

CONV 689/1/03
REV 1

CERCLE I 16

REPORT

from :	Chairman of the Discussion Circle on the Court of Justice
to :	Members of the Convention
Subject :	Supplementary report on the question of judicial control relating to the common foreign and security policy

1. The Discussion Circle on the Court of Justice met on 17 March 2003 to examine the draft final report; it was decided on that occasion that an extraordinary meeting should be held to consider the issue of judicial control relating to the common foreign and security policy. That meeting took place on 4 April 2003 ¹.
2. The discussion was based on a Secretariat document (WD 10) describing the current situation and setting out a number of possible approaches (see Annex). The Chairman explored each of the possible options and presented the points which the Circle could discuss. He said that Mr Bury and Mr Meyer had written to tell him that they supported paragraphs 1 and 2 of the Secretariat document, which proposed amending Articles 60 and 301, so as to make explicit provision for the possibility of adopting economic sanctions against individuals, and the use of the preliminary ruling procedure; moreover, Mr Meyer also agreed that the Court of Justice should have the possibility in CFSP matters of giving a prior opinion as provided for in Article 300(6) TEC.

¹ The meeting was chaired by Mr António Vitorino and attended by the following members: Berger, Dastis, Duff, Floch, McDonagh, Lord MacLennan, Baroness Scotland, and Severin.

3. In the discussion there was general support among members for the idea that Articles 60 and 301 should be amended so as to make explicit provision for the possibility of adopting economic sanctions against individuals on the basis of those two provisions, a step which may already be taken, where necessary, by using Article 308 TEC if no specific legal basis is available.
4. The Circle's views were more divided on the other approaches set out in the working document. Some members were in favour of the Court of Justice having powers to interpret CFSP acts which required implementation by the Member States, but others were against this.
5. Some members believed that the Court of Justice should have general jurisdiction with powers to control the legality of acts adopted by the Council in the CFSP field. They pointed out that this was a consequence of the Union's being a community based on the rule of law and having a Charter of Fundamental Rights, and that, in any event, the European Court of Human Rights could be asked to consider actions arising from the implementation of such acts. The possibility of providing for Member States to bring actions (as under Article 227 TEC) was mentioned in this connection. Other members argued that if the Court of Justice were given powers to review the legality of acts adopted in the CFSP field, this would not only threaten the policy's effectiveness and development but would also entail a significant shift in the existing institutional balance.
6. Some members thought that consideration could be given to introducing into the Constitution provision for an institution or a Member State to ask the Court of Justice for a prior opinion as to whether an international agreement envisaged in the CFSP field was compatible with the provisions of the Constitution (Article 300(6)). Some members said that precautionary monitoring of this kind would provide a minimum guarantee of compliance with the Constitution, for it would be unacceptable for the Union to be able to conclude an international agreement that was incompatible with the provisions of the Constitution. Other members were firmly opposed to the Court of Justice having powers to give a prior opinion on international agreements envisaged in the CFSP field.

7. Winding up the meeting of the Circle, the Chairman summarised the discussions as follows:
- (a) There was consensus in the Discussion Circle in support of the idea of changing the wording of Articles 60 and 301 TEC so as to make explicit provision for the possibility of adopting economic sanctions against individuals on the basis of those two provisions;
 - (b) Following the merging of the pillars, the Constitution should keep the principle set out in Article 47 TEU, on the basis of which the Court of Justice has powers to verify that CFSP measures and procedures do not encroach on procedures applying to other (ex-first pillar) policies of the Constitution, so that those policies can be preserved;
 - (c) A detailed examination of whether the institutions and Member States should be given the right to ask the Court to annul CFSP decisions seemed premature at this stage, before the substantive CFSP provisions and the role of each institution had been unveiled. This point could, if necessary, be considered later in the light of the substantive CFSP provisions. The Chairman noted, however, that some members were opposed to this;
 - (d) Another question which should be discussed in the light of the substantive CFSP provisions was whether the jurisdiction of the Court of Justice should be extended to restrictive measures under CFSP decisions which might affect persons other than from an economic point of view (e.g. visa bans). However the Circle did not reach a firm conclusion on this point either;
 - (e) Lastly, most members of the Circle came out in favour of the possibility of applying the prior opinion procedure under Article 300(6) TEC for international agreements envisaged in the field of the CFSP. However, there was no consensus on this point, as a few members took the opposite view.

THE EUROPEAN CONVENTION

Brussels, 12 March 2003

THE SECRETARIAT

CERCLE I

Working Document 10

NOTE

from :	Secretariat
to :	Discussion circle on the Court of Justice
Subject :	Judicial control relating to the common foreign and security policy

I. Current situation

Under Article 46 of the Treaty on European Union, the Court does not have jurisdiction in actions against CFSP acts, including those on the conclusion of international agreements in the CFSP field. Such acts cannot therefore be annulled by the Court pursuant to Article 230 of the EC Treaty.

Article 47 of the TEU, however, states that no provision of that Treaty shall affect the provisions of the EC Treaty. Under Article 46 of the TEU, the provisions of the EC Treaty concerning the powers of the Court and the exercise of those powers apply to Article 47 of the Treaty on European Union. The Court is therefore competent to ensure that acts concluding CFSP agreements do not encroach upon the powers conferred by the EC Treaty on the Community ¹.

¹ Judgment of the Court of 12 May 1998 (airport transit), Commission v. Council, Case C-170/96, ECR, p. I-2763.

Where an action in the CFSP field provides for economic sanctions against a third country, implementation measures at Community level are necessary; they are taken on the basis of Articles 60 and 301 of the TEC. In the case of economic sanctions against individuals, recourse is had to Article 308 TEC. Nevertheless, the Council has broadly interpreted Articles 60 and 301, using them as a legal basis for adopting sanctions against persons or associations which actually exercised control over a country or part of a country. The Court exercises its judicial control with regard to all such implementing acts in accordance with the TEC.

II. Possible approaches

1. As regards judicial control by the Court of Justice of CFSP matters in general and international agreements in particular, the first possible option is that of maintaining the status quo, as described under I. Under this option, a change of the wording of Articles 60 and 301 TEC could be considered, so as to make explicit provision for the possibility of adopting economic sanctions against individuals on the basis of those two provisions.
2. The first option of extending the Court's powers would involve giving the national courts the possibility of using the preliminary ruling procedure on interpretation before the Court of Justice when they have to decide on questions relating to the implementation by the Member States of CFSP decisions to which they are required to give effect.
3. In Part I it was explained that economic sanctions against individuals are already subject to the Court's judicial control. If it was desired to expand this possibility of recourse to CFSP decisions which may affect persons other than from an economic point of view, consideration should be given to the possibility of giving individuals the right to institute actions before the Court of Justice:
 - either for the annulment of CFSP decisions which are of direct and individual concern to them (e.g. visa bans)

- or solely claims for damages based on the illegality of the act, but without the Court having the right to annul the act or declare it void.
4. Other options aiming to extend substantially the Court's jurisdiction may be considered but are likely to modify the institutional balance in the CFSP field. These would primarily be:
- giving the institutions and Member States the right to ask the Court to annul CFSP decisions on the grounds that they were taken in violation of the Constitution or of a rule of international law by which the Union or all the Member State have agreed to be bound,
 - extending the Court's jurisdiction to CFSP matters on the same conditions as those that apply in the areas currently covered by the EC Treaty.
5. All the options of extending the Court's jurisdiction referred to in paragraphs 2 to 4 may have an impact on the nature of the CFSP; they must inevitably be discussed by the Convention during its debate on the CFSP.
6. As regards the prior opinion provided for in Article 300(6) TEC, consideration could be given to introducing into the Treaty the possibility for an institution or a Member State to request such an opinion in order for the Court of Justice to examine whether a planned international CFSP agreement would be compatible with the provisions of the Constitution.
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