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## THE COURT OF JUSTICE OF THE EUROPEAN UNION IN THE POST-LISBON ERA: IMPACT OF THE TREATY OF LISBON ON THE EU JUDICATURE SINCE ITS ENTRY INTO FORCE

### Abstract:

The Treaty of Lisbon has introduced several modifications concerning the EU courts that have already had a significant impact on their activity. The most important one is the possibility for all national courts to address to the Court of Justice references for a preliminary ruling on the interpretation and validity of acts of the Area of freedom, security and justice. A similar impact can be attributed to the possibility for natural and legal persons to contest regulatory acts which are of direct concern to them. However, the Treaty of Lisbon has also introduced modifications that have not had any significant impact on the activity of the EU courts. This is the case, for example, for the provisions on actions brought by national Parliaments for infringement of the principle of subsidiarity or the provisions on direct actions in the Area of freedom, security and justice.

### Keywords:

European Union, Court of Justice, General Court, Treaty of Lisbon, Proceedings, Action for annulment, Reference for a preliminary ruling, Urgent preliminary ruling procedure, Area of freedom, security and justice, Regulatory acts, Action brought by national Parliament for infringement of the principle of subsidiarity, Nomination of members of the EU courts, Change of philosophy of judicial review, Accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms

Although the Court of Justice of the European Union was not the main concern of authors of the Treaty of Lisbon, amendments concerning this institution have already had an important impact on its functioning since 1 December 2009 when this treaty entered into force.<sup>2)</sup>

These amendments were often a natural consequence of the modifications which were the primary objective of the Treaty of Lisbon. This is true for the most important one which was the abolishing of the complex structure of the three pillars of the former European Union with its numerous exceptions and derogations. Consequently, a single entity was established, the new European

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<sup>2)</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon on 13 December 2007 (OJ 2007 C 306, p. 1; "Treaty of Lisbon"), which took over essential provisions of the Treaty establishing a Constitution for Europe, signed at Rome on 29 October 2004 (OJ C 2004 310, p. 1; "Constitutional Treaty") after its rejection in French and Dutch referendums.

Union, that replaced and succeeded the European Community and the former European Union. This entity continues to be based on two founding and partly renamed Treaties (the Treaty on European Union (“TEU”) and the Treaty on the Functioning of the European Union (“TFEU”) (“Treaties”)) which establish a single set of provisions and mechanisms that are applicable, in principle, to all fields of EU law.<sup>3)</sup>

This is linked to a second series of essential modifications brought about by the Treaty of Lisbon which concerns adaptation of the legislative procedure. The Treaty enlarged domains in which legal acts are adopted by the Council by qualified majority voting with the co-decision of the European Parliament<sup>4)</sup> and it modified the voting in the Council.<sup>5)</sup> This opportunity was also taken to give a new role to national Parliaments. Draft legislative acts must be forwarded to them and they can, under certain circumstances, block the draft of an act that does not respect the principle of subsidiarity.<sup>6)</sup>

The third major modification brought about by the Treaty of Lisbon concerns the role of fundamental rights in the Union. The Charter of Fundamental Rights was annexed to the Treaties, it was declared to be binding and to have the same legal value as the Treaties.<sup>7)</sup> Besides, according to Article 6(2) TEU, the Union is obliged to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>8)</sup> These modifications have important implications for the judicial activity of the Court of Justice and they will be discussed in the third part of this article.

Finally, the Treaty of Lisbon modified provisions governing the institutions of the Union. It created the function of the President of the European Council,<sup>9)</sup> gave the status of an official Union institution to the European Council,<sup>10)</sup>

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<sup>3)</sup> See Article 1(3) TEU.

<sup>4)</sup> This legislative procedure is now called the “ordinary legislative procedure”, it is generalized and is applicable to nearly all fields of EU law, including domains of judicial cooperation in civil and criminal matters, immigration or transport (see Articles 78, 79, 81, 82, 83 and 91 TFEU). However, it is still not applicable to some sensitive fields, in particular to the common foreign and security policy, to the harmonization of taxes and to the social policy (See Articles 24, 113 and 153 TFEU).

<sup>5)</sup> From 1 November 2014, the qualified majority will be defined as at least 55 % of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65 % of the population of the Union (see Article 16(4) TEU).

<sup>6)</sup> See the Protocol No 2 on the application of the principles of subsidiarity and proportionality.

<sup>7)</sup> The Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007 (“Charter”). See Article 6(1) TEU.

<sup>8)</sup> Signed in Rome on 4 November 1950 (“ECHR”).

<sup>9)</sup> The President is elected, by a qualified majority, for a term of two and a half years, renewable once. He or she chairs and drives forward the work of the European Council and ensures the preparation and continuity of its work (see Article 15(5)(6) TEU).

<sup>10)</sup> See Article 13(1) TEU.

changed the status and gave new powers to the High Representative of the Union for Foreign Affairs and Security Policy<sup>11)</sup> and strengthened the role of the European Parliament.<sup>12)</sup>

As for the Union courts,<sup>13)</sup> the most visible change is probably the modification of their denomination. Under Article 19(1) TEU, the institution as a whole is now called the “Court of Justice of the European Union” and it includes the Court of Justice, the General Court and specialised courts. Thus, the official denomination of the highest court remains the same, but the “Court of First Instance” becomes the “General Court” and “judicial panels” become “specialised courts”.<sup>14)</sup>

The judicial activity of the Union courts continues to be based on the Statute<sup>15)</sup> whose amendments have been made substantially easier since future

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<sup>11)</sup> He or she shall ensure the unity, consistency and effectiveness of action of the Union in this field and, in fulfilling his or her mandate, the High Representative is assisted by a European External Action Service (see Articles 18 and 27 TEU).

<sup>12)</sup> Beside the above-mentioned role in legislative procedure, the European Parliament acquired new powers in budget domain and during the appointment of the European Commission. In this context, it is worth noting that the Treaty of Lisbon aimed also at making the European Commission more effective and operational. According to new Article 17(5) TEU, the Commission shall consist, as from 1 November 2014, of a number of members corresponding to two thirds of the number of Member States, unless the European Council, acting unanimously, decides to alter this number. Nevertheless, this modification, that was one of the centrepieces of the Constitutional Treaty and of the Treaty of Lisbon, was in practice set aside after the negative referendum in Ireland. The European Council responded to the concern expressed during the Irish referendum (losing of the Irish commissioner) by agreeing that the Commission shall continue to include one national of each Member State. (See Presidency Conclusions of the Brussels European Council of 11 and 12 December 2008 (Council document n° 17271/1/08) and Presidency Conclusions of the Brussels European Council of 18 and 19 June 2009 (Council document n° 11225/2/09)).

<sup>13)</sup> Since the modifications done by the Treaty of Lisbon concern, in principle, only the Court of Justice and the General Court, this article focuses on these courts that are hereinafter together referred to as “Union courts”.

<sup>14)</sup> This terminology is confusing because denominations “Court of Justice” and “General Court” do not permit to understand that these courts are courts of the European Union (For a discussion on this point, see for example: RUIZ-JARABO COLOMER, D., *La Cour de Justice de l’Union européenne après le Traité de Lisbonne*, Gazette du Palais, 171/2008, p. 23 and BARENTS, R., *The Court of Justice after the Treaty of Lisbon*, Common Market Law Review, 47/2010, p. 710). For this reason, Union courts use in practice denominations that do not respect the terminology of new Treaties because they call themselves respectively “Court of Justice of the European Union” and “General Court of the European Union”. As for the third degree of the Union courts, the only specialised court remains the Civil Service Tribunal, created in 2004, whose denomination is unaffected by the Treaty of Lisbon.

<sup>15)</sup> The Statute of the Court of Justice of the European Union which is laid down in Protocol No 3 (codified version in OJ 2010 C 83, p. 210, “Statute”).

changes will be made in accordance with the ordinary legislative procedure.<sup>16)</sup>

Nonetheless, these changes are rather marginal in comparison to others that have already led to an important impact on the functioning of the Union courts – both from the procedural point of view (II) and from the substantive point of view (III). Beforehand, it must, however, be pointed out that many modifications made by the Treaty of Lisbon have not influenced functioning of the Union courts for the moment (I).

## **I. PROCEDURAL MODIFICATIONS WITHOUT AN IMPACT ON THE ACTIVITY OF THE UNION COURTS**

Judicial activity of the Union courts has not been influenced, first of all, by provisions inserted by the Treaty of Lisbon that could have seemed to represent a progress towards the provisions of effective remedies, but which appear, on a closer examination, as a mere confirmation and consolidation – albeit an incomplete one – of previous case-law.

### **1. Admissibility of actions for annulment of natural and legal persons: incomplete consolidation of previous case-law**

According to new Article 263 TFEU (former Article 230 TCE), the Union courts have the power to review the legality of acts of almost all EU institutions (Council, Commission, European Central Bank, European Parliament and European Council) as well as acts of all bodies, offices and agencies of the Union if these acts are intended to produce legal effects vis-à-vis third parties.

In comparison to former Article 230 TCE, the Union courts have thus acquired the express power to review legality of acts of additional EU institutions, bodies, offices and agencies, such as European Council, European Economic and Social Committee, Europol or Eurojust.

This enlarges the powers of the Union courts in inter-institutional disputes and in disputes between Union institutions and Member States.<sup>17)</sup>

However, for natural and legal persons, this extension has not resulted in a real and substantial widening of jurisdiction of these courts. Even before the Treaty of Lisbon, these persons could have brought a direct action, at least within the scope of EC treaty, against acts of institutions, bodies, offices and

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<sup>16)</sup> With the exception of Title I of the Statute and Article 64 providing the linguistic regime of the Union courts. Before the Treaty of Lisbon, the amendments of the Statute were done by the Council acting unanimously. As before this treaty, the amendments are done 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.

<sup>17)</sup> For an inadmissible action against Europol before the Treaty of Lisbon, see Case C-160/03 *Spain v Eurojust* [2005] ECR I-2077.

agencies that were not expressly mentioned in former Article 230 TCE. This principle followed from the case-law *Les Verts*,<sup>18)</sup> according to which the European Community was “a Community based on the rule of law, inasmuch as neither its Member States nor its institutions [could have avoided] a review of the question whether the measures adopted by them [were] in conformity with the basic constitutional charter, the Treaty.” The Treaty had established a complete system of legal remedies and procedures designed to permit Communities (now Union) courts to review the legality of measures adopted by all institutions. Therefore, even if former Article 230 TCE referred expressly only to acts of certain institutions, “the general scheme of the Treaty [was] to make a direct action available against all measures adopted by the institutions ... which [were] intended to have legal effects.<sup>19)</sup>

Consequently, a general principle followed from this case-law that if the Treaty or the secondary legislation did not provide for any judicial review of acts of an institution, which were intended to have legal effects and were in the scope of application of the TCE, the Court of Justice had the power to review the legality of these acts in conformity with the scheme and spirit of the Treaty.

It is true that *Les Verts* concerned measures adopted by the European Parliament and the Court of Justice did not have any occasion to apply it to other Community institutions. Nevertheless, the principles established by this case-law were general enough to be applied to other institutions, subject to specific conditions of admissibility laid down in the Treaty or in the secondary legislation.<sup>20)</sup>

In any case, these principles were applied to acts of Community bodies and agencies, since it was considered unacceptable, in a community based on the rule of law, that such acts escape judicial review. Thus, even under the regime before the Treaty of Lisbon, actions were declared admissible, for instance, against acts of the European Economic and Social Committee,<sup>21)</sup> the European Maritime Safety Agency<sup>22)</sup> or the European Agency for Reconstruction.<sup>23)</sup>

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<sup>18)</sup> Cases 294/83 *Les Verts v European Parliament (Les Verts)* [1986] ECR 1339 and 34/86 *Council v European Parliament* [1986] ECR 2155.

<sup>19)</sup> See *Les Verts*, cited above note 18, paragraphs 23 and 24.

<sup>20)</sup> See Case T-460/93 *Tête and Others v European Investment Bank* [1993] II-1257.

<sup>21)</sup> Case T-117/08 *Italy v European Economic and Social Committee* [2010] ECR II-0000, paragraphs 32 to 35. This case was decided after the entry into force of the Treaty of Lisbon. However, as the action was brought before (on 11 March 2008), it was examined on the basis of Article 230 TCE.

<sup>22)</sup> Case T-70/05 *Evropaïki Dynamiki v European Maritime Safety Agency* [2010] ECR II-0000, paragraphs 65 to 75.

<sup>23)</sup> Case T-411/06 *Sogelma v European Agency for Reconstruction* [2008] ECR II-2771, paragraphs 37 to 43.

It follows that Article 263 TFEU is only a confirmation and codification of *Les Verts*, at least as regards the above-mentioned acts adopted within the scope of former EC treaty.<sup>24), 25)</sup>

Nevertheless, Article 263 TFEU is a positive step towards legal certainty because the confirmation of *Les Verts* makes clear conditions of admissibility of actions for annulment. This admissibility could have been unclear regarding acts adopted outside the scope of the EC Treaty and concerning acts of some EU bodies or agencies whose situation could have been considered dissimilar to the situation which gave rise to judgment in *Les Verts*.

However, this clarification has not had any significant impact on the caseload of the Union courts.

Before this treaty, there were – apart from the Staff regulation cases – two substantive cases against acts of agencies in 2007,<sup>26)</sup> one substantive case in 2008<sup>27)</sup> and five substantive cases in 2009.<sup>28)</sup>

It is true that, after the entry into force of the Treaty of Lisbon, there was an important increase in cases against bodies, offices or agencies omitted in former Article 230 TCE and mentioned in Article 263 TFEU – twelve substantive cases

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<sup>24)</sup> For application of *Les Verts* outside the scope of EC Treaty, see Opinion of Advocate-General Poireres Maduro in *Spain v Eurojust*, cited above note 17. In the judgment, the Court of Justice did not follow the Opinion, but on the ground that the concerned persons had access to the Community Courts regarding the acts in question and that Spain could not have brought an action in their place. On the other hand, the Court of Justice did not exclude that the principle of effective judicial protection applied to the third pillar. It rather hinted that this principle may have required judicial review if the concerned persons had had no access to the Community Courts (see *Spain v Eurojust*, paragraphs 41 to 43).

<sup>25)</sup> The effect of Article 263 TFEU in practice is furthermore limited by the fact that acts setting up EU bodies, offices and agencies often lay down conditions and arrangements concerning actions brought by natural and legal persons against acts of these bodies, offices and agencies (See, for instance, Article 15(3) of Council Regulation No 1035/97 of 2 June 1997 establishing a European Monitoring Centre on Racism and Xenophobia (OJ L 151, 10.6.1997, p. 1). Thus, these acts made such actions possible even before the Treaty of Lisbon. In this regard, Article 263 TFEU does not change anything because it follows from Article 263(5) TFEU that actions can be brought only in conformity with specific conditions and arrangements laid down in acts setting up bodies, offices and agencies of Union.

<sup>26)</sup> T-476/07 *Evropaiki Dynamiki v Frontex* and T-264/07 *CSL Behring v Commission and European Medicines Agency*.

<sup>27)</sup> T-439/08 *Joséphidès v Commission and Education, Audiovisual and Culture Executive Agency*.

<sup>28)</sup> T-518/09 *Ecoceane v European Maritime Safety Agency*; T-297/09 *Evropaiki Dynamiki v European Aviation Safety Agency*; T-164/09 *Kitou v European Data Protection Supervisor*; T-52/09 *Nycomed Danmark v European Medicines Agency*, T-8/09 *Dredging International v European Maritime Safety Agency*.

were brought in 2010<sup>29)</sup> and five substantive cases were brought in 2011.<sup>30)</sup> Nevertheless, this increase is not linked to the Treaty of Lisbon. The large majority of actions were brought against the European Chemicals Agency which was established by Regulation No 1907/2006 and began adopting legal acts during the period the Treaty of Lisbon was concluded.<sup>31)</sup>

Furthermore, none of these actions has been brought against an act for which there was a serious doubt about the possibility of contesting it before the Treaty of Lisbon or which could not have been contested on the basis of former Article 230 TCE, as interpreted in the light of *Les Verts*, or on the basis of secondary legislation.<sup>32)</sup>

In this context, it must be added that, even though Article 263 TFEU aims at widening and clarifying the conditions of admissibility of actions for annulment, it does not constitute a complete consolidation of the *Les Verts* case-law. In fact, whereas it mentions actions against acts of all bodies, offices and agencies of the Union, it enumerates only some Union institutions whose acts can be contested. Hence, according to the wording of Article 263 TFEU, no action should be possible against acts of institutions omitted in this provision, i. e. against acts of the Court of Justice and the Court of Auditors.

It is true that these institutions do not usually adopt normative or administrative acts which would be intended to have legal effects vis-à-vis third parties and which would be comparable to acts of other institutions.<sup>33)</sup> Nevertheless,

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<sup>29)</sup> Eight cases were brought against the European Chemicals Agency (T-1/10 *PPG et SNF v European Chemicals Agency*; T-93/10 to T-96/10 *Bilbaina de Alquitranes and Others v European Chemicals Agency*; T-268/10 *PPG et SNF v European Chemicals Agency*; T-343/10 *Etimine et Etiproducts v European Chemicals Agency*; T-346/10 *Borax Europe v European Chemicals Agency*) and four against other bodies (T-339/10 *Cosepuri v European Food Safety Authority*; T-532/10 *Cosepuri v European Food Safety Authority*; T-554/10 *Evropaiki Dynamiki v Frontex*; T-573/10 *Octapharma Pharmazeutika v European Medicines Agency*).

<sup>30)</sup> T-214/11 *Client Earth et PAN Europe v European Food Safety Authority*; T-245/11 *Client Earth et International Chemical Secretariat v European Chemicals Agency*; T-345/11 *ENISA v European Data Protection Supervisor*; T-526/11 *Igcar Chemicals v European Chemicals Agency*; T-577/11 *Ethnikokai Kapodistriako Panepistimio Athinon v European Centre for Disease Prevention and Control*.

<sup>31)</sup> Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006, concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC (OJ 2006 L 396, p. 1).

<sup>32)</sup> In particular, according to Regulation No 1907/2006, actions against decisions of the European Chemicals Agency may have been brought even before the entry into force of the Treaty of Lisbon. The same was in principle possible for other agencies.

<sup>33)</sup> The aspect treated here does not concern Staff Regulation cases which are admissible on the ground of Article 91 of this Regulation.

they do sometimes adopt such acts. For example, they adopt administrative acts in the field of access to documents<sup>34)</sup> or in the domain of public procurement procedures.<sup>35)</sup>

Precisely in these fields, there has recently been an important increase in actions against Union institutions, including the Court of Justice and the Court of Auditors (in particular in the domain of public procurement, in which unsuccessful tenderers have begun contesting more systematically decisions of Union institutions awarding tenders to another tenderer).

In this respect, litigants have contested acts of the Court of Justice and the Court of Auditors on the basis of Article 263 TFEU even if this provision does not mention acts of these institutions. The General Court considered these actions admissible, without specifying the legal basis on which they could have been brought.<sup>36)</sup>

It is true that the Court of Justice, as a defendant, did not raise a plea of inadmissibility, which is logical, because it would have been delicate for this guardian of legality to plead that the right to an effective remedy is not applicable to its own administrative acts and that it could avoid judicial review. However, since the jurisdiction of the General Court is an issue involving an absolute bar to proceedings, the General Court is not bound by the parties'

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<sup>34)</sup> Pursuant to Article 15(3) TFEU, any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union's institutions, bodies, offices and agencies, including the Court of Auditors and the Court of Justice (when the latter exercises administrative tasks). According to a draft amendment of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents, this regulation shall apply to all institutions (COM(2011) 137 final). In this regard, it must be also noted that Article 8 of Regulation No 1049/2001 is ambiguous as to if it creates itself the right to bring an action against the act of refusal to grant access to a document. Pursuant to its Article 8(1), in the event of a total or partial refusal, the institution "shall inform" the applicant of the remedies open to him or her, namely instituting court proceedings against the institution under the conditions laid down in Articles 230 TCE. Imposing a simple obligation of information, such provision cannot thus create itself a right to a remedy. On the contrary, paragraph 3 of this provision could have such effect, since it states that failure by the institution to reply within the prescribed time limit shall be considered as a negative reply and "entitle" the applicant to institute court proceedings against the institution. However, it would be a paradox if a litigant had a right to content an implicit negative decision under Article 8(3) and not an explicit decision under Article 8(1) and he or she should be therefore entitled to contest both decisions.

<sup>35)</sup> These acts must respect Articles 88 to 107 of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1) that lay down conditions under which public procurement procedures of Union institutions must be executed.

<sup>36)</sup> See Case T-272/06 *Evropaiki Dynamiki v Court of Justice*, not published in the ECR and Joint Cases T-170/10 and T-340/10 *CTG Luxembourg PSF v Court of Justice*. It is a common practice of the General Court not to mention such legal basis, contrary to the Court of Justice that always mentions such legal basis in the introduction of the decision.

position as regards its jurisdiction and the matter could have been examined of the court's own motion.<sup>37)</sup>

This would have been desirable, in particular, in the domain of public procurement because some national courts assert that they have exclusive jurisdiction to adjudicate on the lawfulness of decisions of Union institutions rejecting a tender submitted by a person and awarding to another person the public contract in question.<sup>38)</sup>

The General Court should therefore clearly declare, in cases involving the Court of Justice and the Court of Auditors, that actions for annulment against their acts are in principle admissible if they are brought by natural and legal persons.

The reason for supporting this conclusion follows from the principle established in *Les Verts*, according to which the Union is based on the rule of law, inasmuch as its institutions cannot avoid review of the question whether the measures adopted by them are legal. This is also confirmed by Article 47 of the Charter, under which any person whose rights and freedoms guaranteed by Union law are infringed has the right to an effective remedy. Besides, any other result would be inconsistent with General Court's own case-law, pursuant to which the need for full judicial review of Union acts dictates that the General Court has the jurisdiction to hear actions for annulment of acts of the European Investment Bank even if no provision of the Treaty provides for such actions.<sup>39)</sup>

The conclusion would nevertheless be different for actions brought against acts of the Court of Justice and the Court of Auditors if these actions are brought by another institution or a Member State. In the light of the actual wording of Article 263 TFEU, which omits them, the Union courts should apply the principle of *Spain v Eurojust*, according to which, if the main parties concerned by the contested act have access to the Union courts, the right to effective judicial protection in a Union based on the rule of law does not require that institutions or Member States have a right to contest such acts under conditions of Article 263 TFEU.<sup>40)</sup>

## 2. Admissibility of actions for annulment of Union institutions

The Treaty of Lisbon widened the jurisdiction of the Union courts by enlarging the conditions of admissibility of "constitutional" actions for annulment.

<sup>37)</sup> See Cases T-29/02 *GEF v Commission* [2005] ECR II-835, paragraphs 72 to 74 and T-461/08 *Evropaiki Dynamiki v European Investment Bank* [2011] ECR II-0000, paragraph 32.

<sup>38)</sup> See, for example, *Evropaiki Dynamiki v European Investment Bank*, cited above note 37, paragraph 32. For the execution of a contract concluded after a procedure of public procurement, national courts should have in principle the competence because this execution is, above all, a civil law matter.

<sup>39)</sup> See *Evropaiki Dynamiki v European Investment Bank*, cited above note 37, paragraphs 45 to 52.

<sup>40)</sup> *Spain v Eurojust*, cited above note 17, paragraphs 41 to 43.

First of all, according to Article 263(1) TFEU, it is now possible to contest acts of the European Council intended to produce legal effects vis-à-vis third parties. In respect of the nature of acts of this institution, actions can, in principle, be instituted only by other institutions or Member States.

Furthermore, the Committee of the Regions has acquired the right to bring an action against any Union act, on condition that the purpose of this action is to protect its prerogatives (see Article 263(3) TFEU).

However, none of these provisions has had any im, act on the Union Courts Because no action has been brought against an act of the European Council and the Committee of Regions has not instituted any proceedings these the Union courts.

### 3. Common foreign and security policy

The Treaty of Lisbon modified provisions concerning the jurisdiction of the Union courts in the domain of common foreign and security policy (“CFSP”), but very partially.

The rule remains that the Union courts do not have jurisdiction – and will probably never have due to political considerations – with respect to provisions relating to the CFSP nor with respect to acts adopted on the basis of those provisions (see Article 275(1) TFEU). Thus, they cannot, in particular, review legality of these acts.

Nevertheless, there are two exceptions to this rule. First of all, Article 275(2) TFEU provides that the Union courts have jurisdiction to monitor compliance with Article 40 TEU, which states in paragraph 1 that the implementation of the CFSP shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of Union competences in other domains.

This provision is not, in reality, new because it reproduces provisions of former Articles 46(f) and 47 TEU, without altering significantly their substance.<sup>41)</sup> Thus, in this respect, the Treaty of Lisbon does not have any impact on the activity of the Union courts.

It is true that Article 40(2) TEU contains a new provision, according to which the implementation of the policies listed in Articles 3 to 6 TFEU shall not affect,

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<sup>41)</sup> In reality, wording of the new Article 40(1) TEU tends rather to limit powers of the Union courts because it states that the “implementation of the common foreign and security policy” shall not affect the application of “procedures and the extent of the powers of the institutions” laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 [TFEU]. The wording of former Article 47 TEU was wider because it stated that “nothing” in TEU shall have affected “the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying or supplementing them”. This included the above-mentioned implementation, procedures and powers of institutions, but it could have theoretically covered other types of affectations. However, in practice, this difference will probably have no incidence.

similarly, the application of the procedures and the extent of the powers of the institutions in the domain of the CFSP, as defined in Chapter 2 of Title V TEU. However, it is not very likely that this provision would be of any application in practice because Member States have a strong tendency, in fields concerning the CFSP, to prefer mechanisms based on unanimity provided for in Chapter 2 of Title V TEU, to the supranational mechanisms of the TFEU.

The limited impact of the above-mentioned provisions is confirmed by practice, since no action has been brought for violation of either Article 40(1) TEU or Article 40(2) TEU. This is in line with the caseload before the Treaty of Lisbon, since only three actions had been brought for violation of former Articles 46(f) and 47 TEU, just one concerning the CFSP.<sup>42)</sup>

On the other hand, the Treaty of Lisbon has indeed introduced an important modification in the domain of the CFSP, which was incorporated into the second part of Article 275(2) TFEU, under which the Union courts now have jurisdiction to review directly the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council in the domain of the CFSP. This modification will be discussed in the second part of the article.

#### 4. Direct actions in the Area of freedom, security and justice

The Area of freedom, security and justice (“Area”) covers former provisions of Title IV of Part Three TCE (“Title IV”) (external border controls, visa, asylum, immigration, and judicial cooperation in civil matters) and former provisions of the third pillar (police cooperation and judicial cooperation in criminal matters).

In these fields, the jurisdiction of the Union courts was limited before the Treaty of Lisbon. This treaty abrogated these restrictions and made the general procedural provisions of Articles 258 to 280 TFEU applicable to the Area. As a result, the Union courts have acquired a power to rule on direct actions in this domain and to give preliminary rulings at the request of all national courts.

However, there are two exceptions to this jurisdiction. According to the first, which is permanent, the Union courts cannot review the validity or proportionality of operations carried out by national law-enforcement services 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 (see Article 276 TFEU). In this respect, the provision does not contain any modification because it reproduces, in essence, former Article 35(5) TEU and Article 68(2) TCE.

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<sup>42)</sup> C-91/05 *Commission v Council*. Two other cases concerned the former third pillar (C-176/03 *Commission v Council* and C-440/05 *Commission v Council*).

The second exception is transitional and refers to acts of the Union in the field of police cooperation and judicial cooperation in criminal matters, adopted before the entry into force of the Treaty of Lisbon. As regards these acts, the powers of the Union courts remain the same for a period of five years from the entry into force of this treaty.<sup>43)</sup> Nevertheless, the amendment of such an act entails the applicability of the powers of the Union courts, as set out in the Treaties, with respect to the amended act for those Member States to which that amended act applies.<sup>44)</sup>

Subject to these exceptions, the Treaty of Lisbon resulted in the widening of the Union courts' jurisdiction as regards mainly two direct actions.

Firstly, under Article 258 TFEU, the Commission can now introduce infringement proceedings against a Member State that fails to fulfil an obligation resulting from an act adopted in the Area. As in other domains, such infringements will mainly consist in non-implementation of a directive, but it can concern another act or omission of a Member State, such as non-execution of the European arrest warrant.

Before the Treaty of Lisbon, infringement actions could have been brought concerning acts under former Title IV. In this respect, the powers of the Court of Justice remain unchanged however. The modification concerns, on the contrary, acts of the former third pillar, which were excluded from the jurisdiction of the Court of Justice. The latter only had jurisdiction to rule on disputes between Member States regarding the interpretation or the application of these acts and to rule on disputes between Member States and the Commission regarding the interpretation or the application of conventions.

These provisions have never been used in practice.<sup>45)</sup>

Similarly, new powers of the Court of Justice acquired under the Treaty of Lisbon have remained unused for the moment. In fact, the Commission has not brought any action for infringement in the field of police cooperation and

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<sup>43)</sup> See Article 10 of Protocol No 36 on transitional provisions.

<sup>44)</sup> It is also important for decision-making of the Union courts that according to Article 9 of the Protocol No 36, the legal effects of the acts of the institutions, bodies, offices and agencies of the Union adopted on the basis of the TEU, prior to the entry into force of the Treaty of Lisbon, are preserved until those acts are repealed, annulled or amended in implementation of the Treaties. The same applies to agreements concluded between Member States on the basis of the TEU. This exception is permanent.

<sup>45)</sup> However, in other domains of the Area, there were 22 infringement actions against Member States in 2007 (C-3/07, C-4/07, C-5/07, C-26/07, C-29/07, C-30/07, C-34/07, C-37/07, C-51/07, C-57/07, C-58/07, C-59/07, C-79/07, C-86/07, C-87/07, C-91/07, C-104/07, C-112/07, C-192/07, C-216/07, C-218/07, C-294/07); 12 infringement actions in 2008 (C-122/08, C-130/08, C-190/08, C-191/08, C-209/08, C-220/08, C-256/08, C-266/08, C-269/08, C-272/08, C-293/08, C-322/08) and 2 infringement actions in 2009 (C-407/09 and C-486/09).

judicial cooperation in criminal matters, which is a logical consequence of the above-mentioned five-year transitional period – the Commission could have only brought actions concerning new acts adopted in this domain or concerning amended acts.<sup>46)</sup>

For the future, it remains open to which extent the Commission will institute proceedings in this sensitive field after the expiration of the transitional period. Actions will certainly be brought for non-transposition of directives adopted in the Area. Nevertheless, it can be expected that the Commission will be more cautious concerning infringements of acts of the Area in administrative practice, given the sensitive nature of these acts.

The second action concerned by the generalisation of the Union courts' jurisdiction is the action for annulment. Before the Treaty of Lisbon, natural and legal persons had no possibility to bring an action for annulment against acts adopted in the domain of police and judicial cooperation in criminal matters. The same was true for EU institutions, except for the Commission, because only Member States and the latter could have brought actions to review the legality of framework decisions and decisions (see former Article 35(6) TEU).

The Treaty of Lisbon made it possible to bring an action for annulment, on the ground of Article 263 TFEU, against all acts adopted in the Area, including acts adopted in the domain of police and judicial cooperation in criminal matters. All institutions mentioned in this provision,<sup>47)</sup> Member States and, above all, natural or legal persons can therefore institute proceedings against these acts provided that they satisfy other conditions of admissibility laid down in Article 263 TFEU. Consequently, they can bring, in particular, actions for annulment against acts of bodies such as Europol or Eurojust.

However, so far, no action has been brought against an act adopted in the domain of police and judicial cooperation in criminal matters that would be inadmissible before the Treaty of Lisbon and which would become admissible under the new regime. Only two actions have been brought concerning acts in the field of monitoring of the crossing of external borders and one action has been brought concerning an act in the field of cross-border exchange of information; these actions would have been admissible even before the Treaty of Lisbon.<sup>48)</sup>

Thus, the caseload remains the same as before the Treaty of Lisbon given

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<sup>46)</sup> In the Area, the Commission brought four infringement actions since the Treaty of Lisbon (See Cases C-304/10, C-431/10, C-508/10 and C-568/10). However, all of them concern infringements of acts of former Title IV, for which infringement procedure could have been initiated even before the Treaty of Lisbon.

<sup>47)</sup> The European Parliament, the Council and the Commission. The action can be also 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, even if this possibility is rather theoretical in the domain of police and judicial cooperation in criminal matters.

<sup>48)</sup> See Cases C-355/10, T-37/11 and C-34/12.

that, before its entry into force, one action per year was brought, approximately, in the field of the Area, most of them being brought by the United Kingdom.<sup>49)</sup>

It follows that, for the moment, the Treaty of Lisbon has not had any impact on the Union courts concerning direct actions in the Area. It has only had an impact on the preliminary ruling procedure, which will be discussed in the second part of this article.

##### **5. Actions brought by national Parliaments for infringement of the principle of subsidiarity**

According to the new Article 8 of Protocol No 2 on the application of the principles of subsidiarity and proportionality, the Court of Justice has jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a legislative act, brought in accordance with the rules laid down in Article 263 TFEU by Member States, “or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber thereof”.

Such a provision is not revolutionary in itself. Even before the Treaty of Lisbon, nothing precluded a Member State from providing for a system under which the national government was obliged to bring an action before the Court of Justice on behalf of the national Parliament, including on grounds of infringement of the principle of subsidiarity by a Union legislative act.

However, on the basis of Article 8 of Protocol No 2, this right is now conferred on national Parliaments directly by Union law. It is the national Parliament that becomes the party to the proceedings before the Court of Justice or, at least, the body representing the Member State in the procedure. This follows from the alternative nature of actions mentioned in Article 8 of Protocol No 2 and from the fact that the government of the Member State “notifies” the action instead of bringing it.<sup>50)</sup> Therefore, the Parliament disposes of its own procedural rights and obligations before the Court of Justice, it brings the action and it can do so even against the will of its national government, the latter being obliged to notify it to the Court of Justice. It is true that the government shall act in accordance with the conditions of the national legal order. Nonetheless, these conditions cannot deprive the parliament of its right to institute the proceedings.

Such an impediment is though purely hypothetical since every government is subordinated to the Parliament and, besides, the right to bring the action was

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<sup>49)</sup> C-257/01 *Commission v Council*; C-540/03 *Parliament v Council*; C-77/05 *United Kingdom v Council*; C-137/05 *United Kingdom v Council*; C-133/06 *United Kingdom v Council* and C-482/08 *United Kingdom v Council*.

<sup>50)</sup> Since the national Parliaments are institutions of Member States, it is at least strange to state in Article 8 of Protocol No 2 that the action is brought by Member States “or” notified by them on behalf of their national Parliament. The only plausible explanation is that, in the first case, the action is brought by the usual body of the concerned Member State (government representing the Member State which is, as a whole, party before the Court of Justice) and, in the second case, the action is brought by the national Parliament.

implemented by the national Parliaments themselves, these Parliaments making their rights obviously effective.

In practice, national Parliaments have given special attention to this right, some of them even incorporating it into the national Constitution, in particular in Germany,<sup>51)</sup> in France<sup>52)</sup> and in Austria.<sup>53)</sup> Similarly, this right was clearly defined in the Member States, in which it has not acquired a constitutional nature. In the Czech Republic, it was provided for in Articles 109d to 109h of the Rules of Procedure of the Chamber of Deputies and in Articles 119p to 119s of the Rules of Procedure of the Senate.<sup>54)</sup> In the Slovak Republic, the procedure was laid down in Article 58b of the Rules of Procedure of the National Council.<sup>55)</sup>

Despite all these implementing measures, the new procedure has not had any impact on the judicial activity of the Court of Justice since no action has been brought by a national Parliament so far. However, such actions may be brought in the near future if the Union institutions do not respect the views of national Parliaments, as expressed through the preventive mechanisms of control of the principle of subsidiarity, which were introduced by the Treaty of Lisbon,<sup>56)</sup> since national Parliaments have started using the latter. In particular, the Dutch, Lithuanian, French, Portuguese and Swedish Parliaments have already made

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<sup>51)</sup> See Act of 8 October 2008 amending the Constitution (Article 23, 45 and 93), *Bundesgesetzblatt*, 2008, Part I, No 45, p. 1926. According to the new Article 23(1a), “[t]he Bundestag and the Bundesrat shall have the right to bring an action before the Court of Justice of the European Union to challenge a legislative act of the European Union for infringing the principle of subsidiarity. The Bundestag is obliged to initiate such an action at the request of one fourth of its Members.”

<sup>52)</sup> See Constitutional Act No 2008-103 of 3 February 2008 amending Title XV of the French Constitution. Pursuant to the new Article 88-6 of the Constitution, the National Assembly or the Senate “may institute proceedings before the Court of Justice of the European Union against a European Act for non-compliance with the principle of subsidiarity. Such proceedings shall be referred to the Court of Justice of the European Union by the Government.”

<sup>53)</sup> See Article 23h of Austrian Federal Constitution.

<sup>54)</sup> Act No 90/1995 Coll. of 19 April 1995, Rules of Procedure of the Chamber of Deputies, as amended, and Act No. 107/1999 Coll. of 11 May 1999, Rules of Procedure of the Senate, as amended.

<sup>55)</sup> Act No 350/1996 Coll., Rules of Procedure of the National Council of the Slovak Republic, as amended.

<sup>56)</sup> Pursuant to Article 6 of Protocol No 2, “[a]ny national Parliament or any chamber of a national Parliament may, within eight weeks from the date of transmission of a draft legislative act, in the official languages of the Union, send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity. It will be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers.” On this mechanism, see for example KIIVER, P., The early-warning system for the principle of subsidiarity: The national parliament as a *Conseil d'Etat* for Europe, *European Current Law Yearbook* 2011, p. 23.

use of the so called early warning system, by adopting a reasoned opinion stating that a draft legislative act of the Union was incompatible with the principle of subsidiarity.<sup>57)</sup>

## II. PROCEDURAL MODIFICATIONS WITH AN IMPACT ON THE ACTIVITY OF THE UNION COURTS

The Treaty of Lisbon has made judicial protection more effective mainly by three series of changes that have had impact on the activity of the Union courts: it made the courts less political, it widened their jurisdiction in several domains affecting individuals and it resulted in the acceleration of some procedures.

### 1. Partial depoliticization of the process of nomination of members of the Union courts

Since justice is dispensed by humans – the Judges –, the quality of legal protection depends primarily on the composition of the courts that ensure this protection. In this respect, Articles 253(1) et 254(2) TFEU require – reproducing former Articles 223(1) and 224(2) TCE – that members of the Union courts shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices (Court of Justice) or to high judicial office (General Court).

The Treaty of Lisbon aimed to promote these values but, despite high expectations, it did not enhance the independence of the Judges and Advocates-General by extending their terms of office and making them non renewable, which would have made them completely independent of their respective governments since they could not have sought a re-appointment to their office.<sup>58)</sup>

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<sup>57)</sup> See, in particular, the European Resolution of the French National Assembly of 8 November 2011 (Adopted text No 753 – and commentary SIMON, D., *Subsidiarité: l'Assemblée nationale sur la voie du carton jaune?*, *Revue Europe*, 12/2011, p. 1). The national Parliaments in question adopted the reasoned opinions concerning a draft of a Regulation amending Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code). The new Regulation would confer on the Commission the power to decide if a Member State can maintain a temporary reintroduction of border control at internal borders, which the mentioned Parliaments considered as contrary to the principle of subsidiarity.

<sup>58)</sup> In comparison, the status of Judges of the European Court of Human Rights has been recently changed in this way in order to promote their independence. Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms extended the term of office to nine years without the possibility of re-election. It entered into force on 1 June 2010. On the link between the procedure of selection of Judges and their independence, see JACOBS, G. F., *Advocates General and Judges in the European Court of Justice: Some personal reflections* in: O'Keeffe, D. and Bavasso, A. (eds.), *Liber Amicorum in Honour of Lord Slynn of Hadley – Judicial Review in European Law*, The Hague/London/Boston, 2002, at 24 and MALENOVSKÝ, J., *L'indépendance des juges internationaux*, *Académie de droit international de la Haye*, Leiden/Boston, 2011, pp. 115-157.

Such a proposal was made during the European Convention (concretely to replace the existing six-year renewable term of office by a non-renewable term of office of nine or twelve years),<sup>59)</sup> but the authors of the Constitutional Treaty and the Treaty of Lisbon did not finally opt for it. Nevertheless, they made a modification regarding the process of appointment of members of the Union courts, which may have seemed minor at the beginning, but it turned out to have a significant impact on this process and on the status of these members.

The Judges and Advocates-General have always been appointed by common accord of the governments of the Member States for a term of six years, each government proposing one candidate for the post of Judge and appointment of Advocates-General being based, in part, on a system of rotation.<sup>60)</sup>

Such a procedure gives a decisive role to the executive power, which increases the risk that the process of appointment of a Judge or Advocate-General may be unduly influenced by political considerations.<sup>61)</sup> This could affect his or her independence during the exercise of the mandate because of feelings of gratitude or dependency and might create a doubt as to whether he or she was – in comparison to other candidates – the most suitable candidate for the function.<sup>62)</sup>

It is true that unanimity is required for appointment, which gives a right of veto to every government and makes it possible to block a candidate, should there be any doubt concerning his or her independence or qualifications. However, for diplomatic reasons, none of Member States has desired to be the one that starts contesting a candidate of another Member State and they have therefore respected the choice of the Member State that proposed the candidate concerned.

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<sup>59)</sup> See Final report of the discussion circle on the Court of Justice, European convention (CONV 636/03), p. 3.

<sup>60)</sup> Even after the Treaty of Lisbon, the number of Advocates-General remains at eight. In this respect, the Declaration No 38 annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon confirmed the practice that Germany, France, Italy, Spain and the United Kingdom have a permanent Advocate-General, the remaining Advocates-General rotating among other Member States. However, pursuant to this Declaration if, in accordance with Article 252 TFEU, the Court of Justice requests that the number of Advocates-General be increased by three (eleven instead of eight), the Council will, acting unanimously, agree on such an increase. In that case, Poland will also have a permanent Advocate-General.

<sup>61)</sup> As the former Advocate-General Jacobs noted, the appointment of a particular Judge or Advocate-General has not been for example renewed, from time to time, for apparently arbitrary reasons (See JACOBS, G. F., *Advocates General and Judges in the European Court of Justice: Some personal reflections*, cited above note 58, at 24). See also BARENTS, R., *The Court of Justice after the Treaty of Lisbon*, cited above note 14, at 712.

<sup>62)</sup> See more in detail MALENOVSKÝ, J., *L'indépendance des juges internationaux*, cited above note 58, p. 115.

The Treaty of Lisbon changed this situation. It did not modify the body entitled to appoint the members of the Union courts because, according to Articles 253 and 254 TFEU, this power still lies in the hands of the governments of the Member States that decide by common accord. However, new Article 255 TFEU sets up a panel in order to give an opinion on candidates' suitability to perform the duties of Judge and Advocate-General of the Court of Justice and the General Court before the governments of the Member States make the appointments referred to in Articles 253 and 254 TFEU.<sup>63)</sup>

This panel is a truly non-political body on which the governments have little influence.<sup>64)</sup> It comprises seven persons who are appointed for a fixed period of four years among personalities whose independence and competence are beyond any doubt: former members of the Court of Justice and the General Court, members of national supreme courts and other lawyers of recognised competence.

In this perspective, the Council appointed as members of the panel, for the period 2010-2014, three heads of national supreme courts, a former member of the Court of Justice, a former member of the Court of First Instance, a sitting Judge in a national supreme court and a barrister.<sup>65)</sup>

The profile of these members gave the panel the potential to change significantly the process of appointment. It is true that its role is limited to giving mere opinions on candidates' suitability and that the Member States are not

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<sup>63)</sup> Similar tendency of setting up panels can be observed at national level. In order to make the process of nomination of the candidate for a Judge or Advocate-General in Union courts more transparent, some Member States have begun establishing panels that are charged with the task of choosing or giving opinion on candidates' suitability before the candidate is formally chosen by the government (In the Czech Republic, see Rules on selection of the candidate for the function of the Judge at the Court of Justice of the European Union, annexed to Government Resolution No 525 of 13 July 2011; In the Slovak Republic, see Article 27g of Act No 185/2002 Coll. on Justice Council).

<sup>64)</sup> The members of the panel are appointed by the Council for a period of four years on the initiative of the President of the Court of Justice. The deliberations of the panel take place in camera. Except where a proposal relates to the reappointment of a Judge or Advocate-General, the panel shall hear the candidate; the hearing takes place in private. Reasons for the opinion given by the panel are stated and the panel's opinion is forwarded to the Representatives of the Governments of the Member States (See Article 255(2) *in fine* TFEU and Council Decision of 25 February 2010 relating to the operating rules of the panel provided for in Article 255 of the Treaty on the Functioning of the European Union (OJ 2010 L 50, p. 18).

<sup>65)</sup> Jean-Marc Sauvé, vice-president of the French Conseil d'État (Supreme Administrative Court); Torben Melchior, president of the Supreme Court of Denmark; Péter Pacsolay, president of the Constitutional Court of Hungary; Peter Jann, former member of the Court of Justice; Virpi Tiili, former member of the Court of First Instance; Lord Mance, Justice at the Supreme Court of United Kingdom and Ana Palacio Vallelersundi, barrister, former member of the European Parliament (See Council Decision of 25 February 2010 appointing the members of the panel provided for in Article 255 of the Treaty on the Functioning of the European Union (OJ 2010 L 50, p. 20)).

bound by its opinions. However, in practice, it has the capacity to block the appointment of a candidate, since it can create a serious doubt as to the independence or qualifications of a candidate. Then, it is enough that one single government out of 27 shares its view and threatens to block the appointment, declaring that it considers the opinion sufficiently persuasive to be followed. Such a threat should force the government in question to withdraw the candidate and propose a new one.<sup>66)</sup>

In this regard, the crucial moment was bound to come on the first occasion when a candidate was disapproved by the panel. The powers of the panel would have been substantially weakened, in fact, if the Member State of that candidate had managed to have the candidate approved despite the negative opinion of the panel. On the contrary, should this Member State withdraw the candidate, which would create a precedent for the future and give to the panel a *de facto* veto.

Despite scepticism in the legal literature regarding the utility of the panel,<sup>67)</sup> the second of these scenarios became reality. The panel has not only given negative opinions on the suitability of several candidates for Judges at the Union courts, but these opinions forced the governments in question to withdraw these candidates and to propose new ones. The opinions of the panel have therefore had a decisive influence on the process, creating a political opposition from other governments against these candidates. And if its negative opinions continue to be followed in future, the panel may acquire a *de facto* veto on the appointment of candidates to the Union courts, provided that the panel uses its powers in a reasonable way.

In this regard, it is worth noting that the role of the panel is not limited to a “repressive” function and it includes also an important preventive function. The threat of its negative opinions has, in fact, an influence on the national procedure of appointment, because the national competent authorities – the government and its advisory bodies – make their choice knowing that there is a “review” body at Union level.

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<sup>66)</sup> The opinion of the panel may be shared in particular by the United Kingdom because the latter has always insisted on independence of Judges and it has been a strong advocate of their independence at international level. In order to depoliticize the process of the appointment of the Judges, the United Kingdom proposed for example a committee of the presidents of supreme courts to appreciate the suitability of the candidates for Judge at the International Criminal Court (For more details, see MALENOVSKÝ, J., *L'indépendance des juges internationaux*, cited above note 58, p. 151).

<sup>67)</sup> L. Parret claimed for example that the absence of uniform criteria would make it difficult for the panel to deliver a negative opinion on the suitability of a candidate proposed by a Member State (See PARRET, L., *En wat met de rechtsbescherming? Het Verdrag van Lissabon en de communautaire rechter*, S.E.W. 2003, n° 3, p. 104, cited in: VAN DER JEUGHT, S., *Le Traité de Lisbonne et la Cour de Justice de l'Union européenne*, *Journal de droit européen*, 164/2009, p. 297).

## 2. Widening of Union courts' jurisdiction

The widening of Union courts' jurisdiction has had an impact in three main ways: on admissibility of actions for annulment against regulatory acts, on restrictive measures adopted under the CFSP and on references for a preliminary ruling in the Area.

### 2.1. ADMISSIBILITY OF ACTIONS FOR ANNULMENT AGAINST REGULATORY ACTS

First “fruitful” modification of the Treaty of Lisbon concerns the admissibility of actions for annulment brought by natural or legal persons against regulatory acts, which is a new category of acts that was not used in the official terminology of Union law before the Treaty of Lisbon. Under former Article 230 TCE, no difference was made, in principle, between various Community acts and the same conditions of admissibility were applied to actions for annulment against them. More precisely, an action brought by a natural or legal person was not admissible unless the act in question was addressed to that person or was of direct and individual concern to the former.

These conditions were criticized as too restrictive and not guaranteeing a sufficient legal protection against Union acts.<sup>68)</sup> For this reason, the Court of First Instance attempted to remedy this situation, in part, by moderating the conditions of admissibility.<sup>69)</sup> However, the Court of Justice insisted that the conditions laid down in Article 230 TCE must not be circumvented and it decided that it is for the authors of the founding treaties to change the situation and not for the Union courts.<sup>70)</sup>

The authors of the Treaties responded to this appeal. The Treaty of Lisbon introduced a third possibility for natural and legal persons to contest Union acts, according to which they may institute proceedings against “a regulatory act which is of direct concern to them and does not entail implementing measures”.

It follows from this provision that three conditions must be fulfilled.

Firstly, the act in question must be a “regulatory act”. The denomination itself of this notion poses a problem in some linguistic versions. Above all, the Czech version uses the notion “právní akt s obecnou působností” (“act of general application”), which is a denomination that turned out to be incorrect and confusing in the light of the below-mentioned case-law.<sup>71)</sup> Therefore, the Union

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<sup>68)</sup> See, in particular, Opinion of Advocate-General Jacobs, delivered on 21 March 2002, in Case C-50/00 P, *Unión de Pequeños Agricultores v Council*.

<sup>69)</sup> See Case T-177/01 *Jégo-Quéré v Commission* [2002] ECR II-2365.

<sup>70)</sup> See Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677 and Case C-263/02 P *Commission v Jégo-Quéré* [2004] ECR I-3425. In the latter, the Court of Justice set aside the judgment of the Court of First Instance of 3 May 2002 in *Jégo-Quéré v Commission*.

<sup>71)</sup> Acts of general application cover also legislative acts, but these acts are precisely excluded from the notion of regulatory acts according to this case-law.

courts were forced to “rename” the notion in the Czech version of the judgments and use a neutral, albeit unusual notion “nařizovací akt”.<sup>72)</sup>

As for the content of this notion, the General Court held in two decisions of September and October 2011, respectively, that the meaning of “regulatory act” for the purposes of Article 263(4) TFEU must be understood as “covering all acts of general application apart from legislative acts”.<sup>73)</sup>

Although this interpretation must still be approved by the Court of Justice,<sup>74)</sup> this statement of the General Court has ended, for the time being, a doctrinal discussion about the meaning of this notion. During this discussion, the interpretation adopted by the General Court was defended as well as a broader reading of Article 263(4) TFEU according to which the notion of regulatory act must include all binding Union acts of general application.<sup>75)</sup>

The words “acts of general application apart from legislative acts” need further clarification. They must be read in the light of Article 289(3) TFEU, under which legislative acts are all legal acts adopted by legislative procedure, i. e. by ordinary legislative procedure defined in Article 294 TFEU or by special legislative procedure.<sup>76)</sup>

Thus, if an act is adopted pursuant to the ordinary or special legislative procedure, it cannot be considered as a regulatory act within the meaning of Article 263(4) TFEU. Consequently, even under the new regime, a natural or

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<sup>72)</sup> See the Czech version of the Judgment in Case T-262/10 *Microban International and Microban (Europe) v European Commission* [2011] ECR II-0000, paragraph 18.

<sup>73)</sup> Case T-18/10 *Inuit Tapiriit Kanatami and Others v Parliament and Council* [2011] ECR II-0000, paragraph 56 and *Microban International and Microban (Europe) v European Commission*, paragraph 21.

<sup>74)</sup> An appeal was brought against Order in Case T-18/10 (see Case C-583/11 P).

<sup>75)</sup> For more detail about these readings of Article 263 TFEU see: LENAERTS, K., *Le traité de Lisbonne et la protection juridictionnelle des particuliers en droit de l'Union*, Cahiers de droit européen, 5-6/2009, at 725; LENAERTS, K., *Challenges facing the European Court of Justice after the Treaty of Lisbon*, *Revista Romana de Drept European*, 3/2010, at 22; MAZÁK, J., *Locus standi v konaní o neplatnost': Od Plaumannovho testu k regulačným aktom*, *Právník* 3/2011, at 223; EVERLING, J., *Rechtsschutz in der Europäischen Union nach dem Vertrag von Lissabon*, *Europarecht*, 1/2009, at 74; WARD, A., *The Draft EU Constitution and Private Party Access to Judicial Review of EU Measures in T. Tridimas and P. Nebbia (eds.)*, *European Law for the Twenty-first Century*, Hart Publishing, Oxford, 2004, at 209; TRIMIDAS, T., *The European Court of Justice and the Draft Constitution: A Supreme Court of the Union?* in: T. Tridimas and P. Nebbia, cited above this note, at 114.

<sup>76)</sup> Special legislative procedure is a procedure provided for in some specific cases and it consists in the adoption of a regulation, directive or decision by the European Parliament with the participation of the Council, or by the latter with the participation of the European Parliament (Article 289(2) TFEU). In the specific cases provided for by the Treaties, legislative acts may be adopted on the initiative of a group of Member States or of the European Parliament, on a recommendation from the European Central Bank or at the request of the Court of Justice or the European Investment Bank (Article 289(4) TFEU).

legal person could contest such acts only if they are of direct and individual concern to this person.<sup>77)</sup>

On the other hand, an act is to be qualified as a regulatory act if a Union institution or body adopts it in the exercise of its implementing powers.<sup>78)</sup> The fundamental provision, in this regard, is Article 290(1) TFEU, which states explicitly that a legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act.<sup>79)</sup>

Acts adopted according to this procedure will be always regulatory acts and these acts will constitute the large majority of regulatory acts. However, regarding the broad definition adopted by the General Court, other non-legislative acts may be qualified as regulatory acts provided that they are of general application.<sup>80)</sup>

In this respect, it follows from *Microban* that an act is of general application if it applies to “objectively determined situations and it produces legal effects with respect to categories of persons envisaged in general and in the abstract.”<sup>81)</sup>

If an act does not satisfy these conditions, it must be regarded as an individual act, against which a natural or legal person can bring an action for annul-

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<sup>77)</sup> For an alternative conception of division between legislative and non-legislative acts, see MAZÁK, J., *Locus standi v konaní o neplatnosť: Od Plaumannovho testu k regulačným aktom*, cited above note 75, at 229. Pursuant to this conception, the distinction must be made in respect of the substance of the act in question and not in respect of its form. This approach is convincing insofar as it is based on the settled case-law of the Court of Justice concerning the admissibility of actions for annulment, according to which it is necessary to look to the substance of the contested acts, as well as the intention of those who drafted them, to classify those acts. By contrast, the form in which an act or decision is adopted is in principle irrelevant to the right to challenge such acts or decisions by way of an action for annulment (See Cases C-208/03 P *Le Pen v Parliament* [2005] ECR I-6051, paragraph 46 and C-521/06 P *Athinaiiki Techniki v Commission* [2008] ECR I-05829, paragraphs 42 and 43). Another advantage of this conception is that the author of the act in question cannot escape the judicial review by choosing a certain procedure (See also BARENTS, R., *The Court of Justice after the Treaty of Lisbon*, cited above note 14, at 725). On the other hand, it seems difficult to establish clear criteria of substance, which would make it possible to distinguish between the two types of acts. In comparison, the criterion of the procedure makes such a distinction easier and, besides, it finds a solid legal basis in the wording of Article 289(3) TFEU.

<sup>78)</sup> *Microban International and Microban (Europe) v European Commission*, cited above note 73, paragraph 22.

<sup>79)</sup> This procedure is defined in Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ 1999 L 184, p. 23).

<sup>80)</sup> See *Inuit Tapiriit Kanatami and Others v Parliament and Council*, cited above note 73, paragraph 48.

<sup>81)</sup> *Microban International and Microban (Europe) v European Commission*, cited above note 73, paragraph 23.

ment only if it is its addressee or if this act is of direct and individual concern to this person. In consequence, the new regime of Article 263(4) TFEU does not change anything for applicants who contest individual decisions, such as complainants who file a complaint to the Commission in the field of antitrust law and State aid and who contest individual decisions of the Commission by which this institution rejects the complaint and refuses to investigate.

As regards the second condition of admissibility, the regulatory act must be of direct concern to the applicant. This condition reiterates the condition laid down for the admissibility of actions against individual and legislative acts in the second part of 263(4) TFEU, which reproduces the condition of direct concern as laid down in former Article 230(4) TEC.

According to settled case-law, the latter condition requires that, firstly, the contested Union measure affects directly the legal situation of the individual and, secondly, it must leave no discretion to its addressees, who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from Community rules without the application of other intermediate rules.<sup>82)</sup>

The General Court held in *Microban* that this case-law is applicable to the condition of direct concern of regulatory acts. Thus, if such an act satisfies the above-mentioned criteria, it is of direct concern to the applicant.<sup>83)</sup>

However, the General Court hinted in this judgment that the new concept of direct concern – as introduced in Article 263(4) TFEU by the Treaty of Lisbon – could be subject to a different interpretation from that developed in the previous case-law. In General Court's view, it cannot be excluded that this concept could be subject to a more extensive interpretation than the notion of direct concern as it appeared in Article 230(4) TEC. This would follow from the objective of new provisions of Article 263 TFEU that seek to open up the conditions for bringing direct actions.<sup>84)</sup>

Such an approach is questionable. Given the requirements of unity of the Union legal order and its coherence, the concepts used by Treaty provisions should have the same meaning, unless the authors of the Treaty have expressed

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<sup>82)</sup> See Cases C-404/96 P *Glencore Grain v Commission* [1998] ECR I-2435, paragraph 41; C-486/01 P *National Front v Parliament*[2004] ECR I-6289, paragraph 34 and C-455/07 P *Commission v Ente per le Ville vesuviane and Ente per le Ville vesuviane v Commission* [2009] ECR I-7993, paragraph 45.

<sup>83)</sup> *Microban International and Microban (Europe) v European Commission*, cited above note 72, paragraphs 27 to 30.

<sup>84)</sup> *Microban International and Microban (Europe) v European Commission*, cited above note 72, paragraphs 31 to 32.

a different intention.<sup>85</sup>) In Article 263(4) TFEU, there is no indication that the notions of direct concern, as laid down in the second and third parts of this provision, should have a different meaning. As for the second part of Article 263(4) TFEU, it should have the same meaning as former Article 230(4) TEC since there is no substantive difference between the wordings of these two provisions and there is no other indication that the authors of the Treaties intended to modify the meaning of the condition of direct concern as laid down in Article 230 TEC.

Under these circumstances, the previous case-law related to the concept of direct concern should be applicable to the concept of direct concern of regulatory acts and this concept should be neither more restrictive nor more extensive than the concept laid down in former Article 230 TEC.

This also has implications for the third condition of admissibility of actions against regulatory acts, which requires that this act “does not entail implementing measures”.

In the light of the settled case-law relating to the condition of direct concern, it is in fact difficult to understand the utility and meaning of this condition. In order to satisfy the condition of direct concern, the case-law requires that the contested Union act directly affects the legal situation of the individual and leaves no discretion to its addressees, who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from Community rules “without the application of other intermediate rules”.<sup>86</sup>)

Since the “implementing measures” mentioned in the third condition are such intermediate rules, the satisfaction of the second condition (direct concern) implies that the contested act does not entail implementing measures and it includes therefore the above-mentioned third condition. Thus, the latter appears to be redundant and included in the condition of direct concern, which also contains other aspects (no discretion of the body in charge of applying the measure).

In other words, it can be stated that there are, in reality, only two conditions for the admissibility of actions for annulment in Article 263(4) TFEU *in fine*: the contested act must be a regulatory act and this act must be of direct concern to the applicant. In this perspective, the third condition does no more than to stress that part of the second condition, i.e. that the contested act cannot entail implementing (intermediate) measures.

The General Court opted for a different approach. It sought to respect the structure of Article 263(4) TFEU *in fine* and it examined the third condition as

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<sup>85</sup>) See, by analogy, Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others* [2011] ECR I-0000, paragraph 188 and Case C-271/10 *Vereniging van Educatieve en Wetenschappelijke Auteurs* [2011] ECR I-0000, paragraph 27.

<sup>86</sup>) See cases cited above note 82.

if it were autonomous. However, since it intended to respect, at the same time, the previous case-law on the condition of direct concern, it examined both conditions on the basis of criteria that were not really different, which resulted in certain duplication in the review.<sup>87)</sup>

## 2.2. ACTIONS AGAINST RESTRICTIVE MEASURES ADOPTED UNDER THE CFSP

The Treaty of Lisbon has introduced a new possibility of contesting acts adopted under the CFSP. According to the second part of Article 275(2) TFEU, the Union courts now have jurisdiction to review directly the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council under the CFSP.

At the first sight, the impact of this provision could seem limited because, even before the Treaty of Lisbon, such restrictive measures normally required adoption of Community or national implementing measures which could have been challenged in court. In principle, they were implemented by Community Regulations, adopted in conformity with Articles 60 and 301 TEC, and natural or legal persons had the possibility of bringing an action against these implementing Regulations.<sup>88)</sup> When the restrictive measures were implemented by national acts, the latter could have been challenged before national courts. Thus, in both cases, there was a legal remedy, albeit an indirect one.<sup>89)</sup>

The innovation of the Treaty of Lisbon consists in the possibility to contest *directly* the restrictive measures adopted under the CFSP,<sup>90)</sup> which increases

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<sup>87)</sup> In the review of the second condition, the General Court holds for instance that the contested decision leaves no discretion to the Member States, which are the addressees of the decision and, in that capacity, are responsible for implementing it, adding that “the implementation of [the ban in question is] automatic” (*Microban International and Microban (Europe) v European Commission*, cited above note 72, paragraph 29). However, the implementation of this ban can be automatic and free of discretion on the part of Member States only if the application of the decision does not require (and permit) adoption of implementing measures by the Member States. And later on, in the review of the third condition, the General Court states that “neither non-inclusion in the positive list nor removal from the provisional list required implementing measures on the part of the Member States.” (*Microban International and Microban (Europe) v European Commission*, cited above note 72, paragraph 34).

<sup>88)</sup> See, for instance, Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351. The same possibility is open to the concerned persons even after the Treaty of Lisbon. If restrictive measures require implementing measures, they can be adopted under Article 215(2) TFEU in conjunction with Chapter 2 of Title V TEU. In order to contest these measures, the natural and legal persons can bring an action for annulment in accordance with the conditions laid down in Article 263 (4) TFEU.

<sup>89)</sup> See Case T-228/02 *Organisation des Modjahedines du peuple d'Iran v Council* [2006] ECR II-4665, paragraph 55.

<sup>90)</sup> See, for instance, Case T-316/11 *Kadio Morokro v Council* [2011] ECR II-0000 and Case T-86/11 *Bamba v Council* [2011] ECR II-0000.

their legal protection, in particular when the implementing measures were adopted by the Member States.<sup>91)</sup> In such a case, concerned persons or entities could have been deprived in practice of any legal remedy because they could have challenged national implementing measures, but the national court might not have sought a preliminary ruling on the validity of the measures adopted under the CSFP that obliged national authorities to impose these implementing measures.

The possibility to contest directly such restrictive measures contributed to an important increase of cases in the domain of CSFP since the entry into force of the Treaty of Lisbon. Whereas there were only 7 cases a year concerning the restrictive measures in 2008 and in 2009, this number tripled to 21 in 2010 and it reached 54 cases in 2011.<sup>92)</sup>

However, this increase can be only partially linked to the Treaty of Lisbon. It also results from the increased activity of the Council in this domain in recent years. Moreover, an important impact must be attributed to the judgment of 3 September 2008 *Kadi*, which obliged the Council to grant a number of procedural guarantees in the process of the adoption of restrictive measures and made the chances of success higher for applicants.<sup>93)</sup>

### 2.3. REFERENCES FOR A PRELIMINARY RULING IN THE AREA

Before the Treaty of Lisbon, references for a preliminary ruling concerning acts of former Title IV of TCE could only be made by national courts against whose decisions there was no judicial remedy under national law (see ex-Article 68 TCE). As regards acts of the former third pillar, the jurisdiction of the Court of Justice was dependent on a declaration of each Member State in which it specified whether a preliminary ruling could be requested by any national court or only by higher courts (see former Article 35(3) TEU).

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<sup>91)</sup> Such national implementing measures included in particular measures to prevent the entry into, or transit through, the territories of Member States of the concerned persons (see, for example, Article 3 of Council Common Position 2005/792/CFSP of 14 November 2005 concerning restrictive measures against Uzbekistan (OJ L 299, p. 72), Article 1 of Council Common Position 2005/888/CFSP of 12 December 2005 concerning specific restrictive measures against certain persons suspected of involvement in the assassination of former Lebanese Prime Minister Rafiq Hariri (OJ L 327, p. 26) or Article 1 of Council Common Position 2008/160/CFSP of 25 February 2008 concerning restrictive measures against the leadership of the Transnistrian region of the Republic of Moldova (OJ L 51, p. 23).

<sup>92)</sup> For years 2008-2010, see Annual report of the Court of Justice (2010), p. 178. There were only 5 cases in 2006 and 12 cases in 2007 concerning the restrictive measures adopted under the CSFP. In 2011, contested measures included mainly restrictive measures against President Lukashenko and certain officials of Belarus (Council Regulation No 588/2011), restrictive measures against natural and legal persons related to the situation in Libya, Iran or Ivory Coast.

<sup>93)</sup> See *Kadi*, cited above note 88, paragraphs 333 to 371.

The Treaty of Lisbon abrogated both those provisions, which means that there is no longer any exception concerning references for a preliminary ruling on the interpretation and validity of acts adopted in the domain of the Area. Thus, all national courts can request the Court of Justice, on the basis of the general provision of Article 267 TFEU, subject to a transitional period concerning the acts adopted in the field of police cooperation and judicial cooperation in criminal matters.

And since this transitional period does not concern acts adopted under the former Title IV of the TCE, the Treaty of Lisbon has already resulted in a significant increase in references for a preliminary ruling concerning the Area.

Whereas, in this domain, there were only 8 references in 2006, 12 references in 2007, 26 references in 2008 and 17 references in 2009,<sup>94)</sup> this number more than doubled in 2010, during which national courts addressed 41 references to the Court of Justice. Among these, 26 references concerned judicial cooperation in civil matters,<sup>95)</sup> 12 references concerned visa, asylum and immigration<sup>96)</sup> and 3 concerned police cooperation and judicial cooperation in criminal matters.<sup>97)</sup>

The increase continued in 2011, in which national courts requested 44 preliminary rulings. The number of references declined as regards the judicial cooperation in civil matters (18 references)<sup>98)</sup> and remained almost at the same level for the police cooperation and judicial cooperation in criminal matters (5 references).<sup>99)</sup> However, there was an important increase in references in the field of visa, asylum and immigration, in relation to which the national courts addressed 21 references to the Court of Justice.<sup>100)</sup>

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<sup>94)</sup> Statistics cover Title IV of TCE, Brussels Convention and Justice and home affairs. See Annual report of the Court of Justice (2006), p. 90; Annual report of the Court of Justice (2007), p. 82; Annual report of the Court of Justice (2008), p. 84 and Annual report of the Court of Justice (2009), p. 83.

<sup>95)</sup> C-29/10, C-87/10, C-112/10, C-139/10, C-144/10, C-145/10, C-161/10, C-191/10, C-211/10 PPU, C-213/10, C-292/10, C-296/10, C-315/10, C-327/10, C-384/10, C-400/10 PPU, C-412/10, C-491/10 PPU, C-494/10, C-497/10 PPU, C-514/10, C-523/10, C-527/10, C-543/10, C-616/10, C-619/10.

<sup>96)</sup> C-69/10, C-105/10 PPU, C-188/10, C-189/10, C-411/10, C-430/10, C-493/10, C-502/10, C-563/10, C-563/10, C-606/10, C-620/10.

<sup>97)</sup> C-1/10, C-264/10, C-507/10.

<sup>98)</sup> C-116/11, C-54/11, C-133/11, C-154/11, C-170/11, C-190/11, C-215/11, C-228/11, C-325/11, C-332/11, C-419/11, C-456/11, C-464/11, C-490/11, C-492/11, C-552/11, C-634/11, C-645/11.

<sup>99)</sup> C-27/11, C-42/11, C-79/11, C-396/11, C-399/11

<sup>100)</sup> C-4/11, C-71/11, C-99/11, C-120/11, C-140/11, C-144/11, C-155/11 PPU, C-156/11, C-169/11, C-175/11, C-179/11, C-254/11, C-277/11, C-329/11, C-364/11, C-430/11, C-522/11, C-528/11, C-534/11, C-648/11, C-666/11.

The increase was even more important in 2012, in which there were 21 references for a preliminary ruling only in the first quarter of this year.<sup>101)</sup>

The general increase in references in the Area is mainly due to references made by lower courts. In 2010, 18 references were made by national supreme courts and 23 by lower courts. In 2011, this proportion changed, 13 references being made by supreme national courts and already 31 references by lower courts.

This increase has also a more general impact on the orientation of the case-law of the Court of Justice because references for a preliminary ruling in the Area have become very frequent. At present, they constitute 10-15 % of all references, whereas they were almost inexistent 10 years ago.

### 3. Acceleration of the procedure

It has been a constant intention of the authors of the Treaties to make proceedings before the Union courts as expeditious and efficient as possible. In the past, this intention was carried out, above all, by the creation of additional courts that reduced the backlog of cases in the existing courts. Consequently, the Court of First Instance (now the General Court) was established in 1988 to relieve the Court of Justice. Then, the Civil Service Tribunal was created in 2004 to relieve the Court of First Instance.

The Treaty of Lisbon has not sought to reduce the duration of proceedings by creating any additional courts.<sup>102)</sup> Its contribution was more moderate, but significant nevertheless.

#### 3.1. THE URGENT PRELIMINARY RULING PROCEDURE

The Treaty of Lisbon made easier the adoption of acts in the field of the Area and, at the same time, it made it possible for all national courts to request a preliminary ruling regarding these acts.

Moreover, since cases in this domain often concern persons in custody which, by their very nature, require a very rapid decision, a significant increase in cases was to be expected for which the ordinary preliminary reference procedure was inadequate given its average duration of 16 months.<sup>103)</sup>

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<sup>101)</sup> 8 references concerned the judicial cooperation in civil matters (C-9/12; C-49/12; C-92/12 PPU; C-89/12; C-144/12; C-147/12 and C-157/12), 13 references concerned *visa* asylum and immigration (C-23/12; C-39/12; C-51/12 to C-54/12; C-73/12 to C-75/12); C-83/12 PPU; C-84/12, C-88/12 and 1 reference concerned police C-60/12 and judicial cooperation in criminal matters.

<sup>102)</sup> Such a modification is not necessary because creation of additional courts does not require a modification of existing Treaties. In fact, even before the Treaty of Lisbon, additional judicial panels could have been established by a decision of the Council acting unanimously. The Treaty of Lisbon makes the establishment of new courts even easier because, under new Article 257 TFEU, the specialised courts can be newly established by ordinary legislative procedure, i.e. by qualified majority with the co-decision of the Parliament.

<sup>103)</sup> See Annual report of the Court of Justice (2011), p. 112.

The Treaty of Lisbon therefore added a fourth paragraph to Article 267 TFEU, by which it invited the Court of Justice to act with the minimum of delay in cases concerning a person in custody.

For this reason and in the broader perspective of an increase in the powers of the Court of Justice in the field of the Area, a new urgent preliminary ruling procedure was provided for in Article 23a of the Statute<sup>104</sup>) and in Article 104b of the Rules of Procedure of the Court of Justice (“Rules of Procedure”).

These provisions are broader than Article 267(4) TFEU (mentioning only persons in custody), since they can be used for any reference for a preliminary ruling which raises a question of interpretation or validity of an act adopted in the Area. Besides the situation of persons in custody, this procedure can therefore be used, in particular, for references in proceedings relating to parental responsibility.

The urgent preliminary rulings procedure is operated by a so-called designated Chamber, which is one of the Court’s Chambers of five Judges that is designated to this end for a period of one year. The Chamber may decide to sit as a Chamber of three Judges or to refer the case back to the Court in order for it to be assigned to the Grand Chamber.

The procedure is initiated at the request of a national court or, exceptionally, of the Court’s own motion (on the proposal of the President). After such a request, the designated Chamber decides whether or not to deal with the case under the urgent procedure (Article 104b (1) of the Rules of Procedure). The urgent procedure is launched if two conditions are fulfilled: the reference for a preliminary ruling concerns an act adopted in the Area and there is an extraordinary urgency requiring a decision within weeks.

The procedure entails considerable restrictions of parties’ procedural rights. In particular, statements of case or written observations can be submitted only by the parties to the action before the national court, by the Member State from which the reference is made and by the Union institutions. Moreover, they must submit them within a short period that is prescribed by the designated Chamber.<sup>105</sup>) The Chamber may even, in cases of extreme urgency, decide to omit the written part of the procedure (Article 104b (4) of the Rules of Procedure).

Afterwards, parties to the action before the national court, all Member States and Union institutions have the occasion to submit their observations orally at a hearing. According to Article 104b (5) of the Rules of Procedure, the Advocate-General does not deliver an Opinion, as in the ordinary procedure, but he or she is heard by the Chamber. However, this does not have any consequence in practice because the Advocate-General delivers, in principle, a written

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<sup>104</sup>) Article inserted by Decision 2008/79/EC, Euratom (OJ 2008 L 24, p. 42).

<sup>105</sup>) Article 104b(1) of the Rules of Procedure. In a statement annexed to Decision 2008/79/EC, the Council called upon the Court of Justice to ensure that deadlines in this regard are not, in principle, less than 10 working days.

“View” which is published and which does not differ in essence from Opinions delivered in other procedures.

The urgent preliminary ruling procedure not only restricts procedural rights, it also mobilises resources of the Court of Justice at all stages of the procedure. These two circumstances make it possible to give judgment within an exceptionally short period of two to three months.<sup>106)</sup>

However, the number of cases dealt with under the urgent preliminary ruling procedure still remains modest. Since the procedure was introduced on 1 March 2008, it was used for 3 cases in 2008 (3 rejected requests), 2 cases in 2009 (1 rejected request), 5 cases in 2010 (1 rejected request), 2 cases in 2011 (4 rejected requests) and 2 cases in the first quarter of 2012. It follows that the number of cases dealt with under this procedure is not increasing for the moment. A significant increase may, however, be expected after 1 December 2014 when the transitional period expires for acts adopted in the field of police cooperation and judicial cooperation in criminal matters.

As for the domains of the Area in which the urgent preliminary ruling procedure was used, most cases concerned parental responsibility, namely 7 cases.<sup>107)</sup> Besides, there were 3 cases concerning the European arrest warrant,<sup>108)</sup> 3 cases concerning the return of third-country nationals residing illegally<sup>109)</sup> and 1 case concerning the reuniting of a family.<sup>110)</sup>

Almost all cases were dealt with by the designed Chamber composed of five Judges. Only one case was judged by the Grand Chamber.<sup>111)</sup>

### 3.2. ACCELERATION OF THE INFRINGEMENT PROCEDURE

In order to accelerate infringement proceedings, the Treaty of Lisbon made two changes.

The first concerns financial sanctions imposed for infringements of Union law. Before the Treaty of Lisbon, these sanctions were imposed – concerning all infringements – in a two-stage procedure. The Commission had to initiate a first set of proceedings, in which the Court of Justice found the infringement to exist. It was only after those first proceedings had been concluded that the Commission could then initiate a second set of proceedings, requesting the application of sanctions, provided that the Member State had not complied with the first judgment of the Court.

<sup>106)</sup> The average duration of proceedings was 2,1 months in 2008; 2,5 months in 2009; 2,1 months in 2010 and 2,5 months in 2011 (See Annual report of the Court of Justice (2011), p. 112)

<sup>107)</sup> C-195/08 PPU *Rinau*; C-403/09 PPU *Detiček*; C-211/10 PPU *Povse*; C-400/10 PPU *McB*; C-497/10 PPU *Mercredi*; C-491/10 PPU *Aguirre Zarraga*; C-92/12 PPU *Health Service Executive*.

<sup>108)</sup> C-296/08 PPU *SantestebanGoicoechea*; C-388/08 PPU, *Leymann*; C-105/10 PPU *Gataev and Gataeva*.

<sup>109)</sup> C-357/09 PPU, *Kadzoev*; C-61/11 PPU *El Dridi* C-83/12 PPU *Vo*.

<sup>110)</sup> C-155/11 PPU *Imran*.

<sup>111)</sup> C-357/09 PPU, *Kadzoev*.

However, according to the new Article 260(3) TFEU, when a Member State does not notify measures transposing a directive adopted under a legislative procedure, the Court of Justice may apply financial sanctions already at the stage of the first referral to the Court under Article 258 TFEU, if the Commission requests it in its action. Hence, contrary to the situation before the Treaty of Lisbon, there will be no need for the second set of proceedings in case of infringements for the non-transposition of directives, which will substantially accelerate enforcement of the Union law for these infringements.

This modification will have an important impact on the activity of the Court of Justice given that infringements of non-transposition of directives constitute large majority of more than 100 infringement cases brought every year before the Court of Justice. Moreover, the Commission has made clear, in a Communication on the implementation of Article 260(3) TFEU, that it will use the Article 260(3) procedure as a matter of principle in all cases.<sup>112)</sup>

The Commission has started using these new powers, but relatively late after the entry into force of the Treaty of Lisbon. It was not until January 2012 that the Commission brought an action based on Article 260(3) TFEU and asked the Court of Justice on first referral to impose sanctions on Member States that had not transposed a directive.<sup>113)</sup> A more systematic use of the new mechanism can be expected in the months to come, given that the Commission has now announced that it will apply it to proceedings initiated following the publication of the above-mentioned communication and even to proceedings initiated before that. In the latter case, the Commission would issue a supplementary reasoned opinion warning the Member State concerned that it would lodge a request under Article 260(3) TFEU.<sup>114)</sup>

Whereas this modification concerns only infringements of non-transposition of directives, the second modification brought about by the Treaty of Lisbon has an impact on all infringements. According to the new wording of Article 260(2) TFEU, when the Commission initiates the second proceedings against a Member State that has failed to fulfil an obligation under the Treaty and does not comply with a judgment of the Court declaring this infringement, the Commission now only has to give that State the opportunity to submit its observations before bringing the case before the Court of Justice. Thus, contrary to the situation before the Treaty of Lisbon, the Commission no longer has to issue, in addition, a reasoned opinion.

This new practice has already been implemented, which accelerates the ad-

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<sup>112)</sup> Communication of 15 January 2011 (OJ 2011 C 12, p. 1).

<sup>113)</sup> See cases C-48/12 *Commission v Poland*; C-146/12 *Commission v Germany* and C-148/12 *Commission v Germany* (see also press releases of the Commission of 24 November 2011: IP/11/1402 – Rail transport: Commission refers Germany to the Court of Justice over interoperability; IP/11/1413 – Rail: Commission refers Germany to Court of Justice over railway safety and IP/11/1439 – Commission takes Italy and Poland to Court for incomplete transposition of the third Directive on capital requirements).

<sup>114)</sup> See Communication cited above note 112, paragraph 31.

ministrative procedure before the Commission and, consequently, makes it possible to bring the case earlier before the Court of Justice and, thus, to deliver, at an earlier date, a judgment imposing financial sanctions for infringements of Union law.

### III. SUBSTANTIVE MODIFICATIONS: LIMITATION OF THE UNION COURTS' LIBERTY IN THE FIELD OF FUNDAMENTAL RIGHTS

Before the Treaty of Lisbon, the only formal source of fundamental rights was to be found in the unwritten general principles of law. The Court of Justice began protecting fundamental rights under those general principles of law in the 1970s<sup>115)</sup> and this conception of protection was validated in the Treaty of Maastricht, and more specifically in the former Article 6(2) TEU, under which the Union was obliged to respect fundamental rights, as guaranteed by the ECHR and as they resulted from the constitutional traditions common to the Member States, "as general principles of Community law".

The Treaty of Lisbon changed this situation as it created a regime of triple protection of fundamental rights.

Firstly, Article 6(1) TEU proclaims that the Union recognises the rights, freedoms and principles set out in the Charter, which has the same legal value as the Treaties. Having regard to the legal value of the Charter, its detailed catalogue of rights and the structure of Article 6 TEU, the authors of the Treaties have made clearly that the Charter shall be the main and preferred source of human rights in the Union legal order.

Secondly, under Article 6(2) TEU, the Union is bound to accede to the ECHR and this Convention will therefore become an integral part of the Union legal order.

Thirdly, Article 6(3) TEU reaffirms that fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, continue to exist in the Union legal order as unwritten general principles of Union law.

For the Union courts, the coexistence of these three sources of fundamental rights has had two main consequences: the philosophy of judicial review in this field has changed and their position as guardians of a sovereign and autonomous legal order has been limited.

#### 1. Change of philosophy of judicial review: From legal naturalism to legal positivism

Before the Treaty of Lisbon, the judicial review in the domain of fundamental rights was based on a conception of natural law. Following this conception, the Union courts "discovered" fundamental rights in an unwritten source of law and they had therefore some margin of discretion in finding and interpreting these rights. This liberty was only partially framed by the ECHR and constitutional

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<sup>115)</sup> See Cases 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, paragraph 4 and 4/73 *Nold v Commission* [1974] ECR 491, paragraph 13.

traditions common to the Member States which had to be taken into account in the interpretation of these rights.

After the Treaty of Lisbon, the conception of fundamental rights is rather positivist in nature given that they are set out, above all, in two written sources of law – the Charter and the ECHR – which contain detailed catalogues of rights and liberties. Moreover, in the interpretation and application of the Charter, the Union courts must give “due regard” to the written Explanations relating to the Charter (“Explanations”).<sup>116)</sup>

Turning fundamental rights into positive law results obviously in more legitimacy for these rights. It emphasizes their importance in the Union legal order and enhances their role in the case-law of the Union courts.

At the same time, the positive nature of fundamental rights limits these courts’ freedom of action. This limiting effect is further strengthened by the binding force of the Explanations, of the ECHR, of the case-law of the European Court of Human Rights (“ECtHR”)<sup>117)</sup> and by national constitutional rules.<sup>118)</sup>

In particular, it would now be difficult for the Union courts to proclaim a fundamental right as a general principle of law if this right is not mentioned in the Charter. The absence of intent on the part of the authors of the Treaties to provide for such a right – despite the comprehensive catalogue of rights in the Charter – is in fact a serious argument for the non-existence of any such right in the Union legal order. Conversely, if the Charter protects a right, that is an important indication for the courts that this right exists also as a general principle of law.<sup>119)</sup>

The positive nature of fundamental rights reduces, moreover, the margin of discretion of the Union courts in interpreting the scope and content of these

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<sup>116)</sup> Explanations drawn up under the authority of the Praesidium of the Convention, which drafted the Charter, and updated under the responsibility of the Praesidium of the European Convention (OJ 2007 C 303, p. 17).

<sup>117)</sup> Union courts are de facto bound by the case-law of the ECtHR by virtue of Article 52(3) of the Charter. Pursuant to this provision, in so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the said Convention, this meaning and scope being determined by the case-law of the ECtHR. However, according to this same provision, Union law can provide more extensive protection.

<sup>118)</sup> Treaty of Lisbon has also strengthened the binding force of these constitutional traditions because the rights of the Charter must be interpreted “in harmony with those traditions” when the Charter recognises same fundamental rights as these traditions (Article 52(4) of the Charter). Before the Treaty of Lisbon, the Treaties did not contain such an explicit obligation, Article 6(2) TEU being in particular vaguer in this respect.

<sup>119)</sup> Concerning the right to take collective action, including the right to strike, see Case C-438/05 *International Transport Workers’ Federation and Finnish Seamen’s Union, ‘Viking Line’* [2007] ECR I-10779, paragraphs 43 and 44, and Case C-341/05 *Laval un Partneri* [2007] ECR I-11767, paragraphs 90 and 91; regarding the principle of non-discrimination on grounds of age, see Case C-555/07 *Kücükdeveci* [2010] ECR I-0000, paragraphs 21 and 22.

rights, as they are formally obliged to respect the wording of the Charter, the Explanations, the ECHR, the case-law of the ECtHR and national constitutional rules. It is true that the Union courts used these sources of law even before the Treaty of Lisbon. However, they used them only as a source of inspiration in the process of determining the scope and content of fundamental rights. They were not bound by them and they therefore enjoyed a broader margin of discretion.

In this context, it is worth noting that the Union courts have respected the will of the authors of the Treaties and, since the entry into force of the Treaty of Lisbon, they have started applying the Charter as the main formal source of the fundamental right and – at the same time – they applied it in the light of the other above-mentioned sources.<sup>120)</sup>

However, before applying the Charter, the Court of Justice had to clarify in which circumstances it is applicable.

In this regard, it follows from Article 51(1) of the Charter that it applies without restriction to the Union institutions, and in particular to the Union legislator and the Union courts. Consequently, the Court of Justice confirmed that the Charter is applicable notably when the Court is called upon to interpret, in the light of the Charter, a provision of Union law.<sup>121)</sup>

As for the application of the Charter at national level, its Article 51(1) states that the provisions thereof are addressed to the Member States “only when they are implementing European Union law”.

In the light of this wording, the Charter is clearly applicable in two situations. Firstly, there is no doubt that the Charter is applicable to national provisions that transpose a Union act, in particular a directive. Secondly, the Court has made clear that the Charter does not apply when the situation in question is outside the scope of application of Union law and it declared therefore inadmissible references for a preliminary ruling that sought the interpretation of fundamental rights in such circumstances.<sup>122)</sup>

The situation is less clear when a national measure is in the scope of application of the Union law but it does not transpose a Union act – where, for example, a Member State exercises a discretionary power granted by a Union act.

In this respect, the Court of Justice has not yet adopted a definitive position. In the judgment of 21 December 2011 *N.S. and M. E.*, the Court of Justice held that the Charter is applicable where the exercise of such a discretionary power

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<sup>120)</sup> It is true that, even before the Treaty of Lisbon, Union courts referred to the Charter, proclaimed in 2000 and adapted in 2007, as a source of inspiration. However, the references were not common and the courts practically ceased to refer to the Charter after the abandon of the Constitutional Treaty.

<sup>121)</sup> Case C 400/10 PPU *McB.* [2010] ECR I-0000, paragraph 52, Joined Cases C-483/09 and C-1/10 *Gueye and Salmerón Sánchez* [2011] ECR I-0000, paragraph 69 and Case C 256/11 *Dereci* [2011] ECR I-0000, paragraph 71.

<sup>122)</sup> See, for instance, Order of 23 May 2011 in Joint Cases C-267/10 and C-268/10, *Rossius and Collard* and Order of 22 September 2011 in Case C-314/10, *Pagnoul*.

can be qualified as an implementation of the Union law.<sup>123)</sup> Nevertheless, the question still remains open whether the same conclusion applies in other situations.

In *N.S. and M. E.*, the Court of Justice also took a position, for the first time, on the meaning of Protocol No 30 on the application of the Charter to Poland and the United Kingdom.<sup>124)</sup> It adopted a rather restrictive approach to the scope of this Protocol, holding that it “does not call into question the applicability of the Charter in the United Kingdom or in Poland”, a position which is confirmed by the recitals in the preamble to that Protocol.<sup>125)</sup> Consequently, the Court of Justice ruled that Article 1(1) of Protocol No 30 “explains Article 51 of the Charter with regard to the scope thereof and does not intend to exempt the Republic of Poland or the United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those Member States from ensuring compliance with those provisions.”<sup>126)</sup>

Such statements remain vague and they will need further clarification in the future. Moreover, since the rights referred to in *N.S. and M. E.* did not form part of Title IV of the Charter, there was no need for the Court of Justice to rule on the interpretation of the more delicate Article 1(2) of Protocol No 30.<sup>127)</sup>

After clarifying the scope of the Charter, it can be noted that the Court of Justice applied it systematically, giving it priority over other sources of fundamental rights, and, in particular, over the general principles of law. Hence, even when a national court requested a preliminary ruling and referred to fundamental rights as general principles of law, the Court of Justice recast the reference and analysed the fundamental rights at issue as set out in the Charter.<sup>128)</sup> The same was true for references for a preliminary ruling based on the ECHR, which were also recast by the Court of Justice and analysed exclusively on the basis of

<sup>123)</sup> Joint Cases C-411/10 and C-493/10 *N.S. and M. E.* [2011] ECR I-0000, paragraphs 65 to 69.

<sup>124)</sup> Pursuant to Article 1(1) of this Protocol, annexed to the Treaties by the Treaty of Lisbon, “[t]he Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.”

<sup>125)</sup> *N. S. and M.E.*, cited above note 123, paragraph 119. The Court of Justice refers in particular to the third recital in the preamble to Protocol No 30, under which Article 6 TEU requires the Charter to be applied and interpreted by the courts of Poland and of the United Kingdom strictly in accordance with the explanations referred to in that article. In addition, according to the sixth recital in the preamble to that protocol, the Charter reaffirms the rights, freedoms and principles recognised in the Union and makes those rights more visible, but does not create new rights or principles.

<sup>126)</sup> *N. S. and M.E.*, cited above note 123, paragraph 120.

<sup>127)</sup> *N. S. and M.E.*, cited above note 123, paragraph 121. Under Article 1(2), nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law.

<sup>128)</sup> See, for example, Case C-236/09 *Association belge des Consommateurs Test-Achats and Others* [2011] ECR I-0000, paragraphs 15 to 17.

the Charter.<sup>129)</sup> In some cases, the Court of Justice preferred however to complete the provisions of the Charter by references to the provisions of the ECHR.<sup>130)</sup>

Furthermore, the Court of Justice continued to respect and apply the case-law of the ECtHR<sup>131)</sup> and it confirmed that in so far as a provision of the Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of the former provision must be the same as those laid down by the ECHR, as interpreted by the case-law of the ECtHR.<sup>132)</sup>

Finally, the Court of Justice also applied the Explanations as they contained clarifications on the scope and content of fundamental rights.<sup>133)</sup>

## 2. Limitation of the Court of Justice's role as a guardian of a sovereign and autonomous legal order

The Treaty of Lisbon has strengthened, in a very significant way, the position of the ECHR legal system in the Union legal order.

Firstly, the Union courts have become formally bound by the case-law of the ECtHR by virtue of Article 52 of the Charter. Secondly and more significantly, the Union is obliged to accede to the ECHR according to Article 6(2) TEU. This accession should occur in the very near future because the negotiations between the EU and the Council of Europe began in June 2010 and the process is now coming to an end.<sup>134)</sup>

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<sup>129)</sup> See, for example, Cases C-279/09 *DEB* [2010] ECR I-0000, paragraphs 29 to 31; Case C-69/10 *Samba Diouf* [2011] ECR I-0000, paragraphs 27 and 49; C-70/10 *Scarlet Extended* [2011] ECR I-0000, paragraphs 28, 43 and 50.

<sup>130)</sup> See Cases C-163/10 *Patriciello* [2010] ECR I-0000, paragraph 31; C-391/09 *Runevič-Vardyn and Wardyn* [2011] ECR I-0000, paragraph 66; C-208/09 *Sayn-Wittgenstein* [2010] ECR I-0000, paragraph 52 and C-145/09 *Tsakouridis* [2010] ECR I-0000, paragraph 52.

<sup>131)</sup> See, for example, *McB.*, cited above note 121, paragraphs 54 to 58 and *N. S. and M.E.*, cited above note 123, paragraphs 88 to 90.

<sup>132)</sup> See *McB.*, cited above note 121, paragraph 53 and *Dereci*, cited above note 121, paragraph 70.

<sup>133)</sup> See *DEB*, cited above note 129, paragraphs 32 and 39. See also Case F-103/06 REV *Sain-traint v Commission*, paragraph 53.

<sup>134)</sup> The EU Council gave the European Commission the mandate to conduct the negotiations on the behalf of the EU on 4 June 2010. Official talks on the EU's accession to the ECHR began three days later. In June 2011, a working group finalised its work by submitting a draft accession agreement (See Document of the Council of Europe CDDH-UE(2011)16 and Appendix of the Report of the Steering Committee for Human Rights (CDDH) to the Committee of Ministers on the elaboration of legal instruments for the accession of the European Union to the European Convention on Human Rights, of 14 October 2011, CDDH(2011)009 (both documents are available at [http://www.coe.int/t/dghl/standardsetting/hrpolicy/cddh-ue/cddh-ue\\_documents\\_EN.asp](http://www.coe.int/t/dghl/standardsetting/hrpolicy/cddh-ue/cddh-ue_documents_EN.asp))). However, several EU Member States have reserves concerning this draft and it is unclear for the moment if the latter will remain without substantial changes (see the Report of the CDDH of 14 October 2011, in particular at 11 and 12). In any case, the accession agreement will require for its entry into force the ratification by all states parties to the ECHR as well as by the EU itself.

Once the EU accedes to the ECHR, the judgments of the Court of Justice will be subject –for the first time in the history of European integration – to a judicial review by a different judicial body, i.e. the ECtHR.

This change will bring even more cohesion as between the case-law of the Union courts and that of the ECtHR in the field of fundamental rights, although it should be stressed that their case-law have been largely convergent, with the Union courts respecting and applying the case-law of the ECtHR. It is true that the Union courts have applied fundamental rights, from the formal point of view, as general principles of law or as guaranteed by the Charter. However, given the privileged position of the ECHR as defined in former Article 6(2) TEU and the large amount of ECtHR's case-law, the Union courts have consistently applied this case-law, thus avoiding divergences.

Nevertheless, such an approach still left open the possibility for the Union courts to depart from the case-law of the ECtHR if the nature and specificity of the EU were not compatible with this case-law.

After the accession of the EU to the ECHR, this will no longer be possible because the Union courts will be formally bound by this case-law and, moreover, enforcement of this obligation will be ensured by a system of judicial review of judgments of the Court of Justice by the ECtHR.

This will limit the Court of Justice's role as a guardian of the sovereign and autonomous nature of the Union legal order, as this court will no longer have the last word on the interpretation of the scope and content of fundamental rights in the EU. It will be for the ECtHR to determine to which extent the specificity of the Union legal order may justify a particular approach for the EU in this domain.

It is true that the Protocol on the accession of the Union to the ECHR states that the accession shall respect the specificity of the Union legal order.<sup>135)</sup> However, the draft accession treaty takes into consideration the specific characteristics of the Union only with regard to procedural aspects. From the substantive point of view, it does not provide for any safeguards in respect of any specific features of the EU,<sup>136)</sup> which is a logical consequence of the fact that the latter accedes to the ECHR, as a matter of principle, on an equal footing with other Council of Europe Members, that is, with the same rights and obligations.<sup>137)</sup>

In *Bosphorus*, the ECtHR has admittedly adopted an approach towards the EU that has taken into account specific characteristics of the Union, in particular

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<sup>135)</sup> Protocol No 8 relating to article 6(2) TEU on the accession of the Union to the ECHR.

<sup>136)</sup> See Draft Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms set out in document CDDH (2011) 009, p. 5, cited above note 134.

<sup>137)</sup> See also Draft Explanatory report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms set out in document CDDH-UE(2011)16, in particular at p. 12.

its supranational character and the fact that it protects fundamental rights at a supranational level.<sup>138)</sup> The question remains, however, whether this approach will be maintained after the accession to the ECHR, because the *Bosphorus* case-law is based on a premise that the EU is not a Contracting Party of the ECHR and it is not formally bound by this convention.<sup>139)</sup> After its accession, this situation will change and the ECtHR may treat the EU in the same way as other Contracting Parties.

#### IV. CONCLUSION

It is natural for an amending treaty to contain provisions that are not finally applied in practice and remain largely unused. Such provisions were to be found in the Treaty of Maastricht, in the Treaty of Amsterdam and in the Treaty of Nice. The same is true for the Treaty of Lisbon that has introduced several modifications concerning the Union courts that have not had any significant impact on their activity for the moment.

This is the case, first of all, for the provisions that consolidated previous case-law of the Court of Justice on admissibility of actions for annulment of natural and legal persons against acts of EU institutions, bodies or agencies committed in former Article 230 TCE.

Similarly, no impact can be observed concerning the provisions on direct actions in the Area and the provisions introducing the possibility for national Parliaments to bring actions for infringement of the principle of subsidiarity. Such actions may, however, be brought in the near future, since national Parliaments have, for example, started using the other mechanisms of control of the principle of subsidiarity which were introduced by the Treaty of Lisbon.

As regards the modifications that have already had an impact on the activity of the Union courts, the most important one is probably the possibility for all national courts to address to the Court of Justice – subject to a transitional period for acts relating to police and judicial cooperation in criminal matters – references for a preliminary ruling on the interpretation and validity of acts of the Area. In this domain, a significant increase in references can be observed and the latter have become so frequent that they now constitute 10-15 % of all references addressed to the Court of Justice.

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<sup>138)</sup> See judgment of 30 June 2005 *Bosphorus Hava Yollari Turizmve Ticaret Anonim Şirketi v Ireland* (ECHR 2005-VI) in which the ECtHR decided in that the protection of fundamental rights by EU law can be considered to be, and to have been at the relevant time, “equivalent” to that of the ECHR system. Consequently, a presumption arises that a EU Member State does not depart from the requirements of the ECHR when it implemented legal obligations flowing from its membership of the EU. Such a presumption could be rebutted if, in a particular case, it is considered that the protection of ECHR rights is manifestly deficient (see *Bosphorus*, paragraphs 155 to 165).

<sup>139)</sup> See *Bosphorus*, cited above note 138, paragraph 152.

A similar impact can be attributed to the possibility for natural and legal persons to contest regulatory acts which are of direct concern to them. The General Court has already delivered its first decisions on the legality of regulatory acts. Moreover, several other cases are pending and a significant number of cases can be expected in the future.

It is also worth noting that the Treaty of Lisbon resulted in a partial acceleration of proceedings. In a perspective of enlargement of its powers in the field of the Area, the Court of Justice has introduced a new urgent preliminary ruling procedure that makes it possible to deliver a judgment in two to three months. This procedure has been used in several cases but the number of cases remains modest for the moment. A more significant increase can be expected after 30 November 2014 when the transitional period for acts of police and judicial cooperation in criminal matters expires.

The Treaty of Lisbon also accelerated the infringement procedure. In particular, when a Member State does not notify measures transposing a directive adopted under a legislative procedure, the Court of Justice may now apply financial sanctions at the stage of the case's first referral to the Court. Surprisingly, the Commission has not used this procedure until recently but a more systematic use of the new mechanism can be expected in the months to come.

In this context, it should be noted that further measures to increase the efficiency of the Union courts continue to be adopted even since the Treaty of Lisbon. In particular, the Court of Justice has proposed a modification of the Statute in order to increase the number of Judges at the General Court which is severely overloaded, the only practical and immediate solution being the increase of their number.<sup>140)</sup> Moreover, a modernisation of procedural rules has been launched, the Court of Justice proposing new Rules of Procedure that are at present going through the legislative process.<sup>141)</sup> The Union courts have also introduced a mechanism known as e-Curia that makes it possible for parties to communicate with them electronically, thus making the lodging of documents more efficient.<sup>142)</sup>

In addition to these procedural modifications, it should not be finally forgotten that the impact of the Treaty of Lisbon is not limited to procedural law and it that it also concerns the substantive law applied by the Union courts.

The treaty has, in particular, limited the margin of appreciation of these courts

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<sup>140)</sup> See Draft Amendments to the Statute of the Court of Justice of the European Union and to annex I thereto of 28 March 2011 ([http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-04/projet\\_en.pdf](http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-04/projet_en.pdf)). For a comment, see LOUIS, J.-V., *La réforme de la Cour de justice*, Cahiers de droit européen, 1/2011, p. 9.

<sup>141)</sup> See Draft Rules of Procedure of the Court of Justice of 25 May 2011 ([http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-05/en\\_rp\\_cjue.pdf](http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-05/en_rp_cjue.pdf))

<sup>142)</sup> See Decision of the Court of Justice of 13 September 2011 on the lodging and service of procedural documents by means of e-Curia (OJ 2011 C 289, p. 7)

in the domain of fundamental rights, by incorporating these rights in the Charter and by subjecting the courts to the Explanations, to the ECHR and to the case-law of the ECtHR.

That consolidation of fundamental rights in a written source of law has had a more general impact. It has influenced the nature of Union legal order which, prior to the Treaty of Lisbon, displayed strong natural law characteristics, given the importance of unwritten sources of law. Through the formal adoption of the Charter, the most important unwritten legal rules – those governing fundamental rights – became written law which has made the Union legal order more positivist in nature.