

CIRCLE I

Working Document 19

“Discussion Circle” on the Court of Justice

Subject: UK comments, as sent by Baroness Scotland of Asthal

Members of the “Circle of discussion” on the Court of Justice will find hereafter a paper by Baroness Scotland of Asthal.

UK COMMENTS, AS SENT BY BARONESS SCOTLAND

Paragraph 2

1. If a historical record of the 3 March discussion is to be included here (and this may not in the event be necessary), please delete “also looked into” and substitute “was invited to address”. In the final sentence of the same paragraph, again for reasons of historical accuracy, please reword it to read: “It was agreed that this suggestion should be reviewed in the light of a paper from the Chairman, and the conclusions, if any, added to the present report.”

Paragraph 4

2. In the second sentence, some of us questioned whether the ECJ should simply be regarded as the equivalent to a court of appeal or constitutional court - I suggest substituting "whose powers include those comparable to..." In the last sentence, we suggest “advisable” instead of “necessary” (to better reflect the political considerations).

Paragraphs 6-7

3. I think it would be preferable to describe the proposed panel as “advisory” rather than “assessment” and to abandon the misleading word “filter”. A reference to “specific objective criteria” (on the basis of which the Panel would offer an opinion) would be in line with our discussions, as would clarification that the advisory opinion should be directed to the nominating Member State (so as to avoid discouraging potential applicants for fear of an unnecessarily public spectacle). It may be helpful to make clear that the proposal for associating the European Parliament with the procedure was through nominating a suitable legal expert to sit on the panel. Finally, I would ask you to withdraw the first part of the penultimate sentence, beginning instead at “This could be set up...” There was no consensus on that point and it is not clear why qualified majority voting would make this less necessary. Moreover, my view is that we should not support a system where members of one key community institution effectively chose the members of another, independent organ.

Paragraphs 17-22

4. The analysis omits any reference to the option I put forward. I pointed out that national courts could entertain challenges to the validity of a general community measure, irrespective of the fact that the applicant was not “individually” affected, and refer it for a preliminary ruling. Indeed, the ECJ in the UPA case indicated that such action is required of national courts by virtue of the duty of loyal co-operation set out in Article 10 of the Community Treaty. It is therefore not necessary to make any substantive changes to the fourth paragraph of Article 230, though consideration could possibly be given to codifying the position for the avoidance of any doubt. As regards the Chairman’s “compromise”, I think it fair to record that there was not

supporting consensus at the last meeting for this or any amendment to TEC 230(4). Strictly, the “compromise” should be added to paragraph 19 and paragraphs 20-22 deleted.

Paragraph 23

5. We will need to be clear that the proposed use of "act" here is clear and precise - the case cited in this context appear to use "act" in contradistinction to "decision".

Paragraph 26

6. The Circle made no recommendation on this matter, pending a detailed examination of the individual position for each body and resolution of the question of consultation with the bodies themselves. I am afraid that my initial reaction to the Secretariat paper reinforces the view I expressed at the last meeting that this cannot be regarded as simply a “tidying up” exercise. We can discuss this at the next meeting.

Paragraph 27

7. While there was clear support for simplifying the pre-court procedure, this focussed on the reasoned opinion. We would suggest substituting after "Art 228 TEC" the following - "the stages prior to referral to the Court should be simplified, by removing the reasoned opinion stage".

Paragraph 28

8. This does not appear to take account of the proposal discussed in the meeting that the Court should be given the power, in **all** cases to impose a sanction in initial its first judgment which, in the event of non-compliance - and subject to referral back to the Court - would take effect from the date of that judgment. This is an important element in enhancing the efficacy of the fines arrangement and should be included in the report.