

# **THE EU SYSTEM OF JUDICIAL PROTECTION AFTER THE TREATY OF LISBON: A FIRST EVALUATION\***

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Excellencies,  
Dear colleagues,  
Ladies and gentlemen,

Allow me first of all to express my grateful thanks to the Faculty of Law of the University of Zagreb and especially to Dean Potočnjak and Professor Rodin for the kind invitation to visit the University and deliver a lecture this morning. I consider it both a pleasure and a privilege to be here today in front of such a distinguished audience and I must confess that, although Croatia is not yet a member state of the European Union, the Court of Justice of the European Union has already developed a certain bond with Croatian institutions and especially the University of Zagreb.

On the one hand, as you probably know, one of the basic features of the Court of Justice is its multilingual regime. Therefore our translation department has already started the procedure in order to constitute a first nucleus of Croatian lawyer-linguists that will arrive in Luxembourg six months before the accession and assist in the preparations. The cooperation of our services with this University have, to my knowledge, been very beneficial.

On the other hand, the Court has welcomed students and alumni from the University of Zagreb on numerous occasions both as interns but, most importantly, as participants in the European Law Moot Court Competition. In fact it is with great satisfaction that we have seen the team of the University of Zagreb compete in the finals four times in the last six years and win this prestigious competition this past April.

This shows that the work being done here in the Faculty of Law is extraordinary and that the knowledge in EU law is at a very high level. Therefore, for today's lecture I opted not to speak generally about the role and the functioning of the Court but I selected a topic that is more specific and current: the reforms of the EU system of judicial protection pursuant to the entry into force of the Treaty of Lisbon.

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\* This is the transcript of the speech given by Mr Vassilios Skouris, President of the European Court of Justice on the occasion of his visit to the Croatian Supreme Court. The speech was delivered at the Faculty of Law of the University of Zagreb in June 2011.

As an introductory observation, I would like to stress that the Treaty of Lisbon was not intended to introduce a major overhaul of the administration of justice in the European Union. The reforms and modifications introduced are of a limited nature and were in my view destined to perfect or improve the current system without changing it dramatically.

Nevertheless, I decided that, a year and a half after the entry into force of the Treaty of Lisbon, it would be useful to present the most important reforms it introduced concerning the Court of Justice and the system of judicial protection of the European Union. Accordingly, I will provide you with some first thoughts and comments on how these reforms are functioning in practice.

### ***Denomination of the EU Judicial Institutions***

I will start by focusing on the more general provisions and first draw your attention to article 19 of the Treaty on the European Union (TEU). Under this article “The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts.” With the wording of this article the concept of “one Institution - 3 courts” becomes more evident and the fact that the term “Court of Justice of the European Union” is to be understood as designating the Institution as a whole, is certainly likely to clarify certain misconceptions or misunderstandings in some provisions of the Treaties.

Nevertheless, the renaming of the EU Courts has raised certain issues and could be considered as somehow problematic. In particular, the Court is referred to in the Treaties as “Court of Justice” and the Court of First Instance has been renamed to “General Court”. The need to rethink the denomination of the EU Courts arose principally from the fact that, following the introduction of specialised courts, the CFI was no longer a true “court of first instance” since it also hears appeals against the judgments of specialised courts at last instance. However, the specific terms chosen seem to give rise to concerns insofar as, it is not easy to distinguish the roles of the “Court of Justice” and the “General Court” particularly in view of the fact that the latter is not a Court of general jurisdiction and the former is at the top of the EU judicial hierarchy. In certain languages such as French and German, the terms chosen (“Cour” and “Tribunal”/ “Gerichtshof” and “Gericht”) are much more appropriate. On the contrary, in other languages, such as in English and others, the terms could be considered as perplexing.

### ***Recognition of the decentralised nature of the EU system of judicial protection***

Moving on from these terminological problems, I would like to underline the addition of a very significant new provision in article 19 TEU.

The second indent of the first paragraph provides that “Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.” By this strongly worded provision, the TEU gives a particular emphasis on the decentralised nature of the system of administration of justice within the EU and underlines the obligation of Member States to provide adequate judicial protection to individuals for rights that they derive from EU law. In this way, the TEU confirms that the national judge is usually the first one to apply and enforce EU law and that the system of judicial protection in the EU can only fulfil its purpose if it functions efficiently both at the EU and at national level.

Apart from these observations of a more general nature, it would be useful to present in a little more detail some of the more specific innovations introduced by the Treaty of Lisbon. But first of all, allow me to make a preliminary comment. As we all know, the Treaty of Nice had introduced a number of major reforms in the system of judicial protection of the European Union, reforms that have by now already produced their first results. Neither the Constitutional Treaty nor the Treaty of Lisbon have attempted to introduce reforms of such magnitude.

### ***The advisory panel of article 255 TFEU***

However, some important innovations do feature in the Treaty of Lisbon and one of them is without doubt the advisory panel of article 255 TFEU. This panel has been set up in order to give an opinion on candidates’ suitability to perform the duties of Judge and Advocate-General of the Court of Justice and the General Court, before the governments of the Member States make the relevant appointments.

This panel is comprised of seven persons chosen from among former members of the Court of Justice and the General Court, members of national supreme courts and lawyers of recognised competence, one of whom was proposed by the European Parliament. In that respect, three observations ought to be made. First, the introduction of this advisory panel is a step towards the right direction in the interest of transparency. In addition, the appointment procedure for members of the Court of Justice and the General Court does not remain an exclusively national matter but acquires an EU dimension. Second, with regard to the composition of the panel, it is noteworthy that only former members of the Court of Justice or the General Court can sit on the panel, whereas members of national supreme courts can still be active judges. Third, despite lengthy discussions and many voices advocating for complete parliamentary hearings, we notice that the EU legislator opted for a much more discrete role of the European Parliament in the appointment procedure. This could be viewed as a wise choice as it avoids politicising the appointments procedure. [...]

### ***Imposing a lump sum or periodic penalty on Member States***

The next important reform we can encounter in article 260, paragraph 3, TFEU. It is well known that the procedure for imposing on a Member State the payment of a lump or a periodic penalty for failure to comply with a judgment of the Court was introduced by the Treaty of Maastricht. With article 260, paragraph 3, TFEU, this procedure becomes even more drastic given that on certain cases a lump sum or a periodic penalty could be imposed on a Member state without a second judgement by the Court of Justice. In particular, when the Commission brings a infringement action against a Member State pursuant to Article 258 TFEU on the grounds that the Member State concerned has failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure, it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers suitable in the circumstances.

This new provision undoubtedly enhances the mechanism of judicial enforcement in the EU. However, it is only applicable in cases where Member States have failed to notify the transposition of a directive. And this creates an obvious paradox. The simple failure to notify the measures transposing a directive can be sanctioned in a more severe way than the substantial failure to transpose the directive. How this paradox could be resolved remains to be seen. One approach could be based on the flexibility and wide margin of discretion that the Commission enjoys in this area. For example, the Commission could propose higher lump sums or periodic penalties in cases where the failure to notify the national measures is coupled with a non transposition of the directive.

### ***Locus standi of individuals to challenge acts of EU Institutions***

The Treaty of Lisbon does not only reinforce the mechanism of judicial enforcement of EU law by article 260, paragraph 3, TFEU but also by a substantial modification of the provision related to the *locus standi* of natural and legal persons to challenge acts adopted by the EU Institutions. The conditions of individual and direct concern that were laid down in the old article 230, paragraph 4, EC had been severely criticised in academia and other circles, especially in view of the adoption of the Charter of Fundamental Rights as a binding legal text and part of EU primary law. Both during the proceedings for the elaboration of the Charter and those for the drafting of the Constitutional Treaty, there was extensive discussion on the various approaches in order to render the judicial protection of individuals more effective.

Finally, the approach that was considered the most appropriate was that of modifying article 230, paragraph 4, EC. In that respect I will sim-

ply mention that although the conditions of direct and individual concern are in principle maintained, the new article 263, paragraph 4, TFEU, further provides that for challenging a regulatory act that does not entail implementing measures, an individual need only be directly concerned (and not individually).

It could be argued that, with this important addition, the EU legislator has adequately addressed the main criticism against the current system which is that individuals cannot challenge regulations which are of direct but not individual concern to them. However, one could foresee a rather delicate and complicated interpretative problem in defining the exact content of the term “regulatory acts”. Such a term can be encountered in various national legal orders but it is rather unusual in the framework of the EU legal order. Furthermore, it does not seem to exhaust its content in regulations alone. Therefore, notwithstanding the new wording of article 263, paragraph 4, TFEU, it will again be up to the Court of Justice to define more specifically the conditions under which individuals will have *locus standi* to challenge acts of the EU Institutions.

### ***Area of Freedom Security and Justice and the urgent preliminary procedure***

One of the main features of the Treaty of Lisbon is the fact that the three-pillar structure of the EU has been abandoned. This inevitably leads to an expansion of the Court’s jurisdiction in the so-called area of freedom security and justice both with regard to preliminary references and direct actions. As regards in particular the preliminary references in this field, the Treaty of Lisbon abolished in principle all the restrictions as to which national courts can make references and we now routinely receive cases from lower courts. This has led to an increase of the incoming references in areas such as the Brussels regulations on the recognition and enforcement of judgements in civil, commercial and matrimonial matters, on the European arrest warrant, on asylum and refugees.

In addition, the traditional structure of the preliminary reference procedure was considered to be inappropriate for dealing with some time-sensitive cases in this area. Such time-sensitive cases include those that concern persons in custody and those that involve sensitive family law issues such as child custody.

Article 267, paragraph 4, TFEU provides that if a preliminary question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay. For dealing with such cases the Court considered from the outset that the existing procedural framework was rather inadequate. It therefore proposed an amendment

to its rules of procedure in order to introduce the urgent preliminary ruling procedure. I do not wish to present this new procedure in detail.

I will simply mention that the principal features of the urgent preliminary ruling procedure are three. First, the written procedure is limited to the parties to the main proceedings, the Member State from which the reference is made, the European Commission and the other institutions if a measure of theirs is at issue. The parties and all the interested persons referred to in Article 23 of the Statute will be able to participate in an oral procedure, when they can express a view on the written observations that have been lodged. Second, cases subject to the urgent preliminary ruling procedure will, as soon as they arrive at the Court, be assigned to a Chamber of five Judges that is specially designated for this purpose. Finally, the procedure in these cases will for the most part be conducted electronically, since the new provisions of the Rules of Procedure allow procedural documents to be lodged and served by fax or e-mail.

The urgent preliminary ruling procedure has already been requested 21 times by national courts and the request was accepted in 14 cases. So far, this mechanism has proven to be quite efficient since, in all these cases, the Court has managed to render a judgment in less than 2.5 months.

### ***Judicial control of infringements of the principle of subsidiarity***

Another innovation of the Treaty of Lisbon that I would like to mention is the procedure provided for in article 8 of protocol n° 2 to the Treaty on the application of the principles of subsidiarity and proportionality. Pursuant to this article, the Court of Justice of the European Union has jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a legislative act, brought in accordance with the rules laid down in Article 263 TFEU by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber thereof. This article further provides that in accordance with the rules laid down in article 263 TFEU, the Committee of the Regions may also bring such actions against legislative acts for the adoption of which the Treaty on the Functioning of the European Union provides that it be consulted.

Undoubtedly, with this protocol, national parliaments are called to play a very specific and important role in the system of judicial protection in the European Union. If a number of national parliaments consider that a proposal for an EU legislative act is in violation of the principle of subsidiarity, the said draft legislative act must be re-examined and, if maintained, it must specifically be justified as to why it is considered to be in compliance with the principle of subsidiarity.

If notwithstanding this procedure a national parliament still considers that the adopted legislative act is in violation of the principle of subsidiarity, it can file an action for annulment pursuant to article 263 TFEU. I must underline at this point that, in such actions, the Court will exercise judicial review only on the issue of compliance or not with the principle of subsidiarity and not on other grounds for annulment.

It remains to be seen how this procedure will function in practice and whether such actions before the Court of justice will be a frequent occurrence or a rarity.

### ***The Charter of Fundamental Rights and the EU accession to the ECHR***

The last innovation of the Treaty of Lisbon I would like to focus on this morning is the conversion of the Charter of Fundamental Rights into a binding legal text which is part of EU primary law. The introduction of a legally binding Bill of Rights for the EU is certainly a very important step forward towards increasing the democratic legitimacy of the EU and advancing European integration. However, the conversion of the Charter into a binding legal text did not literally *introduce* a third system of protection of fundamental rights in Europe. Before the entry into force of the Treaty of Lisbon, the EU was no stranger to the protection of fundamental rights. Therefore it would not be an exaggeration to suggest that a third system of protection already existed decades before the 1<sup>st</sup> of December 2009.

Nonetheless, this does not mean that the added value of a legally binding Charter is limited. On the contrary, transparency, codification and legal certainty are of paramount importance in the field of fundamental rights protection and they cannot be effectively achieved without a legally binding Bill of Rights.

This has become evident in the Court's jurisprudence. Indeed, the Court has already examined the first cases involving a direct application of the provisions of the Charter and has already annulled EU law provisions on the basis of the Charter on two occasions. I must also note that its classic legal reasoning in the field of the protection of fundamental rights has changed, since the Court is now using as a starting point the Charter and not the common constitutional traditions of the member states and the European Convention on Human Rights (ECHR). According to this new approach, the Court takes as its starting point the rights guaranteed by the Charter, it applies them based on its own jurisprudence as well as the relevant jurisprudence of the European Court of Human Rights, and refers lastly and only if it is required to the provisions of the ECHR, which constituted until the primary source of reference.

Nevertheless, it is true that a multitude of sources of law with sometimes overlapping fields of application (national constitutions, Charter, ECHR) is certainly not efficient and can be the source of confusion for private individuals, lawyers and judges. The range of the protected rights and the level of protection can be different from one text to another. The risk of conflicting case-law between the ECJ on the one hand and national supreme courts and the EurCourtHR on the other is always present. But these problems are by no means novel and they are surely not the result of the transformation of the Charter into a binding legal text.

Furthermore, the evolution of fundamental rights protection in the EU clearly demonstrates that such difficulties are not insurmountable and can be resolved in a variety of ways. Differences in the *ratione materiae* field of application of the Charter, of the ECHR and of national constitutions would normally be negligible due to the common long-standing tradition of human rights protection in Europe and to the overall harmonising effect of the ECHR. Conflicting case-law, especially between the ECJ and the ECHR, has been a rare and marginal occurrence and that risk can always be minimised by a close cooperation between the two Courts.

Lastly, the lack of efficiency and coherence resulting from the parallel application of three systems of protection of fundamental rights will be decisively reduced by the accession of the EU to the ECHR. In that respect, it is important to stress that the first round of negotiations within the EU has been completed and a mandate was given to the European Commission in order to commence the next round of negotiations with the Council of Europe. These negotiations are at their final stage and we expect to see the draft accord within the next few weeks.

### **Concluding remarks**

I believe that my initial comment regarding the extent of the reforms that were introduced by the Treaty of Lisbon to the system of judicial protection of the European Union is confirmed by a basic analysis of the innovations the Treaty entails. Some of these reforms are important and they constitute steps that can bring about a concrete amelioration of the system. Nevertheless, the drafters of the Treaty of Lisbon had no intention of introducing radical reforms that would alter the fundamentals of the system. Whether such reforms were needed at that stage, especially given the particular political context marked by the rejection of the Constitutional treaty, is in my view questionable and could certainly be an issue for debate.

The system of judicial protection in the European Union as it resulted from the Treaty of Lisbon is certainly viable and able to function



efficiently for a number of years. Nonetheless, the progress of European integration will render more radical reforms necessary in the long run in order to ensure that the administration of justice in the European Union can continue to serve efficiently a Union of more than 500 million citizens, 23 languages and 27 legal traditions.

I thank you very much for your attention I would like to open the floor to your questions.