

CONV 402/02

CONTRIB 141

BEGELEIDENDE NOTA

van: het secretariaat

aan: de Conventie

Betreft: Bijdrage van de heer Farnleitner, lid van de Conventie en de heer Reinhard Rack, plaatsvervangend lid van de Conventie
"Extending the right of action for individuals before the European Court of Justice and the Court of First Instance"

De secretaris-generaal van de Conventie heeft van de heer Farnleitner, lid van de Conventie en de heer Reinhard Rack, plaatsvervangend lid van de Conventie, de bijdrage ontvangen die in bijlage dezes staat.

Extending the right of action for individuals before the European Court of Justice and the Court of First Instance

- A clarification concerning CONV 45/02 CONTRIB 25

Contribution by Hannes Farnleitner and Reinhard Rack
Members of the Convention

Contribution CONV 45/02 CONTRIB 25 by Hannes Farnleitner, Member of the Convention, already raised the issue that individuals have only limited rights to institute proceedings with the Court of First Instance and the European Court of Justice. In particular, individual persons may file actions for annulment according to Article 230 of the Treaty on European Union only under very restricted conditions.

Contribution CONV 45/02 CONTRIB 25 already referred to a possible solution of this problem. In the light of discussions in the Convention— especially in the framework of Working Group II Charter/ECHR - to date, this proposal for a solution is now further developed and put into more concrete terms, in order to take account of concerns that were voiced by a few discussants against an extension of the right of action for individuals.

1. The Issue:

According to Article 230, paragraph 4, TEU, individual persons may only institute proceedings against legal acts of a general nature with the European Court of Justice and the Court of First Instance if the specific legal act affects them directly and individually. The problem, in this connection, is the second requirement, i.e. to be affected "individually". In keeping with the case-law of the European Court of Justice and the Court of First Instance to date, an individual is affected by Community acts whenever the challenged measure concerns individual persons on account of certain attributes, which are peculiar to them, or by reason of factual circumstances, which differentiate them from all other persons, thereby distinguishing them individually in the same way as persons to whom an individual legal act is addressed.

In practice, the result is that actions brought by individual persons against general legal acts are not admitted in many cases because the individual, while being directly concerned is not individually affected. In the annex to Contribution CONV 45/02 CONTRIB 25 several examples were given on this point, which illustrate that this legal situation certainly has implications that citizens will find difficult to understand.

This gap in judicial protection can only be closed by amending the Treaties. The European Court of Justice, for example, recently refused to interpret Article 230, paragraph 4, TEU, in a broader sense, offering more judicial protection, in its judgment in the case *Unión de Pequeños Agricultores* of 25 July 2002 – C-50/00 P, lines 44 and following, since an interpretation in the light of the principle of effective judicial protection by the courts will not eliminate either the requirement in question, which is expressly contained in the Treaty on European Union, without the Community courts exceeding the competences conferred upon them by the Treaty. Although it is possible to envisage a different system for the judicial review of the legality of Community measures with a more general application, it is up to the Member States to reform the system that is currently in force.

In the course of the discussions in Working Group II Charter/ECHR, essentially two concerns were raised against an extension of the right of individuals to file actions.

Firstly, it was said that, as a matter of principle, any challenge by individual persons of legislative acts should be denied. In reply to this, it can be pointed out that according Article 230, paragraph 4, TEU, the currently applicable system already contains this option – albeit with very restrictive requirements.

Secondly, concerns were voiced that an extension of the right of action for individuals would lead to a "flood of actions" and thus overburden the Court of Justice. Although, Vassilios Skouris, Judge at the European Court of Justice, recently – when attending a hearing of Working Group II Charter/ECHR¹ - rejected these concerns by arguing that the risk of increasing the number of cases brought before the Court cannot form a criterion that needs to be taken into account when ensuring effective judicial protection.

General Advocate Francis Jacobs also dismissed this objection and recently advocated again an extension of the right of action for individuals². However, all these concerns should be taken seriously. The following proposal for a solution therefore presents a wording for Article 230, paragraph 4, TEU, that ensures effective judicial protection for individual persons, while at the same time precluding the much-feared "flood" of actions for annulment.

2. Proposal for a Solution:

As was already proposed in Contribution CONV 45/02 CONTRIB 25, the words "and individual" in Article 230, paragraph 4, TEU, could be deleted in order to improve the possibilities for individual persons to obtain judicial protection. In order to void any concerns, i.e. that this change in Article 230, paragraph 4, TEU, might result in a dramatic extension in the right of individual persons to institute proceedings and would thus overburden the European Court of Justice or the Court of First Instance, the words "in their legal position" could be added.

¹ See Working Group II, WD 19, pp. 3

² See Working Group II, WD 20.

Article 230, paragraph 4, TEU, would then read: *"Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct concern to the legal position of the former."*¹

With this wording, natural or legal persons could institute proceedings for annulment against legal acts of the Community in such cases where they are "concerned directly in their legal position". By putting the focus on the legal position of the plaintiff, those cases – certainly large in numbers – will be precluded that have only "economic reflex effects".

To illustrate this point, let us refer to the system used by the Austrian Constitutional Court in its judgments, where the problem of a "flood of actions" was solved in a similar manner, and where individual persons may also challenge a law or an ordinance only in such cases, where they are directly concerned in their legal position. This system has worked very well in practice and, in particular, has not caused the Austrian Constitutional Court an excessive amount of work

The outcome of this proposal for a solution is also in line with the approach taken by the Court of First Instance in the *Jégo-Quéré* case, judgment of 03 May 2002, T-177/01, which also focuses on the direct effect of a general act on the legal position of the plaintiff. However, the proposal submitted here, does not relate to another aspect of the *Jégo-Quéré* case, i.e. whether the plaintiff can have recourse to effective national judicial protection. In the case of *Unión de Pequeños Agricultores*, the European Court of Justice refused to put the focus on the availability of an effective national legal remedy, since the resulting consequence would be an inadmissible interpretation of the national procedural law.

¹ The future wording of Article 230 will, of course, also depend on the results achieved in Working Group IX (Simplification). The proposal for a solution that is presented here, which focuses on the direct concern to the legal position of the plaintiff, might also be feasible in connection with a possible new catalogue of legal sources, though.