

CONV 572/03

CERCLE I 6

COVER NOTE

from	Secretariat
to	“Discussion Circle” on the Court of Justice
Subject :	Oral presentation by M. Gil Carlos Rodríguez Iglesias, President of the Court of Justice of the European Communities, to the "discussion circle" on the Court of Justice on 17 February 2003

Mr Chairman,
Ladies and Gentlemen,

I should like to thank you for having invited me to this exchange of views, which allows me to present the point of view of the Court of Justice on a number of matters which you are considering.

First, may I say that the Court is delighted that this discussion circle has been set up. The Convention represents a key constitutional phase in the process of European integration and I think it important that the Convention give consideration to the Community judicial system. The rule of law is an essential part of any constitutional system and it is the Court's responsibility to ensure that it is observed. Indeed, it is in the Court's case-law that a constitutional character has begun to be conferred on the Community legal system. So it seems natural that the European Convention, whose task is to draw up a constitutional framework for the Union, should take an interest in the Court of Justice.

Since its inception the Court has had a clearly defined role. It has never felt the need for its position in the institutional balance to be altered. Instead it has sought to adapt itself in order to be able to continue to discharge the task assigned to it: ensuring that the law is observed.

In that regard, the current situation is not entirely satisfactory. One can point to the fact that the transition from the European Communities to the European Union in 1993 did not entail a corresponding extension of the guarantees of observance of the law. Instead, it resulted in a situation

in which the mechanisms for judicial protection vary by reference to the different pillars of the Union. The Court makes a rule of not demanding additional powers but it can only regret the development of such inconsistencies in judicial review within the Union.

The Convention is the appropriate forum for bringing about a change in that state of affairs. In that respect, the Court is in favour of the Convention adopting a horizontal approach to the question of judicial protection in the European Union. That approach seems to me particularly appropriate if the will exists to transcend the current state of fragmentation between the different pillars of the Union. Rendering the system of judicial protection uniform on the basis of the Community model would actually appear to be the best way of ensuring observance of the law in all spheres of the European Union.

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I do not want to lose my way in generalities and so I intend to address in turn each of the five main points raised in the "framework of proceedings" for the discussion circle. After that, since you have given me the opportunity to raise other points, I shall bring one further issue to your attention.

1. As regards the *procedure for appointing the Judges and Advocates-General of the Court of Justice*, the Court's only concern traditionally has been to maintain its independence and to ensure that the Court operates effectively.

May I remind you that the Court has already expressed its view on this matter in a report submitted in May 1995 to the Study Group responsible for preparing for the 1996 Intergovernmental Conference ("Report of the Court of Justice on certain aspects of the application of the Treaty on European Union", published in the Court's 1995 Annual Report, p. 19). The Court had stressed in particular that "the procedure for appointment laid down by the Treaties and the practice generally followed in renewing the terms of office of its members have satisfactorily ensured its independence and the continuity of its case-law. The Court would not, however, object to a reform which would involve an extension of the term of office with a concomitant condition that the appointment be non-renewable ...".

The Court's view has not changed since then. Thus, I emphasise that the Court is not asking for the system to be altered. But if it were decided to opt for a longer non-renewable term of office, I must tell you that a nine-year term does not seem long enough to us and that a twelve-year term would be preferable. Limiting the term of office of Members of the Court of Justice to nine years would deprive the Court of extremely valuable experience for the purposes of its judicial business and the consistency of its case-law.

Before moving on, I should like to point out that these considerations concern only the appointment of Members of the Court of Justice. It is not inconceivable that there should be different procedures for appointing Members of the Court of Justice and Members of the Court of First Instance.

2. Second, I shall be fairly brief on the *question whether the unanimity rule should be replaced by a qualified majority rule for Council decisions creating judicial panels, conferring jurisdiction on the Court of Justice in disputes relating to acts which create Community industrial property rights and amending the provisions of the Statute of the Court of Justice* (Articles 225a EC, 229a EC and 245 EC).

The Court is very much in favour of such a change, which reflects the concern for flexibility which it has expressed on many occasions since its 1995 report and which has already inspired the reforms introduced by the Treaty of Nice.

3. I should like to make three points on the third item mentioned in the "framework of proceedings", the titles "*Court of Justice*" and "*Court of First Instance*".

First, the Court's title needs to be adapted to that of the Union. So, if the Union continues to be called the European Union, the Court should naturally be called the "Court of Justice of the European Union".

Second, I would emphasise that the Court of Justice wishes to preserve its identity and the name which it has had throughout its 50 years of existence. It is the name which is familiar not only to specialists but also to the citizens of the Union. It is a name with established goodwill. The Court of Justice would therefore wish to continue to be called the *Court of Justice*.

Lastly, so far as the Court of First Instance is concerned, I shall simply say that, if its name were to be altered, it would be necessary to ensure that the terms used did not give rise to any confusion between the Court of Justice and the Court of First Instance.

4. Fourth, concerning *direct actions by individuals against measures of general application* taken by the institutions, the Court considers that the current system, which is based on the principle of subsidiarity in that the national courts in particular are responsible for protecting the rights of individuals, satisfies the requirements essential for the effective judicial protection of those rights, including fundamental rights.

Admittedly, that protection could be increased by altering the conditions laid down by Article 230 EC so that non-privileged applicants would be able directly to challenge before the Community Courts

Community measures of general application which concern them.

It is first and foremost a policy choice: in the past, the intention was clearly that individuals, even if a measure of general application concerned them, should not, as a general rule, be able to bring actions for annulment before the Court of Justice against such measures. A different choice can perfectly well be envisaged.

I should nevertheless like to draw your attention to the fact that this question is closely linked to that of the restructuring of the sources of Community law. The distinction between legislative measures and regulatory measures is in fact contemplated in the Final Report of Working Group IX "Simplification" (CONV 424/02 of 29 November 2002). If such a hierarchy of secondary legislation were to become a reality, it would seem appropriate to continue to take a restrictive approach to actions by individuals against legislative measures and to provide for a more open approach with regard to actions against regulatory measures.

Furthermore, as regards the options if the fourth paragraph of Article 230 EC were to be amended, I refer to a document prepared by Mr Vitorino as Chairman of Working Group II (working document 21 of 1 October 2002, paragraphs 8 to 12).

Most of the options considered there do not give rise to any reservations on technical grounds. It would be possible to change the current conditions of admissibility ("direct and individual concern") into alternative conditions ("direct *or* individual concern"). It would also be possible to remove the condition relating to individual concern. Lastly, the current form of words could be retained with the addition of "or against an act of general application which is of direct concern to the applicant without the need for an implementing measure."

However, one of the options would cause some difficulties — namely, providing for direct actions against a measure of general application of direct concern to the applicant "where there is no adequate remedy before a national court or tribunal". That option would result in the admissibility of certain actions for annulment before the Community courts being conditional on the absence of an adequate remedy under national law, which would frequently require the Community courts to interpret the relevant national law in order to be in a position to decide whether the action was admissible. The Community Courts are definitely not the most appropriate forum for interpreting national law.

As to the possibility of creating a special remedy for alleged infringements of fundamental rights ("Verfassungsbeschwerde" or "recurso de amparo"), also mentioned in working document 21 cited above, the Court considers that there is no need to create such a remedy in order to improve the protection of fundamental rights in the European Union. It seems to us that it is preferable to protect fundamental rights in the framework of existing remedies. If those remedies were found to be

inadequate, it would then be appropriate to improve them in relation to the protection of all individual rights, not merely fundamental rights.

Lastly, no specific comment is called for from the Court on the suggestion that the Member States' obligation to ensure that there are effective legal remedies before their own courts — an obligation recognised in the case-law — should be written into the Treaty.

5. As regards the last point of your "framework of proceedings", concerning *the effectiveness of the system of penalties for non-compliance with a judgment of the Court of Justice*, the Court must be cautious when expressing its view because its experience of applying the system set up by the Treaty of Maastricht is still very limited.

I should like to make two observations on this point.

First, the Court is amenable to possible improvements in the system of penalties but it should not be expected to act of its own motion. In other words, the Court should impose penalties only where the Commission (or a Member State) asks it to.

Second, if the aim is to make the existing system of penalties more effective, thought should probably be given to simplifying, or even abolishing, the pre-litigation procedure in the event of non-compliance with a judgment establishing that there has been a prior failure to fulfil an obligation. There is nothing new about matters being brought directly before the Court by the Commission or a Member State: provision is already made for that in certain cases (Article 88(2) EC, Article 95(9) EC and the second paragraph of Article 298 EC).

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That is the Court of Justice's view on the questions raised in the "framework of proceedings".

Before concluding, I should like to touch on the issue of continuity in the *acquis communautaire*, including the Court's case-law, in the wake of a major constitutional change such as the forthcoming one. I think it important to draw the Convention's attention to the consequences which the simplification and restructuring brought about by the new constitutional text could entail for the interpretation of the current Treaty provisions.

The fact that provisions taken from the current Treaty are being amended with a view to simplification and that the future Constitutional Treaty will contain two parts, one "more constitutional" than the other, could have unforeseen and unintended consequences for the interpretation of a number of provisions of Community law.

That issue arises in several areas, in particular in relation to the fundamental economic freedoms laid down in the Treaty and the objective of establishing the internal market. In the draft of the Articles of the Constitutional Treaty which has just been published (CONV 528/03 of 6 February 2003), fundamental economic freedoms are regarded as falling within the exclusive competence of the Union. In my opinion, an approach couched in terms of "competences" is not sufficient to ensure that those freedoms and the internal market continue to enjoy the status of "principles of economic constitutional law", which is what they have in the scheme of the present Treaty as interpreted in the Court's case-law. Those freedoms currently constitute individual rights, which might be described as quasi-fundamental.

It seems to me that that is an important matter to which the Convention might give some thought.