OPPORTUNITIES AND LIMITS FOR THE TRANSFER OF PRELIMINARY REFERENCE PROCEEDINGS TO THE COURT OF FIRST INSTANCE

by

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A. *Introduction*

The Treaty of Nice has undoubtedly brought about a far-reaching reform of the Community judiciary[1]. One of its innovations is the newly created possibility for the

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1 See in this respect, e.g.: *Azizi*, "Die Reform der Gerichtsbarkeit der Europäischen Gemeinschaften im Lichte der aktuellen Entwicklung" in *Ginther/Benedek/Isak/Kicker* (eds), Völker- und Europarecht. 25. Österreichischer Völkerrechtstag, Wien (2001) 167-190; *Ruiz-Jarabo Colomer*, "La réforme de la Cour de justice opérée par le traité de Nice et sa mise en œuvre future" Revue trimestrielle de droit européen 2001, 705-725; *Vesterdorf*, "Nice – traktaten og EF-domstolen: en nødvendig reform" Eu-ret & Menneskeret, 2001, 4, 141-149; *Roldán Barbero*, "La reforma del Poder Judicial en la Comunidad Europea" Revista de derecho comunitario europeo 2001, 77-116; *Johnston*, "Judicial reform and the Treaty of Nice" Common market law review 2001, 499-523; *Sack*, "Zur künftigen europäischen Gerichtsbarkeit nach Nizza" EuZW 2001, 77-80; *Lenz*, "Die Gerichtsbarkeit in der Europäischen Gemeinschaft nach dem Vertrag von Nizza" EuGRZ 2001, 433-441; *Due*, "The Court of Justice after Nice" Europarättslig tidskrift 2001, 360-366; *Lipp*, "Europäische Justizreform" NJW 2001, 2657 ff; *Tambou*, "Le système juridictionnel communautaire revue et corrigé par le traité de Nice" Revue du marché commun de l'Union européenne 2001, 164 ff; *Weiler*, "Epilogue: The Judicial Après Nice" in *de Búrka/Weiler* (eds), The European Court of Justice (2001) 215-226; *De Koster*, "L'évolution du système juridictionnel de l'Union européenne" in *Dony/Bribosia* (eds), L'avenir du système juridictionnel de l'Union européenne, Bruxelles (2002) 19 ff; *Kovar*, "La réorganisation de l'architecture juridictionnelle de l'Union européenne" ibidem 49 ff; *Lenaerts*, "La réorganisation de l'architecture juridictionnelle de l'Union européenne: quel angle d'approche adopter?" ibidem 49 ff; *Louis*, "La cour de justice après Nice" ibidem 5 ff; *Obwexer*, "Die Neuordnung des Gerichtssystems nach Nizza" in *Griller/Hummer* (eds), Die EU nach Nizza, Wien (2002) 239-280; *Tizzano*, "La Cour de Justice après Nice: le transfert de competences au Tribunal de première instance" Revue du Droit de l'Union européenne 2002, 665-685; *Jimeno Bulnes*, "La reforma juridiccional del Tratado de Niza" Boletin de información 2002, 1681-1700; *Everling*, "Zur Fortbildung der Gerichtsbarkeit durch den Vertrag von Nizza" in Steinberger-FS, Berlin/Heidelberg/New York (2002) 1103-1127; *Condinanzi*, "Le innovazioni organizzative al sistema giudiziario comunitario" in *Nascimbene/Treves* (eds), Il processo comunitario dopo Nizza, Milano (2003)

Council to entrust the Court of First Instance with jurisdiction for preliminary rulings in specific areas under Article 225, paragraph 3 of the EC Treaty (and Article 140a, paragraph 3 of the Euratom Treaty). Until the coming into force of the Treaty of Nice, preliminary rulings had been the only judicial matter formally excluded by the Treaties from the actual or potential competences of the Court of First Instance[2].

Thus, the new Article 225, paragraph 3, EC Treaty formed one particularly spectacular provision out of a whole bundle of legislative measures in the EC Treaty, which all aimed at increasing the efficiency of the Community judiciary[3].

B. The decisive legal standard: Article 225, paragraph 3 of the EC Treaty[4].

I. General observations

Article 225, paragraph 3, sub-paragraph 1, EC Treaty is the essential basis for any future transfer of preliminary ruling competences to the Court of First Instance.

It simply says:

"The Court of First Instance shall have jurisdiction to hear and determine questions referred for a preliminary ruling under Article 234, in specific areas laid down by the Statute."

It emerges undeniably from this wording that the Member States in their quality as treaty-making constitutional legislators and authors of the Treaty of Nice have explicitly and fundamentally approved the idea that the Court of First Instance be seized with references for preliminary rulings.

Consequently, already from the outset, even if the modalities and "specific areas" remain to be determined, an argument pretending that any transfer of preliminary ruling competences from the Court of Justice to the Court of First Instance would be absolutely contrary to the Treaties would not be admissible: Indeed, denying, for reasons of principle, the compatibility of any such transfer with the Treaties would lead to jeopardising the central content of Article 225, paragraph 3, EC Treaty and, hence, its *effet utile*. For any legal act – and *a fortiori* any constitutional provision – should as far as possible be interpreted in a way that preserves its essential meaning

53-81; *Everling/Müller-Graff/Schwarze* (eds), Die Zukunft der europäischen Gerichtsbarkeit nach Nizza, EuR-Beiheft 1/2003; *Azizi*, "Die Institutionenreform in der EU aus der Sicht der Gerichtsbarkeit" in *Hummer* (ed), Paradigmenwechsel im Europarecht zur Jahrtausendwende, Wien (2004) 181-229.

2 See the last sentence of Article 225, paragraph 1, in its version before the coming into force of the Treaty of Nice.

3 *Azizi*, "Direktklagen und Sonderbereiche beim Gericht erster Instanz" in EuR-Beiheft 1/2003, cited at note 1, 87-114 at 113 f, section V.

4 As to the general questions linked with this provision, see e.g. *Grabenwarter*, "Vorabentscheidungsverfahren nach dem Vertrag von Nizza" in EuR-Beiheft 1/2003, cited at note 1, 55-69.

(and on the basis of the assumption that any utterance of the legislator is presumed to express a normative element and not to be simply irrelevant or void)[5] [6].

II. The general scope of "Questions Referred for a Preliminary Ruling Under Article 234"

Notwithstanding the fact that Article 225, paragraph 3, sub-paragraph 1, EC Treaty refers solely to Article 234, EC Treaty, nonetheless the range of questions for a preliminary ruling covered by this provision includes not only Article 234, EC Treaty as such, but all kinds of preliminary ruling procedures inside or outside the EC Treaty, insofar as their governing provisions, by referring to Article 234, EC Treaty, enlarge its scope of application.

This is the case, for example, for the wide range of possible preliminary references under Title IV of the EC Treaty ("Visas, Asylum, Immigration and Other Policies Related to Free Movement of Persons"), according to Article 68, EC Treaty. Indeed, though Article 68, EC Treaty provides for a specific form of preliminary ruling procedure for measures based on Title IV of the EC Treaty, in accordance with paragraph 1 of this provision, Article 234, EC Treaty shall apply to this title, even if with certain modifications.

On the other hand, it seems to me that references for a preliminary ruling in respect of police and judicial cooperation in criminal matters under Title VI of the Treaty on European Union, according to its Article 35, do not fall within the field of application of Article 234, EC Treaty, because neither Article 35 nor Article 46 TEU do refer to Article 234, EC Treaty. Consequently, Title VI of the Treaty on European Union seems to be excluded from the possible transfer of jurisdiction to the Court of First Instance.

5 An opposite point of view has been exposed by A.G. *Ruiz-Jarabo Colomer* in his opinion of 29 nov. 2001, Case C-17/00, De Coster, [2001] ECR I-9445, para. 74. See also *Waelbroeck*, "Nizza oder das Janus Dilemma: Für oder gegen eine zweiköpfige Gerichtsbarkeitsstruktur für Vorabentscheidungsverfahren?" in EuR-Beiheft 1/2003, cited at note 1, 71-85.

6 Besides this basic legal assessment, a series of evaluative arguments speak in favour of the system outlined in Article 225 para. 3, sub-para. 1 EC Treaty: see below. See also i.a. *Grabenwarter*, in EuR-Beiheft 1/2003, cited at note 1, at 59-61; *Everling*, in Steinberger-FS, cited at note 1, at 1003ff; *Chiti*, "L'architettura del giudiziario europeo dopo il Trattato di Nizza: la lenta evoluzione dall' ecletticismo al razionalismo", in *Cartei/Vannucci* (eds), Diritto Comunitario e ordinamento nazionale, Milano (2003) 31-55, at 43 and 53.

III. How to determine "specific areas" suitable for an attribution to the Court of First Instance?

1. General remark: Possible criteria for the determination of "specific areas"

Any determination of "specific areas" for which it might be appropriate to confer the preliminary ruling jurisdiction upon the Court of First Instance must take into consideration a set of different objectives and values peculiar to the contextual legal background of Article 225, paragraph 3, EC Treaty and which appear to form an evaluative field of tension relevant for positioning the choice to make.

Amongst the various evaluative factors to be taken into account, I would like to stress particularly the following: First, the general objectives followed by the Treaty of Nice in the field of jurisdiction; second, the possible affection of the unity or consistency of Community law as particular legal criterion of Article 225, paragraph 3, EC Treaty; thirdly, various procedural aspects.

2. The main objectives of the Treaty of Nice regarding the judiciary

a) The general objective of efficiency

Concerning the Community judicial system, the main aim pursued by the Treaty of Nice seems to have been to *increase the efficiency of the Community judiciary*[7]. That is, to bring or keep the judicial proceedings to a reasonable speed without hampering/endangering the quality of the judgments.

b) Specific implications of the efficiency principle in the context of Article 225, paragraph 3, EC Treaty

aa) Brief account

Thus, the possibility opened by Article 225, paragraph 3, first sub-paragraph EC Treaty to transfer preliminary ruling competences to the Court of First Instance has to be seen above all as a measure to set free bound working capacities of the Court of Justice, but also as a means to take advantage of the organisational flexibility of the Court of First Instance and of possible synergies with its existing competences.

Now, in this context the following factors known to the Member States authors of the Treaty of Nice have to be taken into account:

7 See e.g. *Azizi*, in *Hummer* (ed.), cited at note 1, at 193 f and at 226 ff.

bb) Foreseeable work-load increase

The number of references for preliminary rulings, which has already been steadily increasing over the years, will most probably show an even more massive, fast and continuous rise a few years after the accession of the ten new Member States. Even if, in the first interim period, the Court of Justice is successful, by way of procedural and organisational reforms[8], in somewhat reducing the average length of preliminary rulings' proceedings, this may well turn out to be a mere drop in the ocean once the courts from new Member States really start using the proceedings under Article 234, EC Treaty and bring a great many references to the Court of Justice (not to speak of the future accession of Bulgaria and Rumania).

cc) Questions of organisational flexibility

It seems that the Member States acting as authors of the Treaty of Nice have made their choice, when they fixed the number of judges at the Court of Justice with "one judge per Member State" (Article 221, paragraph 1, EC Treaty) whilst they decided that the Court of First Instance shall comprise "at least one judge per Member State" and that its number of judges shall be determined by the Statute (Article 224, paragraph 1, EC Treaty).

Thus, the working capacity of the Court of Justice, even if it uses the most efficient working methods imaginable, will always be limited by its restricted number of judges.

On the other hand, it seems that the Member States who were the authors of the Nice Treaty deliberately provided for a flexible adaptation of the number of judges at the Court of First Instance, so as to allow, at any future moment, an increase of the working capacity of that court in parallel with an eventual growth of its work-load[9].

dd) General functional focuses of both courts under the Nice Treaty

As to the main functions of both courts, it seems that the Member States authors of the Treaty of Nice had in mind to shift the emphasis of the activities of the Court of

8 See e.g. *Jacobs*, "Recent and ongoing measures to improve the efficiency of the European Court of Justice" European Law Review 2004, 823-830.

9 *Prechal*, "Who should do what?" in La Cour de Justice des Communautés européennes, 1952-2002: Bilan et perspectives (2004) 63-85, at 80, even deems that the "unlimited number of judges" at the CFI may lead to qualitative advantages for the drafting and reasoning of preliminary rulings as well as to considerable shortening of the preliminary ruling procedure. See also *Lenaerts*, "De hervorming van de rechterlijke organisatie binnen de Europese Unie" in Liber Amicorum Pierre Marchal (2003) 77-95 (at 90 para. 24). *Weiler*, in *de Búrka/Weiler* (eds), cited at note 1, at 217 and 223 f.

Justice to the functions of a Supreme and Constitutional Court of the European Union. On the other hand, for the Court of First Instance, whose importance has been considerably strengthened through various provisions of the Nice Treaty, it seems that the Member States wanted to give it the future role of a central piece within the Community judicial architecture, as a "general court" of the European Union[10], with a huge range of possible competences[11].

ee) Efficiency and access to justice versus purity: the Treaty of Nice approach

For the authors of the Nice Treaty, it probably seemed in the interest of its efficiency quite natural and appropriate that such a "general court" would benefit from some organisational flexibility: On the one hand, in parallel with any new work-load, that courts' size could be adapted by enlarging the number of judges. On the other hand, it would seem adequate that such a general court, once it disposes of a sufficiently high number of judges, reacts autonomously to any new competences by adjusting its internal structures, especially by creating *specialised chambers*[12].

As to the specific character of preliminary rulings proceedings, the following will have to be borne in mind:

In spite of different suggestions to cut down the access for national courts to the preliminary reference procedure or at least to introduce filtering mechanisms, including even the idea of creating regional Community courts for preliminary rulings[13], the Member States authors of the Treaty of Nice have obviously chosen another approach: They kept the wording of Article 234, EC Treaty unchanged and hence, deliberately maintained a rather open access of national courts to procedures

10 The term "The General Court" has also been retained as the characteristic overall denomination for the CFI in the final version of the Treaty Establishing a Constitution for Europe (see e.g. its Article I-29).

11 *Prechal*, in La Cour de Justice des Communautés européennes, cited at note 9, at 78 f, even suggests that at the end of a step-by-step process all preliminary references should go to the CFI in its capacity as a "general and ordinary court" (at 76). In the same direction: *Everling*, "The Future of the European Judiciary within the enlarged European Union" in Mélanges en hommage à Michel Waelbroeck (1999) 333-354, and *Dyrberg*, "What should the Court of Justice be doing?" European Law Review 2001, 291-300.

12 See also *Meij*, "Toekomstperspectieven van het Hof van Justitie van der EG" in Europeanisering van het Nederlands Recht, Haak-FS (2004) 59-72 (at 65) who points out the basic idea, under article 225, para. 3, EC Treaty, of entrusting specific technical matters to more specialised chambers of the CFI.

13 *Olivares Tramon/Tüllmann*, "Die künftige Gestaltung der EU-Gerichtsbarkeit nach dem Vertrag von Nizza", NVwZ 2004, 43-50, at 45/46 (with further citations), distinguish the following four categories of proposals for a reform of the preliminary rulings procedure in the ongoing discussion before the Treaty of Nice: 1.) Restricting the right to bring a preliminary reference; 2.) transforming the right to bring a preliminary reference into a right of appeal; 3.) instituting filtering mechanisms and 4.) decentralization.

under that article, whereas implicitly rejecting any of the above-mentioned suggestions[14].

On the other hand, by opening up the possibility for the Council to entrust the Court of First Instance with "specific areas" of preliminary rulings, the Member States authors of the Treaty of Nice have resolved to stick to the basic concept of a centralised Community judiciary for preliminary rulings, still mainly centered around the Court of Justice, but comprising also alternative competences of the Court of First Instance for certain fields of law, subject to an exceptional review by the Court of Justice[15].

Thus, confronted with the difficulties of safe-guarding efficiency on the one hand and keeping the aspiration for a thoroughly complete homogeneity of case law on the other hand, the authors of the Treaty of Nice have chosen a balanced medium solution.

Maybe, seen solely from the point of view of the "purity" of the system, the approach taken by the Treaty of Nice would appear as being only a "second best solution", as compared with the original concentration of reference proceedings with one single jurisdiction. Yet, although they have been certainly fully aware of that fact, the Treaty making legislators have, for the reasons indicated above, deliberately chosen another approach.

14 See in this respect e.g. *Mastroianni*, "Il trattato di Nizza ed il riparto di competenze tra le istituzioni giudiziarie comunitarie" in *Nascimbene/Treves* (eds), 21-51 (at 38-40).

15 The proposal has been put forward that the Court of Justice be competent for preliminary references brought by national Supreme Courts, whereas the Court of First Instance should be competent for preliminary references from all other national Courts. That proposal also foresees the possibility for national Supreme Courts, to revert - in the course of national remedies proceedings - to the ECJ with a question which had already been answered by the CFI to a lower national Court, thus asking the ECJ to turn over the earlier preliminary ruling given by the CFI [see *Weiler*, in *de Búrka/Weiler* (eds), cited at note 1, at 224 and *idem*, "La arquitectura judicial despuéo de Niza" in *García deEnterría/Alonso García* (eds), "La encrucijáda constitucional de la Unión Europea" (2002) 469-482, at 480]. However, this model not only would require another change of the Treaty, but would also seem highly problematic, as it would seriously hamper as well the principle of legal security as the efficiency objective underlying the Treaty of Nice: indeed, if a preliminary ruling judgement of the CFI could be put into question even after the expiry of the period foreseen for an eventual review by the ECJ under Article 225, para. 3, sub-par. 3, EC Treaty, in connection with Article 62 of the Statute of the Court of Justice, the *effet utile* of this specific review procedure, the legal certainty of the interested parties and of the general public as well as the expediency of a one-stop-shop proceeding for preliminary rulings would be jeopardized. That proposal would also raise the problem of parallel proceedings due to preliminary rulings questions brought simultaneously by national lower Courts and national Supreme Courts. (See also *Grabenwarter* in EuR-Beiheft 1/2003, cited at note 4, at 61/62.) For all these reasons, quite on the contrary to that proposal, under the efficiency concept underlying Article 225, para. 3, EC Treaty, all national Courts involved in a case, including national Supreme Courts must necessarily be bound by the CFI's preliminary ruling if no review procedure is taken up by the ECJ. Otherwise, it would not seem worthwhile at all to transfer any Article 234 competences to the CFI.

Actually, by the way: As a matter of fact, even by keeping all preliminary reference proceedings with the Court of Justice, there would be no guarantee that in 100% of all cases the answers given by one chamber of the Court of Justice will always be coherent with the case law of other chambers or of the Grand Chamber. However, in such cases, once the judgment is rendered, such an inconsistency will become final and remain definitively, even if there was a serious risk of the unity or consistency of Community law being affected. Seen in this light, the transfer of preliminary ruling competences to the Court of First Instance with the *possibility of an exceptional review* of its decisions by the Court of Justice does not seem to necessarily endanger or threaten the present level of jurisprudential consistency achieved in the field of preliminary rulings.

Finally, one should not forget that the Court of First Instance has already at present the competence not only to interpret Community law, but to decide on the validity of legal acts as well under Article 230, EC Treaty (by way of actions for annulment[16]) as under Article 241, EC Treaty (plea of illegality), which latter competence may also include the assessment of legal acts of a general nature.

c) Interim conclusions

What would then be the first conclusions to be drawn from these considerations on the general Treaty objectives inherent to the Treaty of Nice for the transfer of preliminary rulings to the Court of First Instance? Such a transfer not only is not to be excluded, but is properly the answer of the Treaty of Nice to an unavoidable steady increase in the number of proceedings under Article 234, EC Treaty. For matching the different objectives to be met, there is no 100% waterproof solution. This observation/assessment will have to be kept in mind for the determination of legal matters forming "specific areas" for the attribution of competence under Article 225, paragraph 3, EC Treaty.

Now let us have a closer look at the criterion of an affection of the unity or consistency of Community law already mentioned.

16 As to the overlapping or vicinity between actions for annulment and preliminary rulings proceedings, see i.a. *Grabenwarter* in EuR-Beiheft 1/2003, cited at note 4, at 59.

3. The possible affection of unity or consistency of Community law as a legal criterion for determining "specific areas" under Article 225, paragraph 3, EC Treaty

a) The legal background

Article 225, paragraph 3, sub-paragraphs 2 and 3, EC Treaty explicitly address the problem that a preliminary ruling procedure before the Court of First Instance may raise questions relevant to the unity or consistency of Community law.

If, in an open preliminary reference proceeding, the Court of First Instance considers that the case requires a decision of principle likely to affect the unity or consistency of Community law, it may (read: "it shall"[17]) refer the case to the ECJ for a ruling (Article 225, paragraph 3, sub-paragraph 2, EC Treaty). However, under Article 225, paragraph 3, sub-paragraph 3, EC Treaty, once the Court of First Instance has passed a preliminary ruling, such a decision may exceptionally be subject to a review by the Court of Justice, under the conditions and within the limits laid down by the Statute, where there is a serious risk of the unity or consistency of Community law being affected[18]. Very recently, the Council has fixed unanimously those conditions and limits [Council Decision 2005/696/EC, Euratom of 3 October 2005, OJ L266/60 of 11.10.2005, p. 60]. As it seems, there is no reason for giving a specifically different meaning to the words "risk of the unity or consistency of Community law being affected" in Article 225, paragraph 2, sub-paragraph 2, EC Treaty and Article 225, paragraph 3, sub-paragraphs 2 and 3 EC Treaty.

b) Relevance for the choice of "specific areas"

aa) Introduction

It seems appropriate for the Council, when transferring "specific areas" under Article 225, paragraph 3, EC Treaty to the Court of First Instance, to choose in the first place such legal matters for which the risk of an affection of the unity or consistency of Community law would not seem to be particularly high.

17 See also e.g. *Schima*, "Das Vorabentscheidungsverfahren vor dem EuGH", Wien (2004) 115, *Everling* in Steinberger-FS, cited at note 1, at 1124, *Grabenwarter* in EuR-Beiheft 1/2003, cited at note 4, at 63.

18 For the questions related to this review procedure, see e.g. *Tizzano*, cited at note 1 and idem "La Cour de Justice après Nice: le transfert de compétences au Tribunal de première instance", in Mélanges en hommage à Jean-Victor Louis (2003) Vol.I 499-516; *Mastroianni*, in *Nascimbene/Treves* (eds), cited at note 14, at 41-48; *Fardet*, "Le «Réexamen» des décisions du Tribunal de première instance" Revue du Marché commun et de l'Union européenne 2004, 184-193.

Thus, let us first take a look at the possible meaning of these legal terms and then let us try to identify areas with a lower likelihood for an "affection of unity or consistency of Community law".

bb) Configurations possibly affecting the unity or consistency of Community law

Questions touching upon the unity or consistency of Community law can be of a various nature:

(1) First category: shift of jurisprudence or touching "virgin soil" within a particular "specific area"

One category of such cases would comprise any decision of the Court of First Instance which clearly deviates from a former constant general case law in the specific area concerned and which hence could possibly be seen as affecting the unity or consistency of Community law.

The same could be true for decisions which – in the absence of pertinent case law – for the first time ever would interpret provisions central to the application of Community law in a "specific area".

(2) Second category: Questions transgressing the "specific area"

(a) Fundamental and constitutional questions

Another category of cases would encompass decisions which would concern questions going beyond the sole field of the "specific area" but which would be of a more general interest, especially concerning matters involving very systematically horizontal aspects of a constitutional nature, like the four freedoms or general principles of Community law. Indeed, it would in the first place be for the Court of Justice as a constitutional court to deal with matters of a mainly constitutional nature[19].

(b) Questions pertaining simultaneously to the "specific area" and to other areas

"Specific areas" in the sense of Article 225, paragraph 3, EC Treaty should be defined in a way which sufficiently distinguishes them from other areas. Otherwise, theoretically, the specific area transferred to the Court of First Instance under Article 225, paragraph 3, EC Treaty could be eventually so closely linked to an area not

19 Questions concerning the validity of a general act of Community legislation other than an executive regulation may fall in this category.

transferred that most of the references for preliminary rulings would request an answer to questions not falling under the jurisdiction of the Court of First Instance. Such circumstances would then obviously necessitate a referral of the case to the Court of Justice, mostly under Article 225, paragraph 3, sub-paragraph 2, EC Treaty.

4. Selecting "specific areas"

a) Selection under the "risk for unity and homogeneity" criterion

As to the categories of difficulties outlined (see pt. 3.2.2. above), it would seem that there is no specific area of law for which the risk for either of those categories of difficulties could be definitively excluded. But this fact is neither astonishing nor particularly problematic, otherwise Article 225, paragraph 3, sub-paragraphs 2 and 3, EC Treaty, which provide for seizing the Court of Justice in cases possibly affecting the unity and consistency of Community law, would have been superfluous.

This being said, the risk of an affection of the unity and consistency of Community law could be limited in several ways: It could seem adequate, to start with, to choose such "specific areas" which are of a more *technical nature*, and for which it seems rather unlikely that they may give rise to problems of a constitutional dimension, like e.g. *the assignment of goods to position numbers of the Common Customs Tariff* (classification under the Combined Nomenclature)[20].

It could also be envisaged to transfer competences in areas in which, even if they show some constitutional aspects, the rules in force and/or a long lasting, rich, constant and consistent case law of the Court of Justice can serve as a strong guideline for a large majority of future cases[21].

20 See i.a. *Azizi* in *Ginther/Benedek/Isak/Kicker* (eds), cited at note 1, 182 and in *Hummer* cited at note 1, 208; *Lenaerts*, in Liber Amicorum Pierre Marchal cited at note 9, at 92 para. 29.

21 See also *Tizzano*, "La Cour de justice après Nice: le transfert de compétences au Tribunal de première instance", in *Vandersanden/de Walsche* (red.), Mélanges en hommage à Jean-Victor Louis, vol. I 499-516, at 512, who suggests to choose for such a transfer of competences under Article 225, paragraph 3, EC Treaty specific matters of secondary law according to the following criteria: 1.) To clearly limit and define the "specific area", 2.) to choose a "specific area" with an already consolidated case law of the ECJ, 3.) to choose, as from the start, as "specific area" a litigation matter with high substantial importance for the work-load of the ECJ. Concerning that last criterion, I am of the opinion that, in a first, transitory phase, from a pragmatic point of view, a step-by-step approach would seem more appropriate, in order to allow the concerned jurisdictions and parties to get accustomed to the new mechanism. It would, anyhow, seem useful to choose "specific areas" not exclusively through criteria focussing on the sole ECJ, but to take into account also factors on the side of the CFI, which would favour an *efficient* treatment, like the "synergies" to be gained through previous experience (see below).

Even if, at first glance, it would seem that a number of legal fields might be suitable under this aspect (and quite a number of them have been mentioned in literature[22]), yet it would seem wise, at least in an initial phase, to take a prudent and more selective approach.

b) Once more: Efficiency as an appropriate selection criterion

Taking into account the aim of efficiency underlying the Treaty of Nice, an additional factor could be used for selecting "specific areas" under Article 225, paragraph 3, EC Treaty. Indeed, a further pertinent element of efficiency would be to choose legal matters which would be closely related to fields of competence already falling under the jurisdiction of the Court of First Instance, thus using the apparent *synergy* resulting from such constellation. Such a synergy would obviously exist in fields for which, in the future, the Court of First Instance will have to decide on appeals brought against a specialised court ("judicial panel")[23].

In the sense of synergy, the field of *trade mark law* would seem particularly appropriate for a transfer of preliminary reference proceedings into the jurisdiction of the Court of First Instance.

Where such a specialised court is established, the Court of First Instance would become the second and last instance in this field of law, and the Court of Justice's competences for direct actions would be, anyhow, restricted to the review of proceedings under Article 225, paragraph 2, sub-paragraph 2 of the EC Treaty. It would not seem useful to maintain, in such a case, a double-track system of court proceedings in the very same field of law ("specific area")[24].

As a matter of fact, the competence for preliminary rulings in the specific area of trade mark law is highly parallel to the one already exercised by the Court of First Instance in the scope of direct actions. Besides that, a great many questions in this field of law have already been clarified by the case law of both courts.

In the event of a transfer of competences under article 225, paragraph 3, EC Treaty, specialised chambers in the Court of First Instance could be seized as well with direct actions as with preliminary rulings in this field.

22 e.g.: agriculture, social security, antidumping law, customs, VAT, intellectual property, subsidies and State aids law, competition law, "European" international private law, like recognition and enforcement of decisions in civil and commercial cases etc. See e.g.: *Everling*, in Mélanges en hommage à Michel Waelbroeck, cited at note 11 and in Steinberger-FS, cited at note 1; *Grabenwarter* in EuR-Beiheft 1/2003, cited at note 4, at 61; *Schima*, "Das Vorabentscheidungsverfahren vor dem EuGH", cited at note 17, 114. Specifically concerning competition law: *Mengozzi*, "Istituzioni di diritto comunitario e dell'Unione Europea", Padova (2003) at 59.

23 See in this respect also *Lenaerts* in Liber Amicorum Pierre Marchal, cited at note 9, at 93/94, para. 32.

24 See also e.g. *Meij* in Haak-FS, cited at note 12, at 67/68.

Such a transfer of jurisdiction in the specific trade mark area shall be even more adequate once the foreseen specialised court ("judicial panel") for trade marks will have been established.

5. Organisational and procedural side parameters to a transfer of jurisdiction under Article 225, paragraph 3, EC Treaty

a) The present situation within a chronology of relevant legislative steps

In the logic of an eventual transfer of competences for preliminary reference proceedings to the Court of First Instance, a chronology of three different steps can be distinguished:

The first step was the introduction, by the Treaty of Nice, of Article 225, paragraph 3, EC Treaty empowering the Council acting unanimously to adapt the Statute upon the proposal of either the Court of Justice or the Commission (Article 245, paragraph 2, EC Treaty). This first step also comprised the establishment of a first set of flanking rules on the form of the review procedure (Article 62 of the Statute).

The second step was, on 3 October 2005, the establishment by the Council, in conformity with pertinent declaration 13 to the Nice Treaty, of another set of detailed rules on the review procedure, with regard to the procedural roles of the parties and the effects of such procedures on the decision of the Court of First Instance, as well as on the dispute between the parties (Article 62a and 62b of the Statute)[25] [26].

25 Council Decision of 3 october 2005 (2005/696/EC, Euratom) amending the Protocol on the Statute of the Court of Justice, in order to lay down the conditions and limits for the review by the Court of Justice of decisions given by the Court of First Instance, OJ L266, 11.10.2005, p.60. This Council Decision, seems overall to have brought a balanced solution to a number of open procedural problems. These had already been roughly analysed by several authors (see e.g. *Schima*, "Das Vorabentscheidungsverfahren vor dem EuGH", cited at note 17, at 115-118; *Grabenwarter* in EuR-Beiheft 1/2003, cited at note 4, at 62-68; *Mastroianni* in *Nascimbene/Treves* (eds), Il processo comunitario dopo Nizza, cited at note 14, at 44-48).

26 The way the interests of the parties concerned have been taken into account by the Council Decision of 3 october 2005, cited at note 25, is, in my opinion, sufficient to secure the rights of defence of these parties. By the way, had these parties been given the right to trigger a review proceeding with the Court of Justice, then they would for sure have taken advantage in almost every case of this opportunity, thus annihilating the objectives of Article 225, paragraph 3, EC Treaty.

At present, everything is ready, from a legislative point of view, for the taking of the third step, i.e. the determination in the Statute of "specific areas" under Article 225, paragraph 3, EC Treaty[27].

b) Specialisation of chambers within the Court of First Instance

As already mentioned above, for the sake of efficiency, "specific areas" of preliminary references transferred to the Court of First Instance would have to be treated by specialised chambers, which, eventually, should also be competent for direct actions (applications or appeals) relating to the same field of law[28].

c) Particular procedural aspects for preliminary reference proceedings before the Court of First Instance

Once the competence to give preliminary rulings in a certain "specific area" has been attributed to the Court of First Instance, such a new distribution of competences under Article 225, paragraph 3, EC Treaty should – in the interest of its "*effet utile*" – not be undermined by the mere formulation of the request presented by the national court. In other words, the mere assertion, by the referring court, that there is "a serious risk or a likelihood of the unity or consistency of Community law being affected", would – in itself – not be a sufficient reason for the Court of First Instance to refer the case to the Court of Justice for a ruling. Indeed, it would always lie with the Court of First Instance to assess under Article 225, paragraph 3, sub-paragraph 2, EC Treaty whether, eventually, even rules of primary law, including general principles of Community law (like the fundamental rights) invoked by the national court, really give rise to the alleged likelihood or even risk. To do so, the Court of First Instance would also have to take into consideration the eventual existence of an established case law of the Court of Justice on the matter, which would eventually be found to have clarified the legal situation at stake in the present case. A different interpretation of Article 225, paragraph 3, sub-paragraphs 2 and 3 of the EC Treaty would otherwise inevitably result in leaving the question of competence entirely in the hands of the referring court. The national court should not, through an exaggerated and dramatic wording of its reference, be in a position to replace *ad libitum* the competent Court of First Instance by the Court of Justice,

27 As is clear from Article 245, paragraph 2, EC Treaty, as amended by the Treaty of Nice, the proposal for such a change need not necessarily to be brought by the Court of Justice but the initiative for such a step could also be taken by the Commission on its own motion.

28 As to the advantages, in this context, of a possible internal specialization within the Court of First Instance, unlike the Court of Justice, see *Grabenwarter*, EuR-Beiheft 1/2003, cited at note 4, at 60/61.

thus in a manipulative way jeopardising the basic function of Article 225, paragraph 3, to relieve the ECJ[29].

III. Resumé

In spite of some fundamental criticism brought up by several authors, the Article 225, paragraph 3, EC Treaty should not be interpreted in such a way as to carry off its "*effet utile*" by excluding categorically the idea of a transfer of jurisdiction to the Court of First Instance under this article[30].

In the light of the Treaty of Nice, the eventual transfer of preliminary reference proceedings to the Court of First Instance should be seen with a *pragmatic* approach. Such an approach should assess in a balanced manner, in the light of the objectives of the Treaty, possible "specific areas" on their suitability, at a certain stage of the evolution of EC law, for a transfer under Article 225, paragraph 3, EC Treaty.

Nonetheless, the possibilities for a transfer of preliminary reference proceedings to the Court of First Instance would find various *limits*:

First, the object of a possible transfer under Article 225, paragraph 3, EC Treaty does not include competences based on the Treaty on European Union.

Second, legal domains which at present would show a particular likelihood for affecting the unity or consistency of Community law, may not be defined as "specific areas" for such a transfer of jurisdiction. This may be the case in fields of law raising a high density of constitutional questions, like questions concerning the four freedoms, at least for as long as they are still likely to require decisions of principle. However, with the progress of an increasing density of legislation and case law, such legal fields may, nonetheless, at a later stage qualify as "specific areas" in the sense of Article 225, paragraph 3, EC Treaty.

As to *opportunities* for a transfer of preliminary reference proceedings to the Court of First Instance, they would be favoured by any synergy with actual competences of the Court of First Instance for direct actions in the same legal

29 See *Azizi* in EuR-Beiheft 1/2003, cited at note 1, at 112.

30 In parallel with the new potential competence for the Court of First Instance to be seized with preliminary references, it clearly emerges from the new wording of article 220, paragraph 1, EC Treaty, that the Court of First Instance shares with the Court of Justice the mission to guarantee the existence of a Community of Law, in which the Member States and the Community institutions are submitted to a legal control under Community law and, more particularly, that it shares with the Court of Justice the responsibility for the unity and consistency of the Community legal system. See, in this respect, *Condinanzi* in *Nascimbene/Treves* (eds), cited at note 1, at 64 f., who, for reasons of best acceptance in the field of preliminary rulings, even claims to harmonize the prerequisites for the qualification of judges at these two Courts (at p. 65 and 69).

domain, as well for applications as – in the future – for appeals against decisions of judicial panels / specialized courts.

In order to get a first experience with the implementation and practice under Article 225, paragraph 3, EC Treaty, it may seem appropriate to start soon but prudently[31] with one or two rather limited "specific areas". For this purpose, the highly technical matter of the assignment of goods to position numbers in the Common Customs Tariff (Customs Tariff classification) would seem a most appropriate "specific area" for a first transfer of jurisdiction under Article 225, paragraph 3, EC Treaty even if, for the moment, this measure may not concern a considerable number of cases.

Eventually, the synergy with the practice already in existence in the Court of First Instance in the legal domain of trade marks would deem it appropriate to designate it also as a "specific area" in the sense of Article 225, paragraph 3, EC Treaty, at latest after the creation of a specialised Community court for direct actions in the same field.

31 Also in favour of a prudent opening ("behutsam und schrittweise"): *Everling*, Grundlagen der Reform der Gerichtsbarkeit der EU durch Nizza, in EuR-Beiheft 1/2003, cited at note 1, 7-35, at 21, but with a wider range of proposals, encluding agriculture, "European" international private law and competition law.