

**CERCLE I**

Working Document 11

**“Discussion Circle” on the Court of Justice**

**Subject: “Judicial review in the field of Justice and Home affairs”  
by Mr Gijs de Vries, member of the Convention and Mr Tom de Bruijn, alternate  
member of the Convention**

Members of the “Circle of discussion” on the Court of Justice will find hereafter a paper from Mr Gijs de Vries, member of the Convention and Mr Tom de Bruijn, alternate member of the Convention.

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**contribution by the government of the netherlands to the discussion circle of the court of justice concerning judicial review in the field of justice and home affairs**

The Convention is discussing how the institutions operate. An important subject is the abolishment of the pillar structure. A related question is whether the judicial review regarding Justice and Home Affairs has to be extended. The length of the current procedure may cause problems with respect to criminal lawsuits and asylum and immigration lawsuits. Therefore, the current and future problems regarding the workload of the Court of Justice need to be addressed. The Court has always been a driving force behind the development of the *acquis*. However, the growth in its workload is jeopardising its efficiency. Proceedings before the Court are taking longer, with all that this implies for the national legal order, the administration of justice and the legitimacy of the Union. The measures so far taken have not managed to turn the tide. More drastic measures are required to ensure that the Court remains strong and efficient in the future and to safeguard the administration of justice and legal protection in the member states. In a bilateral paper addressed to the Convention Spain and the Netherlands will make a number of proposals on improving the working methods of the Court of Justice. In this paper the Government of the Netherlands present some additional thoughts on the specific subject of judicial review on the field of Justice and Home Affairs.

**1. Preliminary Rulings: causes and effects of the mounting workload**

Half the cases that come before the Court are referred to it for preliminary rulings. Their ever increasing duration (currently 22.7 months, according to the Court's annual report concerning the year 2001) means that national proceedings are being held up for too long, creating legal uncertainty for parties in national cases in which the Court has been requested to give a preliminary ruling. After all, such a request means that the case in question and any similar cases must be suspended until the Court has given judgment. This is expected to have serious consequences, since the number and duration of cases is likely to increase even further as a result of the following factors.

#### a. Accession of new member states

Since 1995, following the accession of Sweden, Finland and Austria, a growing number of preliminary rulings has been added to the Court's workload. Enlargement of the Union from 15 to 25 member states is scheduled for 2004. The new member states must implement tens of thousands of pages of the *acquis* in a very short space of time. Partly due to the specific circumstances in these states, this may result in a considerable additional increase in workload, as a result of which cases will take even longer to process.

#### b. Translation

Translation activities account for a significant proportion of the time taken by the Court to deal with cases. The accession of 10 new member states will considerably increase the number of languages and language combinations used in proceedings. This is likely to lead to even further delays.

#### c. New areas of competence for the Court

##### *Criminal law*

As the reports of working groups IX and X make clear, the Treaty amendments proposed in the Convention concern the inclusion of title VI in the EC Treaty, further harmonisation of criminal law and the law of criminal procedure and the introduction of framework laws with direct effect. This will add to the Court's workload. The power to give preliminary rulings will apply to a steadily expanding *acquis* and, moreover, it will apply retroactively to the existing *acquis*. It will become the standard for every member state. The scope of this power will no longer be differentiated. Requests for preliminary rulings in the field of criminal law will have serious consequences for the national administration of criminal justice, since criminal proceedings cannot continue until the Court has given a preliminary ruling. During the 22.7 months the Court takes to deal with a case, the accused must be released, which is often problematic and undesirable. In addition, any similar criminal proceedings must be suspended until the preliminary ruling has been given. All this places a heavy burden on the administration of criminal justice and does not reflect the preoccupations of EU citizens.

In this regard, reference should also be made to the Court's role with regard to Europol. Judicial control of Europol's activities is currently the task of the national criminal courts. The Court's current role primarily involves giving preliminary rulings on the interpretation of the Europol Convention. Working group X states in its final report that, in the future, Europol's activities must be subject to judicial control by the Court in accordance with normal Treaty rules. However, this overlooks the fact that judicial control of Europol's activities can only take place in national criminal proceedings.

### *Asylum and immigration*

In the field of asylum and immigration, a considerable number of important directives and regulations are (being) prepared and are (being) negotiated with respect to subjects such as family reunification, admission of third country nationals, combatting illegal immigration, re-enforcing external border control and minimum standards for asylum procedures. All these rules will have to be, and are already being, incorporated into national legislation. Asylum and immigration law can affect individuals directly: can they stay or do they have to return to their country of origin? For this reason, there is already a strong tendency nationally to appeal against every negative ruling to prevent it from being executed. Since only the highest national court may request a preliminary ruling (art. 68 EC), national proceedings will be continued up to this level. Since national legislation is increasingly based on European legislation, the number of requests for preliminary rulings is likely to rise sharply, which would affect the administration of justice and legal protection. For instance, the decision by the Council to end an earlier decision to granting temporary protection by the member states based on the EU directive on temporary protection - may result in individuals throughout the Union who first were granted temporary protection, to question the legitimacy of the Council decision to end the granting of temporary protection (and subsequently withdrawal of that status) in national proceedings. Consequently requests will be made for preliminary rulings on the interpretation of the directive concerned. As a result, the Court would take even longer to deal with cases and the national proceedings would be delayed for several years. However, in cases with a public order dimension, and in line with the jurisprudence of the European Court of Human Rights, a person concerned may not be kept in detention for longer than six months. Since Court cases tend to take much longer, the person concerned would have to be released after that period.

#### d. Charter of Fundamental Rights

The report of working group II states that the material provisions of the EU Charter of Fundamental Rights, should be declared legally binding and that the EU should accede to the European Convention on Human Rights. In its current form, the Charter contains both traditional civil and political rights, and social rights. A legally binding Charter would enhance the visibility of human rights within the Community legal order. This is likely to trigger additional proceedings, especially as regards social rights. There are specific problems connected with the way these rights are implemented. The legal enforceability and direct applicability of social rights are by no means acknowledged in the national law of several European countries, partly due to the resulting financial consequences. Due to the lack of a comparable – legally binding – national provision litigants will invoke the relevant provisions of the Charter in *national proceedings*. Many national courts will need to request preliminary rulings on the interpretation of the Charter. This problem will be aggravated by the proposed ‘*communautarisation*’ of the fields of criminal law and asylum and immigration, subjects that touch upon social rights.

#### e. Possible access by national parliaments

It has been suggested that national parliaments should be given the right to apply to the Court with a view to assessing the application of the subsidiarity principle. Given the considerable number of parliamentary chambers concerned and the number of cases in which national parliaments will be able to express their views on subsidiarity, this, too, might lead to a substantial increase in the Court’s workload. In their common submission to the European Convention, Belgium, Luxembourg and the Netherlands have indicated their opposition to the granting to national parliaments of access to the European Court of Justice.

## **2. Solutions**

### **I Institutional solutions**

Building on the suggestions in the paper of Spain and the Netherlands on the Court of Justice, we propose the following institutional solutions:

- In the fields of criminal law and asylum and immigration, a fast-track procedure could be established with respect to preliminary rulings. In cases involving deprivation of liberty, cases would not be allowed to last more than three months. The current accelerated procedure only applies to exceptional and urgent cases and it involves a discretionary power of the Court. It is not sufficiently geared to the need for swift procedures. Alternatively, the suspensive effect of requests for preliminary rulings in the field of asylum and immigration could be abolished, so that a court decision could be executed immediately.
- Secondly, one might envisage more vigorous implementation of the Nice decisions. For example, requests for some preliminary rulings should be transferred to the Court of First Instance, at least in areas for which specialised chambers have been established.
- The existing procedures for translations could be modified. The first step should be to abandon the practice where the Court does not give a judgment until it is available in all languages. It should be agreed that judgment be given in the language used in the proceedings and at least in French or English, and that the other translations should be published within six months.
- The number of judges at the Court of First Instance and translators should be increased.
- The establishment at national level of a centre of expertise on European law for courts should be envisaged. Such centres could help national courts to decide whether a preliminary ruling should be requested and, if so, how best to formulate it. This would help prevent unnecessary and unclear requests.

Although the above measures can ease the Court's mounting workload to some extent, they are not sufficient to effect a *substantial* reduction. Even if it were assumed that the average duration of cases could be brought back to twelve months, this would still not eliminate the problems in the fields of criminal law and asylum and immigration, since a much greater reduction in processing time is needed for the administration of justice in these fields to be effective. More rigorous measures are therefore required. Consideration could be given to abolishing the right to appeal to the Court in cases dealt with by the Court of First Instance. Instead, the Court could be allowed to give a judgment on its own initiative in such cases. This would preserve legal uniformity, and

would also have the advantage of reducing the number of ‘layers’ involved in the administration of justice.

## **II New areas of work**

- Criteria must be established for crimes that would qualify for approximation of law (regarding both their elements and penalties). As proposed by Working Group X, the crime must be of a particularly serious nature and have a cross-border dimension or be directed against a shared European interest which is already itself the subject of a common policy of the Union. The application of the criteria could be safeguarded by a compulsory prior review of each proposal for approximation of law, similar to the subsidiarity test.
- The legal instruments adopted in the field of criminal law should not have a direct effect.
- ‘Framework law’ should be used for measures concerning criminal law or the law of criminal procedure. If member states would be allowed to choose the method of implementation themselves and the wording to be used, the functioning of criminal law would not be disturbed.
- The Court’s role with regard to Europol should be limited to giving preliminary rulings on the interpretation of the Europol Convention; judicial control of Europol’s activities should continue to be exercised at national level.
- If the Court’s powers in the field of justice and home affairs are expanded, the right to request a ruling from the Court under article 68, third paragraph, of the EC Treaty should apply *mutatis mutandis*.