TREATY OF LISBON AND THE MAIN CHANGES AT THE COURT OF JUSTICE OF THE EUROPEAN UNION

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Abstract

This paper analyzes the Court of Justice of the European Union after the Lisbon treaty and the changes that will be performed in order to increase the role of the Court in EU. We will discuss the Lisbon reform and the legacy of the European Constitution and the changes to the organization of the judiciary in the Union and to the appointment of its members. An important part of the paper will be dedicated to the procedure for future amendments of the Statute of the Court of Justice of the European Union and the creation of Specialized Courts. The conclusion of the paper will treat the future of the judicial structure of the Union and the challenges of the greater complexity of the decision-making process and of the binding nature of the Charter of Fundamental Rights. A new phase of judicial activism has begun in the European Court of Justice, a phase focused on the protection of fundamental rights. The European Charter of Fundamental Rights, as well as the Lisbon Treaty has strengthened the position of the Court of Justice.

Keywords: *European Court of Justice, European Union, Lisbon treaty, Charter of Fundamental Rights*.

The Lisbon reform and the legacy of the European Constitution

Lisbon operation consisted in getting through the back door what had been unable to pass through the front door. The body of the failed European Constitution signed in Rome on 29 October 2004 was maintained practically intact, although it was stripped of any constitutional status.

It is worth recalling the above so as not to consign the work of the Convention on the future of Europe to a historical footnote. This Convention gave rise to the 'Draft' European Constitution, which finally became the 'Treaty establishing a Constitution for Europe 'with hardly any significant changes, and this was signed, as I have already stated, in Rome in October 2004. In particular, the endeavors of the Convention with regard to the Court of Justice of the European Union –which scarcely underwent any changes in its transition from Rome to Lisbon – continue to be very useful; specifically, the findings of the Discussion circle on the Court of Justice, whose Final Report was approved for submission before the Convention members on 25 March 2003.

Changes to the organization of the judiciary in the Union and to the appointment of its members. The name of the 'institution 'and of the judicial 'bodies 'of the Union.

With regard to the judicial system of the Union, the Lisbon Treaty follows, as with many other aspects of the reform, the path of the European Constitution, both with regard to its detail amendments and its flaws. With regard to the former, of note is the change in terminology, with an institution that is now called the 'Court of Justice of the European Union', composed of the following bodies: 'Court of Justice', 'General Court'(Court of First Instance in the TEC), and 'Specialized Courts'.

This puts an end to the confusion caused by using the same term, 'Court of Justice', for two different things, the judicial institution and the supreme body within this institution. Under the new regulation, this term will be reserved for the supreme body of the institution representing judicial authority within the Union. This institution, furthermore, shall be deemed to refer specifically to the 'European Union', thereby putting an end to the inconsistency of a Court of Justice which, up to Lisbon, was not of the Union, but rather of 'the European Communities', when the truth is that this Court, apart from exercising its powers within the Community framework (first pillar), also acted in the area of police and judicial co-operation in criminal matters (third pillar)[1].

A similar situation occurred with the name of the 'Court of First Instance', which was wrong to the ears of Spanish lawyers prior to the Nice reform, in so far as its decisions could be appealed to the Court of Justice on points of law only. And this reform made the situation even worse by giving the Court 'of First Instance 'powers to hear appeals lodged against the decisions of the Judicial Panels. And the same might be said, then, with regard to the opposite transformation of the 'Judicial Panels 'into 'Specialized Courts'. The former name would appear to suggest on first glance that they were chambers specialized as to their subject matter within one overall jurisdictional body, which as we have seen, was not and is not the case.

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[1] Craig P. The Lisbon Treaty, Law, Politics, and Treaty Reform. Oxford University Press 2010.

National judges as judges of the Union

It is notable that there is no explicit reference to national judges as an essential part of the European judicial structure, with Lisbon having limited itself to incorporating the consolidated doctrine of the Court of Justice in U.P.A. v. the Council (2002): 'Member States'–provides paragraph two of article 19.1 TEU post Lisbon –'shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'. It is also notable that the whole range of powers-duties that the Court of Justice has placed in the hands of the national judges has not been duly reflected. This is made even worse if one takes into account the fact that national constitutional texts are becoming ever more ineffective at providing legal recognition for the absorption of this range of powers-duties, which on occasion are not just remote from the exercise of jurisdictional powers in purely internal terms, but are actually contrary to it appointment of the members of the Court of Justice and General Court (the panel ex Article 255 TFEU).

With regard to the appointment of the members of the Court of Justice of the European Union – specifically of the Court of Justice (including the Advocates General) and the General Court –we may highlight the introduction of a preliminary stage (article 255 TFEU) which provides for the creation of a panel (composed of seven personalities chosen from former members of the Court of Justice and the General Court, members of the higher national jurisdictional bodies, and lawyers of renowned experience) in order to assess the suitability of the candidates for the exercise of the functions of judge and Advocate General of the Court of Justice and the General Court, prior to the Governments of the Member States proceeding to make any appointments by common accord.

The rules for the formation and functioning of the panel have been set forth in an annex to Council Decision 2010/124 of 25 February 2010. From these rules, we may highlight the following:

1) the General Secretariat of the Council is in charge of performing secretariat services for the panel, providing any necessary administrative support, of which the most important is probably the translation of documents (and the Council is also responsible for bearing the cost of refunding the expenses of panel members);

2) panel members are appointed for a term of four years, which may be renewed just once;

3) the panel shall be quorate when five of its members are in attendance;

4) upon receipt of the information on the proposed candidate (which may be amplified by the nominating Government at the request of the panel), the panel shall hear the candidate 'behind closed doors'(except in the case of renewal, in which case this hearing stage is omitted);

5) Its deliberations shall also be 'behind closed doors', culminating in a reasoned opinion as to the suitability or unsuitability of the candidate. Although these rules say nothing about the scope of the opinion, it does not bind Member States in the event that it should be negative with regard to a particular candidate. Whether it is, or ought to be, a de facto dissuasive element in their decision is another matter.

The procedure for future amendments of the Statute of the Court of Justice of the European Union and the creation of Specialized Courts.

With the Lisbon reform, the procedure to be followed for future amendments of the Statute of the Court of Justice of the European Union (which appears as Protocol no. 3 annexed to the Treaties) shall be the ordinary legislative procedure, governed by article 294 TFEU, with the innovation, provided for by article 19.2 TEU and confirmed by article 281 TFEU, that the proposal may originate not just from the Commission (after first consulting with the Court of Justice), but also from the Court of Justice (after first consulting with the Commission)[2].That is how is stands, unless the amendment refers to Title I of the Statute (concerning the 'Statute of Judges and Advocates-General') and, in what constitutes a departure from the previous régime, to article 64 (concerning the modus operandi for the purposes of governing the linguistic régime of the Court of Justice of the Union), both subject to the ordinary procedure for the reform of the Protocols, which is that of the Treaties themselves.

The third variation introduced by Lisbon refers to the creation of the 'Specialized Courts', which must also follow the ordinary legislative procedure (article 257 TFEU), like the amendment of the majority of the Statute, with the same innovation referred to above to the effect that the proposal may originate not just from the Commission (after first consulting with the Court of Justice), but also from the Court of Justice (after first consulting with the Commission).

Alterations to competences. Full submission of the Area of Freedom, Security and Justice to judicial control.

We may highlight the effort made by Lisbon towards a horizontal approach to the question of judicial protection in the European Union, reducing the variable jurisdictional geometry created by the Treaty of Amsterdam, which we should recall set up a double communitisation process with regard to the third pillar (which up to then had been dedicated to 'co-operation in the areas of justice and home affairs').

On the one hand, communitisation consisting in the transfer of part of the third pillar – that concerning visas, asylum, immigration and other policies related

[2] K. Lenaerts, 'The European Court of Justice and Process-oriented Review' College of Europe, Research Paper in Law 01/2012

to the free movement of persons and judicial co-operation in civil matters – to the TEC; communitisation which, however, was not complete, as this transfer was subject to a sui generis régime with regard to the general Community régime, which in relation to judicial control (article 68 TEC), consisted of providing for a special régime on preliminary rulings, whilst at the same time expressly excluding the jurisdiction of the Court, within the context of the progressive elimination of the controls on persons crossing internal borders, to rule on 'any measure or decision relating to the maintenance of law and order and the safeguarding of internal security'. On the other hand, 'signs 'of communitisation, but to a significantly lesser degree than the previous operation, consisting in the introduction of some features close to the Community régime in that part of the third pillar that remained as 'police and judicial co-operation in criminal matters'. With regard, specifically, to the judicial structure of the Union, a qualified opening to review by the Court of Justice took place, with a recognition of its powers to give preliminary rulings on the validity (excluding conventions between Member States) and the interpretation of the system of the third pillar, although these powers were subject to being accepted by each State (in which it was furthermore necessary to specify which jurisdictional bodies of the State in question were entitled to go to the Court of Justice, i.e. whether it was all of them or only those against whose decisions there was not judicial remedy under national law). It was also admitted that the Court had jurisdiction to consider the lawfulness of the decisions and the framework decisions by way of proceedings for annulment, although this was limited to being initiated by the States or the Commission, as well as to rule on any dispute between Member States, or between a Member State and the Commission.

However, its jurisdiction 'to review the validity or proportionality of operations carried out by the police or other law enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security'(article 35.5 TEU) was expressly excluded. Lisbon will see a reunification in systematic terms of the policies concerning border controls, asylum, and immigration, and in co-operation in civil, criminal, and police matters, as they are all envisaged within the 'Area of Freedom, Security and Justice' (Title V TFEU), which has become one more policy to be added to the traditional ones of the Community, and in this respect, fully subject to the general judicial régime of the Union, with the sole peculiarity of article 276 TFEU, which took over from article35.5 TEU (in its pre-Lisbon version) transcribed above[3]. To this peculiarity might be added the provisions of article 10 of Protocol no. 36 on transitional provisions, which excludes (for a maximum period of five years as from the date of the entry into force of Lisbon, i.e. 1 December 2009) the use by the Commission of the infringement procedure, and maintains the powers of the Court of Justice unaltered (especially those linked to preliminary rulings) in relation to the acts of the Union in the field of police and judicial co-operation in criminal matters which have been adopted, and not amended since then, prior to the entry into force of the Lisbon Treaty.

The special régime of the Common Foreign and Security Policy.

Within the framework of the CFSP, the starting point in terms of its judicial régime can be found in paragraph one of article 275 TFEU, which is a product of Lisbon. This precept, which implements the provisions of article 24.1 TFEU, provides that 'the Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions'. Notwithstanding the foregoing, the following paragraph states that the Court shall have jurisdiction as follows:

1. To control that the measures and procedures of the CFSP do not encroach on the non-CFSP competences of the Union (along the lines laid down by the Court of Justice prior to the Lisbon reform, which had already allowed in 1998, in Commission v. Council, its jurisdiction over measures and procedures of the third pillar –which at the time, prior to Amsterdam, was excluded from the jurisdiction of the Court – that infringed powers pertaining to the European Community). This should be realized through the classical channels of control of the lawfulness/constitutionality over the European Institutions; indeed, not just direct control through actions for annulment (article 263 TFEU), but also indirect control, through preliminary rulings on validity (article 267 TFEU) and pleas of illegality (article 277 TFEU).

2. To decide on actions for annulment lodged by individuals, for any of the reasons listed at article 263 and under the conditions envisaged in paragraph four of the same precept (which I shall set forth below) against CFSP decisions in which restrictive measures are imposed against them. To these competences it would be necessary to add that held by the Court to control measures which are likewise restrictive imposed within the framework of the general régime of the Union in the enforcement of decisions adopted in turn within the framework of the CFSP. It would also be necessary to add, finally and as a consequence of Lisbon, the jurisdiction of the Court of Justice to exercise prior control over any international agreement (including, therefore, those envisaged within the scope

[3] K. Lenaerts, 'The European Court of Justice and Process-oriented Review' College of Europe, Research Paper in Law 01/2012.

of CFSP), to test its compatibility with the Treaties within the framework of article 218.11 TFEU.

The changes to procedure. Proceedings for annulment.

The new regulations governing proceedings for annulment include, first of all, the extension of those activities of the Union that are open to being challenged, covering the actions of the European Council and of those bodies or organisms of the Union that are 'intended to produce legal effects vis-à-vis third parties'(paragraph one of article 263 TFEU; paragraph five, meanwhile, qualifies this by providing that 'acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them).

With regard to the capacity to bring actions, the reform concerning the role of national Parliaments and of the Committee of the Regions for the purposes of challenging the actions of the Union on the grounds of infringement of the principle of subsidiarity may be highlighted, taking the form of an annexed Protocol (Protocol no. 2 on the application of the principles of subsidiarity and proportionality). With regard to this Committee its new powers to bring proceedings for annulment with the aim of safeguarding its prerogatives (paragraph three of article 263 TFEU) is now extended with the aim of safeguarding the principle of subsidiarity in relation, we should note, to 'legislative acts for which the Treaty on the Functioning of the European Union requires consultation in order to be approved'. Within the framework of the Convention on the future of Europe, the Final Report by Working Group I 'Subsidiarity' proposed 'an innovation, by also allowing the Committee of the Regions, the competent consultative body representing all the regional and local authorities in the Union at European level, the right to refer a matter to the Court of Justice for violation of the principle of subsidiarity. This referral would relate to proposals which had been submitted to the Committee of the Regions for an opinion and about which, in that opinion, it had expressed objections as regards compliance with subsidiarity'. The absence of any reference to this last point, both in the European Constitution and subsequently in the Lisbon Treaty, would seem to lead to the discarding of the condition consisting in requiring the Committee to have issued prior and express objections to subsidiarity on the occasion of the opinion compulsorily requested. With regard to national Parliaments, the possibility that they might challenge 'legislative acts' ('non-legislative acts 'are thus also excluded) refers to national legal orders, in the sense that the right continues to vest with the Governments of the Member States, which shall 'transfer 'the corresponding proceedings, where appropriate and inconformity with their respective legal systems, 'on behalf of the national Parliament or one of its chambers'. In similar manner to the situation affecting the initiative powers of the Committee of the Regions, the proposal of the Final Report of Working Group I to the effect that the initiative powers of national Parliaments were to be conditional on the fact of having delivered a reasoned opinion under the early warning system, was not expressly embraced either by the European Constitution (first), or (subsequently) by the Lisbon Treaty, and so it would appear that no such condition exists. With regard, finally, to the locus stand of individuals (paragraph four of article 263 TFEU), we may highlight its extension for the purpose of challenging 'a regulatory act which is of direct concern to them and does not entail implementing measures', making use of the invitation formulated by the Court of Justice in the aforementioned case U.P.A. v. Council (2002).

In effect, focused on a literal reading of the former article 230 TEC (which referred to the 'direct and individual 'concern of the private applicant) that was odd, not just, in a general sense, in view of the flexibility of interpretation to which we were accustomed, but also, in particular, in view of the flexibility that Plaumann v. Council (1963) seemed to enshrine on the side of openness, in the specific context of proceedings for annulment ('the provisions of the treaty regarding the right of interested parties to bring an action must not be interpreted restrictively), the Court of Justice excluded, as a rule (i.e. except in one-off cases involving very specific circumstances, such as in Codorniu v. Council, 199443), individuals 'rights to directly appeal general provisions.

This restriction, criticized not just by learned opinion but also, in their personal capacity, by Judges and Advocates General of Luxembourg, led to the Court of Justice, in its Report on certain aspects of the application of the Treaty on European Union (1995), to ask itself whether proceedings for annulment, 'which individuals enjoy only in regard to acts of direct and individual concern to them, is sufficient to guarantee for them effective judicial protection against possible infringements of their fundamental rights arising from the legislative activity of the institutions'. Despite this, the Court upheld its case-law on this matter in U.P.A. v. Council.

Prior to the Lisbon Treaty, and in view of the uncertainty surrounding the term 'legislative activity', the problem was not so much the restrictions arising from the case law of the Court of Justice with regard to judicial review (familiar to those affecting the national legal systems themselves and which allow in any event indirect channels for judicial review, in the European system by way of a plea of illegality and a preliminary ruling on validity), but rather in its extension to activities which it would appear could not be strictly considered as being 'legislative', but rather 'executive', in the sense of either complementary thereto, or of the exclusive intervention (implemented

following legislative activity, or through the Treaty itself) of a Commission that did not have the same status as the European Parliament and the Council. In other words, the national legal systems did not so much ban the direct judicial review of norms in absolute terms, but rather placed intense restrictions on *locus standi* for such judicial review in the case of Parliamentary Acts46, in terms which recall the restriction traditionally operated by the Court of Justice –and this is where the problem lies –in general terms, i.e. an abstraction made from the legislative or executive nature of the provision in question.

Following the Lisbon reform, paragraph four of article 263 TFEU provides as follows: 'Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures'(such as, for example, a European measure banning the use of certain fishing nets, or the use of certain substances in the manufacture of certain products). The main problem raised by this new version of article 263 consists in determining the exact scope of the words 'regulatory acts 'contained at the end of the paragraph that has just been transcribed. Against those who argue that these words ought to be interpreted so as to cover directly applicable general provisions, irrespective of their nature (i.e. legislative, autonomous non-legislative, delegated, or implementing measures), I for my part consider that this is no more than a simple error, and that the real intention of the 'drafters 'of Lisbon was not to confer powers on individuals to start proceedings for judicial review of 'legislative acts', but rather to limit this to 'non-legislative acts 'approved under the form of 'delegated acts 'or 'implementing acts'(or even resulting from 'autonomous 'on-legislative activity'), irrespective of the typology chosen (therefore including 'decisions 'that are generally applicable); and within these acts, limited to those that concern them directly and do not entail implementing measures. In effect, it should not be forgotten that with the drafting of the European Constitution, the terms of this opening to the private applicants of the action for annulment were the subject of intense debate within the Discussion circle on the Court of Justice. These terms in the end were limited to 'regulatory acts 'in contrast to the 'legislative acts', with regard to which the traditional restrictive approach was maintained in the sense of 'direct and individual concern'. And Lisbon saw the disappearance of the distinction created by the European Constitution (Part I) between 'laws 'and 'regulations'(at articles I-36 and I-37); the error had consisted in maintaining the expression 'regulatory acts 'in the Lisbon Treaty, included in the provisions dedicated by the European Constitution (Part III) to the Court of Justice (at article III-365)53.

Finally, linking paragraph four of article 263 TFEU with article 275 TFEU mentioned above (which refers to the former for the purpose of conferring individuals with the power to challenge restrictive measures imposed within the framework of the CFSP), one would have to conclude by noting the coincidence, for the purpose of bringing actions for annulment by individuals, between challenging any exclusively-CFSP restrictive measure (which by definition cannot be deemed to be 'legislative acts', as article 24 TEU expressly denies this nature to all acts approved within this framework), and any restrictive measure imposed on the basis of article 215 TFEU (which likewise by definition cannot be deemed to be 'legislative acts 'under any circumstances, as they are adopted by the Council, and the simple 'information 'thereof served subsequently on the European Parliament is not classified as a 'special legislative procedure').

Infringement procedure and procedure for the enforcement of judgements.

With regard to the infringement procedure, the wording of articles 226 and 227 TEC is maintained, with amendments being introduced into the procedure for the enforcement of judgements ex article 228 (260 TFEU post Lisbon). This procedure is first of all simplified: the Commission, having offered the offending Member State the possibility of filing allegations on the charges it has drawn up, may apply to the Court of Justice for the imposition of a lump sum and/or penalty payment without any need to first issue, as under the TEC, a reasoned decision offering a fresh and last chance to the Member State to properly enforce the judgement that declared it to be in breach (the non-enforcement of which judgement is part of the origin of the application for the imposition of the monetary penalty). To this is added, as a second innovation, the possibility that the infringement procedure brought by the Commission (not, therefore, by the Member States), may be accompanied simultaneously (in the same proceedings), 'where appropriate', by an application for the imposition of a lump sum and/or penalty payment in situations where the infringement refers specifically to the breach of 'the duty to report on the transposition measures for a directive adopted in accordance with a legislative procedure'. On the other hand, Lisbon states, with regard to the moment as from which the lump sum/penalty payment would be applicable if imposed within the framework of a simultaneous declaration of infringement, that if the Court of Justice were to accept the application filed by the Commission, 'the payment duty would take effect on the date prescribed by the Court in the judgement'; a confusing wording which, if we follow the clarifications supplied by the debate on the European Constitution, ought to be interpreted to mean that 'the sanction would apply after a certain period had elapsed from the date the judgement was delivered'.

Preliminary Rulings

In order to complete the innovations in the traditional jurisdictional system of the Union, we may also highlight the refinement introduced by Lisbon, within the framework of preliminary rulings, in article 267 in fine TFEU. This refinement reads as follows: 'If such a question [on interpretation or validity of European Union Law] is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.' It should be noted in this regard that, in anticipation of the Lisbon reform, the Council amended the Statute of the Court of Justice towards the end of 200762, by adding article 23 a, pursuant to which the Rules of Procedure 'may provide for an expedited or accelerated procedure and, for references for a preliminary ruling relating to the Area of Freedom, Security and Justice, an urgent procedure. 'This latter possibility would be realized by the Court shortly afterwards64, by including in these Rules the urgent preliminary ruling procedure (PPU) regulated in detail at article 104 b, the main characteristics of which are:

1. a distinction is made, for the purposes of greater speed, between parties who may participate in the written stage of the procedure (which may be omitted altogether in cases of 'extreme urgency'), and those who may do so at the hearing stage, which is limited to the parties to the main proceedings, the Member State to which the originating jurisdictional body belongs, the European Commission, and where appropriate, the Council and the European Parliament where one of its acts is involved (other interested parties, and in particular the Member States other than that to which the originating jurisdictional body belongs, do not have this power, but are invited to the hearing);

2. there is considerable speeding-up of the internal processing of cases, given that as from their arrival at the Court of Justice, all those relating to the Area of Freedom, Security, and Justice are attributed to a Chamber of five Judges specifically appointed for this purpose for a one-year period, which has the task of approving the application for the urgent procedure, and must reach its decision, after hearing the Advocate General, in a short space of time;

3. in order to ensure the desired speed, proceedings take place, basically, in practice, by electronic means.

The future of the judicial structure of the Union.

The challenge of the greater complexity of the decision-making process and of the binding nature of the Charter of Fundamental Rights ('typically 'constitutional issues). By way of a final reflection, it could be argued that the balance of the innovations introduced by the Lisbon reform into the judicial process does not seem to be aimed at overcoming the moderation frontier. This moderation is otherwise emphasized if we confine ourselves to the discourse which underlies the European Constitution in constitutional terms, and which was not reflected in the judicial structure, which is traditionally uncomfortable about differences or even qualifications within itself when it comes to tackling the control of a legality that is always understood in accordance with the widest sense of the term (i.e. without distinguishing control of legality in the strict sense of control of constitutionality), with a Court of Justice that has for years been simultaneously exercising controls pertaining to both a contentious and a constitutional court. This would not have any further consequences were it not for the fact that the increase of the European jurisdiction, in quantitative terms (with the avalanche of new Member States still to be finalized) and qualitative terms (with the elimination by Lisbon, on the one hand, of the procedural and substantive restrictions that arose under the special régimes ex articles 35 TEU and 68 TEC, and the moderate opening, on the other hand, of the CFSP to judicial control) will entail a risk that it will be more difficult for the Court of Justice to dedicate, in suitable manner, to the resolution of typically constitutional disputes, such as those concerning the distribution of public powers (both horizontally and vertically), or with due respect for fundamental rights; and incidentally, the complexity of such disputes will be amplified with the Lisbon reform. In effect, with regard to the distribution of powers amongst the various Institutions of the Union, and between the Union and the Member States, Lisbon contains, behind an apparent simplification (arising both from the non-legislative norms / legislative norms pairing, which in turn result from the ordinary legislative procedure / special legislative procedure pairing, and from the detailed cataloguing of the competences of the Union), numerous questions of major constitutional significance which the Court of Justice will be required to tackle judgement by judgement. This is not the place to dwell on such questions in detail. But we can, at least, mention some of them:

The ordinary legislative procedure / special legislative procedure pairing, each one in the singular, is not accurate, for the simple reason that there are numerous special legislative procedures (some of a semi-constitutional nature, as they are subject to being subsequently approved by the Member States). Having accepted this, one must descend into the detail of the articles of all primary Law of the Union, including the Protocols, in order to uncover possible refinements to the consequences which lead the proceedings towards one procedure or the other (for example, in the different treatment of the early-warning system linked to the principle of subsidiarity), or questions raised by the choice of one procedure or the other; or clarifying the precise scope of the exercise of the delegation

envisaged in article 290 TFEU, which, by being linked to legislative acts adopted by way of a special procedure, can notably strengthen, through its control, the practically irrelevant role by hypothesis performed by the European Parliament in the drafting of the delegating act.

In the context of the principle of subsidiarity referred to above, not only would it be necessary to go deeper into questions linked to the exercise of control over it in formal terms, but also in substantive terms, especially in view of the reinforced presence, with Lisbon, of the national Parliaments in the drafting stage of Union Law (which would in turn require an assessment of its effect on the constitutional system itself, both for the Union and for the Member States).

The non-legislative activity of the Union also raises important questions, not just with regard to the boundary (which has yet to be defined) between delegated acts and implementing acts (i.e. whether recourse to one or to the other depends on the discretion of the European legislator, or whether, on the contrary, each one has its own constitutionally-defined territory), but also to the legal nature of the 'autonomous 'on-legislative activity' (which, for example and as I stated above, may give rise to doubts as to whether or not it may be challenged directly before the Court of Justice by individuals).

The traditional problems that have surrounded the choice of the legal basis may intensify after Lisbon, in the context, for example, of the definition of the boundaries between the CFSP and all the other powers attributed to the Union. Thus, for example, in 2008 the Court of Justice annulled an exclusively CFSP decision in Commission v. Council87, which had been approved in execution of a common action, also CFSP, on the contribution of the European Union to combat the destabilizing accumulation and proliferation of small arms and light weapons, arguing that 'taking account of its aim and its content, the contested decision contains two components, neither of which can be considered to be incidental to the other, one falling within Community development co-operation policy and the other within the CFSP'; and as such, according to the Court, 'since Article 47 EU precludes the Union from adopting, on the basis of the EU Treaty, a measure which could properly be adopted on the basis of the TEC, the Union cannot have recourse to a legal basis falling within the CFSP in order to adopt provisions which also fall within a competence conferred by the TEC on the Community'(we should recall that this precept provided that no provision of the Union Treaty would affect the Treaties constituting the European Community or the Treaties and subsequent acts that have amended or completed them). In all likelihood, the same case would pose greater complexity in the post Lisbon age, taking into account the fact that article 40 TEU (which, we should recall replaces and reforms the former article 47) creates a balance between the general régime of the Union and the special régime constituted by the CFSP, precluding the effect of 'the application of the procedures and the extent of the powers of the institutions 'in both directions.

With regard to the effect that the incorporation of the Charter of Fundamental Rights of the European Union into the Treaties may have on the work of the Court of Justice, it is sufficient to note that:

1. It shall be called upon to provide certainty in the land of legal uncertainty caused by the special characteristics of the United Kingdom and Poland;

2. It will have to tackle a foreseeable proliferation in the invocation and application of the Charter in an area that is as sensitive and susceptible to this as the Area of Freedom, Security and Justice, which following Lisbon is now subject to its complete judicial) It will have to pay close attention to the evolution of the constitutional traditions of the Member States (which have grown in number and sensitivities), not just as a hermeneutic tool when it comes to interpreting the Charter, but also as a source of inspiration for completing it, where appropriate, by way of the general principles of Union Law.

Conclusion

The Lisbon Treaty made significant challenges for the newly named Court of Justice of the European Union (ECJ). These changes include: the removal of the three pillar structure of the Treaty on the European Union, changes to the composition of the ECJ, the establishment of an advisory panel to review proposed nominations to the Union Courts, exclusions of competence of the Court by the Treaty on the Functioning of the European Union, the enlargement of the reference procedure from national courts, the Charter of Fundamental Rights, accession of the EU to the European Convention on the Protection of Human Rights and Fundamental Freedoms, changes to *locus standi* and increases in the Courts' case load.

The Lisbon Treaty provisions strengthen ECJ role in the construction of Union and also clarifies the role of the national parliaments. It may also constitute a substantial breakthrough for regional parliaments with legislative powers if they become truly conscious of the importance of adequate scrutiny of legislative proposals.

These novelties are the result of the political will to stimulate participation of national parliaments in EU matters and to bring Europe closer to its citizens. Moreover, regional and local authorities across Europe will witness important progress as a result of the Lisbon Treaty, towards the recognition of multi-governance in the European Union. A more inclusive Europe seems too favored: better involvement of regional and local expertise in the quest for a more cohesive Europe together with a reinforced principle of subsidiarity and an increasing role granted to the national parliaments. Many concrete novelties ensure that EU governance will evolve into more advanced multi-level forms; the most general ones are of utmost

interest to local and regional authorities as they could change the way of working and cooperating with the other levels of government participating in the European decision-making process.

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