COMMISSION OF THE EUROPEAN COMMUNITIES

SEC(88) 366 final

Brussels, 18 May 1988

ESTABLISHMENT OF A COURT OF FIRST INSTANCE

PRELIMINARY GUIDELINES ADOPTED BY THE COMMISSION FOR THE PREPARATION OF AN OPINION ON THE PROPOSAL PUT FORWARD BY THE COURT OF JUSTICE FOR A COUNCIL DECISION ESTABLISHING A COURT OF FIRST INSTANCE (CFI) AND AMENDING THE STATUTES OF THE COURT OF JUSTICE

Preliminary guidelines adopted by the Commission for the preparation of an opinion on the proposal put forward by the Court of Justice for a Council Decision establishing a Court of First Instance (CFI) and amending the Statutes of the Court of Justice.

1. General

The Commission fully shares the Court's concern about improving the effectiveness of judicial protection within the Community order, and its remarks on the consequent need to relieve the Court of the burden of investigating facts in certain types of case - both of which factors underlie the amendments to the Treaties made by the Single European Act with a view to establishing a Court of First Instance. The Commission therefore welcomes the Court of Justice's request, which largely corresponds to some of the Commission's previous initiatives.

However, as the Commission sees it, it is for the Commission, as part of the opinion which it is required to give on the proposal for setting up a Court of First Instance, to make known its own ideas on the main points of the proposal to the extent that these, in the Commission's view, seem likely to provide a better guarantee of the effectiveness of the institutional processes and the quality of the CFI's decisions.

The Commission would also like to make some comments of a technical nature.

2.1 Principal points

2.2 The key question is that of the CFI's jurisdiction (Article 3). To a large extent, this determines the guidelines to be adopted with regard to the composition of the new court, its division into Chambers and, to a lesser extent, in what circumstances an appeal should lie to the Court of Justice.

(a) The proposed decision does not exhaust the possible jurisdiction of the CFI as defined in the Single European Act. In addition to staff cases, it covers actions brought in the fields of competition and trade protection, and other ECSC cases.

Thus defined, the jurisdiction covers two very different fields: staff cases, and cases requiring a detailed examination of the facts and of generally complex economic data.

The general scheme of the proposal thus assumes that the court to be set up will be a specialist court, having in fact two areas of specialization: an administrative tribunal and a court of economic law.

A number of consequences would appear to derive from this approach, as regards both the organization of the CFI (see point 2.3 below) and the number and qualifications of its Members (see point 2.4).

(b) The allocation of staff cases to the CFI is in keeping with the Commission's previous proposals. The Commission has no reservations, therefore, on this score, insofar as the CFI is composed of members who are sufficiently specialized in administrative law, and in particular European public-service law, and is appropriately constituted (see points 2.3 and 2.4).

It seems appropriate to the Commission that provision should also be made for the CFI's jurisdiction to cover cases arising out of the performance of contracts concluded by the Community and containing a clause conferring jurisdiction on the Court of Justice. Such cases, which are not very many, should logically fall to the CFI. They involve examination of facts and reference to (a) internal administrative rules constituting the general conditions of such contracts and (b), at a subsidiary level, the rules of national law under which the contract is concluded. The provisions of the Single European Act admittedly prevent such a power being allocated to the CFI where it is the Commission that brings the action; but there is nothing to preclude such cases being devolved to the CFI where an action is brought by the other contracting party, since uniformity of case law would be ensured by the right of appeal to the Court of Justice and by transferring the case to that Court at first instance if the Commission were to bring a counterclaim.

(c) In the Commission's view, however, allocation of economic cases to the CFI is possible only if there is a guarantee that the CFI will be so constituted and so organized as to attain the degree of qualification and specialization required by the subject-matter in question, especially as regards competition cases (see points 2.3 and 2.4 below).

In the first place, the Commission shares the Court's views that devolution to the CFI of actions brought by undertakings against decisions concerning State aids could not be appropriate, given the factual relationship of such actions to those brought by Member States.

Devolution of this type of jurisdiction to the CFI also presupposes the existence of numerous previous decisions of the Court providing a rich source of precedent to which the new court can refer. This does exist in the competition field, but is is arguable that this condition is not yet entirely met in relation to trade protection.

Moreover, in relation to trade protection, anti-dumping and anti-subsidy cases (AD/AS) under the EEC and ECSC Treaties[1], the Commission does not believe that the creation of the CFI will attain the result desired by the Court, namely to relieve its workload substantially and ease the task of the Community institutions as a whole. This is because the financial importance of AD/AS cases for the firms, and their political importance for the governments concerned, is such that almost all such cases brought before the CFI must be expected to form the subject of an appeal to the Court. The reduction in the workload of the Court will thus be limited, and will be outweighed by the increase of work for the Council and the Commission, which in the majority of cases will have to present argument to both courts.

It must also be noted that, unlike competition cases, where the Commission has the power of final decision, any action taken by the Commission is AD/AS cases is merely provisional, and subject to review by the Council, which alone is competent to decide on definitive measures. If, to this review by the Council and the existing review by the Court of Justice, there were now to be added an additional review by the CFI, a measure would have to be reviewed three times before it could be regarded as definitive. In these circumstances the already very lengthy uncertainty created for the parties to the dispute by AD/AS procedures and the ensuing litigation would be liable to be extended considerably.

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[1] With regard to the jurisdiction of the CFI, the omission of anti-dumping and anti-subsidy cases brought under Article 74 ECSC from the text of the proposal when equivalent cases under the EEC Treaty are included would seem to be a mere technical oversight.

As regards trade protection cases (EEC and ECSC), any improvement in the judicial protection of legitimate interests, such as the introduction of a two-tier court system, will chiefly benefit operators in non-member countries, while Community firms are not always sure to receive comparable treatment in certain non-member countries with respect to the protection of their rights.

In these conditions, the Commission is not in favour of including trade protection in the jurisdiction of the CFI.

(d) Lastly, in general terms, the Commission shares the Court's open-ended attitude, whereby any broadening of the CFI's jurisdiction is left for subsequent decisions. However, the Commission would be in favour of including a provision conferring jurisdiction on the CFI, within the limits set by the Single European Act, and under the conditions to be defined, as appropriate, in the acts establishing new Community bodies, with regard to actions brought against the decisions of such bodies where jurisdiction is conferred on the Court of Justice.

2.3 As regards the structure of the CFI, it is proposed (Article 2(3)) that the CFI should sit in Chambers of three judges, their composition and the assignment of cases to them to be determined by its Rules of Procedure.

(a) Plenary sessions are therefore excluded. In the light of the observations relating to the dual specialization of the CFI, the Commission believes that there is no need for plenary sessions.

(b) Moreover, the Commission is likewise led to the belief that the organization of the CFI should be laid down precisely in the text of the decision creating it, so that it may be ensured that the chambers are composed of lawyers higly-qualified in the two fields of law in question: administrative law on the one hand, and economic law (and more

particularly, competition law) on the other (see point 2.4 (c)). The Commission believes that this solution should enable the CFI immediately to assume the stature of a high-level court in relation to all areas of its jurisdiction and thus to reduce the tendency of parties to initiate proceedings before the Court of Justice. The Commission therefore thinks it would be appropriate for the CFI to consist of two specialized chambers, according to the subject-matter of actions, being required to hear and determine staff and economic actions respectively - at least five judges to sit in the latter case - and to which the Members of the CFI would be assigned for all or part of their term of office.

2.4 As to composition, Article 2(1) of the proposal provides that the new court shall consist of seven Judges.

(a) There would thus be no Advocates-General, the Court of Justice regarding them as unnecessary at first instance. The Commission's view on this particular point is that Advocates-General could make a contribution, especially by calling attention to Court of Justice decisions applicable to the cases coming before the CFI - when the Judges and, in particular, the Judge - Rapporteur in each case will often, given the CFI's jurisdiction, have to examine complex facts - and that this contribution should be weighed against the risk that the proceedings may be prolonged if a stage of preparing an opinion were added. It seems to the Commission, however, that the first argument, which lays stress on the need to enhance the quality of the CFI's decisions, and consequently to limit the number of appeals to the Court of Justice, carries more weight. The Commission is therefore in favour of having Advocates-General.

(b) The number of Members (Judges and Advocates-General) must be such that the CFi can properly carry out its tasks and form Chambers, each section comprising at least three or five Judges, depending on the nature of its cases. On the basis of the figures available for 1980-87, the CFI would have to hear about 130 cases a year, assuming that its jurisdiction is as suggested in the Court's proposal. For the sake of comparison, the Court between 1975 and 1979, when it consisted of nive Judges and four Advocates-General, delivered at best 138 judgments a year (1979). Since it is highly desirable that the establishment of the CFI should result in shorter proceedings than at present, and given the new Court's foreseeable workload, at least 12 Members would appear to be needed.

(c) For the reasons set out above (see point 2.3 (b)), the Commission believes that the Members, to be appointed by mutual agreement between the Member States after the CFI has been established, should have the special qualifications that will enable them to deal with the matters covered by the CFI and should be persons of senior rank so as to lend authority to the Court's judgments and thereby achieve the objective sought in its creation, namely a reduction in the numbers of appeals to the Court of Justice and the acceleration of the judicial process. The Members of the economic Chamber should be lawyers having recognized competence in economic matters, particularly in competition cases.

The Commission is well aware of the possible disadvantages which are also inherent in its approach; the appointment of Members to Chambers at the Court would be closely linked to their specific qualifications and, in particular, considerations of the relative prestige or importance at cases could adversely affect the outcome. That, indeed, is why the Commission does not rule out the rotation of judges during their term of office, which would also allow the organization of the CFI to be adjusted in line with developments in the allocation of cases.

In the final analysis, the all important imperatives in relation to the new Court are that it should be of a high quality and fully effective. To ensure that this is the case, the appointing procedure should be organized in such a way as to permit detailed examination of the proposals submitted by the Member States; these might, for instance, be twice as many as the number of posts to be filled, so that sufficient consideration can be given to the CFI's structure (two autonomous sections); it might be desirable for the conference of the governments of the Member States to seek the opinion of the Court of Justice on the proposed candidates before making the appointments. The same should apply both for the initial appointment of Members of the CFI and for the partial replacement of Members after the first three years and subsequent replacements.

2.5 As regards capacity to appeal to the Court of Justice, the proposal provides (Article 5, re a new Article 48 for the EEC Statute of the Court of Justice) that the decisions of the CFI shall be subject to review by the Court of Justice by means of an appeal lodged by a party or intervener which has been unsuccessful, at least in part, in its submissions - a conventional system of judicial review - it being understood that intervening Member States and institutions are automatically entitled to appeal, whereas individuals who intervene must show, for the appeal to be admissible, that the CFI's decision affects them directly in their legal position (Article 48, second paragraph).

The proposal also extends this possibility, as of right, to Member States and institutions which did not intervene at first instance (Article 48, third paragraph). This is a more debatable solution, since it allows a person not involved in the proceedings to question a decision which satisfies the parties (and the interveners) or which, at the very least, they are prepared not to challenge. It does not help to keep proceedings short; its appropriateness also seems questionable, since the Member States and the institutions are allowed to intervene before the CFI as of right. In practice, therefore, it would be enough for the administrations concerned to arrange to examine in each case the advisability, from the point of view of the importance they attach to the case, of intervening as soon as the action is brought before the CFI, rather than carrying out such an examination once judgment has been delivered. The Commission is therefore opposed to this solution.

3. Observations of a technical nature

Article 3 (Jurisdiction)

re (1) As regards staff cases, it is inappropriate to cite Article 179 EEC and Article 152 EAEC. The reference should simply be to "disputes between the Communities and their servants". This would make it possible to take Article 24 of the Merger Treaty into account and avoid possible misunderstandings as to the inclusion of former ECSC staff and of "satellite"

organizations, such as the European Foundation for the improvement of living and working conditions, Dublin, whose staff, according to the decisions of the Court of Justice, have the status of Community officials.

Article 4 (Functioning)

- The last paragraph of Article 192 EEC, Article 92 ECSC and Article 164 EAEC (of conceivable relevance with respect to staff cases, which are the only type of EAEC cases to be assigned to the CFI) should also be made applicable.

  In addition, with regard only to the EEC Statute, it will be seen that Article 5, through Article 46 of that Statute, makes Article 36 of the Statute which refers to Article 192 EEC applicable to the CFI; similarly, Article 49 of the Statute, so far as appeals to the Court of Justice are concerned, expressly refers to the decisions of the CFI taken under Article 192 EEC.

Article 5 (Amendments to the Statute of the Court of Justice)[1]

- First paragraph of Article 44 of the EEC Statute (Application to the CFI of most of the Statute provisions applicable to the Court of Justice).

  If Advocates-General are to be given a role, the term "Judges" should be replaced by "Members", and Article 8 should also be cited.

  Similarly, Article 12 should also be cited, so that the CFI should not be deprived of the possibility open to the CoJ, namely of appointing, on a proposal from the Court and depending on a unanimous decision by the Council, Assistant Rapporteurs to take part in the preparatory investigation of cases.

  The operation of specialized Chambers presupposes the application of Article 15, with the necessary adjustments.

- Article 46 of the EEC Statute (Representation of parties)

  This provision makes Title III of the EEC Statute governing procedure before the Court of Justice applicable to procedure before the Court of First Instance. The second paragraph of Article 17 states that parties other than Member States and institutions must be represented by a lawyer.

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[1] These observations apply, mutatis mutandis, to the ECSC and EAEC (Articles 7 and 9) Statutes of the Court.

The Commission takes the view that this requirement is not warranted for staff cases being heard by the CFI. To facilitate access to the Court, provision could be made, in these cases, for applicants either to conduct their case in person or to be represented by a lawyer or other person (including a trade union). This was the solution adopted in the Commission's 1978 proposal on the establishment of an Administrative Tribunal for staff cases (OJ No C 225, 22.9.1978, p. 6).

- Article 49 EEC Statute (Appeals against decisions of the CFI ordering emergency measures or suspending enforcement) (third paragraph)

It would seem appropriate to specify that any party which has been unsuccessful in its submissions, either in whole or in part, has a right of appeal (as with Article 48). Should there not also be a time limit for such appeals?

- Article 50 EEC Statute (Grounds of appeal)

The ground that Community law has been incorrectly applied by the CFI was expressed, in the Court of Justice's working document, in terms of "infringement of the Treaty or any rule of law relating to its application"; the latter wording seems more accurate and should therefore be preferred.

- Article 6

It would be more logical to say: "Articles 44 to 46 shall become Articles 53 to 55 in Title V "Miscellaneous provisions". At all events, former Article 46 must also be renumbered.

4. Technical observations on the amendments to the Rules of Procedure of the Court of Justice (insertion of a Title IV concerning appeals against decisions by the CFI)

Citations

The only legal bases to be cited are:

- Article 53 of the Protocol on the Statute of the Court of Justice of the European Coal and Steel Community (as amended by the decision to establish a Court of First Instance);
- the third paragraph of Article 188 of the EEC Treaty (formerly the second paragraph);
- the third paragraph of Article 160 of the EAEC Treaty (formerly the second paragraph).

Article 113(2) and Article 116(2) (Prohibition on the submission of new grounds)

It would seem essential to stress that there is an exception to the prohibition on the submission of new grounds in the appeal and the response where the ground is one of public policy. It must be possible, moreover, to adduce grounds arising from the CFI's decision itself.

Article 118

- It would be clearer to write "subject to the provisions of Articles 119 to 121 ..." (rather than "subject to the following provisions").

- It is not accurate simply to refer to Article 44 of the Rules of Procedure, since the latter contains a reference to Article 41(2) which does not apply to appeals. (Article 117 covers this question.)

Article 121(2) (Rules governing costs in staff cases)

The proposal keeps the special rule whereby an institution bears its own costs where the appeal is brought by the institution (where the CFI's decision gave satisfaction to the official), even if its appeal is successful.

By contrast, where an appeal is brought by an official and the Court of Justice confirms the CFI's decision dismissing his action, the costs incurred by the institution would be borne by the official.

The Commission is not in favour of such an amendment, which would result, in such a case, in aligning the rules governing costs with those applying to the other types of dispute, without taking the specific nature of the relationship of the Community institutions to their officials into account.