

The Lisbon Treaty and the Court of Justice of the European Union.

The Lisbon Treaty has introduced major changes in the European Union and these include matters that will impact on the Court of Justice itself.

It is to be noted in the first place that the EC Treaty has disappeared and is replaced by the Treaty on the Foundation of the European Union which now stands beside the Treaty on European Union.

At an initial level it is to be observed that the European Union is no longer comprised of a three pillar structure which included as its first pillar the European Community with the second and third pillars comprising the areas of Common Foreign and Security Policy on the one hand and the areas of judicial and police co-operation on the other.

The European Community having disappeared it is now replaced by the European Union¹. What was the EC Treaty is now largely contained in the Treaty on the Functioning of the European Union or TFEU.

With these treaty changes a number of old terms also disappear. One no longer refers to the European Communities or to Community law. From now on it is the European Union and The law of the European Union or European Union Law.

There is now the European Union with full legal personality².

As regards the European Union courts, the provisions enacted by the Lisbon Treaty are essentially those that were included in the Constitutional Treaty.

The treaty provisions on the Courts are to be found in Articles 19 to 24 of the Treaty on European Union (TEU) as supplemented by Articles 251 to 281 of the TFEU.

In the first place Article 19 provides for a new denomination. It provides that the Court of Justice of the European Union shall be comprised of the Court of Justice, the General Court and specialised courts.

At a more important level the Statute of the Court of Justice of the European Union³ will be amended in the future on the basis of the '*ordinary legislative*

¹ Article 1 TEU.

² Article 47 TEU.

³ With the exception of Title I relating to judges and Advocates General and article 64 (language arrangements) which will only be capable of being amended in the context of an amendment of the Treaties.

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procedure', whereas previously the Parliament was not involved. Because the amendment of the Statute involves a draft legislative act which shall include a request from the Court of Justice, the Protocol on the Principles of Subsidiarity and Proportionality will apply to such a draft legislative act which means that a proposal to amend the Statute will be required to be submitted to national parliaments, giving them an eight week period within which to submit a draft reasoned opinion if the parliament considers that the principles of subsidiary have not been respected⁴.

APPOINTMENT OF MEMBERS OF THE COURT OF JUSTICE AND THE GENERAL COURT.

Appointment of members of the Courts of the European Union other than the specialised courts will only take place after an advisory panel established under Article 255 TFEU has given an opinion on the suitability of the nominees to perform the duties of Judge and Advocate General.

INCREASED JURISDICTION OF THE COURT OF JUSTICE.

The jurisdiction of the Court of Justice is enlarged to cover certain acts of the European Council intended to produce legal effects *vis-à-vis* third parties. With the removal of the three pillar structure, unless otherwise provided for, the jurisdiction of the Court of Justice of the European Union as an institution extends to Union law as a whole and extends to bodies other than institutions⁵.

While the Court's jurisdiction does not extend generally to matters relating to foreign and security policy⁶. However, the Courts remain competent under Article 275 TFEU to monitor compliance with Article 40 TEU and to ensure that the intergovernmental procedure for common foreign and security policy is not used to prejudice the application of the areas of Union competence under articles 3 to 6 of the TFEU and to protect individuals in the context of restrictive measures affecting natural or legal persons adopted by the Council in this area of common foreign and security policy.

With regard to restrictions on courts and tribunals referring questions of interpretation and validity under Title IV (Articles 35) of the TEU concerning police and judicial cooperation in criminal matters, and Title VI (Articles 68) of Part Three of the EC Treaty concerning visas, asylum, immigration and other policies related to the free movement of persons, including judicial cooperation in civil matters, these disappear under the TFEU with the

⁴ See Protocol (No 2) to the TFEU.

⁵ Article 263 TFEU.

⁶ See Article 24 TEU.

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removal of the pillar structure. In this regard all Irish Courts will be able to make references in these areas in the future. However, the change will not take place immediately as there is a five year transitional period provided for in the TFEU which means that such changes will not take place in Ireland until 2014⁷. The effect of these changes could result in a significant increase in references coming before the Court of Justice in areas such as immigration and in areas of criminal law in the future.

With regard to the Charter on Fundamental Rights it is referred to in Article 6 of the TEU and indicates that the "rights, freedoms and principles" set out in the Charter "shall have the same legal value as the Treaties." It is provided further that the provisions of the Charter shall not extend in any way the competences of the Union.

It is also provided that the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Protocol (No. 8) is addressed specifically to this and includes a provision that the agreement relating to accession "shall make provision for the preserving the specific characteristics of the Union and Union law.

It is to be noted that nowhere does the text of the Charter appear in the Lisbon Treaty and it is available only in the C or information section of the Official Journal of the European Union of the 14th December 2007.

The Charter applies to the Union rather than to the Member States but it applies to the latter in their implementation of Union law.

It has been suggested that the Court of Justice is on the road to becoming a fundamental rights court, or in the European model, a true constitutional court, faced with many delicate questions on the scope and content of the Charter and its relevance for certain matters or criminal law and asylum law.

ACTION FOR ANNULMENT – CHANGES TO LOCUS STANDI REQUIREMENTS:

The Action for annulment is to be found in Article 263 TFEU. As regards the locus standi of natural and legal persons, the standard has been relaxed to a limited degree by providing access in the case of "a regulatory act which is of direct concern" and "does not entail implementing measures." This is understood to relate to measures where the individual would otherwise have to infringe to be individually concerned. It is not entirely clear as to what is

⁷ See Article 10 (3) Protocol (No. 36).

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meant by a "regulatory act" and it would appear to exclude legislative acts⁸. Another issue that may arise is the temporal scope of this provision.

INCREASE IN THE COURT'S WORK LOAD.

It remains to be seen how much fresh legislation will ensue from the treaty changes. The Court's case load could increase significantly in view of the legislative changes in the field of criminal law. Furthermore, the Union Courts will be competent to review the acts of Europol and will become competent to rule on acts of the European Public Prosecutor, the establishment of which is likely.

In addition the treaties have enabled the institutions to establish new agencies with regulatory powers, whose acts will be subject to judicial review by the Union courts. This may be in the areas of climate change, financial regulation as well as in areas of private law and consumer law.

ACTIONS BY THE COMMISSION AGAINST MEMBER STATES.

These actions will now be taken under Articles 258 and 260 TFEU which while largely repeating the provisions of Articles 226 and 228 EC add new powers for fines to be imposed at the first phase and increased possibility for fines and period penalties to be imposed by the Court where a Member State has failed to comply with a judgment of the Court of Justice under Article 258 as it will speed up the procedure by removing the requirement for a fresh reasoned opinion to be issued against a Member State, believed to be in default.

⁸ See Article 289 TFEU.