

**CIRCLE I**

**Working Document 17**

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

**Subject:** Comments by Mr Bobby McDonagh on draft final report (WD08)

Members of the “Circle of discussion” on the Court of Justice will find hereafter a paper by Mr Bobby McDonagh.

**European Convention****Discussion Circle on the Court of Justice****Comments by Bobby McDonagh on draft final report (WD08)**

A number of the issues arising from the draft report will require further consideration at the meeting of the Discussion Circle on Monday. In the meanwhile the following observations may be of assistance.

*Question (a)*

The Chairman's proposals at 7 (a) that the current system of appointment of judges by the common accord of Member States be continued and at 7 (c) that Member States submit only one nomination in respect of any given vacancy are sensible and welcome.

As regards the Chairman's proposal at 7(b) concerning an assessment panel for the appointment of judges, there is merit in the intent of this proposal as it would cause Member States to reflect carefully on the choice of candidates that they put forward. However, it would not seem appropriate or necessary to include this element in a formal Treaty Article. The essential decision-making mechanism of appointment by 'common accord of the Governments of the Member States' would remain specified at Treaty level. The intended result might more appropriately be achieved by granting the Council a general power in relation to assessment procedures or, for example, by incorporating the general intention to establish such an assessment panel in a Declaration to the Treaty.

The current Treaty criterion for persons appointed to the Court of Justice and Tribunal of First Instance is that they be persons qualified for "the highest judicial office in their respective countries". This creates, in effect, a criterion which in practice - as regards the detail - is factually somewhat different for each Member State. The combination of the existing system of judging national criteria against the general requirement of qualification for "the highest judicial office" with an assessment committee sitting supra-nationally is not optimal. It seems essential that any supra-national assessment mechanism would be based on clearly defined objective criteria.

As many members of the Discussion Circle have emphasised, it is essential that the system of appointment should not become politicised. Members made the point that the involvement, for example, of the European or national parliaments would carry the risk of the creation of such a perception.

As regards paragraphs 8-10 concerning the length of judicial appointments, the options of either maintaining 6 year appointments to the ECJ or of making non-renewable 9 year appointments both have their merits. However, as regards the option of 12 year appointments one additional consideration to be borne in mind is the danger that a 12 year term could be so long as to discourage lawyers from certain career paths, particularly private practice or the sitting judiciary in Member States, from accepting an appointment. This in turn might impinge on the useful range of experience available to the Court.

*Question (b)*

The proposal to move to QMV for Articles 225a and 229a is reasonable. As regards the proposal at para 13 to move from unanimity to QMV for parts of the Statute of the Court of Justice, the intent of the final sentence of para 13 is broadly along the right lines. However, it seems important that a more detailed examination of the Statute should be undertaken (perhaps subsequent to the work of the Discussion Circle) before final conclusions would be reached on the particular components of the Statute which can properly move to being capable of amendment by QMV.

*Question (d)*

The compromise proposal for extension of individual access to the Court under Article 230.4 will clearly need to be discussed further at the final meeting of the Discussion Circle on Monday.

Apart from other considerations, it will not be possible for Members of the Convention to take a firm position on this issue until there is greater clarity on the jurisdiction of the ECJ in the Title IV and Title VI areas. The question of greater access to the ECJ can only be determined when the competence of the ECJ in the wider JHA area is determined. (This wider aspect will also presumably fall for discussion when the general JHA provisions are considered at plenary.) It will be important to avoid an unquantifiable opening up of jurisdiction in a situation where there are already significant delays in the ECJ which may be further increased by enlargement. It is also important that any change not create a situation which could give rise to lengthy delays in the JHA area.

*Question (e)*

The approach suggested at paras 27 and 28 (concerning telescoping of the two court actions currently required to prove infringements under Article 226 and impose fine Article 228) is a welcome improvement on present arrangements.