

Liber Amicorum
en l'honneur de/
in honour of
Bo VESTERDORF

Préface de / Foreword by

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THE COURT OF FIRST INSTANCE - THE BEGINNINGS

BY

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I am delighted to have been invited to contribute to this celebration of Bo Vesterdorf's long service as a Judge and as President of the Court of First Instance. We came to the CFI together and quickly became friends, perhaps because we shared a certain Nordic scepticism about Latin enthusiasms. It was always a pleasure to work with him and, like many others, I have admired his tireless efforts to promote and improve the work of the court. This short essay aims to give a somewhat journalistic impression, before memories fade, of the CFI's beginnings.

When we arrived as judges of the new court in September 1989, the atmosphere of Luxembourg seemed to be that of a provincial city in the 1950's. The population of the city was only 44 000. Shops opened at 9 o'clock in the morning (except on Monday when they opened at lunchtime) and shut at 5 o'clock in the evening. Most of them were closed for at least an hour at lunchtime. The recently completed autoroute from Brussels finished at Strassen, and the autoroute to Trier ended at the airport, giving way to a three-lane road with a free-for-all in the middle lane. There were frontier police at the border crossings and there could be long queues, especially on the road to and from Metz. Schengen was known only as a small wine village.

The European institutions occupied the Kirchberg in almost lonely splendour at the end of the Red Bridge. It was still possible, standing on the terrace of the Holiday Inn (1), to admire the pro-

(1) Now, after a face-lift, the Novotel.

portions of the Court's rusty Palais (2) while deploring the rest of Europe's contribution to the Grand Duchy's architectural heritage. The towers of Les Trois Glands peeped out of the ground: the rest of what is now the Musée Grand-Duc Jean was hidden under mounds of earth, together with most of the old fortifications. There were still a lot of fine trees on the Kirchberg, and the view from the top of the Palais was largely of green countryside.

In the 1970s the Court and all its staff had been able to work in the Palais. Indeed, there was initially an over-supply of space: a suite of offices on the top floor was still known to old-stagers as the Norwegian cabinet. But the accession of Greece, Spain and Portugal with three new languages brought a dramatic increase in numbers so that many of the support staff, especially translators, had to work in temporary buildings some distance away. To resolve this problem an annexe (named "Erasmus" by vote of the Court staff) had been opened earlier in 1989. That is where the CFI was to be housed (thus, incidentally, exacerbating the space problem). The car park under Erasmus had the smallest car-parking spaces known to man - a cause of many bruised cars and tempers.

Over the same period, the case load of the ECJ had been growing inexorably and there was a sense amongst parties and practitioners that the Court did not devote sufficient time to establishing the facts, particularly in staff and competition cases (3). There had already been a proposal to set up a Staff Tribunal in the 1970s. Eventually, in 1986 the Council was empowered by the Single European Act to "attach" a court of first instance to the Court of Justice.

The significance of the word "attach" was not made clear, perhaps because no-one had decided what kind of court the CFI was to be, or what it was to do. Some people (including some members of the Court of Justice) thought a new court was unnecessary. Some thought it should deal exclusively with staff cases and be composed of seven judges of A3 (Director) rank. It was only at a relatively late stage that the Council decided that the new court should deal

(2) Runner-up, we were told, in a competition for a third world bank or embassy.

(3) *Allocution prononcée par M. Ole Due, président de la Cour de justice, à l'occasion de la prestation de serment des membres du Tribunal de première instance*, in «Aperçu des travaux de la Cour de justice et du Tribunal de première instance des Communautés européennes en 1988 et 1989 et audiences solennelles», Luxembourg, 1990, p. 278.

with competition cases as well (4), and that there should be 12 judges (one from each Member State) with equivalent rank to the members of the Court of Auditors.

Apart from providing that the ECJ should hear appeals from the CFI, neither the amended Treaties nor the Council Decision establishing the new court (5) defined the nature of the relationship between the CFI and the ECJ. The CFI was to be "attached" to the Court of Justice, with its seat "at the Court of Justice". The President of the Court of Justice and the President of the Court of First Instance were to "determine, by common accord, the conditions under which officials and other servants attached (*sic*) to the Court of Justice shall render their services to the Court of First Instance to enable it to function".

Ole Due, the President of the Court of Justice, compared the relationship between the ECJ and CFI with that of Siamese twins (bicephalous but sharing common organs (6)). This simile did not appeal to some members of the ECJ whose preferred perspective was *de haut en bas*. The ambivalence of the texts on this point has bedevilled relations between the two courts ever since, but it did have the advantage of fostering a sense of solidarity amongst the members of the CFI.

When the Council established the CFI, it also designated its first President (as it had done when the ECJ was set up). He was José Luis da Cruz Vilaça who had been involved in the negotiations for Portuguese accession and was the only one amongst us who had been a member of the ECJ (as Advocate General from 1986 to 1988). José Luis was and is a great enthusiast. In May 1990 he organised an official visit to Portugal and succeeded in the course of a week in giving us a taste of all the delights of his homeland — from the steep slopes of Oporto with the barges carrying wine barrels down the Douro, past the University of Coimbra and the Palácio San Marco where students in black cloaks sang Fado, to Lisbon where we met the delightful President Soares, and finally to the

(4) But not dumping cases, where decisions were taken by the Council and not the Commission and were therefore closer to the hearts of the Member States.

(5) Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988, L 319, p. 1; corrected version in OJ 1989, C 215, p. 1).

(6) With the exception of the registry and *lecteurs d'arrêts*.

ancient Roman city of Evora. That visit consolidated the family feeling amongst us.

The father figure, who said little but always to the point, was Donal Barrington. He had been the first advocate in Ireland to plead the Constitution against the State and already had ten years experience as a judge of the High Court. He had a speciality in one-liners: when Bo announced that he was driving down to Bordeaux to collect some cases of wine and would be taking Suzanne with him, Donal remarked, shaking his head, "What a waste of space".

Two of the new judges (Antonio Saggio and Cornelis Briët) were professional judges in their own countries. Two (Christos Yeraris and Jacques Biancarelli) were *conseillers d'État*; and one (Rafael García-Valdecasas) an *Abogado del Estado*. Two (Heinrich Kirschner and Bo Vesterdorf) came from their respective Ministries of Justice and one (Romain Schintgen) from the Ministry of Labour. Two (Koen Lenaerts and myself) had been full-time professors with experience of practice as advocates. Apart from the President, three had had experience of the Court as *référéndaires* and one as a lawyer-linguist, and some had experience of pleading before the Court.

We were a somewhat variegated group who had been nominated by our respective Member States for a variety of reasons. The age gap between Donal Barrington and Koen Lenaerts was 26 years. Almost none of us had worked together before and, for most of us, life in Luxembourg was a new experience.

Our introduction to the Court was attended by many bureaucratic mysteries and we relied greatly on the help and guidance of Hans Jung, one of the Deputy Registrars of the Court of Justice. He had been at the Court for 13 years, for ten of them as *référéndaire* to President Kutscher and Judge Everling. Over these years, he had been involved in negotiations for the creation of a new court since the late 1970s and in the administrative preparations for the CFI and, at various stages, in revising the Rules of Procedure. No-one could have had a clearer idea of the problems, pitfalls and possibilities that lay before us. It was not surprising that he was elected the first Registrar of the CFI.

We were allowed to choose one *référéndaire* and one secretary. Some of them were recruited from the Court or the Commission and some came with the judges from their own countries. They organised their own outings and entertainments and it was even

rumoured that some of them had developed a taste for *la friture de la Moselle*.

On arrival, we were assigned twelve sets of offices on the top floor of the Erasmus building, some of which looked outwards and some inwards. Our first step as a college, on 7th September, was to draw lots for choice of offices. Some were luckier than others; one of us felt so starved of light that he was transferred to an office from which he could see the sky. We were given a budget with which to furnish our offices, with computers for all, including the judges some of whom could use them. The budget for furniture went further than expected, thanks to the supreme fixer of the *Division de l'Intérieur*, Mr Lens. From him and from Mr Kerschen, the *Chef du garage*, we learned the truth of the maxim that only a Luxembourger should attempt to negotiate with Luxembourgers.

Each judge's secretary was provided with a catalogue written in Euro-French from which to order office equipment. Conventional dictionaries were of no help in revealing what, in tangible terms, was on offer. My secretary resolved this problem by ordering one of each item; checking them off against the list when they arrived and then ordering what we required.

The formalities of constituting the new Court began on 25th September when we took the oath before the ECJ (7). Hans Jung was elected Registrar and was sworn in on 10th October when the CFI sat for the first time in plenary session. On 11th October the President of the ECJ certified that the CFI had been duly constituted. So we were ready to begin - except that we had no robes and no cases.

Important as it was, the inauguration of the CFI was not the most significant event of the autumn of 1989 and my diary records that on 9th October a Russian visitor to the Court went so far as to admit that there were defects in the Soviet system. So far as I can remember, the fall of the Berlin Wall was not seen, in Luxembourg at least, as being as momentous an event as it turned out to be.

About this time we began a series of meetings to decide how we would work. Since we had no cases to get on with, Parkinson's Law

(7) I think it was at the dinner after the ceremony that Ole Due spoke of the Siamese twins.

applied and the meetings lasted as long as there was time available – in some cases as long as five hours. Sundry items of controversy, real or imagined, were picked up, tossed about and put down again for re-examination on another day. Should our robes be black or blue (and if so, what shade of blue) or even green? What should be the design of our notepaper to distinguish it from that of the ECJ? Should the last line of the address be “L-Luxembourg” or “L-GD Luxembourg”? Should our judgments be entitled *Arrêt* or *Jugement* (a distinction lost on most of us)? Bo found these meetings particularly frustrating. After experience of academia, I found them almost refreshing.

The most important step that had to be taken was to draft the CFI’s Rules of Procedure. (For the time being, we had to apply the ECJ Rules “*mutatis mutandis*” – an exercise in drafting which took several weeks.) The preamble of the Council Decision establishing the CFI referred to the need to improve judicial protection in “actions requiring close examination of complex facts” (8), but it gave no indication of how this was to be done. Did it call for new methods of working and, in particular, a new approach to fact-finding? Our conclusion was that the CFI’s jurisdiction rested on the same Treaty basis as that of the ECJ – judicial review of administrative acts on grounds of error of law (9). Subject to some tweaking at the edges, the CFI’s Rules of Procedure had to remain very much the same as those of the ECJ.

A discussion about administering the oath to witnesses revealed an interesting difference of legal cultures. Some of us regarded it as self-evident that witnesses should take the oath to tell the truth *before* giving evidence. But Heinrich Kirschner, who hid a deeply human spirit and a wry sense of humour behind a solemnly pessimistic exterior (reminiscent of Eeyore), insisted that a witness should not run the risk of prosecution for perjury until he or she had had the opportunity to correct what had been said.

The most significant innovation on the Rules of the ECJ was the introduction of “Measures of Organisation of Procedure” (10). This

(8) Council Decision 88/591, preamble.

(9) Articles 179 EEC and 152 Euratom (staff cases); Articles 33 and 35 ECSC (individual acts applying Articles 50 and 57-66 ECSC; Articles 173 and 175 EEC (challenges to competition decisions applicable to undertakings). See Council Decision 88/591, article 3(1).

(10) CFI Rules of Procedure, Article 64.

has proved indispensable in enabling the CFI to deal with its work load and, most recently, to operate fast-track procedures in merger cases. At the time, it gave rise to an argument with the UK representative on the Council working party. He had committed himself publicly to the proposition that the ECJ was the most inefficient court in the world (or words to that effect). But faced with our proposal, and mindful of the need to protect the Member States, he insisted that any proposed measure of organisation of procedure must first be intimated to all the parties who must then have time to object before it was adopted. This was not a recipe for speedy decision-making or efficient case management and, to do him justice, he backed down (11).

By the middle of October case files began to arrive, although the cases were not formally transferred until the middle of November. We could now begin to get down to the work we had been sent there to do. The first hearing *en référé* (12) was held on 21st November, and the first oral hearing (in *Tetra Pak* (13)) on 14th December. Since it was the first big competition case, we sat as a full court in our nice new blue robes, though my diary records "Dignity not improved by putting us in the wrong order with names in the wrong places". (Heinrich Kirschner, who acted as Advocate General, delivered his Opinion on 21st February and the Court delivered judgment on 10th July 1990, a record that was difficult to keep up.) The day after this hearing we heard that the members of the ECJ had decided that our *référéndaires* should be classed in a grade below their own, thus demonstrating the reality of the relationship between the Siamese twins.

In January 1990 we were ready to begin a regular routine of oral hearings in the new Erasmus courtrooms. The first art works had been installed in the red courtroom the previous November. They were the work of a Danish artist, Dalsgaard, and are composed of the motto "Europe United in Peace and Justice" written in all the (then) nine Community languages (14). Soon afterwards, the blue courtroom was decorated with tapestries illustrating Fernando Pes-

(11) The compromise solution is in the second paragraph of Article 64(4).

(12) In Case T-131/89 R *Cosimez v Commission* [1990] ECR II-1.

(13) In Case T-51/89 *Tetra Pak Rausing v Commission* [1990] ECR II-309.

(14) There is a mistake in the large panel between the entrance doors that offers an interesting exercise in linguistic detection.

soa (looking remarkably like James Joyce) and his poetry. The courtrooms of the "old" Palais also contained works of modern art (some distinctly better than others). It is sad that pressure of space for interpretation cabins has made it impossible to continue the practice of putting artworks in the courtrooms. There was always something interesting to look at when tedium set in.

Most of our time in the early days was spent on hearings and deliberations in staff cases, some of which were long overdue. Many of them were employment disputes such as one would find in any national system, but they sometimes illustrated two unattractive sides of the European bureaucracy – on the one hand, favouritism and national bias and, on the other, an obsession with the rights and privileges of the Community *fonctionnaire*. The task of the CFI was to ensure fairness and transparency while discouraging the more absurd pretensions. So it was important that the cases should be decided in a reasonable time by a court with time to examine the facts in some detail.

For myself and perhaps for others too, there were intensive lessons to be learned about the differences in legal culture, the approach to facts and burden of proof, and the process of reaching a collegiate decision and writing a collegiate judgment. We were helped in this respect by the fact that all cases were referred from the start to one of the Chambers – a chamber of three judges for staff cases, a chamber of five for competition cases (15). This meant that we were sitting and deliberating day by day in small chambers with the same colleagues and got to know each other very well.

I had come from the common law tradition of individual judgments and dissents. But I soon became convinced of the merits, for a multi-national and multi-lingual court, of the process of *délibéré* – what Judge Grévisse called *le cœur de notre activité* – working towards a common judgment that all the judges could accept as a legally justifiable result even if the minority would have preferred a different result. A consequence of this approach is, of course, that

(15) The rule of the CFI is the opposite of that of the ECJ where all cases are considered by the whole Court before the decision is taken whether they should be referred to a Chamber. Very few cases in the CFI have been referred by a Chamber to the plenary Court.

the judgments are impersonal, but that is an incentive to judicial modesty (16).

The process of writing judgments in a language other than one's own required a great deal of help from the *lecteur d'arrêts* – a post for which we recruited the tirelessly patient Evelyne Tichadou. Sometimes the subtleties of the French language eluded me. “*Il faut mettre une virgule ici.*” “*Pourquoi?*” Long pause. “*Parce que c'est plus joli.*”

The fact that all cases started in the Chambers also meant that the Rapporteur's Preliminary Report (17) was presented, not to the Court as a whole, but to the judges who were assigned to the case. They could discuss in some detail what measures of organisation of procedure or measures of inquiry might be appropriate and, in the big competition cases, to arrange a meeting with the parties to decide how long the hearing would be likely to take and how it should be organised. By the stage of the hearing, the judges knew what were the salient points and, in broad outline, what would be the legal issues on which the case was likely to turn. This made the hearings more meaningful for the parties and more interesting for the judges. The Rapporteur usually came away from the hearing with a fairly clear idea of how his colleagues felt the judgment should be written and this helped to cut down the length of the subsequent deliberations.

This is probably the main reason why the CFI has exercised the power to appoint a judge as Advocate General on only four occasions, and then only in the first three years (Heinrich Kirschner in *Tetra Pak* (18), Bo Vesterdorf in *Polypropylene* (19), Jacques Biancarelli in *Peine Salzgitter* (20), and myself in *Automec* (21)). In the ECJ the Advocate General's Opinion is important in providing the starting point for the judges' deliberation, and is specially important in references under Article 234 EC where the order of the refer-

(16) When I presented my first draft, Rafael Garcia-Valdecasas said, “That is a good opinion: now we must make it aseptic”.

(17) CFI Rules of Procedure, Article 52.

(18) Cited at footnote 13 above.

(19) Cases T-1/89 to T-4/89 and T-6/89 to T-15/89 *Rhône-Poulenc and Others v Commission* [1991] ECR II-867 *et seq.*, and [1992] ECR II-499 *et seq.*

(20) Case T-120/89 *Stahlwerke Peine Salzgitter v Commission* [1991] ECR II-279.

(21) Case T-24/90 *Automec v Commission* [1992] ECR II-2223 and Case T-28/90 *Asia Motor France v Commission* [1992] ECR II-2285. This appointment may, of course, have been the straw that broke the camel's back.

ring court and the pleadings of the parties and Member States do not necessarily provide a complete picture of the issues to be decided. The CFI deals only with direct actions where the parties have already defined the issues between them in their written pleadings.

There was considerable discussion about the way in which judgments of the CFI should be written. The practice of the ECJ had been to divide the judgment into two parts, the *Partie en fait* and the *Partie en droit*. The *Partie en fait* was an adaptation of the Report for the Hearing. Translation of the Report for the Hearing into all the official languages put intolerable pressure on the translation divisions so, from about 1985, the Court adopted the solution of inserting a single paragraph into its judgments :

“Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.”

This approach seemed to be inappropriate in a context where the judgments of the CFI were to be subject to review by the ECJ on appeal. It was therefore decided to adopt a style of judgment in which all the material relevant to an appeal – facts, arguments and reasoning – would be available in a single document. Since we did not know what intensity of review the ECJ would apply to our judgments, we felt it necessary to be fairly detailed. This led to some very long judgments, particularly in competition cases. In the event, it became clear that the Court would not submit our judgments to intensive review and, in retrospect, it would have been possible to deal more curtly with some of the far-fetched arguments with which some practitioners feel it necessary to litter their pleadings.

On the whole, the productivity of the CFI was high and I believe we lived up to the task that had been set us of “improving judicial protection of individual interests” (22). It was a consequence of doing so that we sometimes gave the institutions a hard time. This was resented in some quarters – particularly in the Commission. But others recognised that the CFI’s approach imposed a degree of quality control over administrative decisions and practice that had

(22) Council Decision 88/591, preamble.

previously been lacking. After all, the ultimate goal of judicial review should be to help governments to be good even more than to compel them to be so (23).

(23) See J.D.B. MITCHELL, *Why European Institutions*, University of Edinburgh Inaugural Lecture, 1968, p. 10.