

Working Group II

Working document 21

**"Working group II "Incorporation of the Charter/ accession to the ECHR"**

**du :** The Secretariat

**au :** Working Group II

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**Objet:** The question of effective judicial remedies and access of individuals to the European Court of Justice

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The members of the Group will find attached WD 021 from Mr. António Vitorino, Chairman of the Working Group.

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## I. Introduction

1. One remaining subject for examination by the Working Group is the question whether the current system of judicial remedies of individuals against acts of the institutions needs to be reformed in the light of the fundamental right to effective judicial protection as recognised by case-law of the Court of Justice and restated in Article 47 of the Charter<sup>1</sup>. As explained in doc. CONV 116/02, this issue has been subject to controversial debate among legal scholars and practitioners for quite some time independently of the Charter, although the drafting of the Charter has revived the discussion. CONV 116/02 also recalls the arguments of those who advocate liberalising the conditions of direct access of individuals to the Court of Justice (as currently laid down in Article 230 § 4 TEC), as well as of those arguing that the Community possesses, in principle, a complete system of remedies which provides effective judicial protection, according to circumstances, either through direct action in accordance with Article 230 § 4 TEC or through action in national courts which may - or even must - make a preliminary reference to the Court of Justice under Article 234 TEC.
2. Doc. CONV 116/02 further mentions a particular case which, under the current system of remedies, has meanwhile widely been recognised as problematic against the background of the fundamental right of effective judicial protection. That is the case of a "self-executing" Community regulation which imposes a directly applicable prohibition without the need for a national implementing act, thus forcing an individual wishing to assert his or her rights first to violate Community law and to appeal against the sanction which might be applied by national authorities against such a violation.<sup>2</sup> In its recent judgment "*Jégo-Quéré*"<sup>3</sup> concerning precisely such a case, the Court of First Instance, departing from the previous "*Plaumann*" case-law of the Court of Justice<sup>4</sup>, which it deemed too restrictive, admitted an action by an

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<sup>1</sup> See point 3 of the Group's mandate (doc. CONV 72/02) and developed in further detail in document CONV 116 (Section II 6, especially (c), pp. 15 et seq.).

<sup>2</sup> It should be noted that the same situation may occur in Member States' laws. While according to some legal systems, individuals submitted to a prohibition by national laws or regulations are obliged to incur a sanction in order to seize a judge, other legal systems have devised alternative techniques permitting individuals to obtain a "preventive" judicial injunction or statement in order to protect their rights against the law or regulation in cause.

<sup>3</sup> Judgment of 3 May 2002, T-177/01, *Jégo-Quéré v. Commission*.

<sup>4</sup> Line of cases developed since the case *Plaumann*, Case 25/62, ECR 197, explained in doc 116/02, page 15 Footnote 2.

individual against a Community regulation, invoking the right to seise a judge. However, the Court of Justice, in its judgment of 25 July 2002 "*Union de Pequeños Agricultores*"<sup>5</sup>, confirmed its interpretation of Article 230 § 4 TEC and made it clear that, while it is possible to envisage a system of judicial review of the legality of Community measures of general application different from that established by the Treaty, it is for the Member States, if necessary, in accordance with Article 48 TEU, to reform the system currently in force.

3. Another issue examined in doc. CONV 116/02<sup>6</sup> which should be recalled without however needing further in-depth analysis in this paper, relates to the jurisdiction of the Court in the fields of Justice and Home affairs. While this issue goes beyond questions of fundamental rights and will therefore be treated in more detail in the newly constituted Working Group X, this group should take note of expert authority presented to it<sup>7</sup>, expressing concern about the current restrictions of jurisdiction of the Court in this area which is particularly sensitive to fundamental rights, including not least the risk that, whether or not the Union acceded to the ECHR, Union law and acts of the institutions in this area are exposed to appeal before the Strasbourg Court where the Court of Justice is prevented from exercising efficient control. The group may therefore wish to make a general comment, from a fundamental rights perspective, with regard to this issue.

## **II. Options for possible further action**

4. On the basis of the above, the purpose of this paper is to present three main options for possible further action on Treaty level.

### **Option A: A special remedy based on alleged violations of fundamental rights ("Verfassungsbeschwerde"; "recurso de amparo")**

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<sup>5</sup> Case C-50/00 P, *Union de Pequeños Agricultores*.

<sup>6</sup> Doc. CONV 116/02, Section II 6 (b), pp. 14 et seq.

<sup>7</sup> See the hearings of Judge Skouris (WD 19) and of Judge Fischbach on 17 September 2002; hearing of Mr. Schoo of 23 July 2002 (WD 13); WD 20 of Mr. Ben Fayot presenting a note by Advocate-General Francis Jacobs on this issue. See also WD 06 of Mrs. Paciotti.

5. This option, which has been proposed for quite some time and was mentioned in the report of the Court of Justice of May 1995 (prior to the Intergovernmental Conference leading to the Treaty of Amsterdam), would consist of the introduction of a new special action enabling individuals to challenge Community acts, including those of general application (i.e. of legislative or "regulatory" character), directly in the Court of Justice; the causes of action would however be limited to alleged violations of the applicants' fundamental rights. Models for such an action are to be found in the law of certain Member States such as Germany and Spain.
6. Advocates of that model argue that it would allow to leave intact the "normal" system of direct actions as established by Article 230 § 4 TEC focusing on individual acts of administrative character, and to add a special remedy of truly constitutional character. Critics however doubt notably whether it would be possible or convincing to distinguish alleged violations of fundamental rights from other violations of law serving as causes of action under Article 230 TEC. They point to experience in Germany suggesting that it is possible in almost all cases to express an alleged illegality also in terms of a fundamental rights violation, given the large scope of a number of fundamental rights in modern constitutional law (e.g., freedom of occupation or to conduct a business, property, respect for private life...). According to these critics, the relationship between such a special "constitutional" action and the ordinary system of remedies in Article 230 § 4 TEC could be difficult to establish, especially if the "constitutional" action were to be introduced directly before the Court of Justice and not before the Court of First Instance.<sup>8</sup>
7. For the sake of completeness, it should be recalled that possible accession to the European Convention on Human Rights would give individuals an additional judicial remedy based on fundamental rights, although by an external jurisdiction, against acts of the Union.

**Option B: Amendment to Article 230 § 4 TEC:**

8. A second option would be to amend the current wording of Article 230 § 4 TEC, in order to alleviate the rigidity currently resulting from the condition of "individual concern" in Article

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<sup>8</sup> For these considerations, see also the points made by Judge Skouris at the hearing on 17 September 2002, WD N° 19.

230 § 4 TEC where an applicant wishes to challenge "self-executing" Community acts of general application.<sup>9</sup>

9. Several possibilities of wording have been proposed or could be conceived to that effect, as described below. One criterion for their appreciation by the group could be in how far they would in practice open up access to the Court of First Instance and therefore lead to a shift in the current division of tasks between the Community jurisdiction and national courts (according to which in most cases *national* courts, acting as "judges of Community law", scrutinise the legality of Community acts and, in case of doubt, are empowered or even obliged to make preliminary references under Article 234 TEC to the Court of Justice, whereas direct access to the Community Courts under Article 230 § 4 TEC is narrowly circumscribed). It should be stressed that valid arguments have been put forward both in favour of a stronger centralisation of judicial protection against Community acts at the level of the Community courts, and in favour of maintaining, in principle, the current division of work. Furthermore, some argue that enlarging too much the right of action under Article 230 § 4 TEC could open legislative acts to challenge by a vast number of individuals, whereas the law of several Member States protects legislation from such challenges and other Member States have established a *special* constitutional remedy ("Verfassungsbeschwerde", "recurso de amparo") covering legislative acts.<sup>10</sup>
10. a) A suggestion made by a Convention member is to convert the conditions of "direct" and "individual" concern in Article 230 § 4 TEC into *alternative* criteria (i.e. "direct *or* individual concern")<sup>11</sup>. A very similar result would be achieved by simple deletion of the words "...and individual..." in Article 230 § 4 TEC as proposed by another Convention Member<sup>12</sup>. It appears

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<sup>9</sup> For proposals or arguments in that direction, see WD N° 17 by Jürgen Meyer; CONV 45/02 CONTRIB 25 by Hannes Farnleitner; Judge Skouris at the hearing on 17 September (WD N° 19); note from Advocate General Jacobs (see WD N° 20 of Mr. Fayot).

<sup>10</sup> An issue which would require careful consideration in case of a possible enlargement of direct access to the Court under Article 230 § 4 against acts of general application, but also in case of a possible "Verfassungsbeschwerde", would be how such enlarged direct remedies would relate to the case law on the Court of Justice according to which those who "without any doubt" could have challenged an act under Article 230 § 4 TEC but did not do so, can no longer invoke implicitly its illegality (Article 241) in further proceedings, see Case 92/78, Simmenthal, 1979 ECR 777, C-188/92, Textilwerke Deggendorf, 1994 ECR 833.

<sup>11</sup> Working document N° 17 by Jürgen Meyer.

<sup>12</sup> Doc. CONV 45/02 CONTRIB 25 by Hannes Farnleitner.

that this solution could lead to a rather significant opening-up of direct access of individuals to the Court of First Instance and thus to a shift in the present division of tasks.

11. b) Alternatively, one could think of an amendment leaving the basic structure of Article 230 § 4 TEC unchanged while adding language opening-up access exceptionally in cases of Community acts of general application where is no act of implementation against which the applicant could adequately seek judicial protection on national level. The test proposed by the Court of First Instance in the *Jégo-Quéré* judgment seems to be formulated with that intention<sup>13</sup>; yet it may be asked whether the limits proposed are sufficiently precise to provide guidance for the practice of the Court. A stricter and more objective formula would consist of adding, at the end of current Article 230 § 4 TEC, the words "or against an act of general application which is of direct concern to the applicant without calling for a measure of implementation" (...*"contre un acte de portée générale qui la concerne directement sans comporter une mesure d'exécution"*). In a similar vein, one could provide for direct actions against an act of general application which are of direct concern to the applicant "where there is no [adequate] remedy before a national court or tribunal".<sup>14</sup>
12. The aim of the latter formulae would be to preserve the global division of work between courts on European and on national level, and to remedy only such exceptional situations where currently there is no protection on either level.

**Option C:     Enshrining an obligation of Member States to provide for effective rights of action before their courts**

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<sup>13</sup> According to that test, an individual could seise the Court also (i.e., besides the case of individual acts) against a Community measure of general application "*that concerns him (i.e. the applicant) directly if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him*".

<sup>14</sup> It should be born in mind that this formula could oblige the Community Courts to interpret, to a certain extent, national procedural law in particular cases (see the critical remark by Judge Skouris at the hearing of 17 September WD N° 19). It has also been observed that the Court already appreciates national procedural law, for example when judging whether a body qualifies as court or tribunal within the meaning of Article 234 or whether an action for compensation under Article 235 TEC might be barred because national rights of action *providing an effective means of protection* have not been exhausted, see Case 175/84, Krohn v. Commission, 1986 ECR 753.

13. Under this option, the rights of direct action of individuals before the European Courts would not be enlarged. Instead, the new constitutional treaty could contain a provision on the obligation of Member States to provide for remedies by their courts ensuring effective judicial protection for the rights guaranteed by Union law. A proposal in that sense is notably included in the contribution tabled by the European Ombudsman, Mr. Söderman.<sup>15</sup> Such a provision would merely codify existing case law of the European Court of Justice<sup>16</sup>. However, an express provision in the constitutional Treaty, thus enshrining the obligation of Member States to contribute to a complete system of judicial remedies in the European Union, would underline the Member States' responsibility in this area, while respecting the principle of procedural autonomy, and facilitate such reforms to the national procedural systems as may prove necessary. One could therefore hope that both a liberal interpretation by the Court of Article 230 § 4 TEC and evolutions in the national procedural systems may over time help eliminate existing lacunae in judicial protection against Community acts. It has also been argued that such a solution would best correspond to the principle of subsidiarity. On the other hand, it must be understood that such a Treaty provision might not necessarily permit to provide effective judicial protection in each individual case where a lacuna becomes manifest.

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<sup>15</sup> See doc. CONV 221/02, Article "b", paragraph 2, of the Chapter on "Remedies". Attention is also drawn to the proposal made in this document to introduce a new action by the Ombudsman before the Court of Justice. This proposal is not analysed in detail here since it does not concern the right of individuals to judicial protection discussed in this paper.

<sup>16</sup> See judgment of 25 July 2002, pts. 41, 42: "It is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection. In that context, in accordance with the principle of sincere cooperation laid down in Article 5 of the Treaty, 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." See also CFI, Case 172/98, *Salamander etc.* / Council and Parliament, pt. 74: "Pursuant to the principle of genuine cooperation set out in Article 5 of the Treaty, Member States must help to ensure that the system of legal remedies and procedures established by the EC Treaty and designed to permit the Community judicature to review the lawfulness of acts of the Community institutions is comprehensive."