NOTES

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES*

I. INTRODUCTION

In light of the increasing difficulties facing the Court of Justice as a result of its heavy caseload, the Council of Ministers of the European Communities (Council) unanimously adopted a decision on October 24, 1988, to create a Court of First Instance of the European Communities (Court of First Instance).[1] The newly created court essentially is intended to assume a "trial court" role over certain classes of cases formerly within the jurisdiction of the Court of Justice.[2] By relieving the Court of Justice of some of its caseload, the Council believed it would, *inter alia*, "enable the Court [of Justice] to concentrate its activities on its fundamental task of ensuring uniform interpretation of Community law."[3]

On September 1, 1989, the Court of First Instance officially began its operations.[4] The court, however, did not actually take up its duties until October 1989 and did not hold its first full session until December 14, 1989.[5] Nonetheless, the court has been fairly productive in the short period of time it has been functioning, rendering fifty-

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1. *See* Council Decision of October 24, 1988, establishing the Court of First Instance of the European Communities, 31 O.J. EUR. COMM. (No. L 313) 1 (1988) [hereinafter Council Decision], *amended* 32 O.J. EUR. COMM. (No. C 215) 1 (1989). In order to avoid confusion, future reference to the Council's Decision will only be made to the amended version. There are no substantive differences between the two versions of the decision. The Council was empowered to establish the Court of First Instance of the European Communities [hereinafter CFI], pursuant to the power vested in it by the Single European Act. *See infra* notes 51-55 and accompanying text for further discussion regarding the establishment of the CFI.

2. As discussed further below, *see infra* notes 135-158 and accompanying text, labeling the CFI a "trial court" is essentially inaccurate as the new court will not conduct trials as the term is understood in common law countries. My reference to the CFI as a trial court is due mainly to the fact that the CFI's primary task is to be a fact-finding court.

3. *See* Council Decision, *supra* note 1, at preamble.

4. *Court of First Instance Starts Operations*, 638 Common Mkt. Rep. (CCH), Aug. 24, 1989.

5. *See* XXIIIRD GENERAL REPORT ON THE ACTIVITIES OF THE EUROPEAN COMMUNITIES 1989, at 41-42 (1990). The judges appointed to the new court were not sworn in until September 25, 1990. *See* Buchan, *Relief at Hand for Eurocourt*, Fin. Times, Sept. 26, 1989, at 2, col. 6.

eight decisions by the end of 1990.[6] A number of these decisions have been appealed to the Court of Justice.[7]

The purpose of this Note is to examine the organization and structure of the Court of First Instance to determine whether it is suited to assume its role as a trial court. In particular, emphasis will be placed on the new court's ability to be a fact-finder as this is one of its primary tasks. It may be helpful in this connection to first review the role and function of the Court of Justice within the European Community; and, then the circumstances under which the Community chose to attach a lower level court to the Court of Justice. With this as a foundation, the Note will then examine the Council's decision which setup the basic structure of the new court. The Note will also examine some aspects of the Court of First Instance's newly formulated rules of procedure. Finally, some thoughts will be given as to the expected long-term impact of the Court of First Instance on the Court of Justice and the European Community in general.

II. THE COURT OF JUSTICE

The Court of Justice serves as the legal body of the three communities created under the European Economic Treaty, European Coal and Steel Treaty and European Atomic Energy Treaty.[8] Its basic task is to insure that in the interpretation and application of these treaties the "law is observed."[9] The Court of Justice also assumes a broader

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6. The CFI decided no cases in 1989, and 58 cases in 1990. (Information supplied by the Registrar of the Court).

7. In 1990, there were 19 appeals taken to the Court of Justice of the European Communities [hereinafter ECJ] from decisions of the CFI. (Information supplied by the Registrar of the Court).

8. *See* Treaty Establishing the European Economic Community, Mar. 25, 1957, arts. 167-88, 298 U.N.T.S. 3 [hereinafter EEC Treaty]; Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, arts. 31-45, 298 U.N.T.S. 140 [hereinafter ECSC Treaty]; Treaty Establishing the European Atomic Energy Community, Mar. 25, 1957, arts. 136-60, 298 U.N.T.S. 167 [hereinafter EURATOM Treaty]. For the official English translations of the Community Treaties *see* OFFICE FOR OFFICIAL PUBLICATIONS OF THE EUROPEAN COMMUNITIES, TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (1987).

9. *See* EEC Treaty, *supra* note 8, at art. 164. For purposes of simplicity reference will be made only to the provisions in the EEC Treaty dealing with the ECJ. These provisions are essentially identical to those contained in the ECSC and EURATOM Treaties.

Community law collectively consists of the law laid down by the Member States and the law laid down by Community Institutions. *See* Lenz, *The Court of Justice of European Communities*, 14 EUR. L. REV. 127, 128 (1989). Community law laid down by the Member States includes the treaties establishing the European Community, as amended, the three accession treaties, and the Single European Act of 1987. *Id.* Community law created by the Institutions of the Community, known as secondary or derived Community law, comes in various forms - *e.g.*, Council or Commission decisions, regulations or directives, which vary with respect to their binding character. *See id.* Community law also includes the international agreements

role in that its caselaw is an important element in producing greater intergration of the Member States in the Community by being "convincing, coherent, and based on clear objectives."[10]

As the principal legal body of the Community, the Court of Justice hears a wide variety of cases. Prior to the creation of the Court of First Instance, the court had jurisdiction to hear the following types of cases:

1. Disputes between Community Institutions and their employees (so called "staff cases");[11]

2. Requests for preliminary rulings by the courts of the Member States;[12]

3. Cases involving the review of decisions or rulings made by Institutions[13] of the Community;[14]

4. Actions by the Commission or other Member States to have a particular Member State declared in breach of its treaty obligations;[15]

5. Actions by individuals or firms for damages based on tort or contract claims;[16]

6. Disputes between Member States which relate to the subject matter of the Community treaties.[17]

For purposes of this Note, it is not necessary to delve into each of

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entered into by the Community with non-member countries and other international organizations. *Id.*

10. *See* Everling, *The Court of Justice as a Decision Making Authority*, 82 MICH. L. REV. 1294, 1295 (1984).

11. *See* EEC Treaty, *supra* note 8, at art. 179.

12. *See id.* at art. 177. Under the EEC Treaty, the ECJ has jurisdiction to give preliminary rulings concerning: a) the interpretation of the EEC Treaty; b) the validity and interpretation of acts of the Institutions of the Community; and, c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide. *Id.* Requests for preliminary rulings are made by courts and tribunals of the Member States. *Id.* Parallel provisions to article 177 of the EEC Treaty are found in the ECSC Treaty, *supra* note 8, at art. 41, and the EURATOM Treaty, *supra* note 8, at art. 150, as well as, in the Brussels Convention. *See* Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 15 O.J. EUR. COMM. (No. L 299) 23 (1972), unofficial text of the Convention, incorporating all amendments, was published at 33 O.J. EUR. COMM. (No. C 189) 35 (1990).

13. The Institutions of the Community include the European Parliament, the Council, the Commission and the ECJ. *See* EEC Treaty, *supra* note 8, at arts. 137-88. Ancillary Institutions of the Community include the Economic and Social Committee and the Court of Auditors. *See id.* at arts. 193-98 and 206-09.

14. *See* EEC Treaty, *supra* note 8, at arts. 173 and 175. The ECJ reviews both individual (quasi-judicial) and general (quasi-legislative) decisions of the Community Institutions.

15. *See id.* at arts. 169 and 170.

16. *See id.* at arts. 178, 181 and 215.

17. *See id.* at art. 182. The ECJ will have jurisdiction over such disputes only if the

the categories mentioned above. It is, however, relevant to observe that in the early to mid 1980s the Court of Justice had found it increasingly difficult to deal efficiently and expeditiously with the cases it heard.[18] This was primarily due to the increased complexity of the factual issues involved in resolving some of them and to the increased caseload of the court.[19]

A. Cases Involving Complex Factual Issues

Cases involving time consuming factual inquiries include in particular "staff cases"[20] and competition related cases.[21] Concerning staff cases, these actions often raise no significant legal issues. Rather, they involve extensive factual investigations to determine whether an employee has been treated in a manner inconsistent with Community law.[22] The Court of Justice had found these cases to be a nuisance and had previously attempted on several occassions to have them removed to another forum.[23]

Concerning competition related cases, such actions involve alleged violations of Community law regarding agreements in restraint

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disputes are submitted to the ECJ under a special agreement between the parties. *See id.* at art. 100.

18. *See infra* notes 33-43 and accompanying text.

19. There are a number of reasons for the increase in the ECJ's caseload; these include, among others, the accession of Spain and Portugal into the Community, and the numerous directives and regulations that have been made in order to gradually give effect to the principles and objectives of the Community treaties. *See* Slynn, *Court of First Instance of the European Communities*, 9 NW. J. INT'L L. & BUS. 542, 542-43 (1985). There is likely to be a continued increase in the caseload as rules and directives are adopted to give effect to the Single European Act, which calls for the creation of a single "Internal Market" by 1992. *Id.*

20. As discussed further below in the section on the CFI, the ECJ no longer has jurisdiction to hear these cases at first instance. *See infra* note 63 and accompanying text.

21. *See* Slynn, *supra* note 19, at 543.

22. *See id.* Staff cases involve "disputes between the Communit[y] and their servants referred to in article 179 of the EEC Treaty and in article 152 of the [EURATOM] Treaty." *See* Council Decision, *supra* note 1, at art. 3(1). Typical staff cases involve allegations of wrongful discharge, sex discrimination and improper promotion procedures. *See, e.g.* Bonino v. Commission, Case 233/85, 30 O.J. EUR. COMM. (No. C 57) 4 -(1987) (Article 25 of the Staff Regulations of Officials of the European Communities does not require the appointing authority to give its reasons for a decision assigning an official to a new post; the presence of women among the applicants for the post, and the principle of equal treatment for men and women, in no way affects this holding).

23. *See* Kennedy, *The Essential Minimum: the Establishment of the Court of First Instance*, 14 EUR. L. REV. 7, 22 (1989). "Suits by Community employees have comprised roughly one-third of the Court of Justice's caseload . . . and although most of the cases were heard by three-judge chambers rather than the full court, members of the Court of Justice and other commentators have, for more than a decade, seen no real need to burden the Court with those cases, which often involve trivial issues." *See Court of First Instance Starts Operations*, *supra* note 4, at 1.

of trade, mergers and state subsidies.[24] In addition to raising complex legal and policy issues, these types of cases require the Court of Justice to make extensive factual investigations.[25] The Court may often be required to sift through thousands of pages of documents,[26] as well as, hear entensive expert testimony.

The inability of the Court of Justice to efficiently deal with competition related cases is significant. Because the functions of the European Community are essentially economic in nature, the Court of Justice's most important case law is to be found in this area.[27] The inability of the court to timely address competition related issues arising in such cases potentially hinders the integration of the economies of the Member States, which is the basic aim of the Community.[28]

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24. Related procedural problems occur in connection with dumping cases brought under the Community's anti-dumping regulation. *See* Council Reg. No. 2423/88 of July 11, 1988 on Protection against Dumped or Subsidized Imports From Countries Not Members of the European Community, 31 O.J. EUR. COMM. (No. L 209) 1 (1988).

My comments concerning the increased difficulty of the ECJ to deal with competition related cases are primarily directed at the cases that are appealed to the ECJ from the Commission rather than requests for preliminary rulings by the national courts of the Member States. The latter types of cases essentially raise only legal issues as factual findings are made by the national court of the Member State making the request. *See* EEC Treaty, *supra* note 8, at art. 177; *but see infra* notes 89-93 and accompanying text concerning preliminary rulings on the classification of products under the common customs tariffs.

For general reference, Community competition law is enforced by either the Commission or by the national courts of the Member States. *See* OFFICE FOR OFFICIAL PUBLICATIONS OF EUROPEAN COMMUNITY, EEC COMPETITION POLICY IN THE SINGLE MARKET 44-56 (manuscript) (1989) [hereinafter EEC COMPETITION POLICY]. The advantage for a private legal person raising a claim in a national court is the possibility that he may recover damages. *Id.* at 44. In an action before the Commission, an individual who has claimed to have been injured by a breach of Community competition law may not recover damages, in fact he is not even a formal party to the proceedings. *Id.* The individual merely informs the Commission of the violation, which in turn investigates the claim and takes action accordingly. *Id.* Rulings by the Commission may then be appealed to the ECJ. *Id.*

The current trend has been for individuals to use the Commission rather than go to the national courts of the Member States. *Id.* It should be noted that the Commission may also act on its own motion. *See* Regulation No. 17/62, 5 O.J. EUR. COMM. (No. L 204) 35 (1962).

25. *See* Slynn, *supra* note 19, at 545; *see also* Kennedy, *supra* note 23, at 22-23.

26. *See* Slynn, *supra* note 19, at 544.

27. *See* Lenz, *supra* note 9, at 132. There is evidence that Community competition law will continue to grow in importance. *See* Hawk, *The Proposed Revisions to the Justice Department's Antitrust Guidelines for International Operations and Recent Developments in EEC Competition Law*, 57 ANTITRUST L.J. 299, 308 (1988).

> "EEC Competition law continues to grow in importance. This movement will accelerate for two reasons. The Community is going through its own deregulation wave, notably in telecommunications, air transport, and public procurement. More importantly, the Member States' agreement to remove all government barriers to interstate trade by 1992 is generating support for stronger competition law enforcement at the Community level." *Id.*

28. The basic aim of the Community is to create a single "common market" through the

B. Methods of Inquiry Available to the Court of Justice

Some have observed that the Court of Justice is ill-suited to perform the task of fact-finding.[29] The rules of procedure of the Court of Justice, however, clearly show that the court has a number of investigatory devices available to it.[30] These include the ability to request information and documents from parties.[31] The procedural rules also allow the court to hear testimony of witnesses, receive expert reports and question the parties themselves.[32] These methods of inquiry appear to be adequate enough to make any kind of factual investigation a case may require. In the past, however, the ability and willingness of the court to use such devices has been affected by its heavy caseload.

C. The Increased Caseload of the Court of Justice and its Effects

The growing number and complexity of cases brought before the Court of Justice has had a significant impact on the smooth operation of the court.[33] Over the last decade there has been a marked increase in the amount of time it has taken the court to dispose of a case, whether it be a direct action or a request for a preliminary ruling.[34] Because of the delays, a large backlog of cases has been built up.

The following statistics illustrate the increased burden of the Court of Justice. In 1978, there were 268 cases brought before the Court of Justice.[35] At that time it took approximately six months to get a preliminary ruling and nine months to get a decision on a direct action.[36] By 1983, the number of cases brought before the court increased to 297;[37] and, the amount of time it took to render prelimi-

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elimination of all distortions of trade between Member Countries. *See* EEC COMPETITION POLICY, *supra* note 24, at 9.

29. *See* Everling, *supra* note 10, at 1297.

30. *See* Rules of Procedure of the Court of Justice of the European Communities, art. 45, 17 O.J. EUR. COMM. (No. L 350) 1 (1974) [hereinafter Rules of Procedure of the ECJ].

31. *See id.* at art. 45 § 2.

32. *Id.*

33. "Until the arrival of the Court of First Instance [the ECJ] had to act as a court of first and last instance and determine facts in a considerable number of factually complex cases. The result of this dual role was a steady build-up in the number of cases awaiting judgment and an increase in the duration of proceedings to an extent which had become unacceptable [.]" *See* Rice, *Europe Learns to Love its Court*, Fin. Times, June 6, 1990, § I, at 22, col. 3.

34. *See* Kennedy, *supra* note 23, at 8.

35. *See* TWELFTH GENERAL REPORT ON THE ACTIVITIES OF THE EUROPEAN COMMUNITIES 1978, at 367 (1979).

36. *See* Kennedy, *supra* note 23, at 8.

37. *See* SEVENTEENTH GENERAL REPORT ON THE ACTIVITIES OF THE EUROPEAN COMMUNITIES 1983, at 348 (1984).

nary rulings increased to twelve months, while decisions on direct actions increased to fourteen months.[38] Five years later, in 1988, more than 370 cases were brought before the court,[39] and it took on average eighteen months to render preliminary rulings and more than twenty-four months to render decisions on direct actions.[40] Because of the increased caseload and the resulting time delay for their disposition, the number of cases pending before the court increased from 261 in 1978,[41] to 486 in 1983[42] and to 594 in 1988.[43]

The Court of Justice gradually became aware that its growing caseload was hindering it from carrying out the tasks entrusted to it under the Community treaties.[44] For instance, it was believed that national courts of the Member States were being discouraged from applying for reference opinions concerning Community law because of the expected time delay in receiving a ruling.[45] A trend such as this, if not addressed, would adversely affect the Court of Justice's ability to insure the uniform interpretation of Community law.

Over the years a number of measures were adopted in an attempt to increase the efficiency of the Court of Justice in order to ease the adverse effects of its heavy caseload.[46] For example, several amendments were made to the court's procedural rules so as to improve the way actions were handled.[47] There was also an increased tendency to

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38. EC Bulletin, Nov./Dec. 11 (Price Water House 1989).

39. *See* XXIIND GENERAL REPORT ON THE ACTIVITIES OF THE EUROPEAN COMMUNITIES 1988, at 448 (1989) (372 cases were brought before the ECJ).

40. EC Bulletin, *supra* note 38, at 11. In 1989, 385 actions were brought before the ECJ. *See* XXIIIRD GENERAL REPORT, *supra* note 5, at 436.

41. *See* TWELFTH GENERAL REPORT, *supra* note 35, at 367.

42. The number of cases pending before the ECJ have been adjusted to reflect the fact that a number of related cases were consolidated and treated as one case. The unadjusted figure for 1983 is 1,100 cases. *See* SEVENTEENTH GENERAL REPORT, *supra* note 37, at 348.

43. *See* XXIIND GENERAL REPORT, *supra* note 39, at 448.

44. *See* Kennedy, *supra* note 23, at 7. In a memorandum to the Council in 1978, the ECJ indicated "[t]he [Court's] workload is constantly increasing at an ever faster rate. It is already near the limit of what can be done with the Court's present man power on the basis of the present legislation." *See id.* at 2 n.2 (citing Memorandum of July 21, 1978, published in the bulletin of the news agency "Europe").

45. *See id.*

46. *See* T. MILLET, THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES 3-6 (1990). The measures adopted "may be grouped under three head[ings]: steps to increase the manpower of the ECJ, steps to streamline the procedure of the ECJ, and steps to establish first instance tribunals." *Id.* at 3.

47. In 1979, the ECJ's Rules of Procedure were amended to improve the way the court handled cases. *See* Amendments to the Rules of Procedure of the Court of Justice of the European Communities of 12 September 1979, 22 O.J. EUR. COMM. (No. L 238) 1 (1979) [hereinafter Amendments]. In order to further streamline the proceedings before the ECJ, stringent limits on the speaking time allowed to parties at hearings were imposed. *See* T. MILLET, *supra* note 46, at 5.

refer cases to the three or five judge "chambers" rather than the entire court.[48]

Though the measures adopted were helpful, they were inadequate as an effective long term solution.[49] Once realizing this, the Community, in particular the Court of Justice, began to seriously consider the establishment of a lower level court to which it could transfer some of its cases.[50]

III. COURT OF FIRST INSTANCE

A. *The Creation of the Court of First Instance*

In early 1986, the members of the EEC signed, and later ratified, a supplementary treaty to the existing Community treaties called the Single European Act (SEA).[51] Article 11 of the SEA inserted a new provision, article 168a, into the EEC Treaty.[52] This new provision empowered the Council, at the request of the Court of Justice and after consultation with the Commission, to establish a court of first instance of the European Communities.[53] After receiving a formal request from the court,[54] the Council exercised this power by unanimously adopting a decision (Decision) on October 24, 1988, officially creating the Court of First Instance.[55] As previously noted, the basic objective of the Council in creating the Court of First Instance was to

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48. The 1979 Amendments to the ECJ's Rules of Procedure, *inter alia*, increased the types of preliminary rulings which could be assigned to chambers and also allowed certain actions brought by natural or legal persons to be assigned to chambers as well. *See* Amendments, *supra* note 47, at art. 95(1).

49. *See* Kennedy, *supra* note 23, at 13. "[W]elcome though the changes in the European Court's procedures and the increase in the number of members were, those measures were insufficient and the situation continued to deteriorate. . . . [I]t had become increasingly clear, by 1985, that the efforts of the [ECJ] alone could not suffice to resolve the problems which it faced." *Id.*

50. *See* Schermers, *The European Court of First Instance*, 25 COMMON MKT. L. REV. 541, 542-43 (1988); *see also* Slynn, *supra* note 19, at 544.

51. The Single European Act, 30 O.J. EUR. COMM. (No. L 169) 1 (1987) [hereinafter SEA].

52. *See* EEC Treaty, *supra* note 8, at art. 168a. Articles 4 and 26 of the SEA respectively provide that parallel provisions to article 168a be inserted in the ECSC [32(d)] and EURATOM [140(a)] Treaties. To simplify matters, reference is made hereinafter to only the EEC Treaty; unless otherwise stated, it may be assumed that references to the relevant provisions in the ECSC and EURATOM Treaties are also intended.

53. *See* EEC Treaty, *supra* note 8, at art. 168a(1). The SEA also provided for an amendment to article 188 of the EEC Treaty. *See* SEA, *supra* note 49, at art. 12. The article empowered the Council, under the same conditions as in article 168a, to amend Title III of the Protocol Establishing the Statute of the Court of Justice, to create the rules and organizational structure of the CFI. *See id.*; *see also infra* note 130.

54. *See* Schermers, *supra* note 50, at 543.

55. *See* Council Decision, *supra* note 1.

reduce the heavy caseload of the over-burdened Court of Justice.[56] By relieving the court of original jurisdiction over "certain classes of cases," it was believed that the Court of Justice would be in a better position to focus on its fundamental task of ensuring uniform interpretation and application of Community law.[57] In addition, it was also believed that by transferring certain types of cases to the Court of First Instance, particularly those which required close examination of complex facts, judicial protection of individual interests would be improved within the Community.[58]

The role of the Court of First Instance is essentially that of a trial court in that its principle task is fact-finding. As has been discussed, the Court of Justice is not well suited - either because of its caseload or the methods of inquiry available to it, to make the type of extensive factual inquiries that are often involved in, for example, antitrust and state subsidy cases.[59] Accordingly, in establishing the jurisdiction, structure and procedural rules of the Court of First Instance, the Council had to consider the basic role of the new court and the purported inadequacies of the Court of Justice.

B. Jurisdiction

Pursuant to article 168a of the EEC Treaty, the Court of First Instance may be given jurisdiction to "determine at first instance, subject to the right of appeal to the Court of Justice on points of law only . . . certain classes of action or proceeding brought by natural or legal persons."[60] This provision left the Council to determine what specific classes of cases would be within the jurisdiction of the new court. The provision did, however, exclusively reserve to the Court of Justice jurisdiction over cases brought by Member States or by Community Institutions, and questions referred by national courts for preliminary rulings under article 177 of the EEC Treaty.[61]

The Council could have chosen to grant the widest possible range of jurisdiction permissible under article 168a. Such a decision would have substantially reduced the burden on the Court of Justice by leaving it original jurisdiction only over those cases noted above. The Council chose, however, to follow the more pragmatic and measured

56. *See* EC Bulletin, *supra* note 38, at 10.
57. *See* Council Decision, *supra* note 1, at preamble.
58. *See id.*
59. *See* Lang, *The Impact of the New Court of First Instance in EEC Anti-trust Cases*, in FORDHAM CORP. L. INST. 579 (1988).
60. *See* EEC Treaty, *supra* note 8, at art. 168a(1).
61. *See id.*

approach suggested by the Court of Justice in its proposal to the Council. This was to transfer jurisdiction of certain well defined matters to be enumerated individually.[62]

Under article 3(1) of the Council Decision, the Court of First Instance will exercise jurisdiction over three categories of cases:

1. Disputes between the Community Institutions and their employees, i.e., "staff cases";[63]

2. Actions brought against the Commission with respect to its decisions enforcing provisions of the European Coal and Steel Treaty (ECSC) relating to levies, production, prices and competition;[64]

3. Cases brought by natural or legal persons against Community Institutions relating to the implementation of the competition rules applicable to undertakings under articles 85 and 86 of the EEC Treaty.[65]

Furthermore, in instances where actions falling into the above categories are accompanied by claims for damages, the Council Decision provides that the Court of First Instance will have jurisdiction to hear such claims.[66] The court will not have jurisdiction to hear these claims under any other circumstances.[67]

With respect to the first category of cases, it was believed that while they were always important to the individuals who brought them, staff cases rarely raised general principles of law and essentially involved factual inquiries.[68] The reason they had come before the Court of Justice was simply that there was no other forum for them to be heard.[69] As previously noted, the Court of Justice had suggested that these cases be transferred to another forum which had better facilities and more time to investigate issues of fact, and which had a greater opportunity to reach possible compromises.[70] Hence, it seems appropriate that original jurisdiction over staff cases be given to the Court of First Instance.

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62. *See* Kennedy, *supra* note 23, at 21.

63. *See* Council Decision, *supra* note 1, at art. 3(1).

64. *See id.*

65. *See id.*

66. *See id.* at art. 3(2).

67. *See* Council Decision, *supra* note 1, at art. 3(2).

68. *See* Slynn, *supra* note 19, at 543.

69. *Id.*

70. *Id.* The transfer of staff cases to a tribunal of first instance has been on the Community's agenda since 1974. *See* Schermers, *supra* note 50, at 542; *see also* Proposal for a Council Regulation (Euratom, ECSC, EEC) amending Staff Regulations of Officials and Conditions of Employment of other Servants of the European Communities and establishing an Administrative Tribunal of the European Communities, 21 O.J. (No. C225) 6 (1978).

The second category of cases involves claims brought against the Commission under the ECSC Treaty by undertakings or association of undertakings alleging that Commission decisions concerning them were invalid.[71] The decisions in question relate to the imposition of levies on the production of coal and steel, the fixing of prices or quotas, and rulings concerning restrictive practices and abuses of a dominant market position.[72] These cases often involve very complex factual inquiries as well as analysis of difficult legal and policy issues. Hence, like the previous category of cases, it is appropriate they be given to the Court of First Instance.

Significantly, with respect to the above category of cases, because the Court of First Instance will be better able than the Court of Justice to review more critically the factual findings and conclusions of the Commission's decisions, there may be an increased burden on the Commission to substantiate its decision.[73]

The last category of cases concern decisions by the Commission or Council against natural and legal persons for violations of the Community antitrust laws contained in articles 85 and 86 of the EEC Treaty.[74] This category of cases also includes actions brought by natural or legal persons claiming that these Community Institutions have failed to act when called upon to do so in regard to these treaty provisions.[75] The removal of these cases to the Court of First Instance will have a similar impact as the removal of the previous category of cases with respect to the Commission's burden of making factual inquiries.

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71. *See* T. MILLET, *supra* note 46, at 24-25. A Commission decision may be declared invalid if it is, among other things, *ultra vires* or involves a misuse of power. Slynn, *supra* note 19, at 545.

72. *See* Slynn, *supra* note 19, at 545.

73. *See* Lang, *supra* note 59, at 592. "It is clear that . . . the overall effect of the new court will be to review the Commission's economic assessments and findings of fact more critically and more closely than" the ECJ has done in the past. *See id.*

The Commission itself is over burdened with work and the Community may need to expand its capacity. In the past, for example, the increased workload of the Commission has hindered its ability to investigate possible violations of Community laws. *See* Jacobs, *Civil Enforcement of EEC Antitrust Law*, 82 MICH. L. REV. 1364, 1367 (1984). As a result, the competition laws have not served as a strong deterrent because of the selective nature in which they are enforced. *Id.*

74. Article 85 relates to agreements and concerted practices between undertakings which aim to, or do in fact, prevent, restrain or distort competition within the Common Market. *See* EEC Treaty, *supra* note 8, at art. 85. Article 86 relates to abuse of dominant positions within the Common Market. *Id.* at art. 86. Both articles are aimed at preserving and enhancing Community competition rules by different means. Article 85 focuses on agreements or concerted practices between two or more enterprises, whereas article 86 is directed at abusive behavior by monopolies or firms with very considerable power. *See* EEC COMPETITION POLICY, *supra* note 24, at 13.

75. *See* EEC Treaty, *supra* note 8, at arts. 85 and 86.

Significantly, considering the basic mission of the new court, it is less likely that the Court of First Instance will adopt, as the Court of Justice has sometimes done, the findings of the Commission without making substantial inquiry itself into the facts.[76] As noted earlier, the reason for the Court of Justice being less inquisitorial as to factual issues than perhaps it should be is directly related to its heavy caseload.

The removal of the types of cases listed above, particularly those cases dealing with commercial law, will allow the Court of Justice to focus on the other cases which remain within its jurisdiction. Importantly, any appeals taken from decisions of the Court of First Instance will be restricted to points of law.[77] Therefore, the Court of Justice will not be troubled by the time consuming process of fact-finding when it reviews these cases. Hence, the efficiency of the court will be improved.

The grant of jurisdiction to the new court is limited and excludes, in particular, cases relating to violations of Community law with respect to dumping and violations of articles 92 and 93 with respect to state subsidies. The Council Decision did provide, however, that "in light of experience, including the development of jurisprudence, and after two years of operation of the [Court of First Instance]," it would re-examine the proposal of the Court of Justice to determine whether the new court's jurisdiction should be expanded to include additional classes of cases.[78] Such cases include, among others, dumping and subsidy cases noted above.[79]

Concerning cases involving challenges to decisions of the Commission or the Council regarding violations of Community anti-dumping laws, the Court of Justice has been significantly burdened by the considerable amount of detail and large number of documents entailed in resolving such actions.[80] Because of the particular nature of these cases, they have been very time consuming and have "impose[d] a disproportionately large burden on the [Court of Justice relative] to their number."[81] There is evidence that based on the current economic situation within the Community the number of anti-dumping

76. Lang, *supra* note 59, at 592. "So far, particularly in trade cases, the Court has tended to concentrate on ensuring that procedural rules were strictly obeyed and, provided that this had been done, to accept the Commission's findings on factual and economic issues." *Id.*

77. *See infra* note 88.

78. *See* Council Decision, *supra* note 1, at art. 3(3).

79. *Id.*

80. *See* Slynn, *supra* note 19, at 544. Anti-dumping cases have produced thousands of pages of pleadings and accompanying exhibits. *Id.*

81. *See* Kennedy, *supra* note 23, at 23.

cases will continue to grow.[82] Such evidence includes the fact that in recent years the Commission has been increasingly required to investigate claims by industries that companies outside the Community have dumped their products within the Community.[83] Therefore, based on the type of inquiries involved in adjudicating anti-dumping cases, it seems appropriate that they be transferred to the Court of First Instance.[84]

The Council Decision indicates that one reason for not transferring jurisdiction over anti-dumping cases to the Court of First Instance is that jurisprudence in this area has not been sufficiently developed.[85] Another reason given is that the Community itself has not had much experience dealing with this type of infraction of Community law.[86]

Concerning the need to develop jurisprudence in this area, it could be more quickly developed if the new court was given jurisdiction to hear these cases at first instance. As noted, anti-dumping cases, like subsidy cases, involve complex factual inquiries which take

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82. *See id.*; *see also* Slynn, *supra* note 19, at 545-46.

83. *See* Slynn, *supra* note 19, at 545-46. The types of cases the Commission has recently been asked to investigate have involved alleged dumping of electronic equipment from Japan and low priced refrigerators and minerals from Eastern Europe and the Soviet Union. *Id.* (citing *e.g.*, Technointors v. E.C. Commission, 3 COMM. MKT. L. REV. 491 (1987) (freezers from the USSR); Tokyo Elec. Co. Ltd. v. E.C. Council, 1 COMM. MKT. L. REV. 169 (1988); Celestri & Co. Spa v. Amministrazione Delle Finanze Dello Stato, 3 COMM. MKT. L. REV. 181 (1985) (zinc coated steel sheets from East Germany); Re Anti-Dumping Proceeding Concerning Imports of Certain Tubes of Iron or Steel Originating in Rumania, 1 COMM. MKT. L. REV. 504 (1980); Nashua Corp. v. E.C. Commission, 1985 E. Comm. Ct. J. Rep. 3467).

84. Some have argued that by not granting the CFI jurisdiction over anti-dumping cases, the CFI may be underemployed. *See* Kennedy, *supra* note 23, at 23.

85. *See* Council Decision, *supra* note 1, at art. 3(3). "[O]ne EEC expert explained, 'for the [C]ommunity, dumping legislation is a relatively new law where many questions are still open.' As a result, the EC Commission believes that relegating dumping cases to the lower court would not represent 'any [additional] easing of the [ECJ's] workload because outside trade lawyers have already indicated that they would appeal any dumping decisions to the higher court,' the expert said." *See EC's New Inferior Court is Designed to Ease Burdens of the Court of Justice*, 57 ANTITRUST & TRADE REG. REP. (BNA), No. 1432, (Int'l Dev. Sec.), at 358 (Sept. 14, 1989) [hereinafter *EC's New Inferior Court*].

86. *See* Kennedy, *supra* note 23, at 22. A majority of the Member States, as well as a majority of the members of the European Parliament and of the judges of the ECJ, supported extending the CFI's jurisdiction to anti-dumping and subsidy cases. *Id.* (citing a press release issued by the Information Office of the Court of Justice, dated June 13, 1988). Those against granting jurisdiction over dumping cases to the new court included the Commission and France. *See* Buchan, *supra* note 5, at 2, col. 6. "The Commission argued that those of its officials dealing with anti-dumping actions were overstretched enough without having to appear before two courts first in the lower-tier court, and then probably in the [ECJ] to defend their imposition of dumping fines." *See id.*

up an inordinate amount of the Court of Justice's time.[87] The Court of First Instance, on the other hand, was specifically created to handle these type of inquiries. If the new court was granted jurisdiction over anti-dumping cases, the Court of Justice's task in refining Community law would be facilitated as the only issues on appeal would be legal ones.[88] The Court of Justice would also benefit from the new court's analysis of the legal issues raised in such cases. Accordingly, Community law relating to dumping could be clarified much more quickly.

Lastly, there are strong arguments that the Council should reconsider its decision to exclude all reference opinions from the jurisdiction of the Court of First Instance.[89] It is true that a good number of the requests for preliminary rulings deal with unclear questions of Community law, and, therefore, it is appropriate that the Court of Justice hear them directly.[90] However, there are also a number of reference opinions that in effect raise only questions of fact. A good illustration of this are requests for preliminary rulings on the classification of particular products under the common customs tariffs.[91] How a particular product is classified involves a factual determination based largely on expert opinion.[92] The Council could consider adopting guidelines that would try to differentiate what types of questions

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87. *See supra* notes 24-26 and accompanying text.

88. An appeal from a decision of the CFI is limited to only points of law. *See* EEC Treaty, *supra* note 8, at art. 168a. The Protocol on the Statute of the Court of Justice attached to the EEC Treaty, as amended by the Council's Decision, provides three grounds for appeal from the CFI to the ECJ. These include:

1) A lack of competence of the CFI;

2) A breach of procedure before the CFI that adversely affects the interests of the appellant; and,

3) The infringement of Community law by the CFI.

See Council Decision, *supra* note 1, at art. 7 (inserting Title IV, art. 51, into the Protocol on the Statute of the Court of Justice [hereinafter Protocol]). There will be no appeal regarding the amount of costs awarded or the party ordered to pay them. *Id.*

89. *See* EEC Treaty, *supra* note 8, at art. 168a(1). Article 168a(1) of the EEC Treaty specifically withholds from the jurisdiction of the CFI questions referred for preliminary rulings by national courts of the Member States under article 177 of the Treaty. *Id.* This article also excludes actions brought by Member States or by Community Institutions. One reason offered for excluding cases that either directly or indirectly involve Member States is that it would be inappropriate for any Community legal body other than the ECJ to address them. *See* Schermers, *supra* note 50, at 543-44. However, some argue that "any suggestion of inferiority of the new court is undesirable" and that the Community should reconsider including these cases within the CFI's jurisdiction. *Id.*

90. *See* Schermers, *supra* note 50, at 543.

91. *Id.* Judge David Edward, Britain's judge on the CFI, has argued that technical customs classification should be given to the CFI. *See* Rice, *supra* note 33, at 22, col. 4.

92. *See* Schermers, *supra* note 50, at 543; *see e.g.*, J. Cleton & Co. B.V. v. Inspecteur der Invoerrechten den Accijnzen, case No. 11/79, Oct. 4, 1979, 1979 E.C.R. 3069 (refrigerator v. air conditioning equipment).

raise primarily factual issues and what types of questions raise primarily legal issues.[93] Hence, if a reference request is referred to the Court of Justice and it determines the issues raised are primarily factual under the adopted guidelines, the request could be directed to the Court of First Instance for disposition.

The Council has time to evaluate the above and other arguments before it considers expanding the Court of First Instance's jurisdiction in 1992.

C. Composition, Organization and Rules of Procedure of the Court of First Instance[94]

1. Judges

The Court of First Instance is composed of twelve judges who sit for six year terms.[95] In order to insure continuity of the new court, six of the members appointed initially will serve only a three year term, while the remaining six members will serve a full term.[96] As is the case with the Court of Justice, there is no provision requiring one judge from each Member State.[97] The omission of such a requirement is an expression of respect for judicial independence.[98] Nonetheless,

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93. What are legal and what are factual issues can sometimes be difficult to discern. Issues raised in reference opinions may raise legal and factual issues that are so intertwined that they cannot be separated. *See* Lang, *supra* note 59, at 592.

94. The CFI is located in Luxembourg, in the same building as the ECJ. The judges have their own personal staffs which include their law clerks. The number of law clerks may be increased as the caseload of the new court increases. The CFI will have its own registrar, however, it will share all other administrative support services with the ECJ. These include, translations, interpretations for oral hearings, finance, recruitment and other personnel matters, as well as other general services. *See* Council Decision, *supra* note 1, at art. 7 (inserting Title IV, art. 45, into the Protocol); *see generally* Kennedy, *supra* note 23, at 24-25.

95. *See* Council Decision, *supra* note 1, at art. 2. On July 31, 1989, the Conference of the Representatives of the Governments of the Member States appointed judges to the CFI. The judges appointed include: Jose Luis da Cruz Vilaca, President (Portugal), Jacques Biancarelli (France), Cornelis Paulus Briet (Netherlands), David Alexander Ogilvy Edward (United Kingdom), Rafael Garcia-Valdecasas y Fernandez (Spain), Christos G. Geraris (Greece), Heinrich Kirschner (Germany), Koenraad Lenaerts (Belgium), Antonia Saggio (Italy), Romain Schintgen (Luxembourg), Bo Vestrdorff (Denmark) and Donal Barrington (Ireland). Europe (Telex) July 31/Aug. 1, No. 5068 (1989).

96. *See* Council Decision, *supra* note 1, at art. 12.

97. *See id.* at art. 2. The proposal of the ECJ called for only seven judges to be appointed to the CFI. However, the difficulty with having only seven judges with 12 Member States in the Community is that a certain amount of anxiety is created for those Member States without a nominee on the new court. This anxiety could have been lessened if the ECJ proposal had been adopted by introducing a rotation system. *See* Schermers, *supra* note 50, at 546.

Some have argued that having a judge from each Member State serves an important function by introducing the legal thinking and basic concerns of each Member State into the ECJ's consideration of cases. *See* Everling, *supra* note 10, at 1296.

98. *See* Lenz, *supra* note 9, at 130.

the current judges of the court represent all the Member States of the Community.[99] It is expected that each Member State will continue to be represented.[100]

2. *Chambers*

The Council Decision specifies that the Court of First Instance may sit in chambers consisting of three to five judges.[101] Under the court's recently formulated rules of procedure, the chambers of the court are broken down into two divisions.[102] The first division is composed of three judges who will hear disputes between the Community and their servants, i.e., "staff cases."[103] The second division is composed of five judges who will hear all other cases within the court's jurisdiction.[104]

The designation of a division of chambers to specialize in hearing only one class of cases is unique to the Court of First Instance. Under the current rules of procedure of the Court of Justice, there are no specialized chambers. The apparent reason for designating staff cases to chambers composed of only three judges is the belief that such cases do not require as much judicial manpower to resolve as do the other cases within the new court's jurisdiction. This is explained perhaps by the fact that staff cases primarily involve factual determinations for their resolution.[105] Commercial related cases, on the other hand, which are handled by five judge chambers, often require the court to address not only complex factual issues but legal issues as well.

Under the Council Decision, whether the Court of First Instance would be required to sit in plenary session rather than in chambers, when hearing certain types of cases, was left to be established by the court's rules of procedure.[106] The court's newly formulated procedural rules contain no such requirement. This is unlike the Court of Justice whose rules require that it sit in plenary session when hearing

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99. *See supra* note 95.

100. *See* Lenz, *supra* note 9, at 130.

101. *See* Council Decision, *supra* note 1, at art. 2(1).

102. Rules of Procedure of the Court of First Instance, 33 O.J. EUR. COMM. (No. C 136) 1 (1990) [hereinafter Rules of Procedure of the CFI]. These rules have not yet entered into force. *See infra* note 133.

103. *See* Rules of Procedure of the CFI, *supra* note 102, at art. 12.

104. *See id.*

105. *See supra* notes 68-70 and accompanying text.

106. *See* Council Decision, *supra* note 1, at art. 2(4).

certain types of cases.[107] Such cases include, *inter alia*, actions brought by Member States and by Institutions of the Community.[108] Significantly, the Court of First Instance does not have jurisdiction to hear these type of cases or any other which must be heard by the Court of Justice in plenary session.

While the rules of procedure do not require the Court of First Instance to sit in plenary session, the rules do indicate that "whenever the legal difficulty or the importance of [a] case or special circumstances so justify, the [Court of First Instance] may . . . decide to refer [a] case to a bench composed of a different number of Judges" than contained in the one to which it was assigned.[109] Hence, it is possible for the court to sit in plenary session when hearing important cases.[110] The language of the above quoted provision also suggests that the court could sit in chambers containing more than five judges but less than all the judges of the court.[111] This gives the Court of First Instance considerable flexibility to add judicial manpower when needed to handle important and/or difficult cases.[112] Interestingly, the Court of Justice does not have a similar provision in its rules to augment the number of judges in its chambers.[113]

3. *Advocate General*

The Council Decision provides that the Court of First Instance will have the assistance of Advocate Generals in rendering its decisions.[114] Under the procedural system of the new court, which is based largely on the continental legal system of Europe,[115] the main

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107. *See* EEC Treaty, *supra* note 8, at art. 165, as amended by the Rules of Procedure of the ECJ, *supra* note 30, at art. 95.

108. *See id.*

109. *See* Rules of Procedure of CFI, *supra* note 102, at art. 14.

110. At any stage of the proceedings, a case may be referred to a different number of judges than contained in the chamber to which it is assigned. *See id.* at art. 51. The decision to increase the number of judges hearing a case will be made after a proposal has been made to that effect by the Judge-Rapporteur, and after consultation with the Advocate General assigned to the case. *Id.*

111. The voting in a chamber that has other than three or five judges is governed by article 32(4) of the CFI's Rules of Procedure.

112. The language of the CFI's Rules of Procedure would also seem to allow a decrease in the number of judges in a chamber. *See* Rules of Procedure of the CFI, *supra* note 102, at art. 142. Hence, this also gives the CFI flexibility to conserve judicial manpower in less important cases and/or less difficult cases.

113. There appears no reason why the ECJ could not similarly adopt a rule that would allow it to increase or decrease the number of judges in a chamber, depending on the complexity and importance of a case.

114. *See* Council Decision, *supra* note 1, at art. 2.

115. *See* Schermers, *supra* note 50, at 552.

task of an Advocate General is to act "with complete impartiality and independence" in making opinions in open court on certain cases "in order to assist the [Court of First Instance] in the performance of its task."[116] In brief, an Advocate General participates in the written and oral stages of the court's proceedings,[117] though he does not take part in deliberations.[118] An Advocate General "will review the facts of [a] case, deal with submissions of the parties and of any others who have taken part of the proceedings, review the law, and finally [express] his own opinion on how the judges should decide the case."[119] The opinion of the Advocate General, usually made at a hearing after the parties have delivered their arguments, is not binding on the judges hearing the case, rather it is meant only to assist the members of the court in reaching their judgment.[120]

Unlike the practice of the Court of Justice, an Advocate General will not be assigned to every case heard by the court.[121] The rules provide that one will be assigned to a case if the action is being heard by the court in plenary session.[122] Otherwise, an Advocate General will only be assigned "if it is considered that the legal difficulty or the factual complexity [of a case] so require."[123]

The rationale for having Advocate Generals assigned to all cases heard by the Court of Justice, at least prior to the creation of the Court of First Instance, was that the Court of Justice was the first and last forum of review with respect to rulings on Community law.[124] It was believed that the assistance of the Advocate General was necessary to ensure that Community law was properly interpreted.[125] This rationale does not, however, support having Advocate Generals assigned to cases heard by the Court of First Instance as legal issues reviewed by the new court may be appealed to the Court of Justice.

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116. *See* Council Decision, *supra* note 1, at art. 2(3).

117. *See infra* notes 138-158 and accompanying text for a brief discussion of the written and oral stages of proceedings before the court.

118. *See* Council Decision, *supra* note 1, at art. 2(3).

119. L.N. BROWN & F.G. JACOBS, THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES 54 (1989).

120. *See id.* An Advocate General essentially serves as official *amicus curiae*. *Id.* at 55.

121. *See* Rules of Procedure of the CFI, *supra* note 102, at arts. 17 and 18.

122. *See id.* at art. 17.

123. *See id.* at art. 18. The decision to designate an Advocate General in a particular case will be voted on by the members of the CFI at the request of the chamber to which the case is assigned or devolved. *See id.* at art. 19. The President of the CFI will designate the court member who will serve as Advocate General. *See* Rules of Procedure of the CFI, *supra* note 102, at art. 19.

124. *See* Lenz, *supra* note 9, at 130.

125. *Id.*

Hence, there are two forums of review concerning rulings on Community law.

In connection with the above, some have asserted that Advocate Generals are not essential to the Court of First Instance because its main task is fact-finding, not resolving difficult legal issues.[126] While this is essentially true, it is also true that unsettled questions of Community law will still arise in the cases heard by the court. This may not perhaps occur with regard to staff cases, but it is likely to occur with regard to the other two categories of cases heard by the court which deal with Community commercial law. In addition, unsettled questions of Community law will likely become more frequent if the jurisdiction of the new court is expanded in the future.

Lastly, when called upon, members of the court will serve as Advocate Generals.[127] This is different from the practice followed by the Court of Justice, where the Advocate Generals, six in total, are appointed separately from the judges of the court.[128] As the Court of First Instance currently has a limited caseload, it is not necessary that the Advocate Generals be appointed separately from the judges of the court. This should be reconsidered, however, if the new court's jurisdiction is expanded.

4. *Procedural Rules*

The procedures before the Court of First Instance are governed by the Council Decision establishing the court,[129] the Protocol on the Statute of the Court of Justice of the European Communities, as amended,[130] and the Rules of Procedure of the Court of First Instance.[131]

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126. *See* Schermers, *supra* note 50, at 549. The ECJ did not recommend in its proposal to the Council that the CFI should have Advocate Generals assigned to it. *Id.*

127. *See* Rules of Procedure of the CFI, *supra* note 102, at art. 19. The President of the CFI may never serve as an Advocate General. *Id.* at art. 9. A judge selected to serve as an Advocate General on a particular case most likely will not be a member of the chamber to which the case has been assigned.

128. *See* EEC Treaty, *supra* note 8, at art. 166.

129. *See* Council Decision, *supra* note 1, at arts. 2 and 11.

130. Acting pursuant to article 12 of the SEA Treaty, the Council amended Title III of the Protocol attached to the EEC Treaty to include provisions concerning the operations of the CFI. *See id.* at art. 7. The amended Protocol provides that the procedures of the CFI will be governed by Title III, with the exception of article 20, and the newly inserted Title IV of the Protocol. *See id.* (inserting Title IV, art. 46, into the Protocol). Acting under the SEA Treaty, the Council also amended in its Decision, the Protocol attached to the ECSC and EURATOM Treaties to include parallel provisions to the ones referenced in regard to the Protocol attached to the EEC Treaty. *See id.* at arts. 5, 6, 9 and 10.

131. *See* Council Decision, *supra* note 1, at art. 7 (inserting Title IV, art. 46, into the Protocol).

The Protocol and the Council Decision provide for the general organizational framework of the court as well as for the general procedural process cases will follow. Several of the provisions contained in these documents have already been briefly discussed. Concerning the day to day operations of the court, they will be primarily governed by the new court's rules of procedure. Acting pursuant to article 11 of the Council Decision, the court recently formulated its own procedural rules which are currently awaiting approval by the Council.[132] Until the rules enter into force, the court will apply *mutatis mutandis* the Rules of Procedure of the Court of Justice.[133]

Space does not permit a detailed discussion of the lengthy procedural rules contained in the above referenced sources. For purposes of this Note, the discussion will focus only on the procedural measures that relate to fact finding by the Court of First Instance, since this is its principal task. Any significant differences in the manner in which facts are found by the Court of First Instance, that vary from the manner in which they are found by the Court of Justice, will be highlighted.

The procedures for establishing facts are, as expected, essentially identical to those followed by the Court of Justice.[134] As is the case with the Court of Justice, there is no "trial" as the term is understood in common law countries.[135] Rather, the determination of facts as well as law is spread over a considerable period of time.[136] A brief, though simplified, explanation of these procedures is as follows.[137]

Proceedings before the Court of First Instance are divided into two phases: the written phase and the oral phase.[138] During the written phase, the parties file documents resembling pleadings.[139] Attached to the pleadings is the written evidence of the parties.[140] After

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132. *See* Rules of Procedure of the CFI, *supra* note 102.

133. *See id.* at art. 11. The Council is expected to approve the CFI's procedural rules sometime in May of 1991. Upon approval, the rules will enter into force on the first day of the second month following their publication in the "L" series of the Official Journal. *Id.* at art. 130.

134. *See* Schermers, *supra* note 50, at 552.

135. *See* Herzog, *The Procedure Before the Court of Justice of the European Communities*, 41 WASH. L. REV. 438, 454 (1966).

136. *See id.*

137. Where there are any notable variations between the procedural rules of the CFI and the ECJ they are referenced in the accompanying notes to the text.

138. *See* Rules of Procedure of the CFI, *supra* note 102, at arts. 43-55 (written procedures) and arts. 56-63 (oral procedures).

139. *See id.* at art. 43. The documents differ from pleadings submitted in American courts in that they contain legal arguments.

140. *See id.*

the appropriate documents have been submitted, the Judge-Rapporteur of the chamber assigned to hear the case[141] will review the documents and prepare a preliminary report.[142] The report will contain a summary of the facts and legal issues raised in the case.[143] The report will also contain a recommendation whether "measures of organization of procedure"[144] or "measures of inquiry"[145] should be undertaken and whether the case should be referred to a bench composed of a different number of judges.[146]

The bench hearing the case will then decide whether to adopt any of the recommendations contained in the preliminary report.[147] If the recommendations are not adopted, the case will be scheduled for oral hearing.[148] If the recommendations are adopted, they are implemented.[149] When they have been completed, the Judge-Rapporteur will prepare a final report summarizing the legal and factual issues in the case.[150] The case will then either be decided,[151] or as will most often occur, be scheduled for oral hearing.[152] If the matter is to be decided at this point, the Advocate General, if one is assigned to the case, will deliver his opinion in open court, either orally or in writing, as to how the case should be decided.[153] After the opinion is

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141. *See* Rules of Procedure of the CFI, *supra* note 102, at art. 13 § 2. One of the judges assigned to the chamber to which the case has been referred is designated to act as rapporteur. *Id.* The Judge-Rapporteur, unlike an Advocate General, will participate in deliberations.

142. *See id.* at art. 52 § 1.

143. *See* Rules of Procedure of the CFI, *supra* note 102, at art. 51 § 1.

144. *See id.* at art. 64. As will be discussed, *see infra* notes 165-180 and accompanying text, "measures of procedure" are unique to the CFI's Rules of Procedure. There are no comparable measures found in the ECJ's Rules of Procedure.

145. As discussed further below, *see infra* notes 159-162 and accompanying text, the measures of inquiry available to the CFI, such as the ability of the court to request the production of documents or call witnesses, are identical to those available to the ECJ.

146. *See* Rules of Procedure of the CFI, *supra* note 102, at art. 52 § 1; *see also supra* text at notes 109-113 (discussion noting that there is no comparable provision in the ECJ's procedural rules with respect to increasing or decreasing the number of judges that are in a chamber to which a case has been assigned).

147. *See* Rules of Procedure of the CFI, *supra* note 102, at art. 52 § 2. Guided by the preliminary report and any recommendation of the Advocate General, the court decides what issues of fact, if any, need to be proven and what measures of inquiry will be used for this purpose. *See* L.N. BROWN & F.G. JACOBS, *supra* note 119, at 230.

148. *See* Rules of Procedure of the CFI, *supra* note 102, at art. 52 § 2.

149. *See id.*

150. The CFI's rules of procedure do not specifically indicate that a final report will be prepared by the Judge-Rapporteur after measures of inquiry have been completed by the court. However, this practice is followed by the ECJ and is likely to be followed by the CFI. *See* L.N. BROWN & F.G. JACOBS, *supra* note 119, at 230.

151. *See* Rules of Procedure of the CFI, *supra* note 102, at art. 55.

152. *See id.* at art. 54.

153. *See id.* at arts. 55 and 61.

delivered, the proceedings are closed and deliberations are begun.[154]

If the matter proceeds to the oral phase, the parties present their legal and factual arguments in the case.[155] The members of the bench, including the Advocate General, may put questions to the parties.[156] After the arguments have been heard, the Advocate General, if assigned to the case, will deliver his opinion in the same manner as described above.[157] The president of the chamber will then declare the oral phase of the hearings closed and deliberations will begin.[158]

The fact that the Court of First Instance's above described procedural rules are very similar to those of the Court of Justice is significant. This is particularly the case with respect to the measures of inquiry available to both courts. Under its recently formulated rules of procedure, the Court of First Instance is granted the same measures of inquiry as those granted to the Court of Justice.[159] These measures include, *inter alia*, the ability of the court to call witnesses, request information and the production of documents, and request the presence of and pose questions to the parties.[160] As indicated earlier, these measures are employed during the written phase of the proceedings to assist the court in the factual investigation of cases.[161]

The significance of the measures of inquiry being identical is that it demonstrates that the drafters of the rules believed the factual investigatory devices available to the Court of Justice were adequate enough to be given to the Court of First Instance to fulfill its role as a fact-finding court.[162] The advantage the new court will have over the Court of Justice is that it will not be as heavily burdened with work.

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154. *See id.* at art. 55. The bench hearing the case may deliver judgment without oral argument from the agents, advisors or lawyers of the parties, "unless one of the parties objects on the ground that the written procedure did not enable him to fully defend his point of view." *See id.*

155. *See* Rules of Procedure of the CFI, *supra* note 102, at art. 57. All judges assigned to the chamber hearing the case must be present at the oral hearing or they cannot participate in deciding the case. *Id.* at art. 33 § 2.

156. *See id.* at art. 58.

157. *See id.* at art. 61.

158. *See id.* at arts. 60 and 61. The bench may, after hearing from the Advocate General, order the reopening of the oral procedure. *See id.* at art. 62.

159. Compare article 45 § 2 of the Rules of Procedure of the ECJ, *supra* note 30, with article 65 of the Rules of Procedure of the CFI, *supra* note 102.

160. *See* Rules of Procedure of the CFI, *supra* note 102, at art. 65.

161. The court must make an order specifying the measures of inquiry to be used. *See* L.N. BROWN & F.G. JACOBS, *supra* note 119, at 227.

162. Prior to the publication of the CFI's procedural rules, there were some who felt that the ECJ's procedural rules were sufficiently flexible to be adopted almost in toto by the CFI. *See* Lang, *supra* note 59, at 552.

Hence, it will be in a better position to make full use of these investigatory devices.

In connection with the above, an observation should be made with regard to who is present when the measures of inquiry are being employed. Under the procedural rules of both the Court of First Instance and the Court of Justice, the measures of inquiry will be conducted by the bench or be assigned to the Judge-Rapporteur.[163] If an Advocate General is assigned to a case he will also participate.[164] One problem perhaps with this arrangement is that only the Judge-Rapporteur and the Advocate General are actually required to be present while the important phase of factual investigations is taking place. With regard to the Court of Justice, it has sometimes been the case that only these individuals were present. As a result, the absent judges could not personally weigh the credibility of witnesses or experts that may have testified, or consider for themselves any documents that were submitted. They had to rely, therefore, solely on the findings found in the Judge-Rapporteur's report.

The reason the Court of Justice followed such a practice was in part attributable to the heavy caseload placed on its judges. The Court of First Instance, on the other hand, has a limited jurisdiction and a relatively light caseload in comparison. Therefore, it would not be unreasonable to require judges who are not assigned to be either a Judge-Rapporteur or an Advocate General to participate in the measures of inquiry. The Council might reconsider adopting such a requirement particularly in light of the fact that the new court's basic purpose is to find facts.

Lastly, one important addition to the Court of First Instance's rules of procedure, that has no counterpart in the Court of Justice's rules of procedure, is the provision relating to the "measures of organization of procedure."[165] As shown below, the addition of this provisions is apparently intended to streamline and make more efficient the operations of the new court, in particular the court's fact-finding capability.

Article 64, section 1, of the court's rules of procedure specify that

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163. *See* Rules of Procedure of the ECJ, *supra* note 30, at art. 45 § 3; *see* Rules of Procedure of the CFI, *supra* note 102, at art. 53 § 1. Under article 53 of the CFI's Rules of Procedure, where a case is being heard in plenary session, the CFI may participate in measures of inquiry as a whole or assign it to the chamber from which the case originated or to the Judge-Rapporteur of that chamber. *See* Rules of Procedure of the CFI, *supra* note 102, at art. 53 § 1.

164. *See* Rules of Procedure of the ECJ, *supra* note 30, at art. 45 § 1; *see* Rules of Procedure of the CFI, *supra* note 102, at art. 67 § 1.

165. *See* Rules of Procedure of the CFI, *supra* note 102, at art. 64.

the "[m]easures of organization of procedure shall, in particular, have as their purpose:

(a) to ensure efficient conduct of the written and oral procedure and to facilitate the taking of evidence;
(b) to determine the points on which the parties must present further arguments or which call for measures of inquiry;
(c) to clarify the form of order sought by the parties, their submissions and arguments and the points at issue between them;
(d) to facilitate the amicable settlement of proceedings."[166]

While the rules specify the various purposes of the measures of organization of procedure, they do not indicate exactly what the measures are.[167] However, based on the language of the rules, it seems apparent that the measures entail something similar in substance to a pre-trial order, which is commonly found in the American judicial system.[168] The general purpose of such a document is to clarify the legal and factual issues in dispute before a case proceeds to trial. While there is no "trial" in a case before the Court of First Instance,[169] measures of organization of procedure appear to accomplish the same task. The measures also seem to go beyond this, to encompass all measures that will assist the court in quickly and efficiently resolving disputes that come before it.[170]

It seems apparent that the measures of organization of procedure, if properly used, will facilitate the efficient running of the Court of First Instance. Furthermore, there does not seem to be any reason why the Court of Justice should not adopt a similar provision in its own procedural rules. In fact, it may be of greater value to the Court of Justice because of its larger caseload.

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166. *See id.* at art. 64 § 2.

167. The CFI's procedural rules indicate that the measures of organization of procedure will be prescribed by the bench after hearing from the Advocate General. *Id.* at art. 64 § 1.

168. The measures of organization of procedure may have been influenced to some extent by a provision in the German Code of Civil Procedure, which was added as part of a major revision in 1976. *See* Zivilprozessordung § 272 (1977). Under section 272 of the German Code of Civil Procedure the presiding judge must at the beginning of the proceedings render a decision indicating how the main hearing, which should terminate the case, should be prepared. *See id.*; *see also* L. ROSENBERG & K.H. SCHWAB, ZIVILPROZESSRECHT 642-43 (14th rev. ed. 1986). The judge has two options, he may either order the parties to attend an early preliminary hearing to prepare the case, or he may order the parties to continue exchanging writings to simplify and clarify the issues. *See* L. ROSENBERG & K.H. SCHWAB, *supra*, at 642-43.

169. *See supra* note 135-136 and accompanying text.

170. The CFI's procedural rules indicate that measures of organization of procedure may be undertaken at any stage of the proceedings. *See* Rules of Procedure of the CFI, *supra* note 102, at art. 49.

IV. Impact of the Court of First Instance

In 1989 more than 150 cases were transferred from the Court of Justice to the Court of First Instance.[171] This figure represented approximately one quarter of the Court of Justice's arrears.[172] Under the present grant of jurisdiction, the types of cases transferred to the new court have in past years represented approximately twenty to twenty-five percent of the Court of Justices caseload.[173] While this still leaves the Court of Justice with a substantial number of cases,[174] it is certainly a step forward in relieving some of the court's burden.[175] Importantly, the types of cases assumed by the Court of First Instance, particularly those involving violations of the ECSC Treaty and infringements of articles 85 and 86 of the EEC Treaty, are ones which have received a disproportionate amount of the Court of Justice's attention because of the complex factual questions involved in resolving them.[176] Accordingly, the court will be left with more time to focus on shortening the waiting period for reference opinions and on reducing the number of cases in arrears.

It is too early to say whether the Court of First Instance will fulfill the goals set for it by the Community. The new court's long term success will be evidenced by the refinement of Community law through the development of better case law.[177] Recognition of the success of the new court will also be seen if the Council decides to expand, as it should, the court's jurisdiction to include the other

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171. *See* XXIIIRD GENERAL REPORT, *supra* note 5, at 41-42. In 1989, the CFI dealt with a total of 169 cases, 153 of them transferred from the ECJ. *Id.* For a listing of the cases transferred to the CFI *see* 32 O.J. EUR. COMM. (No. C 317) 10-12 (1989).

172. *See* EC Bulletin, *supra* note 38, at 11. In 1989, the total number of cases pending before the ECJ was 649. *See* XXIIIRD GENERAL REPORT, *supra* note 5, at 436.

173. *See* EC Bulletin, *supra* note 38, at 11.

174. Some have argued that the true worth of the new court will be seen only when the CFI assumes approximately 50% of the ECJ's caseload and the arrears are substantially reduced. *See id.*

175. *See id.* The extent to which the burden on the ECJ will actually be relieved is in part dependent upon the number of appeals the ECJ will hear. Some have indicated that any relief given to the ECJ may be short lived in light of the anticipated increase in complaints related to the completion of the EC's Single Market. *See EC's New Inferior Court*, *supra* note 85, at 358. Some expect the caseload of the ECJ to escalate back to the level it was before the creation of the CFI. *Id.*

176. Interestingly, one of the very first competition law decisions rendered by the CFI raised solely questions of law. *See* Tetra Pak Rausing SA v. Commission, Case T-51/89, July 10, 1990, 33 O.J. EUR. COMM. (No. C 193) 10 (1990). The question raised, which the court answered in the affirmative, was whether it was possible to be in breach of article 86 of the EEC Treaty with respect to conduct benefiting from an exemption under article 85(3) of the same treaty.

177. *See* EC Bulletin, *supra* note 38, at 11.

classes of cases recommended in the Court of Justice's proposal.[178]

V. CONCLUSION

The Court of First Instance will increasingly assume, particularly if its jurisdiction is expanded, a greater role in the Community. Its existence will have a significant impact in the future on the ability of the Court of Justice to enforce and interpret Community law.

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178. Though not included in the ECJ's proposal to the Council, other types of cases likely to be considered for transfer to the CFI include actions for damages and State Aids. *See* Kennedy, *supra* note 23, at 29.