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Lisbon and the Court of Justice of the European Union

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Lisbon and the Court of Justice of the European Union

Ricardo Alonso García[*]

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I. Introduction: the Lisbon reform and the legacy of the European Constitution.

In a nutshell, the Lisbon operation consisted in getting through the back door what had been unable to pass through the front door. In other words, 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.

This has been the opinion not just of the majority of the academic world, but also of someone as well-qualified as Jean-Paul Jacqué, who has provided the following analogy for the operation[1]: when a motor manufacturer is not satisfied with the sales of one of its new models (i.e. the European Constitution), it can either cease production and come up with an all-new vehicle, which will require a substantial investment, or for the price of a few design modifications, it could re-launch the old model on the market and present it as being completely new (which is what the European 'draftsman' did with Lisbon).

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 endeavours 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*[2], whose Final Report[3] was approved for submission before the Convention members on 25 March 2003.

II. Changes to the organization of the judiciary in the Union and to the appointment of its members.

1. 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' (in the place of 'Judicial Panels')[4].

This puts an end to the confusion caused by using the same term, 'Court of Justice', for two different things, viz. the judicial institution and the supreme body within this

[1] *La complexité d'un traité simplifié. Le Traité de Lisbonne et la coexistence de trois traités*, Revue des Affaires Européennes / Law & European Affairs, 2007-2008/2, p. 178.

[2] As is well known, not a single one of the Working Groups that operated within the framework of the *Convention on the future of Europe* focussed on institutional matters in general, or on the judicial structure of the Union in particular. However, given the need to systematically tackle matters that had been addressed by all Working Groups, to a greater or lesser degree, in the end the *Discussion circle on the Court of Justice* was set up, chaired by the Portuguese Commissioner Antonio Vitorino.

[3] CONV 636/03 CERCLE I 13. Subsequently, a supplementary report on the question of judicial control relating to the common foreign and security policy was added to this (CONV 689/1/03 REV 1 CERCLE I 16).

[4] Article 19.1 TEU.

institution[5]. Under the new regulation, this term will be reserved for the supreme body of the institution representing judicial authority within the Union.[6] 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)[7].

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[8].

And the same might be said, then, with regard to the apposite 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[9].

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[5] Thus, article 7.1 TEC, when listing the institutions of the Community, referred to the 'Court of Justice'. And in its regulation of this institution, under the heading 'Court of Justice', at Section Four of Chapter I of Title I of Part Five of the TEC, began by providing (article 220) that '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'.

[6] Which will not in practice prevent a certain amount of confusion from persisting in those contexts where reference to the supreme *body* 'Court of Justice' must be necessarily accompanied – at risk of even greater confusion – by its attachment to the 'European Union'. Consider, for example, a context of comparative analysis of the work of a series of international or regional courts in which the reference is intended to be to the European *body* and not to the *institution*. Perhaps one possible solution would consist in consolidating the term 'European' Court of Justice to refer to the body, reserving the term Court of Justice 'of the European Union', as provided by the Treaties, to the institution. Furthermore, this possible confusion could have been avoided had the Discussion Circle accepted the proposal submitted by the then President of the CFI, that the 'institution' should be named 'The Judicial Authority of the Union': cf. *Oral presentation by M. Bo Vesterdorf, President of the Court of First Instance of the European Communities, to the 'discussion circle' on the Court of Justice on 24 February 2003*, CONV 575/03 CERCLE I 8.

[7] And in the second pillar, as we shall see below. Furthermore, it is surprising that the first express reference in the Treaties to the Court of Justice as the Court 'of the European Communities', occurs with the Amsterdam reform, which was precisely the reform that gave the Court powers in the third pillar, i.e. aside from the European Communities (cf. article 35 TEU in its pre-Lisbon version).

[8] It should be noted that in languages like Spanish, which refer to both bodies as a 'Tribunal', or English, which refer to them both as a 'Court', it has been considered necessary to describe the former Court of First Instance as 'General'. This term is not used in other languages where the name of the body already differentiates between them (thus in French, where there is a distinction between the 'Cour' and the 'Tribunal', or in Italian between the 'Corte' and the 'Tribunale'). On the debate that arose regarding the naming of the judicial bodies of the Union, cf. S. Van der Jeught, *Le Traité de Lisbonne et la Cour de Justice de l'Union Européenne*, Journal de Droit Européen, 2009 (164), pp. 297-298.

[9] Indeed, we should recall that the first and hitherto only Judicial Panel created was named the Civil Service 'Tribunal', and the Council explained in the Decision on its creation (2004/752, of 2 November 2004) that 'the new judicial panel should be given a name that distinguishes it in its trial formations from the trial formations of the Court of First Instance' (on the role of the Civil Service Tribunal, cf. C. Bernard-Glanz, L. Levi y S. Rodrigues, *Le contentieux de la fonction publique européenne – une matière à (re)découvrir*, Journal de Droit Européen, 2010, nº 168; H. Kraemer, *The European Union Civil Service Tribunal: A New Community Court Examined After Four Years*, Common Market Law Review, 2009, nº

2. 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[10], with Lisbon having limited itself to incorporating the consolidated doctrine of the Court of Justice in *U.P.A. v. the Council (2002)*[11]: '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[12].

6, pp. 1873 et seq.l.). We should point out that as compared to the pre-Lisbon regime, which gave the Council exclusive powers to unanimously set up Judicial Panels, the regime currently envisaged for establishing Specialised Courts is of ordinary legislative proceedings, in which the Council and the Parliament decide jointly following the procedure laid down at article 294 TFEU.

[10] Within the context of the works of the Discussion Circle, cf. point 9 of the '*Propuestas para garantizar una mayor eficiencia y efectividad en los métodos de trabajo del Tribunal de Justicia y del Tribunal de Primera Instancia' por A. Palacio y G. de Vries*, CIRCLE I WD 21, in which, under the heading 'Recognition of national judges as judges of Community Law (EU)', one may read: 'One of the main features of the EU legal system is that respect for and enforcement of this system is protected by the national courts, which therefore act as a part of the *judicial structure of the EU*. The entire procedure surrounding preliminary rulings by the ECJ or the CFI is based on this understanding. It would seem appropriate that an element as important in the EU as a *common legal system* should be explicitly recognized in the future Treaty'. The Final Report of the Discussion Circle maintained that 'the Constitution might state explicitly that the Union has a judicial system which comprises the Court of Justice, the CFI, the specialised courts *and the national courts whose role as ordinary law courts of the Union could be highlighted in the Constitution*' (CONV 636/03 CERCLE I 13; italics added). Cf. also in this regard the *Report on the Future of the European Communities' Court System* (which was drafted in 2000 for the Commission under the presidency of Ole Due, with a view to the Nice reforms), which proposed 'stating explicitly a fundamental principle which is only implicit in the current text of Article 234 and which, consequently, is sometimes lost sight of by certain national courts: this is the principle that the courts of the Member States have full authority to deal with questions of Community law which they encounter in the exercise of their national jurisdiction, subject only to their right or their duty to refer questions to the Court of Justice for a preliminary ruling'.

[11] In which the Court held that 'it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection'. Amongst the many comments that this statement attracted, see for example D. Sarmiento, *La Sentencia UPA (C-50/00), los particulares y el activismo inactivo del Tribunal de Justicia*, Revista Española de Derecho Europeo, 2002, pp. 531 et seq.

[12] The Spanish Council of State, for example, referred on numerous occasions in its *Informe sobre modificaciones de la Constitución española* (*Report on amendments to the Spanish Constitution*, February 2006) to 'the constitutional mutation that results from the duty imposed on judges and the courts by the EU not to apply laws, which is contrary to the provisions of articles 117 and 163 of the Constitution'. And the fact is that, in effect, the national Constitutions tend to approach the matter of integration in terms of powers which, once ceded to the Union, are exercised thereby with the resulting loss of powers for the national public authorities, including the judicial bodies. However, they do not envisage the boomerang effect that this loss of powers entails: the transfer of powers to the Union, far from causing a *drain* of internal public powers in general terms (both in legislative matters and in administrative and judicial matters), has instead produced a *restructuring* of these powers for the purposes of integration, assuming that the legal system of the Union operates in terms of functional

3. The 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[13]) and the General Court – we may highlight the introduction of a preliminary stage (article 255 TFEU) which provides for the creation of a panel[14] (composed of seven personalities

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decentralization. Thus, and leaving the judicial question to one side, it should be borne in mind that the majority of European legislation requires national legislation, whether for the purposes of normative implementation (we should recall that not even the possibility of a Directive producing direct effects relieves Member States from their duty to transpose), or for the purposes of legal certainty (in the sense that regulations, which are by their very nature directly applicable, also require a process of formal refinement in order to eliminate any shadow of doubt caused by maintaining internal norms that do not comply with European law). And on many occasions this requires approximations to the body with powers to legislate and to the way in which this is done that are completely unrelated to the purely internal context (for example, in order to comply with the normative implementation deadlines laid down in European legislation), which can furthermore entail a significant imbalance in favour of the executive to the detriment of the legislature, extending the prevailing reality in the ascending stage of formation of European Law to the descending stage of implementation of Union Law. The same occurs again with administrative enforcement of Union Law, which is in the hands of the national administrative Authorities as a general rule, which on many occasions need to be equipped with tools that are not envisaged (or not clearly envisaged) within the domestic framework in order for integration to be possible; an example would be the need to equip them with powers to review State aids incompatible with Union Law, or in general terms, powers to review final administrative activity in order to ensure the full operation of Union Law, not to mention the yet-to-be-clarified power to not apply norms, including Parliamentary Acts, that are contrary to Union Law. The Council of State has also had an opportunity to consider all of the above in its *Informe sobre la inserción del Derecho europeo en el Ordenamiento español* (*Report on the incorporation of European Law into the Spanish Legal System*, February 2008).

[13] In *Declaration No 38*, annexed to the Final Act of the Intergovernmental Conference, *on Article 252 TFEU regarding the number of Advocates General in the Court of Justice*, the Conference declared that 'where, pursuant to paragraph one of article 252 of the Treaty on the Functioning of the European Union, the Court of Justice should seek to increase the number of Advocates General by three persons (i.e. eleven instead of eight), the Council shall give its unanimous approval to the said increase'. And it added: 'In this case, the Conference agrees that Poland, as is already the case with Germany, France, Italy, Spain, and the United Kingdom, shall have one permanent Advocate General and shall no longer participate in the rotating system. Meanwhile, the current rotation system shall affect five Advocates General instead of three'. Cf. in this regard S. Van der Jeught, *Le Traité de Lisbonne et la Cour de Justice de l'Union Européenne*, cit., pp. 298-299.

[14] The panel is not given any qualifying adjective in the Lisbon Treaty, or before that in the European Constitution (in contrast to the Discussion Circle Final Report, which called it the 'advisory panel', after considering terms such as 'filter mechanism', used during its deliberations: cf. *Contribution of N. Duff, M. Berger, E. Paciotti, R. Rack and J. Würmeling*, CIRCLE I WD 18, and *UK comments, by Baroness Scotland of Asthal*, CIRCLE I WD 19).

The need for the creation of an advisory or assessment panel was already noted (and eventually discarded by the Nice reform) in January 2000 by the aforementioned *Report on the Future of the European Communities' Court System* ('The Working Group would also suggest that the appointment of all Members of the Court of Justice and the CFI should be scrutinised on the basis of a comprehensive file submitted by each Member State. To assist the Member States in their deliberations, an advisory committee consisting of highly-qualified independent lawyers should be set up to verify the legal competence of candidates').

Furthermore, it should be borne in mind that a 'committee' already existed for the appointment of the members of the Civil Service Tribunal. This body, which is maintained post Lisbon, is composed of seven persons chosen from among former members of the Court of Justice and the Court of First Instance and lawyers of recognised competence (article 3.3 of the Annex to Protocol no. 3 of the Statute of the Court of Justice of the European Union). Cf. Council Decision of 18 January 2005 concerning the

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[15]) in order to assess the suitability of the candidates[16] 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[17].

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)[18]; 5) and its deliberations shall also be 'behind closed doors', culminating in a reasoned opinion as to the suitability or unsuitability of the candidate.

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operating rules of the committee provided for in Article 3(3) of Annex I to the Protocol on the Statute of the Court of Justice (2005/49/EC, Euratom, OJ L 21 of 25.1.2005, p. 13).

[15] Article 255 provides that 'one of whom shall be proposed by the European Parliament'. This association of the Parliament in the appointment of the committee was openly challenged by H. Haenel, representative of the French Senate at the Convention (cf. CERCLE I WD 22, p. 2), because he saw in it a danger that the appointment process would become politicised (cf. Discussion Circle Final Report, point 6); which risk was also recorded by B. McDonagh in his comments on the draft Final Report (CIRCLE I WD 17, p. 2), on which point the Circle demurred, there being consensus as to the non-political nature, but rather purely assessment nature, of the panel (in the words of R. Rack in his contributions with regard to the draft Final Report, 'there was also consensus that the assessment panel for judges should not be a *political* body but rather a body that *checks* the qualifications of respective judges': CIRCLE I WD 13, p. 2). It should be recalled on this point that in its *Report on certain aspects of the application of the treaty on European Union (Luxembourg, May 1995)*, the Court of Justice considered that 'a reform involving a hearing of each nominee by a parliamentary committee would be unacceptable'. 'Prospective appointees', the Court argued, 'would be unable adequately to answer the questions put to them without betraying the discretion incumbent upon persons whose independence must, in the words of the treaties, be beyond doubt and without prejudging positions they might have to adopt with regard to contentious issues which they would have to decide in the exercise of their judicial function'.

[16] The Circle's Final Report favoured, as it had done previously and has done hitherto, that Member States should continue to put forward only one candidate (cf. in defence thereof the contributions of the President of the Circle, A. Vitorino, and T. de Bruijn, CIRCLE I, WD 08 and WD 20 respectively). On the need to make the selection criteria as objective as possible, cf. the comments on the draft Final Report by B. McDonagh (cit., p. 2). On the profiles of the candidates in view of the composition of the Court of Justice since its creation, cf. A. Cohen, *Sous la robe du Juge. Le recrutement social de la Cour*, in P. Mbongo and A. Vauchez (dir.), *Dans la fabrique du droit européen. Scènes, acteurs et publics de la Cour de Justice des Communautés Européenes*, Bruylant, 2009, pp. 11 et seq.; also in the same work, L. Scheeck, *La diplomatie commune des cours européennes*, (especially the section on 'teacher-judges', pp. 122 et seq.).

[17] Articles 253 and 254 TFEU.

[18] The Circle's Final Report favoured a panel 'whose deliberations would not be public and which *would not hold any hearings*'. Baroness Scotland of Asthal, for her part, insisted on clarifying that 'the advisory opinion should be directed to the nominating Member State (so as to avoid discouraging potential

Although these rules say nothing about the scope of the opinion, I think that it does not bind Member States in the event that it should be negative with regard to a particular candidate[19]. Whether it is, or ought to be, a *de facto* dissuasive element in their decision is another matter…

4. 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[20], 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)[21].

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).

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applicants for fear of an unnecessarily public spectacle)' (cf. CIRCLE I WD 19, p.2). This observation, it should be noted, was made from a perspective *of openness and transparency in the presentation of candidatures*, with the aim, as was finally contained in the Final Report, of 'making Member States more demanding in the choice of candidates they put forward' (taken particularly seriously by Anglo-Saxon countries: cf. the comments cited above by McDonagh).

[19] In this regard, cf. J.V. Louis, *Le Traité de Lisbonne*, Journal des Tribunaux. Droit Européen, 2007 (144), p. 294.

[20] Subject, it would appear, to the requirements of *Protocol no. 2 on the application of the principles of subsidiarity and proportionality*; which has been criticised by R. Barents on the basis that the matters governed by the Statute would fall by their very nature within the exclusive competence of the Union (*The Court of Justice in the Renewed European Treaties*, in A. Ott and E. Vos, eds., *Fifty Years of European Integration: Foundations and Perspectives*, T-M-C-Asser Press, 2009, pp. 59-60).

[21] In the pre-Lisbon regime, the reform rested (article 245 TEC) on a unanimous decision of the Council (at the request of the Court of Justice and after having consulted the European Parliament and the Commission, or at the request of the Commission and after having consulted the European Parliament and the Court of Justice).

III. Alterations to competences.

1. 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 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[22], with the sole peculiarity of article 276 TFEU, which took over from article

[22] The decision-making regime in the Area of Freedom, Security and Justice reveals even more qualifications in relation to the classical supra-national rules of procedure, which respond to the still-high level of sensibility of the Member States in this context: thus, the European Council is expressly

35.5 TEU (in its pre-Lisbon version) transcribed above.[23] 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[24]) 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.

2. 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[25] 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[26] (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*[27], its jurisdiction over measures and procedures of the third pillar – which at the

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recognized as having an important role, with its task of defining who 'shall define the strategic guidelines for legislative and operational planning'; national Parliaments are also assigned a key role, by being called upon to participate in the mechanisms for the evaluation of the application of the Union's policies in this Area and of the activities of Eurojust, and in the political control of Europol; and finally, the right of initiative of Member States (shared with the Commission) in the area of police and judicial co-operation in criminal matters is preserved (although this right ceases to be an individual right of initiative, becoming a right to be exercised by one quarter of Member States). In this regard, J. Monar (ed.), *The Institutional Dimension of the European Union's Area of Freedom, Security and Justice*, Cahiers du Collège d'Europe / College of Europe, Volume 11, 2010.

[23] Article 276 TFEU now provides that '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'

[24] Therefore, during this maximum term of five years, such acts may only be subject to a preliminary ruling where this is initiated by the jurisdictional bodies of the Member States that have accepted the jurisdiction of the Court of Justice, and within the terms of this acceptance (after all, we should recall that each Member State decides whether it confers the power to seek preliminary rulings to all its jurisdictional bodies or just to those that are the final appellate court).

[25] With regard to other institutional aspects, cf. W. Wessels and F. Bopp, *The Institutional Architecture of CFSP after the Lisbon Treaty: Constitutional breakthrough or challenges ahead?*, CEPS Challenge Paper No. 10, 2008.

[26] And *vice versa*, i.e. that the non-CFSP measures and procedures of the Union should not encroach on the CFSP (article 40 TEU post Lisbon). Cf. the next two footnotes.

[27] ECJ Judgement of 12 May 1998 (C-170/96). The Court of Justice found that it was competent pursuant to article 47 TEU (article M at the time), which provided as follows: 'Subject to the provisions amending the Treaty establishing the European Economic Community with a view to establishing the European Community, the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community, and to these final provisions, nothing in this Treaty shall affect

time, prior to Amsterdam, was excluded from the jurisdiction of the Court – that infringed powers pertaining to the European Community)[28]. 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)[29].

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[30].

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[31].

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the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying or supplementing them'.

[28] The Court of Justice, even without referring to article 47 TEU, had also started to monitor Community excesses where there was encroachment of the inter-governmental pillars (*European Parliament v. Council and Commission, C-317 and 318/04*, ECJ Judgement of 30 May 2006). The express prohibition under article 40 TEU, post Lisbon, of such excesses (of which the only 'victim' would be the CFSP), and their consideration on an equal footing with inverse excesses (i.e. CFSP excesses which would affect the other policies of the Union), with the aim of reinforcing the specificity of the CFSP in the general context of the Union (thereby putting in doubt the exact meaning of the disappearance of the system of pillars proclaimed by authors such as G. Guillermin, *Un Traité en trompe l'oeil*, in E. Brosset et al., dir., *Le Traité de Lisbonne. Reconfiguration ou déconstitutionnalisation de l'Union Européenne*, Bruylant, 2009, p. 24; others such as A. Rigaux are more cautious, referring to the 'at least formal' disappearance 'of the structure of pillars – *L'écriture du Traité: le discours de la méthode*, in the monograph directed by D. Simon entitled *Le Traité de Lisbonne: oui, non, mais à quoi?*, Europe, 2008, no. 7, p. 31), raises problems, to which I shall return later, when it comes to the selection of the legal basis in the presence of two indissoluble components, where neither one may be considered to be accessory to the other.

[29] In accordance as was expressly allowed by the Court in its Judgement of 20 May 2008, *Commission v. Council (C-91/05)*, prior to Lisbon and in relation to article 241 TEC.

[30] Economic (e.g. the freezing of assets within the framework of the fight against terrorism) or non-economic (e.g. restrictions on visas).

[31] Cf. article 215 TFEU. An important clarification needs to be made in this regard. Despite the atypical presence of the High Representative at the proposal stage, in relation to the general decision-making regime of the 'Community method', the fact is that the resulting product remains an instrument of the EU adopted within the framework of Chapter I of Title V of the TEU (dedicated to 'General provisions on the Union's external action'), as is stated at article 205 TFEU, and not of Chapter II of this Title (dedicated to 'Specific provisions on the Common Foreign and Security Policy'). This gives rise to its absolute control pursuant to the general jurisdictional system, aside from the specificities of the CFSP. Whether or not the latter can be invoked in a situation where indirect control is sought, arising from the questioning of restrictive measures imposed pursuant to article 215 TFEU is another issue. It is obvious that the interpretation upheld here is based on the premise that when paragraph one of article 275 lays down the rule on the exclusion of the jurisdiction of the Court of Justice to decide 'with respect to the provisions relating to the common foreign and security policy and with respect to acts adopted on the basis of those provisions', it is referring to acts that are exclusively CFSP (to which the exceptions to the general rule envisaged in the following paragraph shall be applied, which amount to a qualified opening to control by the Court of Justice), and not to acts imposed on the basis of article 215 (subject to the general jurisdictional control regime). To maintain that the exclusion initially contained at article 275 *ab initio* would affect all acts, both CFSP and non-CFSP (i.e. those under article 215), imposed on the basis of a prior CFSP provision, would lead to the absurd result of a tighter restriction on judicial control by the

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 of CFSP), to test its compatibility with the Treaties within the framework of article 218.11 TFEU[32].

IV. The changes to procedure.

1. 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[33], covering

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Court of Justice in a general context of greater openness of this control over the activity of the Union, by denying the right to lodge appeals for annulment (pursuant to article 263 TFEU, i.e. Member States, Parliament, Commission, and Council) to privileged subjects (for reasons other than the infringement of article 40 TEU) against 'Community' acts (such as those of article 215, which replaces in amended form article 301 TEC, which is the legal basis, in the pre-Lisbon regime, for acts subject to the full judicial control of Luxembourg). Cf. in this regard A. Hinarejos, *Judicial Control in the European Union. Reforming Jurisdiction in the European Union*, Oxford University Press, 2010, pp. 154 et seq.; the author expresses her doubts (p. 160), which I share, as to whether the interpretation defended here of partial opening of acts that are fully CFSP to the control of the Court of Justice (assuming that control would be absolute over 'community' acts approved on the basis of article 215), would be extended up to the point of allowing them to be challenged (aside from article 40 TEU) by way of preliminary rulings on their validity, and even compensation, payable directly by the Union, for any losses incurred as a result of such acts. Tridimas considers, in relation to restrictive CFSP measures that do not meet the conditions for a direct challenge, that 'the possibility of an incidental challenge in preliminary reference proceedings is not expressly provided but that does not necessarily mean that it is excluded'; from which he deduces that 'once it is accepted that such measures are subject to the jurisdiction of the Court, there is no reason why challenge should be restricted to a direct action' (*The European Court of Justice and the Draft Constitution: A Supreme Court for the Union?*, in T. Tridimas and P. Nebbia, eds., *European Union Law for the Twenty-First Century: Rethinking the New Legal Order*, Volume 1, Hart Publishing, 2004, p. 128).

[32] In the pre-Lisbon regime, competence and proceedings to conclude international agreements within the framework of CFSP was governed by article 24 TEU, subject to the general exclusion of jurisdiction of the Court of Justice in the area of the second pillar (article 46 TEU). After Lisbon, competence to conclude international agreements within the framework of CFSP is provided for at article 37 TEU, whereas the procedure to be followed is governed by article 218 TFEU (which procedure is none other than the one followed in all international agreements, with some qualifications; thus, special rules are envisaged for the opening of negotiations, and the lack of any requirement to consult even the European Parliament is remarked upon). And article 218 itself concludes with section 11 in which it is provided, in general terms, that all international agreements are subject, without distinctions, to the prior control of the Court of Justice. In this regard, cf. G. de Baere, *Constitutional Principles of EU External Relations*, Oxford University Press, 2008, p. 190. Hinarejos raises the following interpretational doubt (op. cit., pp. 164-165): in so far as article 275 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*', it might be considered that this last exclusion would also extend to international agreements approved on the basis of CFSP (given that it would be article 37 TEU, the legal basis for the agreements in question, and not article 218 TFEU, of an exclusively procedural nature …). However, as the author herself acknowledges, such an exclusion would not sit well with the European Constitution and its preparatory works, which as we saw at the start of this study, are significant when it comes to interpreting the Lisbon reform. In effect, the complementary Report on the question of judicial control of the Common Foreign and Security Policy, issued by the Discussion Circle on the Court of Justice, concludes by highlighting the favourable climate for submitting international agreements envisaged within the framework of CFSP to the prior control of the Court of Justice.

[33] Cf. along the same lines of article 263, the extension of the *inactivity* that may be challenged by way of article 265 TFEU.

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'[34]).

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*)[35].

With regard to this Committee[36], 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'[37]. Within the framework of the Convention on the future of Europe, the Final Report by Working Group I 'Subsidiarity'[38] 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 in

[34] With regard to this extension of judicial control to the acts of the bodies, offices, or agencies of the Union, cf. E. Nieto Garrido and I. Martín Delgado, *Derecho administrativo europeo en el Tratado de Lisboa*, Marcial Pons, 2010, pp. 214 et seq.

[35] Cf. article 8 of the Protocol.

[36] The possibility of extending the right to bring actions to the 'regions with legislative powers' (or 'constitutional regions'), which is much debated in the *Convention on the future of Europe*, was in the end not reflected in the European Constitution or in the Lisbon Treaty. Cf. in this regard B. Martín Baumeister, *El recurso de anulación de las regiones europeas con competencias legislativas*, Gaceta Jurídica de la Unión Europea y de la Competencia, 2010 (15 Nueva Época), pp. 34 et seq.

[37] Therefore the following are excluded from its right to bring challenges *on the basis of subsidiarity*: 1) non-legislative acts, and 2) legislative acts for which there is no duty to consult the Committee of the Regions (and this despite the fact that the Committee should have issued *motu proprio* or at free request of the European political Institutions, a prior report denouncing possible infringements of subsidiarity, in exercise of the powers it is acknowledged under article 307 TFEU).

[38] CONV 286/02 WG I 15.

conformity with their respective legal systems, 'on behalf of the national Parliament or one of its chambers'[39]. 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[40].

With regard, finally, to the locus standi 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)*[41].

In effect, focussed 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)*[42] 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, 1994*[43]), individuals' rights to *directly appeal general provisions*.

This restriction, criticised not just by learned opinion but also, in their personal capacity, by Judges[44] and Advocates General[45] of Luxembourg, led to the Court of

[39] It might be debated whether this is a prerogative granted directly by the Protocol to the national Parliaments, such that Governments would be limited to being the mere formal transferors of the challenge filed by these Parliaments, or on the contrary whether this is a referral to the national legal systems, which would have the last word, including that of allowing certain (or broad) governmental discretion in this regard. The latter interpretation of the Protocol has been favoured by the Spanish legislator, where the reform of 22 December 2009 (Law 24/2009) of Law 8/1994, of 19 May, governing the Joint Committee of Parliament for the European Union, provides that 'the Government may, after stating its reasons, reject the filing of proceedings for annulment sought by either Chamber of Parliament or by the Joint Committee of Parliament for the European Union'.

[40] Cf. in this regard J.V. Louis, *National Parliaments and the Principle of Subsidiarity – Legal Options and Practical Limits*, in I. Pernice and E. Tanchev, *Ceci n'est pas une Constitution – Constitutionalisation without a Constitution?*, Nomos, 2008, p. 143. As was highlighted at the time by I. Cooper, the proposal of Working Group I would have encouraged national Parliaments to object as a general rule to draft European legislation in order to preserve their initiative powers before the Court of Justice (*The Watchdogs of Subsidiarity: National Parliaments and the Logic of Arguing in the EU*, Journal of Common Market Studies, 2006, no. 2, p. 294).

[41] ECJ Judgement of 25 July 2002 (C-50/00 P), which states as follows: 'While it is, admittedly, possible to envisage a system of judicial review of the legality of Community measures of general application different from that established by the founding Treaty and never amended as to its principles, it is for the Member States, if necessary, in accordance with Article 48 EU, to reform the system currently in force'.

[42] ECJ Judgement of 15 July 1963 (25/62).

[43] ECJ Judgement of 18 May 1994 (C-309/89).

[44] E.g. J.C. Moitinho de Almeida, *Evolución jurisprudencial en materia de acceso de los particulares a las jurisdicciones comunitarias*, Universidad de Granada, 1991, pp. 62-65; or K. Lenaerts, *Legal Protection of Private Parties under the TEC: A Coherent and Complete System of Judicial Review?*, in *Scritti in onore di G.F. Mancini. Volume II*, Giuffrè, 1998, pp. 620-623.

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 Acts[46], 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)[47], 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'

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[45] E.g. F. Jacobs (who drafted the Opinion in *UPA v. Council*, which were in favour of making the restrictive case-law of the Court of Justice more flexible), *Access to Justice as a Fundamental Right in European Law*, in *Mélanges en hommage à F. Schockweiler*, Nomos, 1999, pp. 203-206.

[46] Cf. V. Ferreres Comella, *Constitutional Courts and Democratic Values*, Yale University Press, 2009.

[47] E.g. O. De Schutter, *Les droits fondamentaux dans l'Union Européenne*, Journal de Droit Européen, 2008 (148), p. 130; J. Roux, *Les actes: un déordre ordonné*, in D. Simon (dir.), *Le Traité de Lisbonne: oui, non, mais à quoi?*, cit., p. 56; J. Bast, *Legal Instruments and Judicial Protection*, in A. von Bogdandy and J. Bast (eds.), *Principles of European Constitutional Law*, Hart-Beck-Nomos, 2010, p. 396.

non-legislative activity'[48]), irrespective of the typology chosen (therefore including 'decisions' that are generally applicable); and within these acts, limited to those that concern them directly[49] and do not entail implementing measures[50].

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.*[51] 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'[52]. 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

[48] I shall return to this question in the final part of this study (specifically at section V.1).

[49] Direct concern is explained by the Court of Justice in the following terms: 'for a person to be directly concerned by a Community measure, the latter must directly affect the legal situation of the individual and leave no discretion to the addressees of that measure 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' (*re Dreyfus v. Commission*, held by the ECJ in its Judgement of 5 May 1998, C-386/96 P).

[50] According to Koen Lenaerts, the Court's 'message' in *Unibet* (ECJ Judgement of 13 March 2007, C-432/05) would have consisted in taking the view that where an individual was obliged to expose him/herself to administrative or criminal proceedings, and to their corresponding penalties, as the only way to object to the compatibility of national provisions with Union Law, this was insufficient for the purpose of effective judicial protection. And on the basis of this premise, he considers that there would be no obstacle whatsoever to extending it to the context of examining the validity of the acts of the Union, given that otherwise this would lead to double standards between European acts and those of the Member States, which could challenge the coherence of the system of proceedings within the Union. For this reason, he concludes that 'if the Court were to consider that the notion of 'regulatory act', in the sense of article 263 TFEU, only covers non-legislative acts, the Member States would be under a duty to ensure that individuals had legal channels through which to operate this control – by the Court on the basis of preliminary rulings – on the validity of 'legislative acts' which do not include implementing measures, with special care that access to such channels should not pre-suppose that the individuals have broken the law'. Cf. *Le Traité de Lisbonne et la protection juridictionnelle des particuliers en Droit de l'Union*, Cahiers de Droit Européen, 2009 (5/6), pp. 742-743.

[51] As we are reminded by the *Presidium* of the Convention (CONV 734/03), 'the Circle was divided into two groups: one group considered that the substance of the fourth paragraph of Article 230 must not be amended as it satisfied the essential requirements of effective judicial protection, particularly given that national courts can (or must) refer to the Court of Justice for preliminary rulings on questions relating to the interpretation or assessment of validity of Union law; other members argued that the conditions of admissibility laid down in this paragraph for proceedings by individuals against acts of general application were too restrictive'.

It is interesting to point out that in the interventions in the Discussion Circle, the then Presidents of the Court of Justice and of the Court of First Instance were in favour of a distinction between legislative activity and regulatory activity, along the lines finally reflected in the European Constitution: cf. *Oral presentation by M. Gil Carlos Rodríguez Iglesias, President of the Court of Justice of the European Communities, to the 'discussion circle' on the Court of Justice on 17 February 2003*, CONV 572/03 CERCLE I, and *Oral presentation by M. Bo Vesterdorf, President of the Court of First Instance of the European Communities, to the 'discussion circle' on the Court of Justice on 24 February 2003*, CONV 575/03 CERCLE I 8.

[52] Cf. M. Varju, *The Debate on the Future of the Standing under Article 230 (4) TEC in the European Convention*, European Public Law, 2004 (1), pp. 43 et seq.

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'[54]).

[53] In this regard, cf. e.g. A. van Waeyenberge and P. Pecho, *L'arrêt 'Unibet' et le Traité de Lisbonne – Un pari sur l'avenir de la protection juridictionnelle effective*, Cahiers de Droit Européen, 2008 n(1/2), pp. 152-153. Also A.H. Turk, *Judicial Review in EU Law*, Elgar European Law, 2009, pp. 168-169, who nonetheless argues, on the basis exclusively of a comparison with the national legal systems, that the exclusion of legislative acts from proceedings for annulment, in the context we have been examining, ought to be limited to those resulting from ordinary, and not special, legislative procedure. However, I believe that this last refinement goes beyond the wishes of the draftsman. Thus, to give an example, the European Constitution provided at article III-124.1 for the possibility of enacting 'laws' or 'framework laws' in order to establish measures to fight against discrimination on the grounds of sex, race, or ethnic origin, etc., following a procedure in which the Council would express a unanimous view, following approval by the European Parliament; and with regard to 'laws' or 'framework laws', these would be excluded from the opening of proceedings for annulment to individuals operated by the Constitution. Well then, this precept has been maintained post Lisbon as article 19.1 TFEU, except that the measures adopted would be 'legislative acts' (specified in regulations or directives) arising from a 'special legislative procedure' in which, as in the Constitution, the Council shall decide unanimously, following the approval of the European Parliament. And I do not believe, contrary to Turk's opinion, that it should have been the intention of the Lisbon draftsman to open such acts to direct judicial review by individuals merely on the grounds of being a special – as opposed to an ordinary – legislative procedure. It is a different matter where, assuming that the intention of the draftsman had been to exclude the opening of article 263 to *all* legislative acts, one could argue that the Court of Justice ought to interpret this in the sense of extending the locus standi of individuals to special legislative acts, or even to any general provision, irrespective of the nature (legislative or otherwise) thereof (provided, obviously, that the requirements of affecting the individual directly and the self-executing scope of the provision are met). This last line of argument is espoused by e.g. M. Dougan, *The Treaty of Lisbon 2007: Winning Minds, Not Hearts*, Common Market Law Review, 2008, pp. 676-679 (also at the time, and with special emphasis where fundamental rights are in question, by A. Arnull, *Protecting Fundamental Rights in Europe's New Constitutional Order*, in T. Tridimas and P. Nebbia, eds., *European Union Law for the Twenty-First Century*, cit., pp. 111-112).

[54] Apart from anything else, had such a classification been made, this would have contradicted article 289.4 TFEU, which does not envisage the High Representative of the Union for Foreign and Security Policy as being entitled to initiate, not even in conjunction with the Commission (as required by article 215 TFEU), the legislative procedure, whether ordinary or special.

2. 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[55] 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[56], may apply to the Court of Justice for the imposition of a lump sum and/or[57] 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[58] adopted in accordance with a legislative procedure'[59].

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

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[55] 'Small but significant', in the opinion of L. Prete and B. Smulders, members of the Legal Service of the Commission (*The Coming of Age of Infringement Procedures*, Common Market Law Review, 2010, p. 61).

[56] Therefore the warning stage is maintained (with the possibility of allegations by the offending State upon receipt of the letter of request from the Commission), the abolition of which (together with that of the reasoned decision) was considered throughout the debate on the European Constitution.

[57] If we follow the doctrine of the Court of Justice in *Commission v. France*, ECJ Judgement of 12 July 2005 (C-304/02).

[58] 'A distinction is made in practice between cases of "non-communication", i.e. the Member State has not taken any transposition measure, and cases of incorrect transposition, i.e. the transposition measures taken by the Member State do not, in the Commission's view, comply with the directive (or framework law). The proposed arrangements would not apply in the second case' (Final Report of the Discussion circle on the Court of Justice, p. 28 b, note 2). One would suppose, therefore (as Van der Jeught does), that 'rather than a "duty to communicate", this is in fact a "transposition duty", given that otherwise a Member State could simply communicate any measure in order to avoid the application of article 260.3, which would therefore be devoid of any useful purpose' (*Le Traité de Lisbonne et la Cour de Justice de l'Union Européenne*, cit., p. 303). In the same regard, cf. J. Frutos Miranda, *El procedimiento por inejecución de las sentencias declarativas de incumplimiento: estado de la cuestión*, Revista Española de Derecho Europeo, 2010 (35), p. 435.

[59] Aside from article 260.3, what remains, then, is the absence of communication with reference to directives that have not been adopted in accordance with a legislative procedure, whether ordinary or special.

interpreted to mean that 'the sanction would apply after a certain period had elapsed from the date the judgement was delivered'[60].

3. 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.[61] 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 2007[62], 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[63] would be

[60] Cf. Final Report of the Discussion circle on the Court of Justice, p. 28 b. And the fact is that, in effect, taking into account the location of this innovative regulation at section 3 of article III-362 of the Constitution and the terms under which the debate took place, it seems obvious that this is a *procedure for the enforcement of judgements* of the Court of Justice declaring an infringement by a Member State; thus it is not the infringement itself that determines the imposition of the lump sum/penalty (although it might determine its value), but rather the non-enforcement of a judicial ruling declaring that infringement to exist. Therefore, the innovation consists in allowing that at the same time as the infringement is declared to exist, the State is required to pay a lump sum/penalty the effectiveness of which is made subject to the fact that the State in question should not remedy the infringement, enforcing the judgement within the time limit stipulated by the judgement. For a different perspective, according to which article 260.3 TFEU would not necessarily correspond to a procedure for the enforcement of judgements, such that it would be possible to impose a lump sum where the communication of the transposition measures takes place once the litigation has started but prior to the hearing stage, and a penalty where the absence of communication persists at the date of the hearing, cf. I Kilbey, *The Interpretation of Article 260 TFEU (ex 228 EC)*, European Law Review, 2010 (3), pp. 383-384.

It should be noted, in any event, that in contrast to article 260.2, which allows the Court of Justice to depart from the proposal of the Commission, even though it considers it a 'useful point of reference' (*Commission v. Greece*, ECJ Judgement of 4 July 2000, C-387/97), the new article 260.3 specifies that 'if the Court 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*'. This express exclusion of the *reformatio in peius* does nothing other than re-open the debate as to the legal nature of the measures *ex* article 260 (especially in relation to lump sums), and the possible application, within this context, of principles pertaining to Penal Law and the Law of Sanctions. Cf. in this regard J. Frutos Miranda, *El procedimiento por inejecución de las sentencias declarativas de incumplimiento: estado de la cuestión*, cit., pp. 415 et seq.

[61] Also section c) of article 234 TEC, which made the power of the Court of Justice to interpret the statutes of the bodies created by the Council by way of preliminary rulings subject to the requirement that these statutes should have effectively envisaged the Court's power to do so, is repealed.

[62] Decision 2008/79/EC, Euratom (OJ L 24, 29.1.2008, p. 42).

[63] The expedited procedure, developed at articles 62 *a* and 104 *a* of the Rules of Procedure, was introduced in 2000 (first in the context of preliminary rulings, and in direct actions shortly afterwards: cf. Amendments to the Rules of Procedure of the Court of Justice of the European Communities of 16 May 2000, OJ L 122 of 24.5.2000, p. 43, and 28 November 2000, OJ L 322 of 19.12.2000, p. 1), and has been scarcely used (given that it consists, basically, in giving priority to the case over others that are pending, it would become self-defeating in the presence of many cases pursued in accordance with the same procedure: cf. E. Bernard, *La nouvelle procédure préjudicielle d'urgence applicable aux renvois relatifs à l'espace de liberté, de sécurité et de justice*, Europe, 2008, no. 5, pp. 5 et seq.). On the *iter* that followed

realized by the Court shortly afterwards[64], 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'[65]), 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[66], and must reach its decision[67], after hearing the Advocate General[68], in a short space of time[69];

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the introduction of the expedited procedure, cf., in addition to the work just cited, that of A. Lazowski, *Towards the Reform of the Preliminary Procedure in JHA Area*, in S. Braum and A. Weyembergh (ed.), *Le contrôle juridictionnel dans l'espace pénal européen*, Bruylant, 2009, pp. 220 et seq. In general on both procedures, cf. C. Naômé, *La procédure accélérée et la procédure préjudicielle d'urgence devant la Cour de Justice des Communautés Européennes*, Journal de Droit Européen, 2009 (162), pp. 237 et seq.

[64] Amendments to the Rules of Procedure of the Court of Justice of the European Communities of 15 January 2008 (OJ L 24 of 29.1.2008, p. 39).

[65] Thereby saving the time inherent not just to the actual filing of the allegations or written observations and their notification to the parties and other interested parties, but also their translation (cf. M. Broberg and N. Fenger, *Preliminary References to the European Court of Justice*, Oxford University Press, 2010, p. 394).

[66] In contrast to the expedited procedure, the commencement of which is decided by way of a reasoned order, in the PPU the decision is reached at an administrative meeting, which does not mean that the factors determining urgency remain confidential, as they are referred to in the judgement (cf. K. Lenaerts, *Traité de Lisbonne et la protection juridictionnelle des particuliers en Droit de l'Union*, cit., p. 739).

[67] Although the possibility is envisaged that the PPU Chamber, in accordance with the nature of the case, may decide to substantiate its decision with a three-judge formation or to refer it to the Grand Chamber.

[68] Who is not required to submit a written opinion. Initially the non-publication of the opinion of the Advocate General was criticised, and in the end the Court decided to publish this opinion when it is given in writing (cf. K. Lenaerts, *Traité de Lisbonne et la protection juridictionnelle des particuliers en Droit de l'Union*, cit., p. 738-739, n. 107).

[69] According to statistics from the Court of Justice for 2009 on preliminary rulings, the average duration of the processing and resolution of such rulings was of 17.1 months, practically identical to 2008, when it was 16.8 months (the average duration of direct appeals and appeals to the Court was of 17.1 and 15.4 months respectively, and of 16.9 and 18.4 months in 2008). And in this context, substantiation by way of the urgent preliminary ruling procedure was sought in three cases, and the Chamber set up for this purpose considered that only two of them met the necessary criteria for this, and they were decided in an average of 2.5 months (cf. *Kadzoev*, ECJ Judgement of 30 November 2009, C-357/09 PPU, and *Detiček*, ECJ Judgement of 23 December 2009, C-403/09 PPU), rather longer than the 2.1 months corresponding to those decided in 2008 (three, with a further three for which the urgent procedure was rejected, to wit *Rinau*, which inaugurated the PPU and was decided by ECJ Judgement of 11 July 2008, C-195/08 PPU, *Santesteban Goicoechea*, ECJ Judgement of 12 August 2008, C-296/08 PPU, and *Leymann and*

3) in order to ensure the desired speed, proceedings take place, basically, in practice, by electronic means[70].

V. The future of the judicial structure of the Union.

1. 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 emphasised 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[71] (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[72]; and incidentally, the complexity of such disputes will be amplified with the Lisbon reform.

Pustovarov, ECJ Judgement of 1 December 2008, C-388/08 PPU; cf. in this regard the positive assessment of A. Rosas, who chaired the pertinent Chamber until October 2008, in *Justice in Haste, Justice Denied? The European Court of Justice and the Area of Freedom, Security and Justice*, Cambridge Yearbook of European Legal Studies, 2008-2009, volume 11, pp. 9 et seq.). It should be noted, in comparing the PPU with the expedited procedure for preliminary rulings, that in this latter framework the Court heard two cases in accordance with this procedure in the first half of 2010 (in 2009, according to statistics referred to above from the Court of Justice, the Court rejected three applications for proceedings to be heard pursuant to article 104 *a* of the Rules of Procedure): *E and F* took 6 months to be decided by the Judgement of the Supreme Court of 29 June 2010 (C-550/09); and joindered *Melki and Abdeli* were decided a little earlier by the Judgement of the Supreme Court of 22 June 2010 (C-188 and 189/10) in just 2 months, in a context in which what was at stake was none other than the compatibility of the 'question prioritaire de constitutionnalité' before the *Conseil Constitutionnel* (governed under French Law by Loi Organique no. 2009-1523, of 10 December 2009), with article 267 TFEU (cf. the *dossier* covering this issue of the Revue Française de Drot Administratif, 2010, nº 4).

[70] This also contributes to shortening the timescales inherent to the written stage compared to the expedited procedure.

[71] In fact, it was quite significant that the European Constitution, in its regulation of proceedings for annulment (article III-365), should start off by referring to control by the Court of Justice of the European Union of 'the legality of European laws' (sic).

[72] Having ruled out the creation of a Court that is exclusively – or at least essentially – Constitutional in the European Union, distinguished from some kind of Supreme Court focussed on controlling and

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:

1) 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[73] (some of a semi-constitutional nature, as they are subject to being subsequently approved by the Member States[74]). 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[75], or the possibility of

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interpreting legality (in its strict sense), it would nonetheless be feasible to extend the possibilities in this direction that were already opened up by the Treaty of Nice. Cf. in this regard I. Pernice, J. Kokott and C. Saunders (eds.), *The Future of the European Judicial System in a Comparative Perspective*, Nomos, 2006 (in particular the work of Bo Vesterdof, *A Constitutional Court for the EU?*, pp. 83 et seq., in which he expresses support for a devolvement of powers in favour of the Court of First Instance with safeguards to ensure that the Court of Justice decides on 'truly important questions', whilst at the same time supporting a more prominent role for the Grand Chamber which would ensure significant representation of the national legal systems, the constitutional traditions of which, as we shall see, continue to be called upon to perform an essential role in the future of the legal system of the Union).

[73] In addition to the 'assent procedure' by the European Parliament for acts approved by the Council, which in some cases gives its opinion with a qualified majority (e.g. in relation to the measures for the application of the system of own resources of the Union: article 311 TFEU), in others unanimously (e.g. in relation to measures to fight all discrimination or to extend rights linked to citizens: articles 19 and 25 TFEU), the European decision-making system provides for a 'consultation procedure', in which the intervention of the Parliament is compulsory but not binding, and the decision of the Council may likewise be given on the basis of a qualified majority (e.g. in relation to measures to ensure diplomatic and consular protection: article 23 TFEU), or unanimously (e.g. measures regarding social security or welfare: article 21 TFEU). Also classified as special legislative procedures are those acts approved by the Parliament, with the prior approval or consultation of the Council (the former, in the event of the approval of channels for the exercise of the right to investigate contraventions or maladministration in the implementation of Union Law: article 226 TFEU; the latter in relation to the statute of the Members of the European Parliament and the European Ombudsman: articles 223 and 228 TFEU). The *sui generis* special legislative procedure in budgeting matters deserves a special mention, as it is subject to detailed regulation under article 314 TFEU. Also deserving of a special mention are the multiple variations that the legislative procedure, including the ordinary procedure, can undergo at its initial stage (cf. article 289.4 TFEU, pursuant to which, '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').

[74] Such as those envisaged to extend the rights of citizens or the powers of the Court of Justice to hear litigation on European intellectual property (articles 25 and 262 TFEU), as well as to establish the system for the election of its members by way of direct universal suffrage (article 223 TFEU) and the system of own resources of the Union (article 311 TFEU).

[75] Cf. sections 2 and 3 of article 7 of *Protocol no. 2 on the application of the principles of subsidiarity and proportionality* (it should be noted that the method under section 3 only comes into play 'under the ordinary legislative procedure').

invoking the 'passerelle clause'[76]), or questions raised by the choice of one procedure or the other[77]; 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[78].

2) In the context of the principle of subsidiarity referred to above[79], 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[80] (which would in turn require an assessment of its effect on the constitutional system itself, both for the Union[81] and for the Member States…[82]).

3) 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[83], or whether, on the contrary, each one has its own constitutionally-defined territory[84]), but also to the legal nature of the 'autonomous'

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[76] Which, envisaged under article 48.7 TEU as a specific variation of the '*Simplified revision procedure*' of the Treaties, allows the transformation of the decision-making process in a particular area or case, either converting the unanimity required within the Council into a qualified majority, or the legislative procedure envisaged as 'special' into 'ordinary legislative procedure'.

[77] As in the case, for example, of the 'flexibility clause' envisaged at article 352 TFEU, which appears to offer *carte blanche* to the Institutions when assessing their intervention, identical in its form, as a result of a 'special legislative' or 'non-legislative' procedure.

[78] As in the case, for example, of a delegation act adopted in accordance with a special legislative procedure in which the Parliament limits itself to intervening in a compulsory manner ('consultation procedure').

[79] With regard to which Van der Jeught states that he is absolutely convinced of an increase in proceedings filed by the Committee of the Regions and the Member States (*Le Traité de Lisbonne et la Cour de Justice de l'Union Européenne*, cit., p. 300).

[80] In this regard, e.g. C. Ferrer Martín de Vidales, *Los Parlamentos nacionales en la Unión Europea. De Masstricht a Lisboa*, Dilex, 2008.

[81] Cf. e.g. the hypothesis put forward by C. Delcourt of an inter-institutional accord of joint nature, with the decision-making triangle of the Union and the national Parliaments as protagonists (*Du Traité Constitutionnel au Traité de Lisbonne: quelles évolutions pur les institutions parlementaires?*, in E. Brosset et al., dir., *Le Traité de Lisbonne* …, cit., p. 90).

[82] Cf. e.g. House of Commons (European Scrutiny Committee), *Subsidiarity, National Parliaments and the Lisbon Treaty*, Thirty–third Report of Session 2007–08.

[83] As was maintained by Working Group IX 'Simplification' (CONV 424/02 WG IX 13) in its Final Report within the framework of the *Convention on the future of Europe*: 'It is the legislative act – and therefore the legislator – which would determine on a case-by-case basis whether and to what extent it was necessary to have recourse to "delegated" acts and/or to implementing acts and what their scope would be'.

[84] In my opinion, the natural environment of 'delegated acts' is that where the objectives laid down by the Treaties must be made specific by the European legislator, who has a wide margin for manoeuvre when it comes to exhausting the regulation by way of the corresponding 'legislative act'. Notwithstanding this, and with the aim of simplifying and rationalizing the legislation of the Union, freeing it where appropriate from detailed regulation which the Commission can tackle in a more speedy and suitable manner, the legislator is allowed to confer powers on the Commission so that it may specify the guidelines that the legislator has necessarily defined as 'essential elements' in the act of delegation. The natural environment of 'implementing acts', in contrast, would be as follows: intervention of the European legislature directly

non-legislative activity'[85] (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[86]).

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connected to the Treaties (i.e. in the context not just of an ordinary or special legislative procedure, but also of a non-legislative procedure of autonomous nature), thereby exhausting, either directly or by way of delegation, the regulation of a matter within the competency terms allowed by the Treaties themselves and their Protocols (i.e. including respect for the principles of subsidiarity and proportionality; which respect, incidentally and with regard to subsidiarity, shall not be subject to scrutiny by the national Parliaments in the event the powers originate from non-legislative activity). As from that time, section 1 of article 291 TFEU would come into play, pursuant to which, 'Member States shall adopt all measures of national law necessary to implement legally binding Union acts'; unless the circumstances that allow the application of section 2 of the same article arise, pursuant to which 'where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases [...] on the Council'. In the words of the Commission in its Communication of 9 December 2009, COM (2009) 673 final, with regard to the possible criteria for implementing Article 290: 'The legislator is entitled to enact full and comprehensive regulations governing a particular field of action, entrusting to the Commission the responsibility for ensuring their harmonised implementation through implementing acts; alternatively the legislator can choose to regulate the field in question only partially, leaving the Commission the responsibility for supplementing the regulations with delegated acts'.

[85] Becoming instruments approved by the Council which, as they are sometimes identical, in the way they are drafted, to those approved within the framework of a special legislative procedure (e.g. in the case of the measures to be approved in application of the principles governing European Competition Law), they do not, however, have a legislative nature, due to the fact that the Treaties (perhaps in arbitrary or incoherent fashion) do not classify this manner of drafting as 'special legislative procedure'. Directly connected to the Treaties (i.e. with no prior European legislation required), such 'autonomous' instruments may likewise and exceptionally be approved by the Commission (e.g. also within the framework of European Competition Law).

[86] Cf. B. de Witte, *Legal Instruments and Law-Making in the Lisbon Treaty*, in S. Griller and J. Ziller (eds.), *The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?*, Springer, 2008, pp. 101-102. In my opinion, in accordance with the system designed by the European Constitution, which as I have argued, would have inherited the Lisbon Treaty, autonomous non-legislative activity would also be open to direct challenge by individuals within the terms of paragraph four of article 263 TFEU. This is because the European Constitution already envisaged this kind of activity (and in the same sectors as reflected in the Lisbon Treaty, viz. in the rules governing Competition Law and in policies such as agriculture or economics), which it classified as 'regulatory' (open to being challenged directly by individuals), as opposed to 'legislative' (immune to such challenges): cf. article I-33, which after defining 'European law' and 'European framework law', goes on to define 'European regulation' as a 'non-legislative act of general application for the implementation of legislative acts *and of certain provisions of the Constitution*'.

In *Arcelor v. European Parliament and Council (T-16/04), Norilsk and Umicore v. Commission (T-532/08)* and *Etmine and Ab Etiproducts v. Commission (T-539/08)*, the General Court ordered the re-opening of the hearing stage and invited the parties to give an opinion on the eventual consequences that ought to be extracted within the framework of the procedures for the entry into force of the Lisbon Treaty, and in particular, article 263, paragraph four, of the TFEU. At the time of writing, only the first of these cases had been decided by way of the Judgement of the General Court of 2 March 2010; in its judgement, the Court accepted the argument of the Parliament and the Council, supported by the Commission, to the effect that the Member States had a wide margin for discretion in implementing the Directive that was challenged, such that it could not be considered to be, under any circumstances, a regulatory act *which does not include implementing measures* in the sense of article 263 TFEU, paragraph four (which would, as a general rule, apply to all Directives, whether or not they are of a legislative nature, that are in accordance with the letter and the spirit of article 288 TFEU). However, the Judgement does not offer any clues as to the position maintained by the Institutions in relation to the scope of the term 'regulatory act', although such a clue may be found in the written observations filed by the European Commission for the purpose of clarifying the effect of the Lisbon Treaty on the Communication – addressed to the Aarhus Convention Compliance Committee – on the observance by the EC of the provisions of the Convention

4) 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. Council*[87], 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*[88].

5) Lastly, the 'passerelle clause' itself, referred to above, poses some questions, which the Court of Justice will have to gradually resolve taking into account how it has been interpreted, hitherto, by a Court as significant as the German Federal Constitutional Court, the ruling of which on the occasion of ratification by Germany of the Lisbon

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concerning access by members of the public to review procedures (ACCC/C/2008/32). In these observations, the Commission reported that in its opinion and in that of the European Parliament, the term 'regulatory act' under article 263 TFEU, paragraph four, only applied to non-legislative activity (including that of an autonomous nature), because otherwise the term 'regulatory' would be redundant; furthermore, such an interpretation would be supported by the preparatory works of the European Constitution. It also stated that in the allegations filed before the General Court, the Council and the Commission had considered that it would be 'extremely difficult, or even impossible' to allow direct judicial review of Directives by individuals, as these required implementing measures by the Member States.

[87] ECJ Judgement of 20 May 2008 (C-91/05).

[88] Perhaps it would be possible to predict in this regard that the *vis attractiva* of the general regime will be maintained, based now on both the Preamble to the TEU and on article 1 thereof (where the Member States declare that they are determined to continue with the process of laying the foundations of ever closer union among the peoples of Europe, in which decisions are taken openly and as close as possible to the citizens), and on the case-law of the Court concerning the maximum support for the role of the Parliament in the European decision-making process (cf. *Commission v. Council*, ECJ Judgement of 11 June 1991, C-300/89). A similar conclusion is reached by L. Paladini (*I conflitti fra i pilastri dell'Unione europea e le prospettive del Trattato di Lisboa*, Il Diritto dell'Unione Europea, 2010, no. 1, p. 106), following M. Cremona (*A Constitutional Basis for Effective External Action?*, EUI Law Working papers 2006/30; cf. also, from the same author, *Defining Competence in EU External Relations: Lessons from the Treaty Reform Process*, in A. Dashwood and M Maresceau, eds., *Law and Practice of EU External Relations*, Cambridge University Press, 2008, pp. 42-46), on the basis of a different reasoning, viz. the application of the principle of *lex specialis derogat generalis* (i.e. the CFSP, which in principle covered all sectors of foreign policy, would be pushed aside by the special powers in matters of overseas action provided for in the TFEU).

Treaty could give rise to problems, and not just with regard to this regime, concerning how this fits together in orthodox terms with the view from Luxembourg of European integration[89].

With regard to the effect that the incorporation of the Charter of Fundamental Rights of the European Union into the Treaties[90] may have on the work of the Court of Justice[91], 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[92];

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[93], which following Lisbon is now subject to its complete judicial

[89] This ruling from the Bundesverfassungsgericht, of 30 June 2009, has been the subject of endless comment (and will probably continue to be so). Amongst those published in Spanish, cf. those of P. Häberle, *La regresiva 'Sentencia Lisboa' como 'Maastricht-II' anquilosada*, Revista de Derecho Constitucional Europeo 2009 (12), pp. 397 et seq.; F. Castillo de la Torre, *La sentencia del Tribunal Constitucional Federal Alemán de 30.06.2009, relativa a la aprobación del Tratado de Lisboa – Análisis y comentarios*, Revista de Derecho Comunitario Europeo, 2009 (34), pp. 969 et seq.; A. López Castillo, *Alemania en la Unión Europea a la luz de la 'Sentencia-Lisboa' de 30 de junio de 2009, del Tribunal Constitucional Federal alemán*, Revista Española de Derecho Constitucional, 2009 (87), pp. 337 et seq.; M.J. Bobes Sánchez, *La integración europea según el Tribunal Constitucional Federal Alemán. Comentario a la Sentencia del BVerfG sobre el Tratado de Lisboa*, Revista Española de Derecho Europeo, 2010 (33), pp. 157 et seq.

[90] Article 6.1 TEU provides as follows post Lisbon: 'The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties'.

[91] Despite ruling out the idea, which was at one time considered by the *Convention on the future of Europe*, 'of establishing a special procedure before the Court of Justice for the protection of fundamental rights' (cf. Final Report of Working Group II 'Charte/ECHR', CONV 354/02 WG II 16).

[92] We should recall that in exchange for recognition of its binding legal effect and its 'constitutional' status, the Charter had to pay the price of becoming a *cherry-picking* norm where the Lisbon reform included a Protocol on its application in Poland and the United Kingdom (no. 30 annexed to the Treaties), to which the Czech Republic could potentially be added pursuant to the Agreement of the Heads of State or Government of the Member States approved within the framework of the European Council of 29-30 October 2009 (in which they undertook to annex a Protocol to the Treaties providing for the extension of the Protocol concerning Poland and the United Kingdom to the Czech Republic 'at the time of the conclusion of the next Accession Treaty and in accordance with their respective constitutional requirements').

On the disputed question of whether or not the Protocol really constitutes an opt-out from the Charter, it is sufficient to mention here the opinion of the Director-General of the Legal Service of the Commission, Jean-Claude Piris, for whom 'one thing is obvious: the legal effects of the Protocol are not easy to determine' (to which he adds: 'Ultimately, the interpretation of the Protocol no. 30 will be a matter both for the EU Court of Justice and for national courts. It is not possible to predict at this stage what they will decide when interpreting the Protocol'). Cf. *The Lisbon Treaty. A Legal and Political Analysis*, Cambridge University Press, 2010, pp. 161 and 163.

[93] In this regard, cf. e.g. R. Barents, *The Court of Justice in the Renewed European Treaties*, cit., p.67. Cf. likewise the 'Zero Tolerance Policy' announced by the Commission in its Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Delivering an Area of Freedom, Security and Justice for Europe's citizens-Action Plan Implementing the Stockholm Programme*, 20.4.2010 COM(2010) 171 final.

control[94];

3) 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[95]), not just as a hermeneutic tool when it comes to interpreting the Charter[96], but also as a source of inspiration for completing it, where appropriate, by way of the general principles of Union Law[97].

2. The accession of the Union to the European Convention on Human Rights.

Given that I have just referred to the effect that the Charter of Fundamental Rights of the European Union will have on the European judicial structure, I shall conclude with a

[94] Without forgetting, it should be recalled, the moderate opening of the CFSP to such control, especially with regard to the restrictive measures that directly affect individuals and which do not require implementing measures, and which are often linked to the delicate matter of the fight against terrorism.

[95] Cf. e.g. O. Pollicino, *New Emerging Judicial Dynamics of the Relationship Between National and the European Courts after the Enlargement of Europe*, NYU Jean Monnet Working Paper 14/08; W. Sadurski, *'Solange, Chapter 3': Constitutional Courts in Central Europe-Democracy-European Union*, European Law Journal, 2008 (1), pp. 1 et seq.

[96] According to section 4 of article 52 (which is a product of the 2007 'adaptation'), 'in so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions'. Cf. in this regard, for example, the opinions of Advocate General Kokott submitted on 29 April 2010 in *Azko Nobel Chemicals et al. v. Commission (C-550/07 P)*, pending judgement; after considering that professional secrecy would be deduced from article 7 of the Charter (with regard to communications) in relation to articles 47, paragraphs one and two, second sentence, and 48, section 2 (right of being advised, defended and represented, and respect for the rights of the defence), Kokott had to refer to the national legal systems in order to clarify whether or not, under Union Law, communications held with in-house lawyers within a company or group of companies would be covered by professional secrecy, and if so, to what extent (concluding that 'the extension of the protection afforded by legal professional privilege to internal company or group communications with enrolled in-house lawyers is not justified on grounds of any special characteristics exhibited by the tasks and activities of the European Commission as competition authority and it does not currently constitute a growing trend among the Member States, be it in the area of competition law or in any other field').

[97] It should not be overlooked that pursuant to article 6.3 TEU, '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, shall constitute general principles of the Union's law'. And in this regard, one should ask, for example, if the reference to these general principles had been conceived in terms of concurrence and equivalence with the rights and freedoms of the Charter, or as a purely subsidiary and complementary source (Vassilios Skouris, Judge at that time and later President of the Court of Justice, came out in favour of the latter view in his intervention within the framework of the *Convention on the future of Europe*: cf. his hearing before Working Group II 'Charter', CONV 295/02 WG II 10 and WG II WD 19; cf., likewise, his work *Introducing a Binding Bill of Rights for the European Union: Can Three Parallel Systems of Protection of Fundamental Rights Coexist Harmoniously?*, in *Liber Amicorum für P. Häberle*, Mohr Siebeck, 2004, especially pp. 267 et seq.); this would also, for example – and given that we have just referred to the uncertainty surrounding the Charter in relation to Protocol no. 30 – have its consequences when it comes to deciding whether the intended opt-out for the United Kingdom and Poland (and potentially for the Czech Republic) could or could not be in turn redirected to the general regime of being subject to the European parameters through the general principles of Union Law (cf. C. Barnard, *The 'Opt-Out' for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reality?*, in S. Griller and J. Ziller, eds., *The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty*, cit., p. 268).

brief incursion into the mandate for accession to the European Convention on Human Rights, introduced by Lisbon at article 6.2 TEU[98].

With formal negotiations on this issue opened in July 2010 between Thorbjorn Jagland, Secretary-General of the Council of Europe, and Viviane Reding, Vice-President of the Commission, a whole series of technical matters have arisen, and underlying all of them is a concern for the autonomy of the Union legal system, proclaimed nearly half a century ago by a Court of Justice which, despite the initial mood generally in favour of accession within the Court[99], sees a danger that once this happens it will no longer be the ultimate and supreme interpreter[100].

Focussing on questions that could affect the judicial structure of the Union in more specific ways[101], Luxembourg is particularly concerned 'that the European Court of

[98] Which provides, in imperative terms: 'The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties'. In December 2009, the European Council declared as follows: 'after the entry into force of the Lisbon Treaty, the rapid accession of the EU to the European Convention on Human Rights is of key importance' (cf. The Stockholm Programme – An open and secure Europe serving and protecting the citizens, OJ C 115 of 4.5.2010, p. 8). On 1 June 2010, Protocol 14 to the Convention came into force, article 17 of which expressly provides that 'the European Union may accede to this Convention' (cf. article 59.2 of the consolidated text).

[99] With some exceptions, such as Advocate General Léger (cf. his intervention in the forum held at the Sorbonne, 13-14 March 2003, the minutes of which were published in G. Cohen-Jonathan and J. Dutheil de La Rochére, dir., *Constitution européenne, démocratie et droits de l'homme*, Nemesis/Bruylant, 2003, p. 267-268). Cf. in this regard the work cited above of L. Scheeck, *La diplomatie commune des cours européennes*, pp. 108 et seq., which also highlights the very favourable reception that a future accession has received amongst the members of the Strasbourg Court. The opinions of Luzius Wildhaber, who was at the time the President of the Strasbourg Court, and Johan Callewaert, are very expressive, envisaging the question of accession as a 'real missing rung in the European constitutional area': cf. *Espace constitutionnel européen et droits fondamentaux. Une visión globale pour un pluralité de droits et de juges*, in *Festsschrift für G.C. Rodrígues Iglesias*, Berliner Wissenschaft-Verlag, 2003, p. 84 (the lack of accession would be defined as an 'outdated anomaly in today's European human rights system' by the Luxembourg Judge Allan Rosas: cf. *Fundamental Rights in the Luxembourg and Strasbourg Courts*, in C. Baudenbacher, P. Tresselt and T. Orlygsson, eds., *The EFTA Court. Ten Yers On*, Hart Publishing, 2005, p. 175).

[100] *Protocol no. 8 relating to Article 6(2) of the Treaty on European Union on the Accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms*, which was an innovation introduced by the Lisbon reform in respect of the European Constitution, already states at article 1 a concern to preserve 'the specific characteristics of the Union and Union law' (cf. in this regard P. Mengozzi, *Les caractéristiques spécifiques de l'Union européenne dans la perspective de son adhésion à la CEDH*, Il Diritto de l'Unione Europea, 2010, no. 2, pp. 231 et seq.), imposing at article 2 *ab initio* that the agreement 'shall ensure that accession of the Union shall not affect the competences of the Union or the powers of its institutions'.

[101] Other questions range from the participation of the Union in the bodies of the Council of Europe (Committee of Ministers, Parliamentary Assembly, and in particular, in the European Court of Human Rights itself), to the provision that in those cases where the European Court of Human Rights should find against a Member State and this decision is liable to raise questions relating to Union Law, the Union may intervene in the capacity of a co-defendant (and *vice versa*, i.e. that in all cases against the Union settled under the same conditions, any State may intervene in the capacity of a co-defendant), with regard to the actual aim of the accession (given that it should not be forgotten that not all the Protocols of the Convention have been ratified by all Member States of the Union, and that amongst those that have been ratified, there are reservations). Cf. the *European Parliament Resolution of 19 May 2010 on the institutional aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* (2009/2241(INI)), as well as the intervention of Viviane Reding before the Committee on Constitutional Affairs on 18 March 2010.

Human Rights will one day decide on whether an act of the Union is in conformity with the Convention without the Court of Justice having first been able to pass final judgement on that question', therefore considering that 'it is necessary to have in place a mechanism capable of ensuring that the Court of Justice is able to hear questions as to the validity of an act of the Union in an effective manner before the European Court of Human Rights is able to decide on the conformity of that act with the Convention'[102].

The problem spotted by the Court would arise, essentially[103], in relation to proceedings filed in Strasbourg against Member States of the Union in a context of implementation (and more specifically, in a context of implementation without any margin of appreciation) of Union Law, where the national judge at the origin of the litigation has omitted to seek a preliminary ruling *ex* article 267 TFEU.

Christian Timmermans, Judge of the Court of Justice, in his intervention before the European Parliament Committee on Constitutional Affairs on 18 March 2010 (and as such prior to the position adopted by the Court in its Discussion document referred to just above) expressed his approval for allowing the Commission the possibility[104] of seeking a pronouncement from Luxembourg once Strasbourg has declared that the proceedings are admissible. This request would lead to the suspension, until Luxembourg makes a ruling, of the proceedings in Strasbourg (which would therefore lose their purpose should the Court of Justice decide that there has been an infringement of fundamental rights).

Olivier De Schutter[105] spoke at the same forum against such a mechanism, considering that 'the creation of a special procedure aimed at allowing the Court of Justice of the European Union an opportunity that it would have been denied by national jurisdiction would give rise to an unprecedented exceptional situation in favour of the Court of Justice'[106]. According to De Schutter, it would be sufficient to reinforce the requirements arising under article 267 TFEU[107] within the national legal systems

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[102] *Discussion document of the Court of Justice of the European Union of 5 May 2010 on certain aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms.* Cf. sections 9 and 12.

[103] But not exclusively, given that it should not be forgotten that the Court of Justice has no powers to examine the primary Union Law in terms of validity (although Judge Timmermans, in his intervention quoted below, considers that in the majority of cases, the supposed clash between this and fundamental rights could be overcome through interpretation; and even where this is not possible, he considered that the Court would have the possibility, should the case arise, to find that it did not have jurisdiction, as from which moment it would be up to the Member States, 'masters of the treaties', to resolve the conflict).

[104] 'Viewed freely', on the basis that 'the case gives rise to a real problem of compatibility with fundamental rights'.

[105] Cf. the adapted text of his hearing before the European Parliament Committee on Constitutional Affairs on 18 March 2010, *L'adhésion de l'Union européenne à la Convention européenne des droits de l'homme: feuille de route de la négociation*, Revue Trimestrielle des Droits de l'Homme, 2010 (83), pp. 563-566.

[106] Françoise Tulkens, President of Section 2 of the Strasbourg Court and who also appeared before the Committee on Constitutional Affairs, was of the opinion that even if an 'absolute equality between the EU and the other Contracting Parties, it is not possible or even desirable', the mechanism proposed by Timmermans would be 'extremely complex' and could 'involve timescales that would hardly be compatible with respect for the rights of European citizens'.

[107] Considering the European judge as a 'legal Judge' or a 'Judge predetermined by law' when the conditions to activate article 267 TFEU arise in compulsory terms; having thus linked preliminary rulings

themselves, in view of the evolution of both Union Law (with a reform of Lisbon that would have emphasized the duty of the national judge to refer to the European judge by providing, as we saw at the relevant time, that 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'[108]) and by the European Convention on Human Rights (with the Strasbourg Court consolidating its case-law in the sense of linking the *arbitrary* refusal to activate article 267 TFEU with an infringement of article 6.1 of the Convention, i.e. the right to a fair trial[109] 'The Court reiterates that the Convention does not guarantee, as such, any right to have a case referred to the ECJ for a preliminary ruling… Nevertheless, refusal of a request for such a referral may infringe the fairness of proceedings if it appears to be arbitrary').

Regardless of how this is resolved during the negotiations[110], we will nonetheless and likewise have to wait and see what kind of future the *Bosphorus case-law*[111] has in store

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to effective judicial protection, internal mechanisms ought to be envisaged to correct any infringement of such fundamental rights recognized by the national legal systems themselves.

In Germany, cf. article 101 (1) GG and the decision of the *Bundesverfassungsgericht* of 9 January 2001 (1 BvR 1036/99). In this regard, e.g. F. Arndt, *The German Federal Constitutional Court At the Intersection of National and European Law: Two recent Decisions*, German Law Journal, 2001, no. 11; C.D. Classen, *German Bundesverfassungsgericht: Medical Training, Decision of 9 January 2001*, Common Market Law Review, 2002, no. 3. In Spain, cf. article 24 EC and Judgement of the Constitutional Court 58/2004 of 19 April. In this regard, J.M. Baño León, *El Tribunal Constitucional, juez comunitario: amparo frente al no planteamiento de cuestión prejudicial (STC 58/2004)*, Revista de Derecho Comunitario Europeo, 2004, no. 18; A. Sánchez Legido, *El Tribunal Constitucional y la garantía interna de la aplicación del Derecho comunitario en España (a propósito de la STC 58/2004)*, Derecho Privado y Constitución, 2004, no. 18; J.I. Ugartemendia Eceizabarrena, *El recurso a la prejudicial (234 TCE) como cuestión de amparo (a propósito de la STC 58/2004)*, Revista Española de Derecho Europeo, 2004, no. 11; P.J. Martín Rodríguez, *La cuestión prejudicial como garantía constitucional: a vueltas con la relevancia constitucional del Derecho Comunitario (a propósito de la STC 58/2004, de 19 de abril, asunto tasa fiscal sobre el juego)*, Revista Española de Derecho Constitucional, 2004, no. 72; R. Alonso García, *Spanish Constitutional Court. Judgement 58/2004, of 19 April 2004*, Common Market Law Review, 2005, no. 2. In Austria, cf. article 83 (2) B-VG and the decision of the *Verfassungsgerichtshof* of 11 December 1995 (VfSlg. 14.390). It should be noted that the case-law of the Austrian Constitutional Court, in contrast to that of Germany or Spain, does not seem to require arbitrariness as an essential factor in order for the legal judge to find that a breach of article 267 TFEU is identified with an infringement of the right set forth in article 83 (2) of the Austrian Constitution (cf. T. Marktler, *The European Court of Justice as a Lawful Judge*, International Constitutional Law Online Journal, 2008, no. 4, pp. 297 et seq.). In the Czech Republic, cf. the decision of the Constitutional Court (*Ústavní Soud*) of 30 June 2008 (IV. ÚS 154/08) (in this regard, M. Navrátilová, *The Preliminary Ruling Before the Constitutional Courts*, International Conference 'Days of Law', Masaryk University, 4-5 November 2008, Acta Universitatis Brunensis Iuridica no 337, pp. 695 et seq.).

[108] Article 19.1, paragraph two, TEU.

[109] Cf., amongst the most recent, *John v. Germany*, decision on admissibility of 13 February 2007 (no. 15073/03), and *Herma v. Germany*, decision on admissibility of 8 December 2009 (no. 54193/07).

[110] The European Parliament, in its Resolution of 19 May 2010, considered that it was sufficient to require the defendant to apply before a national judge for activation of the preliminary ruling, at risk, should he/she not do so, of having the appeal before the Strasbourg Court rejected for not having exhausted all domestic remedies, as required by article 35 of the Convention, (cf. section 10 of the Resolution). The Court of Justice, stated the following opinion in its Discussion Document (section 10): 'With respect more particularly to the preliminary ruling procedure provided for in Article 267 TFEU, it may be pointed out in this connection that its method of operation, as a result of its decentralised nature which means that the national courts have general jurisdiction in respect of European Union law, has given altogether satisfactory results for more than half a century, even though the Union now consists of 27 Member States. However, it is not certain that a reference for a preliminary ruling will be made to the Court of Justice in every case in which the conformity of European Union action with fundamental rights could be challenged. While national courts may, and some of them must, make a reference to the Court of Justice

for us, not just in the context of the activity of the Union subject to the general régime of control by the Court of Justice[112], but also, and above all, the other activity subject to the peculiarities arising from its connection with the CFSP…[113]

for a preliminary ruling, for it to rule on the interpretation and, if need be, the validity of acts of the Union, it is not possible for the parties to set this procedure in motion. *Moreover, it would be difficult to regard this procedure as a remedy which must be made use of as a necessary preliminary to bringing a case before the European Court of Human Rights in accordance with the rule of exhaustion of domestic remedies*' (italics added).

[111] *Bosphorus Hava Yollari Turizim v. Ireland*, decided by Judgement of the ECHR of 20 June 2005 (no. 45036/98). Amongst most recent comments, cf. A. Potteau, *À propos d'un pis-aller : la responsabilité des États membres pour l'incompatibilité du droit de l'Union avec la Convention européenne des droits de l'homme : remarques relatives à plusieurs décisions 'post-Bosphorus' de la Cour européenne des droits de l'homme*, Revue Trimestrielle de Droit Européen, 2009 (4), pp. 697 et seq.; T. Lock, *Beyond Bosphorus: The European Court of Human Rights' Case Law on the Responsibility of Member States of International Organisations Under the European Convention on Human*, SSRN Working Paper, 2010.

[112] Cf. e.g. L. Besselink, *The EU and the European Convention of Human Rights after Lisbon: From 'Bosphorus' Sovereign Immunity to Full Scrutiny?* , SSRN Working Paper, 2008.

[113] Peculiarities which neither before, nor, so it would seem, after Lisbon, are going to meet the requirements of the *Bosphorus doctrine* on equivalent protection, as there is no *complete system* of appeals and procedures aimed at ensuring the legality of the acts of the Institutions of the Union: cf. *Bosphorus*, FJ 160, and *Gestoras Pro Amnistía v. Council (C 354/04 P)* and *Segi et al. v. Council (C-355/04 P)*, decided by Judgements of the Court of Justice of 27 February 2007, FJ 50.