The Right of Appeal to the Community Courts – Hurdles and Opportunities

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Table of Contents

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A. Introduction

The right of appeal to the Court of Justice of the European Communities (hereafter: ECJ), not to mention its twin brother, the appeal to the Court of First Instance of the European Communities (hereafter: CFI), is still a newcomer amongst the legal remedies in EU law. Both provide a second chance to have a judicial decision reviewed. Yet their purpose, scope and procedural rules are not always fully understood, either out of ignorance or sometimes even deliberately. The purpose of the present article is to critically assess the various procedural hurdles and, by the same token, highlight the opportunities provided by these legal remedies.

I. The past – the legislature's choices

During its first three decades the European integration was mainly in the hands of the legislature and the judiciary: At a rather early stage the ECJ created *inter alia* a number of specific fundamental principles, such as supremacy and direct effect. In the meantime the legislature was busy adopting first generation secondary legislation in order to fill out the multitude of areas covered by the various Treaties, essentially the EC Treaty. By contrast, primary law, including those provisions governing the European judicial system, remained literally unchanged.

During the last twenty years, however, the judicial system underwent major changes: It all began in 1986 when the "European Single Act" provided *inter alia* the basis for a further judicial instance, the CFI, and a right of appeal to the ECJ, limited to points of law. Both were implemented in 1989. Subsequently, the gradual extension of the CFI's jurisdiction and the ensuing substantial increase of cases brought before it inevitably generated the need for improving the CFI's conditions of operation. This issue and the ECJ's equally high workload were finally addressed in the context of the Treaty of Nice[1]. It resulted *inter alia* in a legal basis for the creation of a third judicial layer, composed of "judicial panels" and the possibility of an appeal to the CFI. It took another five years until the first of such panels, the "European Union Civil Service Tribunal" (hereafter: Civil Service Tribunal) was created. It became operational some twelve months ago and a number of its decisions have since been challenged at the CFI[2].

II. Appeals in the daily practice – turning procedural rules into empty words?

Gradually the right of appeal to the ECJ has become an important legal remedy. The proportion of CFI decisions appealed varies between roughly a quarter and a third.[3] In the meantime the ECJ has handed down well over 700 appeals decisions, thereby shedding more light on the rather arid and somewhat unfamiliar provisions governing the appeals procedure. By the same token, the ECJ's appeal judgments and in particular its orders are something like a negative record: No other legal remedy suffers from so many infringements of its procedural rules, in such a chronic way. Even European institutions, which lodge comparatively few appeals[4], get it wrong sometimes[5].

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1 Which entered into force on 1st February 2003.

2 While the ECJ's website provides a helpful "numerical access" to *inter alia* all cases pending at the ECJ and the CFI the appeals cases are difficult to detect, as the relevant case numbers do not bear the commonly used "P"-letter.

3 See *Jacobs*, Recent and ongoing measures to improve the efficiency of the European court of Justice, [2004] European Law Review, Vol. 29 No. 6, p. 826.

III. The future – towards a limitation of appeals?

Parts of the debate preceding the Treaty of Nice turned on the likely effects of the then forthcoming major enlargement of the EU on the workload of the ECJ and the need for reform of the EU's judiciary. One of the issues was the need to curb the number of appeals through appropriate filtering mechanisms – but so far these discussions have never led to any tangible result. Today, seven years later, while the first appeals are pending at the CFI, the same questions arise (see D. hereafter).

B. The right of appeal to the ECJ

I. Introduction

The creation of the right of appeal to the ECJ was never an end in itself. Rather, it is something like a "by-product" of the creation of the CFI[6]. Thus, understanding the causes for the creation of such a right starts by looking at the reasons for establishing the CFI, which were political, rather than legal: The European Community[7] is "based on the rule of law in which its institutions are subject to judicial review of the compatibility of their acts with the Treaty"[8]. This does not, however, mean that the European Community was *de jure* obliged to create a multi stage judicial system: Article 6 ECHR merely guarantees the access to judicial protection, but remains silent as to the number of judicial instances. Thus, the reasons for the creation of the CFI were mainly political: The idea was to both reduce the ECJ's workload by enabling it "to concentrate its activities on its fundamental task of ensuring uniform interpretation of Community law"[9] and improve the judicial protection of individ-

4 Many of which are successful, see e.g. Case C-312/00 P, *Commission/CAMAR a.o.*, [2002] ECR I-11355; Case C-142/00 P, *Commission/Nederlandse Antillen*, [2003] ECR I-3483; Case C-111/02 P, *Parliament/Reynolds*, [2004] ECR I-5475; Case C-198/03 P, *Commission/CEVA*, [2005] ECR I-6357; Case C-78/03 P, *Commission/Aktionsgemeinschaft Recht und Eigentum*, [2005] ECR I-1737; Case C-373/04 P, *Commission/Alvarez Moreno*, [2006] (not yet published in the ECR).

5 See e.g. the Commission's cross-appeal in Case C-346/90 P, *France/Commission*, [1992] ECR I-2707, para. 18; Case C-153/99 P, *Commission/Giannini*, [2000] ECR I-2905, para. 13; Case C-236/03 P, *Commission/CMA CGM a.o.*, [2004] (not yet published in the ECR), para. 25, 26, 43, 49.

6 See the former Article 168a ECT.

7 Regarding the European Union see third recital and Article 6 (1) and (2) of the Treaty on the European Union.

8 Case C-50/00 P, *Unión de Pequenos Agricultores/Council*, [2002] ECR I-6677, para. 38 and 39.

9 See 4th recital of Council Decision 88/591/ECSC, EEC, Euratom: Council Decision of 24 October establishing a Court of First Instance of the European Communities, OJEC L 319, 25.11.1988, p. 1-8.

uals at first instance "in respect of actions requiring close examination of complex facts"[10]. This generated the need for a legal remedy designed to ensure the uniform interpretation of Community law.

II. Missed opportunities?

1. Late implementation

No one could have seriously expected the Member States to establish a multi stage judicial system in the early years of the Common Market, as it was then called. At the time, and still today the vast majority of international judicial bodies, such as the European Court of Human Rights[11], the International Court of Justice[12], the International Tribunal for the Law of the Sea[13], etc., comprise only one instance. The International Criminal Court is a specific exception, which has an appeal on points of fact.[14] But even in the absence of such precedents, there were a number of reasons for acting earlier than in 1986:

Firstly, the issue of the ECJ's workload and its repercussions e.g. in terms of duration of proceedings existed well before that date. Already in the 1980s a referral procedure took an average of 12 months.[15]

Secondly, there was never much justification for entrusting the ECJ with peripheral matters such as staff cases. It was clear that their number was bound to increase over the years, as a result of enlargements and also due to the fact that the rules on costs applying to staff cases were "official-friendly"[16]. In 1974 already, the Council anticipated this evolution and advocated the creation of a special Court for staff cases.[17] In 1978 the Commission put forward such a proposal,[18] which failed in the early 1980s.[19] The ECJ itself reflected on the need to create a Court of first instance

10 See 5th recital of Council Decision 88/591/ECSC, EEC, Euratom, ibid.

11 See Article 44 (2) ECHR.

12 See Article 60 of the Statute of the ICJ.

13 See Article 33 of the Statute of the International Court of the Law of the Sea.

14 See Article 83 of the Statute of the International Criminal Court.

15 See "Report by the working party on the future of the European Communities Court System", (2000), p. 7, (hereafter: "Due"-Report). This duration needs to be added to the duration of the national procedure.

16 See Article 88 CFI Rules of procedure.

17 See *Jung* in: von der Groeben/Schwarze, Vertrag über die Europäische Union und Vertrag zur Gründung der Europäischen Gemeinschaft, [2004], Articles 224-225, para. 6.

18 See Commission's proposal in OJEC C 225, 22.9.1978, p. 6.

19 See *Bülow*, Überlegungen für eine Weiterentwicklung des Rechts der Gemeinschaftsgerichtsbarkeit, [1980] Europarecht, Vol. 15, p. 315/316.

for certain categories of cases, such as competition and extra-contractual liability matters.[20] But in the end there was, apparently, not sufficient political will to go any further.

Thirdly, the current success rate of appeals seems to indicate that some of the judgments the ECJ has handed down during its 30 years as a single judicial body would have been set aside had there been the possibility of an appeal: Today, approximately 15 percent of all appeals are successful.[21] There is no reason to minimise this figure, as some tend to do.[22] On the contrary, it reflects a relatively high rate of errors, bearing in mind that these cases were heard by three and, in many instances, five CFI-judges.

The reason behind the Member States' slow reaction could be a fear that the European judicial system might develop into a much too complex system.[23] Lastly, there clearly was and still is a certain reticence to provide the European Community with too many symbols typical of a State. Any future initiative to reshape the European judicial system can hardly afford to simply ignore these parameters.

2. Was it imperative to limit the appeal to points of law?

The official reason for limiting the appeal to points of law[24] is that the ECJ operates as "the supreme court within the legal system" and that it was thus "necessary to make certain that the Court of Justice was not compelled, on appeal, to re-examine the facts already established by the Court of First Instance"[25]. But does this status necessarily rule out any review on points of fact, even if strictly limited?

a) Reasons for extending the ECJ's review to issues of fact

There are a number of reasons for extending, in principle, the ECJ's review to the facts found or assessed by the CFI: If it is acknowledged that there is a genuine risk of errors on points of law, which is why the appeal was created in the first place, why would there be no risk of getting it wrong when it comes to issues of fact? Moreover, in some areas of EU law, such as competition, the facts tend to be both numerous and complex, while the purely legal aspects are often less demanding. It

20 See *von der Groeben/Schwarze*, op. cit., fn. 17, para. 6.

21 See statistics in *Sonelli*, Appeal on points of law in the Community system – a reviw, [1998], Common Market Law Review, Vol. 35, No. 4, p. 872.

22 Ibid.

23 This term is taken from the article of *van Gerven*, The Role and Structure of the European Judiciary now and in the future [1996] European Law Review, Vol. 21, No. 3, p. 217.

24 See Article 225, para. 1, ECT.

25 See AG *Tesauro's* Opinion in Case C-132/90 P, *Schwedler/Parliament*, [1991] ECR I-5756, para. 2.

also needs to be stressed that most of these cases involve very substantial economic interests. It thus appears rather imbalanced, at least with respect to this category of cases, to limit the assessment of the facts to a single instance, the CFI, while questions of law can be reviewed on appeal by the ECJ. Consequently, even though not each and every error on facts has a bearing on the legal characterisation it seems appropriate and justified to extend the ECJ's review to points of fact, at least in principle. The question, however, is to what extent.

b) Limits

It should be clear from the outset that extending the scope of an appeal to points of fact cannot result in a full retrial of the first instance. Such enhancement of the individual's judicial protection would be at the price of a substantial increase of the ECJ's workload, while the CFI and the appeals procedure were created to achieve the opposite effect. The risk is also that in the end the ECJ might be no longer able to hand down its decisions within a reasonable period of time.[26] However, its workload is unlikely to increase significantly, if the appellant's right to contest the facts was strictly limited to those factual findings and assessments which are both mentioned in the CFI's decision and relevant for the legal characterisation.

III. The procedural rules governing the appeal – a series of stumbling blocks

1. Introduction

Procedural rules are something like the backbone of all contentious proceedings: Ignoring or misunderstanding them can make the best arguments on substance worthless. This has become increasingly relevant with respect to appeals, since the CFI became gradually competent to hear all direct challenges lodged by natural and legal persons,[27] including trade-mark and Community plant-variety rights litigation.[28] That said, the procedural rules governing the appeal to the ECJ are not a masterpiece of transparency.

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26 Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P, C-251/99 P, C-252/99 P and C-254/99 P, *Limburgse Vinyl Maatschappij a.o./Commission*, [2002] ECR I-8375, para. 179.

27 See in particular Council Decision 93/350, ECSC, Euratom: Council Decision of 8 June 1993 amending Council Decision 88/591/ECSC, EEC, Euratom establishing a Court of First Instance of the European Communities, OJEC L 144, 16.6.1993, p. 12-22; Council Decision 94/149/ECSC, EC, Euratom: Council Decision of 7 March amending Decision 93/350/Euratom, ECSC, EEC amending Decision 88/591/ESCS, EEC, Euratom establishing a Court of First Instance of the European Communities, OJEC L 66, 10.3.1994, p. 29.

28 Council Reg. No. 40/94, OJEC L 11, 14.1.1994, p. 1, as amended by Reg. No. 3288/94, OJEC 1994, L 349, 31.12.1994, p. 83; Council Reg. No. 2100/94, OJEC 1994, L 227, 1.9.1994, p. 1, as amended by Council Reg. No. 2506/95, OJEC L 258, 28.10.1995, p. 3.

First, the term "appeal" is a bit unfortunate as in English[29] and to a lesser extent in German[30] it is also used as a generic expression covering various kinds of contentious proceedings before the CFI and the ECJ[31] as well as administrative, i.e. pre-contentious, complaints.[32] Next, the relevant rules are scattered over three legislative sources: the EC-Treaty[33], the Statute of the ECJ[34] and the rules of procedure of the ECJ[35]. Thus, they are not always easy to find. Moreover, the appeal is one of the few legal remedies which is governed by a combination of general provisions (see 2.) below) and a catalogue of specific rules. Thus, the ECJ, albeit at a rather late stage, decided to publish "practice directions"[36] and, more recently, an update of its "Notes for the guidance of Counsel"[37], in order to prevent the more recurrent errors regarding the relevant procedural rules.

2. General procedural rules

The general procedural rules governing appeals include those mentioned in Articles 112 (1)[38], 115 (2) and 118 of the Rules of procedure. On the whole they do not pose particular problems in practice. By contrast, some of the more specific rules tend to be a hurdle to many and will thus be analysed in 3.-12. below.

3. Time-limit

An appeal may be brought before the ECJ within two months of the notification of the judgment or order[39] appealed against[40], to which a deadline of 10 days on

29 The French expression ("pourvoi") is more explicit.

30 Confusions occur between the word "Rechtsmittel" and the genuinely generic expression "Rechtsbehelf".

31 See e.g. Articles 230 and 233 ECT.

32 See e.g. Article 66 of Decision No. 9/2005 of the ACP-EC Committee of Ambassadors of 27 July 2005 concerning the Staff Regulations of the Centre for the Development of Enterprise (CDE), OJEC L 348, 30.12.2005, p. 54.

33 See Article 225 ECT.

34 See Articles 56-61 ECJ Statute. The Treaty of Nice merges the EC and the Euratom Statute.

35 See Articles 110-123 ECJ Rules of procedure.

36 See "Practice directions relating to direct actions and appeals", OJEC L 361, 8.12.2004, p. 15.

37 See www.curia.eu.int.

38 Limited to §§ 2 and 3 of Article 38; See Case C-294/98 P, *Metsä-Serla a.o./Commission*, [2000] ECR I-10079, para. 15.

39 E.g. in interim proceedings.

40 See Article 56 (1) ECJ Statute.

account of distance is to be added.[41] The latter even applies if the party has its habitual residence in Luxemburg.[42] In the case of a CFI decision dismissing a third party's application to intervene the deadline for an appeal is only two weeks.[43] However, no right shall be prejudiced in consequence of the expiry of the time-limit if the party concerned proves the existence of unforeseeable circumstances or of *force majeure*[44]. Hardly any appellants[45] have missed the time-limit for appeals, by contrast to certain other applications to the CFI[46] and the ECJ[47]. Thus, the issues raised in this respect are essentially of a practical nature. Given their importance it appears useful to enumerate some of them:

Regarding the date of notification of the CFI's decision which is appealed against, a lawyer should never provide the ECJ's registrar with wrong or misleading information, as the postal receipt indicates that date.[48] Whenever travel plans are likely to interfere with the signing of the appeal, the lawyer who has the power of attorney should prepare a last page indicating the order sought and bearing his signature. Any signing by a partner, who is not entitled to plead in one of the Member states is likely to result in the appeal being rejected.[49]

In any event, all appellants should keep in mind, that they remain entitled, until the last day of the time-limit, to withdraw a first document instituting appeal proceedings in order to replace it, within the same period, by a new version of that document.[50]

4. Interest in bringing the proceedings

This condition, which the ECJ examines *ex officio*[51] with respect to both the appeal as a whole and the individual legal pleas[52], raises no particular problems either: The

41 See Article 81 (2) ECJ Rules of procedure.

42 This was different under the previous rules, see Case C-245/95 P, *Commission/NTN Corporation and Koyo Seiko*, [1998] ECF I-426, para. 20-23.

43 See Article 57 (1) ECJ Statute.

44 See Article 45 (2) ECJ Statute.

45 The only known exception is Case C-369/03 P, *Forum des migrants/Commission*, [2004] ECR-1981.

46 See e.g. Case T-126/00, *Confindustria a.o./Commission*, [2001] ECR II-95; Case T-124/98, *Corrado Politi/European Training Foundation*, [1999] ECR-SC IA-9, II-29.

47 See e.g. Case C-406/01, *Germany/Council and Parliament*, [2002], ECR I-4561.

48 See Case C-7/99 P, *Campoli/Commission*, ECR I-2680, para. 3.

49 See Case T-37/98, *Foreign Trade Association a. o./Council*, [2000] ECR II-373.

50 Case C-274/00 P, *Simon/Commission*, [2002] ECR I-6013, para. 29-30.

51 See Case C-19/93 P, *Rendo a.o./Commission*, [1995] ECR I-3336, para. 13; C-241/00 P, *Kish Glass/Commission*, [2001] ECR I-7760, para. 20; Case C-50/00 P, *Unión de Pequeños Agricultores/Council*, op. cit., fn. 8, para. 21; Case C-277/01 P, *Parliament/Samper*, [2003] ECR I-3033, para. 28.

appellant has an interest in bringing proceedings if the appeal is likely, if successful, to procure him an advantage.[53] By contrast, the appellant has no such interest if an event subsequent to the judgment of the CFI, e.g. a decision of the administration, removes the prejudicial effect thereof as regards the appellant.

5. Who may lodge an appeal?

By contrast to the above, some of the rules determining the rights of the parties, the interveners, and in particular the Member States and institutions, raise question marks:

a) Parties

An appeal may be brought by any party which has been unsuccessful, "in whole or in part, in its submissions" before the CFI.[54] *Prima facie* this seems to be a rather simple test. It is, however, not merely a matter of analysing the operative part of the CFI's decision, as the wording of the provision seems to suggest:[55]

An appellant is also considered to be partly unsuccessful if the operative part of the CFI's judgment gives him full satisfaction, while the grounds of the contested judgment give him only partial satisfaction.[56] Thus, the Commission was entitled to appeal a judgment by which the CFI rejected an application against a Commission decision as inadmissible, on the grounds that the challenged decision is "non existent", due to major procedural defects.[57] An institution's appeal is also admissible if the CFI declares an application admissible but unfounded, while the institution had raised a plea of inadmissibility.[58]

It is also easily overlooked that a defendant may not only seek to dismiss, in whole or in part, the appeal, but may also seek to set aside, in whole or in part, the decision of the CFI[59]. Such a "cross-appeal"[60], which needs to be integrated into the

52 See Case C-277/95 P, *Lenz/Commission*, [1996] ECR I-6110, para. 46.

53 See Case C-111/99, *Lech Stahlwerke/Commission*, [2001] ECR I-727, para. 18; Case C-82/04 P, *Audi/OHIM*, [2006] (not yet published in the ECR), para. 20.

54 See Article 56 (2) ECJ Statute.

55 As AG *Mischo* rightly points out in Case C-73/97 P, *France/Comafrica a.o.*, [1998] ECR I-188, para. 12.

56 Case C-383/99 P, *Procter&Gamble/OHIM*, [2001] ECR I-6251, summary point 1.

57 Case C-137/92 P, *Commission/BASF a.o.*, [1994] ECR I-2555 et seq.

58 Case C-73/97 P, *France/Comafrica a.o.*, op. cit, fn. 55.

59 See Article 116 (1) ECJ Rules of procedure.

60 Expression commonly used by the ECJ, but not contained in the Rules of procedure.

defendant's response and thus lodged within the time-limit of two months[61], may be used to question parts of the judgment unaffected by the appeal.[62] It is, however, not an autonomous legal remedy in that it loses its object in case the appeal is withdrawn, turns out to be inadmissible or loses its object.

b) Interveners

In this respect the procedural rules follow the same logic as Article 230 (4) ECT: Interveners other than Member States and the institutions[63] may bring an appeal only "where the decision of the Court of First Instance directly affects them"[64]. Furthermore, they must "show a direct, present interest in seeing those forms of order granted"[65]. Thus, individuals who can establish only an indirect interest in the result of the case by reason of similarities between their and one of the parties' situation, will not be admitted.[66] However, interveners before the CFI are regarded as interveners in the appeal before the ECJ. They do not have to submit a fresh application to intervene before the ECJ,[67] which would be rejected as inadmissible.[68]

Another particularity is that the interveners must, in the absence of any express limitation such as the one existing for the intervention in proceedings before the CFI, be able to raise pleas relating to any point of law on which the contested judgment is based.[69]

It is unclear however, whether an intervener may lodge a cross-appeal if the main party, which it helped at first instance, has partially lost, but limits itself to requesting the dismissal of the appeal, i.e. without lodging itself a cross-appeal: On the one hand, Article 40 (4) ECJ Statute, which provides that the intervention is limited to supporting the form of order sought by one of the parties, seems to plead against such right. But on the other hand, Article 56 (2) ECJ Statute grants interveners, who are directly affected by the CFI's decision, the right to lodge an appeal indepen-

61 Article 115 (1) ECJ Rules of procedure.

62 Case C-136/92 P, *Commission/Brazzelli Lualdi a.o.*, [1994] ECR I-2016, para. 72.

63 Both of which are privileged, see. e.g. more recently case C-418/05 P, *ASAJA and others/Council*, [2006] (not yet reported in the ECR).

64 See Article 56 (2), 2nd sentence, ECJ Statute.

65 See Case C-76/93 P, *Scaramuzza/Commission*, [1993] ECR I-5716, para. 5 and 6; Case C-186/02 P, *Ramondín and Ramondín Cápsulas/Commission*, [2003] ECR I-2418, para. 7; Case C-130/06 P (I), *An Post/Commission*, [2006] ECR I-53, para. 8.

66 See case C-76/93 P, *Scaramuzza/Commission*, loc. cit., fn. 65, para. 11.

67 See Case C-244/91 P, *Pincherle/Commission*, [1993] ECR I-6996, para. 16.

68 See Case C-245/95 P, *Commission/NTN Corporation*, [1996] ECR I-554, para. 7-9; Case C-245/95 P, *Commission/NTN Corporation and Koyo Seiko Co.KG*, [1998] ECF I-426, para. 23.

69 Case C-390/95 P, *Antillean Rice Mills a.o./Commission*, ECR I-797, para. 21 and 22.

dently of the main party. This leads to the conclusion that interveners benefit from the right to lodge an autonomous cross-appeal which may, however, not go beyond the order thought by the main party in the first instance.

c) The questionable prerogatives of Member States and institutions

Unlike natural or legal persons, the Member States and institutions do not need to demonstrate that they are directly affected, nor do they have to have a direct interest when it comes to intervening in an appeals procedure. But they enjoy an even further-reaching right, laid down in Article 56 (3) ECJ Statute. It provides that any Community institution[70] or Member State[71], whether or not it was a party to the case at first instance, may bring an appeal against a decision of the CFI, even though none of the parties at first instance appealed. Such an appeal is "in the nature of an action brought in the interests of the correct interpretation and application of Community law"[72]. It is not merely an "interesting aspect"[73], but raises several question marks:[74]

Firstly, all proceedings at first instance involve an institution, mostly in the role of the defendant. If the institution concerned does not appeal against the CFI's decision, because it is of the opinion that there is no risk of inconsistent evolution of EU law, then why should a Member State be entitled to nevertheless lodge an appeal, i.e. *de facto* overrule the institution's decision.[75]

Secondly, the legislature excludes such autonomous rights to appeal in "disputes between the communities and their servants"[76], which are determined by the subject matter of the action,[77] because it accepts that insofar the individual interest prevails over the community interest. But why should this not be the case in other sectors, such as competition matters, which almost always involve considerable financial, i.e. individual interests? It is true that the legislature has provided a certain pro-

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70 See Case C-49/92 P, *Commission/Anic Partecipazione*, [1999] ECR I-4125, para. 171-172.

71 See Case C-73/97 P, *France/Comafrica a.o.*, op. cit., fn. 55.

72 As AG *Mischo* puts it in case C-73/97 P, *France/Comafrica a.o.*, op. cit, fn. 55, para. 14.

73 See *Kapteyn* and *VerLoren van Themaat*, Introduction to the Law of the European Communities, [1998], p. 267.

74 See also *Tizzano*, La Cour de Justice et l'Acte unique européen, in: Du droit international au droit de l'intégration: Liber Amicorum Pierre Pescatore, [1987] p. 720 and *Heffernan*, The Community Courts post-Nice: A European certiorari revisited, [2003], International and Comparative Law Quarterly, Vol. 52, p. 913.

75 See *B. Wägenbaur*, Das EU-Prozessrecht – gleiches Recht für alle?, [2007], Europäische Zeitschrift für Wirtschaftsrecht, (awaits publication).

76 See 1st sentence of Article 56 (3) ECJ Statute.

77 Case C-434/98 P, *Council/Busacca a.o.*, [2000] ECR I-8587, para. 21.

tection of the parties concerned since the ECJ "may, if it considers this necessary, state which of the effects of the decision of the Court of First Instance which has been quashed shall be considered as definitive in respect of the parties of the litigation"[78]. This provision, however, – provided it is used – merely mitigates the consequences of such appeal, without removing the question of principle.

Thirdly, it would be consistent with the Commission's role as the guardian of the Treaty[79] if it was granted an exclusive right of lodging an autonomous appeal. Besides, the current provision seems somewhat absurd in that it allows even the ECJ in its capacity as an institution,[80] to lodge an autonomous appeal, which the very same ECJ would subsequently hear.[81]

6. Scope of the appeal

Any potential appellant should also have a clear idea as to which decisions can be challenged by way of an appeal, bearing in mind that the ECJ examines this question of its own motion.[82]

a) Decisions open to appeal

Appeals may be brought "against final decisions of the Court of First Instance and decisions of that Court disposing of the substantive issues in part only or disposing of a procedural issue concerning a plea of lack of competence or inadmissibility"[83]. In addition decisions dismissing an application to intervene[84] and orders concerning interim proceedings[85] may be appealed as well, in the former case only by the potential intervener, not the main party. In both cases the appeal is, in principle, limited to points of law, as in the main proceedings.[86]

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78 See Article 61 (3) ECJ Statute.

79 See Article 211 ECT.

80 See Article 7 ECT.

81 See Article 18 ECJ Statute regulates conflicts of interest of Judges.

82 Case C-23/00 P, *Council/Boehringer*, [2002] ECR I-1873, para. 46.

83 See Article 56 (1) ECJ Rules of procedure.

84 See Article 57 (1) EJC Rules of procedure; e.g. Joined Cases C-151 and 157/97 P (I), *National Power and PowerGen/British Coal/Commission*, [1997] ECR I-3491 et seq.

85 See Article 57 (2) ECJ Rules of procedure.

86 See e.g. Case C-329/99 P (R), *Pfizer Animal Health/Council*, [1999] ECR I-8343, para. 60-61; Case C-300/00 P (R), *Federación de Cofradías de Pescadores et Guipúzcoa a.o./Council*, [2000] ECR I-8797, para. 31 and 32; Case C-233/03 P (R), *Linea GIG/Commission*, [2003] ECR I-7911, para. 34, 36-37.

b) Acts not open to appeal

All other decisions not fitting into this *numerus clausus* cannot be appealed:

aa) Purely internal decisions

The ECJ cannot review measures of organisation,[87] which have a predominantly internal effect such as the deferral of cases,[88] the modification of measures of organization of procedure,[89] the designation of an Advocate General,[90] the joinder of proceedings,[91] the possibility of referring a case at any time to the Court of First Instance sitting in plenary session[92], the wrongful transmission of procedural documents,[93] the adoption of appropriate measures of enquiry,[94] and of transferring the case to a given Chamber of the Court of First Instance.[95]

The same applies to those measures which seem to affect a party more directly, such as the CFI's decision to postpone the adjudication upon an objection of inadmissibility until the final judgement[96] or its order instructing the defendant to produce documents so that they can be placed in the case-file and made available to the other party.[97]

bb) Decisions on costs and legal aid

The operative part of a CFI decision regarding costs[98] and orders fixing the amount of recoverable costs[99] or regarding legal aid[100] cannot be appealed either. This is

87 See Case C-173/95 P, *Hogan/Court of Justice*, [1995] ECR I-4907, para. 15.

88 See Article 55 CFI Rules of procedure.

89 See Articles 49 and 64 (4) CFI Rules of procedure.

90 See Article 18 CFI Rules of procedure.

91 See Article 50 CFI Rules of procedure.

92 See Articles 11, 14 and 51, last sentence CFI Rules of procedure.

93 See Article 25(1) CFI Rules of procedure.

94 See Article 65(c) CFI Rules of procedure.

95 See Case C-173/95 P, *Hogan/Court of Justice*, op. cit, fn. 87, para. 11 and 15.

96 See Case C-126/90 P, *Bocos Viciano/Commission*, [1991] ECR I-781, para. 6.

97 See Case C-349/99 P, *Commission/ADT Projekt*, [1999] ECR I-6468, summary.

98 See Article 58 (2) ECJ Statute and Case C-264/94 P, *Bonnamy/Council*, [1995] ECR I-17, para. 14; Case C-253/94 P, *Roujansky/Council*, [1995] ECR I-9, para. 14; Case C-396/93 P, *Henrichs/Commission*, [1995] ECR I-2632, para. 66; Case C-49/69 P, *Progoulis/Commission*, [1996] ECR I-6804, para. 35; Case C-303/96 P, *Bernardi/Parliament*, [1996] ECR I-1241, para. 49.

99 E.g. Case T-132/01 DEP, *Euroalliages a.o/Commission*, [2006] (not yet published).

100 E.g. T-49/04 AJ, *Faraj Hassan/Council and Commission*, [2006] (not yet published).

undoubtedly justified as regards the former, as the operative part on costs merely reflects, ideally speaking, the judgment as a whole. By contrast, a CFI's decision to refuse a request for legal aid directly affects the person concerned in that it prevents him or her from acceding to justice – despite a right to effective judicial protection.[101] This highlights a structural problem of the EU's judicial system, as it stands: It does not provide a judicial complaint or similar legal remedy. Thus, any decision of the CFI, which does not match the specific requirements of the appeals procedure, is definite.

cc) Judgments by default

Lastly, it is not clear whether judgements by default[102] may be appealed against or are a matter for an application to set them aside.[103] Since the latter is merely an option for the person concerned, it would seem that it remains free to choose between an appeal and such application. An appeal against the CFI's decision on an application to set the judgment by default aside is in any event admissible.

7. The pleas in law – the potentially thorny backbone of every appeal

a) Introduction

The decision whether to lodge an appeal and the reflection on how to optimize its chances of success are important challenges, which raise a broad spectrum of questions. There are, however, a number of preliminary steps, which should not be underestimated either:

Every potential appellant needs to keep in mind that the first instance will generally seek to make its judgment or order as "appeal proof" as possible. For this purpose the CFI tends to base a given legal finding on both legal and factual arguments,[104] bearing in mind that the latter cannot be reviewed by the ECJ, or on several legal arguments.[105] It is, furthermore, vital to have a clear idea of the contents of the contested decision. Neither can the appellant afford an incorrect reading of a judgment[106] or an order[107], nor should his understanding in this regard be "mani-

101 See e.g. Case 222/84, *Johnston/Chief Constable of the Royal Ulster Constabulary*, [1986] ECR 1651, para. 17 and 18; Case T-111/96, *ITT Promedia/Commission*, [1998] ECR II-2937, para. 60; Case C-269/99, *Carl Kühne a.o.*, [2001] ECR I-9517, para. 57-58.

102 See Article 94 ECJ Rules of procedure.

103 See Article 41 ECJ Statute.

104 See e.g. Case T-320/02, *Esch-Leonhardt a.o./ECB*, [2004] ECR-SC II-79, para. 86 and 87.

105 See e.g. Case C-73/93 P, *Viho/Commission*, [1996] ECR I-5457, para. 22.

106 See e.g. Case C-137/95 P, *SPO a.o./Commission*, [1996] ECR I-1613, para. 39, 40, 43; Case C-293/95 P, *Odigitria/Council and Commission*, [1996] ECR I-6131, para. 17 and 24.

festly selective"[108]. Next, the appellant needs to be perfectly aware of the scope of the ECJ's review and the difference between points of law and issues of fact.

b) The scope of the ECJ's review

The ECJ's review of decisions of the CFI is limited by two important parameters:

Firstly, the right of appeal is limited to "points of law", irrespective of the nature of the judgment or order appealed against.[109] The legislature deemed this limitation so important that it created no less than three provisions to this effect[110] – which have not however, prevented many appellants from disregarding this particular rule (see c) below).

Secondly, the legislature has created three categories of legal grounds.[111] This *numerus clausus* is reminiscent of Article 230 (4) ECT and overlapping:

aa) Lack of competence of the CFI

The wording of Article 58 (1) ECJ Statute ("grounds of lack of competence") is slightly misleading, since it also covers cases in which CFI wrongly negated its competence.[112] That said, this legal ground is no longer relevant, since the CFI is now competent for all applications lodged by natural and legal persons. Besides, Article 54 (1) and (2) of the ECJ Statute allows referrals from the ECJ to the CFI and vice-versa in case of manifest "error of address" or where the CFI or the ECJ find that they have no jurisdiction.

bb) Breach of procedure

The broad wording of the second category ("breach of procedure" which "adversely affects the interests of the appellant") sounds promising, but there are two substantial limits.

Firstly, the procedural rule concerned must be designed to protect the interests of the appellant. This is particularly the case with rules guaranteeing procedural

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107 See Case C-268/96 P (R), *SCK and FNK/Commission*, [1996] ECR I-4973, para. 49.

108 See e.g. Case C-150/96 P, *Galtieri/Parliament*, [1996] ECR I-1230, para. 15.

109 See *Lasok*, The European Court of Justice, [1994], p. 472.

110 Explicitly in Articles 225 (1) ECT and 58 (1) ECJ Statute and implicitly in Article 112 (1) (c) ECJ Rules of procedure.

111 See Article 58 (1) ECJ Statute.

112 See e.g. Case C-253/94 P, *Roujansky/Council*, op. cit., fn. 98, para. 5 et seq.

rights.[113] Consequently, purely internal organisational measures, such as choosing the Advocate General, the chamber etc.,[114] do not come within this category. Similarly, the appellant cannot claim that the CFI committed a breach of procedure, if he either agreed with the measure at issue or did not make use of a legal remedy, even though he could have done so, e.g. rejecting a witness.[115]

Secondly, the abovementioned breach of procedure must have had an impact on the CFI's decision[116] or, at the very least, such ramification cannot be excluded.

cc) Infringement of community law

This is the general clause *par excellence* and thus the most important amongst the three categories. It covers infringements of literally all sources of EU law, ranging from primary and secondary legislation to fundamental rights, and general principles of law, such as the rights of defence[117] and the protection of legitimate expectations[118] etc.

c) Distinguishing points of law and issues of fact

aa) Introduction

It is not always easy to draw the dividing line between issues of fact and questions of law.[119] One would thus expect that the appellant would essentially err on the exact boundaries of this "grey zone"[120]. In practice however, the picture is different: Many appellants seek to contest clear cut findings and/or assessments of factual issues, even though this is evidently inadmissible.

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113 See Case C-185/95 P, *Baustahlgewebe/Commission*, [1998] ECR I-8485, para. 26 et seq.: the right to fair legal process within a reasonable period (para. 33); principles of unfettered appraisal of evidence and of the benefit of the doubt (para. 55); Case C-119/97 P, *Ufex/Commission*, [1999] ECR I-1341, para. 110: rejection the appellants' request to order production of a document; Case C-199/92 P, *Hüls/Commission*, [1999] ECR I-4336, para. 94 et seq.: refusing to reopen the oral procedure and to order measures of organisation of procedure and of inquiry.

114 See Case C-173/95 P, *Hogan/ECJ*, op. cit., fn. 87, para. 15.

115 See Case C-244/92 P, *Kupka Floridi/ECOSOC*, [1993] ECR I-1993, 2046.

116 See e.g. Case C-51/92 P, *Hercules Chemicals/Commission*, [1999] ECR I-4250, para. 86.

117 See e.g. Case C-480/99 P, *Gerry Plant a.o./Commission*, [2002] ECR I-265, para. 20.

118 See Case C-320/92 P, *Finsider/Commission*, [1994] ECR I-5697, para. 25 et seq.

119 There is unanimity in this respect, see e.g. AG *Jacobs* in Case C-53/92 P, *Hilti/Commission*, [1993] ECR I-669, para. 46; *Brown*, The first five years of the Court of first instance and appeals to the Court of Justice: assessment and statistics, [1995], Common Market Law Review, Vol. 32, p. 746; *Sonelli*, op. cit., fn. 21, p. 872.

120 Which is analysed in detail by e.g. *Lenaerts/Arts*, Europees Procesrecht, [1999] p. 399-406.

These infringements were not limited to the early years of the appeals procedure,[121] as one might have thought, but have become a chronic phenomenon. Much of this has to do with a certain degree of ignorance vis-à-vis this still rather new legal remedy. One of the reasons might be that even though the appeal is inspired from certain appeals in the Member States[122] it does not carry the "national terminology" such as the French expression "cassation" or the German "Revision". In some cases though, the lawyers seem to deliberately ignore these and other procedural rules, possibly because they would otherwise have to admit that there is not much to be put into their appeals. It is thus important to go into an in depth analysis of the difference between points of laws and issues of fact.

bb) Points of law

The points of law comprise four categories of errors which, by order of logic, rather than importance, are as follows:

aaa) First category

It comprises the rare cases in which the first instance applies a provision even though it is no longer in force, or has been declared void[123] or is otherwise not the right provision.[124]

bbb) Second category

The second category, still rather rare, covers cases in which the CFI infringes EU law. A common legal plea is the alleged infringement of Article 253 ECT if the appellant considers that the decision's reasoning is insufficient[125] or contradictory or otherwise inadequate.[126] But this requires a cautious approach.

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121 See *B. Wägenbaur*, Die Prüfungskompetenz des EuGH im Rechtsmittelverfahren, [1995], Europäsche Zeitschrift für Wirtschaftsrecht, p. 199 et seq.

122 See e.g. AG *Van Gerven's* Opinion in Case C-145/90 P, *Costacurta/Commission*, [1991] ECR I-5458, para. 3 and references in footnote 2.

123 See e.g. Case C-30/91 P, *Lestelle/Commission*, [1992] ECR I-3755, para. 15, 27.

124 See AG *Tesauro's* Opinion in Case C-132/90 P, *Schwedler/Parliament*, op. cit., fn. 25, para. 2.

125 See Case C-68/91 P, *Moritz/Commission*, [1992] ECR I-6849, para. 21-25; Case C-188/96 P, *Commission/V.*, [1997] ECR I-6575, para. 24; Case C-199/92 P, *Hüls/Commission*, op. cit., fn. 113, para. 66.

126 See Case C-13/99 P, *Team Srl./Commission*, [2000] ECR I-4686, para. 49; Case C-446/00 P, *Cubero Vermurie/Commission*, [2001] ECR I-10315; para. 20.

Primarily, the appellant has to make sure that the alleged insufficiency is not merely a drafting error, which does not justify the annulment of the contested judgment on that point.[127] The actual challenge is perhaps less easy to meet: It is true that the CFI must, in principle, reply to the arguments presented in the course of the procedure,[128] in particular in the case of an important argument.[129] However, the appellant should keep in mind that the obligation to state reasons does not require the CFI to provide an account that follows exhaustively and one by one all the reasoning articulated by the parties to the case. The reasoning may, therefore, be implicit on condition that it enables the persons concerned to know why the measures in question were taken and provides the competent court with sufficient material for it to exercise its power of review.[130] Similarly, the CFI cannot be required, every time that a party raises a new plea in law which clearly does not satisfy the requirements of Article 48 (2) of its Rules of Procedure, either to explain in its judgment the reasons for which that plea is inadmissible, or to examine it in detail.[131] Also, the CFI cannot, subject to its obligation to observe general principles and the Rules of Procedure relating to the burden of proof and the adducing of evidence and not to distort the true sense of the evidence, "be required to give express reasons for its assessment of the value of each piece of evidence presented to it, in particular where it considers that that evidence is unimportant or irrelevant to the outcome of the dispute."[132] The above is *a fortiori* the case of the judge hearing an application for interim measures (see 11) below): He cannot be required to reply explicitly to all the points of fact and law raised in the course of the interlocutory proceedings. It is sufficient that the reasons given validly justify his order in the light of the circumstances of the case and enable the ECJ to exercise its powers of review.[133]

ccc) Third category

This category comprises cases where the CFI applies the appropriate provision, but interprets it in an erroneous manner.[134]

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127 See Case C-326/91 P, *de Compte/Parliament*, [1994] ECR I-2139, para. 96.

128 See to this effect, Case C-259/96 P, *Council/De Nil and Impens* [1998] ECR I-2915, para. 32.

129 See Case C-197/99 P, *Belgium/Commission*, [2003] ECR I-8506, para. 127 et seq.

130 See Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland a.o./Commission*, [2004] ECR I-123, para. 372.

131 Joined Cases C-395/96 P and C-396/96 P, *Compagnie Maritime Belge Transports a.o./Commission*, [2000] ECR I-1365, para. 107.

132 See Case C-237/98 P, *Dorsch Consult/Council and Commission*, [2000] ECR I-4564, para. 51; Case C-330/00 P, *AICS/Parliament*, [2001] ECR I-4811, para. 37.

133 See Case C-148/96 P (R), *Goldstein/Commission*, [1996] ECR I-3885, para. 25; Case C-248/97 P (R), *Chaves Fonseca Ferrao/OHIM*, [1997] ECR I-4731, summary 4.

ddd) Fourth category

A further category of even greater significance consists of errors regarding the legal characterisation of facts. This was not clear from the outset. Advocate General *van Gerven*[135] was the first to stress that the term "point of law" also comprises the case "where a given set of facts is wrongly categorized in law"[136]. In its judgment the ECJ assessed the legal characterisation of facts, but did not explicitly confirm the AG's views. Only after a number of implicit confirmations[137] did the ECJ finally, in 1994, clarify this point explicitly.[138]

It is arguable, that the characterisation of facts covers an independent area of review, since it results in control over interpretation[139] (see ccc) above). But it should be treated as such, for the sake of clarity. The presumably worst error in this respect is the omission by the CFI to characterize a given plea, e.g. by not answering the plea advanced by the applicant and responding to a different plea which had not been raised by him,[140] or otherwise misunderstanding a given pleas meaning.[141]

The legal characterisation of facts is in the immediate vicinity of what appears to be a rather vast subject, i.e. "issues of fact". Here again, the potential appellant faces a number of hurdles, but also opportunities, since some aspects appear as issues of fact, while they are points of law and can thus be reviewed by the ECJ.

cc) Points of fact

aaa) Preliminary comments

The finding and assessing of facts cannot be challenged by way of an appeal, as this is a matter for the CFI (see bbb) and ccc) below). It is usually too late to reflect about these limits when the question of an appeal to the ECJ arises. The parties to an appeal need to be aware of this well before, i.e. while initiating proceedings at first instance. While this may sound obvious to some, it is very much ignored by many. It is thus appropriate to recall some basic rules in this respect:

134 See e.g. Case C-329/02 P, *SatellitenFernsehen/OHMI*, [2004], ECR I-8317, para. 37.

135 See AG *Van Gerven's* Opinion in Case C-145/90 P, *Costacurta/Commission*, op. cit., fn. 122, para. 3.

136 Closely followed by e.g. AG *Tesauro's* Opinion in Case C-132/90 P, *Schwedler/Parliament*, op. cit., fn. 25, para. 2.

137 See e.g. Case C-255/90 P, *Burban/Parliament*, [1992] ECR I-2268, para. 5 et seq.

138 Case C-136/92 P, *Commission/Brazzelli Lualdi a.o.*, op. cit, fn. 62, para. 49; Case C-470/00 P, *Parliament/Ripa di Meana a.o.*, [2004] ECR I-4167, para. 40-41; Case C-499/03 P, *Biegi Nahrungsmittel and Commonfood/Commission*, [2005] ECR I-1751, para. 40-41.

139 See *Sonelli*, op. cit., fn. 21, p. 885.

140 Case C-298/93 P, *Klinke/ECJ*, [1994] ECR I-3009, para. 20.

141 Case C-298/93 P, *Klinke/ECJ*, loc. cit., fn. 140, para. 24.

Firstly, the CFI can only legally characterise those facts, which are on the file. Thus the parties will have to concentrate on providing the CFI with all the relevant facts and appropriate evidence – bearing in mind that at the level of an appeal it is too late.

Secondly, the applicant to the CFI, *alias* the potential appellant to the ECJ, has to carry out this exercise within a rather tight time-limit: two months[142] plus ten days on account of distance[143] in the case of applications for annulment. Unless the applicant is an European official or temporary agent lodging a staff case[144] in which case the time-limit is three months[145] plus ten days on account of distance.

Thirdly, every applicant to the CFI should pay particular attention to the Judge-Rapporteur's report for the hearing:[146] Its purpose[147] is "precisely to present in summary form the elements of fact and law in the case and the pleas and arguments of the parties, and it is open to the parties before or during the hearing to ask for corrections to be made or to express reservations"[148]. Such corrections and reservations should always be put in writing, in particular when they relate to factual issues.

bbb) Finding the facts

The CFI is exclusively competent for finding the facts on which it bases its decision. That said, some aspects look very much like factual issues, while the ECJ considers them as points of law. Finding the facts is, by definition, a very important step in any judicial proceeding, given its bearing on the subsequent legal characterisation of facts. A single nuance can make the difference between winning and loosing a case. The CFI is exclusively competent for finding the facts, be it at the level of the written[149] or oral proceedings,[150] including in interim proceedings.[151] Thus, it is also a matter for the CFI to assess the evidence submitted by the parties.[152] Such general

142 See Article 230 (5) ECT.

143 See Article 102 (2) CFI Rules of procedure.

144 See Article 236 EC.

145 See Article 91 (2) of the Staff Regulations of EU officials.

146 See Article 35 (5) CFI Rules of procedure.

147 The European Union Civil Service Tribunal has opted for a "preliminary report for the hearing", which is much more succinct and thus of little value to the parties.

148 Case C-161/97 P, *Kernkraftwerk Lippe-Ems/Commission*, [1999] ECR I-2057, para. 58.

149 See e.g. Case C-416/04 P, *Sunrider/Ohim*, [2006] ECR I-4237, para. 49.

150 See e.g. Case C-151/03 P, *Meyer/Commission*, [2004] (not yet reported in the ECR), para. 39.

151 Case C-149/95 P (R), *Commission/Atlantic Container Line AB a.o.*, [1995] ECR I-2168, para. 17-18; Case C-148/96 P (R), *Goldstein/Commission*, op. cit., fn. 133, para. 22.

exclusion of review of evidence goes too far, however, since assessing evidence may prove to be necessary when verifying e.g. the CFI's competence or a procedural mistake.[153] Moreover, the ECJ may review if the evidence was duly obtained, the rules and general principles of law relating to the burden of proof[154] and standard of proof,[155] were observed, such as e.g. the presumption of innocence,[156] and also the rules of procedure in relation to the taking of evidence.[157]

Consequently, a party to appeals proceedings may not, e.g. request the ECJ to verify e.g. whether a natural person has suffered a financial or moral prejudice;[158] make offers of evidence in order to establish a given fact;[159] or request the ECJ to review the CFI's economic assessment or judgment, which is normally limited to verifying e.g. in competition cases, that the Commission is not guilty of any manifest error of appraisal or abuse of power.[160]

During the early years, the ECJ emphasised that an appeal excluded "any issue challenging the facts as established by the Court of First Instance"[161]. Consequently, it quasi systematically pointed its finger[162] at any direct or indirect attempt to challenge the CFI's findings.[163] Only sometimes the ECJ would leave it open, as to whether a given point is a legal or factual issue and add a legal argument to indicate that the plea is in any event unfounded.[164] That said, it has happened that the ECJ construed a point of fact as alleging an error of law.[165]

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152 See Case C-294/91 P, *Sebastiani/Parliament*, [1992] ECR I-4998, para. 13; Case C-190/04 P, *French a.o./Council and Commission*, [2005], (not yet published in the ECR), para. 13.

153 See in this respect Case C-480/99 P, *Gerry Plant a.o./Commission*, op. cit., fn. 117, para. 20.

154 Although it may have an impact on the CFI's findings re. facts, see Joined Cases C-2/01 P and C-3/01 P, *Bundesverband der Arzneimittel-Importeure/Commission*, [2004], ECR I-23, para. 61.

155 Which was the central issue in Case C-12/03 P, *Tetra Laval/Commission*, [2005] I-987.

156 See Case C-199/92 P, *Hüls/Commission*, op. cit., fn. 113, para. 65.

157 See Case C-136/92 P, *Commission/Brazzelli Lualdi a.o.*, op. cit, fn. 62, para. 66.

158 See e.g. Case C-257/98 P, *Luccacioni/Commission*, [1999] ECR I-5276, para. 34.

159 See Case C-396/93, *Henrichs/Commission*, op. cit., fn. 98, para. 14; Case C-199/92 P, *Hüls/Commission*, op. cit., fn. 113, para. 90.

160 See *Brown*, op. cit., fn. 119, p. 755 and the case comment on the *Hilti* case, by *Topping*, "Finally nailed down: the Hilti appeal to the ECJ" [1994] European Intellectual Property Review, Vol. 16, No. 12, p. 545.

161 See e.g. Case C-18/91 P, *V./Parliament*, [1992] ECR I-4008, para. 15.

162 *Hakenberg* and *Stix-Hackl*, Handbuch zum Verfahren vor dem Europäischen Gerichtshof, [2005], p. 104.

163 See e.g. Case C-378/90 P, *Pitrone/Commission*, [1992] ECR I-2375, para. 11-12; Case C-346/90 P, *France/Commission*, op. cit., fn. 5, para. 7-10 and 16-18.

164 See e.g. Case C-255/90 P, *Burban/Parliament*, op. cit., fn. 137, para. 24.

165 See e.g. Case C-35/92 P, *Parliament/Frederiksen*, [1993] ECR I-1023, para. 25.

ccc) Assessing / Appraising the facts

The CFI is, furthermore, exclusively competent for "assessing" or "appraising"[166] the facts[167] (hereafter: appraising). This means that any contesting[168] or putting into doubt[169] of such appraising at the level of an appeal is manifestly inadmissible. The meaning of "appraising the facts" is best illustrated by an example: Determining the marks achieved by an EU official during a given period is a matter of finding the facts. Determining whether these marks have improved as compared to those received for an earlier period is a matter of appraising the facts[170]. While "appraising" the facts is not the same as "finding" them, it is normally neither difficult nor really necessary to distinguish both, since the CFI is in any event exclusively competent.

By contrast, it is not always easy to determine whether a given part of the CFI decision is an appraisal of facts, and hence not challengeable, or a legal characterisation of facts, which is a point of law and can thus be reviewed by the ECJ (see bb) above): In the *SFEI* case the ECJ held that "in analyzing the contested letter as a document without legal effects, the Court of First Instance not only assessed the facts but also assigned to them a classification. The Court therefore has jurisdiction to examine this plea"[171]. This also means that the ECJ did not follow Advocate General *Lenz*, who viewed the CFI's analysis as an appraisal of facts, while rightly emphasising that the "dividing line between questions of fact and law is very difficult to draw" [172].

The difficulties resulting from this opacity do not, however, explain a certain lack of clarity in the ECJ's case law, which is reminiscent of the lacunas regarding the finding of facts (see bbb) (3) above): On the one hand, the ECJ emphasises that "an appeal may be based only on grounds relating to the infringement of rules of law, to the exclusion of any appraisal of the facts"[173]. Such wording clearly leaves no

166 The ECJ uses both expressions as synonyms.

167 See e.g. Case C-325/94 P, *An Taisce and WWF UK/Commission*, [1996] ECR I-3727, para. 28-29; Case C-416/04 P, *Sunrider/OHIM*, op. cit., fn. 149, para. 88; Case C-171/05 P, *Piau/Commission*, [2006] ECR I-37, para. 22.

168 See e.g. Case C-352/03 P, *Del Vaglio/Commission*, [2004] (not yet published in the ECR), para. 35-36; Case C-111/04 P, *Adriatica di Navigazione/Commission*, [2006] ECR I-22, para. 54.

169 See e.g. Case C-447/02 P, *KWS Saat/OHMI*, [2004] ECR I-10107, para. 34.

170 See Case C-115/90 P, *Turner/Commission*, [1991] ECR I-1423, para. 13.

171 Case C-39/93 P, *SFEI a.o./Commission*, [1994] ECR I-2701, para. 26.

172 See the Opinion of AG *Lenz* in Case C-39/93 P, *SFEI a.o./Commission*, loc. cit., fn. 171, para. 29 et seq.

173 Emphasis added, see Joined Cases C-241/91 P and C-242/91 P, *RTE and ITP/Commission*, [1995] ECR I-743, para. 67; C-91/95 P, *Tremblay a.o./Commission*, [1996] ECR I-5547, para. 14, 17; Case C-362/95 P, *Blackspur a.o./Council and Commission*, [1997] ECR I-4775, para. 16; Case C-59/96 P,

room for any exception. On the other hand, the ECJ handed down at least as many judgments in which it held that it may review an appraisal of facts "where the clear sense of the evidence has been distorted"[174].

ddd) Borderline cases – "manifest distortions of facts"

There are however, two specific circumstances which on the face of it concern issues of fact, but were considered by the ECJ, back in 1994, as being points of law. Both concern manifest "distortions of facts":

(1) Manifest distortions of the contents of documents

This comprises cases "where a substantive inaccuracy of the CFI's findings is apparent from the documents submitted to it"[175]. While the ECJ may thus review whether the CFI distorted the claims[176] or parties' arguments[177] contained in written submissions the supreme judicature never explicitly explained why it considers such "substantive inaccuracy" to be a point of law. Later the ECJ specified that such inaccuracy "must be obvious from the documents before the Court without its being necessary to undertake a fresh assessment of the facts"[178]. This means, in less abstract words, that it is a point of law if the CFI manifestly distorts a statement on facts contained in a written submission, i.e. application and statement of defence[179], or written reply to a question of the CFI.

Koelman/Commission, [1997] ECR I-4809, para. 31 and 33; Case C-149/98, *Toller/Commission*, [1998] ECR I-7623, para. 21; Case C-174/97 P, *FFSA a.o./Commission*, [1998] ECR I-1303, para. 21, 36, 39.

174 See Case C-390/95 P, *Antillean Rice Mills a.o./Commission*, op. cit, fn. 69, para. 29; Joined Cases C-280/99 P to C-282/99 P, *Moccia Irme a.o./Commission* [2001] ECR I-4717, para. 78; Case C-430/00 P, *Dürbeck/Commission*, [2001] ECR I-8547, para. 24; Case C-274/00 P, *Simon/Commission*, op. cit., fn. 50, para. 46.

175 See Case C-136/92 P, *Commission/Brazzelli Lualdi a.o.*, op. cit, fn. 62, para. 49; Case C-119/97 P, *Ufex/Commission*, op. cit., fn. 113, para. 66.

176 See Case C-412/92 P, *Parliament/Meskens*, [1994] ECR I-3757, para. 7 and 12.

177 See Case C-293/95 P, *Odigitria/Council*, op. cit., fn. 106, para. 33.

178 See Case C-265/97 P, *VBA/Florimex a.o.*, [2000], ECR I-2095, para. 139; Case C-266/97 P, *VBA/VBG a.o.*, [2000] ECR I-2158, para. 92.

179 Including a reply and rejoinder if such second exchange of submissions is granted by the CFI, see Article 47 CFI Rules of procedure.

(2) Manifest distortions of evidence

In *Hilti*[180] the ECJ held that it may also revise the CFI's appraisal of the evidence put before it where "the clear sense of that evidence has been distorted", thus rejecting the Advocate General's[181] more restrictive approach.

Even though this issue is about the scope of the ECJ's competence in appeals proceedings it did not, for a number of years, provide guidance as to what exactly is to be understood by a "clear distortion of the evidence"[182]. Only recently did it specify that the appellant "must indicate precisely the evidence alleged to have been distorted by that Court and show the errors of appraisal which, in his view, led to that distortion" [183]. It then added[184] that the distortion "must be obvious from the documents on the Court's file, without there being any need to carry out a new assessment of the facts and the evidence". In its recent *PKK* judgment[185], however, the ECJ loosened this strict standard, as suggested by Advocate General *Kokott*, by concluding that "there is such distortion where, without recourse to new evidence, the assessment of the existing evidence appears to be clearly incorrect". Even though this test is less rigid than the previous one it still requires a manifest error and thus rules out a detailed appraisal of the evidence, which is a matter for the CFI. The particular length of the assessment carried out in the *PKK* case[186] raises some doubt as to whether the ECJ remained within the limits of its newly defined test .[187]

(3) Examples of manifest distortions

Many appellants have pleaded one or the other category of manifest distortion of facts, but have frequently misinterpreted and/or wrongly applied these concepts. So far the successful cases can be divided into two categories:[188]

180 See Case C-53/92 P, *Hilti/Commission*, op. cit., fn. 119, para. 42.

181 See AG *Jacobs* in Case C-53/92 P, *Hilti/Commission*, op. cit., fn. 119, para. 46.

182 As rightly emphasised by *Topping*, op. cit., fn. 160, p. 545.

183 See Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland a.o./Commission*, op. cit., fn. 130, para. 50-51.

184 See Case C-116/03 P, *Fichtner/Commission*, [2004] (not published in the ECR), para. 34; C-551/03 P, *General Motors Nederland and Opel Nederland/Commission*, [2006] ECR I-3173, para. 54.

185 See Case C-229/05 P, *PKK and KNK/Council*, [2007], (not yet published in the ECR), para. 37.

186 See Case C-229/05 P, *PKK and KNK/Council*, ibid., para. 37-52.

187 See in this respect *B. Wägenbaur*, Bericht aus Luxemburg re. Case C-229/05 P, *PKK and KNK/Council*, [2007], Europäische Zeitschrift für Wirtschaftsrecht, p. 99.

188 See also *B. Wägenbaur*, Neuere Entwicklungen im Bereich des Rechtsmittelverfahrens, [2003] Europäsche Zeitschrift für Wirtschaftsrecht, p. 517 et seq.

The first category comprises cases in which the CFI either took account of the challenged decisions, but changed their respective contents/reasoning[189] or, worse, omitted to take account of an important part of the challenged decision:

– In *DIR International Film*[190] the ECJ ruled

> "that the contents of the contested decision was distorted. It was precisely that distortion which enabled the Court of First Instance to set aside the interpretation put forward by the Commission […]"[191]

– In *Belgium v Commission*[192] it held that:

> "By incorrectly identifying the SNCI and Belfin loans covered by the contested decision, the Court of First Instance therefore distorted the scope of the decision" [193]

– In *Commission v Trenker*[194] and seven parallel appeals all concerning interim proceedings,[195] the president of the ECJ, referring to the findings of the president of the CFI regarding the contents of the challenged decision, held the following:

> "Those findings are not based on even a cursory analysis of the statement of reasons for the contested decision as set out in Annex II to the decision, to which Article 2 refers."

The second category comprises genuine distortions of evidence:

– In *Parliament v Samper*[196], the ECJ held:

> "In the light of that fact, it appears that the finding, in paragraph 40 of the judgment under appeal, that, in its note of 27 November 1997, the appointing authority took the view that the decisive criterion for promotion was the level

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189 Further examples are Joined Cases C-172/01 P, C-175/01 P, C-176/01 P and C-180/01 P, *International Power e.o./NALOO*, [2003], I-11421, para. 156 and Joined Cases C-442/03 P and C-471/03 P, *P&O European Ferries [Vizcaya]/Commission and Diputación Foral de Vizcaya/Commission*, [2006], (not yet published in the ECR), para. 63 et seq.

190 See Case C-164/98 P, *DIR International Film Srl/Commission*, [2000] ECR I-468, para. 44, 48.

191 Not detected by the Advocate General.

192 See Case C-197/99 P, *Belgium/Commission*, op. cit., fn. 129, para. 67.

193 Thus following Advocate General *Léger*, loc. cit., cf. para. 120.

194 Case C-459/00 P (R), *Commission/Trenker*, [2001] ECR I-2823, para. 52.

195 See Case C-471/00 P (R), *Commission/Cambridge Healthcare Supplies*, [2001] ECR I-2865, para. 48; Case C-474/00 P (R), *Commission/Bruno Farmaceutici a.o.*, [2001] ECR I-2909, para. 50; Case C-475/00 P (R), *Commission/Hänseler*, [2001] ECR I-2953, para. 50; Case C-476/00 P (R), *Commission/Schuck*, [2001] ECR I-2995, para. 50; Case C-477/00 P (R), *Commission/Roussel and Roussel Diamant*, ECR I-3037, para. 50; Case C-478/00 P (R), *Commission/Roussel and Roussel Iberica*, [2001] ECR I-3079, para. 50; Case C-479/00 P (R), *Commission/Gerot*, [2001] ECR I-3121, para. 45.

196 See Case C-277/01 P, *Parliament/Samper*, op. cit., fn. 51, para. 40.

> of responsibility deployed, was made without reference to the context and distorts the contents of that note."

– And in *PKK and KVK v Council*[197], the ECJ concluded, that

> "the findings of fact in paragraphs 35 and 37 of the contested order are therefore incorrect and distort the clear sense of the evidence available to the Court of First Instance".

It appears from the above, that there is a certain degree of confusion regarding the terminology used with respect of these "border-line" cases: It has been stated that the *DIR and Belgium v Commission* cases contain "a change to the contents of the evidence"[198] and that the *Trenker* case (and the seven parallel cases) are about a "distortion of *evidence*"[199] (emphasis added). However, in all of these cases the ECJ held that the first instance distorted the contents of the decision respectively challenged. The latter, however, is clearly not a piece of evidence, i.e. a given document provided by the parties and designed to prove a factual statement, but the very object of the contentious procedure before the CFI.[200] Thus, it appears that the ECJ uses the term "evidence" in the non-technical sense of the word, which is rather confusing.[201] One way of removing the confusion would be the use of a generic expression, e.g. "manifest distortion of facts".

eee) Room for further exceptions?

So far the ECJ has resisted attempts to broaden its case law in the light of the national experiences regarding the "fact/law" distinction[202]: In *British Airways*[203], the Advocate General suggested that an "obvious infringement of the laws of logic" is also a legal ground. In *Hilti*[204] the Advocate General had similar views, but so far the ECJ did not accept this as a legal ground. The reasons for the ECJ's implicit refusal are a matter for speculation, but could be twofold: It might be of the opin-

197 See Case C-C-229/05 P, *PKK and KNK/Council*, [2007], (not yet published in the ECR), para. 53.

198 See Advocate General *Léger's* Opinion in Case C-57/02 P, *Acerinox/Commission*, [2005] ECR I-6689, para. 162, and Advocate General *Kokott's* Opinion in Case C-229/05 P, *PKK and KNK/Council*, [2006], (not yet published in the ECR), para. 43.

199 See *Jung* in: von der Gröben/Schwarze, op. cit., fn. 17, p. 411, para. 195, who erroneously refers to Case C-459/00 P (R), *Commission /Trenker*, fn. 194, as a "distortion of evidence".

200 Which needs to be annexed to every application; see Article 43 (1) CFI Rules of procedure.

201 See in this respect also *Hackspiel* in: Rengelin/Middeke/Gellermann, Handbuch des Rechtsschutzes in der Europäischen Union, [2003], p. 505, para. 28.

202 See *Sonelli*, op. cit., fn. 21, p. 872.

203 See Opinion of AG *Kokott* in Case C-95/04 P, *British Airways/Commission*, (not yet reported in the ECR), para. 83.

204 See Case C-53/92, *Hilti/Commission*, op. cit., fn. 119.

ion that the magistrates sitting at the CFI are of such high level[205] that they would simply never infringe the laws of logic, be it in an obvious way or otherwise. Besides, adding such infringement to the catalogue of legal grounds could be detrimental in terms of the CFI's and thus institution's image. More importantly, the ECJ could argue that there is no need for such legal ground, since an obvious infringement of the laws of logic will generally also result in an error of motivation, which can be reviewed by the ECJ.

fff) Other limits to the ECJ's jurisdiction

Appellants need also to bear in mind that it is not for the ECJ, when ruling on questions of law in the context of an appeal, to substitute, on grounds of fairness, its own assessment for that of the CFI exercising its unlimited jurisdiction to rule on the amount of fines imposed on undertakings for infringements of Community law.[206] Thus, the ECJ cannot verify whether a fine is proportionate in relation to the gravity and duration of the infringement as established by the CFI on completion of its appraisal of the facts.[207]

In contrast, the ECJ does have jurisdiction to consider whether the CFI has responded to a sufficient legal standard to all the arguments raised by the appellant seeking to have the fine abolished or reduced.[208] However, when the amount of the fines imposed is determined the exercise of unlimited jurisdiction must not result in discrimination between undertakings which have participated in a cartel contrary to Article 85(1) ECT.[209]

8. Drafting the appeal

a) Introduction

Before drafting the appeal the appellant should carefully read the "Practice directions relating to direct actions and appeals"[210] and "Notes for Guidance of

205 See Article 223 ECT.

206 See Case C-310/93 P, *BPB Industries and British Gypsum/Commission*, [1995] ECR I-865, para. 34; Case C-185/95 P, *Baustahlgewebe/Commission*, op. cit., fn. 113, para. 129; Case C-248/98 P, *KNP BT/Commission*, [2000] ECR I-9641, para. 54; Case C-359/01 P, *British Sugar/Commission*, [2004] ECR I-4933, para. 48; Case C-281/04 P, *Leighton a.o./Council and Commission*, [2005] (not yet reported in the ECR), para. 15-16.

207 See Case C-338/00 P, *Volkswagen/Commission*, [2003] ECR I-9189, para. 151.

208 See Case C-219/95 P, *Ferriere Nord/Commission*, [1997] ECR I-4411, para. 31.

209 See Case C-280/98 P, *Moritz J. Weig/Commission*, [2000] ECR I-9757, para. 63.

210 See OJEC L 361 of 8.12.2004, p. 15 et seq.

Counsel"[211] published by the ECJ. While the drafting of an appeal looks like a straightforward exercise, it nevertheless remains a challenge, in particular as regards the indication of the pleas in law and legal arguments (see d) below).

b) Indicating the name and address of the appellant

The appeal shall, as a first element, contain "the name and the address of the appellant"[212]. The ECJ is not formalistic in this respect: An appellant who indicates the city where his administrative offices are said to be based rather than the town where the company is established for the purposes of national law, commits an irregularity. But it is not substantial enough to make the appeal formally inadmissible.[213] That said, on a related subject, any potential appellant should know that he needs to be represented by a lawyer,[214] which means he cannot validly sign an appeal himself – even if he is a fully qualified lawyer.[215]

c) Indicating the names of the other parties

The obligation to indicate "the names of the other parties to the proceedings before the Court of First Instance"[216] is not a source of procedural mistakes either. And the ECJ is also not at all formalistic in this respect: Not indicating the names of the other parties to the proceedings before the CFI and not mentioning the date on which the judgment under appeal was notified to the appellant is not sufficient to render the appeal inadmissible.[217]

d) Indicating the pleas in law – yet another stumbling block

aa) Introduction

The appeal shall furthermore contain "the pleas in law and legal arguments relied on"[218]. This innocent looking provision is one of the procedural cornerstones of

211 Published in January 2007, see www.curia.europa.eu.

212 See Article 112 (1) (a) ECJ Rules of procedure.

213 See Case C-161/97 P, *Kernkraftwerke Lippe-Ems/Commission*, op. cit., fn. 148, para. 55.

214 See Article 19 (3) ECJ Statute.

215 See Case C-174/96 P, *Lopes/ECJ*, [1996] ECR I-6402 et seq.; Case C-175/96 P, *Lopes/ECJ*, [1996] ECR I-6410 et seq.; Case C-200/05, *Correia de Matos/Commission*, [2006], ECR I-43, para. 12 and the case law quoted.

216 See Article 112 (1) (b) ECJ Rules of procedure.

217 See Case C-91/95 P, *Tremblay a.o./Commission*, op. cit., fn. 173, para. 10-11.

218 See Article 112 (1) (c) ECJ Rules of procedure.

the appeals proceedings. A number of appellants underestimate it, others disregard it totally.[219] Understanding this provision requires an understanding of the appeal's ratio: It is a review by the ECJ of the legality of the CFI's decision. Thus, it is not a retrial, i.e. a re-examination of the application submitted before the CFI. It is in the light of this ratio that the ECJ has "put some flesh" on the otherwise laconic wording of Article 112 (1) (c) EJC Rules of procedure.

bb) Indicating which aspects of the contested CFI decision are criticised

This first requirement does not flow from the wording of Article 112 (1) (c), but is determined by the ratio of the appeals procedure: The appellant has to indicate those parts of the CFI's decision he intends to challenge, which means that he cannot expect the ECJ to investigate this *ex officio*. That said, the ECJ's case law regarding the exact extent of the appellant's obligation is slightly ambiguous: On the one hand the appellant has to "indicate precisely the elements of the contested judgment which it disputes"[220]. On the other hand the ECJ held, at least in some cases, that it does not matter if the appeal does "not formally identify on each occasion the precise points" of the contested decision, as long as the defendant is properly able to take a position on the arguments brought against it"[221]. In the same vein the ECJ accepted that an appeal challenges "by implication but clearly, the operative part of the judgment of the Court of First Instance"[222].

Against this background every potential appellant is well advised to opt for a cautious approach:[223] He should indicate exactly the paragraph(s)/parts of paragraphs containing the legal finding of the CFI's decision challenged by the appeal.[224] He should furthermore specify which legal ground relates to which of these paragraphs and also explain why, in his view, each legal ground is well founded (see cc) below).

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219 See e.g. Case C-114/03 P, *Piscioneri/Parliament*, [2004] (not yet reported in the ECR), para. 8; Case C-215/05 P, *Papoulakos/Italy and Commission*, [2006] ECR I-18, para. 9.

220 Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P, C-251/99 P, C-252/99 P and C-254/99 P, *Limburgse Vinyl Maatschappij a.o./Commission*, op. cit., fn. 26, para. 500; C-107/03 P, *Procter & Gamble/OHIM*, [2004] (not yet reported in the ECR), para. 34-35; Case C-279/02 P, *Antas de Campos/Parliament*, [2004] (not yet reported in the ECR), para. 48, 56; Case C-114/03 P, *Piscioneri/Parliament*, [2004] (not yet published in the ECR), para. 7-9; Case C-315/04 P, *Dipace/Italy*, [2005] (not yet reported in the ECR), para. 6-7.

221 Case C-447/98 P, *Molkerei Großbraunshain und Bene Nahrungsmittel/Commission*, [2000] ECR I-9100, para. 61; see also to this effect Case C-208/03 P, *Le Pen/Parliament*, [2005] ECR I-6051, para. 41.

222 See Case C-136/92 P, *Commission/Brazzelli Lualdi a.o.*, op. cit, fn. 62, para. 34.

223 See also *Hackspiel*, op. cit., fn. 201, p. 507, para. 31.

224 There are also cases where the appellant raises an absence of legal findings, see e.g. Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P-C-252/99 P, and C-254/99 P, *Limburgse Vinyl Maatschappij a.o./Commission*, op. cit., fn. 26, para. 423.

cc) Indicating the legal arguments which specifically support the appeal

Under the second requirement, which is explicitly provided in Article 112 (1) ECJ Rules of procedure, the appellant needs to indicate the "pleas in law and legal arguments relied on". Thus, the appellant needs to first select the right arguments and then present them in an appropriate way.

aaa) Selecting the legal arguments

This is not merely a matter of detecting the legal arguments with the highest degree of persuasion. Prior to this exercise, the appellant needs to know the following:

He may not rely on pleas of law "which he expressly withdrew in the proceedings before the Court of First Instance or on pleas declared inadmissible by that court, where the finding that they are inadmissible is not contested"[225]. Similarly, the ECJ is prevented from upholding an error of law, which it has spotted, but which had not been pleaded in the appeal.[226] In particular the appellant may not simply reiterate, be it by repeating,[227] without reproducing,[228] repeating "purely by reference",[229] or reproducing verbatim[230], the pleas in law and arguments already submitted to the CFI, including those based on factual allegations expressly dismissed by that Court[231] or considered as irrelevant.[232] Such repetition would amount to a retrial or re-examination of the first instance.[233] That said, the appellant may repeat those legal grounds already raised at first instance, if he wishes by using the same wording,[234] provided he indicates the contested parts of the CFI's judgement[235]

225 See Case C-354/92 P, *Eppe/Commission*, [1993] ECR I-7045, para. 13.

226 See Case C-136/92 P, *Commission/Brazzelli Lualdi*, op. cit., fn. 62, para. 52.

227 See Case C-244/92 P, *Kupka-Floridi/ECOSOC*, fn. 115, op. cit., para. 9 and 10; Case C-338/93 P, *De Hoe/Commission*, [1994] ECR I-821, para. 19; Case C-260/02 P, *Becker/Court of Auditors*, [2005] (not yet published in the ECR), para. 21-22.

228 Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P, C-251/99 P, C-252/99 P and C-254/99 P, *Limburgse Vinyl Maatschappij a.o./Commission*, op. cit., fn. 26, para. 530.

229 See Case C-354/92 P, *Eppe/Commission*, op. cit., fn. 225, para. 8; Case C-87/95 P, *CNAAP/Council*, [1996] ECR I-2005, para. 31; Case C-162/05 P, *Entorn/Commission*, [2006] ECR I-12, para. 42 et seq.

230 See e.g. Case C-26/94 P, *X/Commission*, [1994] ECR I-4381, para. 14; Case C-190/04 P, *French a.o./Council and Commission*, op. cit., fn. 152, para. 17 and 18; Case C-268/05 P, *Lebedef/Commission*, [2006] ECR I-19, para. 15.

231 See Case C-26/94 P, *X/Commission*, [1994] ECR I-4379, para. 15; Case C-62/94 P, *Turner/Commission*, [1994], ECR I-3177, para. 17.

232 See Case C-31/95 P, *Del Plato/Commission*, [1996] ECR I-1443, para. 22.

233 See most recently the opinion of AG *Stix-Hackl* in Case C-68/05 P, *Cosun/Commission*, [2006] (not yet published in the ECR), para. 52 and 53.

234 Case C-41/99 P, *Sadam Zuccherifici a.o./Council*, [2001] ECR I-4250, para. 19.

and contests the application or interpretation of EU law made by the CFI.[236] In this respect the ECJ clarified, albeit at a rather late stage, that "if an appellant could not thus base his appeal on pleas in law and arguments already relied on before the Court of First Instance, an appeal would be deprived of part of its purpose".[237]

bbb) Presenting legal arguments in an appropriate way

Furthermore, the appellant "must clearly state the legal arguments which specifically support the request".[238] Despite this rather strict standard, clearly inspired from the French procedural tradition ("moyens de droit"), the ECJ is not too formalistic in practice. In case of doubt it tends to distil the points of law out of the appellant's written / oral submission: In *Vidrányi*[239] it held that a certain part of the appeal "may be understood only as a criticism of the Court of First Instance for having failed to criticize an infringement of the general principle of the observance of the rights of the defence." In *Lucaccioni*[240] the ECJ adopted an even more appellant-friendly view: "In order to be rendered meaningful, the second part of the second limb of the plea must be construed as alleging that the judgment under appeal fails to state the grounds on which it is based as regards the criteria for determining the amount regarded by the Court of First Instance as making good the material damage suffered by the appellant." And in case *Comunità montana della Valnerina*[241] the ECJ held that it does not matter if two legal arguments, read separately, were slightly ambiguous, as long as their sense becomes clear if considered together.

The above indicates that a legal ground is admissible provided it is presented at least as a nucleus or at the very least implicitly, be it in a "laconic" way.[242] The fact that an appeal, or a plea in support of an appeal, does not refer to all the reasons which led the CFI to adopt a position on a question does not result in the plea being inad-

235 See Case C-386/96 P, *Dreyfus/Commission*, [1998] ECR I-2351, para. 38; Case C-391/96 P, *Compagnie Continentale (France) SA/Commission*, [1998] ECR I-2380, para. 36; Case C-403/96 P, *Glencore Grain/Commission*, [1998] ECR I-2408, para. 36; Case C-82/98 P, *Kögler/ECJ*, [2000] ECR I-3869, para. 23; Case C-353/01 P, *Mattila/Council and Commission*, [2004] ECR I-1073, para. 25-27; Case C-18/04 P, *Krikorian a.o./Parliament, Council and Commission*, [2004] (not yet published in the ECR), para. 21-22; Case C-254/03 P, *Eduardo Vieira/Commission*, [2005] ECR I-237, para. 32-33.

236 See e.g. Case C-187/03 P, *Drouvis/Commission*, [2004] (not yet published in the ECR), para. 18.

237 Case C-321/99 P, *ARAP a.o./Commission*, [2002] ECR I-4350, para. 49; Case C-200/01 *IPK-München/Commission*, [2004] ECR I-4627, para. 48-51.

238 See e.g. Case C-76/00 P, *Petrotub a.o./Council*, [2003] ECR I-79, para. 71.

239 Case C-283/90 P, *Vidrányi/Commission*, [1991] ECR I-4361, para. 19.

240 Case C-257/98 P, *Lucaccioni/Commission*, op. cit., fn. 158, para. 36.

241 Case C-240/03 P, *Comunità montana della Valnerina/Commission*, [2006] ECR I-731, para. 110.

242 See case C-299/98 P, *CPL Imperial/Commission*, [1999] ECR I-8686, para. 36.

missible".[243] The same applies in case of an incorrect reference to the pertinent provisions.[244]

However, if the legal argument the appellant intends to make is too abstract it may well end up as inadmissible. This is particularly the case if the appellant confines himself to saying that the reasoning in the contested decision contains errors of law,[245] or that the CFI ought to have interpreted a given judgment differently, without putting forward any legal argument in that respect.[246] The same applies to those appellants who are of the opinion that the first instance ought to have construed a certain provision differently "for reasons of equity and/or natural justice, without stating anything further in this regard"[247] and/or merely "refer back to arguments put forward in another context", which must be dismissed as insufficiently substantiated and consequently clearly inadmissible".[248] Thus, clarity is not only likely to prevent a given plea from being declared inadmissible, but also facilitate any self-critical assessment of the chances of success of the legal pleas chosen.

e) Indicating the form or order sought by the appellant

The appeal shall also contain "the form or order sought by the appellant"[249] This provision does not raise any particular problems. The possible options are indicated in Article 113 (1) ECJ Rules of procedure. That said, the appellant should keep in mind that it is only the CFI's judgment which can be the subject of an appeal, i.e. he cannot request the ECJ to annul the decision challenged in first instance.[250]

f) Other provisions

Article 112 (1), 2nd sub-paragraph, ECJ Rules of procedure provides that "Article 37 and Article 38 (2) and (3) of these Rules shall apply to appeals". These provisions relate to a number of formalities every applicant has to comply with, such as the number of certified copies of the original to be handed in, the annexes, the address

243 Case C-458/98 P, *Industrie des poudres sphériques/Council*, [2000] ECR I-8177, para. 67; Case C-357/04 P, *Andolfi/Commission*, [2005] (not yet published in the ECR), para. 22.

244 Case C-149/95 P(R), *Commission/Atlantic Container Line AB a.o.*, op. cit., fn. 151, para. 14.

245 See e.g. Case C-156/96 P, *Williams/Court of Auditors*, [1997] ECR I-239, para. 13 and 20.

246 See Case C-338/93 P, *De Hoe/Commission*, op. cit., fn. 227, para. 25 and 26.

247 See Case C-318/92 P, *Moat/Commission*, [1992] ECR I-481, para. 14.

248 See Case C-51/95 P, *Unifruit Hellas/Commission*, [1997] ECR I-727, summary 4 and para. 33.

249 See Article 112 (1) (d) ECJ Rules of procedure.

250 See e.g. Case C-198/99 P, *Ensidesa/Commission*, [2003] (not yet published in the ECR), para. 32; Advocate General's opinion of 22 June 2006 in Case C-266/05 P, *Jose Maria Sison/Council*, (not yet published in the ECR), para. 11.

for service, etc. In this respect it should be noted that the Rules of procedure nowhere do provide that failure to comply with the requirements of Article 37(1) and (4) thereof renders the appeal inadmissible.[251] The ECJ also confirmed that the reference to Article 38 (2) and (3) ECJ Rules of procedure means that the formalities provided for in Article 38 (5) of these Rules do not apply to appeal proceedings.[252] Also, there is no need to indicate in the appeal the date on which the contested decision was notified, as long as it is confirmed by a certificate of receipt.[253]

9. No changing of the subject-matter

a) Introduction

A further procedural corner-stone is enshrined in Article 113 (2) ECJ Rules of procedure,[254] which provides that "the subject-matter of the proceedings before the Court of First Instance may not be changed". Indeed, since an appeal is meant to review the CFI's decision, thus excluding a retrial, any change of the subject-matter of the first instance is *a fortiori* excluded. This rule is self-explanatory, by contrast to a number of other procedural principles, such as the one in 8) above, and yet it is frequently ignored by appellants[255] and sometimes even by institutions.[256]

b) No new form or order sought

This rule is relatively simple. It means e.g. that an annulment in the first instance cannot be completed by a claim in the appeal for compensation.[257] Equally, an appellant cannot seek an annulment different from the one in first instance.[258] Besides, the other party to the proceedings is not entitled to seek compensation for

251 See Case C-82/01 P, *Aéroports de Paris/Commission*, [2002] ECR I-9334, para. 9-12.

252 See Case C-294/98 P, *Metsä-Serla Oyj a.o./Commission*, op. cit., fn. 38, para. 15.

253 See Case C-263/02 P, *Commission/Jégo Quéré*, [2004] ECR I-3425, para. 22.

254 See the analogous provision in Article 116 (2) ECJ Rules of procedure, which concerns the response.

255 See e.g. Case C-19/95, *San Marco/Commission*, [1996] ECR I-4435, para. 49; Case C-95/98 P, *Edouard Dubois and son/Council and Commission*, [1999], ECR I-4835, para. 26; Case C-299/98 P, *CPL Imperial 2 and Unifrigo/Commission*, op. cit., fn. 242, para. 41-42; Case C-217/01 P, *Hendrickx/CEDEFOP*, [2003] ECR I-3701, para. 37; Case C-204/02 P, *Joynson/Commission*, [2003] ECR I-14763; Case C-488/01 P, *Martinez/Parliament*, [2003] ECR I-13355, para. 76; Case C-180/03, *Latino/Commission*, [2004] ECR I-1587, para. 42, 44; Joined Cases C-183/02 P and C-187/02 P, *Demesa and Territorio Histórico de Álava/Commission*, [2004] ECR I-10609, para. 59; Joined Cases C-186/02 P and C-188/02 P, *Ramondín a.o./Commission*, op. cit, fn. 35, para. 60.

256 See e.g. Case C-218/97 P, *Council/Fernandes Leite Mateus*, [1997] ECR I-6945.

257 See Case C-283/90 P, *Vidrányi/Commission*, op. cit., fn. 239, para. 9-10.

258 See e.g. Case C-174/97 P, *FFSA a.o./Commission*, op. cit., fn. 173, para. 44-45.

damage allegedly suffered by him as a result of the appeal lodged by the applicant.[259]

c) No new legal grounds

In order to avoid any possible misunderstandings, it should be pointed out from the outset that Article 113 (2) ECJ Rules of procedure is only concerned with pleas in law which have not been raised before the CFI.[260] This has nothing to do with the general rule providing that "no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure".[261] The latter rule is relevant in case the appeal and the response are – exceptionally – supplemented by a reply and a rejoinder.[262]

To allow a party to put forward for the first time before the ECJ a plea in law which it has not raised before the CFI would be to allow it to bring before the ECJ a case of wider ambit than that which came before the CFI.[263] In an appeal the ECJ's jurisdiction is thus confined to review the findings of law on the pleas argued before the CFI.[264]

This rule, however, is not as absolute as its wording suggests:

Firstly, it does not apply if it turns out that the CFI infringed a rule which the ECJ has to verify ex officio. This is the case of all ordre public rules, such as the obligation to state reasons,[265] or the non competence of the acting institution.[266]

Secondly, appellants may very well raise a new plea of law if he or she is of the opinion that the CFI's decision is e.g. in breach of a procedural rule and/or a general principle in law. In these circumstances the appellant could, by definition, not raise such legal grounds during the proceedings pending at the CFI, i.e. prior to its judgment. Any other reading would mean that the CFI's judgment or order may be in breach of EU law, as long as it is not an aspect which has been already discussed at first instance.

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259 See e.g. Case C-35/92 P, *Parliament/Frederiksen*, op. cit., fn. 165, para. 35

260 See e.g. Case C-183/02 P, *Demesa a.o./Commission*, [2004] op. cit, fn. 255, para. 69.

261 See Article 118 and 42 (2) ECJ Rules of procedure.

262 See Article 117 (1) ECJ Rules of procedure.

263 See Case C-230/05 P, *L/Commission*, [2006] ECR I-55, para. 99.

264 See Case C-136/92 P, *Commission/Brazzelli Lualdi a.o.*, op. cit, fn. 62, para. 59; Case C-18/91 P, *V/Parliament*, op. cit., fn. 161, para. 21; Case C-1/98 P, *British Steel /Commission*, [2000] ECR I-10353, para. 47.

265 Case C-367/95 P, *Sytraval*, [1998] ECR I-1719.

266 Case C-210/98 P, *Salzgitter/Commission*, [2000] ECR I-5843.

Thirdly, appellants remain entitled to develop legal arguments already raised at first instance[267] (see 8.d) above).

10. The written and oral procedure before the ECJ

a) Introduction

The procedure before the ECJ shall consist[268] of a written part and an oral part, but the ECJ may dispense with the oral procedure, if provided in the rules of procedure. These rules are the result of a compromise: On the one hand, the legislature had to make sure that the appeals procedure is sufficiently "light" in order to keep the ECJ's workload within reasonable limits. On the other hand, it had to guarantee that the review of the first instance's decision is sufficiently efficient. As a result the appeals procedure is both shorter and simpler than e.g. an application for annulment.[269]

b) Written procedure

The quest for simplification translates into a limitation of the parties' rights:

aa) Limited rights of the applicant

In the vast majority of appeals the written procedure consists of a single exchange of written submissions, i.e. the appeal, followed by the response. If an appellant wishes to reply to the response he not only needs to apply for it within seven days as of receipt, but convince the President of the ECJ that this is necessary "in order to put forward his point of view or in order to provide a basis for the decision on appeal".[270] As to those appellants who have requested an expedited procedure[271] they may still apply for such a second exchange of submissions, but in practice their chances of success are rather slim. The only case where an appellant is entitled to lodge a reply to the response is when the defendant lodged a cross-appeal in his response.[272]

267 See Case C-76/93 P, *Scaramuzza/Commission*, op. cit., fn. 65, para. 8.

268 See Article 59 ECJ Statute.

269 See Article 230 ECT.

270 See Article 117 (1) ECJ Rules of procedure.

271 See Articles 118 and 62a ECJ Rules of procedure.

272 See Article 117 (2) ECJ Rules of procedure.

bb) Limited rights of the defendant

In appeals proceedings the defendant can neither raise a plea of inadmissibility,[273] nor seek a judgment by default,[274] as both procedures tend to lengthen the proceedings considerably. On the whole this restrictive policy is justified: On the one hand, the parties to an appeal are already familiar with the subject-matter and should thus be able to concentrate their arguments into a single exchange of submissions. On the other hand, they tend to misuse a second exchange of written submission, if obtained, in order to repeat themselves or to comment on new facts contained in the reply.[275]

c) Oral procedure

According to the wording of the relevant procedural rules[276] a hearing is the rule and the absence of same the exception. This turns out to be misleading as in practice it tends to be the other way round.

aa) Absence of oral hearing

The ECJ makes frequent use of the possibility to reject appeals by way of order, i.e. without a hearing, after having found, on the basis of the submissions, that they are in whole or in part clearly inadmissible or clearly unfounded.[277] Such an unpleasant outcome must be expected by those appellants who merely seek a retrial of the first instance, rather than putting forward legal grounds,[278] contest issues of fact rather than raising points of law,[279] or challenge a decision which is manifestly legal.[280] In many cases, appellants commit multiple infringements of the same rule,[281] or of several rules governing the admissibility.[282]

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273 See Article 118 ECJ Rules of procedure, which does not refer to Article 91 ECJ Rules of procedure.

274 See Article 116 ECJ Rules of procedure.

275 Case C-12/95 P, *Transacciones Marítimas a.o./Commission*, [1995] ECR I-468, para. 8.

276 See Article 59, 1st sentence ECJ Rules of procedure.

277 See Article 119 ECJ Rules of procedure.

278 Case C-244/92 P, *Kupka Floridi/ECOSOC*, op. cit., fn. 115; Case C-338/93 P, *De Hoe/Commission*, [1994], op. cit., fn. 227; Case C-26/94 P, *X/Commission*, [1994], op. cit., fn. 230; Case C-173/95 P, *Hogan/ECJ*, op. cit., fn. 97.

279 See Case C-115/90 P, *Turner/Commission*, op. cit., fn. 170; Case C-294/91 P, *Sebastiani/Parliament*, op. cit., fn. 152.

280 Case C-275/93 P, *Boessen/ECOSOC*, [1994] ECR I-159 et seq.

281 See e.g. Case C-403/95 P, *Obst/Commission*, [1998] ECR I-27, para. 23, 35; 42.

282 See e.g. Case C-431/98 P, *Progoulis/Commission*, [1999] ECR I-8319.

The ECJ may, furthermore, decide to dispense with the oral part of the procedure unless one of the parties submits an application "setting out the reasons for which he wishes to be heard".[283] In this respect it should be kept in mind that an appellant's waiver of the right to request permission, in accordance with Article 117 (1) of the Rules of procedure, to lodge a reply does not give it a right to a decision by the Court, at its request, to hold a hearing, nor does it prove that the written procedure did not give it an opportunity to fully defend its point of view.[284] In appeals concerning interim proceedings an oral hearing is the exception, since the judge will normally have all the information needed to give judgment on the appeal.[285] In all other cases the ECJ will carry out an oral hearing.[286]

bb) Practical aspects of a hearing

Hearings in appeals proceedings involve a number of practical aspects, which appellants should be aware of:

In the average appeals proceedings, the "Judge rapporteur" and his fellow Judges do not pose many questions to the parties, unlike their counterparts from the CFI. But there is a certain tendency – again without generalising - towards putting more questions to the institution involved, which in most cases is in the role of the defendant. Appellants should not, however, take this as an indication of their chances of success. Much of this has to do with the fact that an institution is presumed to have – and in many cases has – a better vertical and horizontal knowledge of EU law, than the lawyers of natural persons or companies.

Moreover, there is at least a presumption that an institution's approach to EU law will normally be more objective – unless its legal views are to some extent distorted by politics, which tends to be the case in certain sensitive areas such as health protection.[287] By contrast, the lawyers of individuals may well be specialised in the area of law concerned, but will, nevertheless, have a natural and to some extent understandable tendency to assess legal questions in the light of their client's individual interests. The latter are often dominated by considerable economic interests.

Similarly, the vast majority of oral hearings are public, and thus frequently attended by visitors, such as students, magistrates, officials from Member States, concerned representatives of the private sector, the press etc. Under these circumstances the

283 See Article 120 ECJ Rules of procedure.

284 Case C-291/98 P, *Sarrió SA/Commission*, [2000] ECR I-1214, para. 11.

285 Case C-481/01 P(R), *NDC Health/IMS Health and Commission*, [2002] ECR I-3405, para. 52.

286 Regarding appeals a reopening of the oral hearing is extremely rare, see e.g. Case C-227/04 P, *Lindorfer/Council*, [2006] (not yet published in the ECR).

287 See e.g. Directive 98/43/EC introducing a total ban on the advertising and sponsorship of tobacco products, quashed by Case C-376/98, *Germany/Parliament and Council*, [2000] ECR I-8419.

ECJ is – understandably – eager to prevent any impression on the side of the public that there could be something like sympathy, let alone collusion, between the ECJ in its capacity as an institution and the institution respectively concerned by the appeals proceedings. As a result the magistrates' questions are rarely indicative of their views of the case. On the contrary, sometimes one or the other question to the institution may not only be rather difficult, but even more or less hostile.[288] Again, the appellant should not view this as circumstantial evidence indicating that the institution has a fair chance to lose the case.

Lastly, the ECJ is also understandably keen to avoid the risk of a party claiming an infringement of its right to be heard. In the worst of all cases this could end up with an application to the European Court for Human Rights in Strasburg. This is why the ECJ has a certain tendency – again without drifting into a generalisation – not to interrupt the lawyers of individuals and companies whenever their pleadings deviate, as is sometimes the case, into more political views and/or comprise inadmissible aspects, such as the contesting of issues of fact.

d) The right to discontinue the proceedings

It is clear that the right to lodge an appeal comprises the right to discontinue the proceedings.[289] The appellant may exercise this right at any time,[290] fully or partly,[291] even after the oral hearing – until the date of the handing down of the judgement. In this respect suffice to note that this is the appellant's autonomous decision. The fact that the defendant (normally an institution) would state that it has "no objection to the discontinuance of the proceedings"[292] is merely a matter of courtesy. The sole issue then is one of costs, which are determined on the basis of the parties' claims[293] and relevant rules,[294] unless the parties have agreed on an amicable solution.[295]

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288 As was the case e.g. during the oral hearing concerning case C-459/00 P (R), *Commission/Trenker*, op. cit., fn. 194.

289 See Article 78 ECJ Rules of procedure, e.g. Case C-197/05 P, *ET/OHIM*, [2006] (not yet published in the ECR).

290 E.g. over a year after lodging the appeal, see Case C-426/04 P, *AER/Schmitt*, [2006] (not yet published in the ECR).

291 See e.g. Case C-243/05 P, *Agraz a.o./Commission*, [2005] (not yet reported in the ECR).

292 See for example Joined Cases C-372/90 P, C-372/90 P-R and C-22/91 P, *SEP/Commission*, [1991] ECR I-2043, para. 7-8.

293 No such claim was made by the Commission in Case C-276/03 P, *Scott/Commission*, [2005], ECR I-8437, para. 39.

294 Such orders are never published.

295 Such as the one in Case C-121/05 P, *OHIM/Deutsche Post Euro Express*, [2005] (not yet published in the ECR), para. 3.

11. Interim measures in the context of an appeal

a) Introduction

Appeals have no suspensory effect,[296] unless the ECJ orders such effect as a result of interim proceedings.[297] By excluding an automatic suspensory effect, which exists in some Member States, e.g. Germany,[298] the legislature prevented appeals being lodged for the sole purpose of delaying the enforcement of CFI judgments. This would have increased the ECJ's workload dramatically and amounted, in many cases, to an abuse.

Every potential applicant, however, faces a major structural difficulty in that an application for suspension of operation cannot, in principle, be envisaged against a negative decision, such as a judgment at first instance dismissing the action in its entirety, since the grant of suspension could not have the effect of changing the applicant's position.[299] The problem the potential appellant is facing here is that, statistically, the majority of proceedings at first instance result in a negative decision.

Since a request for interim measures[300] is ancillary to the appeals proceedings proper, i.e. not an appeals procedure as such, by contrast to an appeal lodged against interim measures adopted by the first instance, the following will be kept to a brief overview:

b) Overview on applicable rules

There is no particular requirement in terms of time-limit, other than the request for interim measures being lodged while the appeal is pending at the ECJ. In practice, both submissions should be submitted simultaneously, as this is consistent with the urgency and the *prima facie* case every applicant needs to demonstrate.

aa) Urgency

The ECJ consistently held that the urgency must be assessed in relation to the necessity for an order granting interim relief in order to prevent serious and

296 See Article 60 (1) ECJ Statute.

297 See Articles 242 and 243 EC and the less relevant Articles 157 and 158 of the EAEC Treaty.

298 See. e.g. the various appeals in administrative matters ("Berufung" and "Revision"), §§ 124 and 132 Verwaltungsgerichtsordnung (rules of procedure).

299 See Case 206/89, *R S/Commission* [1989] ECR 2841, para. 14; Case C-89/97, P (R) *Moccia Irme/Commission* [1997] ECR I-2327, para. 45; Joined Cases C-486/01 P-R and C-488/01 P-R, *Front National and Martinez/Parliament*, [2002] ECR I-1845, para. 73.

300 See Articles 83-90 ECJ Rules of procedure.

irreparable damage to the party requesting the interim protection.[301] Thus, it is a bit of an irony that while the applicant is not entitled to put forward pleas of fact in the main proceedings, i.e. the appeal proper, he must demonstrate the urgency of his application for interim measures by submitting the appropriate facts. The situation where the appeal in the main proceedings is to be determined pursuant to an expedited procedure,[302] does not *ipso jure* mean that the application for interim measures is without object.[303]

bb) Prima facie case

The ECJ will, furthermore, assess the *fumus boni juris*, i.e. whether the appeal is *prima facie* not manifestly inadmissible[304] and well founded. If the appeal raises a complex matter or a question of principle with no case law the ECJ will tend to apply a lower test, i.e. what could be called the *fumus non mali juris* test.[305] In other words, it will assess whether the appeal does not, *prima facie*, appear as manifestly unfounded.

cc) Balancing of the interest

Where appropriate, the judge hearing such an application must also weigh up the interests involved.[306]

12. Rulings in appeals proceedings

a) Introduction

The success rate of appeals is relatively modest: In 2005 out of 50 appeals only 7 were wholly or at least partly successful.[307]

301 See Case C-35/92 P-R, *Parliament/Frederiksen*, [1992] ECR I-2400, para. 2, 17-18.

302 See Article 62a ECJ Rules of procedure.

303 See Case C-39/03 P-R, *Commission/Artegodan a.o.*, [2003] ECR I-4487, para. 4-5.

304 Joined Cases C-486/01 P-R and C-488/01 P-R, *Front National and Martinez/Parliament*, [2002] ECR I-1845, para. 79 et seq.

305 See Case C-345/90 P-R, *Parliament/Hanning*, [1991] ECR I-232, para. 29-30.

306 See Case C-326/05 P-R, *Industrias Químicas del Vallés/Commission* [2005] (not yet reported), para. 14.

307 See p. 237 of the ECJ's annual report for 2005, published on www.curia.eu.int.

b) When is an appeal "well founded"?

The answer is not as simple as the question seems to suggest, since not every pertinent plea of law results in the appeal being well founded:

If a criticism formulated by an appellant is directed against a *superabundant* ground of the judgment of the CFI it must be rejected as nugatory.[308] If the pleas put forward by the applicant, directed against additional grounds, do not call the CFI's finding into question they must be rejected as inadmissible.[309] Similarly, a plea is ineffectual if it concerns reasoning which the CFI included only for the sake of completeness.[310] Lastly, an appeal must be dismissed, even if the grounds of the challenged judgment or order disclose an infringement of EU law, when the operative part of the challenged decision is well founded for other reasons of law.[311]

c) What happens next if the appeal is "well founded"?

If the appeal is well-founded the ECJ shall quash the decision of the CFI. If the judgement or order is set aside in its entirety the findings of fact contained therein no longer exist. A request for revision based on that judgment is therefore inadmissible.[312]

The ECJ may then itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the CFI for judgment,[313] provid-

308 See Case C-244/91 P, *Pincherle/Commission*, op. cit., fn. 67, para. 31; Case C-362/95 P, *Blackspur DIY a.o./Council and Commission*, op. cit., fn. 173, para. 23.

309 See Case C-326/91 P, *de Compte/Parliament*, op. cit., fn. 127, para. 123; Case C-49/69 P, *Progoulis/Commission*, op. cit., fn. 98, para. 28; Case C-264/95 P, *Commission/UIC*, [1996] ECR I-1312, para. 48; Case C-288/03 P, *Zaoui a.o./Commission*, (not yet published in the ECR), para. 13-20; Case C-153/04 P, *Euroagri/Commission*, [2005] (not yet published in the ECR), para. 46; Case C-553/03 P, *Panhellenic Union of Cotton Ginners and Exporters/Commission*, [2005] (not yet published in the ECR), para. 34-35.

310 See Case C-274/99 P, *Connolly/Commission*, [2001] ECR I-1589, para. 77; Case C-184/01 P, *Hirschfeldt/EEA*, [2002] ECR I-10189, para. 48.

311 See Case C-30/91 P, *Lestelle/Commission*, op. cit., fn. 123, para. 28; Case C-36/92 P, *SEP/Commission*, [1994] ECR I-1932, para. 33; Case C-320/92 P, *Finsider/Commission*, op. cit., fn. 118, para. 37; Case C-294/95 P, *Ojha/Commission*, [1996] ECR I-5902, para. 52; Case C-49/92 P, *Commission/Anic Partecipazioni*, op. cit., fn. 70, para. 120; Case C-150/98 P, *ECOSOC/E.*, [1999] ECR I-8877, para. 17; Case C-265/97 P, *VBA/Florimex a.o.*, op. cit., fn. 178, para. 121; Case C-210/98 P, *Salzgitter/Commission*, op. cit., fn. 266, para. 58; Case C-312/00 P, *Commission/Camar a.o.*, op. cit., fn. 4, para. 57; Joined Cases C-172/01 P, C-175/01 P, C-176/01 P and C-180/01 P, *International Power (ex National Power)/Commission*, [2003] ECR I-11421, para. 137; Case C-164/01 P, *van den Berg/Council*, [2004] ECR I-10225, para. 95; Case C-226/03 P, *José Martí Peix/Commission*, [2004] ECR I-11421, para. 29; Case C-64/02 P, *OHIM/Erpo Möbelwerk*, [2004] ECR I-10031, para. 51-52; Case C-396/03 P, *Killinger/Germany a.o.*, [2005] ECR I-4967, para. 12.

312 See Case T-43/89 RV, *Gill/Commission*, [1993] ECR II-303, para. 51.

313 See Article 61 (1) ECJ Statute.

ed the latter is competent in the first place. The ECJ will opt for the latter whenever it considers that it is not in a position to give final judgment since it may be that findings of fact will have to be made in order to adjudicate on the other pleas raised at first instance".[314] This is often the case if the CFI wrongly declared the application as inadmissible,[315] wrongly declared a plea of law to be well-founded and subsequently did not assess the other pleas of law,[316] infringed procedural rules[317] or because claims for compensation for the damage allegedly caused are involved.[318]

d) "Effet utile" of ECJ judgements on appeal

ECJ decisions not only have a bearing on the parties, but also on EU law in general. Thus, it is worthwhile to briefly explore this latter aspect.

First, it should be kept in mind that the creation of the appeal as such had an immediate effect on the quality of judicial protection of individuals since it forces the CFI to carefully motivate its decisions. Turning to the appeals decisions proper, their *effet utile* is in no way comparable to that of referral proceedings within the meaning of Article 234 ECT. The latter have generated such fundamental principles as the supremacy of EU law, its direct effect, and state liability, just to mention a few. But this has essentially to do with the fact that both legal remedies are not comparable. Many referral proceedings are concerned with the interface between supranational and national law, and thus a much wider area than the cases heard by the CFI, which relate to individual decisions directly and individually affecting an individual person.

The *effet utile* of appeals proceedings on the evolution of EU law can be divided into three categories:

The first one comprises a rare species of cases: Those in which the CFI did not follow the case-law established by the ECJ, which it normally tends to do.[319] A recent example is *Jégo Quéré*[320] in which the ECJ quashed the CFI's decision,[321] which, even though the applicant lacked individual concern according to the existing case law on Article 230 ECT, had applied a new, more liberal test to ensure an effective remedy.[322]

314 See Case C-188/96 P, *Commission / V*, op. cit., fn. 125, para. 33.

315 See Case C-404/96 P, *Glencore/Commission*, [1998] ECR I-2435, para. 57.

316 See Case C-316/97 P, *Parliament/Gaspari*, [1998] ECR I-7597, para. 37.

317 See Case C-433/97 P, *IPK/Commission*, [1999] ECR I-6795, para. 19.

318 See Case C-68/91 P, *Moritz/Commission*, op. cit., fn. 125, para. 42.

319 See *Sonelli*, op. cit, fn. 21, p. 872.

320 See Case C-263/02 P, *Jégo-Quéré et Cie SA/Commission*, [2002] ECR II-2365.

321 Case T-177/01, *Jégo-Quéré et Cie SA/Commission*, op. cit., fn. 321.

322 See *Arnull*, April shower for Jego-Quéré, [2004], European Law Review, Vol. 29, No. 3, p. 287.

The second category comprises those cases in which the ECJ's judgments have some importance with respect to procedural questions, general principles of law, or the separation of powers between the legislature and the judiciary. Examples are the ECJ's rulings on the limitation of duration of proceedings,[323] the single judge at the CFI who is not competent for hearing cases involving a plea of illegality[324] and the CFI's somewhat eccentric case-law relating to the "non-existent" decision.[325]

The third category consists of contentious matters in which the interested public expected the ECJ to provide some guidance, which then did not materialise. A recent example is *Tetra Laval*,[326] a merger case, in which the ECJ failed to clarify the exact limits of the CFI's power of assessment with respect to economic matters.[327]

C. The right of appeal to the CFI

I. Introduction

Article 220 (2) ECT provides that "judicial panels may be attached to the Court of First Instance under the conditions laid down in Article 225a […]". Article 225a ECT,[328] which was added by the Treaty of Nice, empowers the Council to create "judicial panels" to hear and determine at first instance certain classes of action or proceedings brought in specific areas, to lay down the rules on the organisation of the panel and the extent of the jurisdiction conferred upon it.[329] As to the reasons for creating this third layer the Council Decision merely indicates that it would "improve the operation of the Community courts system".[330] This is a bit of an understatement: The purpose is to take away some of the case load from the CFI and transfer it to specialised courts.[331] With respect to staff cases this case load is very substantial.[332]

323 See Case C-185/95 P, *Baustahlgewebe/Commission*, op. cit., fn. 113, para. 26 et seq.

324 See Case C-171/00 P, *Libéros/Commission*, [2002] ECR I-451.

325 See Case C-137/92 P, *Commission/BASF a.o.*, op. cit., fn. 67.

326 See Case C-12/03 P, *Commission/Tetra Laval*, op. cit., fn. 155.

327 See *Prete* and *Nucara*, Standard of proof and scope of judicial review in merger cases: everything clear after Tetra Laval, [2005] European Competition Law Review, Vol. 26 No. 12, p. 698.

328 And Article 140b Euratom Treaty.

329 See also 1st recital of Council Decision of 2 November 2004 establishing the European Union Civil Service Tribunal, OJEC L 333, 9.11.2004, p. 7 et seq.

330 See 2nd recital of Council Decision loc. cit.

331 See *Lavranos*, The new specialised Courts with the European judicial system, [2005], European Law Review, Vol. 30, No. 2, p. 262.

332 In 2005 there were 151 staff cases lodged at the CFI; see p. 226 of the ECJ's annual report for 2005, www.curia.eu.int.

Article 225a ECT[333] furthermore provides that appeals may be lodged at the CFI against decisions of the judicial panels. The procedural rules governing this new appeal to the CFI[334] are exactly the same as those applicable to appeals to the ECJ.[335] Hence, the procedural questions discussed in this project (see B) above) apply also with respect to the appeal to the CFI.

II. Judicial panels

The most innovative change to the current judicial system, the possibility of establishing judicial panels,[336] has now been implemented for the first time: The European Union Civil Service Tribunal (hereafter: Civil Service Tribunal) took up its work in early 2006 and held its first hearing on 28 March 2006.[337] The status of the Civil Service Tribunal, as well as the future judicial panels, raises a number of question marks, which will be assessed hereafter.

1. The Civil Service Tribunal

a) Is it "attached" to the CFI?

First it needs to be emphasised that the terms used in Article 225a ECT ("judicial panel", "attached") are rather confusing: The term "judicial panel" is a new and indeed "strange expression",[338] which is more reminiscent of the quasi-judicial dispute settlement procedure of the World Trade Organisation than a genuine judicial instance in the sphere of the EU.

The word "attached" is somewhat misleading. It suggests that a judicial panel has the status of a dependant body.[339] This impression is reinforced by the French ("chambres juridictionnelles") and the German ("gerichtliche Kammern") expressions for "judicial panel", which suggest that the judicial panels are something like special chambers of an existing Tribunal.[340] All of this is rather misleading as the Civil Service Tribunal is clearly an autonomous judicial instance. It has been argued

333 See 2nd sub-para. of para. 1.

334 See Art. 137-149 CFI Rules of procedure.

335 See Art. 110-123 ECJ Rules of procedure.

336 *Heffernan*, op. cit., fn. 74, p. 912.

337 See EU Press Release No. 28/06.

338 See *Everling*, Grundlagen der Reform der Gerichtsbarkeit der Europäischen Union und ihres Verfahrens durch den Vertrag von Nizza, [2003], Europarecht, additional volume 1, p. 20.

339 See *Johnston*, Judicial Reform and the Treaty of Nice, [2001] Common Market Law Review, vol. 38, p. 503.

340 The Civil Service Tribunal has only 7 judges.

that the word "attached" was chosen in order to emphasise that the new judicial body is part of the ECJ in its capacity as an institution within the meaning of Article 7 ECT.[341] This reason, however, is not convincing: The CFI used to be "attached" to the ECJ,[342] but this is no longer the case since the Treaty of Nice. Nevertheless the CFI has not become a separate institution within the meaning of Article 7 ECT. The Commission elegantly circumvented these ambiguities, by using the term "tribunal", instead of "panel", which is closer to the expression used in the draft Treaty establishing a Constitution for Europe.[343]

b) The appeal to the CFI – towards a new genre of legal remedy?!

A comparison between Articles 225 (2) ECT and 225a (3) ECT reveals that there is no longer a single model of appeal: By virtue of the former provision an appeal to the ECJ is limited to points of law (see B) above). By contrast, Articles 225a (3) ECT provides the legislature with the right to choose between "a right of appeal on points of law only" and "a right of appeal also on matters of fact". So far little or no attention is paid to this rather substantial difference,[344] even though it is only a matter of time until it will materialise: In the case of the Civil Service Tribunal the legislature has opted for an appeal on points of law only,[345] in line with the Commission's proposal. In the case of the Community Patent Court[346] the Commission proposes an appeal both on points of law and issues of fact.[347]

The deeper reason for allowing the legislature to opt for an appeal on points of law and issues of fact is that some categories of cases are considered to be sufficiently "factual" to justify such an extended appeal.[348] This is undoubtedly true for patents and, more generally, for intellectual and industrial property matters. But there are serious doubts as to the consistency of the legislature's approach: The vast majori-

341 See *Brown*, op. cit., fn. 119, p. 750.

342 See the old Article 168a EC.

343 See Article I-29 and Article III-359, which refer to "specialized courts".

344 The 8th recital of the Council Decision establishing the European Union Civil Service Tribunal simply negates this option, by narrowing it down to appeals on points of law; see also e.g. *Nascimbene*, Community Courts in the area of judicial cooperation, [2005] International and Comparative Law Quarterly, p. 492.

345 See Article 11 of Annex I of Council Decision 2004 establishing the European Union Civil Service Tribunal, OJEC L 333, 9.11.2004, p. 7.

346 Based on Article 229a EC.

347 See Article 27 of the Commission's proposal of 23 December 2003 for a "Council Decision establishing the Community Patent Court and concerning appeals before the Court of First Instance", COM (2003) 828 final.

348 See the Commission's explanatory memorandum regarding its proposal for a Council Decision establishing the Community Patent Court, loc. cit.

ty of competition cases, in particular those involving cartels or mergers are very factual. Moreover, they involve substantial economic interests since the fines in e.g. cartel cases often reach tens, if not hundreds of millions of Euros, whereas the economic interests in certain merger cases go well into the billions. The question therefore remains, why competition matters should not benefit from an appeal on points of law and issues of fact?

2. Future judicial panels

The EC Treaty does not limit or otherwise specify the number of "judicial panels" the legislature may create.[349] The Commission made use of this possibility and proposed a Community patent jurisdiction to be created by 2010 at the latest.[350] Its faith is still unknown and it is thus unclear if and when further panels will be created. Does the EU need a special Tribunal for e.g. competition matters, as advocated by some?[351] This seems far from sure: Staff and patent matters tend to be numerous and predominantly factual. By contrast, competition cases are not very numerous and a decentralisation of competences regarding the application of Articles 81 and 82 ECT might reduce the number of cases heard by the CFI. On the other hand, the modernisation of EC antitrust law might lead to an increase in the number of actions for the annulment of Commission decisions, and subsequently of appeals to the ECJ.[352] Thus the factors characterizing staff and intellectual property cases cannot be compared to those typical for competition matters.[353] It should, furthermore, not be underestimated that the institution of new panels requires an unanimous vote by the Council.[354] Lastly, it should also be taken into account that with each new judicial body the risk of fragmentation of jurisprudence tends to increase.

349 See *Lavranos*, op. cit., fn. 332, p. 262.

350 Proposal for a Council Decision establishing the Community Patent Court and concerning appeals before the Court of First Instance, of 23.12.2003, COM (2003) 828 final.

351 See e.g. *Lavranos*, op. cit., fn. 332, p. 271; *Vesterdorf*, The Community Court system ten years from now and beyond: challenges and possibilities [2003] European Law Review Vol. 28 No. 3, p. 317 and the Due-Report, op. cit., fn. 15, para. 29-35.

352 See *Atanasiu* and *Ehlermann*, The modernization of EC antitrust law: consequences for the future role of the EC Courts, [2002] European Competition Law Review, Vol. 23 No. 2, p. 74.

353 See *Heffernan*, op. cit., fn. 74, p. 913.

354 See Article 225a (1) ECT.

D. Is there a need for reform?

I. Introduction

In the context of the Intergovernmental Conference (IGC) 2000 designed to prepare the Treaty of Nice, the reform of the European judicial system was amongst the major issues. The debate turned on the need to define appropriate legal instruments in order to reduce the ECJ's workload. In the end, the Member States agreed essentially on a number of changes to the judicial architecture:[355] the competence in referral proceedings was conferred on the CFI and the legislature created a legal basis for establishing "judicial panels", in order to alleviate the CFI (see C) above).

The discussion also turned on the possible reform of the appeals procedure[356] and a number of filter mechanisms, designed to "weed out" certain appeals at the source (hereafter: filter mechanism), were discussed, such as the creation of a European "certiorari"-procedure[357] or a system of leave.[358] But in the end, the Treaty of Nice, remained "conspicuously silent"[359] in this respect, as no filter mechanisms were inserted at the level of primary law. Thus, a party to an action before the CFI still has an "automatic" right to appeal to the ECJ.[360] That said, the EC-Treaty[361] provides that the right of appeal is granted "under the conditions and within the limits laid down by the Statute" – which means that filter mechanisms are a matter for secondary legislation, as the case may be. Thus, the question arises whether today – six years after the IGC 2000 and three years after the coming into force of the Treaty of Nice - there is a still a need for reducing the ECJ's workload and, if so, which filter mechanism(s) would seem appropriate.

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355 Which is a structural change, contrary to what is stated in *Lenaerts/van Nuffel*, Constitutional Law of the EU, [2005], p. 64, para. 3-024.

356 See e.g. the "Contribution by the Court of Justice and the Court of First Instance to the Intergovernmental Conference" (2000) (hereafter: "contribution of the EJC" and the "Due"-Report, op. cit., fn. 15, p. 28.

357 See *Heffernan*, op. cit., fn. 74, p. 913.

358 See "The Future of the Judicial System in the European Union", published by the Commission, (1999), p. 15; see also *Korah*, Tetra Pack II – lack of reasoning in Court's judgment, [1997], European Competition Law Review, Vol. 18. No. 2, p. 99.

359 See *Heffernan*, op. cit. fn. 74, p. 913.

360 See *Weatherhill* & *Beaumont*, EU Law, [1999], p. 206.

361 See Article 225(1) ECT.

II. The ECJ's workload – a chronic problem!

The ECJ's annual report for 2005[362] reveals the following average figures for the period 2000 to 2005:

Duration of appeals proceedings (in months)

2000	2001	2002	2003	2004	2005
19	16,3	19,2	28,7	21,3	20,9

Number of new appeals lodged

2000	2001	2002	2003	2004	2005
66	72	46	63	52	66

Thus, on average the duration of appeals proceedings in 2005 was as long as it was in 2000. The 20,9 months in 2005 are exactly the same as the average duration for 2000-2005, which is 20,9 months.[363] Similarly, the 66 appeals lodged in 2005 are as numerous as in 2000 and slightly above the average for the entire period, which is 60,8.

It is of course rather difficult to predict the future: On the one hand, the CFI will have to hear those appeals which will sooner or later be lodged against the decisions of the Civil Service Tribunal.[364] On the other hand, the still recent enlargement will ultimately result in a greater number of appeals to the ECJ, as well as referral cases and infringement proceedings. But at this stage, the following conclusions can be drawn: Firstly, the number of appeals contributes substantially to the ECJ's workload. This in turn is potentially detrimental to all proceedings heard by the ECJ, in particular referral cases[365] and vice-versa. Secondly, while the current duration of appeals proceedings is not an "excessive procedural delay" within the meaning of Article 6 ECHR and Article 47 Charter of Fundamental Rights[366] it nonetheless goes, in many instances, beyond the planning periods of economic operators and individuals in a modern society.[367] Thirdly, matters will not improve, at least in the near future. Thus, there is still a need to reduce the ECJ's workload. The next and indeed more difficult question is by which means this goal should be achieved.

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362 See http://www.curia.eu.int/fr/instit/presentationfr/index.htm (access date: 3.5.2007).

363 Which is approximately the same as in 1993 (19,2 months) and 1994 (21,2 months), see *Brown*, op. cit., fn. 119, p. 749.

364 Currently, there are more than 200 cases pending: 130 cases from 2005 "inherited" from the CFI and (to date) 77 cases lodged in 2006.

365 Which in 2005 took an average of 20,4 months (see ECJ report for 2005, op. cit.).

366 See Case C-137/92 P, *Commission/BASF a.o.*, op. cit., fn. 67.

367 See *Schobe*, La réforme du contentieux communautaire du point de vue des droits du particulier, [2005] Cahiers de Droit Européen, p. 664.

III. Possible solutions

1. Introduction

Fundamentally there are two ways of reducing the ECJ's workload and thus the duration of the appeals proceedings: by increasing the number of judges or by limiting the appellant's right to appeal, via adequate "filter mechanisms". Both approaches require changes to primary and/or secondary EU legislation, which might be difficult to implement. Thus, it should first be verified whether the existing rules cannot become part of the solution.

2. Making better use of Article 119 ECJ Rules of procedure?

Unlike genuine "filter mechanisms" Article 119 ECJ Rules of procedure, which provides that clearly inadmissible or clearly unfounded appeals may, at any time, be dismissed by reasoned order, does not "weed out" appeals at the source. But it has something in common with such a mechanism in that it is also designed to reduce the ECJ's workload. This leads to the question of how efficient Article 119 is.

The ECJ makes frequent use of this provision: In a number of cases appeals are not in line with elementary procedural rules and thus manifestly inadmissible. In other instances the ECJ rejects them as "clearly unfounded" – where it finds e.g. that this decision can be easily reached,[368] or when the appellant attempts to reverse a decision of the CFI which has followed established case law and the appellate Court does not deem it necessary to reconsider it.[369]

All of this undoubtedly reduces the ECJ's workload to some extent, since the time the magistrates would otherwise have spent on hearing such cases is saved. The *effet utile* of Article 119, however, is limited as it does not apply e.g. to those appeals which, without being manifestly inadmissible or manifestly unfounded, tend to be numerous, e.g. in competition matters.[370]

Apart from these structural limits there are some doubts as to whether the ECJ makes an optimal use of Article 119:[371] The ECJ may have recourse to this provision "at any time". Thus, in case of a manifestly inadmissible or non-founded appeal the judges could hand down an order rather quickly, i.e. without notifying the appeal to the defendant and setting him the two months deadline for a response. This would not be to the detriment of the defendant, on the contrary, and would undoubtedly

368 See Case C-338/93 P, *De Hoe/Commission*, op. cit., fn. 227, para. 22.

369 Case C-87/95 P, *CNPAAP/Council*, op. cit., fn. 229, paras 33 et seq.; Case C-126/90 P, *Bocos/Commission*, op. cit., fn. 96, para. 13.

370 See *Harding* and *Gibbs*, Why go to Court in Europe? An analysis of cartel appeals 1995-2004, [2005] European Law Review, Vol. 30 No. 3, p. 357.

371 See also *Sonelli*, op. cit., fn. 21, p. 896.

save some time. Nevertheless, the ECJ hardly ever proceeds this way. One explanation could be that in clear cut cases it is ultimately more time efficient to let the defendant hand in a defence, which, in many instances, is likely to help the ECJ to decide whether there are sufficient reasons to make use of Article 119. As to all other cases the ECJ presumably does not want to take the risk inherent to hasty procedures, which could mean that some appeals are being rejected as clearly inadmissible or manifestly unfounded, even though they are not. Thus, there are clear limits to the possibilities of making use of Article 119 ECJ Rules of procedure.

That said, on this occasion it needs to be stressed that this provision is not the catalyst it was meant to be, as in some instances the ECJ takes considerable time to hand down its orders: In *Obst v Commission*[372], the ECJ needed more than two years to find that the appeal is partly manifestly inadmissible and partly manifestly unfounded; in *Becker v Court of Auditors*[373] it took three years. Such delays are definitively too long for orders concerning obvious situations.

3. Increasing the number of judges?

This option is hardly ever discussed, let alone advocated,[374] possibly because the questions it raises are primarily financial and political, rather than legal. Some argue that it also has to do with the Community judiciary's image and moral authority.[375]

At first sight, one might argue that this solution has the "beauty of simplicity".[376] But this somewhat underestimates "that Article 6 § 1 of the Convention imposes on the Contracting States the duty to organise their legal systems in such a way that their courts can meet each of the requirements of that provision, including the obligation to decide cases within a reasonable time […]".[377] It should therefore provide the Community courts with the adequate number of judges in order to enable the judiciary to decide cases within a reasonable time period. The difficulty, however, is that this would require a unanimous amendment to the current rule of "One Member State, one judge".[378] This is highly unlikely to be achieved under the pre-

372 See Case C-403/95 P, *Obst/Commission*, op. cit., fn. 281.

373 See Case C-260/02 P, *Becker/Court of Auditors*, op. cit., fn. 227.

374 Two of the rare authors in favour are *Schohe*, op. cit., fn. 367, see pages 667-668, and *Voß*, The national perception of the Court of First Instance and the European Court of Justice, [1993], Common Market Law Review, Vol. 30, p. 1119.

375 See *van Gerven*, op. cit., fn. 23, p. 218.

376 See *Scorey*, A new model for the Communities' judicial architecture in the new Union, [1996] European Law Review, Vol. 21, p. 226.

377 See Judgment of the European Court of Human Rights of 25 March 1999 (Grand Chamber), *Pélissier and Sassi/France*, application no. 25444/94, para. 74.

378 See Article 221 (1) ECT as regards the ECJ and Article 224 (1) as regards the CFI.

sent circumstances.[379] It would be certainly feasible to increase the number of supporting staff,[380] but this might simply not be sufficient a measure. Thus, alternative or, rather, additional means need to be examined.

4. Filter mechanisms

There are essentially two mechanisms likely to curb the number of appeals and reduce the ECJ's workload accordingly: The first alternative, which was intensely debated in the context of the Treaty of Nice, consists of limiting the number of appeals *a limine*. The second alternative, which is hardly ever discussed, is to amend the rules regarding costs in order to deter a number of potential appellants. Both mechanisms are about "finding an appropriate balance between efficiency and judicial protection".[381] This rules out any filter or rules on costs which would simply exclude appeals in certain areas of the EU Treaty, or single out certain classes of cases,[382] such as staff cases,[383] since this would be discriminatory.

a) Limiting the appeals "a limine"?

Several mechanisms, some inspired from those existing in the Member States[384] and in the USA,[385] have been discussed. There are essentially two schools of thought, which can be summarised as follows: One way would be to require an appeal "to have major importance either for the development of Community law or for the protection of individual rights".[386] Another approach would be the commission of a "manifest error" on the part of the CFI.[387] Such filter mechanisms,

379 As already mentioned, the Civil Service Tribunal comprises only 7 judges, which is quite the opposite trend.

380 See *Johnston*, op. cit., fn. 339, p. 516-517.

381 See *Biondi*, Architectural Designs and Workload of the Community Courts, [2000] European Public Law, Vol. 6 No. 3, p. 311.

382 See the contribution of the ECJ and the CFI to the Intergovernmental Conference, p. 3.

383 See *Rabe*, Zur Reform des Gerichtssystems der Europäischen Gemeinschaften, [2000], Europarecht, p. 814.

384 See the overview of *Sonelli*, op. cit., fn. 21, p. 892-893, see also the comparative overview by *Silvestri*, Access to the Court of last resort: a comparative overview [1986] Civil Justice Quarterly, Vol. 5, p. 304 et seq.

385 See *Heffernan*, op. cit., fn. 74, p. 923 et seq.

386 See contribution of the ECJ, op. cit., p. 15; Due-Report, op. cit., fn. 15, p. 28; *Sonelli*, op. cit., fn. 21, p. 875.

387 See *Jacqué* and *Weiler*, On the Road to the European Union – A new Judicial Architecture: An Agenda for the Intergovernmental Conference, [1990] Common Market Law Review, vol. 27, p. 193.

however, whether implemented by a system of leave to appeal,[388] be it at the level of the lower court or the appellate court,[389] a "European certiorari system",[390] or similar mechanisms, raise a number of question marks: Are they compatible with the European Single Act, which grants a "right of appeal"?[391] What do these abstract and subjective criteria[392] mean in practice and how would they be applied? Should the EU's interest in the particular case prevail over the individual's interest to act?[393] Should an error in law committed by the CFI become definitive simply because the ECJ happens to consider that the appeal is of "minor" importance? Isn't there a risk that such power of a *limine* selection might be (mis-) used to avoid certain issues?[394]

Thus, such filters could ultimately generate "the impression of a denial of justice".[395] The actual question is, therefore, whether the Community judicial system should bear this risk or seek alternative means, such as creating "financial deterrents"?

b) Financial deterrents

aa) Introduction

There is little doubt that a number of appeals are lodged for more or less futile or otherwise unjustified reasons: Some are merely the result of an "entrenched adversarial culture".[396] Others are being pushed by the lawyer, rather than his client, e.g. in cases where the lawyer missed a time-limit at the CFI.[397] And then, as already stated, a considerable number of appeals are rejected as manifestly inadmissible and/or manifestly unfounded. It is safe to assume that a number of these appeals would have never materialised if the rules governing the costs in appeals proceedings weren't so generous, both as regards the institutions and the ECJ.

388 As advocated by e.g. *Everling*, Die Zukunft der europäischen Gerichtsbarkeit in einer erweiterten Europäischen Union, [1997], Europarecht, p. 416-417.

389 As rightly nuanced by *Brown*, op. cit., fn. 119, p. 744.

390 See *Heffernan*, op. cit., fn. 74, p. 923 et seq.

391 See *Jacobs*, Proposals for reform in the organization and procedure of the Court of Justice of the European Communities: with special reference to the proposed Court of first instance, in: Du droit international au droit de l'intégration – Liber Amicorum Pierre Pescatore, [1987], p. 295.

392 As rightly emphasised by *Heffernan*, op. cit., fn. 74, p. 927.

393 *Schohe*, op. cit., fn. 367, p. 665.

394 See *Sonelli*, op. cit., fn. 21, p. 898.

395 See *Vesterdorf*, op. cit., fn. 352, p. 315.

396 *Harding and Gibbs*, op. cit., fn. 371, p. 368.

397 See e.g. Case T-126/00, *Confindustria a.o./Commission*, op. cit., fn. 46; Case T-124/98, *Corrado Politi/European Training Foundation*, op. cit., fn. 46.

bb) The costs of the institutions

An appellant who loses an appeal generally bears the costs of the proceedings. But what does this mean in practice? This comprises the appellant's own costs, i.e. his lawyer's fees and expenditures. They are usually paid either by the appellant himself or by a third party, such as an insurance scheme, a trade association or, in certain staff cases, a trade union. In addition the appellant bears the costs of the defendant – in so far as such costs occurred and are considered to be reimbursable. This is where the problem lies:

If the defendant, who is almost always an institution, has recourse to an external lawyer the appellant will have to reimburse that lawyer's fees and expenses, within the limits of what is deemed "to be necessary for the purpose of the proceedings".[398] Normally, however, the European institutions act solely through one or several officials of their respective legal services, i.e. do not involve external lawyers. In these cases the appellant will merely have to pay the official's travel and subsistence expenses, which, by contrast, is a very limited amount. Thus, it is an irony that in all cases in which the defendant has no recourse to an external lawyer and which are rejected via an order, i.e. without a hearing taking place, the appellant will receive no bill whatsoever from the defendant.

This has to do with the fact that institutions cannot, as the law stands today, charge the other side for the costs of occupying an official on a given case.[399] This case-law is undoubtedly consistent with the current legislative rules. The question is, however, whether the latter are in all instances appropriate:

It is true that European officials are being paid to perform their duties as a whole, including the defence of their institution's interest in proceedings before the Community courts. However, every appeal which turns out to be either manifestly inadmissible or manifestly unfounded within the meaning of Article 119 ECJ Rules of procedure is ultimately a waste of time for everybody, including the official who has to deal with the case. In the year 2005 out of 44 appeals 19,[400] i.e. almost one in two, were dismissed on the basis of this provision.[401] In all of these cases it was the Community budget who paid those officials who have to deal with such cases, – while the applicants didn't have to reimburse the defendants anything. In other words, the current rules on costs amount to the appellant being granted the right to lodge manifestly inadmissible or manifestly unfounded appeals at the European taxpayers' expense.

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398 See Article 73 ECJ Rules of procedure.

399 See Case C-126/76, *Dietz*, [1979] ECR 2131; Case C-409/96 P-DEP, *Commission/Sveriges Betodlares and Henrikson*, [1999], ECR I-4941, summary.

400 See ECJ Report for 2005, op. cit.

401 In 1997 the ratio was 15 orders and 17 judgments, see ECJ General Report 1997, p. 4, www.curia.eu.int.

Moreover, the current legislative rules do not treat appellants equally. It is the defendants', i.e. institutions', sole decision to have recourse to an external lawyer in a given case. This varies from one case to another and is quite often determined by the language of procedure chosen by the appellant. As a result some appellants who make a "normal" use of their right to appeal and ultimately lose their case could land up paying the fees of the institution's external lawyer, while those appellants, who lodge a manifestly inadmissible or unfounded appeal, do not have to bear such costs, if the institution did not have recourse to an external lawyer.

Under these circumstances, it seems necessary and appropriate to amend the rules of procedure[402] in such a way that an appellant, whose appeal has been thrown out as clearly inadmissible or clearly unfounded, would have to pay a certain amount which reflects the costs of the defendant in terms of human resources. An ancillary question would then be how these costs should be determined, e.g. as a lump sum.

Such financial deterrent, which presents little risk of abuse on the side of the magistrates, is likely to make some appellants think twice before lodging manifestly inadmissible or otherwise unfounded appeals and thus wasting everybody's time. It would not be unfair to those appellants who might not necessarily be responsible for the fact that their lawyer missed e.g. the time limit for lodging the appeal or took points of facts for points of law: Those appellants could claim damages from their lawyer. Such a Damocles' sword should contribute to reducing the number of appeals.

cc) The costs of the ECJ

Proceedings before the ECJ shall be free of charge, except when a party "has caused the Court to incur avoidable costs".[403] In that case the ECJ may, after hearing the Advocate General, order that party to refund these costs. This provision, as it stands, is not a legal basis for claiming costs from appellants who lodged a manifestly inadmissible or manifestly unfounded appeal, since such appeal does not cause the ECJ "to incur avoidable costs". But the underlying idea of this provision is that an appellant should, under certain circumstances, be held liable for compensation. The same concept is enshrined in Article 69 (3), 2nd sub-paragraph ECJ Rules of procedure, which provides that the Court may order a party "to pay costs which the Court considers that party to have unreasonably or vexatiously caused the opposite party to incur". Some appeals are so blatantly inadmissible or without the slightest chance of success that they are clearly "unreasonable", to say the least. Again, similarly to the institutions' officials (see bb) above) the question arises why

402 Since the Treaty of Nice such amendment no longer requires unanimity in the Council, but merely a qualified majority; see Article 223 (6) ECT.

403 See Article 72 (a) ECJ Rules of procedure.

an appellant may force judges to spend a considerable share of their time and the ECJ's resources on such cases without participating in the costs generated.

E. Conclusions

From the outset the youngest amongst all legal remedies, the right of appeal to the Community Courts, has raised a number of question marks regarding the choice of the procedural rules and their practical implementation. These were generated by the Member States, the legislature, the judiciary and last but not least the parties to the appeals proceedings:

The Member States were not consistent in that they paved the way towards a coexistence between a right of appeal limited to points of law and an appeal covering both questions of law and fact.

Regarding the legislature two major omissions have become apparent:

Some legislative rules governing the appeals proceedings are so arid that they needed to be infringed a considerable number of times until the judiciary shed more light on how to interpret the relevant legislative parameters. Thus, in the early years, a number of appellants became victims, rather than the authors of a non-compliance with procedural rules.

Another major omission is the absence of any filtering mechanisms designed to curb the number of appeals and thus reduce the ECJ's workload. Admittedly, a number of mechanisms, such as a system of leave, might create efficiency at the risk of appearing as a denial of justice. But the complexity of this subject cannot become a pretext for not creating any filtering mechanism whatsoever. While all appellants should remain entitled to lodge appeals, there is no reason why those who take the risk of lodging manifestly inadmissible/unfounded appeals should not bear, at least in principle, the financial consequences generated by such avoidable procedures.

The judiciary's merit is that it has added a considerable amount of "flesh" onto the rather minimalist and sometimes enigmatic procedural rules. The ECJ, moreover, was ready to interpret the term "points of law" extensively, thus taking on board some of the principles applicable at the level of the Member States, and on the whole its approach vis-à-vis the appellants is not too formalistic. On the other hand, a further clarification of certain specific points, in particular regarding the "grey zone" between points of law and issues of fact, would be most welcome.

Finally, the appellants – or rather their lawyers – bear a major responsibility in the appeals' tormented procedural life: Never before have the procedural rules of a legal remedy been, on the whole, so blatantly and continuously ignored. While this may have been, to some extent, excusable during the early years, given the novelty of this

legal remedy, it has now become very much inexcusable to act in what amounts, in many cases, to a misuse. Too many lawyers either ignore the rules or share their client's "nothing to lose attitude", thereby failing to act as objective filters.

It is thus time to create financial deterrents in order to prevent many of those appeals, which turn out to be manifestly inadmissible or unfounded and should therefore have never been lodged in the first place. If nothing is undertaken history might repeat itself with respect to the appeals to the CFI.