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The Impact of the Amsterdam Treaty upon the Court of Justice

Ole Due*

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Abstract

The Intergovernmental Conference leading up to the adoption of the Maastricht Treaty was probably the first during which the case law of the Court of Justice formed a topic of discussion. The result of this discussion was certainly positive in relation to the new Treaty's general rules. But, clearly, criticism had also been voiced during the discussion. This criticism can be seen from two protocols to the Treaty, both drawn up as unfortunate reactions to specific rulings. It is important that the establishment of a closer cooperation between some Member States does not permit them to escape from the rules of jurisdiction applicable in the area in question and that decisions on the establishment of and accession to such closer cooperation are subject to the rules of jurisdiction of the EC Treaty. The extension of the Court's jurisdiction to areas outside the Community Treaties is certainly an achievement, and it is important that this extension also applies to conventions, where the question until now has created great difficulties. The mere complexity of the provisions and the many limitations of access to the Court, however, greatly reduce its practical importance. On the other hand, the system is sufficiently flexible to permit the Member States and their courts to remedy some of the deficiencies. In the perspective of a gradual development of the judicial system of the Union, the rules of the Draft Treaty concerning the jurisdiction of the Community Courts appear, in their entirety, to constitute an acceptable result of considerable efforts on the part of the Conference.

THE IMPACT OF THE AMSTERDAM TREATY UPON THE COURT OF JUSTICE

*Ole Due**

INTRODUCTION

For many years, the rules of the European Community treaties¹ on the organization, procedure, and jurisdiction of the Court of Justice (or "Court") were left practically untouched. Before the Single European Act,² the only amendments adopted by the Member States were pure consequences of the accession of new Member States and were concerned with the number of judges and advocates general. An amendment to Article 165, third paragraph, of the Treaty establishing the European Economic Community ("EEC Treaty"),³ as well as the corresponding provisions of the two other treaties,⁴ was made by Council Decision of November 26, 1974,⁵ which opened the possibility for the Court to assign references for a preliminary ruling to a chamber. The Single European Act introduced Article 168a in the EEC Treaty and corresponding articles in the two other treaties, which empowered the Council to attach a Court of First Instance to the Institution.⁶

The Maastricht Treaty⁷ also contained some amendments

* Former President of the Court of Justice; Professor of University of Copenhagen Faculty of Law.

1. Treaty establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty]; Treaty establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140 [hereinafter ECSC Treaty]; Treaty establishing the European Atomic Energy Community, Mar. 25, 1957, 298 U.N.T.S. 167 [hereinafter Euratom Treaty].

2. Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA] (amending EEC Treaty, *supra* note 1).

3. EEC Treaty, *supra* note 1, art. 165, at 199.

4. ECSC Treaty, *supra* note 1, art. 32, at 151; Euratom Treaty, *supra* note 1, art. 137, at 173.

5. Council Decision No. 74/584/EEC, Euratom, ECSC, O.J. L 318/20 (1974).

6. SEA, *supra* note 2, arts. 4, 11, 26, O.J. L 169/1, at 5, 6, 13 (1987), [1987] 2 C.M.L.R. at 744, 745, 752. When both courts are concerned, I shall in the following refer to "the (judicial) Institution" or simply to "the (Community) Courts." When only the Court of Justice is concerned, I shall often use the term "the Court" in singular.

7. Treaty on European Union, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719 [hereinafter TEU] (amending EEC Treaty, *supra* note 1). This Treaty contains a number of new articles partly of a general character (Title I and Title VII), partly introducing the two so-called "new pillars" (Title V "Provisions on a common

requested by the Court, intended to improve the efficiency of this institution. Article 165, third paragraph, of the Treaty establishing the European Community ("EC Treaty") and the corresponding articles of the two other Community treaties were amended,⁸ this time in order to permit assignment to a chamber of all kinds of cases unless a Member State or a Community institution, being a party to the proceedings, requests that the case be heard in plenary session. Article 168a and the corresponding articles were likewise amended in order to empower the Council to extend the jurisdiction of the Court of First Instance, thus creating a better balance between the workloads of the two courts.⁹

Also, the provisions on the jurisdiction of the Court had to be amended as a consequence of the introduction of the co-decision procedure. At the same time, the Member States, by amendments to the relevant Treaty provisions, confirmed the rulings of the Court on the standing of the European Parliament to sue and to be sued.¹⁰ The standing of the European Central Bank was regulated after the same pattern. The respect of the new rules on the Economic and Monetary Union are, in principle, ensured by normal judicial means with the sole exception of Article 104c(10), which replaces the judicial control under Articles 169 and 170 with the political control procedures concerning government deficits in paragraphs 1 to 9 of the same article.¹¹

The Maastricht Treaty made one substantial extension of

foreign and security policy" and Title VI "Provisions on cooperation in the fields of justice and home affairs"). Titles II-IV contain amendments to the three Community treaties, now considered to form the "first pillar." To distinguish the new rules in Titles I and V-VII from the Community treaties, their articles are indicated by letters instead of numbers.

8. Treaty establishing the European Community, Feb. 7, 1992, art. 165, ¶ 3, O.J. C 224/1, at 60 (1992), [1992] 1 C.M.L.R. 573, 576 [hereinafter EC Treaty], *incorporating changes made by TEU, supra* note 7; TEU, *supra*, arts. H(11) & I(10), O.J. C 224/1, at 81, 89 (1992). One amendment to the Treaty establishing the European Economic Community ("EEC Treaty") removed the word "Economic." EC Treaty, *supra*, art. 1, O.J. C 224/1, at 8 (1992), [1992] 1 C.M.L.R. at 588.

9. EC Treaty, *supra* note 8, art. 168a, O.J. C 224/1, at 61 (1992), [1992] 1 C.M.L.R. at 685; TEU, *supra* note 7, arts. H, I, O.J. C 224/1, at 83, 89-90 (1992).

10. EC Treaty, *supra* note 8, arts. 173, 175, O.J. C 224/1, at 62 (1992), [1992] 1 C.M.L.R. at 687, 688; TEU, *supra* note 7, arts. H(13), I(13), O.J. C 224/1, at 81, 90 (1992).

11. EC Treaty, *supra* note 8, art. 104c, O.J. C 224/1, at 34 (1992), [1992] 1 C.M.L.R. at 638.

the jurisdiction of the Court of Justice. By an amendment to Article 171, it introduced the possibility of imposing penalty payments on Member States failing to take the necessary measures to comply with a judgment.¹² But the jurisdiction of the judicial Institution was not extended to the two new "pillars,"¹³ the common foreign and security policy and the cooperation in the fields of justice and home affairs, both based on the principle of intergovernmental cooperation. Only Article K.3(2)(c) provides that Member States, in conventions drawn up under the third pillar, may stipulate that the Court shall have jurisdiction to interpret the provisions of such conventions and to rule on any disputes regarding their application.¹⁴

The Intergovernmental Conference leading up to the adoption of the Maastricht Treaty was probably the first during which the case law of the Court of Justice formed a topic of discussion. The result of this discussion was certainly positive in relation to the new Treaty's general rules. As mentioned above, the case law on the procedural standing of the European Parliament was included in the rules on the jurisdiction. Furthermore, Article F(2) of the Maastricht Treaty¹⁵ was modeled on the case law concerning the protection of fundamental rights, although, illogically, the judicial Institution was not given jurisdiction in relation to this article. But, clearly, criticism had also been voiced during the discussion. This criticism can be seen from two protocols to the Treaty, both drawn up as unfortunate reactions to specific rulings.¹⁶

12. EC Treaty, *supra* note 8, art. 171(2), O.J. C 224/1, at 61-62 (1992), [1992] 1 C.M.L.R. at 687.

13. TEU, *supra* note 7, tits. V, VI, O.J. C 224/1, at 94-98 (1992), [1992] 1 C.M.L.R. at 736.

14. *Id.* art. K.3(2)(c), O.J. C 224/1, at 95 (1992), [1992] 1 C.M.L.R. at 736.

15. *Id.* art. F(2), O.J. C 224/1, at 6 (1992), [1992] 1 C.M.L.R. at 728.

16. TEU, *supra* note 7, Protocol concerning Article 119 of the Treaty establishing the European Community, O.J. C 224/1, at 104 (1992) [hereinafter Barber Protocol]; *id.*, Protocol annexed to the Treaty on European Union and to the Treaties establishing the European Communities, O.J. C 224/1, at 130 (1992). These protocols are nicknamed the "Barber Protocol" and the "Grogan Protocol" respectively, after the judgments having motivated the protocols. The Barber judgment stated that occupational pension schemes were covered by Article 119 on equal pay for men and women and the Grogan judgment qualified abortion, prohibited by the Irish Constitution, as "services" under Community law.

I. THE 1996/1997 INTERGOVERNMENTAL CONFERENCE

In the period leading up to and during the 1996/1997 Intergovernmental Conference ("Conference"), numerous ideas concerning the judicial Institution of the European Union were advanced, more or less officially, by some of the governments and institutions. I shall limit myself, however, to the major points of the following two official documents:

- 1) The report that the Court of Justice presented in May 1995 pursuant to the invitation that the Study Group, which was established in order to prepare the Conference, had sent to all institutions asking them to submit reports on the operation of the Maastricht Treaty;¹⁷ and
- 2) The Memorandum on the European Court of Justice presented to the Intergovernmental Conference by the United Kingdom in July 1996 ("U.K. Memorandum").¹⁸

Although most of the ideas put forward in the two documents have left no visible traces in the final text of the Amsterdam Treaty,¹⁹ they indicate problems felt by the authors that may reappear at later conferences and require solutions to be found.

A. *The Report of the Court of Justice*

Apart from presenting the general views of the Court on the tasks and functioning of the judicial system within the European Union, the Report underlined some problems, made a few proposals, and, in a very discreet manner, commented on some of the ideas advanced by other participants in the public debate on the Court. The Report found that, as to the composition of the Court, and in view of the coming enlargement of the Union, two factors must be balanced: on the one hand, the existence of an "invisible boundary between a collegiate court and a deliberative assembly,"²⁰ and on the other, the fact that "the presence of

17. See Weekly Bulletin on the Activities of the Court and the Court of First Instance No. 15/95 [hereinafter *The Report*]. Also, the Court of First Instance made a contribution which, however, is of less interest to the topic of this Essay.

18. Memorandum by the United Kingdom on the European Court of Justice of July 1996 [hereinafter *The Memorandum*].

19. Treaty of Amsterdam amending Treaty on the European Union, the Treaties establishing the European Communities and certain related acts, Oct. 2, 1997, O.J. C 340/1 (1997) (not yet ratified) [hereinafter *Treaty of Amsterdam*].

20. *The Report*, *supra* note 17, point 16.

members from all the national legal systems on the Court is . . . conducive to harmonious development of Community case law"²¹ and that "the presence of a judge from each Member State enhances the legitimacy of the Court."²² The Report did not try to predict the result of this balancing test, and there is an accepted belief that in this respect there have been differences of opinion within the Court, as there certainly are between the Member States.

The final text of the Amsterdam Treaty only refers to this problem once. It is addressed in the general provision of Article 2 of the Protocol on the institutions regarding the prospect of the enlargement of the European Union.²³ The provision provides for the convocation, at least one year before the membership of the Union exceeds twenty, of a conference to carry out a comprehensive review of the provisions on the composition and functioning of the institutions.

In the Report, the Court commented on a proposal from the European Parliament to amend the rules on the appointment of judges and advocates-general.²⁴ According to this proposal, the appointment should be decided by the Council, acting unanimously and after consulting the Parliament. Following the pattern known from national constitutional courts, such a modification might, in the view of the Parliament, be combined with the introduction of a non-renewable term of office. This term might be longer than the present six-year period.

In its Report, the Court found that the present procedure and the practice generally followed in renewing the terms of office of its members have satisfactorily ensured the independence of the Court and the continuity of its case law. The Court added that it

would not, however, object to a reform which would involve an extension of the term of office with a concomitant condition that the appointment be non-renewable. Such a reform would provide an even firmer basis for the independence of its members and would strengthen the continuity of its case

21. *Id.*

22. *Id.*

23. Treaty of Amsterdam, *supra* note 19, Protocol on the institutions with the prospect of enlargement of the European Union, art. 2, O.J. C 340/1, at 111 (1997).

24. The Report, *supra* note 17, points 17, 18.

law.²⁵

In the Court's view, it would also be an advantage for the continuous functioning of the Court that such a system, at least in the long run, would avoid the present simultaneous replacement of members every third year. Let me add as a personal note that it might also prepare the way for the introduction of dissenting and concurring opinions. As to the procedure, the Court considered that "a reform involving a hearing of each nominee by a parliamentary committee would be unacceptable."²⁶ In fact, experiences from the appointment procedure to the Court of Auditors have shown how difficult it is to restrict a parliamentary hearing to a pure examination of professional qualifications. Answering other questions may easily put the independence of the prospective nominee in jeopardy. The final text of the Amsterdam Treaty does not contain any amendment to the rules on the appointment of judges and advocates-general, but the question is sure to reappear at future conferences.

Concerning the functioning of the judicial system in the Communities, various ideas had been voiced during the public debate prior to the Conference. One idea was to confer a certain power to override rulings from the Community Courts on the Council. According to the case law of the European Court of Human Rights, such a system would have resulted in a situation where the judicial authorities of the Communities no longer could be considered as independent courts or tribunals in the sense of Article 6 of the Human Rights Convention.²⁷ It is, therefore, difficult to disagree with the Court of Justice when, in its Report, it stated that "[a]ny decision affecting the structure of the judicial system must therefore ensure that the courts remain independent and their judgments binding. Were that not to be the case, the very foundations of the Community legal order would be undermined."²⁸ Fortunately, no such proposal was tabled during the Conference, but, as we shall see, one of the proposals in the U.K. Memorandum contains traces of the same idea.

25. *Id.* point 17.

26. *Id.*

27. Van de Hurk, 288 Eur. Ct. H.R. (ser. A) (1994) (judgment of 19 April 1994) (concerning decisions of Dutch administrative tribunal that could, in principle, be set aside by Dutch government).

28. The Report, *supra* note 17, point 4.

At least one of the governments had thought of proposing the creation of a separate Constitutional Court, the members of which would be appointed in a way different from the members of the existing Community Courts. As it would be impossible to make a clear distinction between the jurisdiction of such a new court and a parallel jurisdiction of the present Court of Justice, the Constitutional Court would have to hear appeals from the Court of Justice on points that it considered to be of a constitutional character. The following statement in the Report from the Court of Justice must be seen as a comment on such ideas:

[T]he need to ensure uniform interpretation and application of Community law . . . presupposes the existence of a single judicial body, such as the Court of Justice That requirement is essential in any case which is constitutional in character or which otherwise raises a question of importance for the development of the law.²⁹

As we shall see shortly, the U.K. Government avoided this problem with its proposal to introduce an appeal procedure within the Court of Justice itself.

As to the jurisdiction of the Community Courts, an idea voiced by at least one of the governments was to abolish the possibility for national courts and tribunals of first instance to request preliminary rulings from the Court of Justice. The reason presented was the desire to lighten the workload of the Court. One contributory factor, however, is the considerable public expense caused by a number of requests by national courts of first instance for preliminary rulings by the Court of Justice that had interpreted Community rules, in particular on social rights of migrant workers. To the extent that this factor is the real reason, the idea is, however, misconceived. Such national jurisdictions would still have to apply Community law, if need be, by setting aside a national rule or decision,³⁰ only they would be deprived of the possibility of seeking the guidance of the Court of Justice as to the proper interpretation of the Community law to be applied. Were the right to refer questions on the validity of Community acts also abolished, all national courts of first in-

29. *Id.* point 5.

30. See *Amministrazione delle Finanze dello Stato v. Simmenthal*, Case 106/77, [1978] E.C.R. 629, [1978] 3 C.M.L.R. 263 (discussing exclusive jurisdiction of Italian Constitutional Court to review validity of Italian statutes).

stance would simply have to apply any Community act having direct effect, even if the court nourished grave doubts as to its validity.³¹ The following passage in the Report from the Court of Justice clearly contains a reference to this idea: "To limit access to the Court would have the effect of jeopardizing the uniform application and interpretation of Community law throughout the Union, and could deprive individuals of effective judicial protection and undermine the unity of the case law."³² Fortunately, the Amsterdam Treaty does not amend the general rules of the Community treaties on preliminary rulings. With the extension of the Court's jurisdiction, however, to matters presently covered by the third pillar, the new Treaty makes the problem reappear.

While in general the Court seemed satisfied with the present rules on its jurisdiction, the Report stressed the necessity to review Article L in the Maastricht Treaty concerning its jurisdiction—or rather lack of jurisdiction—in relation to the two new pillars.³³ The Court drew the attention of the Conference to "the legal problems which may arise in the long, or even the short, term."³⁴ In particular, the Court considered it

obvious that judicial protection of individuals affected by the activities of the Union, especially in the context of cooperation in the fields of justice and home affairs, must be guaranteed and structured in such a way as to ensure consistent interpretation and application both of Community law and of the provisions adopted within the framework of such cooperation.³⁵

The Court also mentioned the problems concerning delimitation of powers between the Union and the Member States and between the institutions of the Union, as well as the necessity of ensuring a uniform implementation of the decisions taken.³⁶ The Amsterdam Treaty does in fact contain rules conferring jurisdiction on the Court in relation to the third pillar, although

31. See *Foto-Frost v. Hauptzollamt Lubeck-Ost*, Case 314/85, [1987] E.C.R. 4199, [1988] 3 C.M.L.R. 57 (stating that national courts cannot declare Community acts invalid).

32. The Report, *supra* note 17, point 11.

33. *Id.* point 4.

34. *Id.*

35. *Id.*

36. *Id.*

certainly not to the extent desired by the Court.³⁷

B. *The U.K. Memorandum on the European Court of Justice*

In the U.K. Memorandum presented to the Conference by the Conservative Government, the United Kingdom proposed a number of amendments:

- 1) treaty amendments limiting the financial consequences of judgments interpreting Community provisions in ways not generally expected;³⁸
- 2) introduction of an appeal procedure within the Court of Justice;³⁹
- 3) a new procedure for amendments of Council legislation as a reaction to Court rulings on the interpretation of this legislation;⁴⁰
- 4) a protocol on the application by the Court of the principle of subsidiarity;⁴¹ and
- 5) An amendment to the Statutes of the Court introducing an expedited procedure for preliminary references.⁴²

The United Kingdom proposed three amendments to the Treaty in order to limit the financial consequences of certain judgments interpreting Community provisions in an unexpected way, mentioning as examples the *Defrenne II*,⁴³ the *Francovich*,⁴⁴

37. See Treaty of Amsterdam, *supra* note 19, art. 1(11), O.J. C 340/1, at 19-20 (1992) (replacing art. K.7 of TEU); Consolidated version of the Treaty on European Union, art. 35, O.J. C 340/2, at 165-66 (1992), 37 I.L.M. 67, 75 (not yet ratified) [hereinafter Consolidated TEU] (art. K.7 of TEU), *incorporating changes made by* Treaty of Amsterdam, *supra*. By virtue of the Treaty of Amsterdam, articles of the TEU will be renumbered in the Consolidated version of the Treaty on European Union. Treaty of Amsterdam, *supra*, art. 12, O.J. C 340/1, at 78-79 (1997).

38. The Memorandum, *supra* note 18, annex A.

39. *Id.* annex D.

40. *Id.* annex F.

41. *Id.* annex H.

42. *Id.* annex E.

43. *Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena*, Case 43/75, [1976] E.C.R. 455, [1976] 2 C.M.L.R. 98 (acknowledging direct effect of EC Treaty Article 119 on equal pay for men and women).

44. *Francovich v. Italian Republic*, Joined Cases C-6, 9/90, [1993] E.C.R. I-5357, [1993] 2 C.M.L.R. 66 (discussing liability of Member States failing to implement directive).

and the *Emmott*⁴⁵ judgments. The United Kingdom proposed to introduce an article on Member States' liability to pay compensation respecting breaches of Community law, explicitly limiting this liability to the conditions laid down in the most recent case law of the Court (*Brasserie du pêcheur*⁴⁶ and *Dillenkofer*⁴⁷), but at the same time excluding the liability under Community law to pay compensation in relation to any loss occurring more than three years before the date on which legal proceedings were begun.⁴⁸ The United Kingdom also proposed to introduce an article providing that national rules relating to the time limits in which proceedings may be commenced should apply to corresponding proceedings brought in national courts based on rights derived from the Treaty.⁴⁹ This condition would be one of the conditions generally imposed by the case law of the Court on the application of national procedural rules to such actions (*Rewe*⁵⁰ and later judgments).⁵¹ This proposal constituted a reaction to the *Emmott* judgment,⁵² which was based on the very special circumstances of the case. Finally, the United Kingdom proposed to introduce an article explicitly conferring power to exclude the retroactive effect of a judgment interpreting a Community provision on the Court.⁵³ Compared with the existing case law of the Court, the proposed article additionally took into account serious consequences for the public finances of any Member State. It also accounted for the possible reliance of a Member State on the conduct of a Community institution or, in the case of persons, reliance on the conduct of a Member

45. *Emmott v. Minister for Social Welfare*, Case C-208/90, [1991] E.C.R. I-4269, [1991] 2 C.M.L.R. 894 (reviewing applicability of national procedural time-limits).

46. *Brasserie du Pêcheur*, Joined Cases C-46, 48/93, [1996] E.C.R. I-1029, [1996] 2 C.M.L.R. 889 (considering liability of Member States for infringements of Community law other than failure to implement directives).

47. *Dillenkofer v. Germany*, Joined Cases C-178-79, 188-90/94, [1996] ECR I-4845, [1996] 3 C.M.L.R. 466 (explaining general conditions of liability of Member States).

48. The Memorandum, *supra* note 18, annex A.

49. *Id.* annex B.

50. *Rewe-Zentralfinanz v. Landwirtschaftskammer für das Saarland*, Case 33/76, [1976] E.C.R. 1989, [1977] 1 C.M.L.R. 533. In *Rewe Zentralfinanz*, the Court stated that actions intended to protect rights that Community law confers on citizens cannot be treated under conditions that are less favorable than those relating to similar actions of a domestic nature or that make it impossible in practice to exercise these rights.

51. The Memorandum, *supra* note 18, annex A.

52. See *Amministrazione delle Finanze dello Stato v. Simmenthal*, Case 106/77, [1978] E.C.R. 629, [1978] 3 C.M.L.R. 263.

53. The Memorandum, *supra* note 18, annex C.

State. None of these proposals were retained by the Conference and the legal development in these areas will still be left to the case law of the Court. The Court, however, may well take note of the concerns underlying the proposals, which may have even been the United Kingdom's real purpose.

The proposed article on an internal appeal procedure provided that all cases brought before the Court of Justice should be decided by a chamber subject to appeal to the Plenary.⁵⁴ The Court should also sit in plenary session to hear appeals from decisions of the Court of First Instance and requests for an opinion pursuant to Article 228(6) of the EC Treaty. The detailed rules were contained in proposed new articles for the Statutes of the Court. With a few exceptions, these rules were modeled on the existing rules on appeals from decisions of the Court of First Instance, but a system for a leave to appeal was added.⁵⁵

To the extent that the proposal was meant to remedy the situation that two chambers reach different views on analogous matters—which seems to be the primary concern of the United Kingdom—the introduction of a two-tier system, even if combined with the requirement of a leave to appeal, is certainly a very complicated and time-consuming solution to a problem with which all supreme courts with several chambers have to deal. As more and more cases are assigned to chambers, it becomes a growing responsibility for the Court to take the necessary precautions in order to avoid conflicting judgments. The Court can draw on considerable national experiences in this respect.

A look at the advantages mentioned by the United Kingdom in its motivation for the proposal indicates that a further important purpose was the possibility of obtaining review of rulings “which could have a disproportionate impact on individuals and Member States, removing the immediate need for the Member States to adopt corrective legislation or to take actions such as the Barber Protocol.”⁵⁶ The Barber Protocol⁵⁷ is one of the two protocols to the Maastricht Treaty intended to limit the possible consequences of a specific judgment. The *Barber* judgment was a

54. *Id.* annex B.

55. *Id.* annex D.

56. *Id.* at 10, point 19(b).

57. *See* Barber Protocol, *supra* note 16.

preliminary ruling and the concern indicated by the United Kingdom would, in particular, apply to such rulings. In its Report to the Conference, the Court rightly stated that a two-tier system is unsuited to preliminary references, not only because of the further delays, but also because there are no parties to the case in the normal sense. The new articles that the United Kingdom proposed for the Statute of the Court did not solve this difficulty, as the right to request leave to appeal, apart from Member States and Community institutions, was conferred to "any party which has been unsuccessful, in whole or in part, in its submissions"⁵⁸ and to "interveners at first instance,"⁵⁹ notions that have no sense in preliminary cases. Thus, these proposals were not accepted by the Conference for more than one reason.

The proposed new article on legislation amendment was meant to be used where an act of the Council is interpreted by the Court of Justice in a way that "does not accord with the Council's legislative policy."⁶⁰ The Council should then amend the act to give effect to that policy. The procedures prescribed by the Treaty in relation to the act should be followed with the sole exception that the monopoly of initiative of the Commission would be replaced by a right to be consulted before an amendment is adopted.⁶¹ The wording of the proposed article implies that both the field of application of the article and the content of the amendment should be left to the discretion of the Council, as long as the amendment could be seen as a reaction to a judgment interpreting the act. In the relations between the Court and, on the one side, the Council and, on the other side, the Commission, such an article would clearly have represented a major change of the constitutional system of checks and balances in the Communities and was not accepted by the Conference.

Another apparently innocent proposal with far-reaching consequences was the proposed Protocol on the application by the Court of the principle of subsidiarity.⁶² The proposed protocol began with this fairly obvious statement: "In the exercise of its jurisdiction, the Court of Justice shall always have regard to

58. The Memorandum, *supra* note 18, annex D.

59. *Id.*

60. *Id.* annex F.

61. *Id.* annexes F, G.

62. *Id.* annex H.

the principle of subsidiarity.”⁶³ Although the principle of subsidiarity is first and foremost a political principle governing the legislative process and the implementation of Community acts, the place that it has been given in the Maastricht Treaty clearly has turned it into a general legal principle to which the Court must have regard. But the text of the proposed protocol continued:

In particular, it shall be presumed that, in the absence of a clear contrary intention, the Community legislator intends to conserve the freedom of the Member States as far as possible. Accordingly, when faced with more than one possible interpretation of provisions of Community law, the Court shall, unless there is a clear contrary intention, prefer the interpretation which least constrains the freedom of the Member States.⁶⁴

Had this proposal been accepted, the principle of subsidiarity would have been transformed into the principle of restrictive interpretation. This presumption in favor of the sovereignty of Contracting Parties, which for so long haunted international law, but which found no place in the Vienna Convention on the Law of Treaties,⁶⁵ can no longer be considered a general principle of international law. Now, to introduce this principle in Community law would have been a retrograde step of prime importance. Fortunately, the proposal was not accepted by the Conference. The last point in the Protocol on the application of the principles of subsidiarity and proportionality, annexed to the EC Treaty by the Amsterdam Treaty, simply states that “[c]ompliance with the principle of subsidiarity shall be reviewed in accordance with the rules laid down by the Treaty.”⁶⁶

The proposal to amend the Statutes of the Court of Justice in order to introduce an expedited procedure for preliminary references⁶⁷ was not adopted either, probably for more practical reasons. The Court is very conscious of the necessity to reduce the delays in this area of its jurisdiction and continuously considers possible measures that may have such an effect. The Court

63. *Id.*

64. *Id.* annex H.

65. Convention on the Law of Treaties, May 23, 1969, 115 U.N.T.S. 331.

66. See Treaty of Amsterdam, *supra* note 19, Protocol on the application of the principles of subsidiarity and proportionality, O.J. C 340/1, at 107 (1997).

67. The Memorandum, *supra* note 18, annex E.

will no doubt take note of the ideas presented by the United Kingdom. Such amendments of the Statutes can be adopted by the Council at the request of the Court pursuant to Article 188, paragraph two, of the EC Treaty and the corresponding articles of the two other Community Treaties.⁶⁸

So, finally, the Conference did not act on any of the proposals in the U.K. Memorandum. At least in part, this inaction was due not only to the position of other Member States, but also to the change of government in the United Kingdom before the end of the Conference. The new Labor Government disagreed with many of the proposals. The proposals, however, should not simply be dismissed as having lost all importance. The proposals were expressions of the misgivings of a Member State's government in relation to the Court's case law in certain areas. In part, these misgivings were shared by some of the other governments, and they are reflected in the extremely cautious approach of the Amsterdam Treaty to the extension of the Court's jurisdiction into what remains of the third pillar. Because of this, this paper deals with them at some length.

II. THE AMSTERDAM TREATY

The agenda of the Conference was set in March 1996 by the European Council in Turin. The Court was placed on this agenda, in particular, in relation to the third pillar. The most important amendments concerning the Court to be found in the Amsterdam Treaty are those extending its jurisdiction to matters until now covered by the third pillar. The Treaty was signed on October 2, 1997. If ratified by all Member States, it will probably enter into force sometime in January 1999. Thus, we are still faced with a Draft Treaty. The amendments concerning the Court will be examined under the following subheadings:

- 1) Jurisdiction in Relation to Immigration and Asylum Policies;
- 2) Jurisdiction in Relation to Police and Judicial Cooperation in Criminal Matters;

68. See EC Treaty, *supra* note 8, art. 188, ¶ 2, O.J. C 224/1, at 64 (1992), [1992] 1 C.M.L.R. at 691; ECSC Treaty, *supra* note 1, art. 45, at 173; Euratom Treaty, *supra* note 1, art. 188, at 178.

- 3) The Schengen Protocol;⁶⁹
- 4) Flexibility;
- 5) Fundamental Rights; and
- 6) Other Amendments.

A. *Jurisdiction in Relation to Immigration and Asylum Policies*

The Maastricht Treaty already introduced provisions in the EC Treaty, Articles 100c and 100d, on the adoption of a common list of third-world countries whose nationals must be in possession of visas when crossing the external borders and on the adoption of a uniform format for visas.⁷⁰ Further provisions in this area are left to the intergovernmental cooperation under the third pillar,⁷¹ supplemented by the Schengen Agreement, which has only been signed by thirteen of the fifteen Member States. The Amsterdam Treaty transfers the whole area to the EC Treaty as a new separate Title IIIa, Articles 73i-73q.⁷² Title IIIa also confers power on the Council to adopt measures in the field of judicial cooperation in civil matters and to adopt appropriate measures to encourage and to strengthen administrative cooperation in this area.⁷³ In principle, this amendment should submit the area to the normal jurisdiction of the Court under this Treaty, but the new Article 73p contains two limitations.⁷⁴ The obligation to request preliminary rulings under Article 177 is maintained for courts and tribunals against whose decisions

69. Treaty of Amsterdam, *supra* note 19, Protocol integrating the Schengen *acquis* into the framework of the European Union, O.J. C 340/1, at 93-96 (1997).

70. EC Treaty, *supra* note 8, arts. 100c, 100d, O.J. C 224/1, at 32-33 (1992), [1992] 1 C.M.L.R. at 635.

71. TEU, *supra* note 7, tit. VI, O.J. C 224/1, at 97-98 (1992), [1992] 1 C.M.L.R. at 96 (Provisions on cooperation in the fields of justice and home affairs).

72. Treaty of Amsterdam, *supra* note 19, art. 2(15), O.J. C 340/1, at 28-32 (1997) (inserting tit. IIIa into EC Treaty); *see* Consolidated version of the Treaty establishing the European Community, tit. IV, arts. 61-69, O.J. C 340/3, at 200-05 (1997), 37 I.L.M. 79, 89-91 (not yet ratified) [hereinafter Consolidated EC Treaty] (tit. IIIa of EC Treaty), *incorporating changes made by* Treaty of Amsterdam, *supra*. By virtue of the Treaty of Amsterdam, articles of the EC Treaty will be renumbered in the Consolidated version of the Treaty establishing the European Community. Treaty of Amsterdam, *supra*, art. 12, O.J. C 340/1, at 78-79 (1997).

73. Treaty of Amsterdam, *supra* note 19, art. 2(15), O.J. C 340/1, at 28 (1997) (inserting art. 73i into EC Treaty); Consolidated EC Treaty, *supra* note 72, art. 61(c)-(d), O.J. C 340/3, at 201 (1997), 37 I.L.M. at 90 (art. 73i(c)-(d) of EC Treaty).

74. Treaty of Amsterdam, *supra* note 19, art. 2(15), O.J. C 340/1, at 31 (1997) (inserting art. 73p into EC Treaty); Consolidated EC Treaty, *supra* note 72, art. 68, O.J. C 340/3, at 204 (1997), 37 I.L.M. at 91 (art. 73p of EC Treaty).

there is no judicial remedy under national law.⁷⁵ The faculty for other courts and tribunals to do the same is abolished. Paragraph two of the new Article 73p further contains the general provision that the Court, however, shall have no jurisdiction to rule on any measure or decision taken pursuant to Article 73j(1) relating to the maintenance of law and order and to the safeguarding of internal security. The provision referred to concerns measures with a view to ensuring the absence of any controls on persons when crossing internal borders.

In return for the limitation imposed on references under Article 177, the Amsterdam Treaty offers a new type of reference "in the interest of the law."⁷⁶ According to Article 73p(3), the Council, the Commission, or a Member State may request a ruling on a question of interpretation of the new Title or of acts of the institutions based on this Title.⁷⁷ Such rulings shall not apply to judgments of national courts or tribunals that have become *res judicata*.

The sensitivity of this area was already shown when the Treaty of Maastricht introduced Article 100c in the EC treaty.⁷⁸ Article 100c(5) states that "[t]his Article shall be without prejudice to the exercise of the responsibilities incumbent upon the Member States with regard to the maintenance of law and order and the safeguarding of internal security."⁷⁹ The new Article 73p(2) in fact only transposes the same idea to a situation where such measures may be taken at the Community level.⁸⁰

The limitation imposed on the national courts' application of preliminary references pursuant to Article 177 is more serious. National courts of first instance will have to apply Commu-

75. Treaty of Amsterdam, *supra* note 19, art. 2(15), O.J. C 340/1, at 31 (1997) (inserting art. 73p(1) into EC Treaty); Consolidated EC Treaty, *supra* note 72, art. 68(1), O.J. C 340/3, at 204 (1997), 37 I.L.M. at 91 (art. 73p(1) of EC Treaty).

76. Treaty of Amsterdam, *supra* note 19, art. 2(15), O.J. C 340/1, at 31 (1997) (inserting art. 73p(3) into EC Treaty); Consolidated EC Treaty, *supra* note 72, art. 68(3), O.J. C 340/3, at 204 (1997), 37 I.L.M. at 91 (art. 73p(3) of EC Treaty).

77. Treaty of Amsterdam, *supra* note 19, art. 2(15), O.J. C 340/1, at 31 (1997) (inserting art. 73p(3) into EC Treaty); Consolidated EC Treaty, *supra* note 72, art. 68(3), O.J. C 340/3, at 204 (1997), 37 I.L.M. at 91 (art. 73p(3) of EC Treaty).

78. See EC Treaty, *supra* note 8, art. 100c, O.J. C 224/1, at 32-33 (1992), [1992] 1 C.M.L.R. at 635.

79. See *id.* art. 100c(5), O.J. C 224/1, at 33 (1992), [1992] 1 C.M.L.R. at 635.

80. Treaty of Amsterdam, *supra* note 19, art. 2(15), O.J. C 340/1, at 31 (1997) (inserting art. 73p(2) into EC Treaty); Consolidated EC Treaty, *supra* note 72, art. 68(2), O.J. C 340/3, at 204 (1997), 37 I.L.M. at 91 (art. 73p(2) of EC Treaty).

nity law in this area without being able to obtain clarification from the Court of Justice as to its correct interpretation. National courts will also have to apply acts adopted by the Community institutions, even if they consider the validity of such acts to be doubtful. This application will result in legal uncertainty and, in practice, considerably reduce the role that preliminary references play in other areas as safeguards of individual rights under Community law.

The criteria are not well-suited when they are used to bar access to the Court of Justice. In small claims litigation, courts of first instance may at the same time be the last instance. In such cases, the applicant may create an opportunity for the court to refer a preliminary question to the Court of Justice by limiting his or her claim. Ironically enough, the very important ruling in the *Costa v. ENEL* case,⁸¹ which was based on a reference from the Giudice Conciliatore in Milan in a case concerning 1.925 Italian lire, would still be possible.

If the reason for the limitation is a fear that the Court might be flooded by references from lower national courts, a much better solution would be to introduce a simplified procedure for such references. The provisions of the Statutes and the Rules of Procedure are well-suited for the solution of complicated legal problems of general importance. In relation to everyday problems they are already too cumbersome. It is certainly better to simplify the dialogue between national courts and the Court of Justice than to cut it off altogether. Fortunately, under Article 67(2), the Council is empowered to adapt the provisions relating to the powers of the Court after the transitional period of five years.⁸² It is to be hoped that a better solution has been found in the meantime.

B. *Jurisdiction in Relation to Police and Judicial Cooperation in Criminal Matters*

The Amsterdam Treaty replaces Title VI of the Maastricht Treaty with a new title with the heading "Provisions on police

81. *Costa v. ENEL*, Case 6/64, [1964] E.C.R. 585, [1964] 3 C.M.L.R. 425.

82. Treaty of Amsterdam, *supra* note 19, art. 2(15), O.J. C 340/1, at 31 (1997) (inserting art. 73o(2) into EC Treaty); Consolidated EC Treaty, *supra* note 72, art. 67(2), O.J. C 340/3, at 204 (1997), 37 I.L.M. at 91 (art. 73o(2) of EC Treaty).

and judicial cooperation in criminal matters.”⁸³ This new title contains the remaining part of the third pillar. The extension of judicial control to these provisions was the most difficult problem relating to the Court that the Conference was asked to solve. In fact, the Conference did not succeed in resolving the Member States’ divergent views on this point. In relation to the question of preliminary rulings, the Amsterdam Treaty offers the Member States a panoply of options supplemented by two declarations.

In principle, Article K.7(1) introduces a system similar to that of Article 177 of the EC Treaty, but K.7(1) only applies to a Member State that accepts this jurisdiction by a declaration at the time that the Member State signs the Amsterdam Treaty or any time thereafter.⁸⁴ The declaration must specify whether requests for a preliminary ruling may be made by any of the courts or tribunals of the Member State or only by those against whose decisions there is no remedy under national law. In a general declaration on Article K.7, the Conference notes that Member States, when making the declarations referred to in the Article, may reserve the right to make provisions in their national law requiring the latter courts or tribunals to refer the matters to the Court of Justice.⁸⁵

But even in a Member State that, by a declaration and by its own rules, has opted for a system as near as possible to that of Article 177 of the EC Treaty, other obstacles remain. The preliminary rulings may concern the validity and interpretation of framework decisions and of decisions, the interpretation of conventions established under the title, and the validity and interpretation of measures implementing them, but not the interpretation of the Treaty provisions themselves. According to Article K.6(2) (b) and (c), both framework decisions and decisions shall not entail direct effect and, thus, cannot be directly invoked before a national court.⁸⁶ Finally, Article K.7(5) denies the Court any jurisdiction to review the validity or proportionality of

83. Treaty of Amsterdam, *supra* note 19, art. 1(11), O.J. C 340/1, at 16-22 (1997) (replacing tit. VI of TEU); Consolidated TEU, *supra* note 37, tit. VI, O.J. C 340/2, at 162-68 (1997), 37 I.L.M. at 73-76 (tit. VI of TEU).

84. Treaty of Amsterdam, *supra* note 19, art. 1(11), O.J. C 340/1, at 19 (1997) (replacing art. K.7 of TEU); Consolidated TEU, *supra* note 37, art. 35(1), O.J. C 340/2, at 165 (1997), 37 I.L.M. at 75 (art. K.7 of TEU).

85. *See* Treaty of Amsterdam, *supra* note 19, Declaration on Article K.7 of the Treaty on European Union, O.J. C 340/1, at 133 (1997).

86. Treaty of Amsterdam, *supra* note 19, art. 1(11), O.J. C 340/1, at 18 (1997)

operations carried out by the police or other law enforcement agencies 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.⁸⁷ On the other hand, a declaration on Article K.2 states that action in the field of police cooperation under that article, including activities of Europol, shall be subject to appropriate judicial review by the competent national authorities in accordance with rules applicable in each Member State.⁸⁸

It can be said that these rules are very far from those that the Court of Justice must have had in mind when, in its Report, it criticized the lack of judicial protection of individuals affected by the activities of the Union within the third pillar.⁸⁹ Clearly, the rules pay more attention to the interests of the Member States than to those of the individual, but it remains to be seen whether they are able to function in practice. This ability depends not only on the Member States, but also on the attitude of their courts, which may respect rulings based on references from courts in other Member States, although they themselves are barred from requesting such rulings. National courts may also use Community acts without direct effect as decisive elements of interpretation in relation to national implementation measures. One of the advantages of the system, however, provided for in Article 177, is its relative simplicity. The complexity of the new system may in itself become an impediment to its application.

Article K.7(6) introduces an action for annulment in relation to framework decisions and decisions.⁹⁰ The rules are similar to those of Article 173 of EC Treaty,⁹¹ but actions may be brought only by a Member State or the Commission. Finally, Article K.7(7) provides that the Court shall have jurisdiction to

(replacing art. K.6(2)(b), (c) of TEU); Consolidated TEU, *supra* note 37, art. 34(2)(b), (c), O.J. C 340/2, at 164-65 (1997), 37 I.L.M. at 74-75 (art. K.6(2)(b), (c) of TEU).

87. Treaty of Amsterdam, *supra* note 19, art. 1(11), O.J. C 340/1, at 18 (1997) (replacing art. K.5 of TEU); Consolidated TEU, *supra* note 37, art. 35, O.J. C 340/2, at 166 (1997), 37 I.L.M. at 75 (art. K.5 of TEU).

88. See Treaty of Amsterdam, *supra* note 19, Declaration on Article K.2 of The Treaty on European Union, O.J. C 340/1, at 132 (1997).

89. See The Report, *supra* note 17, point 4.

90. Treaty of Amsterdam, *supra* note 19, art. 1(11), O.J. C 340/1, at 20 (1997) (replacing art. K.7(6) of TEU); Consolidated TEU, *supra* note 37, art. 35(6), O.J. C 340/2, at 166 (1997), 37 I.L.M. at 75 (art. K.7(6) of TEU).

91. See EC Treaty, *supra* note 8, art. 173, O.J. C 224/1, at 62 (1992), [1992] 1 C.M.L.R. at 687.

rule on any disputes between Member States regarding the interpretation or the application of acts adopted under Article K.6(2).⁹² This provision must include common positions, framework decisions, decisions, conventions, and acts implementing conventions. Such disputes, however, must first be referred to the Council, which has six months to obtain a political settlement. Moreover, the Court shall have jurisdiction to rule on any disputes between Member States and the Commission regarding the interpretation or the application of conventions. Here, the Conference has introduced two new actions for which there are no precedents in the EC Treaty.

C. *The Schengen Protocol*

The purpose of the Schengen Protocol is to integrate the Schengen Agreements, and the decisions taken under these agreements, otherwise known as the "Schengen *Acquis*," into the framework of the European Union. Between the Contracting Parties to the agreements, the Schengen *Acquis* covers both matters under the remaining third pillar and matters that the Amsterdam Treaty transfers to the EC Treaty. Thus, the Schengen *Acquis* must be "split in two." Article 2(1) of the Schengen Protocol empowers the Council to determine, in conformity with the relevant provisions of the Treaties, the legal basis for each of the provisions or decisions that constitute the Schengen *Acquis*.⁹³ As long as this division has not been made, the Schengen *Acquis* shall be regarded as acts based on the new Title VI of the Amsterdam Treaty. The Court shall, with regard to the provisions and decisions constituting the Schengen *Acquis*, and in accordance with the determination made by the Council, exercise its powers under the relevant provisions of the Treaties. It is, however, stressed that the Court shall have no jurisdiction on measures or decisions relating to the maintenance of internal law, order, and security. These rules seem to be logical consequences of the new system and do not seem to raise any distinct problem in relation to the jurisdiction of the Court.

92. Treaty of Amsterdam, *supra* note 19, art. 1(11), O.J. C 340/1, at 20 (1997) (replacing art. K.7(7) of TEU); Consolidated TEU, *supra* note 37, art. 35(7), O.J. C 340/2, at 166 (1997), 37 I.L.M. at 75 (art. K.7(7) of TEU).

93. Consolidated TEU, *supra* note 37, art. 2(1), O.J. C 340/2, at 94 (1997).

D. Flexibility

During the public debate preceding the Conference, the notion of "flexibility" was often discussed. Some used it in the sense of a possibility to opt out of parts of the Treaty obligations. Others used it as a way to establish greater cooperation between some of the Member States only, but nevertheless using the institutions, procedures, and mechanisms of the Treaties. Apart from the specific rule in Article J.13(1)⁹⁴ on abstentions of Member States under the second pillar, the Amsterdam Treaty only introduces provisions concerning the latter of these possibilities and submits such closer cooperation to very strict conditions. To this end, a new Title VIa with the heading "Provisions on closer cooperation" and consisting of Articles K.15 to K.17, has been inserted in to the Maastricht Treaty.⁹⁵ These provisions are supplemented by a new Article 5a in the EC Treaty⁹⁶ and by Article K.12 in Title VI on police and judicial cooperation in criminal matters.⁹⁷ Both of these articles contain further provisions for closer cooperation within the area of EC Treaty and the said title respectively.

The provisions concerning the jurisdiction of the Court, Article 5a(4) and Article K.12(4), are relatively simple. In relation to closer cooperation within the area of the European Community, the EC Treaty rules of jurisdiction apply. In relation to closer cooperation concerning police and judicial cooperation in criminal matters, Article K.7 applies. The procedures and decisions concerning the establishment of or the accession to closer cooperation are, however, judicially controlled in accordance with the rules of EC Treaty.

94. Treaty of Amsterdam, *supra* note 19, art. 1(10), O.J. C 340/1, at 14 (1997) (replacing art. J.13(1) of TEU); Consolidated TEU, *supra* note 37, art. 23(1), O.J. C 340/2, at 160 (1997), 37 I.L.M. at 72 (art. J.13(1) of TEU).

95. Treaty of Amsterdam, *supra* note 19, art. 1(12), O.J. C 340/1, at 22-23 (1997) (replacing tit. VIa, arts. K.15-K.17 of TEU); Consolidated TEU, *supra* note 37, tit. VII, O.J. C 340/2, at 169-70 (1997), 37 I.L.M. at 77 (tit. VIa, arts. K.15-K.17 of TEU).

96. Treaty of Amsterdam, *supra* note 19, art. 2(5), O.J. C 340/1, at 25 (1997) (inserting art. 5a into EC Treaty); Consolidated EC Treaty, *supra* note 72, art. 23(1), O.J. C 340/3, at 184 (1997), 37 I.L.M. at 81 (art. 5(a) of EC Treaty).

97. Treaty of Amsterdam, *supra* note 19, art. 1(11), O.J. C 340/1, at 21 (1997) (replacing art. K.12 of TEU); Consolidated TEU, *supra* note 37, art. 40, O.J. C 340/2, at 167-68 (1997), 37 I.L.M. at 76 (art. K.12 of TEU).

E. *Fundamental Rights*

It must call for general approval that the Conference, in an amendment to Article L of the Maastricht Treaty, has proposed explicitly to extend the Court's jurisdiction, with regard to actions of the institutions, to Article F(2) concerning the respect for fundamental rights.⁹⁸ As this article is one of the common provisions of the Maastricht Treaty, the extension also concerns actions within the remaining third pillar to the extent that the Court has jurisdiction pursuant to Articles K.7 and K.12. The amount of obstacles, however, which these articles put in the individual's way may make the extension rather illusory.

The proposed Article F(1) states that "[t]he Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States."⁹⁹ The new Article F.1 empowers the Council to take action in case of a serious and persistent breach by a Member State of the principles mentioned in Article F(1),¹⁰⁰ but jurisdiction is given to the Court with regard to such action. According to the proposed new Article 236 of the EC Treaty and similar articles in the two other Community Treaties, however, a decision to suspend voting rights of a Member State pursuant to Article F.1(2) will suspend these voting rights also with regard to these Treaties.¹⁰¹ Moreover, the Council may decide to suspend certain other rights deriving from the application of the Community Treaties to the State in question. The jurisdiction of the Court in relation to these Articles has not been excluded by the revised Article L. Thus, in relation to actions taken under Article F.1, the Court is competent as far as the action has effects within the Communities, but not with regard to the effects in other areas of

98. Treaty of Amsterdam, *supra* note 19, art. 1(13), O.J. C 340/1, at 23 (1997) (replacing art. L of TEU); Consolidated TEU, *supra* note 37, art. 46, O.J. C 340/2, at 170 (1997), 37 I.L.M. at 77 (art. L of TEU).

99. Treaty of Amsterdam, *supra* note 19, art. 1(8), O.J. C 340/1, at 8 (1997) (inserting art. F.1 into TEU); Consolidated TEU, *supra* note 37, art. 6, O.J. C 340/2, at 153 (1997), 37 I.L.M. at 69 (art. F.1 of TEU).

100. Treaty of Amsterdam, *supra* note 19, art. 1(9), O.J. C 340/1, at 9 (1997) (inserting art. F.1 into TEU); Consolidated TEU, *supra* note 37, art. 7, O.J. C 340/2, at 154 (1997), 37 I.L.M. at 69 (art. F.1 of TEU).

101. Treaty of Amsterdam, *supra* note 19, art. 2(57), O.J. C 340/1, at 50 (1997) (inserting art. 236 into EC Treaty); Consolidated EC Treaty, *supra* note 72, art. 309, O.J. C 340/3, at 301 (1997), 37 I.L.M. at 140 (art. 236 of EC Treaty).

the Union. This problem seems to have escaped the attention of the Conference.

F. Other Amendments

Proposed amendments to Article 173, third paragraph, of the EC Treaty and to the corresponding articles of the other two Community Treaties¹⁰² confer standing to sue on the Court of Auditors. The same conditions for standing as those applicable to the European Parliament and the European Central Bank apply here.

A new Article 7d introduces a curious provision in the EC Treaty, requiring the Community and the Member States to take care that services of general economic interest operate on the basis of principles and conditions which enable them to fulfil their missions.¹⁰³ The Article itself provides that this must be done "without prejudice to Articles 77, 90, and 92."¹⁰⁴ Nevertheless, it has been found necessary to annex a Declaration, according to which the Article shall be implemented "with full respect for the jurisprudence of the Court of Justice, *inter alia* as regards the principles of equality of treatment, quality, and continuity of such services."¹⁰⁵ Both the Article and the Declaration reflects the ongoing confrontation between liberalist states and states where public services used to be synonymous with public undertakings. It seems doubtful what impact, if any, such an amendment will have on the case law of the Community Courts.

102. Treaty of Amsterdam, *supra* note 19, art. 2(42), O.J. C 340/1, at 44 (1997) (replacing art. 173 of EC Treaty); Consolidated EC Treaty, *supra* note 72, art. 230, O.J. C 340/3, at 272 (1997), 37 I.L.M. at 125 (art. 173 of EC Treaty); Treaty of Amsterdam, *supra*, art. 3(6), O.J. C 340/1, at 51 (1997) (replacing art. 33, ¶ 4 of Treaty establishing the European Coal and Steel Community ("ECSC Treaty")); Treaty of Amsterdam, *supra*, art. 4(6), O.J. C 340/1, at 55 (1997) (replacing art. 146, ¶ 3 of Treaty establishing the European Atomic Energy Community ("Euratom Treaty")).

103. Treaty of Amsterdam, *supra* note 19, art. 2(8), O.J. C 340/1, at 26 (1997) (inserting art. 7d into EC Treaty); Consolidated EC Treaty, *supra* note 72, art. 16, O.J. C 340/3, at 185-86 (1997), 37 I.L.M. at 82 (art. 7d of EC Treaty).

104. Treaty of Amsterdam, *supra* note 19, art. 2(8), O.J. C 340/1, at 26 (1997) (inserting art. 7d into EC Treaty); Consolidated EC Treaty, *supra* note 72, art. 16, O.J. C 340/3, at 185-86 (1997), 37 I.L.M. at 82 (art. 7d of EC Treaty).

105. Treaty of Amsterdam, *supra* note 19, Declaration on Article 7d of the Treaty Establishing the European Community, O.J. C 340/1, at 133 (1997).

III. GENERAL ASSESSMENT OF THE AMSTERDAM TREATY'S AMENDMENTS TO THE RULES ON THE COURT OF JUSTICE

It is gratifying to see that none of the many ideas intended to limit access to the Court or to restrict the Court's powers, which had been voiced in the public debate or proposed officially, passed the Conference. It is disquieting, however, that Title IIIa of EC Treaty, inserted by the Amsterdam Treaty, excludes the faculty for national courts of first instance to request preliminary rulings.¹⁰⁶ Fortunately, the Council is empowered to adapt the provisions relating to the powers of the Court in this area when experiences have been gained during the transitional period of five years. This problem is of great importance for the effective protection of the rights of the individual persons affected by the provisions in this Title. For practical and economic reasons the decision of a court of first instance will, to them, often mean the final decision.

It is important that the establishment of a closer cooperation between some Member States does not permit them to escape from the rules of jurisdiction applicable in the area in question and that decisions on the establishment of and accession to such closer cooperation are subject to the rules of jurisdiction of the EC Treaty. The extension of the Court's jurisdiction to areas outside the Community Treaties is certainly an achievement, and it is important that this extension also applies to conventions, where the question until now has created great difficulties. The mere complexity of the provisions and the many limitations of access to the Court, however, greatly reduce its practical importance. On the other hand, the system is sufficiently flexible to permit the Member States and their courts to remedy some of the deficiencies. In the perspective of a gradual development of the judicial system of the Union, the rules of the Draft Treaty concerning the jurisdiction of the Community Courts appear, in their entirety, to constitute an acceptable result of considerable efforts on the part of the Conference.

106. Treaty of Amsterdam, *supra* note 19, art. 2(15), O.J. C 340/1, at 28 (1997) (inserting art. IIIa into EC Treaty); Consolidated EC Treaty, *supra* note 72, tit. IV, O.J. C 340/3, at 200-05 (1995), 37 I.L.M. at 89-91 (tit. IIIa of EC Treaty).