

A CONSTITUTIONAL COURT FOR THE EU?

by

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Ladies and gentlemen,

I would first like to thank the organisers of this conference for giving me the opportunity to address such a distinguished audience and to contribute to what in my view is one of the most important current debates of EU law, namely: the architecture of the judicial system.

The question that I have been asked to address today is: "*a constitutional court for the EU?*" I believe this question can be interpreted in a number of ways. Does it mean: "*do we have a court in the EU that is in charge of constitutional adjudication?*" Or should it be understood as: "*ought we have a court in the EU that would be specialised in constitutional adjudication?*" similar to, say, the French *Conseil constitutionnel* or the *Bundesverfassungsgericht* here in Germany?

I took the liberty to decide upon the second reading, namely "*should we have a specialised constitutional court?*", as in my view the answer to the first question – whether we have a court that is in charge of constitutional adjudication – is quite straightforward. As I will explain briefly, the ECJ already performs the duties of a constitutional court (1). However, given that the ECJ has wider duties than pure constitutional adjudication, I also think that it looks more like a supreme court than a specialised constitutional court. I will therefore examine whether the "specialised constitutional court" model has inherent advantages over the "supreme court" model. I will conclude that neither model is inherently superior to the other (2), but I will nonetheless argue that the ECJ – as a supreme court – should be allowed to concentrate on its constitutional duties as well as on its role as a guardian of the unity and the consistency of EU law (3). Finally, I will summarise my personal thoughts on the means that we can use to redirect the ECJ's functions (4).

A. The constitutional duties performed by the ECJ

There is not a single agreed-upon definition of what a "constitutional court" is, but everybody would probably agree that it requires as a minimum, first, a "constitution"

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(or any other "supreme law of the land" or *magna carta*) and, second, a court defending and interpreting this basic charter.

As regards the existence of a constitution in the EU legal order, it is not necessary to wait for the ratification of the Constitutional Treaty or any other formal constitution before we can say that such a set of norms exists.

In classical terms, a constitution performs three main functions. Firstly, it organises and allocates powers among the different governing bodies within a given society. We could call these a constitution's horizontal provisions. Secondly, it provides for the protection of certain principles and individual rights which, for the very reason that they derive from the constitution, are called "fundamental". These we could term its vertical provisions. The third function is to provide safeguards to ensure that the governing bodies in exercising the powers granted to them under the horizontal provisions do not infringe the rights granted to individuals under the vertical provisions.

The question of how these functions are fulfilled by the Treaties within the framework of the EU legal order is complex, and the contributions to this debate in the form of articles, textbooks and speeches are legion. But it is obvious that the existing Treaties – as interpreted by the ECJ – contain many provisions aimed at defining, distributing and limiting powers and competence among the various EU political entities (including the Member States) as well as other provisions aimed at protecting certain fundamental rights and principles. It cannot be denied that at least some provisions of the Treaties are of a constitutional nature. As noted by the ECJ in a line of cases starting with *Les Verts v Parliament*, the Treaties are our "basic constitutional charter".

Once we have agreed that we do have a comprehensive set of constitutional norms, it is quite straightforward to conclude that we also have a judicial body vested with the powers usually wielded by constitutional courts. As you all know, the ECJ's role under Article 220 EC is to ensure that in the interpretation and application of the EC Treaty the law is observed. On this basis, the ECJ regularly is called upon to settle questions on the allocation of powers among the various bodies within the EU legal order and to defend fundamental rights and principles of good governance as defined by the Treaties. For example, it is obvious that the ability of the ECJ to rule *de facto* on the compatibility of domestic law with EC law by way of Article 234 EC proceedings may have substantial constitutional implications. From a more academic point of view, it is also widely accepted that the ECJ frequently resorts to interpretative techniques and tradeoffs that are quite typical of constitutional adjudication.

Therefore, there can be no doubt that the ECJ already carries out constitutional tasks. But it should be stressed that the ECJ, in reality, does much more than that. The ECJ also decides a number of cases that do not have any constitutional dimension. This is the case in almost all types of actions brought before the ECJ: (i) actions for annulment or (ii) for failure to act, (iii) actions for infringement, (iv) pre-

liminary references or (v) appeals on points of law. To take just one example, issues of a constitutional nature will only rarely arise in the context of preliminary references specifically requesting the ECJ to interpret the meaning of ancillary provisions of the directives approximating the laws of the Member States in the field of environment.

For that reason, the ECJ can be said to have wider duties than a specialised constitutional court; its role also consists in promoting the unity and the consistency of the law, whether constitutional or not, by advising national courts through preliminary references and by judging on appeal from the CFI. Accordingly, were we to place the ECJ within this classification, it would look more like a "supreme court" than like a "constitutional court", at least to the extent that a "constitutional court" is supposed to be strictly specialised in constitutional adjudication.

Provided this view is correct, it immediately invites the following question: is it a problem that the ECJ performs all these functions and, if yes, should it be transformed into a constitutional court with more specialised powers?

B. Supreme courts vs. specialised constitutional courts

In my view, there is no obvious reason to prefer the specialised constitutional court model over the supreme court model. The "supreme court" model is applied successfully in many countries, an obvious example of which is the U.S. Supreme Court, which sometimes rules on questions of federal law without any constitutional implication. The U.S. Supreme Court is endowed with many functions, including the power to prescribe certain rules of procedure which bind the lower courts of the United States. In short, I am not aware of any compelling reason why the "specialised constitutional court" model would be inherently superior to the "supreme court" model.

When that is said, I can none the less identify one situation in which the plurality of functions performed by a supreme court can legitimately raise concerns, namely, when the supreme court's case load is so heavy that it cannot dispose of its cases within a reasonable timeframe. I have serious doubts that a supreme court faced with the Sisyphean task of struggling with an ever increasing docket would always be in a position to dedicate the time and attention required to assess certain important questions of constitutional law. A supreme court operating under time constraints due to its case load runs the risk of jeopardising the comprehensive analysis of the cases before it, a quality of analysis which is one of the very foundations of its legitimacy.

Against this background, it is interesting to note that the case-loads of the ECJ and the U.S. Supreme Court are completely different. According to the U.S. Supreme Court's statistics, its case-load has increased steadily to a current total of more than 7 000 cases on the docket per term, whereas plenary review – with oral argu-

ments by attorneys – is granted in about 100 cases only. Formal written opinions are delivered in 80 to 90 cases.

This is in stark contrast with the situation in the EU: the ECJ has mandatory jurisdiction and must rule on all the cases lodged with its registry. In 2004 the ECJ completed no less than 665 cases and it is widely known that its workload has increased steadily for decades in spite of the transfer of wide competences to the CFI. This increase has had an adverse effect on the ECJ's ability to deliver its judgments within a reasonable timeframe. Allow me to illustrate my point with some statistics. In 1983, it took the ECJ on average 12 months to deal with preliminary references under Article 234 EC. In 2004 the average period for the same type of cases had increased to 23 months. Most would agree that an average duration of almost 2 years can be very problematic given that the case pending before the national court is suspended until the ECJ has ruled upon the question referred to it. We are all keenly aware of what is at stake: if national judges turn their backs on preliminary references, there could be direct consequences for the uniform and direct application of EC law.

However, in 2004 we saw some very happy developments as the average length of the proceedings before the ECJ diminished substantially in all types of actions. In the case of references for preliminary rulings, the average length decreased by 2 months. As regards direct actions, it fell from 25 months in 2003 to 20 months in 2004. Finally, the average time taken to deal with appeals was 21 months, compared with 28 months in 2003. These encouraging figures are convincing evidence that the arrival of ten new judges after the enlargement and the amendment of the ECJ's working methods have already borne fruit.

However, we also have good reasons to be somewhat reticent of giving full rein to our joy since we can foresee a substantial increase in the ECJ's workload. Firstly, it can reasonably be forecast that in three or four years the number of references and direct actions coming from the new Member states will have increased significantly. Secondly, the upward trend will accelerate if, as currently envisaged by the Constitutional Treaty, the normal rules governing the ECJ's jurisdiction are extended. Lastly, the substantive scope of European law continuously increases. Practically all forms of economic activity are already covered by Community legislation, and this legislation is subject to continuous modification and expansion.

I obviously hope that the future will prove me to have been too pessimistic or even wrong. Yet I have few doubts that the ECJ's overburdened docket will remain so if no structural change is put in place. So, what changes should we envision to remedy that situation? And should we transform the ECJ into a truly specialised constitutional court?

C. Should the ECJ be transformed into a constitutional court or should it remain a supreme court?

It is a brave proposition indeed to attempt to grapple with this question in the time to our disposal. And we have even less time to analyse all the proposals that have been put forth to alleviate the burden of the ECJ – including, *inter alia*, the relaxation of the *CILFIT* criteria and the "green light" system for preliminary references suggested by Advocate General Jacobs. I am sure that in any event we will have a number of occasions today and tomorrow to expand on these options. Allow me therefore to focus directly on what is, in my view, the best way to supply the ECJ with some breathing space. I stress at the outset that these are personal thoughts only and that they do not necessarily reflect the views of my colleagues at the CFI.

As I suggested before, I do not think that there is any urgent need to transform the ECJ into a specialised constitutional court. In my view it is perfectly feasible for the ECJ to remain a supreme court in charge not only of ruling on the main constitutional issues but, moreover, of safeguarding the consistency of EU law. However, I also think that in the long term the ECJ should be doing *only* that, which means that it should not be called upon to decide mundane cases or, to put it differently, cases that do not raise constitutional issues and/or do not jeopardise the unity and the consistency of EU law.

Limiting the ordinary jurisdiction of the ECJ to truly important questions would have at least two advantages. Firstly, the ECJ would be spared from having to consider relatively non-problematic cases which do not require the time and attention of a supreme court for their resolution. The judges would have more time to balance the options available to them and to provide more detailed legal reasoning in their judgments and orders. Secondly, it would allow the ECJ to hear cases before it in the grand or the plenary chamber and on a more regular basis than is the case today. This would ensure that all – or at least a majority of – the legal systems in the EU are represented when important judgement calls are required as judges would not have to spread themselves thinly in smaller chambers to deal as swiftly as possible with as large a number of cases as possible. In 1990, approximately 45 % of the cases were judged by chambers and 55% by the ECJ sitting in plenary session, whereas in 2004 the plenary and the grand chamber ruled on only 12 % of the cases. Five-judge chambers are thus becoming the usual formation for hearing cases brought before the ECJ, which is unsatisfactory if one remembers that all or at least a much larger number of national systems should in principle have their say when important questions are addressed.

I am therefore inclined to think that, in the long term, the ECJ should focus only on deciding the main constitutional issues and on safeguarding the consistency of EU law where necessary. I am not saying that it should happen immediately, but I think that this is the end goal towards which the judicial system should and will evolve sooner or later.

D. Limiting the jurisdiction of the ECJ to the most important issues: practical problems and practical remedies

Now, of course some of you may object that while the bigger picture seems appealing, the devil, as always, is the detail. Although there may well be some truth in this objection, I am convinced that thanks to the Treaty of Nice we already have at our disposal the tools needed if we want to ensure that the ECJ is only seized by the most important cases. As you will be aware, Article 225(3) EC now allows the transfer of preliminary references to the CFI in "specific areas". Such transfer would logically alleviate the ECJ's case load. Several commentators have suggested that the "specific areas" envisioned by Article 225(3) EC could cover quite diverse fields of law, such as competition law, intellectual property law, customs law or judicial co-operation in civil matters.

However, other commentators have voiced concerns about the possibility that a transfer in these fields could jeopardise the unity and the consistency of EU law. Their argument is that the CFI could be the final judicial instance in regard of questions which may have a constitutional dimension or on questions which are inextricably linked with areas of law not covered by the transfer of jurisdiction. I naturally understand these concerns but I do not think that those risks will materialise often. What is more, I am still puzzled as to why these critics hardly ever seek to explain why the safeguards enshrined in the Treaty of Nice and the Statute of the ECJ could not be relied upon to avoid such risks. A closer look at the Treaty of Nice and the Statute in my view reveals a comprehensive toolbox. In particular, allow me to quote Article 225(3) EC, which says: "*[w]here the Court of First Instance considers that the case requires a decision of principle likely to affect the unity or consistency of Community law, it may refer the case to the Court of Justice for a ruling*". Also, it should not be forgotten that the CFI is very sensitive to the consistency and the unity of EU law. Accordingly, the CFI's right to transfer a question to the ECJ is in my view a "safety valve" that guarantees that the ECJ will continue to decide the most important questions.

In addition, even if one were to distrust the CFI's ability or willingness to make such referrals, an additional remedy is provided for since the Treaty of Nice: Article 225(3) EC provides that "*[d]ecisions given by the Court of First Instance 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 Community law being affected*". Pursuant to Article 62 of the Statute of the ECJ, the exceptional review by the ECJ is proposed by the First Advocate General. The risk that this procedure creates further delay is limited given the requirements that (i) firstly, the proposal must be made within one month of delivery of the decision by the CFI (Article 62 of the Statute); (ii) secondly, the ECJ must decide whether or not the decision should be reviewed within one month of receiving the proposal made by the First Advocate

General (Article 62 of the Statute); and (iii) lastly, the Court of Justice must give a ruling by means of an urgent procedure (see amendment to the Statute adopted on October 3, 2005). Of course the process will be very demanding for the First Advocate General and his chambers, but there is no reason to expect that he or she will not be able to cope with these new duties.

Ladies and gentlemen, I think that before discarding the possibility of transferring preliminary references to the CFI in "specific areas", it should first be proven that the remedies laid down in the Treaty of Nice are ill-conceived and insufficient. I do not claim that I have read every single piece ever written on the future of the EU judicial architecture, but I have read many of them and so far I have found no compelling reason to distrust these "safety valves".

Turning now to other types of actions, in particular appeals on points of law, the Nice Treaty provides that the Council "may create judicial panels to hear and determine at first instance certain classes of action or proceeding brought in specific areas" (Article 225a). As a consequence of the creation of such specialised tribunals, the CFI will have jurisdiction to hear and determine actions or proceedings brought against decisions of the judicial panel (Article 225(2)), which will in turn partially lighten the work load of the ECJ. Here again, for those who may voice concerns about the unity and the consistency of the law, the "safety valves" already mentioned for preliminary references will also be available. However, when contemplating these reforms we must ensure that we transfer competences and not problems. Therefore, were it to be decided to transfer new functions to the CFI, we must be certain that the latter has enough resources to deal with these new cases quicker than the ECJ currently is able to do, which would require the creation of several specialised courts.

I am therefore inclined to think that in the long term the ECJ should be in charge mainly of (i) interinstitutional litigation; (ii) the review of the CFI's judgments, either in appeals on points of law or on a more exceptional basis if these judgments relate to a field of competences transferred to the specialised courts; and (iii) cases brought before the CFI that raise constitutional questions and therefore should be referred automatically to the ECJ.

Finally a few words on infringement actions. Should we consider a transfer of these actions to the CFI as well? I concede that it may not be palatable for the Member States to relinquish their privileges and that, all in all, a transfer will not necessarily be a significant gain. On the other hand, few of these actions raise questions of constitutional law. For instance, actions that concern the non-communication of transposing measures usually do not raise questions of such a magnitude that they deserve to be treated by the ECJ. On this basis there is probably scope for reflection in that area too. I think that we can envision a system in which most infringement actions would be dealt with by the CFI. Under this system the ECJ would review the CFI's judgements as a *juge de cassation* (appeals on points of law) but could also

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rule directly on the cases brought before the CFI that have a constitutional dimension and should therefore be referred automatically to the ECJ.

E. Conclusion

In conclusion, in my view the time is ripe to think about making full use of the tools provided by the Treaty of Nice. I deliberately say "full use" as one of these tools has already been implemented: as you will be aware, less than one month ago the seven first judges of the new Civil Service Tribunal were sworn in. The Civil Service Tribunal is the first panel created by the Council on the basis of Article 225a EC. It will be a significant test case the outcome of which will allow us to assess the new system envisioned by the Treaty of Nice: staff cases typically raise several issues requiring the application of general principles of administrative law, which by definition also apply in other fields of EU law. We should therefore in a few years be in a position to check whether the unity and the consistency of these principles have unravelled.

As you can imagine, I am confident that this will not happen. But I cannot stress enough the decisive character of this test, because structural shifts like the ones contemplated by the Treaty of Nice generally have to be implemented on a piecemeal basis; changes of this magnitude are usually put in place on a large scale only after it has been proven that the first trial was successful. From a historical point of view, many of you will remember that the first competences transferred to the CFI were quite limited. It was only after the CFI proved that it was up to the job that additional functions were transferred to it. The same applies to the Nice system; its future will probably depend on this first trial. Reality naturally outwits our imagination, but I am sure that the new Tribunal and the CFI as a *juge de cassation* will soon fulfil their new tasks with flying colours, which will reinforce our confidence in the Nice system and bolster the political will required to extend it to other fields of law.