



INST
049

**CONFERENCE
OF THE REPRESENTATIVES OF THE
GOVERNMENTS
OF THE MEMBER STATES**

**Brussels, 31 March 2000 (04.04)
(OR. fr)**

CONFER 4729/00

LIMITE

PRESIDENCY NOTE

to : Government Representatives Group

Subject : ***IGC 2000:***

*Interim report on amendments to be made to the Treaties regarding the Court of
Justice and the Court of First Instance*

Delegations will find the Presidency's report in the Annex.

REPORT BY THE PRESIDENCY
on amendments to be made to the Treaties
regarding the Court of Justice and the Court of First Instance

I – Introduction

The Group of Government Representatives to the Intergovernmental Conference instructed the Friends of the Presidency Group to examine the amendments to be made to the primary-law provisions concerning the Community's judicial system.

This report seeks to summarise the preliminary discussion carried on by the Group at the meetings on 2, 16 and 23 March 2000 and, as far as possible, to identify what the Presidency sees as the consensus and/or main guidelines that have emerged during the proceedings with regard to the four points mentioned in the terms of reference.

Thus the report does not necessarily cover all the issues that may be raised regarding the reform of the system.

The Group's first and principal unanimous conclusion is that, with the enlargement of the Union in prospect, and given the gradual extension of Community competence, it is essential to embark on a reform of the Community's judicial system. This is a matter of urgency since the growing number of cases could in the medium term undermine one of the fundamental pillars of the European venture.

II – What type of reform?

1. This unanimity and sense of urgency is expressed through two different approaches as regards the scope and the depth of the reform required.

Some consider that the whole architecture of the system should be redesigned. The existing Court of First Instance would become an independent court explicitly recognised by Article 7 of the EC Treaty, and would be the ordinary-law court for direct applications. The Court of Justice would become a supreme court dealing with quasi-constitutional matters.

Others believe the current system still has a potential that it would be premature to call into question, although it needs considerable adjustments if it is to respond rigorously and efficiently to the new challenges that will arise in the future.

2. However, these two approaches seem to converge on the same objective, namely to give the system an adaptability which will make it possible in future for any *ad hoc* measures that become necessary, especially those relating to the transfer of competence between the Court of Justice and the courts linked to it, to be adopted without undue delay.

III – Reorganisation of legal bases

3. In their written contributions the Court of Justice and the Court of First Instance suggested introducing changes to the procedure for amending their respective Rules of Procedure so that amendments can be made by qualified majority in the Council and not, as currently required by the third paragraph of Article 245 of the EC Treaty, on the basis of unanimity. This important proposal was supported by nearly all the delegations. On this point, the majority of delegations expressed very considerable reservations about giving the Court of Justice and the Court of First Instance themselves the power to take independent decisions on any amendments to their Rules of Procedure that might be deemed appropriate.

The favourable reception given to the idea of amending the third paragraph of Article 245 of the EC Treaty was, however, tempered by comments from a number of delegations to the effect that certain subjects currently governed by the Rules of Procedure, including those relating to languages (Articles 29 to 31 of the Rules of Procedure of the Court of Justice and Articles 35 to 37 of the Rules of Procedure of the Court of First Instance), could be inserted into the EC Statute of the Court of Justice – amendments to which would continue to require unanimous approval within the Council. Such a measure might involve re-writing Article 290 of the EC Treaty.

Several delegations said it would be useful to reorganise all the legal instruments governing the Court of Justice and the Court of First Instance, especially the Statutes (possibly with the introduction of a single Statute common to all three Communities) and the Rules of Procedure, so as to restore the logical coherence of the structure and ensure a proper hierarchy between the various provisions. Such reorganisation might enable delegations to clarify their positions on the procedures for any future amendment of these legal instruments.

Linked to this problem, a question has arisen which calls for preliminary discussion by the Group, namely whether the Commission should also be given the power to ask the Council for amendments to the Rules of Procedure. Some delegations support this idea, but some are firmly opposed.

4. The perceived need to remove a certain rigidity in the system – which makes it difficult to meet new challenges – also led to the idea of amending Article 245, and possibly Article 225 of the EC Treaty so that future amendments to the EC Statute of the Court of Justice could be decided by the Council, acting unanimously on a proposal from the Court and after consulting the European Parliament and the Commission. Delegations were receptive to this change in the system. Some delegations commented that, when the various legal instruments (mentioned above) came to be reorganised, it would be necessary identify the provisions of the EC Statute of the Court of Justice that should perhaps be moved to the EC Treaty, such as Article 3 of the EC Statute of the Court of Justice.

Some delegations urged that the Commission should also have the right of initiative to make proposals for amending the EC Statute of the Court of Justice, despite the firm opposition of other delegations. The question of associating the Parliament by a more binding procedure was also raised.

5. Likewise, the Group acknowledged the value of inserting in the EC Treaty the necessary legal basis for the possible creation of judicial boards of appeal which would be responsible for determining, in the first instance, disputes relating to clearly defined subjects. The Court of Justice suggests – in line with other opinions expressed in several preliminary study papers – that the EC Treaty should provide for the setting up of boards of appeal to hear and determine actions brought by Community staff.

Delegations mostly agreed that setting up boards of appeal would help to improve the administration of the case load according to its particular characteristics, while ensuring that the decisions of such boards could be appealed against to the Court of First Instance which would give a ruling on appeal. The delegations were very open to the idea of the EC Treaty including a new provision concerning a board of appeal that would hear and determine actions brought by Community staff and also including a legal basis giving the Council powers to set up any other boards of appeal that might be necessary. However, several delegations stressed that the legal basis to be included in the EC Treaty would have to lay down criteria concerning the scope of such powers.

There was disagreement among delegations over the important question of the extent to which a judgment by the Court of First Instance – delivered after hearing an appeal against a decision by a board of appeal – could be the subject of a further appeal to the Court of Justice itself. There were doubts as to what would be gained by allowing three levels of appeal. This matter needs to be discussed further, but, as the Court of Justice suggests, it can be agreed that practical solutions should be specified by inserting appropriate provisions in the EC Statute of the Court of Justice.

6. In the context of flexible decision-making procedures, the Group analysed with interest the idea that in specific areas and in accordance with clearly defined criteria, the Court might hear and determine referrals for preliminary rulings in exceptional circumstances (Article 234 of the EC Treaty). Accordingly, the Court suggested in its written contribution that Article 225 of the EC Treaty include a special provision allowing for this possibility, but empowering the Council to decide unanimously the area or areas involving such a transfer of powers.

Despite the delegations' general amenability to a change of this kind in the system, concern was voiced in some quarters regarding the guarantee of unity and of consistency of interpretation of Community law. The proposal by the Court of Justice, supported by several delegations, that it be permitted to review decisions of the Court of First Instance in exceptional cases through referral in the interests of the law met with some opposition. The Group remained divided between those who challenged the added value of such a review for the sake of the credibility of the Court of First Instance and the legal certainty of its decisions and those who, for the sake of the consistency of Community case-law, owned to the need for corrective procedures, whether through a request by the Member States and/or the institutions or at the instigation of the Advocates-General of the Court of Justice. In any case, it would be necessary for the Court of First Instance to remain under some form of supervision while this power was being exercised and for the EC Statute of the Court of Justice to clarify the nature and form of such a review procedure.

IV – Appeal review procedures

7. The Group held a preliminary exchange of views on improvements to the various appeal review procedures with a view to identifying expedient amendments to primary legislation.

A. Referrals for preliminary rulings (Article 234 of the EC Treaty)

8. The Group expressed its conviction that referrals for preliminary rulings were the cornerstone of the Community judicial system. Indeed, it is this judicial cooperation mechanism based on referral by national courts to the Court of Justice which ensures that Community rules are interpreted and applied uniformly throughout the Community. Moreover, insofar as national courts are required to ensure the application of Community law, national judges have become the real judges for the Community's general law.

9. The problem of the ever-growing number of cases before the Court of Justice reflects in part the increasing and positive cooperation between national and Community courts. This problem is also closely linked to the question of the training and information of national judges, who are in practice in the front line when it comes to interpreting and applying Community law. Consequently, the Group took note of the idea that the Member States should be encouraged to provide their respective judicial systems with an appropriate structure for assisting national judges in the application of Community law. This would make it possible to avoid the referral of unnecessary or premature questions and encourage the formulation of questions in a more fruitful way.

A majority of delegations nevertheless expressed grave reservations at the idea that such a measure should be dealt with in the framework of the Conference, and stressed that this was a purely national matter.

10. Delegations recognised that the various suggestions for amendments to the content of Article 234 of the EC Treaty in the interests of greater clarity sent out a positive political message. However, several pointed out that, given the existence of established case-law, such a measure was unnecessary and could prove to be dispensable and/or equivocal.

The suggestions in question cover the inclusion in the Article of the following:

- the principle that Member State judges are judges in extenso in the Community law issues which they encounter in the performance of their national functions;
- the notion that the referring judge should endeavour to explain the reasons for referral and, as far as possible, contribute his own opinion on Community law matters which are the subject of referrals;

- delete the obligation on the national judge who hands down final decisions to refer to the Court of Justice in cases where the latter's case law eliminates any reasonable doubt (very general opposition);
- a provision to the effect that all national courts are obliged to refer to the Court of Justice when they are minded to let an act of Community law go unenforced on grounds of invalidity.

B. Direct appeals

11. It should be noted that some delegations argued in favour of restructuring the system in order that the Court of First Instance might forthwith be granted general jurisdiction in respect of direct appeals in the context of a new system architecture whereby the Court of First Instance would become the ordinary court under Community law.

However, most delegations thought that the procedure already laid down in Article 225 of the Treaty provided as much leeway as was required and that the Council, acting on a proposal from the Court of Justice, had hitherto acted judiciously in applying it.

12. Some delegations thought it inappropriate and/or too early to alter the actual structure and the rules of primary legislation in force regarding the various direct appeal procedures, as laid down in Articles 226 to 233, 235 and 237 to 243 of the EC Treaty. However, some delegations expressed a wish to propose alterations, particularly to Articles 230 and 232 of the EC Treaty. Debate on this issue is therefore not closed.

13. The delegations were receptive to a reappraisal of the role of the Advocate-General, particularly with regard to uncontested proceedings for failure to act, although certain of them admitted that the EC Statute of the Court of Justice empowered the latter to forgo the intercession of the Advocate-General in cases where such intercession served no clear purpose. This might imply rewriting the current Article 222 of the EC Treaty.
14. In appeals to the Court of Justice against decisions of the Court of First Instance, a distinction should be made between:
 - (a) a case where the latter court's ruling is already a second-stage appeal in a case originally referred to a judicial board of appeal;
 - (b) a case where the said ruling is the first stage in the assessment of the case in question.

Case (a) is covered by the situation provided for in point III.5 of this report below.

Regarding case (b), the Group discussed the introduction of rules and procedures the effect of which would be to temper the Court's acceptance of the appeal. The suggestion that the Court of Justice should, by means of a preliminary authorisation procedure, be empowered to decide not "to hear and determine" an appeal in view of its limited importance or of the inappropriateness of the matter at issue met with the backing of several delegations. Other delegations, however, thought that such a measure would further complicate the procedure without bringing with it any obvious advantages, to say nothing of the violation of the principle of the existence of two levels of court proceedings, of equality before the law and of the transparency of criteria.

V. – Composition of the Courts

A. Court of Justice

15. The composition of the Court of Justice is at present fixed by Article 221 of the EC Treaty, and practice hitherto has been for the number of judges to be at least equivalent to the number of Member States, in order to reflect the different national legal systems.

The prospect of the enlargement of the Union now raises the question of whether that principle should continue to apply. Despite the readiness of one or two delegations to reconsider the idea, the great majority of delegations considered that the composition must continue to reflect all the national legal systems. Given that desire, and the fact that it could be accomplished by amending the first paragraph of Article 221 of the EC Treaty in the accession Treaties, it seemed to some delegations that it would be a good idea to redraft the provision now so that the number of judges would automatically change as did the number of Member States.

16. There was, however, consensus among the delegations that the provisions on the composition of the plenary formation of the Court should be re-examined.

The Group discussed a possible maximum of 11 to 15 judges (or perhaps 13?), retaining a balance between the minimum necessary for stability of the Court's formation and the need for rotation. Several delegations considered that it should be for the Court itself to propose these procedures and rules.

17. Some delegations were aware that certain measures would increase the term of the Presidencies of the Chambers, while agreeing that it would be a good idea to provide for a minimum term of office of three years.
18. Regarding the role of the Advocates-General, and further to the suggestions outlined above that this should relate to the type of case involved, a number of delegations were open to the idea of reducing the number of Advocates-General, which would involve rewriting the current Article 222 of the EC Treaty.

B. The Court of First Instance

19. According to the Group the composition of the Court of First Instance should also reflect all the national legal systems, despite the fact that unlike the Court of Justice, there was no problem of a limit on the numbers of its members. Indeed, in the light of its increased powers and the foreseeable increase in its caseload, it might even be useful for the number of the members of the Court of First Instance to exceed the number of Member States.
20. Regarding the redefinition of its plenary composition, amendment of Council Decision 88/591/ECSC, EEC, EURATOM would make it possible to apply the same solution to the Court of First Instance as set out above for the Court of Justice.
21. The Working Party noted certain proposals to introduce Advocates-General who, as in the case of the Court of Justice would be given a fixed term of office for carrying out these duties at the Court of First Instance.

C. Length of the term of office of Judges

22. This subject is dealt with in Article 223 of the EC Treaty, which currently provides for a six-year, renewable term.

The delegations were divided over the question of whether or not to change the present system. A large number of delegations was reluctant to do so, but some suggested that the term should be increased to nine or twelve years, in which case it would not be renewable.

23. The delegations were not keen on the proposal to establish an advisory committee to assist the Council in the assessment procedure for appointing judges and advocates-general. However, some delegations felt it would be desirable for the Member States to put forward more than one name for assessment.

The question of associating the Parliament with the procedure for appointing members of the Court was also raised.

VI – Conclusions

The Chairman of the Group considers that it is possible at this stage to identify some provisional core conclusions, which might be added to at a later date:

1. The Community judicial system must be reformed as a matter of urgency.
2. The Treaties should be amended to include an appropriate legal basis to empower the Council to adopt measures necessary for the smooth operation of the Community judicial system.
3. Also, a thorough analysis should perhaps be made of the existing legal instruments which govern the Court of Justice and the Court of First Instance (e.g. the Statutes, the Rules of Procedure and the relevant Decisions), with a view to redrafting them if necessary to make the judicial system more coherent and correctly structured.
4. Certain disputes would merit special court procedures, especially disputes involving Community officials.
5. The Court of First Instance should be given fresh powers in specific fields, and in particular it should be able to hear requests for preliminary rulings in specific areas of jurisdiction.
6. Where the Court of First Instance sits as the court of second referral or is hearing requests for preliminary rulings, the possibility of a corrective mechanism to be applied by the Court of Justice remains debatable and should be considered in greater depth.

7. The composition of the Court of First Instance and the Court of Justice must reflect the principle of at least one judge per Member State.
8. The role of the Advocate-General could be reviewed in such a way as to dispense with his intercession in certain cases.
-

Articles of the Treaties and of the Statute which might be subject to amendment**EC Treaty**

Article	Subject
221	composition and definition of the plenary session
222	number of Advocates-General + scope of their duties
223	length of terms of office of Judges and Advocates-General
225	transfer of jurisdiction from the Court of Justice to the Court of First Instance + legal basis for the creation by the Council of specialised judicial boards of appeal
234	procedure for preliminary rulings
236	disputes involving Community staff
245	scope of procedure for amending the Statute and procedure for adopting amendments to the Rules of Procedure of the Court of Justice
290	Consequences of the inclusion of the language rules in the Statute of the Court of Justice.

EC Statute of the Court of Justice

Article	Subject
3	Immunity from jurisdiction for Judges (possible transfer to the Treaties)
15	composition of plenary
Title III	inclusion of provisions in the current Articles 29 to 31 of the Rules of Procedure of the Court of Justice
[49 and 51	mechanisms for appeal and corrective mechanisms]

ECSC Treaty

Article	Subject
32	composition and formation of plenary
32a	number of Advocates-General + scope of their duties
32b	length of terms of office of Judges and Advocates
32c	relationship between the Court of Justice and the Court of First Instance + legal basis + legal basis for the creation by the Council of specialised judicial boards of appeal
45	scope of the procedure for amending the Statute

EAEC Treaty

Article	Subject
137	composition and formation of plenary
138	number of Advocates-General + scope of their duties
139	term of Judges and Advocates-General
140A	relationship between the Court of Justice and the Court of First Instance + legal basis + legal basis for the creation by the Council of specialised judicial boards of appeal
150	procedure for preliminary rulings
152	disputes involving Community staff
190	consequences of the inclusion of the language rules in the Statute of the Court of Justice.