

CERCLE I

Working Document I

NOTE

from :	Secretariat
to :	Discussion Circle I "Court of Justice"
Subject :	Access to the Court of Justice for individuals – possible amendments to Article 230, paragraph 4, of the EC Treaty

I. The problem

1. Under Article 230, paragraph 4, of the EC Treaty:

"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 and individual concern to the former."

2. According to the established case-law of the Court of Justice, the fact that a provision is general in scope does not rule out its direct and individual application to certain individuals. According to well-established case-law, a person is "directly concerned" by a Community measure, when the latter directly affects the legal situation of the individual and leaves no discretion to the addressees of that measure who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from Community rules without the application of other intermediate rules¹. Persons are "individually concerned" by an act which is not addressed to them if the act in question affects them by reason of certain attributes peculiar to them or by reason of circumstances which differentiate them from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person

¹ See in particular Court Judgment of 5 May 1998, Dreyfus v. Commission, C-386/96 P, ECR p. I-2309, paragraph 43).

3. addressed ¹. An act of general application (such as a regulation) can, in some circumstances, be of individual concern to certain natural or legal persons and thus be in the nature of a decision in their regard.
4. In the light of this case-law, the question is whether individuals may thus find it impossible to contest before the Court (now the CFI) allegedly illegal acts of general application directly concerning them. In other words, would this case-law prevent an individual from bringing before the Court of Justice the legality of an act of general application directly affecting his legal situation and from exercising his right to an effective remedy, as guaranteed under Article 47 of the Charter? This poses a particular problem with regard to self-executing acts of general application which have direct legal effects without the adoption of national legal measures (act of transposition) or Community legal measures (act of implementation). If such a measure included a ban directly applicable to an individual, that individual would be obliged to breach Community law, then appeal against the sanction which national courts could impose on him by reason of that breach. Can the fact that an individual affected by a Community measure is obliged to contest its validity before the national courts, by breaching the rules laid down by the measure and by invoking their illegality within the framework of procedures open to him, be considered to constitute adequate judicial protection?
5. This question was examined during the discussions of Working Party II on the Charter. Mr Vitorino presented working document 21 containing certain options. Mr Farnleiter, Mr Rack and Mr Meyer presented proposals to the Convention (CONV 45/02, 402/02 and 439/02). Mr Badinter and Mr Peltomaki also forwarded contributions to the discussion circle.
6. Examination of the following options apart, and taking into account the proposal made to members of the circle by Mr Badinter, it would in any event appear appropriate to simplify the wording of Article 230, paragraph 4. According to well-established case-law, the Court monitors the validity of legal acts in the light of their nature and effects, rather than their form or title? It would therefore be possible to amend the wording of Article 230, paragraph 4, as follows (it being understood that this change does not affect the scope of the provision):

"Any natural or legal person may, under the same conditions, institute proceedings against

¹ Judgment of the Court of First Instance of 3 May 2002, Jégo-Quéré v. Commission, T-177/01, not yet published.

legal acts addressed to or of direct and individual concern to that person". (This simplified wording could be a basis for other changes if one of the three options below were adopted).

II. Possible solutions

7. The first question is whether or not amending Article 230, paragraph 4, is essential to guaranteeing individuals' right to effective judicial protection of their rights under the Community legal order. In this connection, Mr Rodriguez Iglesias, President of the Court of Justice, speaking at the circle meeting on 17 February 2003, said that the current system based on the principle of subsidiarity in the sense that national courts in particular are responsible for protecting the rights of individuals, meets the essential requirements of effective judicial protection of the rights of those falling within the Court's jurisdiction, including fundamental rights (CONV 572/03). Advocate-General Jacobs did not consider it essential to amend the Treaty and suggested that the Court interpret Article 230, paragraph 4, in such a way as to recognise that an individual is "individually concerned by a Community measure where the measure is or is likely to be substantially prejudicial to his interests" ¹. The Court of Justice did not accept this interpretation of the condition of admissibility provided for in the abovementioned provision. It stood by its case-law on this point, emphasising that "where natural or legal persons cannot, by reason of the conditions for admissibility laid down in the fourth paragraph of Article 173 of the Treaty, directly challenge Community measures of general application, they are able, depending on the case, either indirectly to plead the invalidity of such acts before the Community courts under Article 184 of the Treaty or to do so before the national courts and ask them, since they have no jurisdiction themselves to declare those measures invalid (judgment of 22 October 1987, Case 314/85 Foto-Frost [1987] ECR 4199, paragraph 20), to make a reference to the Court of Justice for a preliminary ruling on validity." ² The Court added that "it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection." ³ It follows from the foregoing that changing the aforementioned condition of admissibility by mean of a judicial

¹ See Mr Jacobs's conclusions of 21 March 2002 in Case C-50/00 P, Unión de Pequeños Agricultores v. Council, not yet published.

² Judgment of the Court of Justice of 25 July 2002 in the case referred to in the previous footnote, paragraphs 40 and 41.

³ Idem, loc.cit.

decision would not appear to be an option at this stage. If, therefore, it was the will of the Convention to review the content of Article 230, paragraph 4, either the current text should remain unchanged, or other options should be examined.

7. In this context, it should be emphasised that the idea of establishing separate redress for breach of fundamental rights (similar to the "Bundesverfassungsgericht" or the "recurso de amparo") – proposed by Mr Meyer – was not adopted by the Working Group on the Charter for several reasons. It was emphasised in particular that it would in practice be difficult to draw a rigorous distinction between means concerning the protection of fundamental rights and other means through which the legality of a Community act would be challenged (in this respect, see the abovementioned statement made by Mr Rodríguez Iglesias, President of the Court of Justice, to the discussion circle, and the statement made by Mr Skouris, Judge at the Court, to the Working Group on the Charter).

Option A: Proposal by Mr Meyer to replace the word "and" with "or" in Article 230, paragraph 4, (CONV 439/02)

8. Article 230, paragraph 4, would read as follows:

"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 or individual concern to the former."

9. Mr Meyer is aware that this amendment could lead to an increase in the number of disputes, but feels that this is not a convincing argument. He also stresses that, in the light of the Treaty of Nice, these actions for annulment would be brought before the Court of First Instance and that the CFI's operating methods would therefore need to be improved accordingly.

Option B: Proposal by Mr Farnleitner and Mr Rack to delete the words "or individual" and replace them with the words "is of direct concern to the legal position of the former" (CONV 402/02)

10. In order to enable access to the Court of Justice in the above cases, Mr Farnleitner and Mr Rack proposed that Article 230(4) read as follows:
- "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."*
11. Mr Farnleitner and Mr Rack argue that the risk of an excessive number of actions would be limited as individuals need to prove that they are "directly concerned" by the act of general application in question. In this respect, they refer to the example of Austria, where individuals are guaranteed access to the Constitutional Court without this preventing the Court from establishing a number of admissibility criteria to "filter" actions. By emphasising the individual's "legal position", they seek to restrict the admissibility of actions for annulment in cases having "economic reflex effects" on the individual's position.

Option C: Proposal to maintain the current system but adding actions by individuals against Union acts of general application which concern them directly and which include no implementing measure

12. This proposal does not in any way affect the current balance or the role of national courts (preliminary ruling procedure); in other words, in principle the assessment of validity should first be brought before a national judge. The proposal does, however, widen individuals' access to the Court by giving them the possibility of challenging an act of general application directly concerning them when the act does not contain any implementing measure (either a Union or a national implementing act). This would avoid individuals feeling "forced" to breach a Community act and be sentenced by a national court, only then being able to challenge it before a national court which would decide to refer the case to the Court of Justice for an assessment of the validity of the Union act in question.

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13. Some members argued that individuals should not be able to challenge a legislative act before the Court of Justice, even though such a possibility existed in some legal orders.
- Mr Peltomaki submitted a contribution along these lines. Referring to the final report by Working Group IX on Simplification and the hierarchy of norms contained in it, Mr Rodríguez Iglesias emphasised that *"if such a hierarchy of secondary legislation were to be introduced, it would seem wise to adopt a restrictive approach with regard to actions by individuals against legislative acts and to take a more open approach to actions against regulatory acts"* (see CONV 572/03). Mr Vesterdorf stated that *"the desire broadly shared by members of the Court of First Instance would be to draw a distinction between legislative and regulatory acts by allowing individuals to challenge the latter category of acts (regulatory acts). With regard to the possibility of challenging legislative acts, the current conditions should be maintained so as not to take a step backwards"* (see CONV 575/03). In this respect, however, Court of Justice case-law has determined the admissibility of actions for annulment by individuals on the basis of the "effects" of the measure as opposed to the "nature" of the act in question.
14. The draft Article 24 of the Constitutional Treaty lists the Union's legal instruments (European laws, European framework laws, regulations, decisions, recommendations and opinions). The "regulation" is a non-legislative act of general application which may either be directly applicable or require a national transposition measure. The discussion circle should therefore subsequently examine the adjustments to be made to this provision in the light of the discussions in the Convention.
15. It is proposed that members of the discussion circle adopt a position on options A, B and C above at its meeting on 3 March 2003.
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