

Whose Court of Justice? The European Supreme Court

With the signing of the Lisbon Treaty, **Margarida Vasconcelos** asks what impact this will have on the jurisdiction of the European Court of Justice. The function of the Court will be strengthened with the collapse of the pillar structure within the Treaty and enable the Court to rule on all matters in the Treaty with few exceptions.

Introduction

With the signing of the Lisbon Treaty, we ought to ask what impact this will have on the jurisdiction of the European Court of Justice (ECJ). The ECJ is a creation of the Treaties and not of a Constitution – nevertheless, it has been said that the ECJ judgements have resulted in a constitutionalization of the Rome Treaty. Since the Lisbon Treaty will be the European Constitution in all but name, it is hardly inappropriate to say that it will provide the ECJ with a strengthened constitutional character.

It is undeniable that the ECJ has been the motor behind European integration. It has followed a strong policy of integrating Community law into national legal orders. As G. Federico Mancini – a judge of the European Court of Justice – has said “... no doubt as to the degree of activism the court displayed in fostering the integration of Europe and forging a European identity. Judicial activism, however, is not necessarily a good thing.”

According to Article 220 EC “The Court of Justice and the Court of First Instance, each within its jurisdiction, shall ensure that in the interpretation and application of this Treaty the law is observed.” However, this provision has been used by the ECJ to significantly expand its competence. It is well known that the ECJ, in its need to ensure a uniform interpretation and application and effectiveness of Community Law, has extended its competences beyond the Treaties. Moreover, following its own principle that the Treaties cannot be strictly interpreted, it begins to take into account the state of integration and the objectives of the Court by enabling the Community to legislate in areas without a Treaty base.

It is noteworthy that the ECJ has acquired new powers through the Treaties but the Treaties as well as secondary EU legislation were amended to incorporate ECJ rulings. This is a perfect recipe for further European integration.

Maastricht’s European Union and the Taxpayers

The Maastricht Treaty created the European Union and the three pillars structure: the first pillar, the European Community, the second pillar, Common Foreign and Security Policy and the third pillar, Police and Judicial Cooperation in Criminal Matters. The ECJ powers were mainly concentrated on the European Community Treaty. However, it should be

noted that the Maastricht Treaty introduced Article 171, currently Article 228 EC. This provision strengthened the ECJ’s jurisdiction as it provided the Court with the power to impose financial penalties on Member States which fail to comply with a previous Court’s judgment. Basically, at Maastricht, Member States agreed to be subjected to penalty payments which would be paid for by the taxpayers.

Amsterdam’s Creeping Powers over Policing and Justice

In 1997, the Treaty of Amsterdam incorporated a large part of the former third pillar into the EC Treaty. Consequently, the ECJ’s powers concerning Title IV (visas, asylum and immigration) gained equivalence to powers which upheld and interpreted other Community law areas. Nevertheless, its preliminary rulings for jurisdiction concerning these matters, according to Article 68 EC, is restricted to national courts from which there is no judicial remedy. Moreover, measures related to the maintenance “of law and order and the safeguarding on internal security” are excluded from its jurisdiction. Furthermore, under Article 68 (3), the Court may be requested by the Council, the Commission or a Member State to give a ruling on a question of interpretation of this Title and such a ruling must be applied to judgments of national courts unless they have become “res judicata.” The Treaty of Amsterdam also provided the ECJ with jurisdiction over certain third pillar measures. Hence, under Article 35 TEU, the ECJ acquired jurisdiction to give preliminary rulings on interpretation and validity of framework decisions, decisions and conventions adopted under Title VI (police and judicial cooperation in criminal matters) but only to the courts of a Member State which has expressly accepted such jurisdiction. The UK has not submitted a declaration under Article 35 EU, thus it does not accept the jurisdiction of the Court to give preliminary rulings on such matters. Also, the ECJ acquired jurisdiction “to review the legality of framework decisions and decisions in actions brought by a Member State or the Commission” on the same grounds as those in Article 230 EC. Additionally, the Court was given jurisdiction in disputes between Member States regarding the interpretation or application of any legal acts adopted under Article 34 (2) (common position, framework decisions, decisions, conventions) if the dispute cannot be resolved by the Council or between the Commission and Member States

concerning interpretation or application of a Convention established under Article 34 (2)(d). There are some limits of ECJ jurisdiction on second and third pillar matters as defined in Article 46 TEU. (It should be mentioned that the Commission is not allowed to bring infringements procedures against a Member State which has not complied with a decision or framework decision which was adopted under this title).

‘The Final Arbiter’

In order to ensure the effective and uniform application of Community law, national courts when faced with an issue concerning the interpretation or validity of an act of Community law, may seek a preliminary ruling from the ECJ. However, according to Article 234 EC, if it is a last instance court, it is compelled to refer the matter before the ECJ. Obviously, this has an impact on Member States’ sovereignty as the national courts have lost a significant part of their independence to the ECJ. Moreover, the ECJ reply does not constitute a simple opinion. The judgments of the ECJ not only bind the national court to which it is addressed but also all national courts facing the same issue. Therefore, the ECJ judgments have an impact on all national courts. The ECJ has also stressed that national courts shall refer to its previous judgments in similar cases to reach a solution. It has expressed in the *Foto-Frosto* case its exclusive competence to declare Community acts invalid as decisions from national courts on validity could threaten the unity and effectiveness of the Community legal order. As Lord Brennan has said “The historical position of the ECJ is clear in that it is the final arbiter of the validity of European law. It is its judgments, not those of national courts that are determinative of European law. While national courts may refer questions on European law to the ECJ, it is the ECJ that will then finally decide.”

Obviously, the preliminary rulings procedure has been of decisive importance for the ECJ role in the development of the Community legal order. It was through this procedure that the ECJ developed principles of a constitutional nature, the so-called fundamental principles of Community Law, direct effect and the supremacy of EC law which has no legal basis in the Treaties but were built on the basis of the ECJ conception of how the new legal order should work.

Conferring Rights to be Enforced by Europe’s Supreme Court

In 1963, the ECJ created the doctrine of direct effect in the very well known *Van Gend & Loos* case. The Court had stressed “the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights ...” According to the ECJ, Community law confers upon individuals rights and “These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the treaty imposes in a clearly defined way upon individuals as well as upon the Member states and upon the Institutions of the

Community.” Hence, Treaty provisions can have direct effect and create rights for individuals which national courts must enforce. Moreover, this doctrine is not limited to the Treaty Articles as the ECJ has held it also applies to regulations, decisions and directives. In *Van Duyn* [Case 41/74 *Van Duyn v. Home Office*] the ECJ established the vertical direct effect of directives which means that individuals can directly enforce directives against the Member State after the time limit for their implementation has expired. The Court has held that individuals can derive, from a directive, enforceable rights against the State or emanation of the State but not against private parties (horizontal direct effect). However, in *Von Colson* [Case 14/83 *Von Colson and Kamann v. Land Nordrhein – Westfalen*] the Court held that national courts are required to interpret national law to be in accordance with a directive, creating the doctrine of indirect effect. This principle was developed in *Marleasing* [Case C-106/89, *Marleasing SA v La Comercial Internacional de Alimentacion SA*]. when the Court held “The Member States’ obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 (current article 10) of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts.” Consequently, national courts “in applying national law, whether the provisions in question were adopted before or after the directive” are required to interpret it “as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by it and thereby comply with the third paragraph of Article 189 (current article 249) of the Treaty.” Even more outrageously, the ECJ went much further in a recent case. In *Pupino* (Case C-105/03) the Court stressed “The jurisdiction of the Court of Justice to give preliminary rulings under Article 35 EU would be deprived of most of its useful effect if individuals were not entitled to invoke framework decisions in order to obtain a conforming interpretation of national law before the courts of the Member States.” It was already mentioned that under Article 10 EC Treaty, Member States are required to “take all appropriate measures to ensure fulfilment of their obligations arising out of this treaty.” According to the Court ruling this principle is also binding in the third pillar. So, if a Member State breaches its duties under Article 10 EC, the Commission has the power under Article 226EC to bring it before the Court. However, such mechanism is not presently possible under third pillar. According to the ECJ, its principle created in the *Von Colson* case is applicable in relation to framework decisions adopted under the third pillar which do not have direct effect but are capable to have indirect effect. Hence, the Court held “The binding nature of framework decisions ... is formulated in terms identical with those in the third paragraph of Article 249 EC, concerning directives. ... Thus, when applying national law, the national court that is called upon to interpret it must do so as far as possible in the light of the wording and purpose of the framework decision in

order to attain the result which it pursues and thus comply with Article 34(2)(b) EU.” Such an assumption has a clear lack of support from the Treaties, since this is another ECJ interpretation aimed at achieving further integration with obvious constitutional implications.

Supremacy of EC law and the Merchant Shipping Act

The ultimate ECJ constitutional claim was in Case 6/64, *Flaminio Costa v. Enel*, when the ECJ established the supremacy of EC law over national law. The Court held “... The integration into the laws of each Member State of provisions which derive from the Community and more generally the terms and the spirit of the Treaty, make it impossible for the states, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity, such a measure cannot therefore be inconsistent with that legal system, the law stemming from the Treaty, an independent source of law, could not because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as community law and without the legal basis of the Community itself being called into question.” The doctrine was further developed by the ECJ in subsequent cases requiring national courts to set aside national law which impedes the application of EC law, despite the date, source, and status of the domestic law.

The most important case in the UK on the supremacy of EC law was the *Factortame I* case (Case C-213/89, *R. v. Secretary of State for Transport, ex p. Factortame Ltd*) concerning the Merchant Shipping Act 1988 which Spanish fishermen claimed to be discriminatory and incompatible with the EC Treaty. According to the House of Lords, under English law there was no jurisdiction to grant interim injunctions against the Crown. However, the ECJ held “The full effectiveness of Community law would be just as much impaired if a rule of national law could prevent a court seized of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law. It follows that a court which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule.” According to Lord Bridge, the ECJ’s decision is not “a novel and dangerous invasion by a Community institution of the sovereignty of the United Kingdom Parliament” adding that “... Under the terms of the 1972 Act it has always been clear that it was the duty of a United Kingdom court, when

delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law.”

Presently, the supremacy of EC law is a cornerstone principle of Community law but it is not provided by the Treaties. Nevertheless, a Declaration attached to the Lisbon Treaty provides that “in accordance with the settled case-law of the EU Court of Justice, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case-law.” Although it is not legally binding this Declaration represents the Member States’ recognition of the ECJ case law on primacy of the Union law. With its attempt to bring about the collapse of the pillars, it is not only EC but Union law in general that is supreme.

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Originally, the procedures and remedies for breaches of Community law were a matter for Member States. While the ECJ has no jurisdiction to hear complaints by individuals who rights under EC law were violated it has developed a remedies approach through the preliminary ruling procedures. As the Community law has not laid down procedural rules or remedies, the Member States have to apply their procedures to enforce EC law. The ECJ in order to ensure the judicial protection of EU rights has developed two principles, the principle of equivalence and the principle of effectiveness concerning the adequacy of national remedies.

The ECJ has held through its case law that remedies provided by national courts for the enforcement of Community law “must not be less favourable than those applying to similar claims based on domestic law” (principle of equivalence) and the conditions “must not be such as in practice to make it impossible or excessively difficult to obtain” a remedy (principle of effectiveness). Whereas Member States were not required to create remedies which were not available under national law, the court’s autonomy on EC law enforcement is subjected to these principles. However, in *Factortame*, the principle of effective judicial protection of Community law prevailed over UK rules which the House of Lords required to create a new remedy. Moreover, in the *Marshall* case [Case C-271/91, *M.H. Marshall v. Southampton and South West Hampshire Area Health Authority*] the Court held “Although Directive 76/207, the purpose of which is to put into effect in the Member States the principle of equal treatment for men and women ..., leaves Member States, when providing a remedy for breach of the prohibition against discrimination, free to choose between the different solutions suitable for achieving the objective of the directive, it nevertheless entails that if financial compensation is to be awarded ... such

compensation must be adequate, in that it must enable the loss and damage actually sustained as a result of the discriminatory dismissal to be made good in full in accordance with the applicable national rules." The Court considered that the UK legislation setting up the limits and amount of compensation was not an adequate remedy. Nobody can deny the "creative skills" of the European Court of Justice, especially in the construction of new remedies and methods of enforcement of Community law.

State Liability under ECJ Powers

With the aim of circumventing the limitations of the doctrine of horizontal direct effect, the ECJ, in 1991, in the Francovich case [Joined cases C-6/90 and C-9/90, Andrea Francovich and Danila Bonifaci and others v Italian Republic] introduced the doctrine of state liability enabling individuals to obtain reparation when their rights are violated by a breach of Community law "for which a Member State can be held responsible." According to the Court, the reparation by the Member State is essential when it has not implemented a Directive in due time and consequently the individuals are unable to enforce their rights granted by Community law before the national courts. The principle was further developed in subsequent cases. In *Brasserie du Pêcheur* [Joined cases C-46/93 and C-48/93, Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others], the ECJ has made clear that the principle of state liability applies to all breaches of Community law "whatever be the organ of the State whose act or omission was responsible for the breach." It has stressed "Since the Treaty contains no provision expressly and specifically governing the consequences of breaches of Community law by Member States, it is for the Court, in pursuance of the task conferred on it by Article 164 of the Treaty of ensuring that in the interpretation and application of the Treaty the law is observed, to rule on such a question" In the *Dillenkofer* case [Joined cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94, Erich Dillenkofer, Christian Erdmann, Hans-Jürgen Schulte, Anke Heuer, Werner, Ursula and Trosten Knor v Bundesrepublik Deutschland], the ECJ further developed the conditions for state liability, when it held that "Failure to take any measure to transpose a directive in order to achieve the result it prescribes within the period laid down for that purpose constitutes per se a serious breach of Community law and consequently gives rise to a right of reparation for individuals suffering injury if the result prescribed by the directive entails the grant to individuals of rights whose content is identifiable and a causal link exists between the breach of the State's obligation and the loss and damage suffered." Obviously, this principle has substantial implications, in particular, for the enforcement of EU labour law such as on directives on health and safety at work. Moreover, such principle goes against Member States interests as it has an impact on Member States public funds. It encroaches with national sovereignty as it represents

another intrusion on national court's autonomy. Member States have not accepted the Court's argument that the principle of state liability is inherent in the Treaty and the German Government has argued that a general right to compensation under Community law could only be created by legislation. It should be recalled that at the 1991 IGC, the Member States decided not to include in the Treaty general rules on state liability. Despite this, the ECJ introduced the principle which represents a way to sanction Member States which have not complied with Community law.

To make matters even worse, the Treaty of Lisbon inserted Article 9F which states that "... Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law." Therefore, the Lisbon Treaty codifies the ECJ's principles of effectiveness and equivalence. Obviously, this provision will have a major impact on Member States as a requirement in providing for sufficient remedies in primary law. National courts might be required to provide remedies which are not available under national law as the ECJ held in *Factortame I*. Although the Lisbon Treaty has not created general rules on state liability it is possible to argue that it also codifies the ECJ principle developed in the *Francovich* case. Hence, the ECJ will be able to refer not only to its previous case law but also to this new Treaty provision.

Enforcing the Community's Human Rights

Another example of the ECJ judicial activism is the area of human rights. When the Treaty of Rome was signed in 1957, it contained no provisions pertaining to the protection of human rights within the European Community. However, the ECJ has stated that the "general principles of EC law include protection of fundamental rights which are part of the common constitutional traditions of the Member States." The ECJ has been very committed to including fundamental rights in the EU legal order. It developed the idea through its case law that fundamental rights are a part of EU law. However, the Court has not been given, under the terms of the Treaties, a power to review Community acts in cases of violation of fundamental rights. In fact, the Maastricht Treaty introduced Article 6 which was amended by Treaty of Amsterdam strengthening EU human rights provisions. Combining Article 6(2) TEU which reads "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms ... and as they result from the constitutional traditions common to the Member States, as general principles of Community law" with Article 46 (d), the Court has acquired jurisdiction to review the conduct of the European institutions for conformity with fundamental rights.

The EU Charter of Fundamental Rights was approved by the European Council at Nice in December 2000, but it was limited to a political declaration. This has not prevented the ECJ to referring (in its case law) to rights recognised as fundamental rights in the Charter. In spite of its non legally-binding character it seems to have already caused an impact.

As Bill Cash, MP, recently said: even if the Charter of Fundamental Rights is a declaration “the European Court would still construe any such declaration as being matter for the European Court, taking ‘precedence over those by national judges.’” Therefore, “putting the Charter in the treaty, in these matters, will hand the jurisdiction to the European Court with even more disastrous consequences than at the present.” Although the Charter of Fundamental Rights was not incorporated into the Lisbon Treaty it will be legally binding. According to Article 6 of the Lisbon Treaty it “... shall have the same legal value as the Treaties.” Member States are required to comply with the Charter when implementing Community law. Obviously, the Court will have jurisdiction to hear actions brought by the Commission against a Member State for infringing the Charter when implementing Community law. Also, through the preliminary reference procedures, issues such as the compatibility of a Member State while implementing Community law using the Charter or compatibility of Community legislation with the Charter will be referred to the ECJ. The UK has a Protocol on the Application of the Charter which the Minister of Europe (Jim Murphy) as well as the Foreign Secretary (David Miliband) has explained to the European Scrutiny Committee is not an opt-out from the Charter but “it is a statement of how the Charter provisions will apply in the UK.” Moreover, they say “the Charter provides no greater rights than are already provided for in UK law, and that nothing in the Charter extends the ability of any court to strike down UK law.” However, the Preamble to the Protocol stressed “... that this Protocol is without prejudice to other obligations devolving upon Poland and the United Kingdom under the Treaty on European Union, the Treaty on the Functioning of the European Union, and Union law generally.” Hence, the Protocol will not prevent the UK Courts from being bound by the ECJ interpretations of Union law measures based upon the Charter. As in the above-mentioned, under Article 10, and to ensure the uniform application of the Union law in the Member States, the UK courts are compelled to follow an ECJ ruling when interpreting a measure of Union law in a case arising in another Member State. It is obvious and past experiences tell us that the ECJ will interpret measures of Union law according to the Charter. Hence, the outcome of such interpretation will bind UK courts for reasons of UK obligations under the Treaties and “Union law generally.” Thus, according to the European Scrutiny Committee, “the only way of ensuring that the Charter does not affect UK law in any way is to make clear ... that the Protocol takes effect ‘notwithstanding the Treaties or Union law generally.’”

Creating New European Competences – Subject to Interpretation

It has been argued that the ECJ has the decisive authority to make a decision on Community competences. The Union and its institutions have the powers conferred on them by the

Treaties yet this is not an unquestionable truth. The EU has attributed competences and has the powers accorded to it in the Treaties but the scope of these competences has been subjected to widely different interpretations. In Case 22/70, *Commission v Council concerning a European Agreement on Road Transport* which is better known as the ERTA case, the ECJ delineated the concept of exclusive competence. It has stressed “... each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form they make, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules or alter their scope.”

More recently, the ECJ gave a ruling on the Community’s competence to adopt criminal; measures [Case C-176/03 *Commission v. Council*]. The ECJ has recognised that “as a general rule, neither criminal law nor the rules of criminal procedures fall within the Community’s competence.” Nevertheless, it ruled that “the last mentioned finding does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective.” Obviously, this ruling was heavily criticised as it ignores the Treaties and the Member State interests. The House of Lords European Union Committee has stressed that “the Court did not seem to pay any great regard to the history and the scheme set out in the Treaties” as “the EC Treaty contains no express power for the Community to adopt measures of criminal law or procedure and indeed contains provisions ... which expressly exclude the possibility of Community legislation concerning the application of criminal law.” However, on 23 October 2007, the ECJ gave its ruling in Case C-440/05 and it reiterated that the Community has competences under the EC Treaty for adopted criminal law measures when they are necessary for the implementation of Community objectives. However, according to the Court “the determination of the type and level of the criminal penalties to be applied does not fall within the Community’s sphere of competence.”

The Birth of a ‘Lisbon Treaty’

The Lisbon Treaty establishes a division of competences between the Union and the Member States. It defines which areas will be within the exclusive competence of the Union and which are shared between the Union and the Member States. Obviously, the ECJ will have a major role in the interpreting and deciding on the competence boundaries and it will do so with the objective of the uniform application and effectiveness of EU law. Moreover, the Protocol on the application of the principles of subsidiarity and proportionality annexed to the Treaty specifically provides

the Court with jurisdiction to hear actions for judicial review on grounds of infringement of the principle of subsidiarity. Previous experience tells us that the ECJ does not upend Community action on the ground that it does not comply with Article 5, principle of subsidiarity. For instance, in the case of the Working time directive [C-84-94 United Kingdom of Great Britain and Northern Ireland v Council of the European Union] the UK argued that directive 93/104/EC infringed upon the principle of subsidiarity but the action for annulment was dismissed. Hence, the Lisbon Treaty will strengthen the political role that the ECJ has been developing for itself. So, the judicial process will become even more politicised. As the House of Lords has pointed out in its report concerning the Constitution “but if the Court is the ultimate arbiter on the extent of the Union’s competence it follows that the Court also has the final say in defining the extent of Member States’ powers. It is this side of the coin which some find unacceptable, from a political and in some cases constitutional standpoint.”

The Lisbon Treaty abolishes the pillar structure therefore there is no corresponding provision to Article 46 TEU which limits the ECJ jurisdiction regarding third pillar matters (police and judicial cooperation). Article 68 EC and Article 35 TEU on preliminary reference procedures provided for matters under Title IV EC and the Third Pillar respectively are repealed, thereby unifying and increasing the jurisdiction of the Court. Hence, national courts “against whose decisions there is no judicial remedy under national law” will be obliged to refer a question to the ECJ concerning criminal and police cooperation. However, Article 240b of the Lisbon Treaty states “In exercising its powers regarding the provisions of Chapters 4 and 5 of Title IV of Part Three relating to the area of freedom, security and justice, the Court of Justice of the European Union shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.” Hence, the restriction on the jurisdiction of the Court presently provided by Article 35(5) TEU is maintained. The Lisbon Treaty brings judicial cooperation in criminal law and police cooperation within the general framework of judicial control as applied to other areas of EU law. The ECJ will have full jurisdiction, not merely the power to give preliminary rulings.

Whereas it is arguable if it is a “free choice”, the UK has the right to choose whether to take part in justice and home affairs legislation. Nevertheless, once opted in, the UK is subjected to the Commission enforcement powers and to ECJ jurisdiction. Therefore, it could be taken before the ECJ for failure to implement a range of criminal law legislation in a correct or timely manner.

The Lisbon Treaty amends Article 11 TEU on Common Foreign and Security Policy, according to which the ECJ will have jurisdiction “to monitor compliance with Article 25b

(regarding the exercise of Union competences) of this Treaty and to review the legality of certain decisions as provided for by the second paragraph of Article 240a of the Treaty on the Functioning of the European Union.” Hence, the Court will have jurisdiction to review the legality of restrictive measures adopted by the Council against natural or legal persons while it should not have jurisdiction at all on CFSP.

Moreover, the Lisbon Treaty introduces serious changes in the infringement procedures. According to Article 228 (3) “When the Commission brings a case before the Court pursuant to Article 226 on the grounds that the Member State concerned has failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure, it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned”. Therefore if the ECJ “finds that there is an infringement it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission” and that “the payment obligation shall take effect on the date set by the Court in its judgment.” Hence, the ECJ will have the power of imposing a lump sum or penalty payment on a Member State which has not implement a directive without having a chance of complying, as presently, with a previous declaratory judgment.

The Lisbon Treaty recognises the European Council as an EU institution (in accordance with Article 230 and 232) and the ECJ will acquire competence to review the legality of the European Council acts as well as the “legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.” Moreover, the ECJ will have jurisdiction to hear actions for failure to act against the European Council. Hence, according to Article 233 the European Council might be required “to take the necessary measures to comply with the judgment of the Court of Justice” with all the negative implications this provision is likely to have.

The Lisbon Treaty will provide the ECJ with further powers not only at jurisdiction level but also at a political level. As the House of Lords said “the Court is assuming the function of the Supreme Court of the Union whose jurisdiction is fundamentally constitutional in character. It has a central role to play not only in relation to matters of economic integration but also in deciding issues of political governance, defining democracy at European and national levels, and contributing through the process of judicial harmonisation to the emergence of a European demos.” Obviously, the constitutional character of the ECJ will be strengthened with the adoption of the Lisbon Treaty. The function of the ECJ will be strengthened with the collapse of the pillar structure. The Lisbon Treaty will enable the Court to rule on all matters in the Treaty with few exceptions. Therefore, the time has come, as Bill Cash MP has said in the Commons, to reject this Treaty and have “British laws for British judges.”

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