I. INTRODUCTION

1. As the House of Lords recently remarked relatively little has been said about the position of the European Court of Justice (ECJ) during the drafting of the European Constitution. I see two reasons for this. On the one hand, the reforms introduced by the Treaty of Nice in respect of the European court’s structure are not fully implemented, yet. The Convention has presumably been wise in not intervening in this reform. It would for instance have been very odd to abolish the specialised chambers announced in Article 225 A TEC, before they are actually established and put to the test. On the other hand, there presumably is no consistent view on what the exact role of the ECJ should be. This became particularly clear when near the end of the activities of the European Convention a Discussion Group on the Court of Justice was convened. The Discussion Group proved to be fundamentally divided on the question of locus standi before the ECJ for individual applicants and on the issue of the role of the ECJ in respect of the Common Foreign and Security Policy (CFSP). In
both fields the end result of the Convention, and ultimately the Intergovernmental Conference (IGC), is a compromise, which is still open for interpretation.

2. In this contribution I intend to go deeper into the solutions that have made it into the final text agreed upon by the Heads of State and Government. As the Final Act of the Treaty establishing a Constitution for Europe is at the time of writing not yet adopted, references will be made to the consolidated version of the Treaty establishing a Constitution for Europe of document CIG 87/04. In particular I want to draw the attention to the following issues, which are distinct but not unrelated. In the first place the impact of the compromise on the merger of the three pillars needs to be examined. The paradoxes of this operation will be demonstrated in part II using several controversial examples from the battlefield between CFSP and the other policy fields. In particular I will focus on the question whether the ECJ has the powers to give an opinion on international treaties relating to the CFSP and I will contrast the enforceability of the mutual defence clause with that of the solidarity clause. In the second place the compromise between those supporting a more important role for the national courts and those in favour of greater standing for individuals before the central EU courts will be addressed in part III. This new regime will be demonstrated in particular by testing the new rules for contesting restrictive measures imposed on individuals, where I will demonstrate that Article III-376, paragraph 2 may lead to very different and surprising results depending on the legal basis for the sanction.

3. Before those issues are looked into, I wish to make one methodological remark. Despite the fact that part of this contribution uncovers some paradoxes and inconsistencies in the Constitution’s approach to judicial protection, I do assume that the entire Constitution was supposed to be consistent and should be read as a whole. As a result some paragraphs may look like a jigsaw puzzle with pieces put together from all four parts of the Constitution. At first sight this may be confusing. In reality however it is the reflection of how the various provisions of the Constitution interact, despite serious efforts by the drafters to ensure a logical and readable text without unnecessary repetitions. With a text of over 400 Articles it is simply inevitable, though, that certain provisions only get their full meaning when read in the light of the other Articles. The full text of the

4 The consolidated version of the Draft Treaty establishing a Constitution for Europe and the accompanying protocols, annexes and declarations as approved by the IGC in documents CIG 87/04, CIG 87/04 ADD 1 and CIG 87/04 ADD 2 can be found at the website of the IGC: http://ue.eu.int/cms3_applications/applications/igc/igcDoSearch.asp.