



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 10.11.2003
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COMMISSION OPINION

on the request for an amendment to Articles 51 and 54 of the Statute of the Court of Justice, presented by the Court in accordance with the second paragraph of Article 245 of the EC Treaty, in order to change the division of jurisdiction in direct actions between the Court of Justice and the Court of First Instance as referred to in Article 225(1) of the EC Treaty

The proposal by the Court of Justice

The Court of Justice proposes amending Article 51 of the Statute to read as follows:

"By way of exception to the rule laid down in Article 225(1) of the EC Treaty and Article 140a(1) of the EAEC Treaty, jurisdiction shall be reserved to the Court of Justice in the actions referred to in Articles 230 and 232 of the EC Treaty and Articles 146 and 148 of the EAEC Treaty when they are brought by a Member State against

– an act of or failure to act by the European Parliament or the Council, or by both those institutions acting jointly, except for

◦ decisions taken by the Council under the third subparagraph of Article 88(2) of the EC Treaty;

◦ acts of the Council adopted pursuant to a Council regulation concerning measures to protect trade within the meaning of Article 133 of the EC Treaty;

◦ acts of the Council by which it exercises implementing powers directly in accordance with the third indent of Article 202 of the EC Treaty;

– against an act of or failure to act by the Commission under Article 11a of the EC Treaty.

Jurisdiction shall also be reserved to the Court of Justice in the actions referred to in the same articles when they are brought by an institution of the Communities or by the European Central Bank against an act of or failure to act by the European Parliament, the Council, both those institutions acting jointly, or the Commission, or brought by an institution of the Communities against an act of or failure to act by the European Central Bank."

The technical amendment to the third paragraph of Article 54 of the Statute is underlined in the text reproduced below:

"Where the Court of Justice and the Court of First Instance are seised of cases in which the same relief is sought, the same issue of interpretation is raised or the validity of the same act is called in question, the Court of First Instance may, after hearing the parties, stay the proceedings before it until such time as the Court of Justice shall have delivered judgment or, in the case of actions brought pursuant to Article 230 of the EC Treaty or Article 146 of the EAEC Treaty, decline jurisdiction in order that the Court of Justice may rule on such actions."

The Court explains that this proposal was drawn up on the basis of "a statistical and substantive analysis ... of the actions brought by the institutions and by Member States ... during the previous five years (1996 to 2000)".¹

¹ Council Doc. No 6283, 13.02.2003, p. 3.

Preliminary remarks

a) The proposal forms part of the reforms provided for by the Treaty of Nice which seek to lighten the caseload of the Court of Justice on the one hand, by changing the division of jurisdiction between the Court of Justice and the Court of First Instance (hereinafter, "the CFI"), and the caseload of the CFI, on the other, by relieving it, in particular, of disputes concerning the public service, by establishing a new court of first instance under Article 225a of the Treaty.

It is clear from Declarations 12 and 16 adopted at the Nice summit that these two reforms go together. It is important to ensure, therefore, that they can be introduced if not simultaneously at least as close together in time as possible, in order to avoid a significant increase in the duration of the proceedings at the CFI,² which would inevitably result from "the transfer of a significant number of cases" from the Court of Justice to the CFI, as envisaged by this proposal,³ before the CFI had been relieved of its responsibility for disputes concerning the public service.

b) The Court's proposal does not deal with the question of a possible transfer to the CFI of jurisdiction for preliminary rulings as provided for in Article 225(3) of the Treaty.

The Commission agrees with this approach, insofar as the prime innovation of the Treaty of Nice was to make the CFI the court of general jurisdiction for direct actions and it did not envisage transferring jurisdiction for preliminary rulings except in specific areas to be determined at a later stage, possibly when the specialised judicial panels referred to in Article 225(2) of the Treaty are set up.

c) The proposal aims to implement that part of the reform provided for in the first sentence of Article 225(1), the Court's view being that "There is no need, at this stage, to exploit the possibilities afforded by the final sentence of the first subparagraph of Article 225(1) EC." (Council Doc. 6283, p. 2).

The Commission also supports this approach, as transferring jurisdiction to the CFI for actions for failure to fulfil an obligation is not a priority at this stage.

d) Introducing its proposal and describing its scope,⁴ the Court states that within the framework of the new Article 225(1) of the Treaty, which makes the CFI the ordinary court of law for all the direct actions referred to in the first sentence of that paragraph, "those cases in which the Court of Justice retains exclusive jurisdiction must be justified by particular circumstances." In this spirit the Court believes that it should retain exclusive jurisdiction at first and last instance "only in respect of judicial review of basic legislative activity and in respect of the determination of inter-institutional disputes".

The Commission fully agrees with this analysis. The aim of this new provision in the Treaty is indeed to reserve for the Court of Justice cases of major significance, so that

² Which would be contrary to the objectives of the Treaty of Nice. On the subject of the duration of proceedings see Case C-185/95P *Baustahlgewebe v Commission* [1998] ECR I-8485 (paragraphs 15 and 26-49, particularly paragraphs 44-47).

³ Council Doc. 6283, p. 2.

⁴ Council Doc. 6283, p. 2.

in future it can concentrate on its triple role as a constitutional court (important direct actions, infringements and opinions), as the court of appeal against rulings at first instance given by the CFI, and supreme arbiter of interpretation by way of preliminary rulings and the procedure for reviewing decisions given by the Court of First Instance.⁵

Important direct actions clearly include actions brought by the Member States or the institutions against basic legislative acts, and inter-institutional actions. Such actions directly concern the functioning of the Community in terms of the balance of jurisdictions and powers laid down by the Treaties both between the institutions and the Member States, on the one hand, and between the institutions themselves, on the other. As such, these actions must be reserved for the exclusive jurisdiction of the Court.

The Court's proposal prompts a number of comments by the Commission on the substance of the amendment, concerning the acts and disputes in respect of which jurisdiction is to be reserved to the Court of Justice, and some suggestions as to the form of the wording proposed.

SUBSTANCE

ACTS RESERVED TO THE JURISDICTION OF THE COURT OF JUSTICE

I. Legislative acts

1. The Commission agrees with the Court's proposal as regards acts of the European Parliament and/or the Council. Basic legislative acts adopted on the basis of a provision of the Treaty undoubtedly fall within the jurisdiction of the Court pursuant to Article 225(1) of the Treaty.

This underlying principle of the proposal rightly leads the Court to exclude from its jurisdiction at first and last instance decisions taken by the Council under Article 88(2) of the EC Treaty,⁶ measures to protect trade, especially regulations by which the Council imposes definitive anti-dumping or countervailing duties,⁷ as well

⁵ Procedure introduced by Article 225(2) and (3) (last subparagraphs) of the Treaty.

⁶ As the Court already suggested in 1998, state aid cases should all be subject to the jurisdiction of the CFI, regardless of the identity of the appellant or the defendant "in order to remedy the fragmentation of jurisdictions potentially affecting this kind of action in particular, where actions against a single act depend on who the applicant is" (Council Doc. No 5713/99 JUR 54, 25.02.1999, explanatory memorandum, p. 4).

⁷ Regulations adopted under a provision in a basic instrument, such as Article 12 of Council Regulation No 2423/88 of 11 July 1988 on protection against dumped or subsidised imports from countries not members of the European Economic Community (OJ L 209, 2.8.1988, p. 1), after intervention of the Commission Regulation introducing a provisional anti-dumping or countervailing duty (Article 11). For the same reasons as those given for State Aid cases, the Court proposed in 1998 that responsibility for reviewing these measures be given to the CFI.

as implementing measures taken by the Council on the basis of an empowering provision in a basic legislative act.

A comprehensive analysis of all the implementing measures that were the subject of disputes during the reference period selected by the Court reveals that the measures adopted by the Council, either directly or at the end of a committee procedure, and the implementing measures adopted by the Commission together form a category of implementing measures that should be subject to review by a single court, in this case the CFI.⁸

In the light of this analysis and the principle underlying the Court's proposal, the Commission takes the view that the word "directly" should be deleted from the proposed wording (first paragraph, first indent, third bullet point).⁹

Retaining this wording (which is taken from Article 202 of the Treaty)¹⁰ would have the effect of making the CFI responsible for reviewing acts adopted "directly" by the Council while reserving for the Court of Justice the power to review acts adopted by the same institution at the end of a committee procedure.¹¹

Such a distinction would have no justification within the body of implementing powers and would consequently introduce an inconsistency into the new division of jurisdictions envisaged by the Treaty of Nice.¹²

2. The Commission shares the Court's view that the legislative acts that should remain within its exclusive jurisdiction are not confined to acts adopted by the Parliament and the Council.

The Court rightly retains jurisdiction in actions against acts of the Commission in the field of enhanced cooperation under Article 11a of the EC Treaty. As the Court points out, this power is similar to that exercised by the Council under Article 11(2) of the EC Treaty, the normative implications of which are beyond doubt.

⁸ Commission Opinion, SEC (2002) 994, 20 September 2002, pp. 8-12.

⁹ See proposed redrafting in section on the wording in "The provisions themselves".

¹⁰ Which concerns implementing acts adopted by the Council without prior committee procedure.

¹¹ Procedures provided for in the basic legislative acts, in accordance with Council Decision 1999/468 of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ L 184, 17.7.1999, p. 23), which replaced the Decision of 13.07.1987 (OJ L 197, 18.7.1987, p. 33).

¹² See note 8 above.

3. However, the Commission believes that the objective of reserving exclusive jurisdiction to the Court for basic legislative acts cannot be attained with all the consistency required for a new division of jurisdictions if other legislative acts adopted on the basis of the Treaty by the Commission, on the one hand, and by the ECB, on the other, continue to be excluded from its jurisdiction at first and last instance.

a) Legislative acts adopted by the Commission.

i) Directives adopted under Article 86(3) (formerly 90(3)) of the EC Treaty

In the course of the reference period selected by the Court, several directives adopted by the Commission under former Article 90(3) (now Article 86(3)) of the Treaty were the subject of four actions by Member States.¹³ However, these four cases were removed from the Court's register by orders dated 19.5.1998 and 26.6.1998.

We must therefore refer to earlier cases to establish the legislative nature of these acts and the institutional scope of the actions brought before the Court.

In Joined Cases 188 to 190/80, three Member States applied for the annulment of Commission Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings.¹⁴ In Case C-202/88 France, supported by four other Member States, sought the annulment of Directive 88/301/EC on competition in the markets in telecommunications terminal equipment.¹⁵

It is clear from these judgments that Article 90(3) (now Article 86(3)) of the Treaty empowers the Commission "to lay down general rules specifying the obligations arising from the Treaty which are binding on the Member States as regards the undertakings referred to in Article 90(1) and (2)",¹⁶ that this power is separate from the power exercised by the Commission under Article 169 (now Article 226) of the Treaty¹⁷ and from the general power exercised by the Council under the Treaty.¹⁸

The actions in Joined Cases 188 to 190/80 were dismissed by the Court. The claims of lack of competence on the part of the Commission and misuse of procedure made in Case C-202/88 were also rejected. Although certain provisions of Directive 88/301/EC, which was the subject of the latter action, were annulled by the Court, this

¹³ Cases C-11/96 *Spain v Commission* and C-12/96 *Portugal v Commission* concerned Directive 95/51/EC amending Directive 90/388/EEC with regard to the abolition of the restrictions on the use of cable television networks for the provision of already liberalised telecommunications services (OJ L 256, 26.10.1995, p. 49). Cases C-123/96 and 199/96 *Spain v Commission* concerned Directives 96/2/EC and 96/19/EC amending Directive 90/388/EEC.

¹⁴ Joined cases 188 to 190/80, *France, Italy and the United Kingdom v Commission* [1982] ECR 2545. NB: Directive 80/723/EEC was amended by Commission Directive 2000/52/EC of 26.7.2000 (OJ L 193, 29.7.2000, p. 75).

¹⁵ C-202/88 *France* (supported by Germany, Belgium Greece and Italy) *v Commission* [1991] ECR I-1259.

¹⁶ Case C-202/88, paragraph 14.

¹⁷ Case C-202/88, paragraphs 16 and 17.

¹⁸ Case C-202/88, paragraphs 25 and 26.

was due to a failure to justify the withdrawal of certain special rights¹⁹ and to the fact that the Directive in question targeted certain anti-competitive practices by undertakings, although Article 90(3) (now Article 86(3)) of the Treaty confers powers on the Commission only in relation to State measures.²⁰

These precedents show that actions brought by Member States against directives enacted by the Commission under Article 86(3) of the Treaty are of an institutional, or even constitutional, nature in that they relate to the various powers exercised by the Commission under the Treaty and on the division of powers between the Commission and the Council.

It should also be pointed out that directives cannot in principle be the subject of direct actions in the CFI by natural or legal persons, but can be the subject of references to the Court for preliminary rulings.

In the light of the above, the Commission takes the view that jurisdiction in respect of directives adopted under Article 86(3) of the Treaty should be reserved to the Court of Justice.

ii) regulations adopted by the Commission under Article 39(3)(d) (formerly Article 48(3)) of the EC Treaty

According to this provision, freedom of movement for workers

"3. ...shall entail the right ...

d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission."

There can be no doubt as to the legislative nature of this power. The fact that the last basic act adopted by the Commission in this field dates back to 1970²¹ is no justification for not including Article 39(3)(d) of the Treaty in the context of a reallocation of jurisdiction, with a view to giving the Court exclusive power to review legislative acts adopted on the basis of the Treaty.

b) Acts adopted by the ECB

Under Chapter 2 of Title VII (Part Three) of the Treaty and Chapters VII and VIII of the Protocol on the Statute of the ESCB and the ECB²² (hereinafter "the ESCB Statute"), rule-making powers in the field of monetary policy are shared between the ECB and the Council.²³

¹⁹ Case C-202/88, paragraph 46.

²⁰ Case C-202/88, paragraphs 55 and 56.

²¹ Commission Regulation No 1251/70 of 29 June 1970 (OJ L 142, 30.6.1970, p. 24) was the subject of the *Givane* judgment of 9.1.2003 (Case C-257/00 [2003] ECR I-345).

²² Compendium of Treaties 1999- Book I- Vol. I, pp. 467 to 501.

²³ Unlike the situation in economic policy matters; *cf.* Article 111(4) of the Treaty and Article 6 of the ESCB Statute.

The Council exercises general legislative power, with the possibility, on the one hand, of amending the provisions of the ESCB Statute mentioned in Article 107(5) of the Treaty (Article 41 of the ESCB Statute) and, on the other, of adopting the “complementary” provisions²⁴ provided for in the Articles of the Statute referred to in Article 107(6) of the Treaty (Article 42 of the ESCB Statute).

However, under Article 110(1) of the Treaty (Article 34.1 of the ESCB Statute) the ECB has the power to adopt the measures necessary to implement the tasks defined by the ESCB Statute.

In practice, this power consists of making “regulations” to the extent necessary to implement the tasks defined in the ESCB Statute (first indent of Article 110(1) of the Treaty), i.e:

- “to define and implement the monetary policy of the Community” (first indent of Article 3.1 of the ESCB Statute; first indent of Article 105(2) of the Treaty);²⁵
- “to require credit institutions established in Member States to hold minimum reserve on accounts with the ECB and national central banks in pursuance of monetary policy objectives.” (Article 19.1 of the ESCB Statute);²⁶
- “to ensure efficient and sound clearing and payment systems within the Community and with other countries” (Article 22 of the ESCB Statute).

It also consists of taking “decisions” necessary for carrying out the tasks entrusted to the ESCB under the Treaty and the ESCB Statute (second indent of Article 110(1) of the Treaty).

Regarding ECB regulations, Article 110(2) of the Treaty (Article 34.2 of the ESCB Statute) reproduces the exact words of Article 249 (formerly Article 189) of the Treaty: “*A regulation [of the ECB] shall have general application. It shall be binding in its entirety and directly applicable in all Member States.*”

The first indent of Article 110(1) adds that the ECB may also make regulations “in cases which shall be laid down in the acts of the Council referred to in Article 107(6)”.

These are implementing acts adopted on the basis of an empowering provision in a basic act of the Council.²⁷ The same applies to acts adopted by the ECB in matters

²⁴ As can be seen from the Title of Chapter VIII of the ESCB Statute: “Amendment of the Statute and complementary legislation”, Compendium of Treaties 1999- Book I- Vol. I, p. 495.

²⁵ Article 3.1 of the ESCB Statute was implemented by an instrument entitled Guideline of the European Central Bank of 31 August 2000 on monetary policy instruments and procedures of the Eurosystem (OJ L 310, 11.12.2000, p.1).

²⁶ Article implemented by ECB Regulation (EC) No 2818/98 on the application of minimum reserves (OJ L 356, 30.12.1998, p.1).

²⁷ Example: ECB Regulation (EC) No 2174/2002 concerning the consolidated balance sheet of the monetary financial institutions sector (OJ L 330 du 6.12.2002, p.29) adopted on the basis of Articles 5.1 and 6.4 of Council Regulation (EC) No 2533/98 concerning the collection of statistical information by the ECB (OJ L 318, 27.11.1998, p.8), itself adopted on the basis of Article 5.4 of the ESCB Statute, mentioned in Article 107(6) of the Treaty.

covered by Article 110(3) of the Treaty, whereby the Council may empower the ECB to impose fines or periodic penalty payments on undertakings for failure to comply with its regulations and decisions,²⁸ or Article 105(6) of the Treaty, whereby the Council may confer on the ECB specific tasks relating to prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings.

The Commission is of the opinion that the same approach should be applied to acts of the ECB as to other Community acts.

The review of implementing acts adopted by the ECB on the basis of an empowering provision in a basic act of the Council can be entrusted to the CFI.

However, jurisdiction in respect of other acts adopted by the ECB under Article 110(1) of the Treaty or the ESCB Statute should be reserved to the Court of Justice.

There can be no doubt as to the status as basic legislative acts of regulations or other acts enacted on the basis of the first indent of Article 110(1) of the Treaty, in terms either of their legal basis and effects, or of the substance of the measures adopted. In the Commission's opinion, the complementarity between these measures and acts adopted by the Council under Article 107(6) or Article 107(5) of the Treaty requires that the same court, in this case, the Court of Justice, have the power to review them.

Regulations on minimum reserves adopted by the ECB on the basis of Article 19.1 of the ESCB Statute²⁹ and by the Council on the basis of Article 19.2 of the ESCB Statute are good examples of complementary provisions.³⁰

It follows that there is a risk that Member States might bring actions challenging such acts of the ECB to clarify the division of powers between the ECB and the Council. In the Commission's opinion, account should therefore be taken of this in the drafting of Article 51 of the Statute of the Court.

The decisions referred to in the second indent of Article 110(1) of the Treaty certainly do not belong formally in the category of basic legislative acts.

²⁸ Such as ECB Regulation (EC) No 2157/1999 on the powers of the European Central Bank to impose sanctions (OJ L 264, 12.10.1999, p.21), which refers to Article 110(3) of the Treaty and was adopted on the basis of, in particular, Article 6(2) of Council Regulation (EC) No 2532/98 (OJ L 318, 27.11.1998, p.4), itself adopted on the basis of the former Article 108A(3) (now Article 110(3)) of the Treaty and Article 34.3 of the Statute, mentioned in Article 107(6) of the Treaty.

²⁹ ECB Regulation (EC) No 2818/98 of 1 December 1998 on the application of minimum reserves, reference at foot-note 26. Regulation amended by ECB Regulation No 1921/2000 (OJ L 229, 9.09.2000, p.34) and ECB Regulation No 690/2002 (OJ L 106, 23.04.2002, p. 9).

³⁰ Council Regulation No 2531/98 of 23.11.1998 on the application of minimum reserves (OJ L 318, 27.11.1998, p. 1).

But the Commission is of the opinion that jurisdiction in respect of ECB decisions should be reserved to the Court of Justice, since:

- as the Treaty itself states, they are directly linked to the performance of tasks entrusted to the ESCB and are taken under the ESCB Statute;
- they are linked with large numbers of Council acts as a result of the distribution of powers by the Treaty and the ESCB Statute;³¹ and
- actions brought by Member States challenging such acts would, by their very nature, be institutional actions or, in any case, be of considerable importance in this new sector, where there is as yet no case-law.

In view of these considerations, the Commission is of the opinion that, in actions brought by the Member States challenging acts of the ECB issued under Article 110(1) of the Treaty or other provisions of the ESCB Statute, excluding acts adopted on the basis of an empowering provision in an act of the Council, jurisdiction should be reserved to the Court of Justice.

II. Other acts to be reserved to the jurisdiction of the Court

a) Commission decisions or failure to act under Articles 99 to 104 of the EC Treaty

Under Articles 99 to 104 of the Treaty, measures taken by the Council in the field of economic policy are based on Commission reports and recommendations.

The possibility that Member States will bring actions against the Commission for failure to act or for annulment of action taken must be borne in mind in the context of jurisdiction reserved to the Court of Justice.

b) Acts of the institutions not mentioned in Article 249 of the Treaty, but having legal effects

The Court proposes reserving for its own jurisdiction “*an act of ... the European Parliament or the Council, or ... both those institutions acting jointly*”.

This formulation embraces not only basic legislative acts adopted by the Council alone or in codecision with the Parliament but also acts adopted by those institutions regarding their operation, such as resolutions on the Parliament’s seat³² or the location of its departments³³ and acts such as the Code of Conduct on access to Council documents.³⁴

³¹ See ESCB Statute, in particular Articles 5.3, 5.4, 6 and 12.5, in conjunction with Article 111(4) of the Treaty, the first and second paragraphs of Article 20 and Articles 28 et 29.

³² C-230/81 *Luxembourg v Parliament* [1983] ECR 255, 281.

³³ C-108/83 *Luxembourg v Parliament* [1984] ECR 1945, 1947.

³⁴ C-58/94 *Netherlands v Council* [1996] ECR I-2169; an action was brought against the Commission on the subject of the same code of conduct adopted by the Council and the Commission: Case C-303/90 *France v Commission* [1991] ECR I-5315, 5343.

The Commission shares this approach but considers that the same must apply to all institutions. Provisions adopted by the institutions in the exercise of their institutional autonomy and intended to have legal effects inevitably affect the balance of powers of the institutions.³⁵ Jurisdiction in actions by the Member States challenging such acts should therefore be reserved to the Court.

Insofar as the Court's proposal already extends to such acts as adopted by Parliament or the Council and is extended as regards the ECB, it only remains to adjust the wording in such a way that it also covers acts of the Commission in this respect.

DISPUTES BETWEEN INSTITUTIONS

The Court's proposal is intended to reserve disputes between institutions, between an institution and the ECB and between the ECB and an institution for its own jurisdiction.

In the Commission's opinion, the Court's jurisdiction should extend to all institutional disputes and therefore include actions brought by an institution, and possibly even by a Member State,³⁶ against bodies or agencies which are, in the words of Article 286(1) of the Treaty "set up by, or on the basis of, [the] Treaty".

The Commission is of the opinion that the performance of certain tasks in certain areas, in particular tasks of implementation involving the power to take decisions regarding third parties, calls for high-level powers and expertise which are not always available to the Community administration.³⁷ In such cases the legislature can set up an Agency,³⁸ a body enjoying legal personality and the autonomy necessary to exercise its functions.

In the context of the new distribution of powers under Article 225(1) of the Treaty, actions brought by an institution or a Member State against such a body should not be within the jurisdiction of the CFI if, by its nature, the dispute that is to come before the Community courts concerns the extent of the powers enjoyed by the body in question and its place in the institutional structure.

The point here is not to give bodies and agencies a right to proceed in the Court where the Treaty does confer it, but to keep actions brought by the Member States or the institutions against such bodies within the jurisdiction of the Court.

³⁵ In Case C-366/88 *France v Commission* [1990] ECR I-3571, 3595, the Court annulled the Commission's internal instructions defining its staff's powers in relation to third parties in the management of the EAGGF on the grounds that they were not confined to clarifying the basic Regulation but added to it. In Case C-325/91 *France v Commission* [1993] ECR I-3283, 3303, the Court of Justice annulled the Commission Communication on the application of Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings in the manufacturing sector, published in OJ 1991 C 273, p.2, and notified to all Member States.

³⁶ Action provided for by, for example, Article 42 of Regulation (EC) No 1592/2002 of the European Parliament and of the Council of 15 July 2002 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency (OJ L 240, 7.9.2002, p. 1).

³⁷ Commission Communication on the operating framework for the European Regulatory Agencies: COM(2002)718 final, 11.12.2002.

³⁸ See current list of agencies in COM(2002) 718, p.3.

The Commission is of the opinion that the arrangement proposed by the Court should be amplified accordingly.

THE TEXT OF THE PROPOSAL

I. The Commission suggests that the wording proposed by the Court be amplified on the basis of the observations set out above.

First Paragraph

The Commission first of all suggests a purely drafting change to facilitate the identification of the implementing acts of the Council, since the citations in those acts refer not to Article 202 of the Treaty, but to the provision in the basic act which empowers the Council to adopt the implementing measure in question.³⁹

It also suggests amplifying the wording proposed by the Court in order to add the legislative and non-legislative acts referred to above to those acts reserved to its own jurisdiction.

Second Paragraph

The Commission suggests simplifying the drafting and adding a reference to actions brought by Community institutions against a body or agency set up by, or on the basis of, the Treaty.

The amended wording is set out in Annex 1.

II. However, different wording could be envisaged.

The Commission is of the opinion that it would be worth checking whether the new distribution of jurisdiction between the Court and the CFI would not be clearer, in the spirit of the Treaty of Nice, if acts in respect of which the Court has jurisdiction were grouped by category (acts based on the Treaty, autonomous acts etc.) rather than just listed on the basis of the enacting institution.

The list of acts adopted on the basis of the Treaty, which inevitably has to be made if we follow the form of wording chosen by the Court, in particular as regards Commission acts, is liable to be incomplete and therefore lack certainty. It could also threaten the admissibility of certain actions for failure to act and actions for annulment brought by the Member States against the Commission, particularly in the field of economic policy (Articles 99 to 104 of the EC Treaty).

³⁹ See, for example, Council Regulation (EC) No 2772/1999 of 21 December 1999 providing for the general rules for a compulsory beef labelling system (OJ L 334, 28.12.1999), the first citation of which reads: “*Having regard to Council Regulation (EC) No 820/97 of 21 April 1997, establishing..., and in particular Article 19 thereof*”.

An approach whereby jurisdiction in respect of acts adopted on the basis of the Treaty, with the exception of those relating, in particular, to competition, state aid and commercial policy, is reserved to the Court therefore seems preferable. Such an approach might well also make it easier to adapt to changes flowing from the future constitutional Treaty.

The proposed wording is set out in Annex 2.

ANNEX 1

The amended wording (underlined) would be as follows:

“1. By way of exception to the rule laid down in Article 225(1) of the EC Treaty and Article 140a(1) of the EAEC Treaty, jurisdiction shall be reserved to the Court of Justice in the actions referred to in Articles 230 and 232 of the EC Treaty and Articles 146 and 148 of the EAEC Treaty when they are brought by a Member State against:

i) an act of or failure to act by the European Parliament or the Council, or by both those institutions acting jointly, except for:

◦ decisions taken by the Council under the third subparagraph of Article 88(2) of the EC Treaty;

◦ acts of the Council adopted pursuant to a Council regulation concerning measures to protect trade within the meaning of Article 133 of the EC Treaty;

◦ acts of the Council adopted on the basis of an empowering provision in an act of the Council or of the European Parliament and the Council, adopted on the basis of the Treaty;

ii) an act of or failure to act by the Commission under Article 11a, Article 39(3)(d), Article 86(3) and Articles 99 to 104 of the EC Treaty;

iii) an act not mentioned in Article 249 of the EC Treaty, adopted by the Commission and intended to have legal effects;

iv) acts of or failures to act by the ECB under Article 110(1) of the EC Treaty or other⁴⁰ provisions of the Protocol on the Statute of the ESCB and the ECB;

v) an act of or failure to act by a body or agency set up by, or on the basis of, the Treaty.

2. Jurisdiction shall also be reserved to the Court of Justice in actions brought by:

- an institution of the Communities against an act of or failure to act by another institution of the Communities or the European Central Bank or by the European Central Bank against an act of or failure to act by an institution of the Communities,

- an institution of the Communities against an act of or failure to act by a body or agency set up by, or on the basis of, the Treaty.”

⁴⁰

Other than those referred to in the first indent of Article 110(1) of the Treaty.

ANNEX 2

Alternative wording

« **1.** By way of exception to the rule laid down in Article 225(1) of the EC Treaty and Article 140a(1) of the EAEC Treaty, jurisdiction shall be reserved to the Court of Justice in the actions referred to in Articles 230 and 232 of the EC Treaty and Articles 146 and 148 of the EAEC Treaty when they are brought by a Member State against:

i) an act based on a provision of the EC Treaty or the EAEC Treaty or a failure to act by the Parliament and the Council, the Council or the Commission under the EC Treaty or the EAEC Treaty, except for:

- decisions taken by the Commission or the Council under Article 88(2) of the EC Treaty; and

- decisions taken by the Commission under Articles 38, 76(2), 81, 82, 85, 86(3) and 134 of the EC Treaty;

ii) acts of or failures to act by the ECB under Article 110(1) of the EC Treaty or other⁴¹ provisions of the Protocol on the Statutes of the ESCB and the ECB;

iii) an act not mentioned in Article 249 of the EC Treaty, adopted by an institution of the Communities and intended to have legal effects;

iv) an act of or failure to act by a body or agency set up by, or on the basis of, the Treaty.

2. Jurisdiction shall also be reserved to the Court of Justice in actions brought by:

- an institution of the Communities against an act of or failure to act by another institution of the Communities or the European Central Bank or by the European Central Bank against an act of or failure to act by an institution of the Communities,

- an institution of the Communities against an act of or failure to act by a body or agency set up by, or on the basis of, the Treaty.”

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Other than those referred to in the first indent of Article 110(1) of the Treaty.