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## A Tribute to Judge Bo Vesterdorf

Roger J. Goebel\*

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# A Tribute to Judge Bo Vesterdorf

Roger J. Goebel

## **Abstract**

Judge Bo Vesterdorf retires this fall after serving as Judge on the Court of First Instance (“CFI”) since its inauguration on September 25, 1989, acting as its President for three successive terms since 1998. It is accordingly highly appropriate that the editors of the Fordham International Law Journal (“ILJ”) should dedicate this annual issue devoted to European Union (“EU”) law to Judge Vesterdorf as an eminent jurist who has significantly contributed to the development of the CFI’s jurisprudence, and also provided able pragmatic leadership as its presiding judge. The ILJ can be considered to act on behalf of the entire Fordham Law School community, which has greatly benefited from Judge Vesterdorf’s visits in past years.

## INTRODUCTION

### A TRIBUTE TO JUDGE BO VESTERDORF

*Roger J. Goebel\**

Judge Bo Vesterdorf retires this fall after serving as Judge on the Court of First Instance (“CFI”) since its inauguration on September 25, 1989,<sup>1</sup> acting as its President for three successive terms since 1998. It is accordingly highly appropriate that the editors of the *Fordham International Law Journal* (“*ILJ*”) should dedicate this annual issue devoted to European Union (“EU”) law to Judge Vesterdorf as an eminent jurist who has significantly contributed to the development of the CFI’s jurisprudence, and also provided able pragmatic leadership as its presiding judge. The *ILJ* can be considered to act on behalf of the entire Fordham Law School community, which has greatly benefited from Judge Vesterdorf’s visits in past years.

Indeed, this *ILJ* issue is also in some degree a tribute to the Court of First Instance itself. Over the last eighteen years, the CFI’s jurisprudence has enriched European Community Law, both supplementing doctrines of the Court of Justice and breaking new doctrinal ground as it addresses complex substantive and procedural issues in its most important fields – competition law, anti-dumping, state aids, staff proceedings and trademarks.<sup>2</sup> Long sought in the 1980s as a tribunal that would be able to concentrate on the appeal of Commission and Council administrative decisions and other legal acts, thereby substantially reduc-

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\* Alpin J. Cameron Professor of Law and Director of the Center on European Union Law, Fordham University School of Law.

1. The Single European Act, O.J. L 169/1 (June 29, 1987), effective July 1, 1987, authorized the Council to supplement the Court of Justice with an intermediate appeals tribunal, the Court of First Instance (“CFI”). The Council accordingly created the CFI which became operational on September 25, 1989. See Council Decision 88/591, O.J. C 215/1 (Aug. 21, 1989).

2. The initial jurisdiction granted to the Court of First Instance gave it the power essentially to decide appeals of Commission decisions in competition and staff proceedings. During the 1990s the Council gradually expanded the CFI jurisdiction to all appeals brought by natural or legal persons against the legal acts of the Community political institutions, notably the Commission. For a brief description of the Court of First Instance, see G. BERMAN, R. GOEBEL, W. DAVEY & E. FOX, *EUROPEAN UNION LAW* 65-70 (2002).

ing the docket of an over-burdened Court of Justice,<sup>3</sup> the adjudicative capacity of the CFI is itself now strained by an ever-increasing caseload,<sup>4</sup> leading in turn to the creation of the European Union Civil Service Tribunal in 2004<sup>5</sup> and the currently pending proposal for a further special tribunal to handle appeals from the Community agency that grants Community Trademark and Trade Design rights.<sup>6</sup>

Prior to joining the CFI, Bo Vesterdorf had an unusually varied legal career. Immediately after obtaining his law degree from the University of Copenhagen in 1974, he became a lawyer-linguist at the Court of Justice, an experience which undoubtedly has made him sensitive to the difficulties inevitable in achieving precise and accurate legal translations in court proceedings and judgments. From 1975-88, his principal occupation was that of a lawyer in the Danish Ministry of Justice, rising in responsibilities and ultimately promoted in 1984 to be head of the division of the legal service responsible for constitutional, administrative and human rights issues. He received judicial experience as a deputy judge in 1977 and as a member of the Danish High Court in 1983. In 1988, his final post in the Ministry of Justice was that of the Director in charge of police and judicial affairs. Noteworthy also is that he lectured on constitutional law at the University of Copenhagen during the 1980s and served as a member of the Council of Europe's Steering Committee on Human Rights.

Named by Denmark as an initial member of the Court of First Instance in 1989, Bo Vesterdorf has been a pioneer in the development of its case law in each of its major fields. The CFI customarily sits in panels of three or five judges, issuing a judg-

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3. For an expert review of the background and nature of the initial Court of First Instance, see T. Kennedy, *The Essential Minimum: The Establishment of the Court of First Instance*, 64 *EUR. L. REV.* 7 (1989).

4. The Court of First Instance filed 432 new appeals and other requests for action in 2006 and issued 227 judgments and 209 orders. By way of comparison, the Court of Justice filed 537 new appeals, preliminary references and other requests for action in 2006, and issued 351 judgments and 151 orders.

5. See Council Decision Establishing the European Union Civil Service Tribunal, O.J. L 333/7 (Nov. 9, 2004).

6. After the creation of the Office for Harmonization in the Internal Market (Trademarks and Designs) in 1996, the CFI acquired the power to review appeals from that agency's Board of Appeal. The volume of such appeals has now reached very high levels. In 2006, the CFI filed 145 new appeals or other requests for action, and issued 50 judgments and 41 orders in this field.

ment through a Judge designated at the outset of the proceeding. Because the final judgments of the CFI represent the collective views of the entire panel, rather than the personal judgment of the author, it is not easy to assess the influence of a particular CFI judge. Nonetheless, judgments in leading cases can certainly reflect the quality of legal writing and analysis of the author. The frequency with which a judge acts as the reporting judge in important or particularly challenging cases likewise suggests the level of influence of the judge. Judge Vesterdorf has undoubtedly become best known as a member of the panel, and often the judge writing the opinion, in leading competition judgments,<sup>7</sup> although he has certainly served in all of the other types of CFI proceedings. Furthermore, the President of the CFI has the power to issue Orders that serve as interlocutory judgments in proceedings when the Commission or a party requests some form of urgent interim relief. The quality of the legal analysis and the skill in writing in Orders authored by President Vesterdorf thus demonstrate his high judicial capacity.<sup>8</sup> Finally, when a judge writes an article in a legal academic journal or book, or addresses an academic or practitioner conference, the clarity and authority of the presentation indicates the caliber of judicial thinking of the author or speaker.

Judge Bo Vesterdorf has written or spoken at legal conferences frequently, principally to provide an analytic overview of the CFI's doctrine in particular fields, especially with regard to competition issues. His strong concern for procedural rights, including the extent of the privilege for client communications to lawyers, is evidenced by his recent article, *Legal Professional Privilege and the Privilege Against Self-Incrimination in EC Law: Recent Developments and Current Issues*, published in 2005 in the *ILJ*.<sup>9</sup>

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7. Judge Vesterdorf served as the Advocate General in the earliest major cartel case decided by the CFI, *Rhone-Poulenc SA v. Commission*, Case T-1/89, [1991] ECR II-867, and wrote the opinion in a prominent early judgment interpreting EC Treaty Article 82's prohibition of the abuse of a dominant position in *Hilti S.A. v. Commission*, Case T-30/89, [1991] ECR II-1349. He has served on panels and written judgments in numerous later competition cases.

8. See, e.g., his detailed analysis of the legal issues concerning an interlocutory appeal of a Commission decision ordering a defendant to issue a licence in order to prevent an alleged abuse of a dominant position, *Order of the President of the Court of First Instance, IMS Health Inc. v. Commission*, Case T-184/01R, [2001] ECR II-3193.

9. Bo Vesterdorf, *Legal Professional Privilege and the Privilege Against Self-Incrimination in EC Law: Recent Developments and Current Issues*, 28 *FORDHAM INT'L L.J.* 1179 (2005).

Judge Vesterdorf has also contributed significantly to the development of the principle of transparency and broader access to documents by European citizens. His 1998 article, *Transparency – Not Just a Vogue Word*, also published in this *Journal*,<sup>10</sup> analyzed the evolving scope of the principle of transparency in Community law. It is worth noting that Judge Vesterdorf participated in the CFI panels issuing three of the leading early judgments on access to documents: Carvel,<sup>11</sup> Hautala<sup>12</sup> and Rothmans.<sup>13</sup>

Particularly since becoming President of the CFI, Bo Vesterdorf has been a prominent advocate of rethinking and restructuring the judicial architecture of the Community. Together with the Court of Justice, the Court of First Instance presented its views to the representatives of the Member States engaged in the drafting of the EC Treaty amendments that became the Treaty of Nice, effective February 1, 2003.<sup>14</sup> Article 225a of the EC Treaty, as amended by the Treaty of Nice, enables the Council to create specialized judicial panels to render judgment in certain proceedings, subject to appeal on the law to the CFI. Article 225, as amended, authorizes the Council to amend the Statute of the Court of Justice in order to transfer the power to answer specific categories of questions referred by national courts under Article 234 from the Court of Justice to the CFI.

In a noteworthy article in the *European Law Review* in 2003, *The Community Court System Ten Years from Now and Beyond: Challenges and Possibilities*,<sup>15</sup> Judge Vesterdorf reviewed the evolutionary history of the Court of Justice and the Court of First Instance and discussed the potential changes authorized by the Treaty of Nice. In his view, specialized tribunals should be created to reduce the workload of the CFI in the fields of staff proceedings (now achieved by the creation of the European Union Civil Ser-

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10. Bo Vesterdorf, *Transparency—Not Just a Vogue Word*, 22 *FORDHAM INT'L L.J.* 902 (1999).

11. Carvel v. Council, Case T-194/94, [1995] ECR II-2765.

12. Hautala v. Council, Case T-14/98, [1999] ECR II-2489.

13. Rothmans International B. V. v. Commission, Case T-188/97, [1999] ECR II-2463.

14. The consolidated text of the European Community Treaty as amended by the Treaty of Nice appears in O.J. C 325/33 (Dec. 12, 2002).

15. Bo Vesterdorf, *The Community Court System Ten Years from Now and Beyond: Challenges and Possibility*, 28 *EUR. L. REV.* 303 (2003).

vant Tribunal), and trademarks and/or patents.<sup>16</sup> He also advocated the transfer of some categories of preliminary references or questions from the Court of Justice to the CFI, in order to reduce the caseload of the Court of Justice and to permit that Court to concentrate on cases presenting issues of “important general legal interest [or] major public interest.”<sup>17</sup> He contended vigorously that the transfer of certain categories of preliminary questions to the CFI would not endanger the harmony or consistency of Community law doctrines, because the procedural safeguards within Article 225, supplemented by provisions in the Statute of the Court of Justice, could adequately prevent inconsistent judgments.<sup>18</sup> Judge Vesterdorf’s views certainly have contributed to the ongoing discussion of the advantages or disadvantages that such a partial transfer of Article 234 reference proceedings would represent.

During his term as President, the Court of First Instance had to confront the challenge of absorbing ten new judges from the Central European and Mediterranean States that acceded to the Community on May 1, 2004, as well as the two judges from Bulgaria and Romania upon their accession last January. Anecdotal accounts indicate that Judge Vesterdorf led the CFI in a careful and well-considered process of integrating this unusually large number of new judges into its structure and procedures.

Having thus paid some tribute to the accomplishments of Judge Vesterdorf, it remains to pass in review the articles in this issue in his honor. Three concern competition law, one of the principal fields of the CFI. First mention should undoubtedly go to the article by his old friend and former colleague, Judge Koen Lenaerts of the EC Court of Justice. Judge Lenaert’s article, *Some Thoughts on Evidence and Procedure in European Community Competition Law*,<sup>19</sup> specifically highlights Judge Vesterdorf’s early contribution to the CFI’s doctrinal analysis of illicit cartel behavior, the requisite level of evidence to substantiate cartel behavior, and the CFI’s review of the appropriateness of Commission procedure. With his usual consummate skill, Judge Lenaerts then describes the further evolution and present status of CFI

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16. *Id.* at 322. See also the discussion at pp. 312-13.

17. *Id.* at 314.

18. *Id.* at 315-16.

19. Koen Lenaerts, *Some Thoughts on Evidence and Procedure in European Community Competition Law*, 30 *FORDHAM INT’L L.J.* 1463 (2007).

doctrines concerning evidence and the burden of proof in Commission competition proceedings, as well as the fundamental procedural rules designed to achieve a fair legal process and ensure a proper regard for the rights of defense.

Commissioner Nellie Kroes' noteworthy speech, *Industrial Policy and Competition Law and Policy*,<sup>20</sup> delivered to the annual Fordham International Antitrust Conference last fall, has been reproduced. Commissioner Kroes carefully assesses the proper balance between the goals of these two policies, suggesting how they may be properly harmonized. Professor Robert Pitofsky, a former Federal Trade Commission ("FTC") commissioner and Dean of Georgetown Law School, provides a fascinating comparative study, *Efficiency Consideration and Merger Enforcement: Comparison of US and EU Approaches*,<sup>21</sup> contrasting the American and European Community views on whether production and/or marketing efficiencies that can be achieved through a merger should be assessed positively or negatively in evaluating a merger's impact on competition in a specific market.

Given Judge Vesterdorf's well-known interest in basic rights protection, Professor Elizabeth Defeis' thoughtful article, *Targeted Sanctions, Human Rights and the Court of First Instance of the European Union*,<sup>22</sup> is particularly timely. In several recent judgments the CFI has had to resolve unusually sensitive conflicts between the security interests of the Member States, acting to enforce UN Security Council actions to combat terrorism, and the right to property of individuals who are allegedly terrorists or aid terrorists.<sup>23</sup> Professor Defeis carefully describes the issues, the competing interests, the interplay between Community law and UN sanctions and the human rights implications in her evaluation of the CFI judgments.

Another important jurisdictional field of the CFI is its review of Commission decisions accepting or forbidding various forms of Member State aids or subsidies to economic operators.

20. Nellie Kroes, *Industrial Policy and Competition Law and Policy*, 30 FORDHAM INT'L L.J. 1401 (2007).

21. Robert Pitofsky, *Efficiency Consideration and Merger Enforcement: Comparison of U.S. and EU Approaches*, 30 FORDHAM INT'L L.J. 1413 (2007).

22. Elizabeth Defeis, *Targeted Sanctions, Human Rights and the Court of First Instance of the European Union*, 30 FORDHAM INT'L L.J. 1449 (2007).

23. *Yasuf v. Council*, Case T-306/01, [2005] ECR II -3533; *Kadi v. Council*, Case T-315/01, [2005] ECR II-3649; *Ayadi v. Council*, Case T-253/02, [2006] ECR II- \_\_\_\_; *Hasan v. Council*, Case T-49/04, [2006] ECR II- \_\_\_\_.



Professor Andrea Biondi tackles a crucial technical aspect of CFI state aid jurisprudence in *Some Reflections on the Notion of "State Resources" in European Community State Aid Law*.<sup>24</sup> Endorsing the conceptual framework set out by Judge Vesterdorf in a leading judgment, Professor Biondi analyzes in detail the essential basis for determining whether a measure constitutes State aid, namely, whether it represents a direct or indirect transfer of State resources to a private-sector economic operator, commenting on the diverse judgments concerning this issue.

Judge Vesterdorf's concern for the development of the principle of transparency makes the inclusion of an article by Professor Friedl Weiss highly appropriate. His thoughtful piece, *Transparency as an Element of Good Governance in the Practice of the EU and the WTO: Overview and Comparison*,<sup>25</sup> demonstrates his expertise both in international trade law and European Community law. Professor Weiss analyzes the constitutional elements of good governance and transparency, traces the increasing concern of the Community political and judicial institutions to achieve them, observes their basic rights characterization, and then contrasts the European Community experience with the somewhat more elementary treatment provided by the WTO to both good governance and transparency as appropriate principles in its operations.

Finally, Xavier Lewis, a member of the Commission legal service writing, of course, in a personal capacity, has provided an article, *Standing of Private Plaintiffs to Annul Generally Applicable European Community Measures: If the System Is Broken, Where Should It Be Fixed?*,<sup>26</sup> a thoughtful examination of a highly controversial current issue. He reviews the evolution of the case law of the Court of Justice and the CFI in evaluating the standing of a private plaintiff to challenge a Community regulatory or otherwise generally applicable measure.

Naturally, he examines at length the refusal of the Court of Justice to endorse the CFI view that private parties should in

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24. Andrea Biondi, *Some Reflections on the Notion of "State Resources" in European Community State Aid Law*, 30 FORDHAM INT'L L.J. 1426 (2007).

25. Friedl Weiss, *Transparency as an Element of Good Governance in the Practice of the EU and the WTO: Overview and Comparison*, 30 FORDHAM INT'L L.J. 1545 (2007).

26. Xavier Lewis, *Standing of Private Plaintiffs to Annul Generally Applicable European Community Measures: If the System Is Broken, Where Should It Be Fixed?*, 30 FORDHAM INT'L L.J. 1496 (2007).

principle generally be able to appeal such measures under EC Treaty Article 230, Section 4. He further analyzes relevant provisions of the draft Constitutional Treaty, maintaining that they would not essentially change the doctrinal position adopted by the Court of Justice. His conclusion is that the Community legal order is better served by permitting later indirect challenges to a Community measure of general applicability by means of preliminary references under EC Treaty Article 234, rather than a broadened basis of challenge by private individuals through a reinterpretation or amendment of Article 230, Section 4.

Thus, this issue of the *Fordham International Law Journal* represents a significant tribute to an outstanding jurist, Judge Bo Vesterdorf, on the occasion of his retirement from the CFI. Judge Lenaerts, himself an eminent academic, and the other distinguished professors and lawyers who have contributed articles, have all dealt with issues both timely and of great concern to Judge Vesterdorf and his colleagues on the Court of First Instance, as well as to legal academics and practitioners. This *International Law Journal* symposium accordingly constitutes an expression of great respect for the achievements of Judge Vesterdorf, and the Court which he has so long and so well served, in their extraordinary contributions to the evolution of European Community law.