I.

Especially on the occasion of a prominent birthday, it is common practice to congratulate and to wish the jubilee all the best. It is in particular adequate to do so in the case of the Court of First Instance (CFI), being part of the judiciary of the European Union. However, this is not to say that the CFI has grown up just now. For a long time, it has proved to be a genuine partner of the European Court of Justice with its outstanding ability to deal competently with an enormous amount of cases.

In line with the overall theme of the conference „De 20 ans à l’horizon 2020. Bâtir le Tribunal de demain sur 20 ans de solides fondations“, I would like to start my introduction with a retrospective and highlight, in a nutshell, the Court’s achievements since its creation.

Subsequently, I will turn to the more specific topic of this Atelier. I will thereby discuss the significance of the principle of a free access to the Court within a legal system based on the rule of law such as the law of the European Community. Furthermore, I will roughly outline the selection of topics to expect from the three speakers taking part in this first round of the conference.

Finally, I would like to look ahead by trying to identify, among the plurality of possible questions and considerations, some problems whose solution is, in my view, crucial for the continuation of the successful work of the CFI in the next decade. In doing so, I want to pay specific attention to the question in which way adequate access to the
Court is to be ensured in the future. According to my role as a moderator, I will mainly focus on formulating questions for the following debates rather than on giving definitive answers myself.

II.

Even from a critical point of view, the first 20 years of the CFI’s jurisprudence represent a success story indeed. Measured against the reasons that led to the creation of the Court 20 years ago as expressed in the Council Decision of 24 October 1988, the CFI has fully met the expectations. According to the Council Decision, the main purpose of establishing the CFI was:

“To improve the judicial protection of individual interests in cases evolving the examination of complex facts and to enable the Court of Justice to concentrate its activities on the fundamental task of ensuring uniform interpretation of Community Law.”

From the time before the Court was created, I can report from a conference at the European University Institute in Florence in late 1986, in which legal scholars and practitioners discussed in detail the progress and problems in establishing the CFI. At that meeting, Ulrich Everling, then judge at the ECJ, summarised the decisive and generally acknowledged reasons for establishing the Court as follows:

« La protection juridique des droits des particuliers dans le cadre de la Communauté est une des missions les plus importantes de la Cour. Toutefois, par sa structure, son organisation et sa composition, la Cour est mieux armée pour trancher des litiges d’ordre constitutionnel et pour contrôler la légalité des actes pris par les institutions que pour juger certains cas particuliers. »

In the meantime, the Court has dealt with an enormous number of these “cas particuliers”, and in doing so, it has not only disburdened the ECJ but made a significant contribution to achieve individual justice. Until the end of 2008, the CFI decided more than 6,200 cases, lately about 350 to 500 cases per year. Only a limited number of these cases is challenged by appeal. This exemplifies the settling effect of the CFI’s jurisprudence. Looking in detail at the number of appeal cases in the reference year 2008, the statistics reveal that about one fourth of the CFI’s decisions were challenged. In the same year, the success rate of such challenges

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before the ECJ amounted to 30%.\(^5\) Since the appeal procedure is confined to questions of law only, this means that the CFI has exercised its judicial control in a totally appropriate way in the vast majority of cases.

A review of the judicial practice of the Court discloses that the main focus of its activity lies clearly in the field of administrative law. The CFI has not only decided an enormous number of administrative law cases, but also contributed significantly to the emergence and development of the still fledgling legal field of European administrative law.\(^6\) Therefore the Court can be regarded as the administrative court of the European Union.

Considering the challenge to prepare and decide very complex cases, the CFI has mainly been concerned with questions of civil service law and European competition law in the first years. Thus, it is fair to say that the creation of the Court has helped to achieve the aspired improvement of legal protection in these fields of law.

As it is generally known, this development specifically in the field of civil service law has led to the creation of the European Union Civil Service Tribunal, which took up its work in 2005. The constitution of this Tribunal furthered the differentiation of the EU’s judiciary that is now partly three-staged.\(^7\)

When looking at the CFI’s case load, it becomes apparent that there might be reasons for even further relief and differentiation, but in any case for innovations in the Community Courts’ organisational structure especially in the field of economic and competition law. To some extent, the CFI now suffers from its own success. The problems that led to its creation in the past – in particular the need for a better preparation of often complex questions of fact and law – are now faced by the Court itself.

More than 10 % of the 640 cases filed with the CFI in 2008 were concerned with competition law (in numbers: 71 cases). If one is inclined to accept the number of pages of the judgments of the Community Courts as an indicator for the complexity of the decided cases, there are, in recent years, decisions of the CFI that are by no means shorter than the judgments of the ECJ, which once gave reason for the creation of a further judicial authority. As an example, I only want to refer to the sugar case from 1975, which at that time was considered as a record case\(^8\) in leading to an ECJ judgment of 400 pages and an Advocate General’s opinion of about 100 pages. I remember the beginning of the personal records made by Hans Wolfram Daig, who

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\(^5\) This number includes all cases in which the decision of the Court of First Instance was totally or partially set aside, with and without referral back.


was référendaire at the Court and later director of the library at the ECJ, describing this case in biblical words:

“And so it was that by the first day several lorries drove up before the ECJ with tons of cardboards and files, that landed in my office as référendaire shortly after.”

After the creation of a two-levelled system of jurisdiction, it is no surprise that it then was the CFI that had to decide cases that were similarly complex. In the period of 2000 to 2007 only, this may be exemplified by referring to the following cases of Cimenteries CBR and Others (2000),\textsuperscript{9} Atlantic Container Line (2003),\textsuperscript{10} General Electric (2005)\textsuperscript{11} or Microsoft (2007).\textsuperscript{12} The first two of these cases (Cimenteries and Atlantic Container Line) involved judgments amounting to nearly twelve hundred (1,187 exactly) and five hundred fifty (549 exactly) pages respectively, which were considerably longer than the abovementioned sugar case decided by the ECJ.

An impression of how stressful it is for the judges to cope with such numerous and complex cases, in addition to their regular day-to-day business, can be derived from the striking description of “a day in the life of a judge”, which Christopher Bellamy, former judge at the CFI, published in the Liber Amicorum for Gordon Slynn.\textsuperscript{13}

III.

Subsequent to this general introduction, I now turn to this Atelier’s specific theme “Access to the Judge under the Rule of Law”. In order to describe the fundamental meaning of this constitutional principle, I would like to refer to the concise description provided by Advocate General Ruiz-Jarabo Colomer in his opinion of 5 March 2009 in the case of Roda-Golf:

„Access to justice is a fundamental pillar of western legal culture. ‘To no one will we sell, to no one will we deny or delay right or justice’ proclaimed the Magna Charta in 1215, expressing an axiom which has remained in force in Europe to the extent that it features in the European Convention on Human Rights, the Charter of Fundamental Rights of the European Union and the case-law of the Court. Therefore, the right to effective legal protection is one of the general principles of Community law, in accordance with which access to justice is organised.”\textsuperscript{14}

\textsuperscript{12} C. F. I., Case 201/04 Microsoft [2007] E. C. R. II-3601.
Already from the earliest decisions of the ECJ, it can be deduced that the principle of guaranteed access to the Court not only requires the possibility to go to court in a procedural sense, but that it also contains an obligation to decide cases in line with the rule of law. In the famous Algera case, the ECJ proclaimed the prohibition of “déni de justice” in EC law. As is well-known, the case was concerned with the question, whether it was possible in the absence of a written competence in the ECSC Treaty (Treaty establishing the European Coal and Steel Community) to revoke a favourable administrative decision in the field of civil service law. The ECJ emphasised in this constellation that, “unless the Court is to deny justice it is therefore obliged to solve the problem by reference to the rules acknowledged by the legislation, the learned writing and the case law of the member countries.”15 Thus, the constitutional principle of access to the Court also required the ECJ to decide the case objectively in line with general principles of law. This principle of access to justice is generally accepted in all legal systems of the Member States of the EU.

The conclusions that can be drawn from this principle of Community law16 were further substantiated in the Les Verts case. In that case, the ECJ stated that “the Community is a community based on the rule of law, and that the Treaty has established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions.”17

In its recent Sogelma decision of 8 October 2008, the CFI has explicitly borrowed from this conception and applied it to the European Agency for Reconstruction. The Court observed:

„The general principle to be elicited from that judgment [Les Verts] is that any act of a Community body intended to produce legal effects vis-à-vis third parties must be open to judicial review. It is true, that Les Verts, paragraph 24, refers only to Community institutions and the EAR is not one of the institutions listed in Article 7 EC. None the less, the situation of Community bodies endowed with the power to take measures intended to produce legal effects vis-à-vis third parties is identical to the situation which led to the Les Verts judgment: it cannot be acceptable, in a community based on the rule of law, that such acts escape judicial review.”18

The adequate access to justice was furthermore emphasised by the ECJ in a recent decision in the case Der Grüne Punkt.19 In this case, the proceedings before the CFI had lasted more than five years and therefore, in the view of the ECJ, had infringed

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the principle to adjudicate within a reasonable time deduced from Article 6 of the ECHR. Although the ECJ ultimately rejected the allegations of the plaintiff in the appeal proceedings, it nevertheless indicated the admissibility of an action for damages in this case.

In the first round of our panel discussion we want to elucidate the overall meaning and importance of the principle of an adequate access to justice by means of the following division of work. Mario Siragusa is going to focus mainly on competition law and will comment on this question from the perspective of a practicing lawyer, who represents in particular private parties. As a sort of counterpart, Alice Guimaraes-Purokowski will give an account of her experience with accessing the Community Courts as a representative of a national government. Subsequently, Prof. Bejček will speak about the meaning of access to the Court in a rule of law-based system especially from the perspective of the new Member States.

IV.

The fourth and last part of my speech is concerned with the formulation of questions about the future of legal protection before the CFI. As far as the perspectives for the organisational system of judicial review in the European Community are concerned, one might start with a grand design or a vision, at which the future developments should aim. This concept may be a fully-fledged system of judicial review at three levels. Thereby, specialised courts for certain matters might form the basis, whereas the Court of First Instance would serve as the normal instance for all direct actions as well as for certain preliminary rulings, and the Court of Justice at the top would be responsible for constitutional matters and act as the highest instance in questions of legal review and interpretation of European Community law.20 However, in view of the more practical purposes of this colloquium, it might be preferable to address more concrete questions of judicial reform, which are worthwhile being answered in order to stabilise the judicial system as a whole and to prevent it from a breakdown due to an increasing workload it has to cope with.21

In this pragmatic sense, instead of dealing with more technical questions regarding the internal organisation of the Court, which cannot be answered competently by outsiders, I want to focus on some questions with a rather constitutional character. Albeit this is not to deny the fluent transition between constitutional and technical-procedural questions.

Depending on how liberal or restrictive they are, the relevant provisions of the rules of procedure can exert a quite significant influence on access to justice and thus also turn out to be of constitutional relevance.

1. Among the many issues addressed by legal policy and academic writing, I only want to take on two rather technical-procedural points.

First, I want to mention such measures which intend to restrict the oral part of the proceedings. Admittedly, oral proceedings are time-consuming and occasionally they only repeat parts of the written submissions. However, a further restriction or tightening of the hearings would significantly affect the fundamental right to be heard. The time granted to the parties to plead their case is already strictly limited, which urges the parties to be very concentrated.

In my opinion, any further restriction of the hearings in order to save time would not only conflict with the guarantees of individual legal protection but also with elements of the Community's legal system in general. Even today, the courts of the EU, as I dare to say, remain rather unknown in the public. The best way to become acquainted with them is by personal contact and by the personally gained conviction to be in good hands in the proceedings before the Courts. In this respect, the settling effect of the oral hearing should also not be underestimated.

This is not to say that the Court should not give assistance to the parties by asking questions before or during the proceedings. Exactly these questions formulated by the Court help to concentrate on the important aspects during the hearings.

On the contrary, in order to save time it could be worth considering limiting the written procedure more often than today, to a mere exchange of one set of the written submissions – writ and defence plea. The respective second written submissions do not necessarily disclose new arguments.

2. Among the questions regarding the Court's future organisation and constitution, I first want to mention one factor which could help the Court to cope with the increasing number of cases more easily. At the same time, access to the Court in the described substantive understanding would be facilitated. The wording of the EC Treaty allows increasing the number of judges of the Court. According to Article 224 paragraph 1 of the EC Treaty, the Court of First Instance shall comprise at least one judge per Member State. The number of Judges is to be determined by the Statute of the Court of Justice. The Statute can furthermore provide for the CFI to be assisted by Advocates General. This is currently not the case, at least not in the sense that there are permanent office holders for the Court. The Treaty of Lisbon, while renaming the Court of First Instance as “General Court”, would not change this principal option. In accordance with Article 245 of the current EC Treaty, the Council would have to act unanimously to raise the number of judges, which means that the Member States would have to provide for the necessary budget, too.

21 For the necessity “d’adapter la machine judiciaire communautaire aux exigences découlant du droit à une protection juridictionnelle efficace”, see J. Dutheil de la Rochère, Droit au juge, accès à la justice européenne, Pouvoirs 2001, p. 140.
22 Confer Article 19 (1) and (2) subparagraph 2 of the Treaty on EU and Article 254 of the Treaty on the Functioning of the EU.
Although it seems that – given the enormous amount of workload and cases to be decided – there is reason enough to carefully consider an increase of the number of judges at the CFI, one could be reminded of the well-known words in the “Federalist Papers” about the role of the judges:

„The judiciary […] has no influence over […] the purse […], but merely judgment."²³

A second proposal would materially affect the ECJ as well as the CFI but with contrary consequences. Article 225 paragraph 3 of the EC Treaty provides for the possibility to confer the jurisdiction on preliminary rulings on the CFI in specific areas laid down by the Statute. While this would further disburden the ECJ being currently exclusively competent for preliminary rulings under Article 234 of the EC Treaty, it would put further pressure on the CFI, who would have to cope with an even greater workload. In any case, this transfer of jurisdiction would, in my view, depend on the possibility to identify on the basis of coercive and consistent reasons certain subject areas that appear especially suitable for the CFI. Moreover, a true relief of the workload of both of the Community Courts would only be conceivable if it were combined with an increased number of judges.²⁴

Notwithstanding the difficult problem to increase the number of judges of the CFI, a further crucial point has to be mentioned. It is questionable to what extent the ECJ could actually be disburdened if a shared responsibility between the ECJ and the CFI were introduced in these proceedings. The preliminary procedure is supposed to guarantee an authoritative interpretation of EC law. Threats to the unity or consistency of Community law must be prevented, as Article 225 paragraph 3 of the EC Treaty expressly stresses. In such a system of shared responsibilities, this would mean in these matters that the CFI might have to cope with even more work without completely discharging and excluding the ECJ from having to decide exceptional cases in the interest of the unity of EC law.²⁵ Thus, the transfer of jurisdiction turns out to be a highly delicate matter.

A third proposal to reform the Court’s organisation and constitution could be to further develop the three-staged EU judiciary, which was partly established with the creation of the European Union Civil Service Tribunal in 2004. On various occasions, trademark law has been discussed as a further area of law where the installation of a new judicial panel could be reasonable.²⁶ But also other highly specialised parts of European economic law, like for example the protection of intellectual property rights in general or even competition law, are to be considered.²⁷ According to Article 220

²⁵ See B. Vesterdorf, The Community Court System Ten Years from Now and Beyond: Challenges and Possibilities, E.L.R. 28 (2003), p. 316-317. See also the plans to establish a unified patent litigation
sentence 2, Article 225 paragraph 1 and Article 225a of the EC Treaty, the Council acting on a proposal from the Commission or at the request of the ECJ is able to create judicial panels to hear and determine at first instance certain classes of action or proceeding brought in specific areas. The Treaty of Lisbon would not essentially change this legal situation but rename the judicial panels into “Specialised Courts” and declare the ordinary legislative procedure as provided for in Article 294 of the Treaty on the Functioning of the EU applicable. Consequently, the Council would not have to act unanimously in the future.

However, the installation of further judicial panels or specialised courts would, to some extent, give up the current principle that legal disputes in the EU’s judiciary are generally distributed to judges in turn, regardless their personal expertise in certain areas of law, and are not primarily settled by specialists.28

In this regard, the creation of the specialised European Union Civil Service Tribunal remains a rather exceptional case,29 which confirms the validity of the general principle that legal disputes at the EU level are decided by overall highly qualified judges30 in contrast to specialised ones. The CFI history shows that cases in the field of civil service law are a rather distinct matter. Moreover, the amount of individual cases in this area was so numerous that the ECJ being the Community’s constitutional court had to be disburdened in this respect. In contrast, the objective of its creation was not so much to establish a specialised jurisdiction.

On the other side, the fields of EC law have been growing continuously in the past, and more and more cases end up before the European Courts. Therefore, there seems to be a good reason to re-open the debate about establishing new specialised courts, which might further the trend towards a three-staged EU judiciary. However, it should be taken into account that the exemption of certain legal disputes from the jurisdiction of the CFI would mean that the CFI, being composed of generally qualified judges, would lose its immediate access to the manifold factual and legal questions arising in such cases. Also in this context, it appears not easy to exactly determine the areas of law suitable for specialisation. In any case, the unity and consistency of Community law must be guaranteed by means of an adequate organisation of the appeal procedure.

3. After all, I want to address an issue, which in contrast to the other points is concerned with one particular field of law. This issue has recently been discussed intensively and has been considered as a matter where reform is needed. It is the system based on a special agreement foreseen by Article 300 EC involving the Community, its Member States and other Contracting States of the European Patent Convention (EPC), IP/09/460 of 24 March 2009.

question of judicial control in the field of competition law especially with regard to the legal protection against penalty payments. As you all know, these fines being imposed by the Commission have actually reached the sum of more than a billion Euros.

At this point, I hope you allow me to depart from my role as a moderator to some extent. On the basis of my recent legal research activities, I would like to present some suggestions for reform in this specific subject matter.

Due to time constraints, I will only briefly outline the most important aspects of these proposals. Today’s record fines in the field of competition law necessitate an increase of judicial control, if not even a rearrangement of the overall system de lege ferenda. To be clear: I am not doubting that every system of competition law is dependent on effective instruments that allow its enforcement. It is furthermore not to be denied that penalty payments must have a deterrent effect in order to prevent competition law infringements. Considering fundamental principles of the rule of law, however, the necessary balance between the request for effective enforcement of competition law and the respect for the affected company’s legitimate right to legal protection is currently endangered. This balance, which has been lost in particular due to the increasing fines reaching dimensions that originally – under the legendary regulation 17/62 – were unimaginable, has to be restored.

For that purpose, in my view it is necessary to intensify the substantive control of the Commission’s fining decisions by the EC judiciary. The Courts should widen and deepen their own legal control of the substance of the alleged infringement and the imposed sanction by the Commission instead of, as hitherto, rather focussing on the compliance of the administrative procedure with the Commission’s fining guidelines and on the reasonableness of the administrative decision. Mr. Siragusa will later give his opinion on the necessity to expand the judicial control in the field of European competition law in detail.

I want to add one further suggestion, according to which a new bi-institutional procedure should be introduced de lege ferenda in order to dissolve the Commission’s current sweeping competence as investigating and deciding authority concerning the imposition of competition fines. The European Commission should solely serve as prosecution authority and the CFI, or special chambers within its frame, should decide about the accusation and, when necessary, impose fines according to their own investigation and gathering of evidence. To implement such a system may be difficult and only possible via significant organisational changes. This should, however, not prevent us from seriously considering this proposal given the deficits of the current fining procedure regarding fundamental principles and the rule of law.

With this maybe provoking proposal I want to conclude my introduction. Finally, please allow me to renew my congratulations and please accept my best wishes for

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the next 10 years. It is my strong belief that, contrary to lately expressed scepticism in some places, the EU’s judiciary will prove to be a valid and stable institution in order to guarantee that the rule of law is preserved in the EU. In this way, the CFI together with the ECJ will ensure a solid basis for further steps of European integration.