

# THE JUDICIAL SYSTEM OF THE EUROPEAN UNION IN THE DRAFT CONSTITUTIONAL TREATY

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Although the Treaty of Nice did not respond to the challenges of the enlargement adequately, in particular it failed within the tight timetable set for the completion of the Intergovernmental Conference in 2000 to reach a sound reform of the political decision-making,<sup>1</sup> its outcome for the judicial system of the European Union was not dissapointing. The changes in that area, reflecting the awareness of the urgent need for the significant reform, were „for the most part, not momentous“ and indicated „a willingness on the part of Member States to address serious judicial reform issues, both now and in the future“.<sup>2</sup> Nevertheless, some items of the IGC agenda in the judicial area proved to be too controversial to reach a political consensus. Therefore, there are reasonable grounds for the comparative review of the „Nice left-overs“ with the Draft Treaty establishing a Constitution for Europe.<sup>3</sup>

## 1. Changes from Nice in outline

The Treaty of Nice met some of the requirements for change, provoked by recent and coming developments, identified before the IGC by the Courts themselves and by the Commission:<sup>4</sup> the recent expansion of new areas of EU-policy competence, the success of legal harmonization calling for judicial clarification, the growing juridification of European society conferring more rights on individual and - last but not least - the substantial enlargement of the EU to the central and eastern Europe. These requirements, becoming evident through the increase in caseload of the European Courts, suggested that the unity of Community law would be secured, the due process of justice would become more transparent, accessible for public and dispensed without unacceptable delay, including the efficient enforcement of judgements.

The division of responsibility between the European Court of Justice and the Court of First Instance was modified. Judicial panels, to be established by the Council as attached to the CFI (Articles 220 second para, 225a TEC), may exercise, in certain classes of action or proceeding in specific areas, the judicial competence, while the CFI can hear appeals from such panels (on points of law or, when decided by the Council, on points of fact, too). The jurisdiction of the CFI on direct actions for annulment and failure to act, on damages claims, staff cases and arbitration cases was acknowledged, unless those actions were assigned to a judicial panel or reserved for the ECJ in the Statute. But, such a reservation under current Article 51 of the Statute, preferring the ECJ-jurisdiction on actions brought by the EC institutions (including enforcement actions against Member States), by the ECB or Member States,

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<sup>1</sup> *Tsatsos, D.*, The Treaty of Nice. A failure which can only be remedied by means of an effective and properly implemented post-Nice process, in: *Melissas, D./Pernice, I.* (eds.), *Perspectives of the Treaty and the Intergovernmental Conference in 2004*, Nomos 2001, p. 10.

<sup>2</sup> *Dashwood, A./Johnston, A.*, The Outcome at Nice: An Overview, in: *Dashwood, A./Johnston, A.* (eds.), *The Future of the Judicial System of the European Union*, Hart Publishing 2001, p. 219.

<sup>3</sup> CONV 850/03 of 18 July 2003, Articles 28 and III-258 to 289.

<sup>4</sup> *The Future of the Judicial System of the European Union (Proposals and Reflections)*, May 1999 („The Courts Paper“) and *Report by the Working Party on the Future of the European Communities' Court System*, May 2000 („The Due Report“).

can be narrowed and the scope of the CFI-jurisdiction extended by the unanimous vote of the Council; the Treaty of Nice encouraged the ECJ and the Commission to give a suitable impetus in this respect (Article 225 TEC).

The „organic law“ composed of a Council unanimous decision adopted by the Member States in accordance with their respective constitutional requirements (i.e., outside of the Treaty amendment procedure under Article 48 TEU) can confer a new jurisdiction to the ECJ (CFI or judicial panel) for disputes between individuals relating to the Community intellectual property rights, resulting from the application of uniform instruments of IP-protection (Article 229a TEC). Another change in the area of direct actions made the European Parliament a privileged applicant (equal to Member States, Council and Commission), actively legitimised for annulment actions under Article 230 TEC).

The European jurisdictional structure enables after Nice to extend the scope of the CFI-jurisdiction by questions referred for a preliminary ruling under Article 234 TEC in specific areas laid down by the Statute, unless for reasons of the unity or consistency of Community law the case was referred to the ECJ for a decision of principle; the CFI-ruling may exceptionally be subject to review by the ECJ (Article 225 III TEC).

Without going into details, the composition of the Courts has been adapted to the perspective of the enlarged Union, too: through clear rule „one Member State-one judge“ at the ECJ (Article 221 first para TEC), simplified shape of ECJ-formations and a facultative engagement of the Advocate-General (in cases bringing „new points of law“ only - Article 222 second para TEC, Article 20 fifth para Statute). Amendments to the Statute as the part of primary law (except of the basic provisions of Title I on the status of the Judges and Advocates-General, Article 245 second para TEC) are more accessible now: by a unanimous decision of the Council, i.e. without revision of the Treaty. Amendments to the Rules of Procedure of all judicial branches can be adopted only by a qualified majority vote of the Council.

The Treaty of Nice met several tasks of practical reason able to balance in a better way rather than to prevent an increase of or reduce the workload of the European Courts in the Union of 25 Member States or more. Above this limited immediate improvements, it put a framework in place, within which a further move can be aimed without the cumbersome Treaty revision. Therefore, the innovations from Nice could be summarized as an *unfinished reform*, which could to be implemented by additional measures for operating its through act of the Community institutions. Although the new Member States have been demonstrating a clear support for the preservation of intergovernmental elements in the Union decision-making during the European Convention, their general understanding for more flexibility in the judicial setting of the Union seems to be beyond any doubt. As they believe that the judicial branch of the Community could balance their weak political positions *vis-a-vis* the „old“ Member States, they should not be suspected to attempt undermining of the outcome of Nice by measures for its implementation.

## 2. Leftovers of Nice - issues for consideration by EU-Constitution makers?

The Treaty of Nice, focusing largely on practical matters, left open more fundamental problems of the European judicial system, explored earlier,<sup>5</sup> a.o.:

- should the criteria for the access of private parties to direct actions on annulment of Community acts under Article 230 IV TEC be relaxed, as requested by the academic writers as well as by some inside opinion from the Courts?<sup>6</sup>
- should the preliminary ruling mechanism be reconsidered, when the access of private parties to protection of their rights under Article 230 IV TEC would have to remain very limited (or frustrated), as an earlier fluctuation of the ECJ-case law about the intensity of judicial review („filtering“ of the *acte claire* doctrine) implicated?<sup>7</sup>
- should the preliminary ruling mechanism move to a more appellate system?
- should the ECJ become a real Constitutional Court for EU-citizens, equipped with the capacity to hear and determine complaints about violations of fundamental rights by the EU-institutions?
- should the CFI be developed as a genuine ordinary court for all types of direct actions regardless of the status of the applicant?
- could the „European mandate“ of ordinary national courts be strengthened towards making these courts decentralized judicial bodies of the ECJ?
- could the „centre of gravity“ within the European system of judicial cooperation be gradually shifted towards the development of a federal one?
- should implications of policy choices by the ECJ („activism“) be debated or some limits imposed?

The Declaration of Laeken of 15 December 2001 did not express any explicit order for redesigning of the judicial system in its entirety.

## 3. Draft Articles on the Courts

The „Discussion Circle“ had been set up by the Convention „to look seriously at the implications that certain proposals made within the Convention might have for the operation of the Court of Justice“ under the Constitutional Treaty. It explored the following points:<sup>8</sup>

### 3.1. Procedure for appointing judges and Advocates-General

In general, the *status quo* (appointment by common accord of the governments of the Member States) has been maintained. However, an „advisory panel“, established by a European decision of the Council of Ministers and made up of seven persons chosen from among former members of the Court, representatives of national supreme courts and lawyers of recognized com-

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<sup>5</sup> Supra, note 4.

<sup>6</sup> Schermers, H./Waelbroeck, D., *Judicial Protection in the European Union*, 6th ed., Kluwer 2001, p. 419.; Opinion of the Advocate-General Francis Jacobs from 21 March 2002 in the appeal case C-50/00 P *Unión de Pequeños Agricultores*, 99; decision of the CFI of 3 May 2002 in the case T-177/01 *Jégo-Quéré & Cie*, etc.

<sup>7</sup> Case 244/80 *Foglia*, (1981) ECR 3045.

<sup>8</sup> Final report of the discussion circle on the Court of Justice of 25 March 2003 (CONV 636/03).

petence, one of whom proposed by the European Parliament, could give on the initiative of the President of the ECJ an opinion - on the basis of objective criteria relating to professional qualifications - on whether a candidate's profile was suited to the performance of his/her duties (Article III-262 Draft). The length of the term of office of members of the Court remained unchanged (six-years term, renewable - Article 28 II third para Draft).

### 3.2. Voting rule in the Council

The unanimity rule for amending the Statute by the Council of Ministers has been replaced by the *qualified majority* rule, implied by the legislative procedure of adopting European law for such amendment, with the exception of Title I and Article 64 (language matters) of the Statute (Article III-289 second para Draft). The same rule should govern the conferring of new jurisdiction on the Court of Justice in disputes relating to European intellectual property rights, i.e. without an additional approval by the Member States in accordance with their respective constitutional provisions, i.e., without an „organic law“, introduced by the Treaty of Nice, more (Article III-269 Draft). The same rule is not explicitly expressed for the approval of the Council of Ministers to the Rules of Procedure, adopted by all judicial branches (Articles III-260 fourth para, III-261 fifth para, III-264 V Draft).

### 3.3. Titles of the Courts

The CFI, after the Treaty of Nice, lost the position of an exclusive tribunal for hearing and determination of all classes of action or proceeding in first instance, sharing this competence with judicial panels (as well as with the ECJ); therefore, it has been renamed as the „*High Court*“. In order to avoid confusion in certain languages with „chambers“ for certain specific cases which might be set up within the Court, it seemed to be preferable to call the „judicial panels“ as „*specialised courts*“. The whole of the European judicial system would be called „the Court of Justice“, including the ECJ, the High Court and specialised courts (Article 28 I first para Draft); this deserves still attention.

### 3.4. Direct actions by individuals

The access of private litigants to effective judicial protection of their rights (guaranteed by Article II-47, the Charter of Fundamental Rights, Draft) through direct appeals against general acts of Community institutions has been made more feasible by two-ways approach:

First, Member States are generally required to „provide rights of appeal sufficient to ensure effective legal protection in the field of Union law“ (Article 28 I second para Draft), i.e. to establish a system of legal remedies and procedures which ensures respect for the rights of individuals, resulting from the Union law.<sup>9</sup> This special determination of the principle of *loyal cooperation* requires from the national courts to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before these courts the legality of any decision or other national measure relative to

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<sup>9</sup> Judgement of the ECJ of 25 July 2002 in the case *Unión de Pequeños Agricultores* (referred to supra in note 6), para 41 and 42.

the application to them of a Community act of general application, by pleading the invalidity of such an act.

Second, the restrictive conditions of admissibility of actions by individuals against Community acts of general application (having „direct and individual concern“) have been relaxed in proceedings against *regulatory acts* which does not entail implementing measures: an „individual concern“<sup>10</sup> to the applicant would no more be required (Article III-270 IV Draft). An individual may have a recourse to a judicial remedy at the European level without having breached its obligation under the Community law first. In addition, review of the legality of Union acts shall also include acts of *bodies and agencies* of the Union, producing legal effects towards third parties; the act establishing the body or agency might lay down specific arrangements for the exercise of control of the body or agency in question (the need to institute proceedings first before the Commission, the capacity of the Court to overturn a contested act, ect.). A specific right of individual to bring an action for the defence of fundamental rights has not been introduced into the Draft by the Convention.

### **3.5. Sanctions for non-compliance with a judgement**

The procedure for penalties in cases of failure to fulfil the obligation of a Member State to notify measures transposing a European framework law (i.e., „non-communication“ cases, when the Member State has not taken any transposition measure) has been simplified and speeded up by the possibility granted to the Commission to request, in the *course of the same proceedings*, the imposition of the payment of a lump sum or penalty, which shall take effect after a certain period had elapsed from the date the judgement was delivered, if the Member State did not comply with the Court’s ruling.

### **3.6. Judicial control relating to the areas of special attention**

Among other topics for the debate on the *common foreign and security policy*<sup>11</sup> the Convention drafted to continue in the lack of general judicial competence within this area (Article III-282 Draft), with an exception of reviewing the legality of restrictive measures under CFSP which might have a negative financial impact on natural or legal persons (economic sanctions against individuals). The Convention did not reached a conclusion on the question whether the jurisdiction of the Court should be extended to restrictive measures which might affect persons other than from an economic point of view (e.g. visa bans). In the other merging pillar, the *area of freedom, security and justice* the jurisdiction of the Court shall not cover the review of the validity or proportionality of police operations or other law-enforcement services of Member States with regard to the maintenance of law and order and the safeguarding of internal security under national law (Article III-283 Draft).

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<sup>10</sup> Judgement of 15 July 1963 in the case 25/62 *Plaumann*.

<sup>11</sup> Supplementary report on the question of judicial control relating to the common foreign and security policy of 16 April 2003 (CONV 689/1/03).

#### **4. An evaluation of the Draft Articles**

The general characteristics of the Draft Constitutional Treaty in the area of justice is: restrained approach to changes, based on a cautious estimation of their possible impact on legal practice. No wonder, the fresh amendments from Nice must be experienced prior to the next advancement of the reform drive and nobody can assess the influence of enlargement on the operation of the European judicial system. The large majority of issues identified before as a potential source of improvements of the system remained open.

Nevertheless, an inclination towards the strengthened direct protection of rights conferred on an individual could lead to a decrease in the preliminary ruling mechanism, but unresolved matters might raise the number submissions under this mechanism again. For instance, when the Charter (Article II-53 Draft) excludes an interpretation of its rights „restricting or adversely affecting human rights and fundamental freedoms as recognised by ... the Member States' constitutions“, the questions arises, who would decide about the higher standard of protection. The principle of supremacy of the Community (Union) law over national laws does not admit an autonomous decision made by a national court. Therefore, the preliminary ruling would have to be involved again.

The new Member States from central and eastern Europe, lacking the practical experience with working of the EU-judicial system, could enhance the enforcement of flexibility measures, designed by the Treaty of Nice and confirmed by the Draft Constitutional Treaty without endangering the effective operation of the system in its entirety.