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REPORT OF THE COURT OF JUSTICE

ON CERTAIN ASPECTS OF THE APPLICATION

OF THE TREATY ON EUROPEAN UNION

Luxembourg, May 1995

INTRODUCTION

1. The European Council, meeting at Corfu on 24 and 25 June 1994, decided to set up a Study Group to prepare for the work of the 1996 Intergovernmental Conference provided for under Article N(2) of the Treaty on European Union. It invited the institutions, before the Study Group begins its work on 1 June 1995, to draw up reports on the operation of the Treaty on European Union.

2. In responding to that request, the Court of Justice must reconcile its concern to provide a useful contribution to the work of the Group with the duty of discretion incumbent upon it as a judicial institution.

Under the revision procedure laid down by the Treaties, it is essentially the Member States who have the task of drawing up and approving such amendments as are deemed necessary to meet the requirements of a Union which is, necessarily, always in a state of evolution. In that context, the Court's duty is to indicate what is needed, or indeed indispensable, to allow the judicial system of the Union to continue carrying out its task effectively. It is of the utmost importance that the Union, based on the principle of the rule of law, should possess a system of courts capable of ensuring that that rule is observed.

This report will therefore concentrate on the judicial system and will touch on other aspects only in so far as they may have implications for its operation.

After first outlining the role of the judicature within the framework of the Union, the Court's report will deal with the application of certain provisions of the Treaty on European Union, and submit observations on prospective amendments affecting or likely to have repercussions on the judicial system.

I – THE ROLE OF THE COURTS IN THE EUROPEAN UNION

3. The Union, like the European Communities on which it is founded, is governed by the rule of law. Its very existence is conditional on recognition by the Member States, by the institutions and by individuals of the binding nature of its rules.

The Court of Justice, which is charged with ensuring that in the interpretation and application of the Treaties the law is observed, is responsible for monitoring the legality of acts and the uniform application of the common rules. The Treaties, the protocols annexed to certain conventions between Member States, and certain agreements concluded by the Communities with non-member States, confer various kinds of jurisdiction upon the Court. It is called on to rule on direct actions brought by the Member States, by the institutions and by

individuals; to maintain close cooperation with national courts and tribunals through the preliminary ruling procedure; and to give opinions on certain agreements envisaged by the Communities. The Court thus carries out tasks which, in the legal systems of the Member States, are those of the constitutional courts, the courts of general jurisdiction or the administrative courts or tribunals, as the case may be.

In its constitutional role, the Court rules on the respective powers of the Communities and of the Member States, and on those of the Communities in relation to other forms of cooperation within the framework of the Union and, generally, determines the scope of the provisions of the Treaties whose observance it is its duty to ensure. It ensures that the delimitation of powers between the institutions is safeguarded, thereby helping to maintain the institutional balance. It examines whether fundamental rights and general principles of law have been observed by the institutions, and by the Member States when their actions fall within the scope of Community law. It rules on the relationship between Community law and national law and on the reciprocal obligations between the Member States and the Community institutions. Finally, it may be called upon to judge whether international commitments envisaged by the Communities are compatible with the Treaties.

As regards the remainder of the Court's jurisdiction, the setting up of a two-tier system for all actions brought by natural or legal persons, which are now dealt with by the Court of First Instance subject to the possibility of an appeal to the Court of Justice, has undoubtedly afforded greater protection to individuals and has enabled the latter to devote itself more fully to its essential task of ensuring the uniform interpretation of the law, under conditions which preserve the quality and efficiency of the judicial system.

4. The Court considers it indispensable, if the essential features of the Community legal order are to be maintained, that the functions and prerogatives of its judicial organs be safeguarded in the forthcoming process of revision. The success of Community law in embedding itself so thoroughly in the legal life of the Member States is due to its having been perceived, interpreted and applied by the nationals, the administrations and the courts and tribunals of all the Member States as a uniform body of rules upon which individuals may rely in their national courts. Even before there was the idea of citizenship of the Union, the Court had inferred from the Treaties the concept of a new legal order applying to individuals and had in many cases ensured that those individuals could exercise effectively the rights conferred upon them.

Any decision affecting the structure of the judicial system must therefore ensure that the courts remain independent and their judgments binding. Were that not to be the case, the very foundations of the Community legal order would be undermined.

By virtue of Article L of the Treaty on European Union, the Court of Justice has, for all practical purposes, no jurisdiction over activities of the Union which fall within the spheres of common foreign and security policy and of cooperation in the fields of justice and home affairs.[1] In that regard, the attention of the Intergovernmental Conference should be drawn to the legal problems which may arise in the long, or even the short, term. Thus, it is obvious that judicial protection of individuals affected by the activities of the Union, especially in the context of cooperation in the fields of justice and home affairs, must be guaranteed and structured in such a way as to ensure consistent interpretation and application both of Community law and of the provisions adopted within the framework of such cooperation. Further, it may be necessary to determine the limits of the powers of the Union vis-à-vis the Member States, and of those of each of the institutions of the Union. Finally, proper machinery should be set up to ensure the uniform implementation of the decisions taken.

5. It is obvious that the need to ensure uniform interpretation and application of Community law and of the conventions which are inseparably bound up with the achievement of the objectives of the Treaties presupposes the existence of a single judicial body, such as the Court of Justice, which can give definitive rulings on the law for the whole of the Community. That requirement is essential in any case which is constitutional in character or which otherwise raises a question of importance for the development of the law.

II – THE APPLICATION OF THE TREATY ON EUROPEAN UNION

6. As far as the Court of Justice is concerned, the effect of the amendments introduced by the Treaty on European Union has to date been only limited. The reasons for that are, firstly, that the Treaty has only recently come into force and, secondly, that a certain period is bound to elapse between the introduction of procedures or the implementation of provisions, and their repercussions in terms of litigation.

7. At a formal level, the amendments required by the Treaty on European Union have been made to the EC Statute of the Court and to the Rules of Procedure both of the Court of Justice and of the Court of First Instance. The amendments to the Statute were approved by the Council, at the request of the

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1 – In its order of 7 April 1995 in Case C-167/94 *Grau Gomis and Others*, not yet published in the ECR, the Court held that it had no jurisdiction, in the context of a preliminary ruling, to interpret Article B of the Treaty on European Union.

Court, by decision of 22 December 1994.[2] The Court of Justice adopted the amendments to its Rules of Procedure on 21 February 1995, following approval by the Council.[3] The Court of First Instance adopted the amendments to its Rules of Procedure on 17 February 1995, following approval by the Council and with the agreement of the Court of Justice.[4]

8. At a practical level, as yet the first innovation to have borne fruit to any appreciable extent is the one whose implementation depended on the Court itself, namely the new version of Article 165(3). Under that provision, the Court of Justice may now assign any case to a Chamber unless a Member State or an institution which is a party to the proceedings requests that the case be heard in plenary session. Whilst cases raising fundamental issues are still heard in plenary session, the Court makes regular use of this new possibility in cases which previously had to be heard by the plenary. This has probably contributed to the shortening of the length of proceedings revealed in the most recent statistics.[5] That achievement has been made possible by the attitude of the Member States and the institutions, which have confined to exceptional cases their requests that the Court sit in plenary session.

9. As regards the other Treaty amendments of direct concern to the Court, one action has been brought under the new version of Article 173(1) of the EC Treaty, for annulment of a measure adopted by the European Parliament and the Council in accordance with the procedure laid down in Article 189b of the EC Treaty.[6]

The new version of Article 173(1) of the EC Treaty, which endorses the solution provided by the Court's case-law[7], namely that an action for annulment may lie against measures adopted by the European Parliament intended to have

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2 — OJ 1994 L 379, p. 1.

3 — OJ 1995 L 44, p. 61.

4 — OJ 1995 L 44, p. 64.

5 — Between 1993 and 1994, the average length of proceedings for direct actions before the Court of Justice went from 22.9 months to 20.8 months; for preliminary rulings from 20.4 to 18.0 months; and for appeals from 19.2 to 21.2 months. The last figure is due in particular to the relative increase in the number of appeals in the field of competition, which are often long and complex, compared with those in Community staff cases.

6 — Case C-233/94 *Germany* v *Parliament and Council.*

7 — Case 294/83 *Les Verts* v *Parliament* [1986] ECR 1339.

legal effects vis-à-vis third parties, has also formed the basis for a recent action brought by the Council.[8]

Similarly, the European Parliament, whose right to bring an action for annulment of an act of the Council or the Commission in order to safeguard its prerogatives had already been recognized[9] and indeed exercised on a number of occasions before the Treaty on European Union entered into force, has been able to bring three further actions for annulment[10] on the basis of the new version of Article 173(3) of the EC Treaty, which endorses the previous case-law.

The Court has not been called upon to apply the other amendments relating specifically to the judicial system of the Union. That is true, for example, of the new version of Article 171 of the EC Treaty (and of the corresponding provision of the Euratom Treaty), which enables the Commission to bring an action before the Court of Justice seeking imposition of penalties on a Member State which has failed to comply with a judgment finding that it had infringed the Treaty; similarly there have been as yet no cases concerning the European Monetary Institute or pursuant to the last subparagraph of Article K.3(2)(c) of the Treaty on European Union, which allows attribution of jurisdiction to the Court of Justice in respect of the interpretation and application of conventions concluded within the framework of cooperation in the fields of justice and home affairs.[11]

As regards the new version of Article 168a of the EC Treaty (and the corresponding provisions of the ECSC and Euratom Treaties), which makes it possible to confer jurisdiction on the Court of First Instance to hear and determine certain classes of action or proceedings brought by the Member States or the institutions, with the exception of questions referred for a preliminary ruling, the Court of Justice considers that the possibility of applying that provision can only be evaluated in the light of experience gained from exercise by the Court of First

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8 — Case C-41/95 *Council* v *Parliament*.

9 — Case C-70/88 *Parliament* v *Council* [1990] ECR I-2041.

10 — Case C-21/94 *Parliament* v *Council*, Case C-271/94 *Parliament* v *Council* and Case C-303/94 *Parliament* v *Council*.

11 — The only convention of that type yet signed, the Convention on simplified extradition procedure between the Member States of the European Union, drawn up by Council Act of 10 March 1995 (OJ 1995 C 78, p. 1) does not give any jurisdiction to the Court of Justice.

Instance of the jurisdiction recently transferred to it to hear and determine actions brought by individuals.[12]

10. Some of the other amendments introduced by the Treaty on European Union have already given rise to cases currently pending before the Court of Justice.

These include the principle of subsidiarity embodied in Article 3b of the EC Treaty,[13] the new provisions relating to movement of capital in Articles 73b to 73h of that Treaty[14] and certain of the new legal bases introduced into the EC Treaty.[15]

III – POSSIBLE REVISION OF PROVISIONS RELATING TO THE JUDICIAL SYSTEM

11. The development of the Community legal order has been to a large extent the fruit of the dialogue which has built up between the national courts and the Court of Justice through the preliminary ruling procedure. It is through such cooperation that the essential characteristics of the Community legal order have been identified, in particular its primacy over the laws of the Member States, the direct effect of a whole series of provisions and the right of individuals to obtain redress when their rights are infringed by a breach of Community law for which a Member State is responsible. To limit access to the Court would have the effect of jeopardizing the uniform application and interpretation of Community law throughout the Union, and could deprive individuals of effective judicial protection and undermine the unity of the case-law.

But that is not all. The preliminary ruling system is the veritable cornerstone of the operation of the internal market, since it plays a fundamental role in ensuring that the law established by the Treaties retains its Community

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12 – Council Decision 93/350/Euratom, ECSC, EEC of 8 June 1993 (OJ 1993 L 144, p. 21) and Council Decision 94/149/ECSC, EC of 7 March 1994 (OJ 1994 L 66, p. 29).

13 – Case C-84/94 *United Kingdom* v *Council* and Case C-233/94 *Germany* v *Parliament and Council*.

14 – Case C-163/94 *Ministerio Fiscal* v *Sanz de Lera*, Case C-165/94 *Ministerio Fiscal* v *Díaz Jiménez*, C-250/94 *Ministerio Fiscal* v *Kapanoglu*, Case C-294/94 *Ministerio Fiscal* v *Quintanilha* and Case C-20/95 *Ministerio Fiscal* v *Weg*.

15 – Case C-268/94 *Portugal* v *Council* and Case C-271/94 *Parliament* v *Council*.

character with a view to guaranteeing that that law has the same effect in all circumstances in all the Member States of the European Union. Any weakening, even if only potential, of the uniform application and interpretation of Community law throughout the Union would be liable to give rise to distortions of competition and discrimination between economic operators, thus jeopardizing equality of opportunity as between those operators and consequently the proper functioning of the internal market.

One of the Court's essential tasks is to ensure just such a uniform interpretation, and it discharges that duty by answering the questions put to it by the national courts and tribunals. The possibility of referring a question to the Court of Justice must therefore remain open to all those courts and tribunals.

It is true that the effectiveness of the preliminary ruling procedure, which from a technical point of view is merely a step in the national proceedings, depends on the time it takes. If it takes too long, national courts may be discouraged from submitting questions for a preliminary ruling. The Court is aware of the need to reduce further the time taken to deal with such questions and would stress in that connection that the recent transfer to the Court of First Instance of all direct actions brought by individuals should make it possible to obtain a significant reduction in the time taken for other types of proceedings, in particular references for a preliminary ruling.

The Court is currently examining further measures to increase its productivity. It should be pointed out in that regard that for cases of great importance – particularly constitutional or economic importance – it is hardly possible, or even desirable, to speed up the proceedings before the Court. For cases of lesser importance, however, procedural simplification may certainly be envisaged and could have beneficial effects. The measures necessary for that purpose fall within the framework of the Statute of the Court and its Rules of Procedure, or are pure matters of practice, and do not require any amendment to the Treaties.

12. In view of the considerable period of time which elapsed before its Rules of Procedure were adapted in line with the Treaty on European Union (it was not possible to adopt the necessary amendments until February 1995), the Court considers that the rule in Article 188(3) of the EC Treaty (and in the corresponding provisions of the other Treaties), which requires the unanimous approval of the Council for any amendment to those Rules, should be relaxed. Thus, the Court might be authorized to adopt its Rules of Procedure without the approval of the Council or, if the Member States felt it indispensable to retain the right to be consulted, such approval might be deemed to be given on expiry of a specified period in the absence of amendments by the Council to the Court's proposal. A similar amendment would need to be made to Article 168a(4) of the EC Treaty

and to the corresponding provisions of the other Treaties concerning the Rules of Procedure of the Court of First Instance.

13. In its requests submitted to the Council following the introduction of a two-tier court system, the Court of Justice has already stressed that such a system is not appropriate for preliminary ruling procedures both because it would be likely to lead to unacceptable procedural delays and because it would raise problems as to the authority of judgments given at first instance and as to identification of the parties entitled to lodge an appeal. The Court's jurisdiction to give preliminary rulings cannot be split up on the basis of pre-established criteria relating to the subject-matter of the case or the status of the referring court, which might jeopardize the consistency of the case-law, or on the basis of a flexible system of case-by-case referrals from the Court of Justice to the Court of First Instance, which might run counter to certain conceptions of the 'lawful judge' (*juge légal*).

14. The Court has been informed of certain proposals, first, for amending Article 173 of the EC Treaty and the corresponding provisions of the other Treaties to allow the European Parliament to bring actions for annulment without having to establish an interest and, second, for giving the Parliament the right to request the Court's opinion on an international agreement envisaged by the Community, in accordance with Article 228(6) of the EC Treaty. It is, of course, for the Intergovernmental Conference to decide what action is to be taken on those proposals. The Court wishes to point out that there should be no technical objection to such amendments and that, as regards the procedure for obtaining opinions, it has already allowed the Parliament to submit observations in connection with requests made by Member States, the Council or the Commission. However, the Court doubts whether it would be appropriate to remove to the judicial arena disputes which could just as satisfactorily be settled at a political level, given the mechanisms provided for that purpose.

15. The Court has begun to reflect on the future judicial structure of the Union. The organization of the judicial system will in any event depend on political decisions as regards developing the process of union among the peoples of Europe and as regards the prospects of further enlargement.

At the present stage of development, the Court feels that the structure of the judicial system should not be altered. In particular, there seems to be no need to amend Article 168a of the EC Treaty and the corresponding provisions of the other Treaties with regard to the allocation of tasks between the Court of Justice and the Court of First Instance. A more detailed assessment cannot be made until it has become possible to evaluate the capacity of both Courts to deal satisfactorily with the volume of litigation assigned to them. In any case, the obvious need to maintain an efficient court system means that the number of courts should not be increased unless there are objective reasons for doing so, particularly since the

national courts are called upon to play a central role as the courts with general jurisdiction for Community law.

However, if closer integration is achieved in certain fields, with a concomitant increase in the volume of litigation, it might be that, in the longer term, it would be desirable for the Chambers of the Court of First Instance to become specialized or perhaps for new specialized Community courts to be established. Once the principle of the two-tier system is accepted, there is a certain logic in having the vast majority of direct actions dealt with by one or more courts of first instance and in subjecting certain appeals to the Court of Justice to a filtering system. Increasing the number of courts would be unlikely to endanger the unity of the case-law provided there is still a supreme court to ensure uniformity of interpretation through appeals or preliminary rulings as the case may be.

16. With regard to the prospects of enlargement of the Union, the Court wishes to draw the attention of the Intergovernmental Conference to the problem of maintaining the link between the number of Judges and the number of Member States, even though the Treaties do not provide for any link between nationality and membership of the Court.

In that regard, two factors must be balanced.

On the one hand, any significant increase in the number of Judges might mean that the plenary session of the Court would cross the invisible boundary between a collegiate court and a deliberative assembly. Moreover, as the great majority of cases would be heard by Chambers, this increase could pose a threat to the consistency of the case-law.

On the other hand, the presence of members from all the national legal systems on the Court is undoubtedly conducive to harmonious development of Community case-law, taking into account concepts regarded as fundamental in the various Member States and thus enhancing the acceptability of the solutions arrived at. It may also be considered that the presence of a Judge from each Member State enhances the legitimacy of the Court.

Finally, it should be noted that the question of the number of Judges arises in a completely different way in the Court of First Instance, which normally sits in Chambers and whose decisions are subject to an appeal to the Court of Justice.

17. The Court does not intend to express any opinion with regard to the procedure for the appointment of its members or the term of their appointment, beyond those aspects which concern the preservation of its independence and its functional efficiency.

The Court stresses that the procedure for appointment laid down by the Treaties and the practice generally followed in renewing the terms of office of its members have satisfactorily ensured its independence and the continuity of its case-law. The Court would not, however, object to a reform which would involve an extension of the term of office with a concomitant condition that the appointment be non-renewable. Such a reform would provide an even firmer basis for the independence of its members and would strengthen the continuity of its case-law. Provided that the fixed term of appointment of each member were calculated from the time of taking office, such a solution would also have the advantage, over time, of limiting the operational inconveniences regularly suffered by the Court's activities as a result of the partial replacement rule.

However, without needing to express an opinion at this stage on the other proposals which have been put forward, the Court considers that a reform involving a hearing of each nominee by a parliamentary committee would be unacceptable. Prospective appointees would be unable adequately to answer the questions put to them without betraying the discretion incumbent upon persons whose independence must, in the words of the Treaties, be beyond doubt and without prejudging positions they might have to adopt with regard to contentious issues which they would have to decide in the exercise of their judicial function.

18. The Court would like to put forward once again the suggestion, already raised during the preparations for the Treaty on European Union, that Article 167(5) of the EC Treaty (and the corresponding provisions of the ECSC and Euratom Treaties) should be amended to allow the Advocates General as well as the Judges to take part in the election of the President of the Court from among the Judges. The basis for that proposal lies in the fact that the status of Advocate General is identical to that of Judge; without prejudice to their specific function, they are members of the Court in the same way as the Judges. As such, moreover, they have the same responsibilities with regard to administrative decisions and are concerned in the same way with the functioning of the institution. Since the President organizes the business and directs the administration of the Court, it would be perfectly logical for the Advocates General to take part in the election together with the Judges. It is evident that the President, who directs the hearings and deliberations of the Court sitting in plenary session, can be chosen only from among the Judges. The Advocates General would thus be entitled to vote but not to stand for election.

IV – REPERCUSSIONS ON THE JUDICIAL SYSTEM OF CERTAIN AMENDMENTS ENVISAGED

19. The Court is aware that the Intergovernmental Conference is called upon to examine problems of a constitutional nature, such as changes in the nomenclature of acts and the introduction of a hierarchy of norms, together with the introduction into the Treaty of a catalogue of fundamental rights in keeping with the democratic nature of the Union, which renders the protection of human rights an essential element of European construction. Whilst it is not for the Court to express a view on the desirability of such reforms, it nevertheless notes that they have important aspects which will necessarily have repercussions on the system of judicial review.

20. In the first place, if a catalogue of fundamental rights were to be introduced into the text of the Treaty, the question would arise as to the mechanism for reviewing observance of those rights in legislative and administrative measures adopted in the framework of Community law.

In the exercise of its present jurisdiction, the Court already examines whether fundamental rights have been respected by the legislative and executive authorities of the Communities and by the Member States when their actions fall within the field of Community law. In doing so, it draws on the constitutional traditions common to the Member States and on the international instruments relating to the protection of human rights in which the Member States have cooperated or to which they are parties, in particular the European Convention on Human Rights. The Court would not, therefore, be taking on a new role in reviewing respect for of such fundamental rights as might be provided for in the Treaty. It may be asked, however, whether the right to bring an action for annulment under Article 173 of the EC Treaty (and the corresponding provisions of the other Treaties), which individuals enjoy only in regard to acts of direct and individual concern to them, is sufficient to guarantee for them effective judicial protection against possible infringements of their fundamental rights arising from the legislative activity of the institutions.

21. Secondly, if the Intergovernmental Conference were to decide to revise the nomenclature of the acts of the institutions and possibly to establish a hierarchy amongst those acts, it would be essential to take account of the consequences which such changes would have for the system of remedies, in particular the right of individuals to bring actions for the annulment of such acts.

22. It would be premature to formulate any more detailed observations but, in view of the fundamental importance of those matters for the judicial protection of individuals, the Court wishes to be involved at the appropriate moment in any process of reflection.

23. Finally, in the Court's opinion, the forthcoming process of revision might provide an opportunity for codifying and streamlining the constitutive Treaties. The multiplicity of Treaties forming the constitutional basis for the law of the Union, of which one (the ECSC Treaty) expires in July 2002, the sometimes artificial compartmentalization entailed by the system of three pillars, the survival of many superseded or obsolete provisions, and a numbering system which uses both letters and figures, all run counter to the need for transparency and put citizens of the Union in an unsatisfactory position from the point of view of legal certainty.

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24. The Court has confined itself, at the present stage, to expressing observations of a general nature concerning, essentially, the judicial sphere. The Court reserves the possibility of submitting to the Study Group its observations on the reports of the other institutions in so far as they concern the judicial system or include proposals likely to have repercussions on it. Furthermore, the Court would like to be associated in an appropriate manner with the preparatory work prior to the revision of the Treaties. In any event, the Court must be consulted should the Intergovernmental Conference intend to amend the Treaty provisions relating to the judicial system.