RETHINKING ACCESS BY PRIVATE PARTIES TO THE COURT OF JUSTICE OF THE EUROPEAN UNION

Judicial Review of EU Acts before and after the Lisbon Treaty
Preface

This book corresponds in its core to my Ph.D dissertation which was submitted at the Catolica Global School of Law in October 2012 and discussed publicly in July 2013.

Attention is drawn to the following methodological options:

a) The dissertation includes apart from the main text, one table of cases, one table of legislation, one table of abbreviations, one table of correspondence, the abstract and the list of bibliographic references;
b) Apart from the introduction and conclusion, the dissertation is divided in two main parts, each of them divided in three chapters;
c) The numbering of the chapters is autonomous in each part;
d) For the sake of simplification, clarity and consistency, all bibliographic references included in footnotes follow the same pattern: AUTHOR(S)’ LAST NAME, Title (for books) or “Title” (for articles/working papers), year of publication, relevant page(s);
e) Bibliographic references in the same footnote are indicated by chronological order (starting with the oldest), and in case of references of the same year by alphabetical order of the author(s)’ name;
f) Full bibliographic references may be found in the final list of references;
g) Cases are referred to in the main text according to their short designation, and are identified in footnotes only the first time they are mentioned in the text;
h) In footnotes, references to cases are included in full and said references may also be found in the table of cases;
i) Cases are indicated in footnotes by chronological order following the corresponding number of process regardless of the court which decided them and the date of the final decision;
j) All the CJEU’s cases cited are available in the Court’s website (www.curia.eu);
k) Legal acts are referred to in short, with full reference being included in the table of legislation;
## Contents

Preface 7  
Table of cases 9  
Table of Legislation 40  
Table of Abbreviations 43  
Table of Contents 45

## INTRODUCTION

1. From the “Complete System of Legal Remedies and Procedures” to the Need to Ensure Effective Judicial Protection of Private Parties 49  
2. The European Union as a Rechtsgemeinschaft and the Deficits of Judicial Protection 56  
3. Plan and Terminology 65

## PART I

A Conceptual Analysis: the Les Verts Approach to the Union’s System of Judicial Protection

1. Judicial Review of Union Acts under the CJEU’s General Jurisdiction 71  
       1.1.1. The Action for Annulment Established in the Treaties 71  
       1.1.2. An Approach Mostly Focused on the Type of Reviewable Act: a Recours Donné Contre un Act? 79  
       1.1.3. The Restrictive Case-Law Regarding the Locus Standi Requirements of Private Parties 115  
       1.1.4. The Irrelevance of a Breach of the Right to Effective Judicial Protection: “Do as I Say and not as I do…” 168  
       1.1.5. The Case-Law Favours Objective and Institutional Dimensions of the System of Judicial Review 179  
       1.1.6. The “Hidden Reasons” for the CJEU’s Restrictive Approach to Direct Access: Une Certame Idee of the Union’s Judicial System and the Issue of Caseload 190  
   1.2. Indirect Access by Private Parties to the CJEU: Still an Objectivist, Institutional and Systemic Approach to the Judicial Protection of Private Parties 199
1.2.1. The “Alternative Routes” Approach 199
1.2.2. The So-called “Gap Theory”: Practical Difficulties Surrounding Indirect Access to the CJEU 211
1.2.3. Conceptual Difficulties Surrounding Jurisdictional Subsidiarity 240
1.3. Caught in between: the TWD and Nachi “Guillotines” 280
2. The CJEU’s Jurisdiction over the Intergovernmental Pillars: Articles 6(2), 46 and 47 TEU 298
2.1. The Jurisdiction of the CJEU under the Treaties 298
2.2. The Case-Law of the CJEU and the Gaps of the System of Judicial Review 307
2.2.1. General Remarks 307
2.2.2. On the Institutional Balance between the Union and the Member States: from Air Transport Visa to the Small Arms Case 308
2.2.3. On the Effective Judicial Protection of Private Parties: from Pupino to the Fight against Terrorism 318
3. The Right to Effective Judicial Protection as an Institutional Guarantee 331
3.1. The Objective, Institutional and Systemic Elements in the CJEU’s Case-Law: Summary of the CJEU’s Views on the Union’s System of Judicial Review 331
3.2. Echoes of Institutional Guarantees in the CJEU’s Case-Law 341

PART II
A New Conceptual Approach after the Lisbon Treaty: the Impact of the Johnston Principle on the Union’s System of Judicial Protection

1. The Right of Access to Justice within the Union’s Judicial System in Light of the Renewed System of Fundamental Rights Protection 351
1.1. General Remarks 351
1.2. Article 6(1) TEU: the Binding Legal Value of the Charter of Fundamental Rights 359
1.2.1. The Protection of Fundamental Rights within the European Union: from Substance to Procedure 359
1.2.2. The Johnston Principle: the Right to Effective Judicial Protection and the Effectiveness of Union Law 370
1.2.3. Beyond Johnston: Effective Judicial Protection vis-à-vis the European Union? 381
1.2.4. Article 47 of the Charter of Fundamental Rights 389
1.2.5. The Impact of the Charter on the Union’s System of Judicial Protection 399
1.3. Article 6(2) TEU: the Mandatory Accession to the ECHR 406
CONTENTS

1.3.1. General Remarks: from Opinion 2/94 to the Draft Agreement on Accession 406

1.3.2. The Right of Access to Justice under the ECHR: Articles 6 and 13 ECHR 412

1.3.3. The Union’s Judicial System under the ECHR’s Watch 430

2. Access by Private Parties to the CJEU under the Lisbon Treaty: Reforming Jurisdiction within the Union’s Judicial System 466

2.1. A New Test on Locus Standi of Private Parties: the Scope and Meaning of the new Article 263(4) TFEU 466


2.1.2. The Notion of Regulatory Acts 477

2.1.3. The Test of Direct Concern and the Absence of Implementing Measures 495

2.1.4. A New Approach to the Test of Individual Concern 505

2.1.5. Ensuring Fundamental Rights Review 539

2.1.6. “Plugging the Gaps”: Taking Effective Judicial Protection Seriously or “Do as I do…” 561

2.1.7. TWD and Nachi after Lisbon: an Overlapping of Available Remedies? 578

2.2. The CJEU’s Jurisdiction over the CFSP under the Lisbon Treaty 584

2.2.1 The Unified and Extended Jurisdiction of the CJEU 584

2.2.2. The Scope and Meaning of Article 275 TFEU 588

2.2.3. Expanding Jurisdiction over CFSP Measures: a Move towards Constitutionalism 595

2.2.4. Reasons for Judicial Self-Restraint: a “Political Questions” Doctrine for the EU? 614

3. Dealing with Caseload: the Reform of the Union’s Judicial System 623

3.1. From Jurisdictional Subsidiarity to the Limits of the Judicial System 623

3.2. A Certiorari Approach for the Union Courts: de Minimis non Curat the CJEU? 631

3.3. The Issue of Judicial Reform 643

Conclusion 653

ANNEX 665

ABSTRACT 667

RESUMO 669

REFERENCES 671