# 'The Court of First Instance of the European Communities - an infant prodigy?' from Cahiers de droit européen

**Caption:** Examination of the reasons behind the establishment of a Court of First Instance.

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## The Court of First Instance of the European Communities - an infant prodigy?

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### I. Introduction

Articles 4, 11 and 26 of the Single European Act [1] (hereinafter referred to as the SEA), now Articles 32d of the ECSC Treaty, 168a of the EEC Treaty and 140a of the Euratom Treaty, authorise the Council, acting unanimously, at the request of the Court of Justice and after consulting the Commission and the European Parliament, to attach to the Court of Justice a court with jurisdiction to hear and determine at first instance certain classes of action or proceeding brought by natural or legal persons, subject to a right of appeal to the Court of Justice on points of law only.

On 24 October 1988, just over a year after the Court asked the Council to implement the authority conferred on it by those provisions, the General Affairs Council adopted a decision establishing a Court of First Instance of the European Communities [2], hereinafter referred to as the CFI, and, provisionally, a document amending the Court of Justice's Rules of Procedure, the changes being necessitated by the creation of the new Court.

The document differed in several respects from the proposal submitted by the Court on 29 September 1987. Accordingly, before unanimously approving the amendments to the Rules of Procedure, the Council asked the Court on 16 November 1988, in accordance with the third paragraph of Article 188 of the EEC Treaty [3], to notify its agreement to the changes made compared with the Court's original proposal.

They were approved by the Court on 13 December 1988. In July 1989, the Council will formally adopt a decision [4] amending the Rules of Procedure of the Court of Justice.

Following the adoption of these two legislative acts and the regulation on the remuneration of its Members [5], the CFI may reasonably be expected to come into operation in September or October 1989. Now that a Community judicial system has been created, a Community judiciary is gradually being developed. In the near future, judicial power in the European Communities will be shared between the Court of Justice, which remains the supreme court and sole holder of certain powers, and a court which relieves the Court of Justice of some of its responsibilities in certain carefully defined types of proceedings.

### II. Reasons for the Court's request for the establishment of the CFI

The Court took the initiative on 8 November 1985 to ask [6] the Intergovernmental Conference responsible for revising the Treaties and adopting the SEA to set up a CFI principally because of its concern to maintain the efficiency and quality of judicial scrutiny in the Community legal system.

The Court had two reasons [7] for believing that, if it failed to act, those two qualities, on which the Community's judicial authorities have always been able to pride themselves, might be jeopardised and even destroyed.

The first was the Court's workload, which was steadily increasing as a result of the growing number of cases referred to it and which it was finding more and more difficult to manage.

In 1970, 79 cases were referred to it. Ten years later, the number had quadrupled to 279. In the last four years it has dealt with 433, 329, 395 and 373 cases respectively. As a result, the average duration of proceedings before the Court, both direct actions and references for a preliminary ruling, has increased from 9 and 6 months respectively in 1970 to 22½ and 18 months in 1987.

The impact of this increase on the proper administration of Community justice and its very credibility is particularly disastrous in the case of references for a preliminary ruling. When such references may take 18 months to be processed, there is potentially a significant risk that national courts will refrain from

referring some cases to the Court for a preliminary ruling for fear that this will delay the settlement of the cases before them. If the risk were to become a reality, the whole machinery of references for a preliminary ruling, a real keystone of Community law, would be in jeopardy.

Another worrying phenomenon resulting from this situation is that, despite the fact that the Court is handing down more judgments every year (8), its cumulative backlog, in other words the number of cases pending before it at the end of a legal year, is steadily increasing. From a mere hundred or so cases in 1970, the number had risen to 527 cases by 31 December 1987.

The second reason relates to the fact that, with the increase in the number of actions, the Court is having to deal with more and more cases, particularly competition and anti-dumping cases, which require a detailed examination of complex issues. This is very time-consuming at a time when the Court is overloaded and does not have the resources to devote as much attention to them as it should. In most cases, all the Court is able to do by way of investigation is to put written questions to the parties. For that reason, the Court has decided that, for this type of direct action by natural or legal persons, the creation of a two-tier court would improve the standard of legal protection for litigants.

It should be emphasised that Articles 4, 11 and 26 of the SEA are merely the culmination of a long process initiated by the Court as long ago as 1978. In a memorandum dated 21 July 1978, the Court had outlined to the Council the same problems as it reported to the 1985 Intergovernmental Conference (9). Along with a range of other proposals, it suggested the establishment of a court of first instance which would be solely responsible for staff appeals. On 4 August 1978, the Commission submitted to the Council a proposal for a regulation on the creation of a European Communities' administrative court (10), but, for political reasons, the Court's request remained a dead letter at the time (11).

**III. Chronology of the main stages leading up to Decision 88/591/EEC establishing a CFI**

Anxious for the CFI to be established as rapidly as possible in view of the urgency of the matter, the Court forwarded a draft proposal for the establishment of a court of first instance to the Council on 26 November 1986, with copies to the European Parliament and the Commission.

When the draft was submitted, it was made clear that this was purely a working document setting out the Court's current views, since the SEA had not yet entered into force.

The declared aim of submitting the document was to seek the Council's initial comments on the draft, so that the Court could submit its final proposal as soon as the SEA came into force.

Consideration of the draft in an *ad hoc* Council Working Party on the Court of Justice, consisting of representatives of the Member States, the Court and the Commission, was completed at the end of 1987. It did not include any proposals as to the number of judges to be appointed to the CFI, since the Court took the view that the number would depend very much on the anticipated workload arising from the powers and responsibilities it was decided to transfer.

On 25 September 1987, the Court submitted a formal request to the Council for a CFI to be attached to it, pursuant to Article 168a of the EEC Treaty and the equivalent provisions in the other Treaties. In accordance with the procedure laid down in those provisions, the Council consulted the European Parliament and the Commission on 10 November 1987 and asked them to forward their opinions to it as quickly as possible.

The Council's *ad hoc* Working Party on the Court of Justice finished its consideration of the Court's final proposal on 10 May 1988. It was generally in favour of the proposal, except for two political issues: firstly, the number of judges in the CFI and the possibility of its having Advocates General, and, secondly, the scope of the powers and responsibilities to be transferred to the CFI. These issues were therefore referred to COREPER for a decision.

On 14 December 1987, the European Parliament referred the Court's proposal to its Committee on Legal

Affairs and Citizens’ Rights, which, on 31 May 1988, unanimously adopted the report drawn up by Mrs Vayssade [12]. On 18 January 1988, it also referred the draft to the Committee on Economic and Monetary Affairs and Industrial Policy for an opinion. At its sitting of 17 June 1988, Parliament adopted a resolution embodying its opinion, which incorporated all the conclusions set out in Mrs Vayssade’s report [13]

When delivering its opinion, the Commission adopted a somewhat ‘unorthodox’ procedure. On 18 May 1988, it adopted its initial guidelines [14] for the drawing up of the opinion on the draft decision. It adopted its final opinion on 19 July 1988 after noting the position of the European Parliament.

On 13 June 1988, at the invitation of its President, Mr Genscher, the President of the Court of Justice, Lord Mackenzie Stuart, addressed the Council and outlined the Court’s point of view on the scope of the powers and responsibilities to be assigned to the CFI and the number of judges that it should have. After the meeting, the Council instructed COREPER to consider those two issues further in the light of the opinions of the European Parliament and the Commission.

After COREPER had discussed the issues again on 20 July 1988 in the light of those opinions, the General Affairs Council reached a decision on the two issues still outstanding and unanimously approved the establishment of the CFI at its meeting of 25 July 1988. The text of the decision establishing a CFI was finalised by the *ad hoc* Working Party on the Court of Justice on 27 September 1988. After a final discussion in COREPER, the Council adopted its Decision 88/591/EC establishing a CFI on 24 October 1988, i.e. a little more than one year after the Court’s final proposal but more than 10 years after the Court had first raised the question of the establishment of such a court.

The infant CFI therefore had a very long gestation period.

[…]

**(1) Establishment of the CFI**

The Court will be attached to the Court of Justice, thereby maintaining the principle of institutional unity in European jurisdiction. It will therefore be common to the three Treaties. It will sit in Luxembourg, in a recently completed extension to the Court of Justice building.

Institutionally, the Court will be an integral part of the Court of Justice. With a view to reducing costs, it will not have its own administrative infrastructure but will rely on the administrative services of the Court of Justice (including the library, research and documentation, personnel and translation). Its budget will be part of the Court’s budget.

However, the CFI will be completely independent as regards its judicial functions, except that it will be bound by Court of Justice judgments against its decisions.

To safeguard that independence, it has been provided that the Court of First Instance shall appoint its own Registrar to manage the CFI registry, the only department specific to that court, under the authority of its President. Certain Court of Justice officials may be seconded to the Court of First Instance for the same purpose. They will be accountable to the CFI’s Registrar under the authority of its President but will not be officials of the CFI since it is not a separate institution from the Court of Justice.

[…]

**IV. Conclusion**

There is no doubt that the establishment of the CFI will significantly improve the Community’s judicial process [52].

Its main contribution will be to bring about a marked improvement in the judicial scrutiny of the establishment of facts in economic cases referred to it, and that in itself will enhance the legal protection of natural and legal persons, who will now have access to two tiers of jurisdiction.

The existence of a court which specialises in monitoring the establishment of facts will certainly also have a positive impact on the way in which the Commission establishes facts and the care it takes in doing so.

It will also have a positive, albeit more limited, effect on the Court of Justice's workload, in that that Court will no longer have to deal with the cases brought by officials that make up one-fifth of its proceedings, especially if the Court of Justice adopts a restrictive attitude to costs.

However the CFI should not be regarded as an infant prodigy that will provide a miracle solution to the Court of Justice's heavy case-load in the long term (53).

In addition to the large number of appeals that will be referred to it in 'economic' cases, the number of actions that the Court of Justice has to deal with will continue to rise inexorably.

There are various reasons for this, but they are all intrinsically linked to the fact that the Communities are developing and asserting their authority.

Proceedings relating to trade protection will continue to increase, given the existing international trade imbalances and the latent climate of trade war that they engender.

More and more questions will be referred for preliminary rulings by the Spanish and Portuguese courts. Questions on the interpretation of the provisions introduced into the treaties by the SEA will arise. The numerous legislative acts adopted in implementation of the large internal market scheduled for 1992 will be a potential source of disputes. As Community legislation expands, there will be a growing likelihood of Member States failing to fulfil their obligations, and the number of appeals based on Article 169 of the EEC Treaty may therefore be expected to rise.

If it really wishes to reduce its workload, the Court of Justice should revise and update its own working methods at the same time as the CFI is established.

Since one of the disputes transferred to the CFI, a 'steel' case, was abortive because the Commission had abolished the quota system, the Court of Justice should ensure that the revision of its working methods is coupled in the near future with a proposal to transfer other powers to the CFI, for instance all cases relating to trade protection and liability actions.

However, the establishment of the CFI will give the Court of Justice one year's respite, during which its workload will be reduced as some cases are transferred to the CFI without any more appeals being referred to the Court. It must endeavour to take advantage of this to deal with its cumulative backlog of cases.

(*) The views expressed in this article are those of the author.
(1) OJ L 169, 29.6.1987.
(2) Council Decision (ECSC, EEC, Euratom) 88/591 of 24 October 1988, OJ L 319, 25.11.1988, p. 1.
(3) Third paragraph of Article 188 of the EEC Treaty; Article 55 of the Protocol on the Statute of the Court of Justice of the ECSC and third paragraph of Article 160 of the Euratom Treaty: 'The Court of Justice shall adopt its rules of procedure. These shall require the unanimous approval of the Council.'
(4) This decision will be published in the same edition of the Official Journal as the corrigendum to Decision 88/591/EEC, drawn up to rectify linguistic errors.
(5) Council Regulation (ECSC, EEC, EURATOM) No 4045/88 of 19 December 1988, OJ L 356, p. 1. The monthly salaries of the President, Members and Registrar of the CFI are to be 112.5 %, 104 % and 95 % of the basic salary of a grade A1 European Community official respectively. It appears that one delegation proposed, unsuccessfully, that, if it was decided that the CFI should have 12 judges, the Members of the Court shoul d, in order to save money, be assigned on a salary scale between Court of Justice legal secretaries and directors-general of the institutions of the European Community.
(6) The Court's other request was for a simplification of the procedure for revision of the Court's Statute which, since the Statute was cushioned in ad hoc protocols annexed to the Treaties, was subject to the cumbersome procedure for revision of the Treaties. This request was approved in Articles 5, 12 and 27 of the Single European Act, now Article 45 of the ECSC Treaty, the second

paragraph of Article 188 of the EEC Treaty and Article 160 of the EAEC Treaty, which provide that 'the Council may, acting unanimously at the request of the Court of Justice and after consulting the Commission and the European Parliament, amend the provisions of Title III of the Statute.' The Court was proposing that this simplified procedure be extended to the whole of the Statute and not merely to Title III concerning procedure before the Court.
(7) See: *O. Due* , 'The proposed Court of First Instance of the European Communities, introductory remarks', address given on 22 April 1988 to a conference organised by the Bar Association for Commerce, Finance and Industry and the International Union of Lawyers, to be published in *The Yearbook of European Law* in 1989.
(8) The Court handed down 64 judgments in 1970, 128 in 1980 and 211, 174, 208 and 238 in the last four years respectively.
(9) For an outline of the substance of the memorandum, see. A. Tizzano, 'La Cour de justice et l'Acte unique européen', in *Du droit international au droit de l'intégration* , Liber Amicorum Pierre Pescatore, 1987, pp. 705 and 706.
(10) Commission Proposal of 4 August 1978, OJ C 225, 22.9.1978, p. 6.
(11) See *G. Vandersanden* , 'Considérations sur la perspective de créer un Tribunal de contentieux du personnel', Mélanges en l'honneur du professeur Constantinesco, 1978, p. 841 ff.
On the establishment of this 'administrative court', see also *Select Committee on the European Communities of the House of Lords* , 17th report, 1978–1979 session, 'Staff Administrative Tribunal'.
(12) Report on the draft Council Decision establishing a Court of First Instance, A series EP Doc., A2-0107/88 of 6 June 1988.
(13) Legislative resolution embodying the opinion of the European Parliament on the draft Council decision establishing a Court of First Instance, as drawn up by the Court of Justice (OJ C 187, 18.7.1988, p. 205).
(14) Document SEC (88) 366 final of 18 May 1988.

[…]

(52) For a different view, see P. Pescatore who, in 'L'Acte unique européen', pp. 6 to 8 of *Recueil sur l'unification européenne* , 1988, published on the 40th anniversary of the European Movement and the centenary of Jean Monnet's birth, takes the view that, in the light of the substantial changes made to the Court of Justice's original proposal, the only honourable way out for the Court, since it has been outbid by the Council, would be to withdraw its request.
(53) For a similar view, see J. C. Moitinho De Almeida, 'The Establishment of a Court of First Instance', in *Bar European News* , 1.10.1987, p. 5