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SELECT COMMITTEE ON
THE EUROPEAN UNION

# GOVERNMENT RESPONSES: MID-TERM REVIEW OF THE COMMON AGRICULTURAL POLICY; AND THE FUTURE STATUS OF THE EU CHARTER OF FUNDAMENTAL RIGHTS

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# TWENTY-SEVENTH REPORT

By the Select Committee appointed to consider European Union documents and other matters relating to the European Union.

ORDERED TO REPORT

**GOVERNMENT RESPONSES: MID–TERM REVIEW OF THE COMMON AGRICULTURAL POLICY; AND THE FUTURE STATUS OF THE EU CHARTER OF FUNDAMENTAL RIGHTS**

The Committee publishes as necessary Government responses to our reports. Two such responses to reports made this session are printed here. The reports are due to be debated in the House of Lords shortly.

**CONTENTS: GOVERNMENT RESPONSES**

# APPENDICES

## APPENDIX 1

**Government Response to the Tenth Report of the House of Lords Select Committee on the European Union, Session 2003-03**

MID–TERM REVIEW OF THE COMMON AGRICULTURAL POLICY

This reply to the House of Lords European Union Select Committee's report on Mid–Term Review of the Common Agricultural Policy: external implications (HL 62) is submitted on behalf of the Government by the Department for Environment, Food and Rural Affairs. The response addresses the recommendations as they are laid out in the report's summary of conclusions and recommendations (report text shown in bold below). The numbers refer to the paragraph number in which the recommendations appear in the report.

**104. It is essential that the Commission's recommendations on decoupling are agreed and applied in advance of the eastward enlargement from 2004 to ensure that any stimulation of production resulting from the application of EU agriculture policy is minimised (paragraph 42).**

We share the Committee's view. Decoupling will remove the perverse incentives to over-production in the current system and allow producers in both new and old Member States, to optimise, rather than maximise, production. Furthermore decoupling will also minimise the distortion of market signals in the accession countries when the CAP is extended to them. Many of the accession countries' agricultural sectors are in need of significant restructuring. We believe enhanced rural development measures would be the best way to support them.

**105. A necessary corollary to decoupling of subsidies from production is the abolition of market intervention and export subsidies. Change in emphasis from production and market support to the stimulation of structural change through modulation is even more essential in eastern European than in the EU15 (paragraph 43).**

In general it is true that the new Member States need to restructure their agriculture even more than the EU15. The predominant structure of farming in the new Member States—large numbers of small holdings with limited interaction with the markets—means that their agricultural productivity tends to lag some way behind levels in the EU15. This is why direct payments are being phased in and why the new Member States are being offered a broader and more generous rural development instrument. Rural development commitments for the new Member States are in excess of direct payment commitments for the period 2004-2006—this should help to prevent ossification of their current structure of farming. Furthermore, beneficial co-financing terms and an extended and adapted rural development regulation between 2004-2006 should help candidates further to restructure and to modernise their agricultural economies in their first years after Accession. Contrary to the implications of paragraph 102 of the report on decoupling, Poland has stated it intends to make use of the option available to new Member States to apply a flat rate, decoupled direct payment system and others are at least giving consideration to following suit. The UK supports the gradual reduction in CAP market support which will benefit the whole of the enlarged EU.

**106. As we recommend in paragraph 91, modulation should involve a larger proportion than the maximum of 6 per cent to be removed from direct subsidies and transferred to structural measures, and this should take place at a faster rate than the seven years (effectively ten, since the transfer would not start until 2007) recommended by the Commission (paragraph 46).**

The Government agrees that the proposed level of modulation funds to be made available for rural development may not be sufficient for a strengthened second pillar. We have led calls for a faster and larger transfer of funds to the second pillar. At the time of writing, the outcome of Council negotiations on CAP reform is not known.

**107. Serious consideration should also be given to transferring funds to Pillar 2 policies in the new Member States at a greater rate than in the EU15, possibly by skimming off a percentage of the yield from modulation in the current Member States (paragraph 47).**

The Commission proposal to transfer funds from direct payments to rural development is vital to meet our objectives for rural areas in the EU15; in fact we have called for a more signification transfer of resources. The new Member States will benefit from a more generous rural development instrument in the 2004-06 period as a result of the accession negotiations. We can look again at levels of Rural Development commitments when we come to set levels post–2006. We would want such allocations to be based on objective criteria. The UK receives an unfairly small share of Rural Development funds and we are actively seeking to increase this.

**108. Urgent consideration should be given to the formulation of proposals for the reform of the market regime for sugar and dairy products, which have particularly important implications for the new Member States. We consider the Commission's recent proposals (January 2003) for the dairy sector to be completely inadequate; they leave the market unliberalised and the market distorting intervention and export subsidisation mechanisms intact. They also go against earlier understandings under Agenda 2000 (paragraph 50).**

**109. Proposals for these two sectors should involve, most essentially, plans for the rapid phasing out of the delivery and production quotas linked to stepped cuts in support prices with a view to rapid abolition of market support and export subsidisation. A short time limit should be set for the further operation of milk and sugar quotas. Compensation for the removal of support should be incorporated into the plans for the payment of decoupled income subsidies (paragraph 51).**

**112. Urgent consideration should be given to the formulation of proposals for the reform of the market regimes for dairy products and sugar. We do not regard the latest proposals for modification of the dairy common market organisation as a valid contribution to trade liberalisation. These should involve, most essentially, plans for the rapid phasing out of the delivery and production quotas in both sectors, linked to stepped cuts in support prices with a view to rapid abolition of market support and export subsidisation (paragraph 59).**

Paragraphs 108, 109 and 112 (sugar aspects)

On sugar, the Government agrees that a high priority should be given to early and radical reform of the EU regime. The Commission has indicated that their report and conclusions will be issued shortly, and we welcome this. The Government believes that the current EU Regime, based on high internal prices, import controls and export subsidies, is unsustainable.

If the present CAP reform proposals for other sectors, including decoupled payments to farmers, are agreed this summer, we hope and expect that sugar would follow this model.

Paragraphs 108,109, and 112 (dairy aspects)

On milk, the Government shares the Sub-Committee's disappointment that the Commission has proposed the extension of quotas to 2015, despite the clear mandate from the Berlin Council for their

abolition. However, the price cuts proposed, which go much further than those agreed under Agenda 2000, are welcome as a stage towards the abolition of quotas, and a more market-orientated milk regime. (In our assessment, the cuts would probably result in the alignment of EC skimmed milk prices with those on the world market by 2008/09, although additional cuts of around 12% would still be required for butter). We agree that the direct aid in compensation for the milk price cuts should be decoupled, and therefore support the Commission's proposal to integrate the dairy premium into the single income payment.

**111. It is essential that the European Union agrees the proposals for the decoupling of subsidies from production. This is the only way that the EU can present a credible proposal to what is intended to be a "Development Round"—in other words providing real agricultural trade advantages to less developed countries—and strengthen its own negotiating position. We do not regard the Commission's draft current minimal EU proposal to Geneva as a valid contribution to progress, since it is based on the assumption that present methods of agricultural support will be maintained and that the EU will continue to support markets, subsidise exports and maintain prohibitive import barriers (paragraph 57).**

The Government supports decoupling of subsidies from production. We believe that the EU's current proposals on agricultural trade, submitted to the WTO in January, offer a valid contribution to the negotiating process although we share the Committee's views that we will need to move further. Decoupling would provide the opportunity.

**114. The EU has a responsibility towards the world community, particularly towards less prosperous members, which it has yet to address properly. We share DfID's disappointment that the Commission has not looked in more detail at the impact of its proposals on developing countries. If there is to be any gain for the less developed countries in the mid-term review process it has to come from a significant reduction in the level of EU subsidisation of production. Only in this way can subsidised competition in the domestic markets of these countries and on the international market be reduced. For this reason it is not only necessary that the EU's subsidies be detached from production, but also that the level of subsidy payment to the individual producer be reduced. It is clear that large subsidies to large farms are a positive incentive to low cost production which will continue to undercut international markets—whatever from the subsidy may take. We deplore the complacent attitude of a number of Member States' governments to this problem, as revealed in the seven ministers' open letter of 23 September (paragraph 77).**

The Government shares the Committee's concern for the less prosperous members of the world community and agree that if the current proposals for CAP reform are to offer any real gain to less developed countries it can only come through significant reductions in production–related subsidies. The Doha Trade Round commits all member countries to substantial reductions in market protection and trade–distorting subsidies and we support the current CAP reform initiative as a means to helping achieve this.

**115. We therefore recommend that in order to act as intended, as an income subsidy only, the level of subsidy receipts allowed to individual holdings should be capped, as originally proposed, but at a much lower rate than that recommended by the Commission. The converted subsidy should be utilised only as a transitional income supplement, to be used only where hardship is created by elimination of EU support to production or in economically disfavoured areas (paragraph 78).**

The UK did not support the Commission's earlier idea to cap the subsidies available to large farms. This would discriminate against the UK, which has more such farms than most other Member States, and discriminate against employed labour which tends to be more important on the larger farms. We will argue for a fair, transparent and simple method of degression with flat–rate, across–the–board

reductions. Our experience of administering modulation in the UK supports this approach. A simpler approach would avoid these discriminatory impacts, encourage efficient restructuring in rural areas and provide a simple way of raising funds for rural development.

**116. As part of the mid–term review the EU must abandon its direct subsidisation of exports and scale down its import tariffs. Developing country trade is particularly affected by the EU's subsidised exports of wheat, dairy products and sugar. It is therefore all the more essential that the EU abandons its direct subsidisation of these exports and takes early steps to reform its dairy and sugar market regimes which remain the two outstanding examples of unreconstructed common market organisations. The Commission's January 2003 proposal to continue dairy quotas is a step in the wrong direction (paragraph 79).**

The Government supports the substantial reduction, with a view to phasing out, of all forms of export subsidies and substantial reductions of import tariffs. We are committed to continue negotiating with other WTO members to achieve a successful agreement on these issues in the ongoing WTO negotiations on agriculture. We support the need for reform of the diary and sugar market regimes including the abolition of dairy quotas (see also replies to paragraphs 108, 109 and 112).

**117. Where reform of European agriculture policy and the introduction of the "Everything But Arms" agreement harms the incomes of countries which are dependent on the high prices maintained in the EU market through long-standing preferential access agreements, the EU's development effort to diversify the economies of these countries should be intensified (paragraph 80).**

The Government is working with multilateral and other bilateral agencies to build trading capacity within developing countries so that they are better able to compete on the world markets. For example, we are working with some ACP countries, such as Barbados, to help them adapt for the reform of the EU sugar regime once the EBA agreement is fully implemented.

**119. An important conclusion to be drawn from the evidence presented by less developing country and development agency representatives is that reduction of subsidised competition and the lowering of import barriers is only part of the solution to the problem of increasing the agricultural trade of developing countries. As important is the removal of health, technical and quality obstacles. We therefore recommend that more emphasis should urgently be given to development projects which will assist less developed countries to meet EU health, safety, quality and labelling requirements (paragraph 81).**

We agree that more emphasis should be given to help developing countries in the area of standards. We work with a number of multilateral agencies and in particular through the Standards and Trade Development Facility of the World Bank with the WTO, FAO, and WHO which delivers capacity building to developing countries to meet the Doha objectives. DfID also supports developing country representation at a number of international committees to support the interests of developing countries and ensure that their views are taken into account in the standards-setting process. The European Commission has a number of development assistance projects on Sanitary and Phytosanitary (SPS) and Technical Barriers to Trade (TBT) matters, which DfID contributes to.

**120. It is essential that the cross–compliance measures and the closely allied Farm Advisory system recommended in the mid–term review proposals are sufficiently effective to ensure that possible intensification stimulated by the reduction of support to production is discouraged (paragraph 90).**

On **cross-compliance**: The Government anticipates that the overall effect of de–coupling will be to reduce the incentive for production. We acknowledge that a degree of intensification may ensue, but other farms may see significant reductions in the intensity of production and problems of under–grazing. We are continuing to work to establish a meaningful set of cross–compliance conditions attached to Pillar I payments to counter potentially negative environmental effects. The proposals envisage that the redeployment of some Pillar I funds to Pillar II schemes will target money at increasing environmental protection and enhancement. Furthermore, in the event of changing land–use practices, there are a number of existing policy mechanisms which provide safeguards as well as incentives for enhancement of the environment.

On the **Farm Advisory System**: The Government agrees with this view and with the related comments in paragraph 89 on the need for a flexible risk-based approach to environmental regulation relying more on self–regulation and effective delivery of advice. The government does not consider that the Commission's proposed farm advisory system would fit well into this model, and is pressing for changes designed to yield better value for money and promote more effective outcomes.

**121. The switching of funds from support of production to structural, environmental and other Pillar 2 considerations proposed by the Commission amounts to only a possible total of €1.5 billion for the EU15 by the end of a seven year period. We consider that this is inadequate to have any noticeable effect. We therefore recommend that—subject to careful monitoring and assessment of value for money—the modulation percentage should be considerably more than the maximum of 19 per cent proposed under the Commission's "degressive modulation" proposal of 21 January 2003 and that the time allotted to reach the full figure should be considerably less than what has now effectively become ten years. We deplore the delay in the application of this measure until 2007, as recommended in the January modification of the Commission's proposals (paragraph 91).**

The Government agrees that the proposed level of modulation funds to be made available for rural development may not be sufficient for a strengthened second pillar. We are therefore continuing to press for a faster and larger transfer of funds to the second pillar.

**122. A revised CAP should be less complicated, less bureaucratic and less centralised. It should offer farmers more choice about how to run their businesses. In this respect these proposals fall far short of the Commission's commendable intentions to deliver such reforms (paragraph 92).**

We agree with the Committee's assertion that a revised CAP should be less complicated, less bureaucratic and less centralised. Decoupling will lead to significant simplification for farmers, the industry, and the various agencies involved in distributing and enforcing the CAP. We also agree that CAP reform will offer farmers more choice, as they will be able to optimise their production, as it will be market oriented. Although we would have liked the Commission's proposals to go further, we do not believe they fall short of the Commission's intentions, as they do go a long way in the direction of developing a sustainable, simplified and market oriented common agricultural policy.

**123. If environmental measures are to be effective it is important that, rather than being of an essentially prescriptive nature, the new policies envisaged within the mid–term review proposals should be designed to encourage and reward good land management. We recommend that the type of subsidised "best practice" measures being developed in the UK and in some other EU Member States should be adopted at the general European level (paragraph 93).**

The Government agrees that rural development measures should be sufficiently flexible to allow Member States to target rural development priorities including good land management. 'Agri–environment measures are a compulsory requirement of Rural Development Programmes. To ensure agri–environment schemes reflect the varying needs and characteristics of each Member State, the

responsibility for scheme design should remain at Member State level. The Government agrees, however, that having such agri–environment measures should continue to be a compulsory element of Rural Development Programmes. The Government will consider, in advance of decisions on the next EU Financial Perspective, whether further changes are needed to the EU framework to ensure that a consistently high contribution to objectives such as the protection of biodiversity are made across the EU's Member States.

**124. Early agreement and the application of the Commission's cross–compliance proposals is if anything more urgent in the new Member States than in the EU15. This is because there are many habitats and species still surviving in Eastern Europe which are now rare in the west. Faire to apply effective cross–compliance measures could result in these being endangered by the intensification in these regions (paragraph 48).**

The Government supports the principle of cross–compliance, which, among other things, seeks to establish minimum standards for environmental conditions on farms. Under the current proposals, farmers would also have to ensure minimum maintenance levels to avoid deterioration of habitats.

While the Government acknowledges that there may be a number of vulnerable habitats and species in Eastern Europe, we envisage that effective implementation of all relevant EU legislation in accession States, and not only that which relates to cross–compliance, would ensure that habitats and species are adequately protected.

## APPENDIX 2

### Government Response to the Sixth Report of the House of Lords Select Committee on the European Union, Session 2003-03

THE FUTURE STATUS OF THE EU CHARTER OF FUNDAMENTAL RIGHTS

The House of Lords Select Committee on the European Union published its report "The Future Status of the EU Charter of Fundamental Rights" on 3 February 2003. The Government response addresses the Committee's key conclusions (reproduced in the paragraphs in bold below.)

**Any new constitution for the Union should be accompanied by a bill of rights.**

1. The Government does not accept that any new constitution has to have a bill of rights. It does agree that the treaties should be clarified and simplified and that they should state the fundamental values that guide the Union. Currently, the Union is obliged to respect as general principles of Community law fundamental rights as guaranteed by ECHR and the constitutional traditions common to the Member States. Those sources of law are external to the Union's legal order. There is a respectable argument, based on the avoidance of unnecessary duplication and legal confusion, for retaining that system.

**The Charter, preferably appropriately revised but if that is impracticable then as it stands, could be incorporated into the new constitution so as to constitute the requisite bill of rights.**

2. The Government agrees that the Charter was not drafted in a form suitable for legal status. We are currently considering whether the changes proposed by the Convention's Working Group on the Charter satisfy our concerns to an extent which would allow us to consider a change in the legal status of the Charter.

**If this Charter option is adopted great care must be taken via the "horizontal" clauses to ensure that Union and Community competences are not thereby enlarged and that the Charter rights are enforceable only in respect of the acts of the EU or its institutions within their respective competences or the acts of Member States in relation to the implementation of EU law.**

3. The Government agrees.

**An alternative course would be for the Union to accede to the ECHR so that the ECHR became the Union's bill of rights. Here, too, however, the accession should not enlarge Union competences or the competences of Union institutions.**

4. Accession to the ECHR is seen by most EU partners as complementary, not alternative, to incorporation of the Charter. The Government agrees that, in the even of accession, great care would need to be taken to ensure that there is no enlargement of Community/Union competence.

**The main difficulty with accession by the Union to the ECHR is that the necessary changes in the ECHR Treaty would have to be agreed upon by all its signatories. This unanimity might be very difficult, politically, to achieve. The difficulty would be enhanced by the need to obtain unanimity also on the reservations or derogations to accompany accession.**

5. The Government agrees that the necessary changes to the ECHR to allow the EU to accede would have to be agreed upon by the signatories to the ECHR. Similarly, on accession, the EU would have to decide if it should make any reservations or derogations in respect of those matters within its competence. The Member States would also retain their own reservations and derogations in respect of those matters within their competence.

**There is no conceptual reason why the Charter option and the accession to the ECHR option should not be combined. The combination, if it could be brought about, would provide maximum protection to individual citizens in respect of any alleged breach of fundamental rights by the EU or its institutions.**

6. The Government agrees with the theory of the first proposition (but would have many objections to putting this into practice). On the second, it should be borne in mind that the ECHR is a floor not a ceiling so far as human rights standards are concerned.

**The extent of the practical benefits to be brought to individual citizens either by incorporation of the Charter, or by accession of the Union to the ECHR, or by both, is likely to be limited and disappointing unless there is at the same time a reform of the remedies obtainable by citizens from the Community courts. Without this reform the new bill of rights may take on the appearance of a false prospectus. A review of the jurisdiction of the ECJ and the rules governing and limiting the ability of individual citizens to obtain remedies from the Community courts should be put in hand immediately, with a view to implementation of any necessary reforms at the same time as the coming into effect of the new bill of rights.**

7. We are not in favour of individual right of access to the European Court of Justice. The issue of remedies for breaches of the ECHR is dealt with adequately in our view by the ECHR and the Human Rights Act. (this issue has been reviewed in the Convention by a special Discussion Circle on reform of the ECJ. A copy of the Group's agreed final report is enclosed.)[1]

**Specific/Detailed**

***(a) The Charter—horizontal clauses and commentary***

**The horizontal clauses provide significant advantages for legal certainty as regards the definition of competences. It is essential to ensure that the horizontal clauses are as clear and unambiguous as possible (paras 91, 92). They may need to be strengthened to ensure that the Charter does not extend the competences of the Community and the Union (para 96, 99, 101).**

8. The Government agrees and is currently considering amendments to the horizontal clauses proposed by the Convention Working Group.

**If the Charter is to be incorporated into the Treaty there is a need for an authoritative commentary or "interpretation", which should be published and be readily available to the citizen and the courts (para 94). It should include a statement to the effect that the Charter is not intended to fetter the powers of Member States outside the field of Community/Union law to pursue whatever policies they choose (para 98).**

[1] See Appendix 3

9. The Government agrees.

***(b) Accession to the ECHR***

**The EU should have legal personality (para 119).**

10. The Government is considering this proposal.

**If the Union were to accede to the Convention, the Member States should be able to agree any qualifications or reservations (paras 122, 123).**

11. The Government agrees.

**The autonomy of the Community legal order would not endangered by EU accession to the ECHR. The position of the ECJ would be analogous to that of national constitutional or supreme courts in relation to the Strasbourg Court. But any uncertainty as to the application of the domestic remedies rule should be clarified in the instrument of accession (paras 126, 130 and 131).**

12. The Government tends to agree with those who say that the autonomy of the Community legal order would not be endangered by EC/EU accession to the ECHR. The ECJ would remain the "sole supreme arbiter of questions of Union law and of the validity of Union acts". The ECHR would exercise, as a specialised court, an external control on the EU institutions as it already does with national courts of the Member States. The Government is considering this issue further.

***(c) Remedies***

**If incorporation of the Charter is to confer any real benefit on individuals, the rights that will have been created will need effective remedies in order to give those rights substance and make them meaningful (para 142).**

13. Effective remedies for rights accepted by the Member States should already be available under national law. It is for the Member States to agree what, if any, further remedies may be required at Union level (see also the final report of the Convention Discussion Circle on the ECJ, enclosed with this response).[2]

**No matter within the scope of the Charter and within EU competences should be outwith the jurisdiction of the ECJ. The Court should have jurisdiction over Second and Third Pillar matters, and over all EU institutions and bodies (paras 146, 148, 150).**

14. The Government does not agree. It does not and cannot support any extension of ECJ jurisdiction over CFSP. Foreign policy is an area where national courts have not traditionally exercised jurisdiction or have been reluctant to interfere. There is no ECJ jurisdiction in CFSP at present nor should there be, in respect of an area in the EU which is intergovernmental. CFSP is inherently different from other Union activity in the nature of the powers exercised—these are essentially

[2] See Appendix 3

executive functions exercised at the international level rather than legislative powers impacting on individuals.

15. Similarly, on police and judicial co–operation, we must ensure the right balance is struck. The Government is firmly opposed to the general communitisation of criminal procedural law. It is also opposed to the creation of a European Public Prosecutor. The Government is therefore opposed to any general extension of ECJ jurisdiction in this area. The JHA Working Group report recognised the close link between criminal law and national structure. For that reason, although the Government is willing to consider preliminary rulings jurisdiction for the Title on the Area of Freedom, Security and Jurisdiction in Part II of the draft Constitutional Treaty, it should be limited to ensure that Member States can restrict the courts or tribunals competent to refer a case to the ECJ.

**The standing rule in Article 230(4) TEC should be re–examined. We urge the Government to press the Convention to do so as a matter of urgency, working in close conjunction with the Community Courts (para 156).**

16 This issue was examined in some detail by the Convention Discussion Circle on the ECJ, in which Baroness Scotland participated. That Group heard that both the ECJ and Court of First Instance were divided on the need to relax the standing rule in Article 230(4) TEC and could itself reach no consensus on the matter. Baroness Scotland pointed out that the situation in some national jurisdictions, including the UK, meant that there was no practical gap or lacuna to be addressed. A copy of that Group's report is enclosed with this response.[3]

**The resources of the Community Courts and the Strasbourg Court need strengthening to enable cases to be decided within a reasonable time (para 133).**

17. The Government attaches great important to the Courts' work. Improving their effectiveness is a key aim. We will work to ensure the Courts have resources to do their job properly and efficiently. Changes under the Treaty of Nice, which came into force on 1 February, will also facilitate the allocation of work between the European Court of Justice (ECJ) and the Court of First Instance (CFI), as well as providing for judicial panels to be attached to the CFI. Work is underway to implement these changes which should enable the Courts to carry out their work as efficiently as possible.

18. As for the ECHR, a three-year reform programme aimed at reducing the backlog is in train. The programme includes a significant uplift in resources of £9m extra over 2003-5; the UK's share is currently estimated to be around £1.2m.

**Recommendation**

**The Committee considers that incorporating the Charter into the Treaties raises important questions to which the attention of the House should be drawn and recommends the Report to the House for debate.**

19. The Government would be happy to participate in any debate the House may decide upon.

(JACK STRAW)

Foreign and Commonwealth Office 29 May 2003

[3] See Appendix 3

**APPENDIX 3**

**Report of the discussion circle on the Court of Justice**

**Annex A**

**THE EUROPEAN CONVENTION**

THE SECRETARIAT

**Brussels, 25 March 2003 (26.03)**
**(OR. fr)**

**CONV 636/03**

**CERCLE I 13**

**REPORT**

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| from : | Chairman of the discussion circle on the Court of Justice |
| to : | Members of the Convention |
| Subject : | **Final report of the discussion circle on the Court of Justice** |

1. Following the definition of the framework of proceedings by the Praesidium (see Annex), the discussion circle met four times, namely on 17 and 24 February and on 3 and 17 March 2003. It heard Mr Rodriguez Iglesias, President of the Court of Justice, Mr Vesterdorf, President of the Court of First Instance, and a delegation from the Council of the Bars and Law Societies of the European Union (CCBE), made up of Lord Brennan QC and Mr Berrisch, Mr Brouwer, Mr Kahn and Mr Waelbroeck.

2. The discussion circle also wondered whether it should look into the question of the competence of the Court of Justice with regard to Union acts relating to areas falling within the CFSP[4], following abolition of the pillars. At the meeting on 17 March 2003, it was agreed that the circle would discuss this point at a subsequent meeting and that it could pass on any proposals at a later date and separately from this report.

These conclusions refer to the points in the framework, in order.

**On question (a) of the framework**

4. The circle discussed the provisions of the Treaty of Nice on the number of judges and Advocates–General for the Court of Justice and the Court of First Instance. The circle felt that the provisions should remain unchanged in this regard.[5]

[4] As regards JHA, the circle took due note of the recommendations in the report by Working Group X on Freedom, Security and Justice.

[5] In this context, thought must be given to the question whether to maintain the current number of judges (11) sitting in the Grand Chamber set up by the Treaty of Nice (second paragraph of Article 16 of the Protocol on the Statute of the Court of Justice) after enlargement.

5. On the procedure for appointing judges and Advocates-General to the Court of Justice (hereinafter the Court) and the Court of First Instance (hereinafter the CFI), most members of the circle were in favour of maintaining the status quo (appointment by common accord of the governments of the Member States). However, some members felt that appointment should be by act of the Council and, of these, several felt that the Council should act by a qualified majority.

6. The circle also felt it was appropriate to set up an "advisory panel", which would have the task of giving the Member States an opinion on whether a candidate's profile was suited to the performance of his/her duties, particularly on the basis of objective criteria relating to professional qualifications. The panel—whose deliberations would not be public and which would not hold any hearings—might be made up of former members of the Court and representatives of national supreme courts, while the European Parliament might also appoint a legal expert. However, one member was opposed to the idea of the European Parliament's involvement because he saw in it a danger that the appointment process would become politicised. The circle emphasised that setting up a panel of this kind might make Member States more demanding in the choice of candidates they put forward. The circle also felt that Member States should continue to put forward only one candidate.

7. As for the length of the term of office of members of the Court, the circle took due note that both the President of the Court and the President of the CFI, while preferring the present system, were open to the possibility of introducing a longer and non-renewable term. If this were to be the case, they expressed a preference for a 12-year term as a non-renewable nine-year term could lead to major practical problems, given that half of the Court would be renewed every four and a half years. The circle drew attention to the fact that, particularly in the case of a non-renewable term, a decision would have to be made on the length of the term of office of a judge who replaced another in the event of death or resignation.[67] Moreover, the appointment would refer to the post, and therefore the possibility that an Advocate–General (or a judge) could be appointed judge (or Advocate–General) would not be ruled out.

8. The circle felt that the Constitution might make a distinction between the system of terms of office for the Court and the CFI. Most members of the circle were in favour of prolonging the term of office of members of the Court and making it non–renewable. However, other members pointed out that the current system had worked well and that it was preferable to keep it. In any event, the circle proposed in this context that the Treaty should explicitly mention the independence and impartiality of judges. The circle agreed to retain the current system for judges at the CFI (renewable six–year term).

**On question (b) of the framework**

9. The circle welcomed the idea of amending Articles 225a, 229a and 245 TEC. Members were open to the possibility of providing that the Council would act by a qualified majority, rather than unanimously, as was the rule at present. This would apply in particular to Article 225a TEC on the setting up of judicial panels.

10. As regards Article 229a TEC, most members were also in principle in favour of the Council acting by a qualified majority.

11. Finally, Article 245 TEC on the Statute of the Court of Justice currently provides for a unanimous Council decision, except in the case of Title I of the Statute, which may be amended only by the Treaty revision procedure. On this point, the circle was in principle in favour of amending Article 245 TEC in such a way that the Council acts by a qualified majority except with regard to Title I and for language matters (Article 64 of the Statute), where it would act unanimously. On language matters, some members made the point that the Court's current practice of not giving judgment in a case until the judgment had been translated into all the languages should be changed; the judgment could be published in the language of the proceedings and the other language versions could be

6 Either his term of office would end at the same time as the term of the judge he was replacing, or there would be express provision for possible renewal, or the term of office of the replacing judge would begin when he was appointed for a full term.

7 The circle would also like to draw attention to the fact that, when such a system entered into force, consideration would have to be given to the consequences for terms of office currently in force.

available over the following six months. This change in practice would not require any amendment of the Treaty.

12. The circle took the view that the legislative procedure should apply to the abovementioned provisions. One member stated that he could agree to the Council acting by a qualified majority, but without application of the legislative procedure.

**On question (c) of the framework**

13. With regard to the names of the Court and the CFI, the circle felt that the title of the Court should not be changed but simply adapted in the light of the fact that the "European Communities" would no longer exist. The circle was mindful of the fact that the name of the Court had existed for 50 years and that it would not be advisable to change it. The Court might therefore be called the "**Court of Justice of the European Union**".

14. As for the name of the CFI, the circle noted that in the near future when judicial panels would be set up for specific cases, the CFI would not always be a court of first instance, but might also hand down final decisions. The current name would therefore no longer be appropriate. Nevertheless, for all direct actions not covered by the jurisdiction of the judicial panels, the CFI would act at first instance. The circle was therefore in favour of changing the name of the CFI, while wishing to avoid any confusion at all with the Court. Taking these factors into account—as well as the need to find a name which would not pose any translation difficulties—the circle put forward the possibility of using the name "**Common Court of the European Union**"[8], to express its future position as the basic, general court and to distinguish it from the "specialised courts". There was agreement that, in any event, the new name should seek to preserve the unique nature of the Court. The circle thought it would be helpful if the Legal Services of the three institutions were asked by the Chairman of the circle to let him have their suggestions for an appropriate name for the CFI.

15. The judicial panels provided for in Article 225a are to hear and determine at first instance certain classes of action or proceeding brought in specific areas. None as yet has been set up but one is planned for actions brought by Union employees and another for Community industrial property rights (patents). Others may be envisaged in the future. The current name could stand, which would not prevent these panels being called "courts", as in the case of the "Community Patent Court", in accordance with the political agreement in the Council on 3 March 2003. However, it seems preferable to call them **"specialised courts"**. That name would have the advantage of avoiding confusion in certain languages with the "chambres" for certain specific cases, which might be set up within the Court (or the CFI), as is the case in Member States' supreme courts.

16. Finally, the circle felt that the Constitution might state explicitly that the Union has a judicial system which comprises the Court of Justice, the CFI, the specialised courts and the national courts whose role as ordinary law courts of the Union could be highlighted in the Constitution. However, the circle pointed out that this proposal did not imply the creation of new institutions and that the Court of Justice would remain at the centre of the Union's judicial system, since institutional unity must continue to exist.

**On question (d) of the framework**

17. On the question of possible amendments to the fourth paragraph of Article 230 of the TEC, he circle discussed several possible options on the basis of a working paper prepared by the Secretariat.

18. It emerged from the discussion that the circle was clearly divided into two groups. For the first group, the current wording of the provision satisfied the essential requirements of providing effective judicial protection of the rights of litigants, taking account of the fact that, in the present decentralised

[8] ("Tribunal général de l'Union européenne", "Allgemeines Gericht der Europäischen Union", etc.)

system based on the subsidiarity principle, it was mainly national courts which were called upon to defend the rights of individuals and which might (or should, if at last instance) refer questions to the Court for a preliminary ruling on the validity of a Union act; it would therefore not be necessary to make any substantive changes to the fourth paragraph of Article 230. These members felt, on the other hand, that it would be appropriate for the Constitution to mention explicitly that, in accordance with the principle of loyal cooperation as interpreted by the Court of Justice, national courts are required , so far as possible, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the legality of any decision or other national measure relative to the application to them of a Community act of general application, by pleading the invalidity of such an act. It is in fact for the Member States to establish a system of legal remedies and procedures which ensures respect for the right of individuals to effective judicial protection as regards rights resulting from Union law.[9]

19. According to the second group, the conditions of admissibility laid down in the fourth paragraph of Article 230 ("of direct and individual concern") for proceedings by individuals against measures of general application were too restrictive. Some members therefore proposed the following solutions:

(a) separate the two conditions, which would no longer be cumulative;

(b) replace "and individual" by "and affects his legal situation";

(c) maintain the current wording and add "or against a measure of general application which is of direct concern to him without entailing any implementing measure";

(d) leave the current wording for legislative acts (henceforth laws and framework laws) and allow referral to the Court of Justice for regulatory acts; these could be the subject of proceedings where they are of direct or individual concern to an individual;

(e) same as above, but giving individuals the right to bring proceedings against legislative acts of the Union which do not entail any implementing measure;

The introduction of a specific right to bring proceedings for the defence of fundamental rights was proposed by some members[10] jointly with the proposal in subparagraph (a) above.

20. A majority of members of the group were in favour of amending the fourth paragraph of Article 230, to read as follows:

> *"Any natural or legal person may, under the same conditions, institute proceedings against an act addressed to that person or which is of direct and individual concern to him, and against [an act of general application][a regulatory act] which is of direct concern to him without entailing implementing measures"*.

21. The addition of the words "without entailing implementing measures" aims to ensure that the extension of a private individual's right to institute proceedings would apply only to those (problematical) cases where the individual concerned must first infringe the law before he can have access to a court. This wording enables private individuals to contest before the Court (CFI) an act containing, for example, a prohibition, but no implementing measure, as the individual concerned can apply for its annulment if he can demonstrate that he is directly concerned by the regulatory act in question.

22. A majority of those members who wanted the fourth paragraph of Article 230 to be amended would prefer the option mentioning "an act of general application". However, some members felt that it would be more appropriate to choose the words "a regulatory act", enabling a distinction to be established between legislative acts and regulatory acts, adopting—as the President of the Court had suggested—a restrictive approach to proceedings by private individuals against legislative acts (where

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[9] CJEC, judgment of 25 July 2002, Case C-50/00 P, Unión de Pequeños Agricultores , paragraphs 41 and 42.

[10] See WD 3 by Mr Meyer.

the condition "of direct and individual concern" still applies) and a more open approach as regards proceedings against regulatory acts.

23. Furthermore, following a proposal along these lines, the circle seems amenable to a change merely of wording, not changing the scope of the fourth paragraph of Article 230, consisting in deleting the words "although in the form of a regulation or a decision addressed to another person". A request was also made to replace the word "decision" by "act". These amendments reflect the case–law of the Court.[11]

24. As regards the application of Article 230 TEC to the agencies and bodies of the Union, the circle noted that in general the acts setting up agencies contain provisions for means of redress before the Court of Justice as regards legal acts adopted by those agencies.[12] An analysis of these acts—basically covering the agencies and bodies coming under the EC Treaty—shows that there are several types of provision:

- the Court of Justice is competent to act on proceedings instituted against the agency in accordance with the conditions laid down in Article 230[13];
- any act of the agency, implicit or explicit, may be referred to the Commission with a view to verification of its legality, and the Commission's decision can then be the subject of proceedings for annulment before the Court of Justice [14];
- the act is silent on verification of the legality of acts of the agency.[15]

25. On account of this, somewhat disparate, practice for verification of the legality of acts of the agencies in the EC Treaty framework, the Commission[16] recommended the European Parliament and the Council to standardise the arrangements by making Article 230 TEC applicable to proceedings contesting acts of all the agencies. The argument in favour of this approach is, in particular, that the principle of an effective judicial guarantee, as recognised by consistent case–law (and now included in Article 47 of the Charter), requires that no contested act of an institution, a body or an agency can escape judicial scrutiny of its legality. It is also impossible to state categorically, when an agency is set up, that it will not perform such acts, even if the Regulation establishing it does not give it power to adopt decisions in the formal sense.

26. In the light of the foregoing, a majority of members of the circle recommend that Article 230 TEC be amended so as to cover, in addition to legal acts adopted by the institutions, those of the Union's *bodies and agencies*. It is understood that proceedings instituted against a body or an agency will be admissible only if they have adopted a "legal act", within the meaning of the case–law of the Court; the act establishing the agency might also lay down specific arrangements for the exercise of control of the agency or body in question.[17] It was pointed out that the circle's approach on this point related only to those bodies and agencies covered by the EC Treaty, since those operating in the framework of the CFSP and police and judicial cooperation in criminal matters had to be examined in the light of the

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[11] See Case 60/81, IBM v. Commission (Reports 1981, 2639, paragraph 9): "in order to ascertain whether the measures in question are acts within the meaning of Article 173 it is necessary, therefore, to look to their substance. According to the consistent case law of the Court any measure the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position is an act or decision which may be the subject of an action under Article 173 for a declaration that it is void. However, the form in which such acts or decisions are cast is, in principle, immaterial as regards the question whether they are open to challenge under that Article".

[12] See Secretariat working document on the right of redress against acts of agencies of the Union (WD 9).

[13] As in Council Regulation No 1035/97 of 2 June 1997 establishing a European Monitoring Centre on Racism and Xenophobia (Article 15) (OJ L 151, 10.6.1997, p. 1).

[14] See Council Regulation (EC) No 2062/94 of 18 July 1994 establishing a European Agency for Safety and Health at Work (Article 22).

[15] See Regulation (EC) No 1406/2002 of the European Parliament and of the Council of 27 January 2002 establishing a European Maritime Safety Agency.

[16] See COM (2002) 718 final of 11 December 2002, on the operating framework for the European Regulatory Agencies, pp. 14 and 15.

[17] In particular, as regards the possibility granted to the Court to overturn a contested act (case of the Trade Marks Office) or as regards persons actively entitled to institute proceedings (e.g. Trade Marks Office or Plant Variety Office) or on the need first to institute proceedings before the Commission, if it is desired to retain this particular system.

provisions relating to those policies, since they were likely to present certain special characteristics which could be regulated in the acts establishing those bodies or agencies. One member of the circle could not associate himself with the circle's general recommendation on this point, claiming that it had major implications and should be examined subsequently, taking account of the special characteristics of each agency.

27. Finally, some members asked that Article 230 should be amended to include a right for national parliaments, the Committee of the Regions and/or regions to bring proceedings relating to subsidiarity. However, the circle agreed that these were issues which had already been examined by the Convention, and that it would be for the Praesidium rather than the circle to draw any relevant conclusions from whatever approach the Convention might adopt on the wording of the amendments to be made to Article 230 TEC.

**On question (e) of the framework**

28. As for the machinery for sanctions in the event of failure to comply with a judgment of the Court, the members noted that the present system was not efficient enough, as it might be years before a pecuniary sanction is imposed on States which the Court has found against. The circle therefore considers that means should be found to bring about greater effectiveness and simplicity in the machinery for sanctions for failure to comply with a judgment of the Court. The following suggestions were made here:

(a) to strengthen the sanctions machinery provided for in Article 228 TEC, by abolishing the two stages prior to referral to the Court for the implementation of sanctions, i.e. the stage of formal notice to the State in question and the stage of the Commission's reasoned opinion, or at least one of these stages[18]; a large majority was in favour of this proposal.

(b) to grant the Commission the possibility of initiating before the Court *both* (in the same procedure) proceedings for failure to fulfil an obligation pursuant to Article 226 TEC and an application to impose a sanction. If, at the Commission's request, the Court imposes the sanction in the same judgment, the sanction would apply after a certain period had elapsed from the date the judgment was delivered[19], if the defending State did not comply with the Court's ruling. A majority of members were in favour of this proposal. This would enable the procedure in particular for sanctions in cases of "non-communication" of a national transposition measure to be simplified and speeded up.[20]

(c) to grant the Commission the right to find that a State has failed to fulfil an obligation under the Constitution, after giving that State the opportunity to submit its comments. The State would have the right to institute proceedings before the Court asking for the Commission's decision to be annulled. This model follows Article 88 of the ECSC Treaty.

[18] This referral directly to the Court by the Commission, or by a Member State, would not be an innovation: it is already foreseen by the Treaty in certain cases, as for example if a State makes improper use of the exceptions provided for reasons of defence or in cases of crisis (Article 298).

[19] Some felt that the amount of the sanction (penalty payment) should in this case be calculated in such a way that the penalty payment took effect retroactively, from the date of the judgment.

[20] A distinction is made in practice between cases of "non-communication" – i.e. the Member State has not taken any transposition measure, and cases of incorrect transposition – i.e. the transposition measures taken by the Member State do not, in the Commission's view, comply with the directive (or framework law). The proposed arrangements would not apply in the second case.

**ANNEX**

**Framework of proceedings**

1. The plenary discussions on 5 and 6 December 2002 and 20 and 21 January 2003 revealed that some Convention members felt there was a need to look seriously at the implications that certain proposals made within the Convention might have for the operation of the Court of Justice. It was also considered important that the Court of Justice and the Court of First Instance be given an opportunity to express their views on matters concerning them which were being discussed within the Convention. The Praesidium therefore thought it advisable to set up a "discussion circle" on the operation of the Court of Justice.

2. This circle should in particular look at matters on which the Convention has not yet adopted fixed positions and could explore the following points amongst others:

(a) Should the procedure for appointing the Judges and Advocates-General (Article 223 EC) be altered? What about the appointment of members of the CFI (Article 224 EC)?

(b) To facilitate application of Articles 225a, 229a and 245 TEC, should the present unanimity rule be replaced by a qualified majority rule?

(c) Would it be better to reconsider the titles Court of Justice and Court of First Instance or leave them unchanged?

(d) Should the wording of the fourth paragraph of Article 230 EC concerning direct appeals by individuals against general acts of the Institutions be amended? What about acts of agencies or bodies set up by the Union?

(e) Should the system of penalties for non-compliance with a judgment of the Court of Justice be made more effective? How? By giving the Court the option of imposing fines where a Member State fails to comply with its judgment within a given period? By other means?

3. The "discussion circle" would be open to any other matters which its members or members of the Court or the CFI considered worth examining. It is proposed that the "discussion circle" meet 3 or 4 times during February and submit its report at the beginning of March 2003.

APPENDIX 4

**European Union Select Committee**

The members of the Committee are:

Baroness Billingham
Lord Brennan
Lord Cavendish of Furness
Lord Dubs
Lord Grenfell (Chairman)
Lord Hannay of Chiswick
Baroness Harris of Richmond
Lord Jopling
Lord Lamont of Lerwick
Baroness Maddock
Lord Neill of Bladen
Baroness Park of Monmouth
Lord Radice
Lord Scott of Foscote
The Earl of Selborne
Lord Shutt of Greetland
Baroness Stern
Lord Williamson of Horton
Lord Woolmer of Leeds