

CIRCLE I

Working Document 13

“Discussion Circle” on the Court of Justice

Subject: Remarks by Reinhard Rack on the Draft final Report of the Discussion Circle on the Court of Justice

Members of the “Circle of discussion” on the Court of Justice will find hereafter a paper by Reinhard Rack, alternate member of the Convention.

Remarks by Reinhard Rack on the Draft final Report of the Discussion Circle on the Court of Justice

First of all one has to recognise that the President of the group has done a great job in summarising the results of the discussion circle. Therefore the presented draft report in my opinion does not require major amendments. Though I have the following remarks:

On question (a):

I felt that on the question of appointment of judges there was a majority in the group to preserve the status quo (appointment by common accord of the governments of the Member States). There was also consensus that the assessment panel for judges should not be a “political” body but rather a body that “checks” the qualifications of respective judges. These points should be reflected in the draft.

On question (c):

I welcome the proposed changes in the name of the CFI which better reflect the range of activities of the court. Additionally I would like to hint at one point which was not in depth discussed by the group but was however mentioned by President Vesterdorf. The current title of the treaty chapter on the Community Courts is “Court of Justice”. This title does not reflect the fact that there are several levels of jurisdiction in the Union. The title should therefore be changed to “Jurisdiction of the European Union”.

On question (d):

I felt that there was a slight majority in the group in favour of improving the access for citizens to the court of justice. The main reason for this position, i.e. the very restrictive conditions on admissibility currently provided for in Art. 230 paragraph 4 TEC and the negative and hardly acceptable consequences thereof on the principle of effective judicial protection, should be clearly outlined in the draft.

Within that context, I would like to underline that the formulation *“taking account of the fact that, in the present decentralised system based on the subsidiarity principle, it was mainly national courts which were called upon to defend the rights of individuals”* in point 18 is completely misleading, as it gives the impression that national courts would be able to remedy the effects of an unlawful Community act. This contrasts with the settled case-law of the Court of Justice, according to which national courts are not competent to declare measures of Community law invalid (see case 314/85 *Foto-Frost* [1987] ECR 4199). Consequently, the only possibility for individuals not fulfilling all of the criteria set out in Article 230 paragraph 4 TCE to have access to a competent court consists in the referral of the matter before the Court of Justice according to Article 234 TCE. This possibility is however, as it has been underlined by Advocate General Francis Jacobs in his conclusions delivered on 21 March 2002 in the *UPA*-case (see case 50/00P, *Unión de Pequeños Agricultores/Council*), “not a remedy available to individual applicants as a matter of right”.

These deficits of the current system of legal protection of the Union have to be clearly reflected in the report to the plenary in order to put the latter in a position to carefully consider the consequences of its decision on possible amendments to the fourth paragraph of Article 230 TCE.

I am strongly in favour of the presidents' proposal for amendment of Art. 230 para. 4 TEC. I however oppose a distinction between regulatory and legislative acts when it comes to locus standi conditions.

Infringements of individual rights may occur through legislative acts as well as regulatory acts. Art. 27 para. 1 of the draft Constitutional Treaty (CONV 571/03) states that "a delegation may not cover the essential elements of an area. These shall be reserved for the European law or the European framework law." Distinguishing between legislative acts and regulatory acts would therefore deprive individuals of effective remedies against essential provisions of general application which might infringe upon their rights. The distinction between regulatory acts and legislative acts seems artificial and in contradiction to the principle of effective legal protection.

I welcome the proposed replacement of the word "decision" by "act" in order to preserve the existing case-law even with changed naming of legal acts.

On question (e):

I am in favour of streamlining the procedure of Art. 228 TEC. I could imagine to renounce the reasoned opinion in Art. 228 TEC, but there should be a right for a Member States to reply to the Commissions' "allegations" before court proceedings are initiated. A letter of formal notice should therefore be retained. I do not see a point in distinguishing between procedures of "non-communication" and other infringement procedures. Both procedures are equally important for the functioning of the Union. There is no reason to have a special procedure for "non-communication". In some cases it might even be doubtful whether a Member State has not transposed a framework law or has transposed it incorrectly. For instance in cases where the transposing law already existed before a framework law was enacted.

Moreover I refer to the joint contribution by Andrew Duff, Maria Berger, Elena Paciotti, Joachim Würmeling and Reinhard Rack concerning observations to the draft final report.
