

**COVER NOTE**

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from :	Praesidium
to:	Convention
Subject :	Articles on the Court of Justice and the High Court

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1. Members of the Convention will find attached the draft articles for Part Two on the Court of Justice, together with explanatory comments. Draft Article 20 in Part One of the Constitution, which has already been forwarded to the Convention (CONV 691/03) is also included in this document.
2. The drafting of the new articles is based on the proceedings of the discussion circle on the Court of Justice, chaired by Mr Vitorino (amendments to the existing articles are indicated in bold).
3. The attention of Convention members is drawn in particular to the following amendments proposed by the Praesidium:
  - ◆ Qualified majority and the legislative procedure for provisions in which the Council currently acts unanimously, i.e. Articles 225a (establishment of specialised courts), 229a (establishment of a court specialised in the protection of industrial property rights) and 245 (Statute of the Court of Justice);

- ◆ Amendment of the conditions of admissibility concerning proceedings for annulment brought by natural or legal persons relating to "regulatory acts" (Article 230(4));
  - ◆ Setting up an advisory panel which would be required to give an opinion on the suitability of applications for posts of Judges and Advocates-General of the Court and the High Court (Article 224a);
  - ◆ Improving the system of penalties by providing for simplification of the preliminary procedure for referral to the Court by the Commission (Article 228);
  - ◆ Adding the possibility of challenging acts (Article 230) or omissions (Article 232) by "agencies and bodies of the Union".
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**Table: the proposed Articles concerning the Court of Justice and the High Court in relation to the existing Treaties**

	New articles	Articles reproducing provisions found in the existing Treaties, but only partially or with substantial amendments	Articles reproduced from the existing Treaties, slightly adapted or unchanged
<b>PART ONE</b>			
<u>Article 20</u> : The Court of Justice of the European Union	✓		
<b>PART TWO: THE COURT OF JUSTICE</b>			
<u>Article 221</u>			✓
<u>Article 222</u>			✓
<u>Article 223</u>		✓	
<u>Article 224</u> <u>Article 224a</u>	✓	✓	
<u>Article 225</u> <u>Article 225a</u>		✓	✓
<u>Article 226</u>			✓
<u>Article 227</u>			✓
<u>Article 228</u>		✓	
<u>Article 229</u> <u>Article 229a</u>		✓	✓
<u>Article 230</u> <u>Article 230a</u>	✓	✓	
<u>Article 231</u>			✓
<u>Article 232</u>		✓	

<u>Article 233</u>		✓	
<u>Article 234</u>		✓	
<u>Article 235</u>			✓
<u>Article 236</u>			✓
<u>Article 237</u>			✓
<u>Article 238</u>			✓
<u>Article 239</u>			✓
<u>Article 240</u>	✓		✓
<u>Article 240a</u>			
<u>Article 240b</u>		✓	
<u>Article 240c</u>		✓	
<u>Article 241</u>			✓
<u>Article 242</u>			✓
<u>Article 243</u>			✓
<u>Article 244</u>			✓
<u>Article 245</u>		✓	

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

## **PART ONE**

### THE COURT OF JUSTICE

#### Article 20

#### **Article 20: The Court of Justice of the European Union**

1. The Court of Justice, including the High Court, shall ensure respect for the Constitution and Union law.

Member States shall provide rights of appeal sufficient to ensure effective legal protection in the field of Union law.

2. The Court of Justice shall consist of one judge from each Member State, and shall be assisted by Advocates-General. The High Court shall include at least one judge per Member State: the number shall be fixed by the Statute of the Court of Justice. The judges of the Court of Justice and the High Court, and the Advocates-General of the Court of Justice, chosen from persons whose independence is beyond doubt and who satisfy the conditions set out at Article [XX] of Part Two, shall be appointed by common accord of the governments of the Member States for a term of six years, renewable.
3. The Court of Justice shall be competent for:
  - ruling on actions brought by the Commission, a Member State, an institution or a natural or legal person in the cases and according to the modalities foreseen in Articles [YY] of Part Two;
  - preliminary rulings, at the request of Member State courts, on the interpretation of Union law or the validity of acts adopted by the institutions;

- ruling on appeals on decisions given by the High Court or exceptionally reviewing these decisions under conditions laid down in the Statute of the Court.

## **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.

#### **Comments**

*Text of the second and third paragraphs of Article 221, which have been merged into a single paragraph. The first paragraph ("The Court of Justice shall consist of one judge per Member State.") is in Article 20 of Part One.*

### 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.

#### **Comments**

*Article unchanged.*

## 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.**

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>1</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.

### Comments

*This article reproduces the current Article 223 TEC, apart from the reference to the length of the term of office, at present referred to in Article 20 of Part One, and the current fourth paragraph, on the appointment of the Registrar, which could be incorporated into the Statute of the Court of Justice (new Article 9 of the Statute).*

## 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.

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<sup>1</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.



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 appointed by common accord of the governments of the Member States for a term of six years **after consulting the panel provided for in Article 224a**. 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.

#### Comments

*This Article is largely based on the current Article 224, except that the first and second sentences of the current text ("The Court of First Instance shall comprise at least one judge per Member State" and "The number of Judges shall be determined by the Statute of the Court of Justice") on the procedure for appointing judges appear in Article 20 of Part One. For the rest, the same approach could be followed as for Article 223 on the appointment of the Registrar.*

#### **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 comprise seven 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 of whom shall be proposed by the European Parliament. 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.**

### Comments

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

*On that basis, the draft Article provides for the establishment of such an advisory panel, which it is proposed should have seven members. In order to facilitate decision-making, the Council should act by a qualified majority both for the act laying down the panel's operating rules and for the appointment of its members. Lastly, it seems appropriate for the Court of Justice to be involved in the introduction of this advisory mechanism: hence the suggestion that the Council act on a proposal from the President of the Court of Justice.*

## 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 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 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 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.

### Comments

*Current Article 225a provides that, for the act establishing a specialised court, the Council shall act unanimously after consulting the European Parliament and the Commission (if the proposal came from the Court of Justice). The circle recommended that the Council should act by a qualified majority. A majority also felt that the legislative procedure should apply. The circle therefore felt that the act establishing a judicial panel and determining its jurisdiction was of a legislative nature. The Praesidium has decided to follow the circle's recommendation.*

### 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.

### Comments

*Reproduces the existing Article 226. One member of the discussion circle on the Court of Justice suggested replacing this provision by another taking over Article 88 of the ECSC Treaty. Such a provision would make it possible for the Commission to note that a State had failed to fulfil its obligations under the Constitution. However, the great majority of circle members were in favour of maintaining the current provision.*

## 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.**

#### Comments

*As to the machinery for sanctions in the event of failure to comply with a judgment of the Court, the final report of the discussion circle noted that the present system was not efficient enough, as it might be years before a pecuniary sanction is imposed on States which the Court has found against. The circle therefore considers that means should be found to bring about greater effectiveness and simplicity in the machinery for sanctions for failure to comply with a judgment of the Court. To that end, there was a suggestion to strengthen the sanctions machinery provided for in Article 228 TEC, by abolishing the two stages prior to referral to the Court for the implementation of sanctions, i.e. the stage of "formal notice" to the State in question and the stage of the Commission's "reasoned opinion", or at least one of these stages <sup>1</sup>; a large majority was in favour of the latter proposal.*

*The text of the Article proposes simplifying the preliminary procedure by abolishing the reasoned opinion.*

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<sup>1</sup> This referral directly to the Court by the Commission, or by a Member State, would not be an innovation: it is already provided for in the Treaty in certain cases, as for example if a State makes improper use of the exceptions provided for reasons of defence or in cases of crisis (Article 298).

*Moreover, it was suggested in the circle that the sanctions referred to in Article 228 could take effect retroactively (starting from the beginning of the offence). However, a provision to this effect does not seem necessary, insofar as the current text already provides for the possibility not only of imposing a penalty payment (per day of failure to comply starting from the date the judgment is delivered), but also a lump sum (set according to the gravity of the failure to comply prior to the date the judgment was delivered).*

*Paragraph 3 (new) is the result of a suggestion submitted to the discussion circle by the Commission. It grants the Commission the possibility of initiating before the Court both (in the same procedure) proceedings for failure to fulfil an obligation pursuant to Article 226 TEC and an application to impose a sanction. If, at the Commission's request, the Court imposes the sanction in the same judgment, the sanction would apply after a certain period had elapsed from the date the judgment was delivered, if the defending State did not comply with the Court's ruling. A majority of members of the circle were in favour of this proposal. This would enable the procedure for sanctions in cases of "non-communication" of a national transposition measure to be considerably simplified and speeded up<sup>1</sup>. The Praesidium has decided to take up this recommendation from the circle.*

## 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.

### Comments

*This Article was changed only to take account of the new instruments in Part One.*

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<sup>1</sup> A distinction is made in practice between cases of "non-communication" (when the Member State has not taken any transposition measure) and cases of incorrect transposition (when the transposition measures taken by the Member State do not, in the Commission's view, comply with the directive (or framework law)). The proposed arrangements would not apply in the second case.



## 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.

### Comments

*Discussions within the circle showed a strong desire to make recourse to this legal basis easier. To this end, the circle recommended that the current procedure (unanimous Council decision + ratification by Member States) be replaced by abolishing the requirement for ratification by the Member States, introducing qualified majority voting for the Council decision and, in the view of a majority in the circle, by providing for the legislative procedure. The Praesidium has decided to follow the circle's recommendation.*

## 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** 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.**
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.

### Comments

#### Paragraph 1

*This provision gave rise to lengthier debate in the discussion circle than on the rest. The paragraph contains an important change since it includes the acts of Union agencies and bodies. Following a detailed analysis of the current situation of agencies and bodies as regards verification of the legality of their acts, the circle noted that in general the acts setting up agencies contain provisions for means of redress before the Court of Justice as regards legal acts adopted by those agencies <sup>1</sup>.*

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<sup>1</sup> See Secretariat working document on the right of redress against acts of agencies of the Union (WD 9).

*Members of the circle considered that acts producing legal effects vis-à-vis third parties should not escape judicial scrutiny of their legality and, accordingly, a majority of members recommend that Article 230 TEC be amended so as to cover, in addition to legal acts adopted by the institutions, those of Union agencies and bodies. It was emphasised that the act establishing the agency could also lay down specific arrangements for verification of the legality of acts of the agency or body in question (see new paragraph 5). One member of the circle could not associate himself with the circle's general recommendation on this point.*

*It was also pointed out that the circle's approach on this point related only to agencies and bodies covered by the EC Treaty, since those operating in the framework of the CFSP and police and judicial cooperation in criminal matters had to be examined in the light of the provisions relating to those policies, as they were likely to present certain special characteristics which could be regulated in the acts establishing those agencies or bodies (in any case, insofar as the Constitution would contain an exclusion from the Court's jurisdiction concerning the CFSP, CFSP bodies would not be covered by this article.)<sup>1</sup>*

#### Paragraph 2

*Unchanged.*

#### Paragraph 3

*Following requests by several Convention members, the Praesidium proposes the inclusion of the Committee of the Regions, which could be actively entitled to bring actions to protect its prerogatives.*

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<sup>1</sup> However, in the case of the European Armaments and Strategic Research Agency, provided for in Article 30(3) of Part One, the Council Decision establishing the Agency's method of operation should provide for the Court of Justice to have jurisdiction in the case of acts by the Agency producing legal effects vis-à-vis natural or legal persons.

#### Paragraph 4

*The question of access for natural or legal persons to the Court of Justice in relation to acts of general application was debated at length by the discussion circle. In fact, the circle was divided into two groups: one group considered that the substance of the fourth paragraph of Article 230 must not be amended as it satisfied the essential requirements of effective judicial protection, particularly given that national courts can (or must) refer to the Court of Justice for preliminary rulings on questions relating to the interpretation or assessment of validity of Union law; other members argued that the conditions of admissibility laid down in this paragraph for proceedings by individuals against acts of general application were too restrictive.*

*Members of the circle who were in favour of amending the fourth paragraph of Article 230 stressed in particular the fact that, in certain exceptional cases, an individual could be directly concerned by an act of general application without it entailing an internal implementing measure. In such cases, the individual concerned would currently have to infringe the law to have access to the court. They consider that the current conditions of admissibility, which require the measure to be "of direct and individual concern", do not permit control by the Court in this specific case. With this in mind, the Praesidium recommends that the conditions for instituting direct proceedings be opened up.*

*Members of the circle who were in favour of amending the fourth paragraph of Article 230 expressed a preference for the option mentioning "an act of general application". Some members, however, considered that the term "a regulatory act" would be more appropriate, since it would enable a distinction to be made between legislative acts and regulatory acts, maintaining a restrictive approach in relation to actions by individuals against legislative acts (for which the "of direct and individual concern" condition remains applicable) while providing for a more open approach to actions against regulatory acts. The Praesidium has adopted the latter approach and proposes that provision be made for actions by natural or legal persons against regulatory acts which are of direct concern to them without entailing implementing measures.*

*A simplified wording of the fourth paragraph of Article 230 is also proposed, involving the deletion of the words "although in the form of ..." and their replacement by "an act addressed to that person or which is of direct and individual concern to him".*

*During its discussions the Praesidium also noted a proposal from a number of Convention members for the introduction in this Article of specific redress for the defence of fundamental rights, but it has decided – like the circle – not to take up this idea.*

#### Paragraph 5

See comments on paragraph 1 above.

#### Paragraph 6

*This paragraph contains the time limit for bringing actions for annulment. The idea of keeping this provision for the Statute of the Court of Justice could be considered.*

### 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.**

#### Comments

*This article is based on the content of Article 46(e) TEU, which concerns the procedure in Article 7 TEU and Article 45, Part One, of the draft Constitution, but modifies the wording. It seems appropriate for this provision to be included in Part Two.*

## 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>1</sup> which it has declared void shall be considered as definitive.

## 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, 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.

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<sup>1</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.

### Comments

*This article has been amended and Union bodies and agencies have been added. Even though the circle has not discussed this question, it is considered that, if Union agencies and bodies can be the subject of action for annulment, then it should also be possible to bring proceedings against them for failure to act, with the aim of penalising omissions contrary to the Constitution. The reference to the ECB in the current Treaty can be deleted since it is planned that the ECB will have the status of an institution.*

### 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.

### Comments

*This article has also been amended to incorporate Union bodies and agencies. In addition, the last paragraph of the old version read as follows: "This Article shall also apply to the ECB": with the ECB becoming an institution, this paragraph is no longer necessary.*

### 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.

**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.**

#### Comments

*It is proposed to maintain this provision unchanged - since it plays a fundamental role in that it introduces decentralised control of Union law and cooperation between national courts and tribunals and the Court of Justice - virtually unchanged, except that the specific reference to the ECB can be deleted.*

*When the draft Articles concerning JHA were examined, a Convention member submitted an amendment to the effect that the Court of Justice would have to rule within a maximum of three months where the national proceedings involved a person held in custody. The preliminary ruling procedure does indeed have the effect of suspending the national proceedings, and this is especially important where the national proceedings involves a person held in custody. The Praesidium*



*thought it advisable to adopt this idea, which appears as the last paragraph, and to replace the three-month period with "with the minimum of delay". In fact, the Court can already use "expedited procedures" in certain cases, "where the particular urgency of the case requires the Court to give its ruling with the minimum of delay" (see Article 62a of the Rules of Procedure of the Court of Justice). Moreover, it would be possible to set a time limit for such preliminary-ruling proceedings, in which case the Praesidium thought that the time limit might be stipulated by the Statute of the Court of Justice.*

#### 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.

#### 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.

#### 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 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.**

### Comments

*The discussion circle on the Court of Justice was divided over the question of the Court's jurisdiction in the CFSP sphere. It is therefore difficult to make a consensus proposal. This draft Article reflects the current situation and was drafted in the light of the considerations set out below.*

*Currently, where action in the CFSP sphere provides for economic sanctions against a third country, implementing measures at Community level are required; these are taken on the basis of Articles 60 and 301 TEC. In the case of economic sanctions against individuals Article 308 TEC is used<sup>1</sup>. The Court already exercises its judicial control with regard to all such implementing acts in accordance with the EC Treaty. While maintaining the current situation, the Praesidium accepted the need for the possibility of adopting economic sanctions against individuals to be provided for explicitly in Article 31 of Chapter 4 of Title B (External action). In the cases covered by this provision, the Court exercises judicial control. As regards sanctions (restrictive measures), the question that might arise is whether or not the Convention considers it appropriate to extend the*

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<sup>1</sup> However, the Council has interpreted Articles 60 and 301 TEC broadly, using them as a legal basis for adopting sanctions against persons or associations which actually exercised control over a country or part of a country.

*possibility of actions by individuals to acts adopted on the basis of CFSP decisions that affect persons other than on an economic level (e.g. restrictive measures pursuant to CFSP decisions may be concerned with prohibiting the entry and free movement of persons, such as refusal of visa). The question of a specific legal basis for sanctions other than economic sanctions against individuals should be examined in the context of the Convention debate on Article 31 of Part Two on external action and not in the context of provisions relating to the Court of Justice.*

*Another question raised related to the possibility for States and institutions to bring actions for annulment, on the basis of Article 230 TEC, against CFSP acts allegedly adopted in breach of an essential procedural requirement laid down in the Convention. The Praesidium did not go along with that approach. It did, however, consider that the Court must have jurisdiction to examine the compatibility of a proposed international agreement that comes within the CFSP with the provisions of the Constitution (current Article 300(6)).*

*The Praesidium also examined the discussion circle's recommendation that "following the merging of the pillars, the Constitution should keep the principle set out in Article 47 TEU, on the basis of which the Court of Justice has powers to verify that CFSP measures and procedures do not encroach on procedures applying to other (ex-first pillar) policies of the Constitution, so that those policies can be preserved<sup>1</sup>". On the assumption that the pillars had been dispensed with but that Part Three of the Constitution specified the procedures applicable to each area, the Praesidium was of the opinion that Article 230 enabled the Court of Justice to review legality. In effect, where an institution wrongly used a legal basis from the CFSP chapter in order to adopt an act which should have had a legal basis that was contained in another (non-CFSP) provision of the Constitution, it would thereby infringe the Constitution insofar as the act in question had an incorrect legal basis.*

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<sup>1</sup> Discussion circle on the Court of Justice – supplementary report of 16 April 2003 on the question of judicial control relating to the common foreign and security policy (CONV 689/1/03 REV 1, paragraph 7(b)).

## 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.**

### Comments

*Except for the last nine words, this Article is based on Article 35(5) of the current TEU and corresponds to Article 9 of the series of articles adopted by the Praesidium concerning JHA. It has been the subject of many amendments calling for its deletion, but other members have also called for Article 35(5) TEU simply to be reproduced. The above wording of this Article may therefore be regarded as an acceptable compromise. However, it would seem more appropriate to insert this provision in the articles concerning the Court rather than in the chapter on the area of freedom, security and justice.*

## 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.

### Comments

*This article reproduces the text of Article 292 TEC, and would seem rather to belong with the provisions of Part Two concerning the Court of Justice.*

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

### Comments

*This article has been amended only to take account of the new names of the instruments.*

## 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 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.**

### Comments

*A majority within the circle recommended that the Statute of the Court of Justice be adopted using the legislative procedure, with the exception of Title I, which concerns in particular the immunity arrangements for Judges and Advocates-General, and Article 64 on language arrangements. The Praesidium decided to accept the circle's recommendation.*

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