



## Statewatch

### EU Constitutional annotation no 3

#### Part III, Title VI, Chapter I, Section 1, Subsection 5: Court of Justice

The following text includes the entire text of the subsection of Part III of the proposed EU constitution concerning the Court of Justice, with annotations indicating how the proposed Constitution compares to the current Treaties, practice and case law.

The changes in this area would include particularly the full application of the Court of Justice jurisdiction to the area of Justice and Home Affairs (except for limited jurisdiction over actions of national police forces). The present rules apply the ECJ's normal jurisdiction to immigration, asylum and civil law matters, except that references from national courts are limited to final courts only, there is a restriction on jurisdiction relating to border controls and there is a possibility of the Council, Commission or Member States sending the Court a 'request for interpretation' (Article 68 EC). Entirely separate rules apply presently to policing and criminal law measures (Article 35 EU), giving Member States an opt-in to the Court's jurisdiction to receive references from national courts, allowing only a narrow range of plaintiffs to challenge EU measures, and providing for rules on dispute settlement between Member States (or Member States and the Commission), instead of infringement proceedings as provided for in the EC Treaty. Both sets of special rules would be replaced by the normal rules set out below.

Other changes to the Court rules would concern the rules on standing to bring annulment actions, on infringement proceedings and on the procedure for decision-making regarding key rules governing the EU court system.

It should be noted that the Court only expressly has jurisdiction over acts of the European Council in Article III-276, but it would have implied jurisdiction in Articles III-272 and III-274, as the European Council would be an 'institution' of the EU. Based on the prior case law of the Court, it could be argued that it has even fuller jurisdiction over acts of the European Council, to ensure that it does not act outside its powers.

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Article III-258<sup>1</sup>

The European Court of Justice shall sit in chambers, as a Grand Chamber or as a full Court, in accordance with the Statute of the Court of Justice.

Article III-259<sup>2</sup>

The European Court of Justice shall be assisted by eight Advocates-General. Should the European Court of Justice so request, the Council of Ministers may, acting unanimously, adopt a European decision to 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 or her involvement.

Article III-260<sup>3</sup>

The Judges and Advocates-General of the European 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 III-262.

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.

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

The European Court of Justice shall adopt its Rules of Procedure. Those Rules shall require the approval of the Council of Ministers.

Article III-261<sup>4</sup>

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> Art. 221 EC, amended to delete reference to one judge per Member State; this appears in Art. I-28(2).

<sup>2</sup> Art. 222 EC, with only a technical amendment to refer to the type of instrument to be used.

<sup>3</sup> Art. 223 EC, amended to delete reference to six-year term (now in Art. I-28(2)), to add a reference to the new appointments panel, to delete reference to appointment of the Registrar (the Registrar would no longer be referred to in the Treaties/Constitution) and to drop reference to Council approval of the rules of procedure by QMV (redundant in light of Article I-22(3)).

<sup>4</sup> Art. 224 EC. The Court of First Instance would be renamed the 'High Court'; the reference to the number of judges and six-year term is now in Art. I-28(2); a reference to the appointment panel would be added; the reference to the Registrar is deleted; and the reference to Council voting on the Rules of Procedure would be changed (see *ibid.*).

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 after consultation of the panel provided for in Article III-262.

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 or she may be re-elected.

The High Court shall establish its Rules of Procedure in agreement with the European Court of Justice. The Rules shall be subject to the approval of the Council of Ministers.

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

#### Article III-262<sup>5</sup>

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 European Court of Justice and the High Court before the governments of the Member States take the decisions referred to in Articles III-260 and III-261.

The panel shall comprise seven persons chosen from among former members of the European 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 Council of Ministers shall adopt a European decision establishing the panel's operating rules and a European decision appointing its members. It shall act on the initiative of the President of the European Court of Justice.

#### Article III-263<sup>6</sup> (ex Article 225)

1. The High Court shall have jurisdiction to hear and determine at first instance actions or proceedings referred to in Articles III-270, III-272, III-275, III-277 and III-279, with the exception of those assigned to a judicial panel and those reserved in the Statute for the European 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 European Court of Justice on points of law only, under the conditions and within the limits laid down by the Statute of the Court of Justice.

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 III-264.

Decisions given by the High Court under this paragraph may exceptionally be subject to review by the European 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.

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<sup>5</sup> This Article is entirely new.

<sup>6</sup> Art. 225 EC, amended only to refer to 'specialised courts' rather than 'judicial panels'.

3. The High Court shall have jurisdiction to hear and determine questions referred for a preliminary ruling under Article III-274, in specific areas laid down by the Statute of the Court of Justice.

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 European 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 European 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 III-264<sup>7</sup>

1. A European law may establish specialised courts attached to the High Court to hear and determine at first instance certain classes of action or proceeding brought in specific areas. It shall be adopted either on a proposal from the Commission after consultation of the Court of Justice or at the request of the Court of Justice after consultation of 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 of Ministers, acting unanimously.

5. The specialised courts shall establish their Rules of Procedure in agreement with the Court of Justice. Those Rules shall require the approval of the Council of Ministers.

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 III-265<sup>8</sup>

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.

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<sup>7</sup> Art. 225a, amended to rename the courts, to drop the redundant reference to the voting procedure in the Council, and to change the decision-making procedure so that new courts are established by co-decision and qualified majority voting, rather than unanimous voting and consultation of the EP.

<sup>8</sup> Art. 226 EC, not amended; but see Art. III-267(3).

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 III-266<sup>9</sup> (ex Article 227)

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 III-267<sup>10</sup>

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 judgement 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 III-266.

3. When the Commission brings a case before the Court of Justice pursuant to Article III-265 on the grounds that the State concerned has failed to fulfil its obligations to notify measures transposing a European 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.

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<sup>9</sup> Art. 227 EC,

<sup>10</sup> Art. 228 EC, amended to drop the 'reasoned opinion' stage from para. 2, and to add a new para. 3.

Article III-268<sup>11</sup>

European laws and European regulations of the Council of Ministers may give the Court of Justice unlimited jurisdiction with regard to the penalties provided for in them.

Article III-269<sup>12</sup>

Without prejudice to the other provisions of the Constitution, a European law may 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 European intellectual property rights.

Article III-270<sup>13</sup>

1. The Court of Justice shall review the legality of European laws and framework laws, of acts of the Council of Ministers, of the Commission and of the European Central Bank, 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 bodies and agencies of the Union intended to 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 of Ministers 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 or her, and against a regulatory act which is of direct concern to him or her and does not entail implementing measures.

5. Acts setting up bodies and agencies 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.

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<sup>11</sup> Art. 229 EC, with a technical amendment to take account of new names for instruments.

<sup>12</sup> Art. 229a EC, with a change to the decision-making procedure so that this measure is adopted by co-decision and qualified majority voting, rather than unanimous voting and consultation of the EP.

<sup>13</sup> Art. 230 EC, amended to include agencies and bodies in para. 1, to include the Committee of the Regions in para. 3, to change the standing rule in para. 4 and to add a new para. 5.

Article III-271<sup>14</sup>

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 which it has declared void shall be considered as definitive.

Article III-272<sup>15</sup>

Should the European Parliament, the Council of Ministers, the Commission or the European Central Bank, 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 bodies and agencies of the Union which fail to act.

The action shall be admissible only if the Institution, body or agency 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, body or agency of the Union has failed to address to that person any act other than a recommendation or an opinion.

Article III-273<sup>16</sup>

The Institution or Institutions, body or agency 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 III-337.

Article III-274<sup>17</sup>

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 these 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.

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<sup>14</sup> Art. 231 EC, amended to provide that the Court can maintain in force provisions of all acts when declaring them void, not just regulations; this confirms Court practice.

<sup>15</sup> Art. 232 EC, amended to apply to bodies and agencies. The European Council could bring an action.

<sup>16</sup> Art. 233 EC, amended to apply to bodies and agencies.

<sup>17</sup> Art. 234 EC, amended to delete a reference to jurisdiction over the statutes of agencies and bodies, and to add the final paragraph on persons in custody. Acts of the European Council would be covered.

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.

Article III-275<sup>18</sup>

The Court of Justice shall have jurisdiction in disputes relating to compensation for damage provided for in the second paragraph of Article III-337.

Article III-276<sup>19</sup>

At the request of the Member State concerned by a determination made by the European Council or the Council of Ministers pursuant to Article I-58, the European Court of Justice shall have jurisdiction solely on the procedural stipulations contained in that Article. The Court shall rule within one month from the date of that determination.

Article III-277<sup>20</sup>

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 of Officials and the Conditions of Employment of other servants of the Union.

Article III-278<sup>21</sup>

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 III-265;

(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 III-270;

(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 III-270, 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;

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<sup>18</sup> Art. 235 EC; no amendments.

<sup>19</sup> Art. 46(e) EU, redrafted but no substantive change.

<sup>20</sup> Art. 236 EC; no amendments.

<sup>21</sup> Art. 237 EC; no amendments.



(d) the fulfilment by national central banks of obligations under the Constitution and the Statute of the European System of Central Banks. In this connection, the powers of the Council of the European Central Bank in respect of national central banks shall be the same as those conferred upon the Commission in respect of Member States by Article III-265. 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 III-279<sup>22</sup>

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 III-280<sup>23</sup>

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 III-281<sup>24</sup>

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 III-282<sup>25</sup>

The Court of Justice shall not have jurisdiction with respect to Articles I-39 and I-40 and the provisions of Chapter II of Title V of Part III concerning the common foreign and security policy.

However, the Court of Justice shall have jurisdiction to rule on proceedings reviewing the legality of restrictive measures against natural or legal persons, adopted by the Council on the basis of Article III-224, and brought in accordance with the conditions laid down in Article III-270(4).

Article III-283<sup>26</sup>

In exercising its competences regarding the provisions of Sections 4 and 5 of Chapter IV of Title III 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.

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<sup>22</sup> Art. 238 EC; not amended.

<sup>23</sup> Art. 239 EC; not amended.

<sup>24</sup> Art. 240 EC; not amended.

<sup>25</sup> Successor to Art. 46 EU as regards excluding ECJ jurisdiction over the CFSP. The second paragraph, confirms current practice, as the Court has all forms of jurisdiction over first pillar sanctions measures adopted pursuant to Arts. 60 and/or 301 EC. It does not appear to give the Court jurisdiction over the initial foreign policy measures adopted before the sanctions measures. See also Art. III-209.

<sup>26</sup> Art. 35(5) EU, amended.

Article III-284<sup>27</sup>

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 III-285<sup>28</sup>

Notwithstanding the expiry of the period laid down in Article III-270(5), any party may, in proceedings in which a European law or a European regulation of the Council of Ministers, of the Commission, or of the European Central Bank is at issue, plead the grounds specified in Article III-270(2) in order to invoke before the Court of Justice the inapplicability of that act.

Article III-286<sup>29</sup>

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 III-287<sup>30</sup>

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

Article III-288<sup>31</sup>

The judgments of the Court of Justice shall be enforceable under the conditions laid down in Article III-307.

Article III-289<sup>32</sup>

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

A European law may amend the provisions of the Statute, with the exception of Title I and Article 64. It shall be adopted either at the request of the Court of Justice and after consultation of the Commission, or on a proposal from the Commission and after consultation of the Court of Justice.

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<sup>27</sup> Art. 292 EC; not amended.

<sup>28</sup> Art. 241 EC, amended to update references to instruments.

<sup>29</sup> Art. 242 EC, not amended.

<sup>30</sup> Art. 243 EC; not amended.

<sup>31</sup> Art. 244 EC; not amended.

<sup>32</sup> Art. 245 EC, amended to provide for a different decision-making procedure (co-decision in place of unanimity/consultation).