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From 20 to 2020 – Building the CFI of tomorrow on solid foundations

Workshop 'Access to Justice'

Honourable Presidents,
Honourable members of the Court
Distinguished guests

I would like to start by congratulating the Court of First Instance on the occasion of its 20th anniversary. It is my great honor to present the report of the workshop Access to Justice. We had seven excellent presentations which led to a set of inspiring discussions. Each of the presentations had its unique and very contributing approach to the general topic at hand. In brief, we had an opening speech by Prof. Schwarze addressing some features of the access to justice under the rule of law and the future of the legal protection before the CFI. Mr Siragusa gave his critical view on the interplay between the Courts and the Commission in the field of competition law. Prof Bejiček presented new member state's perspective of EU law giving an insight into Courts interpretation techniques. Next Finnish state agent Ms Guimaraes-Purokoski introduced finish experience before the Courts, concentrating among other things to the importance of Member States's presence before the court. The afternoon session was opened by Mr Lasok who gave his extensive overview of the different facets of the judicial control in the EU by analysing the meaning of legality. Subsequently the floor was given to Prof Jabloneker, the President of the Austrian Supreme Administrative Court, who gave some insights into the Austrian administrative court system. The session was closed by Mr Antunes who addressed the nature of judicial control by rising some interesting and very topical questions as regards the future developments.
I PANEL

I think it is only appropriate to start my overview of the first presentation by outlining the statistics Prof Schwarze used for the appraisal of the achievements of the CFI. Statistics, which show that the CFI not only disburdened the ECJ but also contributed to achieve individual justice. For example, in 2008 there were 640 cases filed in the CFI. Out of them one fourth were challenged and only 30% had a success rate before the ECJ.

In the light of CFI's achievements Prof Schwarze made a point that the CFI is to be considered as THE administrative court of the EU; facing now the very same problems that led to its creation in the past. He addressed several points of judicial reform which could help Court(s) to cope with the increasing number of cases more easily: as a solution for saving time he proposed limiting the written procedure to a mere exchange of one set of written submissions; but warned that any further restriction of oral pleadings would conflict with the Community's legal system. Touching upon the question of the Court’s future organisation and constitution Prof Schwarze called on considering an increase of the number of judges at the CFI. He argued also for considering the transfer of jurisdiction with regard to a preliminary ruling procedure, and invited to re-open the debate about establishing new specialised courts with a possible trend towards three staged EU judiciary.

He also presented some suggestions for a reform of judicial control in the field of competition law especially with regard to the legal protection against penalty payments: the necessary balance between the effective enforcement of competition law and the respect for the right to legal protection is currently endangered and has to be restored. For that purpose, in his view, it is necessary that Courts widened and deepened their own legal control of the substance.

To conclude, Prof Schwarze presented in his words a provoking proposal to introduce a new bi-institutional procedure *de lege ferenda*, which would have the Commission as the prosecution authority whereas the CFI should decide on the accusation and impose fines.

II Following speaker, Mr Mario Siragusa gave his critical view on the interplay between the Courts and the Commission by expressing the necessity to expand the judicial control in the field of European competition law. Especially at present when the new system of competition law enforcement is in place. In emphasising that the
Commission now functions as a prosecution authority Mr Siragusa submitted that the scope of the Commission’s margin of appreciation in competition cases must be very narrowly defined.

He described deficits in the current competition law enforcement system, pointing to a de facto “criminalization” of EU competition law which is illustrated by huge amount of fines the Commission has been imposing. He indicated doubts whether this system ensures respect for the right to due process and fair trial.

Finally, he criticized judicial deference doctrine that limits the review of the Court only to certain aspects in cases entailing complex economic assessment. Mr Siragusa finds this approach ill-founded stating among others that in areas such as merger control and the assessment of concerted practices the EC Courts have shown their ability adequately to engage in particularly intense judicial scrutiny of complex cases. He also called EC courts on honestly recognizing that the Commission engages in complex economic assessments only in very few cases, if any.

**III** The third speaker, Prof Josef Bejček presented a perspective of a new member state towards the EU law. He gave a description of a situation where these countries after their re-independence found themselves: the Soviet past and its arbitrary decision making had established a fear for too much discretion. That was why radical changes in 1989 brought along the creation of very detailed rules which in turn resulted in an especially restrictive way of grammatical textual interpretation. Against this background the interpretation techniques of the European Courts were surprising to the newcomers, in particular the extent of the competence the courts enjoyed when intervening and explaining the meaning and purpose of law.

Further Prof Bejček characterised the decision making practice of European courts as „legally realistic” because it has brought the law near social reality considering broader social, economic and further aspects of law. Nevertheless, he warned against accepting the U.S. “legal realistic” statement that the written law does not predestinate the result of the dispute.

Analysing the functioning of European law he drew attention that European law constitutes in practice a part of the national law. Prof Bejček concluded in an optimistic tone believing into high probability for a value conformity in European legal
world: a judge in a Member State interprets and applies both European and domestic law using the same value and methodological basis as the judge in Luxembourg.

IV Next, Ms Guimaraes-Purokoski, the director of the litigation unit of the Finnish Ministry of Foreign Affairs gave an overview of Finnish experience before the Courts. She emphasised the importance of the privileged status of Member states before the Courts having regard to the *sui generis* EU legal order and submitted that a member state needs to be active in trying to influence EU law. In order to do this it is important for a Member State to be an active participant in the Courts' proceedings. She stressed a very important aspect of court proceedings, namely that differently from procedures in the Council, the member states have an equal standing before the Courts. Success in the Courts does not depend on the number of voices in the Council but on the quality of arguments. Next she introduced a mechanism how a member state picks a case to participate in. On the one hand there is a heavy reliance on the line ministries. On the other hand, the MFA scrutinizes the cases themselves trying to catalyse line ministries. Finally she considered differences in the proceedings between the Courts pointing at the interactive and not excessively formal proceedings in the CFI. That contributes in her assessment to a feeling of a fair trial and of thorough deliberation prior to a judgment.

II PANEL

I The afternoon was opened by Dr Paul Lasok and his extensive overview of the nature of judicial control. His analysis was centered on the criterion of legality which he found to have two connotations. First, legality in terms of compliance with the legal conditions that define the exercise of a power in a wider sense. Secondly, legality as a legal criteria as set out for example in Article 230 of the EC Treaty. These two different approaches explain in his view two things in the context of Article 230: namely, why the concepts of an error of fact and a margin of discretion are being read into this Article.

Further Dr Lasok proposed to distinguish the following aspects of the exercise of power when reviewing the nature of judicial control: namely, the purely legal factors governing the power; matters of fact; evaluations; and in the case of a discretionary power, the actual exercise of discretion itself. The purely legal factors are supposed to be entirely within the remit of the court exercising judicial control.
As regards the facts, judicial control generally extends to the facts on which the body or person in question acted in exercising power. However Dr Lasok pointed out that two qualifications apply here. First, in case of facts of a technical nature more reserved attitude is adopted by the court. And secondly, a question may arise whether evaluations are matters of fact or something else. In this regard he found it necessary to distinguish between so-called objective ascertainability and conclusions that are not capable of objective verification.

Finally, when making evaluations in the true sense the nature of judicial control is the same as with discretionary aspect of a discretionary power. According to Dr Lasok that type of control has two different aspects: one is to ensure that the power was exercised on a properly informed bases; the other involves a control of the discretion itself.

II. Next, the president of the Austrian Supreme Administrative Court, Professor Jabloner gave an insight into 133 years old Austrian administrative court system. He introduced the underlying philosophy behind the Austrian system according to which the administrative jurisdiction does not only serve as an instrument to control the administration but is also established for protecting it. With regard to the latter he reminded the idea of a separation of powers in the French tradition, which served historically to protect the administration. In summary the relatively detained jurisdiction is counterbalanced by strictly regulated administration and vice versa.

He made an interesting remark that there exists a tendency to favor more judicial control and to narrow all spheres of discretionary power, the reason probably being that judges are always to be set on extending their spheres, even if this means more work.

Prof Jabloner also expressed doubts about the Austrian system’s conformity to the ECHR, especially to its article 6. On the one hand the inability to examine facts serves as a persistent factor of uncertainty. On the other hand compliance with the principle of reasonable time is of a concern.

He finished his presentation by underlining the importance of good administration.

III The last speaker, Mr Antunes devoted his speech similarly to some previous speakers to the nature of the judicial control. He pointed at two main deficits in this regard: firstly, length of procedures and secondly unclear frontiers between administrative and judicial bodies. He also referred to the similarities between these deficits and those we face at national level.
Significant steps undertaken in order to improve the EU judicial system were indicated. Among these steps a more in-depth analysis of the Commission’s decisions, right to damages, reinforcement of procedural rights and the accelerated procedure were outlined. Mr Antunes expressed his support concerning the latter, finding that the accelerated procedure enhanced significantly timeliness of judicial review. As regards the extent of the judicial review, he further brought attention to the CFI's case-law that shows the readiness to undertake a more close scrutiny.

Looking for possible solutions in the future to improve the effectiveness of the EU judicial control, he raised some questions, such as: do we need more judges or should we review the rules of admissibility. One solution worthy of serious consideration should be creating specialized courts. However, Mr Antunes expressed skepticism about great reforms emphasizing instead the need to adopt less formalistic procedure and to go right to the point.

The workshop ended with an intensive debate over concrete proposals for the future changes put forward by Mr Antunes, namely:

1) should we simplify interim measures,
2) limit written submissions,
3) should there be a pre-hearing report indicating specific points for discussion?

Different views remained as to the feasibility of these measures and therefore I can only but refer these concrete suggestions to the distinguished audience, to which I hope we can have answers and proper solutions by the next jubilee of the CFI.