

CIRCLE I

Working Document 15

“Discussion Circle” on the Court of Justice

Subject: “Comments on the draft final report on the Court of Justice”

By Lord MacLennan of Rogart

Members of the “Circle of discussion” on the Court of Justice will find hereafter a paper by
Lord MacLennan of Rogart.

COMMENTS ON THE DRAFT FINAL REPORT ON THE COURT OF JUSTICE

A. POSSIBLE AMENDMENTS TO ARTICLE 230(4)

The Group appears to be in agreement on the principle that citizens of the Union have a fundamental right to “effective judicial protection”. Where the Group is in disagreement is whether or not the European judicial system offers citizens such protection.

Members of the group have argued that, despite the stringent requirements of standing found under article 230(4) TEC, citizens, on the basis of article 234, nevertheless possess the possibility of having their legal grievances adequately addressed by taking cases to their national courts to seek a preliminary ruling.

This arrangement, however, does not provide satisfactory judicial protection for a number of reasons inherent in the preliminary reference procedure. Firstly, applicants do not possess the right to decide whether a reference is made. Nor do they decide which measures are referred for review or what grounds of invalidity are raised. Furthermore, national courts cannot themselves grant the desired remedy to declare the general measure in issue invalid (this follows from Foto-Frost and ensuing case law). Most worryingly, there could be cases where it is difficult or even impossible for an applicant to challenge a general measure indirectly, for example,

- i) where there are no challengeable implementing measures;
- ii) where the applicant would have to break the law to be able to challenge the ensuing sanctions.

These problems illustrate the fact that any indirect challenge to contest the legality of Community norms is in reality, an imperfect and inadequate substitute for direct action through article 230(4). The system therefore, as it stands, does not guarantee “effective judicial protection”.

To rectify this the Group should recommend that the requirements for standing be relaxed. This would provide citizens with more possibilities for challenging Union measures directly. The solution should strike a balance between a somewhat wider notion of access to the Union’s Courts, on the one hand, and “opening the floodgates”, on the other. In widening access, the key situation to be addressed is where the act in question affects the ‘essential’ interests of the person considered—e.g. where a person may go out of business or lose his livelihood. With this in mind, the Group may wish to consider the following amendment to the Chairman’s proposal:

“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 or regulatory act which *affects his essential interests* without entailing implementing measures.”

It should be borne in mind that the possibility of cases being joined will prevent the floodgates from opening. Once the ECJ or the CFI has pronounced on the legality of the contested measure in relation to a claim brought by an applicant who was deemed to have his interests essentially affected that would be the end of the matter. The Court’s decision would resolve the issue in relation to any other possible claimant, unless he could raise some new legal argument that had not

been addressed in the earlier case. Moreover, providing citizens with greater direct access before the Court of Justice and Court of First Instance would also lead to a decrease in the number of preliminary references raised via article 234 TEC.

The Group should not recommend a preservation of the status quo; the Convention will be subject to heavy criticism if a judicial deficit is seen to be opening up as a result of the continued narrow rules on standing.

B. THE COURTS' JURISDICTION

FLEXIBILITY

The Treaties set out the scope of the jurisdiction of each court in section 4 of Part V of the TEC and article 46 TEU. Without seeking to widen the scope of their jurisdiction it should be possible to reallocate responsibilities between the two courts without a constitutional amendment. This procedural flexibility would enable the Union's institutions to take account of and effectively respond to changes in the Courts' workloads. This issue deserves further attention.

CFSP

I would like to reiterate the point made orally at the last session that the current provisions for the Court to give advisory opinions on international agreements, as found in article 300(6) TEC, should be extended to Treaties entered into under the CFSP. The Group should also seek to ensure that article 220 TEC will be incorporated and taken to apply to the entire Constitution and that both provisions will override article 46 TEU.

THE AREA OF FREEDOM, SECURITY AND JUSTICE

The reflection circle should endorse the views found in the final report produced by Working Group 10, on 'Justice, security and freedom', "the specific mechanisms foreseen in Articles 35 TEU and 68 TEC should be abolished and that the general system of jurisdiction of the Court of Justice should be extended in the area of freedom, security and justice, including action by Union bodies in this field...to the extent that this recommendation would imply an increase in the workload of the ECJ, the provisions provided for in the Nice Treaty on reform of the Court would allow the Court to cope with it."

ORGANISATION OF THE CONSTITUTION'S ARTICLES

The Group should recommend that for the sake of clarity and coherence all articles on the Courts

should be grouped in a single sub-title under ‘Institutions’. The Court of First Instance should be made an institution in its own right, as was recommended by the President of the Court of First Instance.

ORGANISATION OF THE FINAL REPORT

The draft report follows the structure found in the Group’s terms of reference.

Instead, the report should deal with the issues of greatest public concern first, namely the jurisdiction of the Courts and the criteria for standing. These should then be followed by the machinery for sanctions, the proposed changes to the appointment procedures and the proposed changes to the judges’ length of office. It may be desirable to have a summary at the beginning or end of the Group’s report, listing all the proposed recommendations.