The Appeal Procedure before the European Court of Justice Under the Looking Glass: A review of Corinna Bölhoff, The Appeal Procedure before the European Court of Justice

By Timo Tohidipur
Suggested Citation: Timo Tohidipur, *The Appeal Procedure before the European Court of Justice Under the Looking Glass: A review of Corinna Bölhoff, The Appeal Procedure before the European Court of Justice*, 3 German Law Journal (2002), *available at* http://www.germanlawjournal.com/index.php?pageID=11&artID=168
Corinna Bölhoff, DAS RECHTSMITTELVERFAHREN VOR DEM GERICHTSHOF DER EUROPÄISCHEN GEMEINSCHAFTEN. Nomos Verlagsgesellschaft: Baden-Baden 2001.

by Timo Tohidipur

I. Introduction: A New Kid on the Block

[1] With the implementation of the Court of First Instance (CFI) on 31 October 1989,(1) a major change occurred in the judicial system of the European Communities. Article 225 EC (ex Article 168 a EEC) became the legal foundation for the new CFI. The main reason for establishing a new Court in the Judicial System of the European Communities was the rapidly growing workload and the increasing complexity of the cases before the Court of Justice of the European Communities (ECJ), which led to a great backlog of cases and a general increase in the average time the ECJ was taking to complete the cases submitted to it. The CFI is not yet a separate institution. In fact, it can instead be characterized as a new judicial body, which will become independent after the ratification of the Nice-Treaty (if and when this happens). The CFI consists of fifteen Judges appointed for renewable terms of six years. There is no assistance by Advocates General on a permanent basis but each Judge could be called upon to perform the function of Advocate General cases of significant difficulty or complexity. Only limited use has been made of this possibility.

[2] The transfer of jurisdiction from the ECJ to the CFI, which is at the Council's discretion after submission of a request from the ECJ, has been growing steadily.(2) The CFI's jurisdiction now extends to the following subject matters: challenges by individuals or undertakings to Commission decisions, claims for compensation for damage caused by Community institutions or their servants, challenges to anti-dumping regulations adopted by the Commission or the Council, staff cases and cases brought under the ECSC Treaty. In addition to these bases of jurisdiction, the CFI is an appeal court itself, to the degree that it has jurisdiction over decisions of the appellate boards of the European Community Trademark Office and of the Plant Variety Rights Office.

II. The Changed Role of the European Court of Justice

[3] With the transfer of jurisdiction to the CFI, the ECJ took on a new role as an appellate court in the identified areas of jurisdiction. Article 225 para. 1 EC provides that the CFI exercises its jurisdiction subject to a right of appeal to the ECJ, on points of law only and in accordance with the conditions laid down by the Statute of the Court. Corinna Bölhoff, in her recently published book *Das Rechtsmittelverfahren vor dem Gerichtshof der Europäischen Gemeinschaften* [The appellate procedure before the ECJ] (3) , begins her examination of the ECJ's appellate procedure by pointing to the hitherto existing lack of analytical literature on the issue. Clearly, this omission is now remedied with Bölhoff's thorough analysis of the Court and its respective procedures.

[4] According to Article 51 of the Protocol on the Statute of the Court, appeals may be taken only on a point of law. Furthermore, the scope of appeals is restricted by Article 51 of the Protocol, which states that an appeal may rest only on the grounds of: A. lack of competence of the CFI; B. a breach of procedure before it which adversely affects the interests of the appellant; or C. the infringement of Community law by the CFI. In this context Bölhoff clarifies that the ECJ's first task is to clarify the precise scope of the right to appeal in view of the procedural and the substantive law.

[5] With respect to the procedural law (including in its analysis of the sufficiency of a motion seeking leave to appeal) Bölhoff assumes that the ECJ has been generally quite generous in extending its scope of review. But she sees a big difference with regard to the substantive side of the appeal procedure. From the beginning the ECJ has made very rare use of the opportunity to reverse a ruling of the CFI and to thereby pronounce an infringement of Community rights where the CFI had not found a violation. According to Bölhoff, the ECJ's appellate case law can be understood as safeguarding and strengthening the acceptance of the CFI. At the same time, the CFI has established itself as an important part of the EU's jurisdiction structure. The ECJ has increasingly become aware of its controlling function. After a phase of consolidation, there seems to be a tendency of intensified review on the part of the ECJ.(4)

III. The Gatekeeping Function of the Appellate Procedure

[6] Among a list of general principles of the appellate procedure before the ECJ which Bölhoff emphazises, the distinction between questions of fact and legal questions is counted to be of greatest importance as it proves decisive of the appeal's very fate. In fact, only a legal question (viz. 'points of law') may form the basis of appeal from a decision of the CFI. Furthermore, the lodging of an appeal does not have the effect of suspending the operation of the judgement of the CFI, which could have interesting effects because an appeal may not only be lodged against final decisions of the CFI but also against its decisions on interlocutory matters, such as decisions disposing of a procedural issue.(5) Against this background, the *Lestelle* decision (6) , which is, as Bölhoff correctly notes, not often mentioned in surveys of European (Procedural) Law, is central to the question of the ECJ's appellate procedure. In *Lestelle*, the ECJ ruled that only those infringements of rights can lead to the reversal of the CFI's ruling which are relevant to the final decision and have an effect on the holding of the decision. Moreover, the provisions concerning preclusion are handled very strictly by the ECJ. Finally, the ECJ has the power to vacate the decision of the CFI and enter final judgement in the matter itself or to remand the case back to the CFI for judgement regarding the determined infringement of rights.

[7] Bölhoff illustrates the ongoing developments of the appellate provisions mainly by drawing on cases from the field of competition law and the body of law concerning EC officials. At the same time, she always comes back to a broader analysis of the appellate procedure, with an eye on the further developments and implications of ratification of the Nice-Treaty.

[8] Now, all new? All different? Even after the implementation of the CFI the workload of the ECJ remains more or less unchanged,(7) consequently the basic idea of relieving the Court from its tremendous work load is very likely to come again onto the agenda. Given the probable, imminent ratification of the Nice-Treaty, the future may bring some relief to the ECJ. The Nice Treaty enables the CFI to make preliminary rulings, which is not yet part of its mandate. The preliminary ruling is described as the "jewel in the crown of the ECJ´s jurisdiction"(8) and has always been beyond the authority of the CFI. But the Nice Treaty does not only bring clear benefits with respect to the CFI. It is also necessary to bear in mind some of the uncertainties, including how to determine the role of the new judicial chambers within the judicial system of the EU. With the installation of a three stage jurisdiction, indeed a major change occurs to the judicial system of the EU. One of the most interesting questions will be how the three courts, and certainly the national courts within that new system, will relate to and interact with one another. The unity of the legal system might be questioned by some critics. Corinna Bölhoff, however, approves of the changes coming with the Nice Treaty, as far as they will lead to a more effective legal protection particularly in view of the impending enlargement of the European Union.

[9] Corinna Bölhoff's book does present an important and long sought-after analysis of the appellate procedure before the ECJ. The principles and the ongoing development since the establishment of the CFI are well researched and analyzed. In sum, her study is worthwhile reading for both those generally interested in procedural law and in the judicial system of the EU in particular.

---

(1) This was based on Decision 88/591/ECSC, EEC, EURATOM, published at OJ 1989 C 215/1.

(2) For an overview of the ongoing process of transfer of jurisdiction, *see*, L.Neville Brown, Tom Kennedy, THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES 78 (5th Ed. 2000).

(3) Published with NOMOS Verlagsgesellschaft, Baden-Baden, 2001.

(4) *See, e.g.* , Case C-185/95 (*Baustahlgewerbe v. Commission*), ECR 1998, I-8417 et seqq. and Cases C-395/96 P and C-396/96 P (*Compagnie maritime belge transports SA and Compagnie maritime belge SA v. Commission*), ECR 2000, I-1365 et seqq.

(5) As the latest example of an interlocutory judgement of the CFI, see, Case T-177/01(*Jégo-Quéré and Cie SA v. Commission*), published 3 May 2002, available on the official webside of the ECJ: http://curia.eu.int; *see*, the commentary to this case by Dominik Hanf, in this issue, at http://www.germanlawjournal.com/current_issue.php?id=166.

(6) Case C-30/90 (*Lestelle v. Commission*), ECR 1992, I-3755 et seqq.

(7) Paul Craig, *The Jurisdiction of the Community Courts Reconsidered*, in THE EUROPEAN COURT OF JUSTICE 183 (Gráinne de Búrca, J.H.H. Weiler eds., 2001) (explaining the reasons for the unchanged workload).

(8) *Id.* ast 182.