

CIRCLE I

Working Document 08

from :	Secretariat
to :	Discussion circle on the Court of Justice
Subject :	Draft final report of Mr António Vitorino, Chairman of the Discussion Circle

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. At the last meeting on 3 March 2003, the discussion circle also looked into the question of the competence of the Court of Justice with regard to Union acts relating to areas falling within the CFSP¹, following merger of the pillars. It was agreed that this point would be discussed in a separate note and the conclusions of the discussion inserted in the present report.
3. The President endeavoured to take the fullest possible account of the various tendencies which emerged within the circle on questions included in the framework of proceedings. 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 Nice Treaty on the number of judges. For the Court of Justice, which has the powers of a court of appeal and a constitutional court, a proposal was made to limit the number of judges, but it was also pointed out that it was necessary to have one judge per Member State. For the Court of First Instance, which can expect to hear an increasing number of cases, the formula of "at least" one judge per Member State was deemed satisfactory. A majority of members seemed to feel that no change was necessary on this point 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), the circle was divided between maintenance of the status quo (appointment by common accord of the governments of the Member States) and appointment by a Council act. Some members favoured the latter option. Of these, some felt that the Council should act by a qualified majority, which might increase the degree of scrutiny to which proposed candidates were subject.
6. Furthermore, several members supported the idea of introducing a "filter mechanism" in the form of an assessment panel, which would have the task of giving the Council/Member States an opinion on whether a candidate's profile was suited to the performance of his/her duties. 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, and the European Parliament might also be associated with the procedure. It might conceivably be less important to set up this panel if the Council is acting by a qualified majority, but it could be set up irrespective of the nature of the act (Council act or Member States' act) and of the required voting rules; if this system were introduced, it might make Member States more demanding in the choice of candidates they put forward. At this point the circle did not look in detail at the question whether States should continue to put forward one or more candidates.
7. *The President proposes (a) that the current system for the appointment of judges and Advocates-General to the Court and judges to the CFI by common accord of governments be maintained; (b) that an "assessment panel" be set up with responsibility for giving an opinion*

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.

on the suitability of candidates to perform the duties of judge or Advocate-General at the Court, or judge at the CFI; and (c) restricting each Member State to a single candidate.

8. As for the length of the term of office of members of the Court, some proposed changing the current system and introducing a non-renewable term of 9 years. Some members indicated a preference for a single, longer, term of 12 years, since some adjustment was necessary and a longer term gave more guarantee of stability in the Court's proceedings. Finally, some members felt there was no need to change the current system (six years renewable).
9. Both the President of the Court and the President of the CFI, while preferring the present system, were open to the possibility of extending the term of office. They expressed a preference for a 12-year term because 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 ¹. 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.
10. The circle agreed 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. The circle agree to retain the current system for judges at the CFI (renewable six-year term).

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.

On question (b) of the framework

11. The circle was generally in favour of 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.
12. As regards Article 229a TEC, most members were also in principle in favour of the Council acting by a qualified majority.
13. 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 question (c) of the framework

14. 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**".
15. As for the name of the CFI, the circle noted that in the near future when judicial panels had been 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 President proposed using the name "**General Court of the European Union**", to express its future position as the basic, general court and to distinguish it from the "specialised courts". The circle thought that the legal/linguistic experts of the institutions might be asked to adapt the title.

16. 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 be retained, 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.

On question (d) of the framework

17. On the question of possible amendments to the fourth paragraph of Article 230 of the TEC, the 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; it would therefore not be necessary to make any substantive changes to the fourth paragraph of Article 230.
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 one of 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;
- (f) introducing a specific right to bring proceedings for the defence of fundamental rights.

20. As the circle remains divided and to make it easier for the circle to take a decision, the President proposes a compromise wording, 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 breach the law before he can have access to a court, whether the act concerned be a legislative or a regulatory one. This wording enables private individuals to contest before the Court (CFI) a regulatory 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 affected by the regulatory act in question.
22. If the words "regulatory act" are chosen, a distinction is 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 (non-legislative acts, according to the terminology of Article 26 of the Constitution), where the individual must merely demonstrate that he is

directly concerned. This wording also takes into account the remarks made to the circle by the President of the CFI, as it retains the present conditions of admissibility in the case of legislative acts and therefore presents no risk of "taking a step backwards".

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 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;
 - 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 ⁴;
 - the act is silent on verification of the legality of acts of the agency ⁵.

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).

⁴ See Council Regulation (EC) No 2062/94, of 18 July 1994, establishing a European Agency for Safety and Health at Work (Article 22).

⁵ See Regulation (EC) No 1406/2002 of the European Parliament and of the Council of 27 January 2002 establishing a European Maritime Safety Agency.

25. On account of this, somewhat disparate, practice for verification of the legality of acts of the agencies, the Commission ¹ 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, the discussion circle recommends 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 ².

On question (e) of the framework

27. 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. Members of the circle recommend that, in order to strengthen the sanctions machinery provided for in Article 228 TEC, 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, should be abolished. Direct referral to the Court by the Commission, or by a Member State, is not new : it is already provided for in the Treaty in certain cases, for example if a State makes improper use of the exceptions permitted for defence reasons or crisis situations (Article 298) ³.

¹ See COM (2002) 718 final of 11 December 2002, on the operating framework for the European Regulatory Agencies, pp. 14 and 15.

² 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.

³ See also, by analogy, Articles 95(9) and 88(2) TEC.

28. Finally, in this context a proposal has also been made which could perhaps be added to the previous one, that, in cases of "non-communication" by Member States of measures transposing a framework law, the Constitution should 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 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, if the defending State did not comply with the Court's ruling. This would enable the procedure for sanctions in cases of "non-communication" of a national transposition measure to be simplified and speeded up¹.

¹ 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.

Other questions

The circle must state a view on the extent of the Court's jurisdiction following the merger of the pillars and possibly on strengthening the role of the Commission in the infringement procedure, and on measures to ensure legal redress at national level as referred to in point 18.
