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**PROPOSALS FOR AMENDMENTS TO THE DRAFT ARTICLES OF THE  
TREATY ESTABLISHING A CONSTITUTION FOR EUROPE**

**ARTICLES ON THE COURT OF JUSTICE AND THE HIGH COURT**

**General Comments**

**The articles on the Court of Justice and the High Court include some positive improvements with a view to the European Parliament, the speeding up of the penalty procedure, the inclusion of the European Council into the jurisdiction of the Court of Justice, albeit in a very restricted way of a violation of essential procedures laid down in Article 45, Part One. Also, the idea of a panel to be established in the framework of the election and nomination procedure of Judges and Advocates-General has its merits. However, the overall progress in comparison to the Nice Treaty is still very limited. The suggested amendments aim at:**

- **Strengthening the independence of the judges and Advocates-General through a longer term of office (8 years), not renewable**
- **Strengthening the procedure of selection and nomination of judges and Advocates-General by involving the Council and the European Parliament**
- **Introducing elements of transparency through public hearings in the panel and a decision-making procedure on its establishment putting the Council and the Parliament on an equal footing**
- **Including references to the fundamental rights granted (probably) in Part II of the Constitution.**

**PART TWO**

Article 221

The Court of Justice shall sit in chambers, in a Grand Chamber or as a full Court, in accordance with the rules laid down for that purpose in the Statute of the Court of Justice.

Article 222

(Current article: unchanged)

The Court of Justice shall be assisted by eight Advocates-General. Should the Court of Justice so request, the Council, acting unanimously, may increase the number of Advocates-General.

It shall be the duty of the Advocate-General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice, require his involvement.

#### Article 223

The Judges and Advocates-General of the Court of Justice shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence; they shall be appointed by common accord of the governments of the Member States **after consulting the panel provided for in Article 224a.**

**[Stronger version: they shall be appointed by the Council, acting by a qualified majority, after having obtained the assent of the European Parliament, on the basis of an opinion given by the panel provided for in Article 224a.]<sup>1</sup>**

**[Less stronger version: they shall be appointed by the European Council on a recommendation of the Council which has consulted the European Parliament.]**

Every three years there shall be a partial replacement of the Judges and Advocates-General, in accordance with the conditions laid down in the Statute of the Court of Justice <sup>2</sup>.

The Judges shall elect the President of the Court of Justice from among their number for a term of three years. He may be re-elected.

The Court of Justice shall establish its Rules of Procedure. Those Rules shall require the approval of the Council, acting by a qualified majority.

#### Article 224

The number of Judges of the High Court shall be determined by the Statute of the Court of Justice. The Statute may provide for the High Court to be assisted by Advocates-General.

The members of the High Court shall be chosen from persons whose independence is beyond doubt and who possess the ability required for appointment to high legal office. They shall be

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<sup>1</sup> The stronger version tries to combine the involvement of the Council and the European Parliament with the idea of a panel, following some sort of Community logic (Opinion proposed by the panel, Council with OMV after assent of EP). The stronger version in its fully fledged form would not require any panel solution should the EP organise a public hearing with the candidates in question before voting on the appointment (US-Senate-Model). However, political reality seems to be far away from that, leading to the suggestion of a combination model in the stronger form or the weaker form as suggested by the Praesidium. Since the Praesidium version sounds awkward in comparison to other procedural provisions of the Constitution and notably in comparison to the selection and nomination procedure of the members of the ECB Council, a further model might be applied involving the European Council deciding on a recommendation of the Council which has consulted the European Parliament (less stronger version).

<sup>2</sup> This provision is a function of the length of the term of office; if the Praesidium were to opt for a renewable term of office, the provision would have to be deleted.

appointed by common accord of the governments of the Member States for a term of ~~six~~ eight years **after consulting the panel provided for in Article 224a.**<sup>3</sup>

[Stronger version: They shall be appointed by the Council acting by a qualified majority after obtaining the assent of the European Parliament for a term of eight years **on the basis of an opinion of the panel provided for in Article 224a.**

[Less stronger version: They shall be appointed by the European Council deciding on a recommendation of the Council which has consulted the European Parliament for a term of eight years.

The membership of the High Court shall be partially renewed every three years. Retiring members may be reappointed.

The Judges shall elect the President of the High Court from among their number for a term of three years. He may be re-elected.

The High Court shall establish its Rules of Procedure in agreement with the Court of Justice. It shall act after receiving the approval of the Council, acting by a qualified majority.

Unless the Statute of the Court of Justice provides otherwise, the provisions of the Constitution relating to the Court of Justice shall apply to the High Court.

#### Article 224a

**A panel shall be set up in order to give an opinion on candidates' suitability to perform the duties of Judge and Advocate-General of the Court of Justice and the High Court before the governments of the Member States take the decisions referred to in Articles 223 and 224.**

The panel shall organise a public hearing with the candidates in question before formulating its opinion on the basis of its non-public deliberations.

The panel shall comprise ~~seven~~ six persons chosen from among former members of the Court of Justice and the High Court, members of national supreme courts and lawyers of recognised competence, ~~one~~ three of whom shall be proposed by the European Parliament and three by the Council. The appointment of members of the panel and the panel's operating rules shall be decided by the Council, acting by a qualified majority, on a proposal from the President of the Court of Justice after consulting and obtaining the assent of the European Parliament.<sup>4</sup>

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<sup>3</sup> Again: For the stronger and the less stronger version see reference 2.

<sup>4</sup> The panel could become an important bridge towards a more open and democratic appointment procedure for

Article 225  
(Current article: unchanged)

1. The High Court shall have jurisdiction to hear and determine at first instance actions or proceedings referred to in [Articles 230, 232, 235, 236 and 238], with the exception of those assigned to a ~~judicial panel~~ specialised courts and those reserved in the Statute for the Court of Justice. The Statute may provide for the High Court to have jurisdiction for other classes of action or proceeding.

Decisions given by the High Court under this paragraph may be subject to a right of appeal to the Court of Justice on points of law only, under the conditions and within the limits laid down by the Statute.

2. The High Court shall have jurisdiction to hear and determine actions or proceedings brought against decisions of the ~~judicial panels~~ specialised courts set up under Article 225a.

Decisions given by the High Court under this paragraph may exceptionally be subject to review by the Court of Justice, under the conditions and within the limits laid down by the Statute, where there is a serious risk of the unity or consistency of Union law being affected.

3. The High Court shall have jurisdiction to hear and determine questions referred for a preliminary ruling under Article 234, in specific areas laid down by the Statute.

Where the High Court considers that the case requires a decision of principle likely to affect the unity or consistency of Union law, it may refer the case to the Court of Justice for a ruling.

Decisions given by the High Court on questions referred for a preliminary ruling may exceptionally be subject to review by the Court of Justice, under the conditions and within the limits laid down by the Statute, where there is a serious risk of the unity or consistency of Union law being affected.

Article 225a

1. **The European Parliament and the Council, in accordance with the legislative procedure, may adopt European laws** establishing specialised courts attached to the High Court to hear and determine at first instance certain classes of action or proceeding brought in specific areas. They shall act either on a proposal from the Commission after consulting the Court of Justice or at the request of the Court of Justice after consulting the Commission.
2. The European law establishing a specialised court shall lay down the rules on the

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Europe's Judges and Advocates-General, if the European Parliament and the Council would decide on its composition on an equal footing. A further breakthrough would be the organisation of a public hearing with the candidates in question by the panel before it formulates its opinion in a non-public atmosphere. The discussion circle in its suggestions was too restrictive on the point of hearings, thereby missing the chance of introducing greater openness and transparency into the appointment procedure. The amendments to Article 224a will be even more important should the amendments to Articles 223 and 224 fail.

organisation of the court and the extent of the jurisdiction conferred upon it.

3. Decisions given by specialised courts may be subject to a right of appeal on points of law only or, when provided for in the European law establishing the specialised court, a right of appeal also on matters of fact, before the High Court.
4. The members of the specialised courts shall be chosen from persons whose independence is beyond doubt and who possess the ability required for appointment to judicial office. They shall be appointed by the Council, acting unanimously.
5. The specialised courts shall establish their Rules of Procedure in agreement with the Court of Justice. They shall act after receiving the approval of the Council, acting by a qualified majority.
6. Unless the European law establishing the specialised court provides otherwise, the provisions of the Constitution relating to the Court of Justice and the provisions of the Statute of the Court of Justice shall apply to the specialised courts.

#### Article 226

(Current Article: unchanged)

If the Commission considers that a Member State has failed to fulfil an obligation under the Constitution, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.

#### Article 227

(Current Article: unchanged)

A Member State which considers that another Member State has failed to fulfil an obligation under the Constitution may bring the matter before the Court of Justice.

Before a Member State brings an action against another Member State for an alleged infringement of an obligation under the Constitution, it shall bring the matter before the Commission.

The Commission shall deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party's case both orally and in writing.

If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court of Justice.

#### Article 228

1. If the Court of Justice finds that a Member State has failed to fulfil an obligation under the Constitution, the State shall be required to take the necessary measures to comply with the judgment of the Court of Justice.
2. **If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the Court's judgment, it may bring the case before the Court of Justice after giving that State the opportunity to submit its observations.** It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court of Justice finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.

This procedure shall be without prejudice to Article 227.

3. **When the Commission brings a case before the Court of Justice pursuant to Article 226 on the grounds that the State concerned has failed to fulfil its obligations to notify measures transposing a framework law, it may, when it deems appropriate, request that, in the course of the same proceedings, the Court of Justice impose the payment of a lump sum or penalty if the Court finds that there has been such a failure. If the Court of Justice complies with the Commission's request, the payment in question shall take effect within the time limit laid down by the Court of Justice in its judgment.**

#### Article 229

**European laws and framework laws as well as Council laws and regulations**, adopted pursuant to the provisions of the Constitution, may give the Court of Justice unlimited jurisdiction with regard to the penalties provided for in them.

#### Article 229a

Without prejudice to the other provisions of the Constitution, **a European law** shall confer on the Court of Justice, to the extent that it shall determine, jurisdiction in disputes relating to the application of acts adopted on the basis of the Constitution which create industrial property rights.

#### Article 230

1. The Court of Justice shall review the legality of **European laws and European framework laws**, of acts of the Council, of the Commission and of the ECB, other than recommendations and opinions, and of acts of the European Parliament intended to

produce legal effects vis-à-vis third parties. **It shall also review the legality of acts of agencies and bodies of the Union which produce legal effects vis-à-vis third parties.**

2. It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Constitution or of any rule of law relating to its application, or misuse of powers.
3. The Court of Justice shall have jurisdiction under the same conditions in actions brought by the Court of Auditors, by the European Central Bank, ~~and~~ **by the Committee of the Regions and by the Economic and Social Committee** for the purpose of protecting their prerogatives.
4. 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 a regulatory act which is of direct concern to him without entailing implementing measures or against measures of the Union which may infringe a fundamental right granted to them by the Fundamental Rights of the Union under Part II of the Constitution.**<sup>5</sup>
5. **Acts setting up agencies and bodies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies or agencies intended to produce legal effects.**
6. The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

#### Article 230a

**The Member State concerned by a determination made by the European Council or the Council pursuant to Article 45 may apply to the Court of Justice, within one month from the date of that determination, regarding infringement of the purely procedural stipulations contained in that Article.**

#### Article 231

(Current article: unchanged)

If the action is well founded the Court of Justice shall declare the act concerned to be void.

However, the Court of Justice shall, if it considers this necessary, state which of the effects of **the act** <sup>6</sup> which it has declared void shall be considered as definitive.

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<sup>5</sup> The right to institute proceedings against a measure of the Union violating a fundamental right should be made explicit with a view of the inclusion of the Charter of Fundamental Rights into the Constitution.

<sup>6</sup> The replacement of the term "regulation" by "act" is necessary to bring this paragraph into line with case-law whereby the Court of Justice has maintained the effects of acts other than regulations.

## Article 232

Should the European Parliament, the Council or the Commission, in infringement of the Constitution, fail to act, the Member States and the other institutions of the Union may bring an action before the Court of Justice to have the infringement established. **This provision shall apply, under the same conditions, to agencies and bodies of the Union which fail to act.**

The action shall be admissible only if the institution, **agency or body** concerned has first been called upon to act. If, within two months of being so called upon, the institution, **agency or body** concerned has not defined its position, the action may be brought within a further period of two months.

Any natural or legal person may, under the conditions laid down in the preceding paragraphs including the question of an infringement in a fundamental right as granted under Part II of the Constitution, complain to the Court of Justice that an institution, **agency or body of the Union** has failed to address to that person any act other than a recommendation or an opinion.<sup>7</sup>

## Article 233

The institution or institutions, **agency or body** whose act has been declared void, or whose failure to act has been declared contrary to the Constitution, shall be required to take the necessary measures to comply with the judgment of the Court of Justice.

This obligation shall not affect any obligation which may result from the application of the second paragraph of Article 288.

## Article 234

The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of the Constitution;
- (b) the validity and interpretation of acts of the institutions of the Union;
- (c) the interpretation of the statutes of **agencies or bodies** established by an act of the Union, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

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<sup>7</sup> The possibility to complain to the Court of Justice due to a failure of the Union to act in case of an infringement of a fundamental right should be explicitly included into Article 232.

**If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice shall act with the minimum of delay.**

Article 235

(Current article: unchanged)

The Court of Justice shall have jurisdiction in disputes relating to compensation for damage provided for in the second paragraph of Article 288.

Article 236

(Current article: unchanged)

The Court of Justice shall have jurisdiction in any dispute between the Union and its servants within the limits and under the conditions laid down in the Staff Regulations or the Conditions of Employment. [The same shall apply for the servants of the EIB and Europol.] |

Article 237

(Current article: unchanged)

The Court of Justice shall, within the limits hereinafter laid down, have jurisdiction in disputes concerning:

- (a) the fulfilment by Member States of obligations under the Statute of the European Investment Bank. In this connection, the Board of Directors of the Bank shall enjoy the powers conferred upon the Commission by [Article 226];
- (b) measures adopted by the Board of Governors of the European Investment Bank. In this connection, any Member State, the Commission or the Board of Directors of the Bank may institute proceedings under the conditions laid down in [Article 230];
- (c) measures adopted by the Board of Directors of the European Investment Bank. Proceedings against such measures may be instituted only by Member States or by the Commission, under the conditions laid down in [Article 230], and solely on the grounds of non-compliance with the procedure provided for in Article 21(2), (5), (6) and (7) of the Statute of the Bank;
- (d) the fulfilment by national central banks of obligations under the Constitution and the Statute of the ESCB. In this connection, the powers of the Council of the ECB in respect of national central banks shall be the same as those conferred upon the Commission in respect of Member States by [Article 226]. If the Court of Justice finds that a national central bank has failed to fulfil an obligation under the Constitution, that bank shall be required to take the necessary measures to comply with the judgment of the Court of Justice.

Article 238

(Current article: unchanged)

The Court of Justice shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Union, whether that contract

be governed by public or private law. [The same shall apply for contracts concluded by and on behalf of the EIB and Europol.]

#### Article 239

(Current article: unchanged)

The Court of Justice shall have jurisdiction in any dispute between Member States which relates to the subject matter of the Constitution if the dispute is submitted to it under a special agreement between the parties.

#### Article 240

(Current article: unchanged)

Save where jurisdiction is conferred on the Court of Justice by the Constitution, disputes to which the Union is a party shall not on that ground be excluded from the jurisdiction of the courts or tribunals of the Member States.

#### Article 240a

The Court of Justice shall ~~not~~ have in those cases jurisdiction with respect to Articles 29 and 30 of Part One and the provisions of Chapter I of Part Two concerning the common foreign and security policy, in which the question of a breach of essential procedural requirements laid down in the Constitution is concerned as well as with respect to questions of compatibility of an international agreement concluded under the CFSP with the provisions of the Constitution.<sup>8</sup>

#### Article 240b

In exercising its competences regarding the provisions of Chapters 3 and 4 of Title [...] concerning the area of freedom, security and justice, the Court of Justice shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security, **where such action is a matter of national law.**

#### Article 240c

Member States undertake not to submit a dispute concerning the interpretation or application of the Constitution to any method of settlement other than those provided for therein.

#### Article 241

Notwithstanding the expiry of the period laid down in the fifth paragraph of Article 230, any party may, in proceedings in which **a European law, a law** or a regulation of the Council, of the Commission, or of the ECB is at issue, plead the grounds specified in the second

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<sup>8</sup> If a jurisdiction of the Court of Justice is established in Article 230a (in combination with Article 45, Part I of the Constitution) with respect to procedural questions involving the European Council, there is little reason to exclude such a jurisdiction from procedural matters in the CFSP. Also, international agreements negotiated in a CFSP framework must be consistent with the provisions of the Constitution. Hence, there is the need to state the jurisdiction of the Court of Justice in that case too.

paragraph of Article 230 in order to invoke before the Court of Justice the inapplicability of that act.

Article 242  
(Current article: unchanged)

Actions brought before the Court of Justice shall not have suspensory effect. The Court of Justice may, however, if it considers that circumstances so require, order that application of the contested act be suspended.

Article 243  
(Current article: unchanged)

The Court of Justice may in any cases before it prescribe any necessary interim measures.

Article 244  
(Current article: unchanged)

The judgments of the Court of Justice shall be enforceable under the conditions laid down in [Article 256].

Article 245

The Statute of the Court of Justice shall be laid down in a Protocol.

**The law may amend the provisions of the Statute, with the exception of Title I and Article 64. The European Parliament and the Council shall act in accordance with the legislative procedure either at the request of the Court of Justice and after consulting the Commission, or at the request of the Commission and after consulting the Court of Justice.**