtedly improve the system but not to the extent necessary to remedy the workload crisis, much less prepare the courts for enlargement. Moreover, assuming that the member states ultimately copperfasten the Charter of Fundamental Rights with judicial protection, the implications for the workload of the Community courts will be enormous.[37]

[35] For example, of the 503 cases filed at the Court in 2000, 197 were direct actions as opposed to 224 preliminary references. See statistics on judicial activity at the Court of Justice for 2000 <http://www.curia.eu.int/en/pei/rapan.htm>.

[36] Ibid. Appeals accounted for 79 of the 503 cases filed at the Court in 2000.

[37] [2000] OJ C364/1. The status of the Charter is tabled for discussion at IGC 2004. See *Declaration on the Future of the Union* [2001] OJ C80/85. A further potential source of work for the Community courts is the suggested liberalisation of the rules on standing for private applicants in judicial review proceedings embodied in the recent Opinion of Advocate General Jacobs in Case C-500 P, *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677 and the decision of the Court of First Instance in Case T-177/01, *Jégo-Quéré v Commission* [2002] ECR II-2365. However, in its subsequent decision in *Unión de Pequeños Agricultores*, the Court of Justice reaffirmed the strictures of the *Plaumann* test of individual and direct concern [2002] ECR I-6677. Given the opposition of the Council and the Commission, an amendment to the EC Treaty (which is, in the Court's view, a prerequisite to reform), seems a remote possibility. See Editorial, '1952–2002: plus ça change . . .' (2002) 27 *Eur L Rev* 509.

III. THE *CERTIORARI* OPTION

A. Introduction

The Treaty of Nice extends the appellate jurisdiction of the Court of Justice in three important respects. In the first place, the projected increase in the CFI's responsibilities over direct actions should lead to a corresponding increase in appeals to the Court. Secondly, the Court will hear a limited range of 'appeals' (for want of a better term) from the CFI's preliminary rulings in response to national court requests. Finally, in certain circumstances, the Court will examine the CFI's decision in relation to appeals from judicial panels. One of the most important issues left unresolved is the procedure whereby the Court of Justice will review these various decisions of the CFI. Presumably, it is one aspect of the division of labour between the Court and the CFI with respect to which the Conference has solicited the views of the Court of Justice and the Commission.[38] The occasion provides an opportunity for the Community to consider replacing the current system of mandatory appeals with a filter mechanism that would give the Court of Justice the freedom to choose a limited and select number of cases for review.

A system for filtering the caseload of the Court of Justice could also contribute to reform of the preliminary reference procedure. In theory, a European *certiorari*—a discretion to accept some references and to decline others—could enable the Court to prioritise its agenda and maximise the use of its time and resources. Free from the burden of an excessive caseload, the Court could devote adequate time and attention to the pressing constitutional and legal issues of the day. As we shall see, however, filtering preliminary references is a far more problematic prospect, both in principle and in practice. Whether in the context of appeals or preliminary references, the US Supreme Court's *certiorari* practice provides a potentially insightful model for the Community courts.[39]

B. The United States

Article III of the US Constitution declares that '[t]he judicial power of the United States shall be vested in one supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish.'[40] There are two tiers of lower Article III courts: federal district courts[41] and federal courts of

[38] See *Declaration on Article 225 of the Treaty Establishing the European Community* [2001] OJ C80/79.

[39] For an earlier view, including a discussion of the propriety of comparing the EC and US systems, See L Heffernan, 'A Discretionary Jurisdiction for the Court of Justice?' (1999) 34 *Irish Jurist* (NS) 148.

[40] Congress has also established a number of specialised courts and tribunals pursuant to its Art I powers.

[41] There are approximately 100 district courts of general jurisdiction in the territories comprising the United States and Puerto Rico. District judges are assisted by magistrate and bankruptcy judges.

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appeals.[42] An appeal lies from a final order or judgment of the district court to the federal court of appeals for the circuit in which the district court is located.[43] Subsequently, the unsuccessful party may seek Supreme Court review of the decision of the court of appeals. Mixed cases, involving issues of federal and state law, may be litigated in federal or state court. Where the parties have opted to proceed in state court, the determination by the state Supreme Court of any federal question may be appealed to the US Supreme Court.[44]

Of the various procedural routes to the Supreme Court, *certiorari* is the most significant from a practical standpoint.[45] The procedure formally dates back to 1925 when Congress enacted a law giving the Court discretion to determine which cases it should hear and decide.[46] The development was made possible in part by previous initiatives, principally the introduction of the federal courts of appeals. *Certiorari*, in turn, has facilitated a gradual accommodation of the Supreme Court's burgeoning docket, thereby obviating the need for dramatic institutional reform. It allows the Court to select from among the vast number of petitions submitted annually for review those cases that most clearly invoke the Court's essential functions. Thus, in theory at least, it enables the Court to map out the parameters of the legal landscape, identifying the important issues of the day and resolving conflicts among the lower courts over the application of federal law.[47]

The Supreme Court has the capacity to decide only a small percentage of the cases it receives and, consequently, some form of filter mechanism is an operational necessity. This reality is underscored by the demanding standards and rigorous decision-making associated with Supreme Court practice. In contrast to the preliminary reference procedure, review takes the form of full-blown appeal, the Court resolving actual cases rather than hypothetical questions, either by disposing of a case in its entirety or remanding it to a lower court for proceedings consistent with its opinion. Unlike the Court of Justice, which functions increasingly through the use of chambers, the Supreme Court

[42] There are eleven courts of appeals for numbered, geographically defined circuits and one court of appeals for the District of Columbia. In addition, a court of appeals for the federal circuit exercises appellate jurisdiction over customs and patent cases and claims against the US government.

[43] 28 USC s 1291.

[44] The Supremacy Clause, Art VI(2) of the US Constitution, provides an indirect basis for appellate jurisdiction.

[45] The other procedural routes are: original jurisdiction, appeal, certification and extraordinary writ. See 28 US ss 1251, 1254, 1651, and 2241.

[46] Judiciary Act of 13 Feb 1925, ch 229, 43 Stat 936. See *Dick v New York Life Ins Co*, 359 US 437, 48–63 (Justice Frankfurter dissenting).

[47] See generally, RL Stern *et al*, *Supreme Court Practice*, 7th edn (Washington, DC: The Bureau of National Affairs, Inc, 1993); HW Perry, *Deciding to Decide: Agenda Setting in the United States Supreme Court* (Cambridge, Mass: Harvard University Press, 1991); Stephen M Shapiro, 'Certiorari Practice: The Supreme Court's Shrinking Docket' (1998) 24 *Litigation* 25; RK Willard, 'Strategies for Case Preparation and Argument Before the Supreme Court' (1992) 5 *USF Mar LJ* 91; SA Baker, 'A Practical Guide to Certiorari' (1984) 33 *Cath UL Rev* 611.

hears and decides cases as a plenary body of six or, more usually, nine justices.[48] The persona of the individual justice, noticeably absent in Luxembourg, is a defining feature of Supreme Court culture. Individual justices can and, frequently, do write individual opinions, either concurring with or dissenting from the collective decision of the Court. Whether this practice acts as a spur or a rein on collective judicial deliberation is an open question but, in either event, (and notwithstanding the practical advantages of operating in one rather than a multiplicity of languages), the drafting of judicial opinions is a time-consuming process and, generally speaking, Supreme Court judgments are considerably longer and more detailed than the judgments of the Court of Justice.[49] Thus, *certiorari* enthusiasts maintain that, by allowing the Court to maintain its workload, the system balances these competing concerns, ensuring uniformity in the application of federal law and, ultimately, preserves the integrity and efficiency of judicial decision-making as well as the quality of the Court's opinions.

The *certiorari* procedure is relatively straightforward.[50] A party who has lost her case in the lower court (generally a federal court of appeals or a state supreme court) brings a petition requesting the Court to hear and decide the case. The Court will grant *certiorari* and proceed to a decision on the merits if, after a summary consideration of the case, at least four justices are in favour of so doing.[51] Supreme Court Rule 10 explains that a petition will be granted only for 'compelling reasons,' which include, but are not limited to, a conflict among the lower courts, an unwarranted departure from judicial protocol or Supreme Court precedent, and an unsettled but important question of federal law. Rule 10 itself sheds no further light on the meaning or relative importance of these conditions and the unpredictability of the exercise is underscored by a telling caveat that the Rule neither controls nor fully measures the Court's discretion.

The Supreme Court's *certiorari* practice is only moderately more enlightening. The Court generally refrains from indicating the reasons for denying review, although occasionally an individual justice will break ranks to explain why she would have heard the case.[52] When review is granted, the stated reasons tend to be conclusory at best. While it behoves the hopeful petitioner to study the general history of grants and denials in a particular type of case,

[48] See R Posner, *The Federal Courts: Challenge and Reform* (Cambridge, Mass: Harvard University Press, 1996), at 82 (arguing that nine justices is the maximum viable number if the Court is to sit as a single panel).

[49] At the same time, the importance of prompt consideration is reflected in the Court's practice of disposing of the vast majority of cases within each annual term (which officially begins on the first Monday in Oct and closes at the end of June) rather than carrying them over to the next term.

[50] See 28 USC ss 1254(1) and 1257 and Supreme Court Rules, 10–14.

[51] This is a derogation from the Court's general practice of operating by majority rule.

[52] See, eg, *Voinovich v Women's Medical Professional Corp*, 118 S Ct 1347 (1998) (Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, dissenting from the denial of cert. in a challenge to the constitutionality of an Ohio abortion statute).

the precedential value of *certiorari* denials is limited; justices frequently emphasise that a denial should not be interpreted as an official endorsement of the decision below.[53] Thus, the Court has been accused of defining 'certworthiness' tautologically.[54] Indeed, Chief Justice Rehnquist has conceded '[w]hether or not to grant *certiorari* strikes me as a rather subjective decision, made up in part of intuition and in part of legal judgment.'[55]

Nevertheless, certain ground rules have emerged in practice. Great emphasis is placed on the relatively objective ground of the existence of a conflict among the lower courts.[56] The conflict in question must relate to the same matter of law or fact and must be current and real, some would say even 'intolerable'.[57] Conflicts which are narrowly defined or which are likely to be resolved through future litigation in the lower courts may escape review. By the same token, the importance of the issue and the extent of the conflict's recurrence are significant, if not, decisive factors. A conflict between federal courts is essentially limited to a conflict between two, or usually more, federal courts of appeals. In the case of conflicts between decisions of courts of appeals and those of state courts of last resort, Supreme Court review is necessarily limited to disputes over substantial federal questions. In other words, federal jurisdiction can and, indeed, must be avoided when the strategic interests of a case are essentially more state than federal.

A more subjective and elusive but, nonetheless, significant, consideration is the so-called 'importance' of the case. The Court is concerned primarily with public or societal importance than with results in specific cases and, consequently, accepts cases, for example, involving significant constitutional questions or decisions invalidating general legislation or substantial government programmes. Even so, not infrequently, the Court declines jurisdiction in the face of a seemingly pressing federal issue on the premise that a particular case is an unsuitable vehicle for review.[58]

While the Supreme Court's *certiorari* jurisdiction is well entrenched, its operation in practice has generated some controversy over the years. Given the physical demands of screening thousands of petitions annually, it has been suggested that the Court spends as much time setting its agenda (deciding which cases to decide) as it does carrying it out. The loudest criticisms are less institutional in focus and emanate from the Bar where much ink has been spilled schooling practitioners in the quixotic art of drafting 'certworthy' peti-

[53] See, eg, *Brown v Allen*, 344 US 443, 542–3 (1953).
[54] Perry, at 34 and 221.
[55] WH Rehnquist, *The Supreme Court, How it Was, How it is* (New York: Alfred A Knopf, 1987), at 165.
[56] See *Braxton v United States*, 500 US 342, 247–8 (1991), Stern *et* al, at 167–84.
[57] Baker, at 617.
[58] A noticeable omission from Rule 10's lists of grounds for review is the correction of lower court error. The function of supervising the lower courts in their application of federal law is primarily a matter for the federal courts of appeals and state supreme courts. Since the Community judicial system lacks comparable institutional safeguards, the task of overseeing national court interpretation of Community law falls squarely on the shoulders of the Court of Justice.

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tions. Controversy also surrounds the role of law clerks (*referendaires* in Community parlance) that generally assume responsibility for screening petitions in the first instance. Chief Justice Rehnquist has defended the practice on the ground that the decision whether or not to grant *certiorari* is a much more channelled decision that a decision on the merits of a case.[59] That may be so, but it is hard to reconcile this justification for a surprising measure of delegation with the Chief Justice's previously cited recognition of the inherent subjectivity of the *certiorari* decision.[60]

C. A European Certiorari*?*

The notion of filtering the caseload of the Court of Justice is not new. It was first floated in advance of the Intergovernmental Conference that culminated in the Maastricht Treaty on European Union. In presenting an agenda for discussion and debate, Jean Paul Jacqué and Joseph Weiler proposed a new architecture for the judicial system which included four Community Regional Courts with jurisdiction over direct actions, actions for non-contractual liability and preliminary references from the national courts.[61] Under the proposed scheme, the Court of Justice, renamed the 'European High Court of Justice', would have discretion whether or not to admit an appeal from a decision or preliminary ruling of a Regional Court. While Jacqué and Weiler did not specify a procedure to govern the scheme, they suggested that the Court should admit an appeal in the following circumstances: (i) the Court itself or the Regional Court considered that the decision raised a major issue of Community law; (ii) a divergence had developed between the jurisprudence of one or more of the Regional Courts; or (iii) the record revealed that the Regional Court had committed a manifest error.[62]

The issue was raised anew in a comprehensive report on the role and future of the Court of Justice completed in 1996 by a study group established by the British Institute of International and Comparative Law and chaired by Lord Slynn of Hadley.[63] Among a range of innovative reform proposals, the Slynn Report canvassed, but ultimately rejected, both the creation of distinct Community courts along the lines of the US federal system and the introduction of a filter or *certiorari* mechanism. In relation to the latter, the Report noted

[59] Rehnquist, at 264–6 arguing that a significant number of petitions, perhaps as many as half, are patently without merit and do not even reach the stage of being discussed at a conference of the justices).

[60] A further criticism, levelled at the current Court from time to time, and the converse of the complaint in Luxembourg, is that the current Court is not deciding enough cases or, specifically, enough important cases. If the Court of Justice has too little flexibility, the Supreme Court is said to have too much.

[61] JP Jacqué and JHH Weiler, 'On the Road to European Union—A New Judicial Architecture: An Agenda for the Intergovernmental Conference' (1990) 27 *CML Rev* 185, at 192–5.

[62] Ibid, at 193.

[63] *The Role and Future of the European Court of Justice* (London: British Institute of International and Comparative Law, 1996) (hereinafter Slynn Report).

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that at the heart of the arguments for and against a power of selection[64] lies a question about the way a supreme court should function: 'should it work through selected cases of importance or should it ensure that all errors are corrected?'[65] It observed that 'in those jurisdictions which have introduced the principle of selection, the global results have been found to be satisfactory and, whatever particular criticisms there are, do not call into question the principle of selection'.[66] Nevertheless, filters pose unique problems in the Community context: Community law is a relatively immature system; cases which raise new points of law are not always easy to identify; and preliminary references represent a very special case.[67] Thus, the Report concluded that 'at the present stage of development of the Community legal system, the introduction of filters or selection mechanisms for the Court of Justice would be undesirable and difficult to achieve.'[68]

More recently, the possibility of a European *certiorari* was canvassed in the context of the intergovernmental negotiations that led to the Treaty of Nice. In their 1999 Discussion Paper, the Community Courts alluded to the introduction of a filtering system as one of a number of radical solutions to the workload dilemma. While highlighting the potential merits of such a system, the Courts shrewedly observed:

> [t]he effectiveness of such a power of selection would depend on its scope and on the conditions governing its exercise. In order effectively to stem the inflow of references for preliminary rulings, there would be a need for selection criteria capable of being applied in a flexible and prudent manner.[69]

The Courts then revisited the drawbacks identified by the Slynn Report, concluding that

> a system of filtering references for preliminary rulings . . . would not be easy to reconcile with the principle of mutual cooperation between the national courts and the Court of Justice which is a feature of the preliminary ruling procedure and which, by ensuring uniformity and consistency in the interpretation of Community law, has made such a major contribution to the proper working of the internal market.[70]

The overall conclusion was fittingly ambivalent: a filtering mechanism would constitute a possible solution to an excessive caseload and, from that point of view, 'there is much to be said for a more thorough examination of such a mechanism and the ways of implementing it'.[71] A year later, having refined its proposals for the consideration of the intergovernmental conference, the

[64] A power of selection is broader than the concept of a filter. A supreme court or a lower court may exercise selective mechanisms and the criteria of selection may be very wide. Filters are one form of case selection and tend to be applied by a supreme court on the basis of clearly defined criteria. See also Turner and Munoz, at 89–90.

[65] Slynn Report, at 117. [66] Ibid. [67] Ibid, at 117–18.
[68] Ibid, at 118–19. [69] *Courts' Discussion Paper*, above n 6, at 23.
[70] Ibid, at 25. [71] Ibid.

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Courts took a more conservative line and recommended the introduction of a limited form of filter for a select range of appeals from the CFI to the Court. The recommendation was aimed, in particular, at cases where a matter had already been considered by an appellate body, such as a judicial panel, before coming to the CFI. The proposed amendment to Article 225(1) of the EC Treaty would have enabled the Council to determine, by way of amendment to the Statute, the appropriate classes of cases.[72]

The Commission's Working Party tendered a far more robust proposal for filtering appeals in its submission to IGC 2000. The Due Report envisioned that all appeals from the CFI to the Court should be subject to a uniform 'leave to appeal' requirement. On the basis of a swift, written procedure, a chamber of three judges at the Court of Justice would issue a reasoned opinion, on the basis of which the President of the Court would ultimately decide whether to grant or withhold authorisation to appeal. In addition to Article 225(1)'s requirement that appeals to the Court must be limited to points of law, the proposed leave to appeal mechanism introduced a second criterion, namely, that the appeal has major importance either for the development of Community law or the protection of individual rights.[73]

In contrast, the concept of filtering preliminary references was rejected by the Working Party on the premise that a *certiorari* arrangement 'cannot be transposed at present to a system of courts which is radically different from that of the United States'.[74] Indeed, this was one of several reforms (including the proposal, ultimately adopted at Nice, to confer a preliminary rulings jurisdiction on the CFI) discounted by the Working Party in deference to a series of alternative proposals designed to encourage a more assertive Community persona on the part of the national courts.[75]

D. Filtering Appeals

It is important to emphasise, as a preliminary matter, that the potential application of a European *certiorari* is limited to two forms of judicial jurisdiction: appeals from direct actions and preliminary rulings. It has never been suggested, for example, that the Court of Justice should exercise a discretionary first instance jurisdiction over direct actions filed by the privileged applicants or enforcement actions brought by the Commission—and rightly so. Even

[72] *Contribution by the Court of Justice and the Court of First Instance to the Intergovernmental Conference* (Apr 2000), at 3.

[73] Due Report, at 28–9.

[74] Ibid, at 21.

[75] The essential purpose of the Working Party's proposed reforms was that 'the national courts themselves should be better placed to give informed decisions on a growing number of questions of Community law which they meet in the exercise of their national jurisdiction', ibid, at 18. The proposals included: limiting references from courts of last resort to questions which are 'sufficiently important' for EC law; weeding out 'irrelevant, premature or poorly prepared references'; and increasing recourse to preliminary ruling by reasoned order. Ibid, at 15–18.

within the realm of a potential *certiorari*, a firm distinction must be drawn between the Court's respective jurisdictions over appeals and preliminary references. The differences between the two, in terms of function and operation, cannot be overstated for purposes of the present discussion.

In the appellate context, a European c*ertiorari* would target appeals from decisions of the CFI, whether in the context of direct actions, preliminary rulings or appeals from judicial panels. The prospect of an enhanced appellate jurisdiction, generated by the CFI's extended responsibilities under the Treaty of Nice, underscores the need for some method of case selection. From a pragmatic standpoint, a filtering mechanism would ensure that the burden of the Court's original jurisdiction does not resurface in appellate form.[76]

In terms of procedural mechanics, the discretionary jurisdiction might operate along the following lines. In keeping with current practice, the party or parties that has lost its case in the CFI would petition the Court for review of the CFI's decision, within a limited time-frame. The right to petition would be confined to the parties that had intervened below. The parties and any interveners would each be entitled to make a single submission, again within a specified period. The original petition and any such submission would be required to conform to a generally prescribed format and word or page limitation. On the basis of these submissions, and without convening an oral hearing, the Court would decide whether to hear the appeal. Where leave to appeal was denied, the judgment of the CFI would become final.

The underlying objective would be to facilitate quick, thorough, and decisive action on a petition. There are several potential ways in which this might be achieved. Feasibly, appeals could be assigned in the usual way and the decision to accept or decline jurisdiction made *ad hoc*, for example, after the *juge-rapporteur* issues her preliminary report. A centralised screening system would be preferable, whether carried out by one or more chambers, through the offices of the advocates general or otherwise. The Due Report proposed that a chamber of three judges deliver a reasoned opinion which would form the basis of a decision on the part of the President of the Court in favour or against allowing the appeal.[77] Presumably, the President's guiding hand would ensure consistency in the operation of the procedure. Possibly and exceptionally, the initial decision could be subject to some form of summary ratification or veto by the *grand* chamber or plenary court. Alternatively, these decisions could be taken by the *grand* chamber in a manner akin to that of the US Supreme Court: the judges could analyse the petitions, assisted by their *referendaires*, whether acting individually or as a pool, and then vote in favour or against review. Review would be granted where a petition met or exceeded

[76] The Commission's Working Party highlighted that the failure rate of the approximately 30 per cent of appeals that are brought against the decisions of the CFI runs as high as 75 per cent to 93 per cent. Due Report, at 28.

[77] Ibid, at 29.

a set minimum (eg, four votes at the Supreme Court).[78] This style of approach would have the benefit of regular and direct participation of the broad membership of the Court in the screening process.

It would be essential to specify the criteria that the Court would use to review requests for leave to appeal. The most likely contenders would be the importance of the case (assessed, for example, in terms of the development of Community law and the need to protect individual rights)[79] and the existence of a threat to the uniformity or consistency of Community law. Both criteria are essentially subjective, although a threat to uniformity or consistency could operate as an indirect barometer of conflicts within the system. A further criterion, suggested by Jacqué and Weiler in the context of their alternative judicial architecture, would be the commission of a manifest error on the part of the CFI.[80] Although it would be important for the Court to explain its reasons for accepting or declining jurisdiction, American experience signals caution: the practice might involve a counterproductive expenditure of time and resources and there is a danger that the Court would be lured into reviewing the merits through the backdoor. Again, a clearly defined set of criteria for review would guard against an open-ended power of selection and would provide the Court with a point of reference in explaining its decisions.

A filter of this kind would operate principally in relation to the current source of appellate jurisdiction, namely, appeals from CFI's decisions over direct actions. The Treaty of Nice, however, paves the way for important changes in the CFI's mandate: the Council will be empowered to make the CFI the primary forum for direct actions and, in addition, to endow it with a preliminary rulings jurisdiction and an appellate jurisdiction over any judicial panels that are created. At least in principle, a European *certiorari* could extend to the full breadth of the Court of Justice's appellate docket, comprising appeals from the CFI's decisions in response to preliminary references and appeals from judicial panels, as well as direct actions. However, the Treaty of Nice has designated a new procedure (an alternative filtering mechanism) that effectively forecloses such a possibility: acting on a proposal from the First Advocate General, the Court of Justice will review the CFI's decisions on preliminary references and appeals from judicial panels where there is a serious risk to the unity or consistency of Community law. Only time will tell whether the premise that such cases will reach the Court only in the most exceptional of circumstances will hold true, particularly in relation to preliminary rulings. A more serious objection is that this procedural distinction (between direct actions, on the one hand, and preliminary rulings and appeals from judicial panels, on the other) has no bearing on whether the substantive

[78] The *en banc* procedure in the US courts of appeals might serve as an alternative model. See Fed R App Proc, 35.

[79] A definition suggested by the Due Report, at 29.

[80] Jacqué and Weiler, at 193. Presumably, this criterion would be limited to errors of law, given that the Court's appellate jurisdiction does not extend to points of fact.

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issues in a particular case merit adjudication by the Court of Justice.[81] Certainly, if the current levels of congestion continue unabated, future reformists may wish to revisit the possibility of a unified appellate procedure.

E. Filtering Preliminary References

The Supreme Court's *certiorari* practice also provides a potential model for reform of the preliminary reference procedure, the 'hard core of Community litigation'[82] where the rationale for streamlining the Court's docket applies with even greater force.[83] The jurisdiction is broad and eclectic, 'an open valve, with few regulators to control the volume or content of cases'.[84] Save for a technical flaw or a patently redundant question, each national court request forms the basis of a ruling by the Court, regardless of its novelty, complexity or importance.[85] If, as is commonly believed, most references concern issues of secondary importance, there is ample scope to reduce the Court's caseload. IGC 2000 concluded that this was best achieved by sharing the preliminary reference burden with the CFI. However, as noted above, the Conference left unresolved the crucial question of precisely how the jurisdiction might be divided between the two courts.

One possible solution would be to give the Court a discretion to select certain cases for adjudication and to assign all others to the CFI. This would be a halfway house between the current regime and a full-blown discretionary jurisdiction. Every national court would retain an entitlement to receive a preliminary ruling on the interpretation of Community law but the Court of Justice would enjoy a discretion to determine which of the two Community courts would deliver the ruling. A caveat might be entered in deference to the principle that the Court of Justice alone has the authority to annul Community acts.[86]

A distinct but related issue is whether it would be feasible and, if so, desirable to give the Court of Justice a radical, full-blown discretion in relation to preliminary references, along the lines of the US Supreme Court's *certiorari* jurisdiction. Under such a regime, some or potentially all of the national courts would lose their automatic entitlement to a preliminary ruling; instead, the Court would decide, on a case-by-case basis, by reference to a specified set of

[81] In the case of preliminary rulings, at least, the Treaty of Nice prescribes an additional safeguard, namely, the possibility that the CFI will decline jurisdiction in favour of the Court.

[82] T Koopmans, 'The Future of the Court of Justice of the European Communities' (1991) 11 *Ybk Eur L* 15, at 29.

[83] The present discussion refers to the original version of the preliminary reference contained in Art 234 of the EC Treaty, although in principle any solution could potentially embrace the variants contained in Art 68 of the EC Treaty and Art 35 of the EU Treaty.

[84] Costello, at 58.

[85] See Advocate General Jacobs's opinion in Case C-338/95, *Wiener v Hauptzollamt Emmerich* [1997] ECR I-6495.

[86] Case 314/85, *Foto-Frost* [1987] ECR 4199. But see the recent Opinion of Advocate General Jacobs in Case C-500 P, *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677.

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criteria, whether or not to adjudicate on the merits of national court requests. The Court's admissibility jurisprudence reflects a growing consensus that mandatory review is no longer necessary or desirable and, consequently, points in the general direction of, but stops far short of, a European *certiorari*.[87]

Reservations over any form of filtering system for preliminary references have emerged from virtually every quarter of the Community. The Member States fear a loss of prestige for the national courts[88] and the Bar a loss of indirect access to Luxembourg for their clients.[89] For its part, the Court of Justice is anxious not to disturb Article 234's climate of judicial cooperation.[90] A variation on this theme is the lament that *certiorari* could stimulate a judicial tendency to 'take things easy' by dodging 'perilous questions'.[91] These are legitimate concerns, albeit at times overstated. Would a filtering system actually augment Community jurisdiction at the expense of national jurisdiction or, in the final analysis, rewrite the adage that the Court of Justice has the final say on Community matters and the national court on national matters? Arguably, the role of the national court would be enhanced rather than reduced if it were forced to exercise greater responsibility in interpreting and applying Community law.[92]

There would be at least three significant stumbling blocks on the road to this potential reform. In the first place, *certiorari* is a creature of a conventional appellate system and, by design, ill fitted for the preliminary reference procedure. In the United States, litigants trigger Supreme Court review by appealing the final decision of the court below. The Supreme Court alone decides whether to accept or decline the case and, in either eventuality, the Court's ultimate decision generally represents a definitive resolution of the matter. In contrast, a preliminary ruling is essentially an advisory opinion in relation to pending proceedings. It is the national court that seeks the intervention of the Court of

[87] The Court has declined to respond to requests for preliminary rulings for a number of reasons. See, eg, Case 104/79, *Foglia* [1980] ECR 745 (the main action does not involve a genuine dispute); Case C-342/90, *Dias* [1991] ECR I-4673 (the questions are not unconnected to the main action); Case C-83/91, *Meilicke* [1992] ECR I-4673 (the questions posed are purely hypothetical); Case C-167/94, *Grau* Gromis [1995] ECR I-1023 (requests for interpretation of provisions of the TEU over which the Court has no jurisdiction); Case C-307/95, *Max Mara* [1995] ECR I-5083 (questions are unrelated to the interpretation of Community law). See also, the opinion of Advocate General Jacobs in Case C-338/95, *Wiener v Hamptzollamt Emmerich* [1997] ECR I-6495 at 6502 (foreshadowing the current admissibility test). See generally, T Kennedy, 'First Steps Towards a European Certiorari?' (1993) 18 *EL Rev* 121; C Barnard and E Sharpston, 'The Changing Face of Article 177 References' (1997) 34 *CML Rev* 1113.

[88] See some Member State submissions to IGC 2000, eg, above n 11.

[89] See, eg, *Contribution from the CCBE to the Intergovernmental Conference*, CONFER/VAR 3966 (18 May 2000).

[90] The Court's explanation of the threat is cast in vague and less than compelling terms. See also Arnull, at 519 (arguing that a filtering system is 'unattractive' because it could damage the spirit of cooperation on which Art 234 rests).

[91] Koopmans at 30.

[92] This enhanced role for the national courts was the imperative behind the proposals of the Commission's Working Party. See Due Report, at 18.

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Justice, decides whether a ruling is necessary and, ultimately, resolves the case. (One might quibble over the accuracy of these generalisations but hardly with the recognition that the procedure has its own unique characteristics). One obvious drawback is that the Court of Justice would decline jurisdiction without knowing how the national court would ultimately play its hand.[93]

The most promising way around this dilemma would be the commencement of a practice whereby the national court would include in its request a proposed interpretation of the Community law issue. The Court could then expediently endorse as much of the reasoning and result as it deemed appropriate. This 'green light' approach is used in Germany where a reference to the constitutional court contains a reasoned argument, penned by the referring judge, in favour of the unconstitutionality of the measure. In addition to promoting judicial economy at the Court of Justice, this practice would nurture a more proactive role on the part of the national courts. It was for this latter reason that the Commission's Working Party promoted it at IGC 2000 as one of several laudable reforms to the preliminary reference procedure.[94] At the same time, it must be conceded that a green light approach would not necessarily guarantee major savings in the Court's time and resources. The quality of the national courts' proposed answers would be expected to vary and, in extreme cases, could counterproductively complicate the Court's task.[95] This limitation aside, the suggestion has much to recommend it. Arguably, the seeds have already been sown in the Court of Justice's current practice of re-writing, or seeking clarification of, the questions posed.[96]

A second concern is that the filtering of preliminary references would undermine the prevailing, cooperative relationship between the Court of Justice and the national courts. Traditionalists argue that the Court's rejection of a request for a preliminary ruling would be viewed as a slight and even a breach of trust.[97] After all, for most national courts the decision to refer is discretionary and therefore already presupposes some element of selection on the part of the national judge or judges. Precisely how the national courts would react to a *certiorari* system is anyone's guess; some courts might react by referring cases with excessive zeal, others with undue caution.[98] Certainly, there is a danger that national judges might eschew the risk of a denial from

[93] Jacqué and Weiler's filter proposal did not suffer from this deficiency; in their alternative judicial system, the European High Court of Justice would exercise discretionary jurisdiction over appeals from decisions and preliminary rulings of intermediate Community Regional Courts.

[94] Due Report, at 18. In addition, the *Courts' Discussion Paper*, at 24 cited a green light system as a beneficial means of mitigating the drawbacks of a filtering system.

[95] An objection noted by the Slynn Report, at 82. The Report also predicted that this approach would add to the burden of translation.

[96] See, eg, Case 19/81, *Burton v British Railways Board* [1982] ECR 555; Joined Cases C-171 and 172/94, *Mercks and Neuhuys v Ford Motors* [1996] ECR I-1253. See generally, Court of Justice, *Note for Guidance on References by National Courts for Preliminary Rulings* (1997).

[97] See, eg, *Courts' Discussion Paper* at 24; Slynn Report, at 118.

[98] See, eg, Turner and Munoz, at 66 speculating that national courts may choose not to refer through fear of their reference being rejected.

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the Court of Justice by referring only the most imponderable of cases, a practice that could undermine the uniformity of Community law if taken to an extreme. On the other hand, the system might have the beneficial effect of encouraging national courts to engage the procedure more seriously and exercise greater care in the formulation of requests. Finally, one might predict that once a filtering system became entrenched, a rebuff from the Court of Justice might be seen less as a personal slight than an institutional reality.

One possible safeguard against leaving the national courts entirely without guidance would be to retain the obligation currently resting on the Court under Article 234, paragraph 3, to deliver a preliminary ruling in response to a request from a national court of last resort.[99] This would effectively give the Court a discretionary jurisdiction over preliminary references from the lower national courts and a mandatory jurisdiction over references from national courts of last resort. Under this approach, however, the Court's ability to define its agenda—the very essence of *certiorari*—would be partially lost and its caseload only partially reduced. A further objection is the lack of political appetite, manifest at IGC 2000, for the drawing of distinctions between national courts of first and last resort.[100] A distinct but related concern is that the national courts in the candidate countries should not be deprived of the Court of Justice' guiding hand in developing their Community credentials. Given the spectre of on-going enlargement, it might be prudent to establish transitional arrangements that would allow new judicial entrants full and automatic access to the Court of Justice for an initial period following accession.

The third concern is the risk that filtering preliminary references would bring some measure of uncertainty to the legal system. Uncertainty might surface in a number of guises, whether practical or doctrinal. Even assuming that the Community courts were ready to take the plunge, the success of a European *certiorari* would depend on several practical imperatives, such as efficiency in the screening of petitions, consistency and transparency in the exercise of the Court's discretion, and diligence and care in the formulation of requests by the national courts. The need to preserve the unique features of the Community system would also give cause for concern. Ce*rtiorari* might alter the judicial dynamic insofar as it would allow judges to bring their personal and policy preferences to bear on the shaping of the Court's docket; the persona of the individual justice, so a much a feature of the Supreme Court culture, is markedly absent on the collegiate Kirchberg. In addition, some accommodation would be required to safeguard the Community's formidable linguistic regime.

The most ominous cloud of uncertainty, however, is the potential threat a European *certiorari* could pose to the consistent application of Community

[99] A suggestion offered by Koopmans, at 29-30.

[100] One proposal that made little headway at IGC 2000 was to limit, or remove altogether, the right of lower national courts to refer.

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law throughout the member states. Whereas consistency is also a basic principle in the application of federal law in the United States, that judicial system has safeguards that the Community lacks, notably, lower and intermediate federal courts. *Certiorari* enthusiasts would respond that close supervision of the national courts is no longer a necessity and that a discretionary jurisdiction would strengthen rather than weaken the Court's ability to steer the course of Community law. Arguably, increased flexibility and decentralisation in the judicial system would facilitate the percolation of legal discourse through the national courts (both within the Member States and, eventually, between the Member States) and leave to the Court of Justice the resolution of fresh and defining Community controversies. But whether the Community system is sufficiently mature to reap these benefits remains an open question. Writing in 1991, former Judge Koopmans commented:

> When compared to Community law, American constitutional law is a traditional and stabilised system; it was so, at any rate, when *certiorari* was introduced. In comparison, the very foundations of Community law are still being established. Consequently, it is not always easy to predict whether a certain case can ultimately contribute to the further growth of the Community legal system. Judgments which, taken in isolation, may look somewhat innocuous, sometimes turn out to constitute the basis for a completely new chapter of the Court's case law. Under a *certiorari* system, there would be every possibility that cases of this kind would not, at first sight, look interesting enough to be taken by the Court.[101]

The maturing of the Community judicial system during the intervening decade has softened but by no means muted this concern. At the end of the day, the success of a European *certiorari* would turn, not on its application in limited cases (or even categories of cases) but rather on the benefits it would bring to the judicial system overall. In the United States, *certiorari* operates as an efficient and cost-effective means of handling the Supreme Court's docket given the enormous number of cases referred annually for review. Whether the business of the Community courts has reached a stage where the benefits would outweigh the burdens is an open question. But if that day is not here, it cannot be not too far hence, a reality recognised by Judge Koopmans.[102] The Court of Justice may not yet be the magnet for the range and depth of legal controversies drawn to the Supreme Court but it exercises a comparable degree of centripetal force within its own sphere of influence.

[101] Koopmans, at 30 (citations omitted).

[102] Ibid, at 31: '[I]t may be necessary to have a second look at the problem after some time, in particular when delays for getting an answer to questions for preliminary rulings will again begin to increase. The moment may come that the disadvantages inherent in *certiorari* systems are less important than those resulting from the existing situation.'

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IV. CONCLUDING REMARKS

On the basis of the foregoing, a strong case may be made in favour of the introduction of a *certiorari* or leave to appeal mechanism in relation to appeals from the CFI to the Court. The need for some such mechanism, while perhaps not yet pressing, will grow exponentially with the projected increases in Community litigation.

Far greater caution is required in relation to preliminary references where the benefits of filtration are balanced, if not outweighed, by credible objections in terms of policy and procedure. Although the complexity of the task gives reason for pause, it does not justify dismissing the concept out of hand. In truth, at this stage of Community development, there are no easy answers to the preliminary reference conundrum. The theoretical benefits of a European *certiorari* justify a closer look, particularly in relation to the practical steps that might be taken to facilitate and optimise such a procedure within the Community framework. Much will depend, however, on whether the Treaty of Nice's promised preliminary reference jurisdiction for the CFI is realised in practice and, if so, how the jurisdiction is shared between the two courts. An extensive or even respectable command of preliminary references by the CFI would effectively render redundant any proposal to filter the preliminary reference caseload of the Court of Justice.[103]

The results of IGC 2000 make plain the lack of political appetite for a European *certiorari* or, indeed, for dramatic reform. It cannot be gainsaid, however, that the Nice reforms, standing alone, are too modest to guarantee effective, lasting solutions to the present workload crisis, much less to equip the courts for future challenges, including enlargement and, potentially, the defence of the Charter of Fundamental Rights. Only time will tell whether the Treaty of Nice will pave the way for the lasting administration of justice or condemn courts and litigants alike to continued gridlock. In either event, the pressure for further reform must be maintained.

[103] A reduced preliminary reference caseload for the Court of Justice would in itself remove the need for a filter. Depending on the nature of preliminary references over which the CFI exercises jurisdiction, it might be incongruous to provide the national courts with automatic access to the CFI but limited access to the Court of Justice. Nevertheless, a discretionary jurisdiction for the CFI would be a non-starter for several reasons, not least because *certiorari* is feted as a boon to the Court of Justice's uniquely constitutional mandate.

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