LEGAL ORDER FREE OF PILLARS

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- From the legal point of view, the most important change ushered in by the Treaty of Lisbon concerns the scope of the jurisdiction of the Court of Justice of the European Union. This was widened due to the dismantling of the pillar structure. As a general rule, the jurisdiction of the European Courts now covers previous third pillar matters as well, namely criminal law and police co-operation.

- The dismantling of the pillar structure did not, however, affect the Common Foreign and Security Policy. The Union Courts still do not have jurisdiction in this area. This rule has two important exceptions.

- Although the Area of Freedom, Security and Justice is communitarised and more coherent than before, the previous limits in its territorial scope, namely the opt-outs of the UK, Ireland and Denmark, did not disappear, so limits in the Courts' jurisdiction remain.

- The Treaty of Lisbon amendments did not change the fundamentals of the judicial doctrines, such as the direct effect and primacy of European Union law. Importantly, the application of these doctrines was widened instead, owing to the depillarisation.

- The Treaty of Lisbon amendments meant that the decisions of the European Council and European Union bodies, offices and agencies can be reviewed under the preliminary ruling procedure.

- The Treaty of Lisbon changed the much-debated criteria for the standing of non-privileged applicants in actions to review the legality of the European Union acts.

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The seat of the European Court of Justice is situated in the Kirchberg district of Luxembourg. Photo: Razvan Orendovici / Flickr.com

The effective legal control of the governing institutions of the European Union and its member states, as well as the intensive protection of individual rights, belong to the Union's central characteristics, distinguishing it from intergovernmental organisations. In the multilevel and decentralised system of the Union, an important part of the effective judicial protection of individuals is ensuring the unity and effectiveness of the law throughout the Union. Therefore, the governing institutions of the member states bear the main responsibility for fulfilling the demands of European Union law, and the European Union courts consist of both the Court of Justice of the European Union[1] and national courts.

This state of affairs also prevails subsequent to the Treaty of Lisbon as the Court of Justice "shall ensure that in the interpretation and application of the Treaties the law is observed".[2] The main features of the different proceedings – enforcement actions[3], review of legality[4], review of inaction[5], preliminary rulings[6] and damages actions against the Union[7] – have remained as they were before. The importance of effective legal protection and the role of the national judiciary in the European context are reflected in the Treaty on European Union, as amended by the Treaty of Lisbon, stating that the member states "shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union Law"[8]. In the Charter of Fundamental Rights, the right to effective legal protection is expressed both as the right to an effective remedy and to a fair trial.

In many respects, the Treaty of Lisbon – including the process which led to the Treaty – represents a major milestone in the constitutional evolution of the European Union's legal system. The Treaty amendments have their effects on the European Courts' jurisdiction, too. These changes pertain in part to actual proceedings before the Court of Justice and partly to the legal changes in the scope of the Court's jurisdiction. However, it is not only the proceedings and the scope of jurisdiction that are significant here. Indeed, the horizontal changes, new clarity in the legal status of the Charter of Fundamental Rights and the overall simplification, to name but a few, certainly have a positive impact on the Court's jurisdiction in qualitative terms. The abolishing of the pillar structure and merging of the Community and the Union strengthen the jurisdiction, and the protection of fundamental rights as a result.

This paper provides a brief analysis of the Treaty of Lisbon amendments that affect provisions

1 Hereafter the Court of Justice.

2 TEU Art. 19(1).

3 TFEU Art. 258–260.

4 TFEU Art. 263, see also TFEU Art. 277.

5 TFEU Art. 265.

6 TFEU Art. 267.

7 TFEU Art. 268 and 340.

8 TEU Art. 19(1).

concerning the *jurisdiction* of the Court of Justice of the European Union.[9] The current amendments and their impact on the Union judicial system have come under intense discussion in the European law literature. Certainly, the scope of the Court's jurisdiction is now viewed more widely because matters in Justice and Home Affairs are no longer divided between the Community and the so- called third pillar on police and judicial cooperation in criminal matters, while the changes in various proceedings before the Court are regarded mostly as fine adjustments. However, the real effects of the amendments at the level of the case law of the Court of Justice remain to be seen.

Dismantling the pillar structure, widening the scope of jurisdiction

From the legal point of view, the most important change stemming from the Treaty of Lisbon took place *in the scope of the Court's jurisdiction.* This is because the Treaty amendments meant dismantling the pillar structure. After the Treaty of Lisbon entered into force, the formal boundary between the first pillar and the third pillar – which, post-Amsterdam, also formed an internal division of the Area of Freedom, Security and Justice – has been removed. Currently, all of the operative provisions connected with the Area of Freedom, Security and Justice, as well as the provisions concerning other policies of the European Union are, with one exception, concentrated formally and materially as part of one and the same entity.

The exception is that the Common Foreign and Security Policy, the previous second pillar, is still separate from the rest of the Union powers containing the most numerous and clearest deviation from the principles expressing the so-called Community method. Some changes have occurred in the Common Foreign and Security Policy, but the dismantling of the pillar structure did not greatly affect this area, which will largely remain intergovernmental.

If assessed in general terms, the Common Foreign and Security Policy is still an anomaly compared with the rest of the European Union even in the field of jurisdiction, although there are also some remnants of the intergovernmental mode of integration in the provisions concerning the Area of Freedom, Security and Justice. The Union Courts do not have jurisdiction in matters concerning the Common Foreign and Security Policy, neither in respect of provisions in the Treaty nor when it comes to acts which are based on the Treaty provisions on the Common Foreign and Security Policy. This rule has two important exceptions.

Firstly, private parties can take an annulment action with the aim of reviewing the legality of decisions by the Council, which provide for restrictive measures against them. Evidently, economic sanctions against individuals, for example, were subject to the Court's judicial control before the Treaty of Lisbon, but the new Treaty expanded the possibility of review to the Common Foreign and Security Policy decisions, which affect persons more than economically. Secondly, the Courts have jurisdiction over monitoring the borderline between implementation of the Common Foreign and Security Policy and the rest of the European Union competences. Application of the two sets of competences should not affect one another. After the Treaty of Lisbon amendments, the Courts' monitoring task is a reciprocal one.

While it is true that the Courts' role is limited and the Treaty of Lisbon did not extend their jurisdiction to this field in line with the conditions applicable in the rest of the Union policies, these two exceptions manifest a constitutional role for the Courts beyond the Community. They provide tools for judicial protection and constitutional unity in the Union where the previously different pillars now seem to be inseparable. The Treaty of Lisbon does not change the traditional problem of choosing a legal basis when drawing the line between the Common Foreign and Security Policy and other competences. This problem will be complex and intense after the Treaty amendments too.

Making criminal law and police co-operation previously covered by the third pillar a matter of

9 The amendments had some effects on the judicial institutional architecture as well. There are, for example, new elements in the appointment procedure of the judges. However, relations between the Court and national judiciary as well as the relations between the Court and the General Court (the former Court of First Instance) remain unchanged. Of course, the now possible accession of the EU to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) will also have an impact on the Courts' jurisdiction and development.

Community policy (unification) and as such part of the same totality with other Justice and Home Affairs (reunification) is one of the central achievements of the Treaty of Lisbon. When criminal law and police co-operation became a part of the communitarian legal framework, the pillar structure was dismantled in this respect. The possibilities for judicial review have changed with the entry into force of the Treaty of Lisbon in such a way that the competence of the Court of Justice in the Justice and Home Affairs sector is no longer affected by the restrictions that were due to the specificity of that sector in the previous stages of integration. There are only a few exceptions. First, the evaluation of the validity and proportionality of actions carried out by the police and other officials who supervise obedience to the law, and second, the evaluation of the fulfilment of responsibilities by the member states with respect to maintaining law, order and internal security.

These exceptions are remnants of the previous pillar structure: even the provisions concerning the Area of Freedom, Security and Justice do demonstrate a certain reserve about a pillar-free legal order. The fact that there is a decidedly long five-year transition period connected with some parts of the reformulated Area of Freedom, Security and Justice show that the mindset behind the pillar structure still prevails, although to a much lesser extent. Significantly, during the transitional period the previously established competence of the Court of Justice will apply to the former third pillar provisions that remain subject to a limited jurisdiction of the European Court of Justice. After this period, the Court's jurisdiction will extend without limitations to also cover all legislation in police and criminal co-operation matters.

Besides these policy-related and temporal exceptions, territorial exceptions also exist. The vast majority of member states have communitarised the Area of Freedom, Security and Justice, but some of the previous limits in its territorial scope and the Courts' jurisdiction did not change with the Lisbon Treaty. In particular, the participation of the United Kingdom, Ireland and Denmark in the Area of Freedom, Security and Justice has been limited either directly on the basis of the Treaties, or on the basis of possibilities offered by them. The Treaty of Lisbon will not change this basic arrangement. Rather, their position becomes even more anomalous than before: the degree of integration in this area will vary between different member states in new ways, for example, when it comes to the limits in access to justice imposed by the provisions of the Treaties. Judicially, the fact that three member states have a significantly exceptional status in relation to the Area of Freedom, Security and Justice means that some judicial problems of the previous third pillar remain unresolved in the end.

Notwithstanding the policy-related and territorial exceptions outlined above – and not forgetting the transitional period – the new general rule in the scope of the Courts' jurisdiction is nevertheless noteworthy. Special provisions concerning the competence of the Court in matters of Justice and Home Affairs, which were included in the previous Treaty, have been removed. As a consequence, the Area of Freedom, Security and Justice is more coherent than before and belongs to the same overall judicial framework of the Union. These changes represent the normalisation of the supervisory power of the Commission and enhance the Union-level component in legal processes, while the enhanced legal protection for individuals strengthens judicial and democratic legitimacy. In this overall context, the formalisation of the Charter of Fundamental Rights also has a special significance.

Continuity in direct effect and primacy?

The Treaty of Lisbon amendments did not change the fundamentals of the judicial doctrines that are so important for the functioning and effect of legal protection. Of particular note among these are primacy, direct effect, the obligation of consistent interpretation or the liability of member states to pay damages to individuals in cases of breach of Union law. As one of the implications of depillarisation, there are no longer distinct legal instruments with the special restrictions for their legal effect in the field of police and judicial cooperation in criminal matters. This means that the provisions in acts concerned with the previous third pillar issues have direct effect in case they meet the criteria for direct effect, which in turn will probably give rise to several new preliminary rulings procedures in the near future.

Consequently, the Treaty of Lisbon ended some speculation about the nature and status of the non-first pillar European law instruments in the member states, which had been under discussion ever since the entry into force of the European Union Treaty in 1993.

After the dismantling of the pillar structure, it is clear that there is no longer any question about the extent to which the European Union general principles of law and mechanisms, which were mainly developed out of the judicial procedures of the Court of Justice, will also be applied in the legal system of the entire Area of Freedom, Security and Justice.

Of course, it should be remembered that this transformation is not solely connected with the entry into force of the Treaty of Lisbon. Actually, it could be said that the Treaty of Lisbon merely clarified this question. Even before the entry into force of the Treaty, there were clear references in case law to the effect that these principles could be applied in the third pillar. From the point of view of constitutional principles, the dismantling of the pillar structure had thus already begun before the Treaty of Lisbon entered into force. Especially due to the case law of the Court of Justice, those blocks of activity, which were earlier clearly described as Union pillars, had already taken on the same kinds of features as the Community legal system assumed during the constitutionalisation of the Community. Therefore, the weakening of the pillar structure and the constitutionalisation of the *Union* had already begun before the Treaty of Lisbon.

Interestingly, in the stage of the Constitutional Treaty, there was an attempt to include an article on the primacy of European Union law over the law of the member states. This was replaced in the Treaty of Lisbon by a declaration on primacy. Consequently, there will probably be no significant modifications in constitutional doctrines, neither for the Union part nor the national constitutional law part because of this declaration. The Court will presumably continue along the lines of its previous jurisprudence, while the non-acceptance of total primacy will remain as part of the legal reality. The coexistence of the two views can be better tolerated because there is no "hard" provision in the Treaty. Discussions on the nature of primacy of Union law during the preparation and ratification of the Treaty and the attached declaration have, as such, clarified and legitimised the notion of primacy. As mentioned above, primacy is of course strengthened because after the Treaty of Lisbon, primacy clearly covers all the previous third pillar matters, but one should not forget that it is a category for European Union law in its entirety, including the Common Foreign and Security Policy. In sum, primacy is a characteristic feature of all European Union law, but nowadays clashes between the Union viewpoint and national constitutional understanding are most likely to occur in the former third pillar issues, especially in the criminal law.

Last but certainly not least, the Treaty of Lisbon identifies the Charter of Fundamental Rights as part of the primary law of the Union. Although the Court has referred to the Charter prior to the Treaty of Lisbon, "the role of the rights-based claims within judicial review may nonetheless expand considerably".[10] Thus, the Charter could affect the general profile of the judicial review. In particular, the depillarisation of the third pillar and the judicial control of matters concerning the Area of Freedom, Security and Justice, which is so sensitive a field for conflicts with fundamental rights, could give rise to claims based on the Charter.[11]

Changes in various legal courses of action

The changes in various proceedings before the Court are mostly modifications and fine adjustments by their nature. For example, these modifications include changes in the actions and standing of both privileged and non-privileged applicants. By calling these changes fine adjustments I do not intend to undermine their significance, but only to characterise them as part of the overall revision of the Treaties. These adjustments are also important, especially from the judicial protection point of view.

Of particular interest is the change which has occurred due to the altered status of the European Council. As one of the Union institutions vested with decision-making powers, it now falls under the control of the Court of Justice. The Treaty of Lisbon amendments meant that the decisions of the European Council as well as European Union bodies, offices and agencies[12] became reviewable under the preliminary ruling procedure. In addition to this procedure, they are all referred to in provisions on

10 Craig P., *The Lisbon Treaty, Law, Politics, and Treaty Reform.* Oxford University Press 2010 p. 243.

11 Craig 2010 p. 244.

12 These bodies, offices and agencies include various regulatory and administrative Union actors like the European Chemicals Agency, the Office for Harmonisation in the Internal Market and European Defence Agency, and so forth.

actions for annulment. Their acts with legal effect in relation to the third parties are subject to the legality review. They can be held liable for inaction as well.

These changes contribute both to the legal protection of individual parties and the inter-institutional balance. The reviewability of the European Council's acts underlines the importance of the rule of law in the Union's legal system. This extension of preliminary rulings and the changes in direct actions are once again in line with the Court's earlier case law. The lack of constitutional limitations in this respect is furthermore important when thinking about the possible future membership of the EU in the ECHR.

What is conspicuous about the new status of the European Council is that it is not listed among those privileged institutions which enjoy the right to bring an action for annulment against the acts of other institutions. This seems asymmetrical. It could mean that in the inter-institutional disputes it lacks the possibility to defend its competence. Particularly in the cases that concern the borderline between the Common Foreign and Security Policy and the rest of the Union competences, the European Council might have an interest although the decisions are taken by the Council. However, the European Council has the right to bring an action for failure to act as well as to be a defendant in such cases, which makes the above-mentioned asymmetry even more obvious.

Alongside the widening of the list of reviewable acts and privileged applicants, the Treaty of Lisbon changed the standing criteria for non-privileged, individual applicants – any private party fulfilling the test for standing – in actions to review the legality of the European Union acts. The amendment tries to resolve the acclaimed problem of the restrictiveness of the previous criteria that was due to the longstanding interpretation of the Court. As a result, article 263(4) TFEU now includes a new provision alongside its previous contents: an action for annulment is possible "against a regulatory act which is of direct concern" to that person "and does not entail implementing measures". Although these changes certainly do not meet all the challenges of the previous situation – and the ability of private parties to bring these actions will be rather limited after this amendment too – the amendment will probably remove some stumbling blocks in contesting the validity of Union acts of a general nature. Compared with the previous situation, individual concern is no longer required alongside the direct concern. If there is a need for implementing measures, they should be targets of the procedure, while it will be clarified in case law what is meant by "regulatory act" in this context, as the Treaty does not include this kind of classification.

Conclusions

On a general level, the modifications recorded in the Treaty of Lisbon in further dismantling the pillar structure continue along the lines of the Treaty of Amsterdam. The Treaty of Amsterdam had already attempted to react to the same shortcomings such as weak legal instruments, insufficient access to justice and deficient democratic mechanisms in the third pillar. The Treaty of Lisbon further increases the possibility of judicial review in general and attempts to reintegrate the unity of jurisdiction. Nevertheless, there is still one anomaly, namely the Common Foreign and Security Policy.

Despite the many new challenges discussed in this paper, my overall assessment of the changes is positive when taking into consideration the current stage of integration and the requirements concerning the protection of individuals. The fact that the amendments both make the continuity in jurisdiction possible and at the same time enable wider legal control in the Union is considered important. Above all, the Treaty of Lisbon represents a positive development from the standpoint of the Area of Freedom, Security and Justice, especially in respect of judicial protection and control. The widening of the scope of the Courts' jurisdiction is crucial in this field where the fundamental rights of private parties are commonly concerned. Particularly from the point of view of individuals, it is a positive development that the access to justice in questions concerning the Area will be strengthened.

This development is reminiscent of the attractiveness and strength of the so-called Community method. In this respect, there is good reason to call to mind one argument for the pillar structure, namely the protection of the Community legal system and its central features against the weakening effects of the rest of the EU. The relatively rapid transformation of the Justice and Home Affairs has shown that the dismantling of the pillar structure can no longer be seen as posing this threat of weakening the legal

order of the Community. This is partly because of the Treaty amendments and partly due to the practical actions taken by various actors, especially the Court of Justice, which through its important case law has prevented the colonisation of the Community law by the Union law. It is noticeable how close the economic integration connected with the European Community and the previous clearly politically oriented areas of the Union have become as a result of these changes.

It will be interesting to follow how this development will be reflected in the Common Foreign and Security Policy, which is now more difficult than ever to separate from the rest of the EU activities. Hopefully there will be fascinating cases where the borderline between the Common Foreign and Security Policy and the rest of the Union will be discussed. Furthermore, as seen previously, the cases in which private parties bring annulment actions to the Courts' review in the fields close to the Common Foreign and Security Policy, where the adequate protection of fundamental rights and general principles of law is crucial, have importance for the development of the Union as a community based on the rule of law.

Similarly, there is plenty of room for new case law, especially regarding the revised rules of standing for non-privileged applicants. As the European Council has no role as a claimant in the annulment actions it will be interesting to follow whether there will be a case where it would claim such a position. The abolishing of the pillar structure, and the clear extension of the general principles and mechanisms of law into the scope of the previous third pillar, will certainly give rise to several new questions of interpretation from the national courts in the context of the preliminary ruling procedure.

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