Court for a Union

The Treaty of Lisbon has transformed the Court of Justice. The 'three pillar' structure has gone, procedure has been simplified, and the Court's jurisdiction widened. Even the name has changed. *Timothy Millett*, *référendaire* at the Court, examines the reforms

THE Treaty of Lisbon, signed on 13 December 2007, came into force on 1 December last year. Apart from the well-known political innovations that it introduced, the Treaty also made a number of significant changes relating to the Court of Justice. Among the more important were the abolition of the 'third pillar' structure, with its consequent simplification of the preliminary ruling procedure, the formal integration of the human rights dimension and the widening of the admissibility criteria for the annulment action.

OVERVIEW OF THE TREATY OF LISBON. The Treaty of Lisbon substantially amends the Treaty on European Union (TEU). It also amends the EC Treaty, and renames it the Treaty on the Functioning of the European Union (TFEU). It renumbers the provisions of both those treaties.

The Treaty of Lisbon itself is very difficult to read, being essentially composed of a list of amendments. Its impact is easier to grasp from reading a consolidated text of the Treaties in their new version. A consolidated version of the TEU and the TFEU is published in the Official Journal (C 115/1) of 9 May 2008, which also contains (at p. 361) a helpful table of equivalences of the old and new Treaty provisions.

In both Treaties, the term European Community disappears. It is replaced by European Union. The TEU, as amended, contains the broad principles and fundamental rules of the European Union, along with general provisions on the Union's external action and specific provisions on the common foreign and security policy. The TFEU, replacing the former EC Treaty, contains more detailed rules about the functioning of the institutional machinery and the various policies of the Union.

INCORPORATION OF HUMAN RIGHTS DIMENSION. Prior to the Treaty of Lisbon, the Court of Justice did not formally have jurisdiction over the Charter of Fundamental Rights of the European Union. The Charter now has the same legal value as the Treaties under Article 6 of the TEU. As a result, the jurisdiction of the Court of Justice now includes the Charter of Fundamental Rights, unless the Treaties provide otherwise.

In that respect, Article 1 of Protocol No 30 on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom provides that the Charter does not extend the ability of the Court of Justice to find that the laws, regulations or administrative provisions, practices or action of Poland or the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms. It remains to be seen what will be the practical effect of this reservation.

It is worth noting that under Article 47 of the Charter everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal. In cases where the existence of adequate legal protection is an issue, this provision may weigh in favour of an extensive interpretation of the powers of the Court of Justice.

The relationship between the law of the European Union and the law relating to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) raises complex issues. The Charter is not in identical terms to the ECHR and it operates within the constraints specific to the EU. As a result, the effects of the two instruments may diverge. Article 6 of the TEU and Articles 51 and 52 of the Charter contain provisions evidently designed to minimize differences of interpretation, but it is doubtful that they will be sufficient to prevent any such divergence indefinitely.

At the institutional level, Article 6(2) of the TEU lays down that the Union shall accede to the ECHR. Accession will raise interesting questions about the articulation of remedies and procedures between the Court of Justice and the European Court of Human Rights in Strasbourg.

ABOLITION OF 'THIRD PILLAR' STRUCTURE AND SIMPLIFICATION OF PRELIMINARY RULING PROCEDURE. The Treaty of Maastricht (signed 7 February 1992) introduced, among the other provisions of the TEU, Title VI

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Front: The 'grand staircase' of the Palais at the Court of Justice of the European Union, Luxembourg. Shown middle right, the conference room. The stairs lead from the entrance hall down to the main courtroom. *Back:* The two 24-storey towers housing the Court's translation service (*see page 12*). *Photographs* by Georges Fessy courtesy of the Court of Justice. (Photo credit: Dominique Perrault Architecture, Paris / Adagp / Georges Fessy)

headed 'Provisions on cooperation in the fields of justice and home affairs', which came to be referred to as the 'third pillar'. Subsequently, the civil aspects of this third pillar were split off and incorporated in the EC Treaty as Title IV of Part Three of the EC Treaty, 'Visas, asylum, immigration and other policies related to free movement of persons'. The 'criminal rump' of the third pillar remained in the TEU as Title VI, under the new title 'Provisions on police and judicial cooperation in criminal matters'. The Treaty of Lisbon removes this section from the TEU and reunites all the components of the former third pillar in Title V of Part Three of the TFEU, headed 'Area of freedom, security and justice'. Thus the Treaty of Lisbon removes the former third pillar from the realm of intergovernmental cooperation and brings it completely into the mainstream of European Union law.

Article 68(1) of the EC Treaty used to restrict the power to request preliminary rulings on Title IV of Part Three of the EC Treaty (Visas, asylum, immigration and other policies related to free movement of persons) to national courts against whose decisions there was no judicial remedy under national law. This provision was much criticized for restricting the access of the citizen to the Court of Justice, compared to the normal preliminary ruling procedure under Article 234 of the EC Treaty.

The Treaty of Lisbon has wholly repealed Article 68 of the EC Treaty. Consequently the normal preliminary ruling procedure provided for by Article 267 of the TFEU (formerly Article 234 of the EC Treaty) applies to the area of freedom, security and justice without any restriction on the national courts which may make a reference. This is not merely a helpful simplification but a welcome broadening of the conditions of access to the Court of Justice.

As regards Title VI of the TEU in its pre-Lisbon version (Provisions on police and judicial cooperation in criminal matters), Article 35 of the TEU used to restrict the jurisdiction of the Court of Justice to give preliminary rulings by making it subject to formal acceptance by each Member State. They could, on acceptance, opt to give competence to all their national courts or only to courts of last instance. In practice, most Member States (but not the UK) accepted the jurisdiction of the Court of Justice under Article 35 TEU, and a majority opted to give all their national courts competence to make references. The overall result was not far removed from the system under Article 234 EC. The situation was complicated, however, and basically repugnant to the system of the Treaty, which is based on the compulsory jurisdiction of the Court of Justice applicable equally to all Member States.

The Treaty of Lisbon has wholly repealed Article 35 of the TEU, along with Article 46 TEU which gave it priority over the EC Treaty, the Euratom Treaty and the ECSC Treaty. In the area formerly covered by Article 35 TEU, the normal preliminary ruling procedure will apply in all Member States without the need for formal acceptance. This repeal removes an anomaly in the structure of the Treaty concerning the extent of the Court's jurisdiction, and opens up the possibility of requesting a preliminary ruling from courts in Member States which, like the UK, had not accepted the jurisdiction of the Court of Justice in the field.

The repeal of Articles 35 and 46 of the TEU and of Article 68 of the EC Treaty removes major restrictions on the Court's powers, in effect bringing the former 'third pillar' completely into the normal preliminary ruling jurisdiction. The Court of Justice will acquire general jurisdiction across the whole area of freedom, security and justice, subject to certain exceptions and transitional arrangements. These exceptions and transitional arrangements are particularly wide-ranging and complicated in the case of the UK.

Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, provides that the United Kingdom and Ireland do not take part in the adoption of proposed measures in the area of freedom, security and justice, although they have the right to opt in to a proposal if they choose and they retain the right to change their minds and opt in to the measure later. Article 2 of the Protocol provides that, if the United Kingdom or Ireland have not opted in to such a measure, no decision of the Court of Justice interpreting the measure shall be binding or applicable in those countries.

Article 10(1) of Protocol No 36 on transitional provisions provides that, with respect to acts of the Union in the field of police cooperation and judicial cooperation in criminal matters adopted before the entry into force of the Treaty of Lisbon,

Editor's Note

This issue of the *European Advocate* is largely dedicated to the Lisbon Treaty, or more precisely to the post-Lisbon amendments to the Treaty on European Union and the EC Treaty (which now has the slightly unwieldy new name of Treaty on the Functioning of the European Union and matching acronym of TFEU). As former President Valéry Giscard d'Estaing remarked in his open letter to *Le Monde* (with more than a hint of sour grapes) about the difference between the abortive EU Constitution and the Lisbon Treaty: 'Dans le traité de Lisbonne, rédigé exclusivement à partir du projet de traité constitutionnel, les outils sont exactement les mêmes. Seul l'ordre a été changé dans la boîte à outils. La boîte, elle-même, a été redécorée, en utilisant un modèle ancien, qui comporte trois casiers dans lesquels il faut fouiller pour trouver ce que l'on cherche.'

Timothy Millett (*page 2, opposite*) has provided a masterful introduction to the tools in that *boîte à outils*, with specific reference to the ECJ (now Court of Justice of the European Union). Particularly interesting for litigators may be the extension of direct actions pursuant to Article 263 TFEU to (*inter alia*) 'regulatory acts' of direct (but not necessarily individual) concern to natural or legal persons; moreover including such acts by 'bodies, offices or agencies' of the EU. What is a 'regulatory act' has yet to be defined. Fertile ground for litigation.

On page 8 Piet Eeckhout provides a scholarly view of the EU and international law and relations post-Lisbon, which now include the principles of the UN Charter. Erik Lagerlöf picks up on one facet of these international aspects in a commentary on the common commercial policy at page 10.

On other ECJ-related topics, Carsten Zatschler analyses the ECJ's fact-finding powers and abilities (*page 11*) and Sarah Ford summarizes a selection of recent ECJ judgments (*page 14*). □

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the powers of the Court of Justice of the European Union under Title VI of the TEU in its pre-Lisbon version shall remain unchanged during the transitional period. This includes, in particular, the power of the Court of Justice to give preliminary rulings where Member States have accepted its jurisdiction pursuant to Article 35(2) of the TEU, or its lack of power where, like the UK, a State has not done so. The length of the transitional period is set at five years by Article 10(3) of Protocol No 36. Under Article 10(2), however, if any existing measures of the Union in the field of police cooperation and judicial cooperation in criminal matters are amended during the transitional period, the Court of Justice can now exercise its full powers under Article 19(3) of the TEU in relation to the amended measure.

In addition, Article 276 of the TFEU restricts the powers of the Court of Justice in relation to measures concerning judicial cooperation in criminal matters and police cooperation. In these fields, the Court of Justice has 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 on Member States with regard to the maintenance of law and order and safeguarding internal security.

Apart from the extension of the jurisdiction of the Court of Justice in the area of freedom, security and justice, the Treaty of Lisbon makes some amendments to the preliminary ruling procedure itself. Article 267 of the TFEU re-enacts the text of Article 234 of the EC Treaty with two amendments. First, point (c) of the first paragraph (jurisdiction to rule on the statutes of bodies established by an act of the Council) is repealed. Secondly, a new fourth paragraph is added, according to which, if a question of interpretation or validity of EU 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 shall act with the minimum of delay. That paragraph implicitly refers to the urgent preliminary ruling procedure (for a summary of that procedure, see 'A Marked Improvement', Timothy Millett (2008) 158 *NLJ* 694). In this connection, it may be observed that the repeal of Article 68 of the EC Treaty and Article 35 of the TEU means that, in the fields formerly covered by those Articles, requests for urgent preliminary rulings may be made by a wider range of national courts. This may lead to an increase in the number of requests for urgent preliminary rulings.

COMMON FOREIGN AND SECURITY POLICY. Unlike the former 'third pillar', the former 'second pillar' remains largely outside the jurisdiction of the Court of Justice. Under Article 24(1) of the TEU and Article 275 of the TFEU, the Court of Justice does not as a general rule have jurisdiction with respect to the Treaty provisions on the common foreign and security policy (Articles 23 to 46 of the TEU) and acts adopted on the basis of those provisions. The Treaty of Lisbon provides only limited exceptions to this rule.

First, the Court of Justice has jurisdiction (Article 275 TFEU, para 2) to monitor compliance with Article 40 of the TEU. Under that provision, the implementation of the common foreign and security policy must not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of Union competences as set out in Articles 3 to 6 of the TFEU, and vice versa.

Secondly, the Court has jurisdiction (ibid.) to review the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Articles 23 to 46 of the TEU. This provision appears to reflect the principles established by the Court of Justice in its judgments on the freezing of assets of suspected terrorists, in particular the judgment in Joined Cases C–402/05 P and C–415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351.

EXTENSION OF SCOPE OF ACTION FOR ANNULMENT. Article 263 of the TFEU contains several amendments compared to Article 230 of the EC Treaty, which it replaces.

The first paragraph of Article 263 of the TFEU extends the scope of judicial review to acts of the European Council and acts of bodies, offices or agencies of the Union which are intended to produce legal effects *vis-à-vis* third parties. The fifth paragraph of Article 263 TFEU provides that acts setting up bodies, offices or agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of those bodies, offices or agencies intended to produce legal effects in relation to them. Article 230(1) of the EC Treaty made no specific reference to acts of bodies or agencies other than the institutions. While it was in force, the Court's power to review such acts depended on the provisions of the legislation establishing those bodies. The new provision in Article 263 TFEU gives the Court a mandate under the Treaty to review the legality of all such acts, which is a step forward in putting judicial protection on a systematic basis under the Treaties.

The third paragraph of Article 263 of the TFEU extends the jurisdiction to actions brought by the Committee of the Regions for the purpose of protecting its prerogatives. The Committee of the Regions thus joins the Court of Auditors and the European Central Bank as a 'semi-privileged applicant'. In that connection, it may be pointed out that the Committee of the Regions, or one of the Member States acting on behalf of its national parliament, may bring an annulment action on grounds of infringement of the principle of subsidiarity under Article 8 of Protocol No 2 on the application of the principles of subsidiarity and proportionality.

As regards annulment actions by natural or legal persons, the fourth paragraph of Article 263 of the TFEU comprises an amended version of the fourth paragraph of Article 230 of the EC Treaty. It reads: 'Any natural or legal person may … 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.'

This text first re-enacts the substance of the fourth paragraph of Article 230 EC, slightly broadening the category of act which can be challenged, by providing that a natural or legal person may bring an annulment action against any act (not just a decision or a regulation) which is addressed to them or is of direct and individual concern to them. It then adds a new possibility, to the effect that such persons may also bring an annulment action against a 'regulatory act' which is of direct concern to them and does not entail implementing measures.

This provision extends the scope for natural or legal persons to bring annulment actions by removing the requirement of 'individual concern' which had been strictly construed (see Case 25/62 *Plaumann v Commission* [1963] ECR 95) and had been widely criticized for being over-restrictive (see in particular the Opinion of Advocate General Jacobs in Case C–50/00 P *Unión de*

*Pequeños Agricultores v Counci*l [2002] ECR I-6677). Nevertheless, the requirement of 'direct concern' remains, and the provision is limited to 'regulatory acts' which do not entail implementing measures.

'Regulatory act' is not defined in the Treaty, but it will fall to be construed by reference to the new typology of legal acts established in Articles 289 to 291 of the TFEU: legislative acts (adopted by the legislative procedure), delegated acts (adopted by the Commission under powers delegated by a legislative act) and implementing acts (adopted by Member States, the Commission or the Council as necessary). The central question is whether 'regulatory act' is to be construed as excluding all legislative acts. Such an interpretation would have the advantage of clarity and predictability. However, it would substantially restrict the scope of the annulment action and have the unsatisfactory feature of making admissibility depend on the procedure by which a measure happened to be adopted rather than on its content and effect. An alternative would be to interpret 'regulatory acts' to include certain legislative measures, but the criteria for defining the measures covered are not obvious and might not be simple to define. It is submitted that the authors of the Treaty had in mind a relatively narrow extension of the right of action, along the lines of the first of these suggested interpretations. The Court of Justice may not necessarily take such a narrow view, however, particularly in light of the fact that Article 47 of the Charter of Fundamental Rights, laying down the right to an effective remedy, now has legal force under the Treaties.

The test of 'direct concern' is already the subject of abundant case law which indicates that the effect of the contested measure on the person's interests must not depend on the discretion of another person. Thus, if an act of the European Union requires a Member State to adopt implementing measures, and the State retains some discretion over the implementing measures to be adopted, direct concern is excluded. The requirement, in Article 263 TFEU, that the measure should not 'entail implementing measures' would appear to be tautologous. Its origin, however, lies in concerns such as those expressed by the Court of First Instance in T–177/01 *Jégo-Quéré v Commission* [2002] ECR II-2365 about the situation where a Union measure does not entail any national measure for its implementation. In that case the only way for the individual concerned to obtain judicial protection was to bring the validity of the measure before the national courts by violating the rules it lays down. That was not considered an adequate means of judicial protection, as individuals cannot be required to breach the law in order to gain access to justice. The explicit reference in Article 263 TFEU to acts which do not entail implementing measures is apparently intended to ensure that an annulment action will now lie at least in situations such as those which gave rise to concern in the cases *Unión de Pequeños Agricultores* and C–263/02 P *Commission v Jégo-Quéré* [2004] ECR I-3425. The exact scope of the extension of the right of natural or legal persons to bring an action for annulment has still to be worked out in the case law.

Poland's president, the late Lech Kaczynski, after signing the Lisbon Treaty last October. (EU)

EXTENSION OF THE ACTION FOR FAILURE TO ACT. The action for failure to act is, so to speak, the mirror image of the action for annulment. Although such actions are rarely brought, they complete the range of judicial protection in the EU legal order. Accordingly, the Treaty of Lisbon has extended their scope in line with that of the action for annulment.

As compared to Article 232 of the EC Treaty, which it replaces, Article 265 of the TFEU extends the right to bring an action for failure to act to the European Council and allows the Member States and the other institutions of the Union to bring such an action against the European Council Liability to be sued under this article is also extended to bodies, offices and agencies of the Union which have failed to act.

ACCELERATION OF THE PROCEDURE FOR IMPOSING PENALTIES ON MEMBER STATES IN CASES OF INFRINGEMENT. The Lisbon Treaty has shortened the procedure for imposing penalties on Member States which fail to comply with a judgment establishing an infringement. Under Article 260(2) TFEU (replacing Article 228(2) EC), if the Commission considers that a Member State has failed to comply with a judgment of the Court establishing an infringement of Union law, it may now bring the matter before the Court without first issuing a reasoned opinion and giving the Member State concerned time to comply with it.

Article 260(3) TFEU also speeds up the procedure in the initial infringement action under Article 258 TFEU (formerly Article 226 EC) where that action concerns a failure by the Member State to notify measures transposing a directive. In such a case, it is now provided that the Commission may, when it brings a case before the Court pursuant to Article 258 of the TFEU, specify the amount of the lump sum or penalty payment to be made by the Member State which it considers appropriate in the circumstances.

CHANGE OF OFFICIAL NAMES OF THE COURTS. In addition to the changes concerning the jurisdiction and procedures of the Court, the Treaty of Lisbon contains a number of institutional changes, not least the renaming of the Courts.

Under Article 13(1) of the TEU, fifth indent, the name of the institution as a whole becomes the Court of Justice of the European Union. Under Article 19(1) TEU, that institution includes the 'Court of Justice', the 'General Court' (formerly the 'Court of First Instance') and 'specialized courts' (formerly called judicial panels). The name of the European Union Civil Service Tribunal, the first and so far the only specialized court to be established, remains unchanged. The renaming of the General Court puts an end to the paradox that the 'Court of First Instance' had jurisdiction in appeals against decisions of the Civil Service Tribunal. On the other hand, there is now an overlap between the name of the institution as a whole (Court of Justice of the European Union) and the name of the senior court (Court of Justice); a source of ambiguity.

MODE OF ESTABLISHMENT OF SPECIALIZED COURTS. As regards the specialized courts, Article 257 TFEU re-enacts the text of Article 225a EC, subject to certain amendments. Under Article 257 TFEU, first paragraph, the specialized courts are established by means of regulations adopted by the Council and the European Parliament

What's in a name? *From its creation in 1952 the ECJ, then the Court of Justice of the ECSC, sat for six years in the Villa Vauban, Luxembourg—now an art gallery. There were seven Judges, two Advocates General and a Registrar.* Left to right: *Advocates General Lagrange and Roemer; Judges Rueff, Serrarens, Delvaux, Pilotti (Court President 1952–58), van Kleffens, Riese, Hammes.* Far right: *Albert van Houtte, Registrar. (Photo: ECJ)*

following the ordinary legislative procedure (formerly they were established by the Council acting unanimously and by way of decision) and they are 'attached' to the General Court.

INCREASE IN THE NUMBER OF ADVOCATES GENERAL. Declaration No 38 on Article 252 of the TFEU concerning the number of Advocates General in the Court of Justice, adopted by the Intergovernmental Conference and annexed to the Final Act of the Lisbon Treaty, declares that if the Court of Justice asks for the number of Advocates General to be increased by three persons (i.e. from eight to 11) the Council will agree to that increase. Poland would then have a permanent Advocate General, alongside Germany, France, Italy, Spain and the United Kingdom, and the present system of rotation would comprise five Advocates General instead of three.

ADVISORY PANEL ON THE APPOINTMENT OF MEMBERS OF THE COURT OF JUSTICE AND THE GENERAL COURT. The Treaty of Lisbon introduces a requirement that the appointment of a member of the Court of Justice or the General Court may take place only after consulting a panel set up to give an opinion on a candidate's suitability to perform the duties of a Judge or Advocate General of the Court of Justice and the General Court (Articles 253 to 255 TFEU). The panel comprises seven persons chosen from among former members of the Court of Justice and the General Court, members of national supreme courts and lawyers of recognized competence, one of whom is proposed by the European Parliament. The Council is to adopt a decision on establishing the panel's operating rules and a decision appointing its members. The panel acts on the initiative of the President of the Court of Justice.

This advisory panel has only a limited role. Unlike the situation in the Civil Service Tribunal, posts as members of the Court of Justice or the General Court are not open to applications from the public which are then sifted by a selection committee. Candidates for the Court of Justice and the General Court are still put forward by the Member States, and the advisory panel is confined to declaring whether a candidate is suitable or unsuitable. The transparency of the selection procedure continues to depend to a degree on the procedures applied in the Member State concerned.

CONCLUSION. Apart from obvious changes such as the renumbering of the Treaty articles and the renaming of the Courts, the Treaty of Lisbon has introduced changes of major significance for the Court of Justice. The extension of its jurisdiction over the whole of the area of freedom, security and justice, including criminal law matters, gives it power in areas that affect the citizen more closely than the economic, 'technocratic' matters which used to typify Union law. This field will be among the first affected by the Charter of Fundamental Rights, to which the Lisbon Treaty has given binding force, equal to that of the Treaties themselves. This development gives the Court a formal role as a human rights court and enhances its profile as a constitutional court. For the practitioner and his client, two other innovations are of particular importance. First, the extension of the right of natural or legal persons to bring an annulment action removes a serious restriction on access to justice. Secondly, the repeal of the special forms of preliminary ruling procedure linked to the former 'third pillar' introduces both a helpful simplification and a welcome broadening of the conditions for bringing a preliminary reference before the Court of Justice. □

This article is based on a text to be published as an update to Paul Lasok QC, Timothy Millett and Anneli Howard, 'The Court of Justice and the Court of First Instance', Section 2 in Vaughan and Robertson (eds), Law of the European Union (OUP). All views expressed are personal to the author and do not engage the institution

The end of the Community

The Common Market has seen many changes in its nearly 60 years of existence. Starting with the six States forming the geographic core of democratic western Europe and covering just two, but essential, war industries, it quickly expanded to all economic sectors and, more slowly, to nearly all the countries of western, central and eastern, Europe.

Along the way, as it grew bigger, it accepted that unanimous agreement on major constitutional advances would not always be attainable and that partial agreement could be acceptable. Such breach of the ideal of solidarity was hard but the driving power of the originating six core States was irresistible.

Consequently there are now four 'common markets': the original commercial grouping, which covers the 27 Member States plus the four EFTA states; the agriculture and fisheries grouping of the 27, excluding the EFTA states; the Schengen common travel area, which includes the whole of Europe with the sole exception of the UK and Ireland on the western margin and the Black Sea states in the east; and the single currency area, covering a little over half the total EU membership. To this may be added the rheumatoid dissidence of the first accession trio (Denmark, Ireland and UK) who have opted out of some Treaty provisions on justice, security and aliens, but can in various ways opt in again from their opt-outs.

'Like a dog worrying a bone, the movement for an all-embracing union would not let go'

Even so, the political classes in the core Member States quickly became restive at the perceived limitation of the Common Market to economic matters. With their minds set on obtaining popular enthusiasm for the European integration project, rather than mere acceptance by commercial interests, the concept of a Common Market gradually became anathema and was dropped from orthodox academic writing. In the Single European Act it was eventually replaced by a new term 'internal market' which described the commercial workings of the project but not, and in fact never, the Project itself. Thus the term 'common market', which quickly became standard usage in the literature and in the titles of early publications: *Revue du Marché Commun*, *Common Market Law Review*, *Common Market Law Reports*, ceased to exist.

In its place the official term 'Community' came back into favour. There were three of these: two covering the power sector in the fields of coal and steel and of nuclear energy and one universal economic community. Each of the three was governed by its own treaty with no hierarchy between them. But probably because the generalist Economic Community affected a greater range of players, it immediately became the sole focus of the development of a new system of Community law through Court of Justice case decisions. The two specialist Communities were consequently ignored by lawyers and dropped almost completely off the radar.

The Single European Act, however, was not restricted merely to a verbal change. It was, in fact, a compromise outcome of a much more far-reaching ambition to set the European Community constitutionally on a new path which would transcend the economic criteria of a mere, albeit unusually invasive, customs union. The failure on that occasion to make more than partial progress did not discourage its protagonists and the SEA was followed by the even more revolutionary Maastricht Treaty which introduced new non-economic sectors but at the expense of increasing Member State powers under an ingenious 'pillar' system. But even that was a compromise and the original Spinellian proposals had to be split into two draft treaties of which only one was eventually carried through.

Like a dog worrying a bone, however, the movement for an all-embracing union would not let go and a series of more or less five-yearly IGCs ensued, each new treaty edging closer to the goal: Amsterdam, Nice, culminating in the so-called Constitutional Treaty, which would have replaced everything before it with a single codifying treaty to convert the original Communities into a comprehensive union.

Maastricht had in fact introduced the new term 'European Union' but, because it was a compromise solution, it was half-baked. The new Constitution would have completed the baking; but its use of new terminology redolent of statehood and its obvious discomfort with the whole of the existing European Community frightened the people. Although the Constitutional Treaty was adopted by the governments it never completed ratification and after being rejected by two popular referendums it was dropped, only to be immediately resuscitated in a 'cleaned up' version and eventually, after numerous vicissitudes, adopted, ratified and brought into force as a traditional amending treaty, the Treaty of Lisbon.

Not so radical as Maastricht but more pervasive in its interference with the careful balance of powers by which the European Economic Community had been constructed, the new Treaty epitomized the ideal of a 'Union' of European states built on a strong undertow of federalist and statist thinking. This traditionalist approach to integration was opposed to the more original concept of a 'Community' in which the Member States were embodied but tamed. Paradoxically, in the Union the Member States have less legitimacy but far greater power.

The victory of the Union is celebrated symbolically by the systematic expunging of every mention of the word 'Community' from the texts of the two foundation treaties, from the original Community Treaty (now TFEU) upon which the European rule of law had been developed, and from the TEU through which the European rule of politics is being developed and to which the TFEU has in reality been subordinated.

How this conflict plays out will be a defining theme of the coming years. □

For all the world

How will the Lisbon Treaty affect international law in the EU, asks *Professor Piet Eeckhout*, director of the Centre of European Law at King's College, London

After Ireland voted yes — remarkable how democracy swings! — the Treaty of Lisbon has entered into force, and the curtain has fallen over the EU's long constitutional episode which followed the Treaty of Nice. It is by no means the end of the play, though. The curtain might have fallen for the general public, but behind the scenes much of the work remains to be done. The Treaty's entry into force does not close institutional reform. Quite the contrary. It has set in motion a period of intense institutional adaptation, governed by often sketchy Treaty provisions which are indeterminate and riddled with opportunities for inter-institutional strife. This is particularly so for the conduct of the EU's external relations — or external action, as the Treaties now call it. The role and position of the High Representative for Foreign Affairs and Security Policy, Catherine Ashton, who is also a Commission Vice-President, needs to be clarified. Her relationship with the Commission President and with the new European Council President needs to be developed. The EU's External Action Service has to be set up. These are just some examples.

My focus here is not on such institutional issues, but on other questions regarding the EU's future as an international actor, subject to international law. What are some of the main changes which may affect that future? Here are some projections.

'Readers no doubt know this by now — the European Community is no more'

Readers no doubt know this by now, but it is still momentous: the European Community is no more. The difficult construction of a European Union, based on and complementing the European Community, was replaced by a single EU, which has legal personality (Article 47 TEU). That will terminate the rather tedious academic discussions about whether the EU, as opposed to the EC, had such legal personality (it clearly had, at the latest from the moment it started concluding international agreements). Instead of two international legal persons, the EU and the EC, there is now only one. This also means that the various EU external policies will need to be further integrated. The single EU will be able to act under international law, mainly by concluding international agreements and through action in international organizations, in all the spheres of its activity. There is a big but, though. The common foreign and security policy (CFSP) continues to be subject to a specific and separate set of provisions, in the TEU, which are not very different from the old ones. The CFSP essentially retains its 'pillar' status. A question this raises is whether, under the new Treaties, the EU will be capable of concluding international agreements which contain, for example, provisions on both foreign policy and trade policy. At present such inter-pillar agreements appear excluded — see the ECJ in Case C–91/05 *Commission v Council (Small Arms and Light Weapons)* [2008] ECR I-3651, paras 76–77. It is not clear whether Lisbon changes this.

One way in which the new Treaties aim to unify external action is through a common set of provisions which, *inter alia,* define the EU's overall objectives on the international scene. A short version can be found in Article 3(5) TEU, a longer one in Article 21 TEU. There is no lack of ambition. The EU 'shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to strict observance and the development of international law, including respect for the principles of the United Nations Charter' (Article 3(5) TEU). Europeans continue to be from Venus, not Mars. But do such provisions have any legal effect? It is an interesting question. The ECJ has so far not been minded to pay much attention to general Treaty objectives when interpreting or reviewing Community acts (Article 131 EC, for example, which spoke of 'the progressive abolition of restrictions on international trade', has never had any

Uncertain role: the EU's High Representative for Foreign Affairs and Security Policy, Catherine Ashton, speaks at the UN headquarters in New York, 3 May 2010. (Photo: EU)

significance for the judicial review of trade policy measures). But a new Treaty may lead to new case law.

International lawyers will note the final phrase in Article 3(5) TEU: strict observance and development of international law, including respect for the principles of the UN Charter. Could that provision become relevant for the EU Courts? The *Kadi* judgment springs to mind, of course (Joined Cases C–402/05 P and C–415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351). Many international lawyers are critical of the way the Court treated UN law in that judgment. Would the ECJ redefine the relationship between EU law and UN law, in the light of the above provision? In any event it is not unlikely that there will be a sequel to *Kadi* before the ECJ (there is an action for the annulment of Mr Kadi's relisting pending before the General Court).

The EU is, of course, already an active international player, in terms of concluding international agreements in particular. Lisbon is remarkable not only for what it regulates but also for what it leaves untouched. The EU's treaty-making practice has been dominated by its preference for concluding so-called mixed agreements, which had the EC and its Member States as contracting parties. These mixed agreements raise a host of complex questions, under EU law, but also under international law. The Treaties never addressed those questions — other than through the application of the principle of loyalty (Article 10 EC), which was translated into a duty of cooperation in external action. Lisbon, notwithstanding its focus on external action, adds nothing about mixed agreements. Indeed, a casual reader of the EU Treaties will find no references to mixed agreements, and will not even be aware they exist. Constitutional law evolves in written and in unwritten form. It will continue to fall to the ECJ to put flesh on the duty of cooperation (see, for example, the recent Opinion by Advocate General Maduro in Case C–246/07 *Commission v Sweden*).

The EU's external powers — its catalogue of competences — did not substantially expand when Lisbon entered into force, with one major exception. The common commercial policy now extends to 'foreign direct investment' (Article 207 TFEU). With a tick of the clock, an important area of international law has come within the EU's exclusive powers. This is a remarkable development, given that the EU has never displayed a very strong interest in this branch of international economic law. Member States all operate a complex network of bilateral investment treaties, which are at the heart of international investment law. The EU's involvement has been limited to participation in the Energy Charter Treaty, and in GATS, which have investment dimensions, as well as in the negotiation of the ill-fated multilateral agreement on investment. A momentous development, therefore, and it is at this stage unclear how the EU institutions intend to proceed. The many bilateral treaties cannot immediately be replaced by Europe-wide agreements, and the EU will therefore have to authorize their continued existence and operation. But beyond this there is at present no discernible policy direction. International lawyers with an interest in this area will need to brush up on the law of EU external competences, EU trade policy, and treaty-making (including mixity).

These are just some pointers to the kind of questions Lisbon may bring to the surface. One final comment. Notwithstanding the repeal of the Constitution for Europe, and the excision of constitutional symbols and concepts from its Lisbon twin, constitutionalism continues to be the EU law paradigm. The excisions may make this a bit more difficult to notice, but they have not fundamentally altered the nature of the exercise. So Lisbon further strengthens the EU constitution, small caps; and it looks likely that it will be with us in its present form for quite some time. □

This article has been adapted by the author from his contributions to the weblog of the European Journal of International Law

The European Commission president, José Manuel Barroso, and Sweden's prime minister, Fredrik Reinfeldt, meet China's President Hu Jintao at last November's EU-China summit, Nanjing. (EU)

Co-opted members of the BEG committee 2009–10

The following have been co-opted by the BEG committee

KATHERINE APPS
Littleton Chambers

MICHAEL BOWSHER QC
Monckton Chambers

ELISA HOLMES
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MAYA LESTER
Brick Court Chambers

SARAH LOVE
Brick Court Chambers

TOM RICHARDS
Blackstone Chambers

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Policy creep

Uncomfortable questions can—and should—be asked about the EU's new common commercial policy, says *Erik Lagerlöf* of the European University Institute

Having struggled through two referendums in Ireland and delays imposed by a stubborn Czech President, we now live under the reign of the Lisbon Treaty. The increase in the competence of the European Union at the expense of the Member States, and the extent to which this has been the result of the new European 'constitution', are the subject of fierce debate, certainly in the UK. With the Eurosceptics' alarm bells ringing loudly, it must be borne in mind that the safeguards introduced by the Treaty, primarily represented by the reinforced principle of subsidiarity, signify an unprecedented increase in the 'ownership' of the European project at national level. And although much confusion still surrounds the likely impact of the new Treaty, fears of a federal Europe seem exaggerated. There is, however, one area about which uncomfortable questions can, and should, be asked: the new common commercial policy.

Under the original EC Treaty, exclusive Community competence in relation to the common commercial policy may not have been explicit, and some of the arguments used in its favour can surely be questioned, but there were also legitimate reasons why the Court of Justice insisted upon stronger Community powers. With time, and growing confidence in itself as a constitutional court, the ECJ came to focus more on Treaty-imposed boundaries to Community competence rather than on the establishment of a dynamic and exclusive common commercial policy (see Opinion 1/94 *WTO Agreements* [1994] ECR I-5267 and the recent Opinion 1/08 of 30 November 2009, not yet reported). As a result, shared competence became more prominent in external economic relations and while scope was left for Community action the Member States were not forced to yield all ground to Brussels. This message was clearly echoed in the Nice Treaty amendments which, notably, did away with the previous all-exclusive nature of the common commercial policy.

With the Lisbon Treaty and the new Article 207 TFEU on the common commercial policy, exclusive Union competence has come back into fashion and significant changes have been made. All aspects of trade in services and commercial aspects of intellectual property, and even trade in cultural and audiovisual services, as well as social, education and health services, are included within Union powers (albeit that unanimity is sometimes required).

Most astonishing is the inclusion of foreign direct investment (FDI) in the exclusive common commercial policy competence, an amendment rejected in earlier rounds of Treaty reform. Despite—or perhaps because of—it being an interpretative minefield, no further definition of what the concept might cover has been given. To say that it is potentially wide is an understatement. The ECJ has previously interpreted the term 'direct investment' in accordance with Directive 361/88/EC, and then considered it to be capital funds provided by a natural or legal entity to an undertaking characterized by a long-term relationship and lasting interest and control of its activity (see Case C–463/00 *Commission v Spain and UK* [2003] ECR 2003 I-4581, at para 53). The addition of the word foreign ought to imply that any FDI measure taken under the common commercial policy must refer specifically to investment to or from third countries. It is explicitly stated that an objective of the common commercial policy is, progressively, to abolish restrictions on FDI (Article 206 TFEU). It seems that not only are direct barriers to FDI market access likely to fall within EU exclusivity; other investment policies, not directly dealing with formal restrictions on foreign investment, may be included as well.

To make a more qualified guess as to exactly how far the new common commercial policy might stretch is difficult. For example, overlaps exist between FDI as part of the Union's exclusive common commercial policy and related aspects in other provisions in the Treaty, characterized by shared competence. One issue likely to be heavily contested is whether or not the protection of existing investment against expropriation and unfair treatment falls within the common commercial policy. It seems reasonable to believe that in the near future the Court will have to play a role in determining these new boundaries. What is certain is that the advancement of EU exclusivity to include FDI will imply vast changes for the Member States. What to do with all their bilateral investment treaties? So far the Commission sits quiet.

Apart from foreign direct investment, some other innovations of the new common commercial policy should be underlined. The parallelism between the common commercial policy and internal Union competence, being at the heart of the Nice amendments, is no longer as strong as before. Previously we were assured that an agreement could not be concluded on the basis of common commercial policy powers if it would go beyond the Community's internal powers (see ex Article 133(6) EC). This has disappeared, and instead there is a provision guarding against so-called 'reverse AETR' effects. This means that if the EU concludes an external agreement under the common commercial policy, it will not give rise to an exclusivity of Union competence as against the Member States in relation to any subsequent EU-internal action within the same field (Article 207(6) TFEU). The new explicit division between internal and external competence of the Union, where the latter aspect exceeds the former, is somewhat similar to the solution found in many federal systems.

There are also significant changes to the common commercial policy objectives. Apart from the general objective of abolishing trade restrictions being extended to foreign direct investment, the aim of lowering customs barriers has been extended to include 'other barriers' to trade (Article 206 TFEU). This latter amendment is a reflection of the Court's interpretation of the common commercial policy to include quantitative restrictions and measures of equivalent effect as well as tariffs (see Case C–62/88 *Greece v Council* [1990] ECR I-1527). Second, and perhaps more

importantly, instead of referring to the aims of the Member States, as in the original Treaty provision, it is now the Union that, by its trade policy, 'shall contribute' to the development of world trade. While the reference to the Union is a reflection of its exclusive powers, the replacement of the word 'aim' with 'shall' might imply a stronger obligation on the Union to work towards trade liberalization. Third, the Treaty also provides that the common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action (Article 207(1) TFEU). Accordingly, it is not only made explicit that Union trade policy may be used to attain non-economic objectives, there is now an explicit obligation on the Union to take into account other objectives when forming its trade policy, including environmental and sustainable development objectives and the promotion of human rights.

What might be the reasons for these far-reaching amendments? When the ECJ first defined the common commercial policy as an exclusive Community competence it was done in order to protect the internal market from competitive distortions. Uniformity of trade policy was never an end in itself. More recently the ECJ has focused on unity rather than uniformity, on shared rather than exclusive competence, and has thereby made mixed agreements more prominent while promoting the duty of co-operation to close the ranks between the Member States and the Union [*on which see also the article by Professor Piet Eeckhout, 'For all the world', page 8*]. Given the increase of exclusive Union competence discussed here, should the joint project in areas of commercial policy be seen as a failure? No proper investigation into the concept of the mixed agreement and the function of the duty of cooperation in the commercial policy context seems to have been attempted. The need for further exclusive Union competence to be deployed within a framework of much broader objectives is far from obvious. The evolution of Union external relations is in general marked by a flexible application of seemingly strict principles where the modes of interaction between the Member States and the Union testify to a culture of cooperation, even in potentially controversial areas.

At least at first sight it seems that careless assumptions may have been made when reforming the common commercial policy in the Lisbon Treaty. □

Finding facts

Carsten Zatschler, legal secretary to Judge Schiemann at the European Court of Justice, examines the use of facts in judicial review by the EU Courts

Under Article 263 TFEU, the EU Courts are given the task of reviewing the legality of EU legislation, as well as a variety of acts of EU institutions. Article 267 TFEU empowers the ECJ (now the 'Court of Justice of the European Union') to give preliminary rulings concerning the validity of the same range of instruments. The ECJ is also regularly called upon to assess the compatibility of national legislation with EU law in the context of infringement actions brought by the European Commission under Article 258 TFEU or by way of Article 267 TFEU references from national courts. In principle, the ECJ does not interpret national law in the context of references, and will merely give guidance to a national court on what types of national laws are compatible with EU law. The result in practice is often similar to a 'direct' review of national law by the ECJ, leaving little to be done by the referring court.

In each of these three procedures questions of fact are becoming increasingly important, principally where the proportionality of the challenged measure is being examined. The reason for this may have much to do with the maturing EU legal order and the greater understanding of its requirements at both EU and national level. Long gone are the days when the EU might seek to base a legislative measure on an obviously inappropriate legal basis, or when a national legislator might pass laws which obviously discriminate on grounds of nationality. In the absence of such easy targets for challenge, litigation focuses increasingly on borderline cases with both the Commission and private parties testing the boundaries of the proportionality test developed by the ECJ.

The institutional limitations imposed on the use of facts in the ECJ call for closer examination, as do the consequences of those limitations for the scrutiny of the proportionality of both EU and national measures. The Court may gradually be modifying the substantive tests applied in order to cope better with the increasingly 'fact-heavy' nature of the cases brought in front of it. Notably, the burden of proof requirements for showing that a measure is disproportionate seem to be tightening, with Member States being accorded a greater margin of discretion in a number of policy areas. At the same time, a 'coherence' test has been introduced in addition to the traditional proportionality test, focusing on the internal logic of the challenged measure.

INCIDENCE OF FACTS IN THE DIFFERENT PROCEDURAL CONTEXTS. The three different procedures for bringing judicial review cases before the EU Courts each have their particular impact on the way facts are considered and the proportionality of the challenged measures is assessed. A feature common to all three is that, contrary to some continental traditions, notably the German system, the ECJ will not make use of procedural devices simply to allow it to make findings of fact of its own motion, but will instead rely on the parties to present it with the material necessary for making any findings of fact.

First, in direct actions under Article 263 TFEU, EU Courts subject findings of fact on the part of the institutions on which the acts are based to a full judicial review of their veracity (Cases C–403/04 P and C–405/04 P *Sumitomo Metal v Commission* [2007] ECR I-729, at para 73). Judicial deference is shown where complex technical evaluations are involved. In such cases, it is recognized that the institutions, in order to be able to fulfil their tasks, must be permitted a wider margin of discretion in evaluating and drawing conclusions from the facts. One corollary of this degree of judicial deference has been particularly strict scrutiny of respect for the procedural rights guaranteed by the EU legal order

in administrative procedures, including the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case, the right of the person concerned to make his views known and to have an adequately reasoned decision (Case C–269/90 *Technische Universität München* [1991] ECR I-5469, at paras 13–14).

Secondly, in infringement procedures brought by the Commission under Article 258 TFEU, it is plain the Commission must place before the Court information to enable it to establish that an EU law obligation has not been fulfilled. However, once it has made a *prima facie* case, the burden shifts onto the defendant Member State which, pursuant to the duty of sincere cooperation recognized by Article 4(3) TEU, has to facilitate the achievement of the Commission's (and arguably the EU Courts') tasks. It is for the Member State to challenge, in substance and in detail, the information produced by the Commission and any consequences flowing from it (Case C–494/01 *Commission v Ireland* [2005] ECR I-3331, at paras 41–44). Where the restriction of a fundamental freedom has been identified, a Member State can justify it by invoking an imperative requirement as justification for the hindrance to free movement. It is for the Member State relying on such a justification to demonstrate that its rules are appropriate and necessary to attain the legitimate objective being pursued.

Thirdly, in Article 267 TFEU references, any assessment of the facts in the case is in principle a matter for the national court. However, where relevant facts have either already been found by the referring court, or are not seriously disputed, the ECJ itself will give a ruling on the proportionality of a national measure, assessing whether the measure is suitable for achieving the objective or objectives invoked by the Member State, and that it does not go beyond what is necessary to achieve those objectives. Member States must explain in the ECJ, where appropriate by adducing relevant evidence, how the challenged national measures satisfy the requirements of case law (Case C–170/04 *Rosengren* [2007] ECR I-4071, at para 50). Where the ECJ is called upon to rule on the validity of an EU act in the context of a reference, it will not be possible for it to defer to the national court on assessments of fact, but will have to rule itself, as it would in direct action proceedings brought pursuant to Article 263 TFEU. It is thus for the EU legislator to demonstrate the proportionality of the challenged measure and to provide the ECJ with the necessary information for it to verify it (Case C–127/07 *Arcelor Atlantique et Lorraine* [2008] ECR I-9895, at para 48).

CONSTRAINTS ON FACT-FINDING IN THE ECJ. There are a number of institutional and procedural constraints which make the ECJ (if not to the same extent the General Court) averse to becoming closely involved in fact finding. Above all, the ECJ is not used to dealing with facts. Only a tiny minority of the cases brought before it in the past have involved, or turned on, questions of fact. Its jurisdiction is, as would be expected of a quasi-supreme court, mainly concerned with questions of law. Questions of fact in reference proceedings are, in principle, for the national judge, and the vast majority of infringement actions involve mere comparison between the texts of national and Union law rather than, say, spot checks on the quality of Spanish bathing waters; and appeals against judgments of the General Court only lie on points of law.

'Only a tiny minority of the cases have involved, or turned on, questions of fact'

There are also formidable practical limitations on the ECJ's ability to scrutinize facts. As the Court has to deal with litigation in all the EU's official languages, there is heavy reliance on translation and interpretation. [*See illustration, towers housing the translators at the ECJ, back cover*]. To minimize the associated costs and delays of having to translate the written observations of parties, annexes to observations are generally not translated into the internal working language of the Court. Similarly, annexes to orders for reference are not translated, and lengthy orders for reference are summarized before being translated. As a result, experienced practitioners will make a point of quoting important passages from documents annexed to their written observations *in extenso* in the body of their observations — it is their only way of ensuring that they come to the attention of the Judges deciding the case. While it is always possible for any Judge to request the translation of annexes, this is not a frequent practice. Reliance on expert reports or other documentary evidence provided by the parties is, understandably, limited. Similar difficulties limit the usefulness of hearing experts or witnesses in court. Since examination and cross-examination have to be conducted through interpreters, the ability of Judges and parties to truly test any evidence provided is restricted.

As a consequence, the surprisingly elaborate apparatus for expert reports being commissioned by the Court, witnesses being heard and other measures of inquiry has rarely been set in motion (pursuant to Articles 24 to 26 and Article 32 of the Statute of the Court of Justice, and Articles 45, 47 and 49 of the Rules of Procedure of the ECJ). During my six years at the ECJ, I have not once come across a case where calling witnesses or appointing an expert was, to my knowledge, seriously discussed.

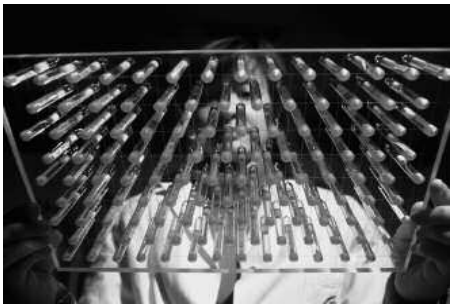
FOCUS OF THE PROPORTIONALITY REVIEW. The principle of proportionality, one of the general principles of Union law, requires that measures should be appropriate for attaining the objective pursued and must not go beyond what is necessary to achieve it. In principle, the scrutiny of the proportionality of Union acts pursuing a particular objective is no different from the scrutiny of the proportionality of national measures pursuing similar objectives (compare, for example, Case C–344/04 *IATA* [2006] ECR I-403, at para 79, and Case C–518/06 *Commission v Italy*, judgment of 28 April 2009, at para 72).

To the extent that the intensity of scrutiny applied to the proportionality of EU and national measures differs, this can be explained by the necessarily different starting points for the ECJ's involvement. The proportionality of EU measures will only be considered where the measure has a proper legal basis in the Treaties, most often Article 114 TFEU, and will so pursue internal market objectives. The proportionality of national measures, on the other hand, will be looked at only when it has been established that they constitute a restriction of, for example, a fundamental freedom, and that they are contrary to the internal market. In the circumstances, it is unsurprising that the proportionality of EU legislation will only be successfully called into question where it is 'manifestly inappropriate' to the objective pursued, whereas national legislation must be shown to be proportionate. However, the scope of

the review and the proportionality test applied remain the same in principle; it is the depth of the review, and the incidence of the burden of proof, which differ.

The second 'necessity' limb of the proportionality test in particular often involves detailed examination of facts, as the effect of hypothetical other, less restrictive means by which the same objectives might be achieved must be considered. The intensity of the scrutiny required in this regard appears to be influenced by whether it is the ECJ or a national court that will have to carry it out. Where the task can be 'delegated' to a national court, notably when the ECJ is called upon to rule in the context of a preliminary reference, the ECJ will often happily give the national court the task of examining long lists of complicated factual issues in order to evaluate the necessity of the challenged measure (Case C–182/08 *Glaxo Wellcome*, judgment of 17 September 2009; Case C–73/08 *Bressol*, judgment of 13 April 2010, not yet reported in the ECR). On the other hand, where the task of assessing the necessity of a challenged measure falls to the ECJ itself, the scrutiny of this aspect of the proportionality test often seems to be rather more lax in practice. Where the necessity test is not fulfilled, the ECJ will often limit itself both in references (Case C–243/01 *Gambelli* [2003] ECR I-13031, at para 74) and infringement actions (Case C–153/08 *Commission v Spain*, judgment of 6 October 2009) to stating in general terms that other less restrictive measures exist. Conversely, where the test appears to be fulfilled, the ECJ has acknowledged, tellingly, that while the burden of proof in infringement actions is on the Member State to establish that the measures taken were necessary within the meaning of the case law, the 'burden of proof cannot be so extensive as to require the Member State to prove, positively, that no other conceivable measure could enable that objective to be attained under the same conditions'.

The difficulty of asking either the Commission or Member States to prove a negative has, in some instances, arguably led the ECJ not only to lower the intensity of the review but also to lessen its scope, concentrating on the appropriateness of the challenged measure while leaving the necessity test to one side. For example, in Cases C–154/04 and C–155/04 *Alliance for Natural Health* the ECJ merely examined whether the authors of the challenged directive 'could reasonably take the view'



Systems of public health protection in Member States vary widely. (Photo: EU)

that they had found an 'appropriate' way of reconciling the interests at stake. In Case C–344/04 *IATA*, the ECJ checked whether the measure was 'manifestly inappropriate', touching on necessity only superficially. In the *Italian Trailers* case (Case C–110/05 *Commission v Italy* [2009] ECR I-519), the ECJ went as far as to recognize that it was possible to envisage alternative, less restrictive measures, but nevertheless found that the ban on motorcycle trailers was proportionate in that it constituted a general and simple rule which could easily be understood and applied by drivers, and easily managed and supervised by the competent authorities.

The application of the proportionality test to national measures is all the more delicate where the ECJ is operating in an area where significant discrepancies exist between the regulatory approaches of the Member States. Where Member States share broadly similar views about the content of a particular type of policy objective, such as consumer protection, fighting

Games of chance are viewed differently across the Union. Palermo, Sicily. (Photo: EU)

crime or environmental protection, the ECJ will naturally feel more confident to make assessments itself about the proportionality of individual measures. This applies to most public policy objectives, which are recognized by the case law precisely because they are common to most Member States.

A group of 'exceptional' policy areas is, however, beginning to crystallize, in which the variations between Member States are significant, and where the ECJ is, in the absence of any 'feel' for the factual context, more reticent to interfere with national measures restricting fundamental freedoms. In these areas, Member States are expressly accorded a wider margin of discretion. This is notably so in relation to certain types of 'health' justification, since systems of public health protection vary widely (Case C–169/07 *Hartlauer*, at paras 29–30; Case C–341/08 *Petersen*, at paras 51–52). Similarly, the ECJ has identified significant differences between the target levels for road safety, Italy apparently pursuing particularly stringent objectives (*Italian Trailers*, cited above; also Case C–518/06 *Commission v Italy*, at paras 83–85). The same is also true, because of moral, religious and cultural differences between Member States, in relation to the more or less permissive approaches towards games of chance.

COHERENCE. Having recognized the difficulty of assessing the proportionality of measures under the traditional test, and having relaxed the necessity requirement for both EU and national measures to some extent, it became important to find a different way of checking Member State action for disguised discriminations and unnecessary restrictions of the fundamental freedoms. The most visible response of the ECJ in this regard has been the addition of a 'coherence' test to the traditional proportionality requirements.

The new test first appeared in the context of gambling regulation but was crystallized as follows in Case C–169/07 *Hartlauer*, judgment of 10 March 2009, at para 55: '. . . national legislation is appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner'.

The test has since been consistently applied to examine the internal logic of national regulatory regimes. The principal advantage of the coherence test over the

more traditional necessity test is that it does not require the court to scrutinize the factual background of the case closely, as there is no need to examine what sort of alternative measures could conceivably have been adopted to achieve the same objective. Instead, it is sufficient to place the challenged measure in the context of the national regulations governing the sector as a whole and to examine whether there are any inconsistencies. In *Hartlauer*, which concerned a refusal by the national authorities to permit the claimant to open a dental clinic for out-patients, the rules governing out-patient dental clinics were compared with those for group practices, which offered the same medical services and were subject to the same market conditions. As the rules governing group practices were found to be more lax without any objective distinction being evident, the stricter rules concerning out-patient dental clinics were held to be incompatible for lack of coherence.

Another issue of concern is how the breadth of the coherence examination is to be determined. It is clear that a Member State which bans, for example, certain advertising of alcoholic beverages, is not acting incoherently by virtue of the fact that the same ban does not apply to tobacco advertising (Case C–262/02 *Commission v France* [2004] ECR I-6569, at para 33). There is no obvious overlap between the protected groups of consumers, and drinkers will not necessarily switch to smoking. The real issue is to what extent Member States are free to regulate sectors differently where there is a degree of substitutability between the products involved, for example where a Member State permits betting on horses but prohibits it on football.

CONCLUSION. The ECJ seems to be finding ways of guaranteeing judicial protection against disproportionate Union or national acts notwithstanding its institutional constraints as to the finding of facts. The coherence test is still in its infancy, but in due course it is likely to play an important role in the ECJ's assessment of proportionality. Because it involves primarily the scrutiny of legislative texts, rather than assessment of facts, in practice it will be much easier for the ECJ to apply it. It remains to be seen how far it will have to be adapted for it to be applied in challenges to EU acts. □

The views expressed are personal to the author and do not engage the institution

ECJ round-up

A selection and summary of some recent judgments of the Court of Justice of the European Union by *Sarah Ford* of Brick Court Chambers

ECJ gives directive horizontal direct effect and Charter of Fundamental Rights of the European Union retrospective effect. Case C–555/07 *Kücükdeveci*

THE judgment of the ECJ in Case C–555/07 *Kücükdeveci* handed down on 19 January 2010 has been hailed as one of the ECJ's most important judgments in decades.

On a reference from the Landesarbeitsgericht Düsseldorf the ECJ was asked whether a German provision which disregarded periods of employment before the age of 25 for the purposes of determining employees' notice periods for dismissal infringed the Community law prohibition of discrimination on grounds of age under primary Community law as expressed in Directive 2000/78.

The ECJ concluded that the legislation in issue pursued a legitimate aim, in that it sought to alleviate the burden on employers in respect of the dismissal of younger workers who might be expected to have a greater degree of personal or occupational mobility. However, it was inappropriate to achieve that aim, since it applied to all employees who joined the undertaking under the age of 25, whatever their age at the time of their dismissal.

The judgment is notable in a number of respects. These include, firstly, that the judgment appears to be an example of a directive being given horizontal direct effect between an individual and a company. Secondly, in that the judgment invokes the Charter of Fundamental Rights of the European Union before the entry into force of the Lisbon Treaty, it suggests that the Charter has retrospective effect.

ECJ refuses to hear interveners. Joined Cases C–403/08 and C–429/08 *The Football Association Premier League Limited*

IN ITS order of 16 December 2009 in Joined Cases C–403/08 and C–429/08 *The Football Association Premier League Limited* the ECJ denied interveners Sky, Setanta, the Motion Picture Association, Canal Plus and UEFA the right to participate in preliminary reference proceedings despite the fact that the parties had been granted permission to intervene by the referring court.

The proceedings concerned the use in the United Kingdom of decoder cards intended for other Member States to gain access to satellite transmissions of live English Premier League football matches. The Chancery Division made a preliminary reference to the ECJ, following which it granted the parties permission to intervene. They then sought leave to submit observations to the ECJ.

President of the Court Vassilios Skouris refused the application, observing that the interveners were not parties to the action at the time of the reference, and their applications to intervene were made only with a view to participating before the ECJ. Although he acknowledged that the interveners had a 'definite interest' in the answers given by the ECJ to the questions referred, that did not mean that they were accorded the status of parties for the purposes of Article 32 of the Statute of the Court.

The Court's order flies in the face of the previously accepted wisdom in respect of preliminary references that the issue of who was a party to the proceedings was a question to be determined by reference to national law and procedure rather than by the ECJ. It is also notable that the order is expressed to be made 'after hearing the Advocate General', although no formal Opinion was given.

£5 bn infringement action against the United Kingdom dismissed. Case C–390/07 *Commission v United Kingdom*

In its judgment of 10 December 2009 in Case C–390/07 *Commission v United Kingdom* the ECJ dismissed an infringement action brought by the Commission against the United Kingdom alleging failure to fulfil its obligations under Council Directive 91/271/EEC concerning urban waste-water treatment.

The proceedings concerned whether the discharge of urban waste water into six bodies of water including Southampton Water, the Thames and Humber estuaries, the Wash and the north-east Irish Sea had given rise to 'eutrophication', defined in the Directive to mean the enrichment of water by nutrients, especially compounds of nitrogen and/or phosphorus, causing an accelerated growth of algae and higher forms of plant life to produce an undesirable disturbance to the balance of organisms present in the water and to the quality of the water concerned.

The ECJ was satisfied that the bodies of water in question were neither eutrophic nor likely to become so. Had the Commission been successful in establishing a breach of its obligations, the United Kingdom would have been obliged to engage in extensive upgrading of sewage plants. The likely cost of such an exercise was estimated to be in excess of £5 bn.

In addition to the sums of money at stake, the ECJ's judgment is notable for two further reasons. First, the hearing itself was exceptional in that each advocate was permitted to speak for double his usual allotted time, and the Court was extremely interventionist in posing a series of highly technical questions. Secondly, the ECJ's lengthy and detailed 69-page judgment exhibited an unusual willingness to grapple with complex and technical scientific issues.

Requirement that proceedings be brought 'promptly' is precluded by Community law. Case C–406/08 *Uniplex UK Limited v NHS Business Services Authority*

In its judgment of 28 January 2010 in Case C–406/08 *Uniplex UK Limited v NHS Business Services Authority* the ECJ held that a requirement that proceedings alleging a breach of the public procurement rules be brought 'promptly' was inconsistent with Directive 89/665, on the coordination of laws and procedures relating to the application of review procedures for the awards of public supply and works contracts.

The proceedings were commenced by Uniplex challenging a procurement by the NHS Business Services Authority. The Queen's Bench Division referred two questions concerning the compatibility of the time limits with the Directive and with Community law principles of equivalence, equal protection and effectiveness.

The ECJ concluded that time limits should run from the date on which the claimant knew, or ought to have known, of the alleged infringement. Further, the ECJ considered that the principles of legal certainty and effectiveness precluded a requirement that proceedings be brought 'promptly', since the duration of such a limitation period lay in the discretion of the national court and was not predictable as to its effects.

The judgment has profound implications for applications for judicial review, in respect of which the time limits are markedly similar. □

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PUBLISHER

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PRINTING

Technographic

ISSN 1351-4172. Published in the UK

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