

ALBA Conference 2010

IMPACT OF THE LISBON TREATY ON PUBLIC LAW

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Introduction

1. The Lisbon Treaty in force since 1 December 2009.
2. Implications for public lawyers.
 - a. Protocols on the role of national parliaments and on subsidiarity and proportionality.
 - b. Amendments to the rules on standing for direct actions, and implications for references to the ECJ.
 - c. Planned accession of the EU to the European Convention on Human Rights.

Overview

3. The new architecture of the Treaties.
 - a. Article 2 of the Lisbon Treaty amends the EC Treaty; renamed the Treaty on the Functioning of the European Union (the TFEU).
 - b. Article 1 of the Lisbon Treaty amends the Treaty on European Union (the TEU).
 - c. EU to replace and succeed the European Community; founded on the TEU and the TFEU which have the same legal value.
 - d. Charter on Fundamental Rights annexed as a Protocol; same legal value as the Treaties.
4. The hierarchy of norms - Articles 289-291 TFEU.
 - a. Legislative and non-legislative acts.
 - b. Legislative act = any measure passed in accordance with the ordinary legislative procedure.
 - c. Non-legislative acts = delegated or implementing acts.
5. Abolition of the pillar structure.
 - a. Area of Freedom Security and Justice - now incorporated TFEU (Title V).

- b. Opt-outs and reservations to Justice and Home Affairs remain.
- c. Common Foreign and Security Policy - jurisdiction of the ECJ, decision-making remains with the EU Council.

The Protocols on the Role of National Parliaments and on Subsidiarity and Proportionality

6. The principle of subsidiarity – history.
7. Protocol No. 1 to the Treaties.
 - a. System for review and production of reasoned opinions by national parliaments.
 - b. 8 week time limit.
 - c. Vote allocation.
 - d. 1/3 of votes of national parliaments concerned - Commission “may decide to maintain, amend or withdraw the draft”.
 - e. More than ½ of votes of national parliaments concerned - Commission must produce reasoned opinion.
 - f. ‘yellow card’ vs ‘red card’ mechanism.
8. Article 8 of Protocol 1 - Member State may bring an action before the ECJ from or on behalf of a national parliament for the annulment of a legislative act on grounds of infringement of the principle of subsidiarity.

The new standing rules

9. Strictness of standing rules under Article 230 EC.
 - a. Non-privileged applicants – measure must be directly addressed to them, or of direct and individual concern.
 - b. Narrow interpretation - Case 25/62 *Plaumann* [1963] ECR 95, 107.
 - c. Case C-50/00 *UPA v Council* [2002] ECR I 6677 and Case C-263/02 *Jégo-Quéré v Commission* [2004] ECR I 3425.
10. Article 263(4) TFEU.
 - a. “Regulatory acts which do not entail implementing measures” - only need to show direct concern, not individual concern.
 - b. Meaning of “regulatory act”?
 - c. Cases T-532/08 *Norilsk Nickel & Umicore v Commission* and T-539/08 *Etimine & Ab Etiproducs v Commission*.
11. Implications for domestic JR.
 - a. Indirect challenge to the intention and/or the obligation of the government to implement EU legislation. (Case 314/85 *Foto Frost* [1987] ECR 4199).

- b. Where an applicant clearly entitled directly to challenge a measure before the EU Courts but neglected to do so, precluded from indirectly challenging the measure through domestic proceedings: Case C-188/92 *TWD* [1994] ECR I-833.
- c. Tight time limit for bringing a direct action - 2 months and 10 days from the date of publication in the OJ.
- d. Is risk more apparent than real?

Accession of the EU to ECHR

12. ECJ ruled in 1996 that the EC did not have competence to accede to the Convention (Opinion 2/94).

13. Lisbon Treaty introduces Article 6(2) TEU: EU shall accede to the Convention.

- a. EU to become 48th contracting party to the Convention.
- b. EU will have a judge at the European Court of Human Rights.
- c. Negotiations began 7 July 2010: "Both sides are committed to a smooth and swift conclusion of the talks, allowing the accession to take place as early as possible."

14. Future interaction between Strasbourg and Luxembourg.

Useful Sources

EU Focus 2010 Legislative Comment (EU Focus 2010, 267, 1-14) contains a concise summary of the main provisions of the new Treaties, under different subject areas.

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10th July 2010