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CERCLE I 13

REPORT

from :	Chairman of the discussion circle on the Court of Justice
to :	Members of the Convention
Subject :	**Final report of the discussion circle on the Court of Justice**

1. Following the definition of the framework of proceedings by the Praesidium (see Annex), the discussion circle met four times, namely on 17 and 24 February and on 3 and 17 March 2003. It heard Mr Rodriguez Iglesias, President of the Court of Justice, Mr Vesterdorf, President of the Court of First Instance, and a delegation from the Council of the Bars and Law Societies of the European Union (CCBE), made up of Lord Brennan QC and Mr Berrisch, Mr Brouwer, Mr Kahn and Mr Waelbroeck.

2. The discussion circle also wondered whether it should look into the question of the competence of the Court of Justice with regard to Union acts relating to areas falling within the CFSP [1], following abolition of the pillars. At the meeting on 17 March 2003, it was agreed that the circle would discuss this point at a subsequent meeting and that it could pass on any proposals at a later date and separately from this report.

3. These conclusions refer to the points in the framework, in order.

[1] As regards JHA, the circle took due note of the recommendations in the report by Working Group X on Freedom, Security and Justice.

On question (a) of the framework

4. The circle discussed the provisions of the Treaty of Nice on the number of judges and Advocates-General for the Court of Justice and the Court of First Instance. The circle felt that the provisions should remain unchanged in this regard.[1]

5. On the procedure for appointing judges and Advocates-General to the Court of Justice (hereinafter the Court) and the Court of First Instance (hereinafter the CFI), most members of the circle were in favour of maintaining the status quo (appointment by common accord of the governments of the Member States). However, some members felt that appointment should be by act of the Council and, of these, several felt that the Council should act by a qualified majority.

6. The circle also felt it was appropriate to set up an "advisory panel", which would have the task of giving the Member States an opinion on whether a candidate's profile was suited to the performance of his/her duties, particularly on the basis of objective criteria relating to professional qualifications. The panel – whose deliberations would not be public and which would not hold any hearings – might be made up of former members of the Court and representatives of national supreme courts, while the European Parliament might also appoint a legal expert. However, one member was opposed to the idea of the European Parliament's involvement because he saw in it a danger that the appointment process would become politicised. The circle emphasised that setting up a panel of this kind might make Member States more demanding in the choice of candidates they put forward. The circle also felt that Member States should continue to put forward only one candidate.

[1] In this context, thought must be given to the question whether to maintain the current number of judges (11) sitting in the Grand Chamber set up by the Treaty of Nice (second paragraph of Article 16 of the Protocol on the Statute of the Court of Justice) after enlargement.

7. As for the length of the term of office of members of the Court, the circle took due note that both the President of the Court and the President of the CFI, while preferring the present system, were open to the possibility of introducing a longer and non-renewable term. If this were to be the case, they expressed a preference for a 12-year term as a non-renewable nine-year term could lead to major practical problems, given that half of the Court would be renewed every four and a half years. The circle drew attention to the fact that, particularly in the case of a non-renewable term, a decision would have to be made on the length of the term of office of a judge who replaced another in the event of death or resignation [12] Moreover, the appointment would refer to the post, and therefore the possibility that an Advocate-General (or a judge) could be appointed judge (or Advocate-General) would not be ruled out.

8. The circle felt that the Constitution might make a distinction between the system of terms of office for the Court and the CFI. Most members of the circle were in favour of prolonging the term of office of members of the Court and making it non-renewable. However, other members pointed out that the current system had worked well and that it was preferable to keep it. In any event, the circle proposed in this context that the Treaty should explicitly mention the independence and impartiality of judges. The circle agreed to retain the current system for judges at the CFI (renewable six-year term).

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1 Either his term of office would end at the same time as the term of the judge he was replacing, or there would be express provision for possible renewal, or the term of office of the replacing judge would begin when he was appointed for a full term.

2 The circle would also like to draw attention to the fact that, when such a system entered into force, consideration would have to be given to the consequences for terms of office currently in force.

On question (b) of the framework

9. The circle welcomed the idea of amending Articles 225a, 229a and 245 TEC. Members were open to the possibility of providing that the Council would act by a qualified majority, rather than unanimously, as was the rule at present. This would apply in particular to Article 225a TEC on the setting up of judicial panels.

10. As regards Article 229a TEC, most members were also in principle in favour of the Council acting by a qualified majority.

11. Finally, Article 245 TEC on the Statute of the Court of Justice currently provides for a unanimous Council decision, except in the case of Title I of the Statute, which may be amended only by the Treaty revision procedure. On this point, the circle was in principle in favour of amending Article 245 TEC in such a way that the Council acts by a qualified majority except with regard to Title I and for language matters (Article 64 of the Statute), where it would act unanimously. On language matters, some members made the point that the Court's current practice of not giving judgment in a case until the judgment had been translated into all the languages should be changed; the judgment could be published in the language of the proceedings and the other language versions could be available over the following six months. This change in practice would not require any amendment of the Treaty.

12. The circle took the view that the legislative procedure should apply to the abovementioned provisions. One member stated that he could agree to the Council acting by a qualified majority, but without application of the legislative procedure.

On question (c) of the framework

13. With regard to the names of the Court and the CFI, the circle felt that the title of the Court should not be changed but simply adapted in the light of the fact that the "European Communities" would no longer exist. The circle was mindful of the fact that the name of the Court had existed for 50 years and that it would not be advisable to change it. The Court might therefore be called the "**Court of Justice of the European Union**".

14. As for the name of the CFI, the circle noted that in the near future when judicial panels would be set up for specific cases, the CFI would not always be a court of first instance, but might also hand down final decisions. The current name would therefore no longer be appropriate. Nevertheless, for all direct actions not covered by the jurisdiction of the judicial panels, the CFI would act at first instance. The circle was therefore in favour of changing the name of the CFI, while wishing to avoid any confusion at all with the Court. Taking these factors into account – as well as the need to find a name which would not pose any translation difficulties – the circle put forward the possibility of using the name **"Common Court of the European Union"** [1], to express its future position as the basic, general court and to distinguish it from the "specialised courts". There was agreement that, in any event, the new name should seek to preserve the unique nature of the Court. The circle thought it would be helpful if the Legal Services of the three institutions were asked by the Chairman of the circle to let him have their suggestions for an appropriate name for the CFI.

15. The judicial panels provided for in Article 225a are to hear and determine at first instance certain classes of action or proceeding brought in specific areas. None as yet has been set up but one is planned for actions brought by Union employees and another for Community industrial property rights (patents). Others may be envisaged in the future. The current name could stand, which would not prevent these panels being called "courts", as in the case of the "Community Patent Court", in accordance with the political agreement in the Council on 3 March 2003. However, it seems preferable to call them **"specialised courts"**. That name would have the advantage of avoiding confusion in certain languages with the "chambres" for certain specific cases, which might be set up within the Court (or the CFI), as is the case in Member States' supreme courts.

16. Finally, the circle felt that the Constitution might state explicitly that the Union has a judicial system which comprises the Court of Justice, the CFI, the specialised courts and the national

[1] ("Tribunal général de l'Union européenne", "Allgemeines Gericht der Europäischen Union", etc.)

courts whose role as ordinary law courts of the Union could be highlighted in the Constitution. However, the circle pointed out that this proposal did not imply the creation of new institutions and that the Court of Justice would remain at the centre of the Union's judicial system, since institutional unity must continue to exist.

On question (d) of the framework

17. On the question of possible amendments to the fourth paragraph of Article 230 of the TEC, he circle discussed several possible options on the basis of a working paper prepared by the Secretariat.

18. It emerged from the discussion that the circle was clearly divided into two groups. For the first group, the current wording of the provision satisfied the essential requirements of providing effective judicial protection of the rights of litigants, taking account of the fact that, in the present decentralised system based on the subsidiarity principle, it was mainly national courts which were called upon to defend the rights of individuals and which might (or should, if at last instance) refer questions to the Court for a preliminary ruling on the validity of a Union act; it would therefore not be necessary to make any substantive changes to the fourth paragraph of Article 230. These members felt, on the other hand, that it would be appropriate for the Constitution to mention explicitly that, in accordance with the principle of loyal cooperation as interpreted by the Court of Justice, national courts are required , so far as possible, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the legality of any decision or other national measure relative to the application to them of a Community act of general application, by pleading the invalidity of such an act. It is in fact for the Member States to establish a system of legal remedies and procedures which ensures respect for the right of individuals to effective judicial protection as regards rights resulting from Union law. [1]

[1] CJEC, judgment of 25 July 2002, Case C-50/00 P, Unión de Pequeños Agricultores , paragraphs 41 and 42.

19. According to the second group, the conditions of admissibility laid down in the fourth paragraph of Article 230 ("of direct and individual concern") for proceedings by individuals against measures of general application were too restrictive. Some members therefore proposed the following solutions:

(a) separate the two conditions, which would no longer be cumulative;

(b) replace "and individual" by "and affects his legal situation";

(c) maintain the current wording and add "or against a measure of general application which is of direct concern to him without entailing any implementing measure";

(d) leave the current wording for legislative acts (henceforth laws and framework laws) and allow referral to the Court of Justice for regulatory acts; these could be the subject of proceedings where they are of direct or individual concern to an individual;

(e) same as above, but giving individuals the right to bring proceedings against legislative acts of the Union which do not entail any implementing measure;

The introduction of a specific right to bring proceedings for the defence of fundamental rights was proposed by some members [1] jointly with the proposal in subparagraph (a) above.

20. A majority of members of the group were in favour of amending the fourth paragraph of Article 230, to read as follows:

"Any natural or legal person may, under the same conditions, institute proceedings against an act addressed to that person or which is of direct and individual concern to him, and against [an act of general application][a regulatory act] which is of direct concern to him without entailing implementing measures".

21. The addition of the words "without entailing implementing measures" aims to ensure that the extension of a private individual's right to institute proceedings would apply only to those (problematical) cases where the individual concerned must first infringe the law before he can have access to a court. This wording enables private individuals to contest before the Court (CFI) an act containing, for example, a prohibition, but no implementing measure, as the individual concerned can apply for its annulment if he can demonstrate that he is directly concerned by the regulatory act in question.

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[1] See WD 3 by Mr Meyer.

22. A majority of those members who wanted the fourth paragraph of Article 230 to be amended would prefer the option mentioning "an act of general application". However, some members felt that it would be more appropriate to choose the words "a regulatory act", enabling a distinction to be established between legislative acts and regulatory acts, adopting – as the President of the Court had suggested – a restrictive approach to proceedings by private individuals against legislative acts (where the condition "of direct and individual concern" still applies) and a more open approach as regards proceedings against regulatory acts.

23. Furthermore, following a proposal along these lines, the circle seems amenable to a change merely of wording, not changing the scope of the fourth paragraph of Article 230, consisting in deleting the words "although in the form of a regulation or a decision addressed to another person". A request was also made to replace the word "decision" by "act". These amendments reflect the case-law of the Court [1].

24. As regards the application of Article 230 TEC to the agencies and bodies of the Union, the circle noted that in general the acts setting up agencies contain provisions for means of redress before the Court of Justice as regards legal acts adopted by those agencies [2]. An analysis of these acts – basically covering the agencies and bodies coming under the EC Treaty – shows that there are several types of provision:

- the Court of Justice is competent to act on proceedings instituted against the agency in accordance with the conditions laid down in Article 230 [3];

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1 See Case 60/81, IBM v. Commission (Reports 1981, 2639, paragraph 9): "in order to ascertain whether the measures in question are acts within the meaning of Article 173 it is necessary, therefore, to look to their substance. According to the consistent case law of the Court any measure the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position is an act or decision which may be the subject of an action under Article 173 for a declaration that it is void. However, the form in which such acts or decisions are cast is, in principle, immaterial as regards the question whether they are open to challenge under that Article".

2 See Secretariat working document on the right of redress against acts of agencies of the Union (WD 9).

3 As in Council Regulation No 1035/97 of 2 June 1997 establishing a European Monitoring Centre on Racism and Xenophobia (Article 15) (OJ L 151, 10.6.1997, p. 1).

- any act of the agency, implicit or explicit, may be referred to the Commission with a view to verification of its legality, and the Commission's decision can then be the subject of proceedings for annulment before the Court of Justice [1];
- the act is silent on verification of the legality of acts of the agency [2].

25. On account of this, somewhat disparate, practice for verification of the legality of acts of the agencies in the EC Treaty framework, the Commission [3] recommended the European Parliament and the Council to standardise the arrangements by making Article 230 TEC applicable to proceedings contesting acts of all the agencies. The argument in favour of this approach is, in particular, that the principle of an effective judicial guarantee, as recognised by consistent case-law (and now included in Article 47 of the Charter), requires that no contested act of an institution, a body or an agency can escape judicial scrutiny of its legality. It is also impossible to state categorically, when an agency is set up, that it will not perform such acts, even if the Regulation establishing it does not give it power to adopt decisions in the formal sense.

26. In the light of the foregoing, a majority of members of the circle recommend that Article 230 TEC be amended so as to cover, in addition to legal acts adopted by the institutions, those of the Union's *bodies and agencies*. It is understood that proceedings instituted against a body or an agency will be admissible only if they have adopted a "legal act", within the meaning of the case-law of the Court; the act establishing the agency might also lay down specific arrangements for the exercise of control of the agency or body in question [4]. It was pointed out that the circle's approach on this point related only to those bodies and agencies covered by the EC Treaty, since those operating in the framework of the CFSP and police and judicial

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1 See Council Regulation (EC) No 2062/94 of 18 July 1994 establishing a European Agency for Safety and Health at Work (Article 22).

2 See Regulation (EC) No 1406/2002 of the European Parliament and of the Council of 27 January 2002 establishing a European Maritime Safety Agency.

3 See COM (2002) 718 final of 11 December 2002, on the operating framework for the European Regulatory Agencies, pp. 14 and 15.

4 In particular, as regards the possibility granted to the Court to overturn a contested act (case of the Trade Marks Office) or as regards persons actively entitled to institute proceedings (e.g. Trade Marks Office or Plant Variety Office) or on the need first to institute proceedings before the Commission, if it is desired to retain this particular system.

cooperation in criminal matters had to be examined in the light of the provisions relating to those policies, since they were likely to present certain special characteristics which could be regulated in the acts establishing those bodies or agencies. One member of the circle could not associate himself with the circle's general recommendation on this point, claiming that it had major implications and should be examined subsequently, taking account of the special characteristics of each agency.

27. Finally, some members asked that Article 230 should be amended to include a right for national parliaments, the Committee of the Regions and/or regions to bring proceedings relating to subsidiarity. However, the circle agreed that these were issues which had already been examined by the Convention, and that it would be for the Praesidium rather than the circle to draw any relevant conclusions from whatever approach the Convention might adopt on the wording of the amendments to be made to Article 230 TEC.

On question (e) of the framework

28. As for the machinery for sanctions in the event of failure to comply with a judgment of the Court, the members noted that the present system was not efficient enough, as it might be years before a pecuniary sanction is imposed on States which the Court has found against. The circle therefore considers that means should be found to bring about greater effectiveness and simplicity in the machinery for sanctions for failure to comply with a judgment of the Court. The following suggestions were made here:

(a) to strengthen the sanctions machinery provided for in Article 228 TEC, by abolishing the two stages prior to referral to the Court for the implementation of sanctions, i.e. the stage of formal notice to the State in question and the stage of the Commission's reasoned opinion, or at least one of these stages [1]; a large majority was in favour of this proposal.

(b) to grant the Commission the possibility of initiating before the Court *both* (in the same procedure) proceedings for failure to fulfil an obligation pursuant to Article 226 TEC

[1] This referral directly to the Court by the Commission, or by a Member State, would not be an innovation: it is already foreseen by the Treaty in certain cases, as for example if a State makes improper use of the exceptions provided for reasons of defence or in cases of crisis (Article 298).

and an application to impose a sanction. If, at the Commission's request, the Court imposes the sanction in the same judgment, the sanction would apply after a certain period had elapsed from the date the judgment was delivered[1], if the defending State did not comply with the Court's ruling. A majority of members were in favour of this proposal. This would enable the procedure in particular for sanctions in cases of "non-communication" of a national transposition measure to be simplified and speeded up[2].

(c) to grant the Commission the right to find that a State has failed to fulfil an obligation under the Constitution, after giving that State the opportunity to submit its comments. The State would have the right to institute proceedings before the Court asking for the Commission's decision to be annulled. This model follows Article 88 of the ECSC Treaty.

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[1] Some felt that the amount of the sanction (penalty payment) should in this case be calculated in such a way that the penalty payment took effect retroactively, from the date of the judgment.

[2] A distinction is made in practice between cases of "non-communication" – i.e. the Member State has not taken any transposition measure, and cases of incorrect transposition – i.e. the transposition measures taken by the Member State do not, in the Commission's view, comply with the directive (or framework law). The proposed arrangements would not apply in the second case.

ANNEX

Framework of proceedings

1. The plenary discussions on 5 and 6 December 2002 and 20 and 21 January 2003 revealed that some Convention members felt there was a need to look seriously at the implications that certain proposals made within the Convention might have for the operation of the Court of Justice. It was also considered important that the Court of Justice and the Court of First Instance be given an opportunity to express their views on matters concerning them which were being discussed within the Convention. The Praesidium therefore thought it advisable to set up a "discussion circle" on the operation of the Court of Justice.

2. This circle should in particular look at matters on which the Convention has not yet adopted fixed positions and could explore the following points amongst others:

   (a) Should the procedure for appointing the Judges and Advocates-General (Article 223 EC) be altered? What about the appointment of members of the CFI (Article 224 EC)?

   (b) To facilitate application of Articles 225a, 229a and 245 TEC, should the present unanimity rule be replaced by a qualified majority rule?

   (c) Would it be better to reconsider the titles Court of Justice and Court of First Instance or leave them unchanged?

   (d) Should the wording of the fourth paragraph of Article 230 EC concerning direct appeals by individuals against general acts of the Institutions be amended? What about acts of agencies or bodies set up by the Union?

   (e) Should the system of penalties for non-compliance with a judgment of the Court of Justice be made more effective? How? By giving the Court the option of imposing fines where a Member State fails to comply with its judgment within a given period? By other means?

3. The "discussion circle" would be open to any other matters which its members or members of the Court or the CFI considered worth examining. It is proposed that the "discussion circle" meet 3 or 4 times during February and submit its report at the beginning of March 2003.