Influence of the Lisbon Treaty on the Jurisdiction of the European Court of Justice in the Area of Freedom Security and Justice

Nikolay Marin, PhD

South-West University "Neophyte Rilsky"
Blagoevgrad, Bulgaria

Keywords: Jurisdiction of the European Court of Justice, Area of Freedom Security and Justice, Human rights

The Lisbon Treaty, which entered into force on December 1st 2009, implemented a number of judicial principles connected with the EU legal system. Among the most visible modifications is the extending of the jurisdiction of the European Court of Justice (ECJ). Largely, it is due to the "depilarization" which was set up in the Treaty establishing a Constitution for Europe in 2004. Thus, not only have the political discussions been cranked up, but also the judicial ones connected with the EU legal system. In this sense, "The implementation of the community method in the Lisbon Treaty in the Area of Freedom Security and Justice (AFSJ) shows an exceptional dynamics of the European integration. It is clear that these are the last barriers for the existence of the state sovereignty in its classical form. Apparently, the new competences which the ECJ gained after the abolition of the pillar structure also affect the AFSJ." (Marin, 2010)

The purpose of this article is to expose the basic judicial principles included in the ECJ competences and to put forward arguments about the necessity of a specialized AFSJ court.

Undoubtedly, the abolition of the pillar structure is a premise for the increasing role of the ECJ in the institutional mechanism of the organization. In maintenance of this opinion some scientists say: „The ECJ is the body whose institutional role is to benefit most from this upcoming "depilarization", possibly more than that of the European Parliament" (Hatzopoulos, 2008).

On one hand, the Lisbon Treaty allots a greater role both to the European Parliament and the citizens of the EU in order to reduce the democratic deficit. On the other, it puts an emphasis on the ECJ competences which develop the EU justice. In this sense it is necessary to share the following statement: „ Simply put under the new –post Treaty of Lisbon – regime, the Court of EU will have full jurisdiction over all Area of Freedom Security and Justice Matters, as those are going to be fully integrated in what used to be in first pillar" (Hatzopoulos, 2008).

In reference to this specific problems, the wider competence of the ECJ is agreed not to be implied automatically with the entering into force of the Lisbon treaty. According to Article 10, Paragraph 3, Point 1, Protocol 36, "in every case the previous measure mentioned in paragraph 1 ceases to be effective 5 years after the Lisbon Treaty enters into force"[1]. This is the reason why the jurisdiction of the Court of Justice works according to article 35, paragraph 2 of the Treaty of the EU.

According to the present legislation, one of the most significant changes is the precise definition of the competences of the legislative procedure dealt with in three directions – ECJ, the General Court (renamed from "Court of First Instance" (CFI), and Civil Service Tribunal.

Under the terms of the general rule of Article 256, par. 1, Treaty on the Functioning of the European Union (TFEU), it is established that the General Court (CFI) is competent to pass judgments on claims regulated by Articles 263, 265, 268, 270, 272. This means that in practice the General Court takes on a significant part of the cases as a first instance in relations regarding the control of the legality of the legislation acts of the Court, the Commission and the European Central Bank. The

[1] Lisbon Treaty for changing the Treaty on European Union and the Treaty establishing the European Community, signed on December 13th, 2007, EU Official Journal, 115, May 9th, 2008, p. 79

recommendations and the opinions are not included in this category and the acts of the European Parliament and the European Council which refer to third parties, too. In contrast, the General Court is able to take control of the actions adopted by the authorities and the offices, as well as the EU agencies again referring to third parties.

Article 256, par. 1, also says that when the institutions, failing to act, cause infringement proceedings against the Treaties, the member states or the Institutions could turn to the ECJ and raise the issue. Anyway, there is a contradiction between Article 256 and Article 265 (TFEU). In Article 256 it is said that the member states or the European Institutions could raise issues to the ECJ, but not before the General Court passes its judgment. In this case we should say that the member states and the Institutions could appeal a judgment of the General Court in the ECJ but not directly, unless it is agreed, for instance, as in case of urgent preliminary ruling procedure. Another important circumstance is that the General Court acts as a first instance court and according to Article 268 (TFEU) the plaintiffs could claim compensations and damages. The provision of Article 270 defines the competence of the ECJ to rule on cases of the EU and its employees, specified in the Staff Regulation of Officials of the European Communities.

Last, according to Article 272 (TFEU), ECJ is competent to rule on arbitration clause, implemented in a treaty based on the public or the private law.

It could be concluded that the jurisdiction of the General Court is extended and turns into a first-instance one. The delivering of judgments on preliminary issues is regulated in Article 267, par. 1, point b). According to it the General Court has the jurisdiction to pass preliminary rulings concerning: validity and interpretation of the acts of the institutions, bodies and offices or agencies of the Union. Considering the issues of the AFSJ and the active role of Union's departments and agencies, it is doubtless that the application the AFSJ provision works together with agencies such as Europol, Eurojust, the College of European Police, and the Fundamental Rights Agency in order to develop their activity and achieve their goals. The implementation of an opportunity for a review of the decisions of the General court from the ECJ is a prerequisite and guarantee for proper implementation and compliance with European Union law, especially in the AFSJ.

Another provision of a particular importance for the future development of both the judicial system of the EU and the Area of Freedom Security and Justice is the text of article 257 of TFEU. Based on the meaning of Article 257 of TFEU there is an opportunity for the European Parliament and the Council to create specialized courts to the General Court appointed to consider the first instance actions in specific areas through an ordinary legislation procedure. In fact, now is the moment for the opportunity for creating a specialized court for the problems with the AFSJ to be discussed by using the five year transition period established in art.10 of Protocol 36 in the best possible way. The reasons for building a specialized court for the AFSJ are reinforced by the intensive development of matters of human rights protection and the main freedoms because through the Lisbon Treaty the Charter of Fundamental Rights of the European Union is incorporated as a part of the EU law. Moreover, the EU joins the European Convention of Human Rights through Article 6, paragraph 2 of TEU. This means an opportunity for competition between ECJ – Luxembourg and the European Court of Human Rights (ECHR) in Strasbourg; although some experts state that "The same rights will be within the competence of the EU and ECHR after the entering into force of the Lisbon Treaty. The opinion of experts in the field of fundamental rights is that a realization of the risk of misinterpretation is unlikely if the ECJ continues to go by the practice of ECHR and it takes into account the specific of the EU law. When the ECHR joins the Convention it will conduct a judicial review over the following of the fundamental rights by the institutions of the EU and it will have an advantage to the ECJ in matters of human rights."(Petranova, 2010) There are no guarantees and the possibility for creating a different practice between the two courts should not be eliminated. It is true that they should work close together and to base on their practice, mostly the ECJ to be based on the practice of the ECHR, since it was able to accumulate a wide practice closely related to human rights. Besides that, an important moment of the practice is that it should be unified and coherent but not constant.

In accordance with the Lisbon Treaty, the quality and the role of the individuals, who have the right to claim upon the legality of acts adopted by the Council, the Commission and the European Central Bank increase. An exception is provided for the raising legal actions in third parties. Therefore, the EU citizens have the opportunity to procedural complaints against the institutions,

agencies and offices of the EU which fail to act and refrain from decision adoption, as well as in respect to the AFSJ.

Another essential issue is the application of the preliminary ruling by the ECJ in the matter of AFSJ, extended in the jurisdiction of every member state.

A centerpiece is devoted to the observance of the human rights. The member states have reached and now maintain high standards in this area. Moreover, an urgent preliminary ruling has been attached and is applicable especially for AFSJ cases. The urgent preliminary ruling can be applied before case to a national judicial authority where there is a detainee person.

In comparison to the preliminary rulings, which time limit is 16-17 months, the time that the ECJ needs to deliver its judgment is 90 days. As some experts point out "The Court makes serious efforts to find and put into action adequate mechanisms that would reduce the time limits of the proceeding and the results are impressive, although – according to the Court itself, still insufficient. In 1998 the persistence of the proceeding is 21,4 months, and 10 years later – it is reduced to 16,8 months." (Popova, 2009).

Bulgaria has also contributed to the development of the practice of the ECJ. In 2009 the Bulgarian Administrative Court requested for an urgent preliminary ruling on Case C-357/09 PPU, Saïd Shamilovich Kadzoev pursuant to Article 104 b on Rules of procedures in ECJ. In short, on October 21st, 2006, Mr Kadzoev was arrested by the Bulgarian border police authorities near the Turkish border. At first he represented himself as Saïd Shamilovich Huchbarov, born in Chechnya

(Grozni city), but later on he stated that his real last name was Kadzoev and he was a citizen of the Chechen Republic of Ichkeria. The regional border department in Elhovo imposed administrative measures of compulsion – prohibition of entering the territory of Bulgaria in a 3-year period and a **compulsory outlet to the border**.

Mr Kadzoev was accommodated temporarily in a special home for foreigners. The Administrative Court in Sofia raised the following questions by which the sense of Article 15, Directive 2008/115/EC to become clear.

In fact, the transposition of this Directive implements **the maximum period of detention – 18 months outlet to border** (6 months, and option for extension – further 12 months under certain circumstances)[2] through the Law on the foreign citizens in the Republic of Bulgaria for detention of illegally staying third-country nationals and their repatriation.

Here are the answers of the raised questions:[3]

Mr Saïd Kadzoev, of Chechen origin, arrived in Bulgaria in October 2006 and applied for asylum. He was placed in a detention centre. All his applications for asylum were turned down and his appeals against these rejections were unsuccessful. The Bulgarian authorities considered that he did not fulfill the conditions for protection to be granted under asylum and ordered his expulsion as an illegal immigrant. However, his expulsion to Russia was not possible, as he had no identity documents issued by the Russian authorities. Pending a solution allowing his return to Russia or to another third country, Mr Kadzoev has been detained in a detention centre for more than 3 years.

The Court was questioned on the interpretation of Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals. Article 15 of this Directive sets out the conditions on detention for the purpose of removal of foreigners and provides in particular that the detention may not exceed a maximum period of 18 months.

In this judgment issued under an urgent preliminary ruling procedure, the Court specifies several points concerning the scope of Article 15 of the Directive, laying particular emphasis on the obligation for Member States not to exceed this maximum period of 18 months.

The Court first specifies that to calculate whether the limit of the maximum duration of detention laid down in Directive 2008/115/EC has been exceeded, it is necessary to take account of any period of detention completed before the rules in that directive become applicable. However, the detention period completed pursuant to the provisions relating to asylum seekers (and in particular

[2] Decision Case C-357/09 PPU KADZOEV, November 30th, 2009, Grand Chamber of the ECJ, Press and Information Office, p. 2

[3] ibid

Directives 2003/9/EC and 2005/85/EC) cannot be taken into account in this calculation as it comes under separate legal arrangements. According to the Court, Article 15(4) of Directive 2008/115/EC, under which detention

ceases to be justified when it appears that a reasonable prospect of removal no longer exists, in particular covers the situation where it appears unlikely that the person concerned will be admitted to a third country before the expiry of the 18-month period laid down by the Directive. However, in any case, Article 15(4) is not applicable when the 18-month period has already expired and, in this case, the person concerned must be released immediately.

Finally, the Court specifies that Member States cannot invoke grounds of public order or public safety for detaining a person under Directive 2008/115/EC and for refusing to release that person immediately, once the 18-month period has expired.[4]

In conclusion, it is obvious that through the new rules established by the Lisbon Treaty, the structure of the legal system of the European Union acquires qualitatively new content. Of course, one of the most serious arguments is the abolition of the pillar structure of the EU and the outlining of the single legal personality of the organization, vividly displayed in the AFSJ. The formal barriers of cooperation in the ASFJ between the national jurisdictions of the Member States and the ECJ are also abolished. This happened because after the preceding 5-year period expires, a declaration recognizing the jurisdiction of the ECJ on these issues is not necessary. The Incorporation of the Charter of Fundamental Rights of the European Union in its legal system is a clear sign of the respect for human rights and the acquisition of jurisdiction of the ECJ on this issue. It refers also to the practice of the ECHR in its judicial activity. This inevitably leads to development of convergence process of the Legal Systems of the Member States and to contribution to the complete establishment of the AFSJ, and undoubtedly confirms the leading role of the European Court of Justice.

References

1. Hatzopoulos, V., 2008 'Casual but Smart: The Court's new clothes in the Area of Freedom Security and Justice (AFSJ) after the Lisbon Treaty', *Research Paper in Law*, College of Europe, 2008, p. 1

2.Marin, N. 2010 "Development of the cooperation in justice and home affairs (1975-2010)", *International Policy Journal*, No.2/2010, South-West University "Neophyte Rilsky", Blagoevgrad, p. 25

3. Petranova, E. 'The Last Decision in the European Community Court History', *World of Law Journal*, No. 3/April, 2010, p. 107

4. Popova, J. 2009, 'The Urgent Preliminary Ruling to the European Court of Justice', *World of Law Journal* № 3/ 2009, p. 38

Summary

The purpose of this article is to expose the basic judicial principles included in the ECJ competences and to put forward arguments about the necessity of a specialized AFSJ court. The reasons for building a specialized court for the AFSJ are reinforced by the intensive development of matters of human rights protection and the main freedoms because through the Lisbon Treaty the Charter of Fundamental Rights of the European Union is incorporated as a part of the EU law. Moreover, the EU joins the European Convention of Human Rights through Article 6, paragraph 2 of TEU. This means an opportunity for competition between ECJ – Luxembourg and the European Court of Human Rights (ECHR) in Strasbourg. There are no guarantees and the possibility for creating a different practice between the two courts should not be eliminated. It is true that they should work close together and to base on their practice, mostly the ECJ to be based on the practice of the ECHR, since it was able to accumulate a wide practice closely related to human rights. Besides that, an important moment of the practice is that it should be unified and coherent but not constant. This inevitably leads to development of convergence process of the Legal Systems of the Member States

[4] C-357/09 PPU Said Shamilovich Kadzoev (Huchbarov), judgment of 30 November 2009, European Commission, Legal Service, http://ec.europa.eu/dgs/legal_service/arrets/09c357_en.pdf

and to contribution to the complete establishment of the AFSJ, and undoubtedly confirms the leading role of the European Court of Justice.

Nikolay Marin obtained PhD degree in the field of International Law and International Relations. He teaches Public International law and European Union Law at South-West University "Neophyte Rilsky" in Blagoevgrad and at Plovdiv University "Paisiy Hilendarsky". He took part as a lecturer in Summer University project in the framework of Programme for Cross-Border Cooperation INTERREG-III held in 2006 and coordinated by the Law Faculty Democritus University in Komotini, Greece. Member of Bulgarian Association of European Law and Bar Association of Blagoevgrad.