



## **The Treaty of Lisbon and the Court of Justice of the European Union**

The Treaty of Lisbon, which was signed on 13 December 2007 by the 27 Heads of State or Government of the Member States of the Union, comes into force on 1 December 2009. It amends the two fundamental treaties – the Treaty on European Union (TEU) and the Treaty establishing the European Community, with the latter to be known in future as the ‘Treaty on the Functioning of the European Union’ (TFEU).<sup>1</sup>

The Treaty of Lisbon makes changes to the organisation and jurisdiction of the Court of Justice of the European Union.

### **A. Changes in the organisation of the Court and the appointment of its Members**

The European Union, which will henceforth have legal personality, will replace the European Community. Accordingly, under the Treaty of Lisbon, the ‘pillar’ structure will disappear and the Union will have a new institutional framework. As a result, in common with the institutions to be renamed, the whole court system of the European Union will be known as the Court of Justice of the European Union,<sup>2</sup> comprising three courts: **the Court of Justice, the General Court and the Civil Service Tribunal.**

With regard to the creation of **specialised courts**, the Treaty of Lisbon maintains some existing provisions but introduces certain changes in relation to procedures for the creation of such courts, namely that, from now on, they will be created in accordance with the ordinary legislative procedure (that is to say by co-decision with a qualified majority) rather than, as hitherto, by unanimity.

It follows from the Treaty of Lisbon that a request for amendment of the Statute of the Court of Justice of the European Union<sup>3</sup> will be deemed to be a ‘draft legislative act’<sup>4</sup> and must be subject to the ordinary legislative procedure. By contrast, the rules on the Judges and Advocates General and the language arrangements of the Court will remain subject to the unanimity rule.

With regard to the arrangements for the **appointment of Members of the Court**, the Treaty of Lisbon preserves the existing provisions in so far as Judges are appointed by common accord of the Governments of the Member States for six years, but from now on they will be appointed after consultation of a panel responsible for giving an opinion on candidates’ suitability to perform the duties of Judge and Advocate General of the Court of Justice and the General Court. This panel will comprise seven persons chosen from among former members of the two Courts, members of national supreme courts and lawyers of recognised competence, one of whom will be proposed by the European Parliament. Acting on the initiative of the President of the Court of Justice, the Council will adopt decisions establishing the panel’s operating rules and appointing its members.

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<sup>1</sup> Only the European Atomic Energy Community or ‘Euratom’ will remain (Protocol No 1 amending the Protocols annexed to the Treaty on European Union, to the Treaty establishing the European Community and/or to the Treaty establishing the European Atomic Energy Community).

<sup>2</sup> Article 19 TEU.

<sup>3</sup> The Statute of the Court of Justice of the European Union appears in Protocol No 3.

<sup>4</sup> Protocol No 2 on the application of the principles of subsidiarity and proportionality.

With regard to Advocates General, there is provision under a declaration for their number to be increased from 8 to 11 on a request by the Court of Justice.<sup>5</sup>

## **B. Changes in relation to the jurisdiction of the Court of Justice of the European Union**

### **Areas**

The pillar structure introduced by the Maastricht Treaty will disappear. That being the case, the jurisdiction of the Court of Justice of the European Union will extend to the **law of the European Union**, unless the Treaties provide otherwise.<sup>6</sup>

Thus, the Court of Justice will acquire general jurisdiction to give preliminary rulings in **the area of freedom, security and justice**, as a result of the disappearance of the pillars and the repeal by the Treaty of Lisbon of Articles 35 EU and 68 EC which imposed restrictions on the jurisdiction of the Court of Justice.

First, as regards police and judicial cooperation in criminal matters,<sup>7</sup> the jurisdiction of the Court of Justice to give preliminary rulings will become binding and will no longer be subject to a declaration by each Member State recognising that jurisdiction and specifying the national courts that may request a preliminary ruling. Under the Treaty of Lisbon, the field of police and criminal justice will become part of the general law, and any court or tribunal will be able to request a preliminary ruling from the Court of Justice. Transitional provisions nevertheless provide that that full jurisdiction will not apply until five years after the entry into force of the Treaty of Lisbon.<sup>8</sup>

Second, as regards visas, asylum, immigration and other policies related to free movement of persons<sup>9</sup> (in particular, judicial cooperation in civil matters, recognition and enforcement of judgments), any national court or tribunal – no longer just the higher courts – will now be able to request preliminary rulings, and the Court will have jurisdiction to rule on measures taken on grounds of public policy in connection with cross-border controls. Consequently, the Court of Justice will have general jurisdiction in this area from the date of entry into force of the Treaty of Lisbon.

In addition, **the Charter of Fundamental Rights<sup>10</sup> of the European Union** will have the same legal value as the Treaties.<sup>11</sup> It will form part of the body of constitutional rules and principles by reference to which the Court of Justice can adjudicate. However, the Charter cannot be invoked against the United Kingdom or Poland, which are covered by a derogation,<sup>12</sup> the effect of which is that the Charter will not extend the ability of the Court of Justice or of any court or tribunal of those two Member States to find that laws, regulations or administrative provisions, practices or action are inconsistent with the fundamental rights or principles that it reaffirms. The Heads of State and

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<sup>5</sup> Declaration No 38 on Article 252 TFEU of the Treaty on the Functioning of the European Union regarding the number of Advocates General in the Court of Justice.

<sup>6</sup> Article 19 TEU.

<sup>7</sup> Formerly Title VI of the EU Treaty.

<sup>8</sup> Article 10 of Protocol No 36 on transitional provisions. It is provided that, as a transitional measure, the powers of the Court of Justice are to remain the same with respect to acts in the field of police cooperation and judicial cooperation in criminal matters which have been adopted before the entry into force of the Treaty of Lisbon. This transitional measure is to cease to have effect five years after the date of entry into force of the Treaty of Lisbon.

<sup>9</sup> Formerly Title IV of the EC Treaty.

<sup>10</sup> Furthermore, Article 6(2) TEU provides that '[t]he Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties'. Protocol No 8 states that the accession agreement is to specify, in particular, 'the specific arrangements for the Union's possible participation in the control bodies of the European Convention [and] the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate'. This accession 'shall not affect the competences of the Union or the powers of its institutions'.

<sup>11</sup> Article 6(1) TEU.

<sup>12</sup> Protocol No 30 annexed to the TFEU on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom.

of Governments have, moreover, agreed to extend that derogation to the Czech Republic in the future.<sup>13</sup>

Although the pillar concept will disappear with the Treaty of Lisbon, **the common foreign and security policy (CFSP)**, under Title V of the EU Treaty,<sup>14</sup> remains subject to special rules and specific procedures. Accordingly, the Court of Justice will not have jurisdiction<sup>15</sup> to monitor provisions relating to that policy or acts adopted on the basis of those provisions, subject to two exceptions, namely (1) the Court will have jurisdiction to monitor the delimitation of the Union's competences and the CFSP, the implementation of which must not affect the exercise of the Union's competences or the powers of the institutions in respect of the exercise of the exclusive and shared competences of the Union;<sup>16</sup> and (2) it will have jurisdiction over actions for annulment brought against decisions providing for restrictive measures against natural or legal persons adopted by the Council in connection, for example, with combating terrorism (freezing of assets).<sup>17</sup>

## Procedures

**The preliminary ruling procedure** will be extended to acts of European Union bodies, offices or agencies,<sup>18</sup> which will thus be incorporated into the law of the Union which can be interpreted, and the validity of which can be reviewed by the Court of Justice at the request of national courts or tribunals, enabling those courts or tribunals, for example, to ascertain whether their national legislation is in conformity with European Union law.

The Treaty of Lisbon introduces a provision requiring the Court of Justice to act with the minimum of delay if a question referred for a preliminary ruling is raised in a case pending before any court or tribunal of a Member State with regard to a person in custody.<sup>19</sup> Reference is thus made in the body of the Treaty itself to the urgent preliminary ruling procedure (PPU), which came into effect on 1 March 2008, and which applies to the area of freedom, security and justice. ([PR 12/08](#))

Under the Treaty of Lisbon the Court of Justice may also review **acts of the European Council**, which the Treaty recognises as a separate institution. New provisions<sup>20</sup> state that the Court of Justice may, at the request of the Member State concerned, decide on the legality of an act adopted by the European Council or by the Council where a clear risk has been identified of serious infringement by that Member State of certain values<sup>21</sup> (respect for human dignity, respect for human rights, etc).<sup>22</sup>

Similarly, the Court of Justice will have jurisdiction under the same conditions in actions brought by the Court of Auditors, by the European Central Bank and, from now on, by the Committee of the Regions for the purpose of protecting their prerogatives.

The Treaty of Lisbon eases the conditions for the admissibility of **actions brought by individuals** (natural or legal persons) against decisions of the institutions, bodies, offices or agencies of the European Union. Individuals may bring proceedings against a regulatory act if they are directly affected by it and if it does not entail implementing measures. Consequently, individuals will no longer have to show that they are individually concerned by the act in question.<sup>23</sup>

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<sup>13</sup> Conclusions of the European Council of 29 and 30 October 2009 state that Protocol No 30 will apply to the Czech Republic (Doc 15265/09 Concl 3).

<sup>14</sup> Article 24 TEU.

<sup>15</sup> Article 275 TFEU.

<sup>16</sup> Article 40 TEU.

<sup>17</sup> Article 275 TFEU.

<sup>18</sup> Article 267 TFEU.

<sup>19</sup> *Ibid.*

<sup>20</sup> Article 269 TFEU.

<sup>21</sup> Article 2 TEU.

<sup>22</sup> Such proceedings must be brought within one month from the date of that determination and the Court of Justice must rule within one month from the date of the request.

<sup>23</sup> Article 263 TFEU.

In the review of compliance with the principle of subsidiarity, it will be possible for a Member State to bring before the Court of Justice an **action** from a national Parliament or one of its chambers **for annulment of a legislative act on grounds of infringement of the principle of subsidiarity**. The action must be formally lodged by the Government of a State but may also simply be 'notified' by that Government, the true author of the action being the national Parliament or a chamber thereof.<sup>24</sup> Similarly, the Committee of the Regions will be able to invoke an infringement of those principles, provided the acts in question are acts on which it is required to be consulted.

In addition, the Treaty of Lisbon speeds up the system of **pecuniary sanctions** (lump sum and/or penalty payment) in the event of non-compliance with a judgment establishing a failure to fulfil obligations.<sup>25</sup> It also enables the Court of Justice to impose pecuniary sanctions, once the initial judgment establishing a failure to fulfil obligations has been given, in the event of a failure to notify to the Commission national measures transposing a directive.<sup>26</sup>

Lastly, after five years, the Commission will be able to bring actions for failure to fulfil obligations in relation to measures concerning police cooperation and judicial cooperation in criminal matters adopted before the entry into force of the Treaty of Lisbon.<sup>27</sup>

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<sup>24</sup> The Maastricht Treaty introduced the principle of subsidiarity. Article 5 of the EC Treaty defines it in these terms: '[i]n areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community'. Another principle closely associated with it is the principle of proportionality, by which '[a]ny action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty'.

<sup>25</sup> Article 260 TFEU.

<sup>26</sup> Article 260 TFEU.

<sup>27</sup> It is apparent from Article 10(1) of Protocol No 36 that such actions will be possible once the period of five years after the date of entry into force of the Treaty of Lisbon has expired.