

EU LAW AND INTEGRATION

TWENTY YEARS OF JUDICIAL APPLICATION OF EU LAW

JOSÉ LUÍS DA CRUZ VILAÇA



B L O O M S B U R Y

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Foreword

When Professor José Luís da Cruz Vilaça asked me to write this foreword, I was delighted to accept. Aside from our mutual friendship, which stretches back for over two decades, I have witnessed his qualities, both professional and personal, at first hand, in his role as Founding President of the Court of First Instance of the European Communities, today the General Court of the European Union, in the period from 1989 until 1995. As a tribute to his contribution to the European Union's judiciary during that period, I still think of him as 'our Founding President'.

His role as President of the Court of First Instance followed a period as Advocate General at the Court of Justice (1986–1988), to which he returned on 6th October 2012, this time as judge.

In honour of his return to the Kirchberg Plateau, this book contains a collection of articles written by José Luis da Cruz Vilaça. This collection is of great academic interest in that it presents an overview of European Union law that, despite covering a period that goes back more than twenty years, has lost none of its relevance. Moreover, the author's academic approach is enriched by his practical experience both as a practitioner at the bar and as a member of the Court of Justice and the Court of First Instance, as it then was. From a thematic perspective, this collection has the quality of great diversity. It is divided into five parts covering EU constitutional law, the EU judicial architecture, individuals' access to justice, European competition law and various other aspects of substantive EU law under the heading 'Studies on EU Law and Economic Integration'.

First, the collection of chapters relating to EU constitutional law opens with a chapter entitled 'Constitutional Law and Community Law: the Case of Portugal' concerning the relationship between Community law and national legal orders, specifically that of Portugal. It provides a compelling account of the development of Portuguese national law, both by means of constitutional amendments and decisions of the courts themselves, leading to the gradual acceptance by the Portuguese courts of the primacy of Community law and of their own duty to cooperate with the European Court of Justice through the preliminary ruling mechanism. In the following chapter 'Are there Substantive Limits to the Amendment of the Treaties?' (*Cahiers de droit européen*, 1993), the author argues that Member States cannot invoke principles drawn from public international law in order to circumvent the formal and procedural requirements for amending the Treaties. In the same way, their power to amend the Treaties is limited by the existence of a 'hard core' of EU Treaty law. That hard core includes the prohibition on any reversal of measures creating the internal market, the principle of conferred powers and strict adherence to the procedure for amendment of the Treaties. It is true that the limits on amendment of the Treaties are implicit and

difficult to determine, in the absence of any objective criteria making it possible to define those limits with any certainty. However, given that the founding Treaties create not only obligations for Member States but also rights for individuals, 'the Treaty is not, and neither could it be, wholly at the disposal of the Member States, no more so than the rights enshrined in their [national] constitutions'. In this chapter, the author thus shares with us his vision of EU law, emphasising the 'constitutional' character of the Treaties as well as the 'autonomy' that the EU legal order has acquired. In the third and final chapter in Part I, entitled 'Reflections on Judicial Review of the Constitutionality of EU Legislation', which first appeared in the collection of essays '*Vers une nouvelle architecture de l'Union européenne*' (Bruylant, 2004), José Luis da Cruz Vilaça examines the role of the Court of Justice as a 'Constitutional Court' of the EU, underlining the Court's contribution to the process whereby the Treaties are gradually mutating into a true constitution. He also describes the positive impact that the creation of the Court of First Instance has had in improving the judicial protection of litigants.

Second, four chapters relating to the EU judicial architecture (4 to 7) constitute Part II that forms the cornerstone of the collection. Indeed, in light of the different functions he has occupied, José Luis da Cruz Vilaça has given a great deal of thought to the judicial architecture of the EU, the possible reforms that might be made to that structure and their consequences; these four pieces of work are the fruit of those reflections. His contribution entitled 'The Setting Up of a New Community Court—the First Year of the Court of First Instance', initially published in French in '*L'Europe et le droit: Mélanges en hommage à Jean Boulouis*' (Dalloz, 1991), is of particular historical value, describing the problems faced by that Court at its inception, from the perspective of its then President. As the author explains, one of the first tasks of the Court of First Instance was to prepare its draft Rules of Procedure. Those provisions of the Court of Justice's Rules of Procedure that could be applied *mutatis mutandis* were adopted wholesale whilst those that were incompatible, either with the composition and structure of the Court of First Instance or with the type of case and the nature of the task of judicial review that had been conferred on it, were not included. The same was true where the experience of applying the Rules of Procedure of the Court of Justice had revealed certain flaws or discrepancies. The author underlines that the establishment of a double degree of jurisdiction improves the judicial protection of individuals.

Regarding the various reforms proposed to modify the judicial architecture of the EU to the treatment of an increasing number of cases, whilst José Luis da Cruz Vilaça is certainly in favour of specific incremental changes, he rejects any radical reforms that might compromise the balance of the EU's judicial system. In that context, mention must be made of the final chapter in Part II, entitled 'The Court System of the European Communities' (*La Conférence intergouvernementale sur l'Union européenne: répondre aux défis du XXI^e siècle*, 1996), where the author considers that the roles of the Court of Justice and the General Court may be approximated, respectively, to those of a constitutional court and of an administrative court. Any reform of the court system of the EU should be directed

towards preserving the balance of that system and the coherence of the case law. Thus, in order to improve the Court of First Instance's productivity, the author proposes pragmatic reforms, such as an increase in the number of judges, the specialisation of chambers (but not of judges), the appointment of assistant *rapporteurs*, the appointment of a small number of Advocates General, and the treatment of cases by a single judge. On the other hand, he is firmly opposed to the creation of a constitutional court alongside the Court of Justice, since the latter already fulfils the functions of a constitutional court. Moreover, any such reform is undesirable because it springs from a belief—an erroneous one, in the author's view—that the Court of Justice is excessively 'activist' in its attitude.

José Luis da Cruz Vilaça has, third, examined in detail the judicial protection of individuals. Part III on this theme contains three chapters (8 to 10). Whereas the first two relate to the protection of individuals under EU law, the third examines the application of Article 6 of the ECHR to disputes involving civil servants. Firstly, in his contribution to the collection of chapters 'Scritti in Onore di Giuseppe Federico Mancini' (*Giuffrè*, 1998), 'Interim Measures in Judicial Proceedings as an Instrument of Protection for Individuals in European Community Law', he explains that the interim measures procedure is a tool serving the judicial protection of individuals, given that this procedure makes it possible to 'achieve a rapid ruling within a time frame that is compatible with the need for the effective administration of justice'. By sharing his experiences as President of the Court of First Instance, in whom, by virtue of the Rules of Procedure, jurisdiction to rule on requests for interim measures is vested, the author describes the legal framework of the interim measures procedure as well as the conditions of admissibility and for the substantive grant of interim measures. That analysis is supplemented by a whole range of examples taken from the Court of First Instance's case law. Next, José Luis da Cruz Vilaça studied the concept of 'direct concern' in the context of actions for annulment brought against decisions addressed to a Member State in the area of EU funding. In his contribution to the 'Mélanges en l'honneur de Philippe Manin, L'Union européenne: Union de droit, Union des droits' (*Ed A Pédone*, 2010), bearing the title 'Effective Judicial Protection with Regard to Community Funds—May One be Directly Concerned by a Decision Addressed to a Member State?', he makes the case that individuals should be considered as being directly concerned, within the meaning of Article 263 TFEU, when an EU regulation or a contested Commission decision expressly impose on the Member State addressee an obligation to pass on to those individuals the financial consequences of that regulation or decision. The same is true where the Member State addressee has a margin of assessment that it does not exercise. A more restrictive interpretation of that concept would, according to the author, go against the principle of effective judicial protection, in particular when the Member State in question has a system of administrative law that is opposed to granting rights of action against purely implementing measures on the basis that the act being executed could have been challenged before the competent court. Finally, in this Part, in his analysis of Article 6 of the ECHR contained in 'Mélanges en hommage

à Georges Vandensanden: Promenade au sein du droit européen' (*Bruylant*, 2008), José Luis da Cruz Vilaça analyses, with approval, the case law of the European Court of Human Rights to the effect that there is a presumption of applicability in favour of Article 6 of the ECHR to any dispute between a civil servant and a Contracting State.

Fourth, regarding competition law, José Luis da Cruz Vilaça published three articles in the prestigious *European State Aid Law Quarterly* (2005, 2006, 2009). In that respect, I would like to draw attention, in particular, to the excellent analysis undertaken by the author in chapter 12 concerning the concept of 'selectivity', both geographical and material, notably in the light of the 'Azores' case law. Part IV closes with a contribution that provides a highly detailed and technical analysis of a specific but vitally important question, the permitted duration of non-complete obligations in full-function joint ventures.

Fifth, and lastly, the collection contains three chapters (15 to 17), concerning a range of subjects under the heading 'Studies on EU Law and Economic Integration' which illustrate the interest that José Luis da Cruz Vilaça has taken in the study of EU law in the round, and even in subjects extending beyond the borders of the EU, as evidenced by his insightful work on the Andean Community (*European Foreign Affairs Review*, 1998). Moreover, we may refer to his contribution in the collection of essays *Services and Free Movement in EU Law* (Oxford University Press, 2003) in which the author explains, with particular emphasis on the "neck" came, the complexity of situations in which national measures relating to advertising may impinge upon both the free movement of goods and the free movement of services. In this section, mention must, finally, be made of his article published in the *European Public Law Review* (2004), which is already a 'classic' of European legal literature, analysing the precautionary principle, particularly through a detailed study of the 'Pfizer' judgment.

In conclusion, I warmly recommend this collection to readers who are looking for a work that covers a wide range of rich and varied ideas in the field of EU law.

Koen Lenaerts

Vice-President of the Court of Justice of the European Union
Former Judge at the Court of First Instance of the European Communities
(1989–2003)

Acknowledgements

This collection of my published writings from the past twenty years, some of which were originally written in a language other than English, owes much to many people.

Several of the texts published here were either written in collaboration with another author or benefited from the assistance of younger colleagues, in terms either of the research that they carried out for me or of the work that they did in helping to produce the text of the article in the language of original publication. On the one hand, my co-authors thus share, to the extent of their respective contributions, the authorship of this book. On the other hand, the cooperation of those who assisted me in the preparation of the articles is acknowledged, as appropriate, at the beginning of the relevant text.

I am also grateful to the original publishers of the articles included in this book for making possible the re-use of the published materials, some of them after translation into English. The content of each article is essentially the same as in the original version but I have taken this opportunity to make marginal amendments or refinements to certain passages.

Turning to the book itself, I am particularly indebted to my friend and colleague Koen Lenaerts, Vice-President of the Court of Justice of the European Union and founding member, together with me and our ten other former colleagues, of the Court of First Instance of the European Communities, as it then was, for the elegant and overly generous Foreword that he kindly wrote as an introduction to this book.

My special gratitude also goes to Mathew Radley, legal secretary in Judge Lenaerts' chambers, for the invaluable contribution he made in revising the English versions of those articles that had originally been published in French. Any inaccuracies that may remain are mine alone.

Two other colleagues, Judge Allan Rosas and former Advocate General Miguel Poiares Maduro kindly encouraged me to undertake this project, for which I thank them also.

In addition, I am grateful to my younger colleagues and '*stagiaires*', who assisted me in preparing the English versions of some of the published materials. Thanks are thus due to Maria João Melícias, Carla Farinhas, Sara Sousa, Marie Lauzanne, Stijn Lamberigts, Stephanie Lodola and Luísa Lourenço, as well as to my assistants Anna Bella Marinho and Marina Artigas for their work in diligently re-typing some of the older texts that were not available in electronic form.

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to detail and for her patience when I significantly overran the deadlines that we had agreed.

Finally, I should like to pay tribute to my friends and, above all, to my family, in particular my wife and children, in recognition of all the time, attention and even physical presence that I was unable to devote to them over a period of many months. As a token of my gratitude, I dedicate this book to Marie-Charlotte and to my children.

José Luís da Cruz Vilaça
Luxembourg, February 2014

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Part I

EU Constitutional Law