

Working Group II

Working document 20

Groupe de travail II "Intégration de la Charte/adhésion à la CEDH"

du : Secrétariat

au : Groupe de travail II

Objet: Le système des voies de recours judiciaires

Document de travail de M. Ben Fayot

Par le présent document de travail, M. Ben Fayot souhaite attirer l'attention des membres du groupe de travail sur la note ci-jointe rédigée par Sir Francis Jacobs, Avocat général à la Cour de justice des Communautés européennes.

NOTE FOR THE WORKING GROUP ON THE CHARTER/ECHR

Necessary changes to the system of judicial remedies

F.G. Jacobs ¹

I have been invited to consider what changes in the system of judicial remedies are necessary if there is agreement in the Convention on giving some form of effect to the Charter of Fundamental Rights and on acceding to the European Convention on Human Rights

Such changes are necessary, first, because some of the features of the existing system are likely to prove incompatible with fundamental rights contained in the Charter and the ECHR: in particular, the right of access to a court and the right to an effective remedy. From a legal point of view it is clearly undesirable for there to be conflicts between the fundamental rights recognised or referred to in the treaty and the provisions on remedies contained in another part thereof. From a political point of view the Union could be accused of hypocrisy or double standards.

Secondly, the fundamental rights so recognised or referred to risk remaining an empty shell if there is no system of judicial remedies which guarantees the effective protection of those rights. In the absence of rules guaranteeing effective remedies a decision to give some form of effect to the Charter and accede to the ECHR might be regarded as mere window-dressing exercises.

Moreover it will be widely accepted that there is a close link between the effective protection of fundamental rights and the legitimacy of the European Union.

¹. Advocate General, Court of Justice of the European Communities. The views expressed in this note are my own.

The Working Group recognised that it could not examine some of the issues concerning judicial remedies at an earlier stage since the Court of Justice had decided in the *UPA* case² to re-examine its restrictive case-law on the standing of individuals challenging the legality of measures of general application, i.e. regulations and directives. In its judgment in that case however the Court of Justice decided essentially not to depart from the existing case-law and stated that, whilst a different system of remedies could indeed be envisaged, such a change would require treaty amendment and thus go beyond its jurisdiction. That statement can perhaps be read as an invitation for the Convention to consider changes in the system of remedies.

As a preliminary point I would note that it has been assumed in some quarters that a decision to give some form of effect to the Charter should be accompanied by the introduction of a special new remedy to enable an individual to bring an alleged infringement directly before the Court of Justice. This would however be both unnecessary and inappropriate. Issues of fundamental rights already arise in connection with the application of the ordinary remedies, often in combination with other issues (e.g. equal treatment, proportionality, etc.), and can and should continue to be dealt with in principle within the habitual procedural framework.

The existing system of remedies is however not adequate in three other crucial respects. At this stage the three issues can be identified very briefly.

1. Standing of individuals to challenge general measures

As has been widely recognised, standing for individuals needs to be enlarged so as to enable them to challenge general measures which affect their rights or interests.

The formulation in Article 230 EC, which requires that the measure challenged should be of direct **and individual** concern to the applicant, has proved too restrictive. It means in practice that the legality of a regulation affecting the rights or interests of individuals cannot

². Case C-50/00 P *Unión de Pequeños Agricultores v Council*, judgment of 25 July 2002.

be challenged by those individuals merely because it is a general measure. The current state of the law is essentially based on the assumption that individuals can obtain a reference to the Court of Justice from a national court on the validity of a general measure. That however is a circuitous and uncertain route, which can also result in a denial of justice where for example there is no national measure to challenge in the national court, or where the national court fails to make a satisfactory reference to the Court of Justice. A further consequence is that, the greater the number of persons affected by a measure of the Community institutions, the less likely it is that effective judicial review will be available.

Doubts about the appropriateness of the law as it stands had long been expressed by the Court of Justice itself ³, by several members of the Court in their extra-judicial writing and by many scholars ⁴.

The Court of Justice decided in the above-mentioned *UPA* case to re-examine the case-law in plenary formation. Although I took the view, in my Opinion as Advocate General, that the necessary change could be made by the Court itself revising its case-law, the Court felt that such an important change would require treaty amendment ⁵.

In May of this year the Court of First Instance, relying in part on the Charter, showed itself willing, in the *Jégo-Quéré* case ⁶, to depart from the existing case-law and to facilitate challenges to general measures. That was particularly significant since that Court is the court most concerned by a possible change, as the court of first resort for individual applicants. Its decision seems to refute what was previously seen as the strongest argument against enlarging access to the Community Courts, namely the risk of overload – the "floodgates" argument.

³. See the *Report of the Court of Justice on Certain Aspects of the Application of the Treaty on European Union*, May 1995, paragraph 20.

⁴. For references, see the Opinion of 21 March 2002 in Case C-50/00 P *Unión de Pequeños Agricultores v Council*, notes 5 and 6.

⁵. A summary of the main arguments is contained in my Opinion, an extract from which is annexed to this note.

⁶. Case T-177/01 *Jégo-Quéré*, judgment of the Court of First Instance of 3 May 2002.

It may be concluded that both Community Courts have now acknowledged the appropriateness or even the need for treaty amendment on this point.

2. Extension of the scope of judicial review to measures taken by all institutions and bodies of the Union

The Treaty allows challenges by individuals only to measures taken by the Institutions. The Charter is however (rightly) addressed to the "institutions and bodies" of the Union. It seems clear therefore that an action must be available to individuals against measures adopted by **all** institutions and bodies of the Union (Europol etc.).

3. Extension of the scope of judicial review to measures across the whole range of Union activities

Under the current system the Community Courts' jurisdiction is severely limited or even excluded as regards the Union's activities in certain fields. In particular the limitations under Article 68 EC and under Title VI of the Treaty on European Union – areas where the need for an effective protection of fundamental rights is of special importance – raise serious questions about the compatibility of the current state of the law with the Charter and the ECHR. It will therefore be important to ensure that the Community Courts have jurisdiction to review all measures across the whole range of Union activities. Since those measures will in any event be subject to review by the European Court of Human Rights in the event of accession to the ECHR, any argument for excluding them from review by the Community Courts seems to have little force.

Extract from the Opinion in UPA
(paragraphs 100-103)

Conclusion

100 The case-law on the standing of individuals to bring proceedings before the Court of Justice (now before the Court of First Instance) has, over the years, given rise to a large volume of discussion, much of it very critical. It cannot be denied that the limited admissibility of actions by individuals is widely regarded as one of the least satisfactory aspects of the Community legal system.¹ It is not merely the restriction on access which is criticised; it is also the complexity and apparent inconsistency which have resulted from attempts by the Court to allow access where the traditional approach would lead to a manifest 'denial of justice'. Thus, one of the fullest and most authoritative recent studies refers to 'the blot on the landscape of Community law which the case-law on admissibility has become'.² While there may be doubts about the degree of criticism that can be levelled at the case-law, it is surely indisputable that access to the Court is one area above all where it is essential that the law itself should be clear, coherent and readily understandable.

101 In this Opinion I have argued that the Court should Å rather than envisage, on the basis of *Greenpeace*, a further limited exception to its restrictive case-law on standing Å instead re-consider that case-law and adopt a more satisfactory interpretation of the concept of individual concern.

1 See above note 5.

2 A. Arnall, 'Private applicants and the action for annulment since *Codorniu*', cited in note 6, at p. 52.

102 It may be helpful to summarise the reasons for that view, as follows:

- (1) The Court's fundamental assumption that the possibility for an individual applicant to trigger a reference for a preliminary ruling provides full and effective judicial protection against general measures is open to serious objections:
 - under the preliminary ruling procedure the applicant has no right to decide whether a reference is made, which measures are referred for review or what grounds of invalidity are raised and thus no right of access to the Court of Justice; on the other hand, the national court cannot itself grant the desired remedy to declare the general measure in issue invalid;
 - there may be a denial of justice in cases where it is difficult or impossible for an applicant to challenge a general measure indirectly (e.g. where there are no challengeable implementing measures or where the applicant would have to break the law in order to be able to challenge ensuing sanctions);
 - legal certainty pleads in favour of allowing a general measure to be reviewed as soon as possible and not only after implementing measures have been adopted;
 - indirect challenges to general measures through references on validity under Article 234 EC present a number of procedural disadvantages in comparison to direct challenges under Article 230 EC before the Court of First Instance as regards for example the participation of the institution(s) which adopted the measure, the delays and costs involved, the award of interim measures or the possibility of third party intervention.
- (2) Those objections cannot be overcome by granting standing by way of exception in those cases where an applicant has under national law no way of triggering a reference for a preliminary ruling on the validity of the contested measure. Such an approach
 - has no basis in the wording of the Treaty;

- would inevitably oblige the Community Courts to interpret and apply rules of national law, a task for which they are neither well prepared nor even competent;
 - would lead to inequality between operators from different Member States and to a further loss of legal certainty.
- (3) Nor can those objections be overcome by postulating an obligation for the legal orders of the Member States to ensure that references on the validity of general Community measures are available in their legal systems. Such an approach would
- leave unresolved most of the problems of the current situation such as the absence of remedy as a matter of right, unnecessary delays and costs for the applicant or the award of interim measures;
 - be difficult to monitor and enforce; and
 - require far-reaching interference with national procedural autonomy.
- (4) The only satisfactory solution is therefore to recognise that **an applicant is individually concerned by a Community measure where the measure has, or is liable to have, a substantial adverse effect on his interests**. That solution has the following advantages:
- it resolves all the problems set out above: applicants are granted a true right of direct access to a court which can grant a remedy, cases of possible denial of justice are avoided, and judicial protection is improved in various ways;
 - it also removes the anomaly under the current case-law that the greater the number of persons affected the less likely it is that effective judicial review is available;
 - the increasingly complex and unpredictable rules on standing are replaced by a much simpler test which would shift the emphasis in cases before the Community Courts from purely formal questions of admissibility to questions of substance;

- such a re-interpretation is in line with the general tendency of the case-law to extend the scope of judicial protection in response to the growth of powers of the Community institutions (*ERTA*, *Les Verts*, *Chernobyl*);

(5) The objections to enlarging standing are unconvincing. In particular:

- the wording of Article 230 EC does not preclude it;
- to insulate potentially unlawful measures from judicial scrutiny cannot be justified on grounds of administrative or legislative efficiency: protection of the legislative process must be achieved through appropriate substantive standards of review;
- the fears of over-loading the Court of First Instance seem exaggerated since the time-limit in Article 230(5) EC and the requirement of direct concern will prevent an insuperable increase of the case-load; there are procedural means to deal with a more limited increase of cases.

(6) The chief objection may be that the case-law has stood for many years. There are however a number of reasons why the time is now ripe for change. In particular:

- the case-law in many borderline cases is not stable, and has been in any event relaxed in recent years, with the result that decisions on admissibility have become increasingly complex and unpredictable;
- the case-law is increasingly out of line with more liberal developments in the laws of the Member States;
- the establishment of the Court of First Instance, and the progressive transfer to that Court of all actions brought by individuals, make it increasingly appropriate to enlarge the standing of individuals to challenge general measures;

- the Court's case-law on the principle of effective judicial protection in the national courts makes it increasingly difficult to justify narrow restrictions on standing before the Community Courts.

103 For all of those reasons I conclude that an individual should be regarded as individually concerned within the meaning of the fourth paragraph of Article 230 EC by a Community measure where, by reason of his particular circumstances, the measure has, or is liable to have, a substantial adverse effect on his interests.

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