Introduction

Judicial review constitutes an important aspect of any legal system operating under the rule of law. It allows individuals to protect their rights and legitimate interests, maintains the balance between the political branches of government and provides the courts with a greater or lesser opportunity to shape the process of the making and application of the law. Judicial review hence contributes to the accountability of government and the protection of individuals. Each legal system has, however, different conceptions as to the extent to which courts are involved in the review of acts adopted by the other branches of government. Member States in the European Union provide extensive review of administrative acts of individual application, but often also of those of general application. Courts have asserted greater control over the administration in part to counteract the dominance of the executive and to provide a means of accountability. On the other hand, for reasons of democratic legitimacy constitutional review of parliamentary acts is the exception in the Member States and, where it exists, is entrusted to constitutional courts or tribunals, mainly to uphold constitutionally entrenched values and principles.

The rationales of judicial review are also pertinent in the European Union. The necessity of judicial review as a means of preserving the institutional balance in disputes between the political institutions, and, due to its federal nature, of maintaining the balance between the EU and its Member States in disputes relating to the existence and exercise of EU competence is not seriously disputed. Nor is there any doubt as to the need to protect the rights of individuals. All the same, it is with regard to the

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3 See the discussion on judicial review by constitutional courts in V.C. Jackson and M. Tushnet, Comparative Constitutional Law (Foundation Press, 2nd edn., 2006), chapter VII.
latter that serious concerns have been raised as to whether the European Court of Justice\(^5\) adequately performs this function, in particular because of its restrictive approach of allowing individuals direct access to the Community Courts in case of a challenge against normative acts. Greater demand for a liberalisation of the standing requirements for individuals is considered specifically justified on the basis that the EU does not have the same democratic credentials as Member States.\(^6\)

The proper function of judicial review in the EU is to a large extent dependent on how one views the nature of the EU. Those who see the EU as an administrative entity exercising delegated powers\(^7\) would perhaps argue that EU acts should be subject to judicial review analogous to that applicable in the Member States for administrative acts. This would have as a consequence that direct access to the Community Courts be granted on more liberal terms and that judicial review be undertaken with greater intensity. On the other hand, those who consider the EU as an autonomous legal system of a constitutional nature,\(^8\) like the author of this book, might be more inclined to apply a more differentiated view. Acts akin to legislation could be reviewed directly in the Community Courts in more restrictive circumstances, while direct access to challenge administrative acts would be more readily available and review would apply stricter standards.\(^9\) A discussion about judicial review in the EU is therefore also a discussion about the nature of the EU and the nature of the acts which it adopts.

Judicial review in the EU is most extensive under the EC Treaty, where direct actions are available for the annulment of Community acts under Article 230 EC and for failure to act under Article 232 EC. Member States and EU institutions enjoy privileged access to the Community Courts to avail themselves of these remedies. Private parties, on the other hand, have

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5 The European Court of Justice of the European Communities consists of the Court of Justice, the Court of First Instance and the Civil Service Tribunal. References to the European Court of Justice or ECJ can therefore relate, depending on the context, to the Court of Justice of the European Communities as an umbrella term for all three courts, or only to the Court of Justice. The term Community Courts is used in this book to refer to the Court of Justice and the Court of First Instance. The term Court refers to the Court of Justice as one of the Community Courts.


to meet more restrictive conditions to bring a direct action in the Court of First Instance. While these conditions would usually allow individuals to challenge individual administrative acts, they generally make it impossible to bring a direct action against acts of general application.\footnote{See A. Türk, supra note 8, at p. 173.} The validity of such general Community acts would normally only be open to indirect review under Article 234 EC through the national courts, where individuals have brought an action against national authorities which have applied them, or, exceptionally, in the CFI under Article 241, where Community institutions were entrusted with their application. In this respect the system of judicial remedies provided in the Community legal system is a consequence of the logic of executive federalism,\footnote{For a description of the classic model of executive federalism, see, for example, K. Lenaerts, ‘Some Reflections on the Separation of Powers in the European Community’, (1991) 28 CMLRev, 11–35 at 11 et seq.; B. Dubey, ‘Administration indirecte et fédéralisme d’exécution en Europe’, (2003) CDE 87–133.} in which the implementation and application of general and abstract Community rules would be mainly the responsibility of Member States. In addition to the remedies of judicial review, Article 235 grants the Court jurisdiction to award damages under the conditions of Article 288(2).

The Court has insisted that ‘[b]y Articles 230 EC and Article 241 EC, on the one hand, and by Article 234, on the other, the Treaty has established a complete system of legal remedies and procedures designed to ensure review of the legality of acts of the institutions\footnote{Case C-263/02 P Jégo Quéré v Commission [2004] ECR I-3425, para. 30.} and has given responsibility for such review to the Community Courts. Behind the claim of a robust system of judicial review is hidden the enormous task of adapting this system to the challenges it has had to face since its inception. The Court’s task goes in this respect beyond the mere interpretation and in some cases, such as the non-contractual liability of the Community under Article 288(2), the creation of the principles and rules governing the remedies available under the EC Treaty. It is the transformation that has taken place within the Community’s legal system\footnote{See J.H.H. Weiler, ‘The transformation of Europe’, in J.H.H. Weiler, The Constitution of Europe (CUP, 1999), pp. 10–101; P. Craig, ‘Constitutions, Constitutionalism, and the European Union’ (2001) ELJ 125–150, pp. 128–135.} and through consecutive Treaty amendments the conferral of ever more competences to the Community which have posed the most profound challenges to the Community’s system of judicial review. First, the increase of Community competence and the loss of national influence at EC level, be it through greater recourse in the Council of Ministers to qualified majority voting for the adoption of basic acts or the expansion of the comitology system by which implementing powers
are delegated to the Commission, has led to a more litigious approach by the Member States to protect their competences. Second, the dynamic nature of the Community’s institutional balance has had to adjust to the growth in powers of the European Parliament, whose status as applicant and defendant in judicial proceedings before the Court had to be defined accordingly. Third, the increased role of the European Parliament in the law-making process within an autonomous constitutional system makes it possible to consider certain acts adopted by the Community as legislative acts which are functionally equivalent to national legislation. This necessitates a reflection on the role of judicial review in relation to such acts. Fourth, the expansion of Community competence and the corresponding increase in Community acts led to a proliferation of direct challenges in the Community Courts by private parties affected by such acts. The restrictive standing requirements for private parties to challenge acts of general application directly in the Community Courts have focused attention on the availability of indirect means of review of such acts through the national courts and whether Community law provides individuals with an effective judicial remedy in this respect. This seems all the more justified when the cautious approach of the Community Courts in respect of judicial review of Community acts is compared with the more radical inroads the Court has made into the autonomy of the national legal systems to provide individuals with effective remedies to enforce Community rights in national courts. Finally, the development of the Community legal order has led to a more complex system of EU administrative governance than the simple model of executive federalism might suggest. EU administrative governance is today characterised by intensive co-operation between administrative actors from the national and Community level.

15 A. Türk, supra note 8, p. 228.
17 A. Ward, supra note 4.
The involvement of national administrations in the decision-making processes of the Community and the participation of Community actors in the implementation of Community law in the national legal systems have added to the difficulties which individuals face within the current judicial architecture.

While the Court of Justice was asked to adapt the Community’s system of judicial review to these challenges, it became clear that the increase in litigation also required a reform of the judicial architecture.\(^20\) The Court of First Instance, established in 1988,\(^21\) was given limited jurisdiction only, but by 1994\(^22\) was competent to hear direct actions brought by natural and legal persons subject to an appeal to the Court. The growing delay in actions before the Court made further transfers of jurisdiction inevitable. The amendment to Article 225(1) EC in the Nice Treaty gives the CFI jurisdiction to hear at first instance actions or proceedings referred to in Articles 230, 232, 235, 236 and 238 EC unless they are assigned to a judicial panel or are reserved to the Court in the Statute for the Court of Justice. Article 225a EC was inserted in the Nice Treaty and provides for the possibility of judicial panels being established by Council decision. The Council made use of this possibility by setting up the European Civil Service Tribunal which has jurisdiction to hear staff cases.\(^23\) With the amendment of Article 51 of the Court’s Statute the Court has reserved jurisdiction for actions under Articles 230 and 232 EC brought by a Member State against the European Parliament and/or against the Council (with the exception of those which are heard by the CFI) or by one EC institution against another.\(^24\) Consequently, the CFI now has jurisdiction to hear direct actions brought by natural or legal persons under Articles 230 and 232 EC; actions brought by Member States against the Commission; actions brought by Member States against the Council in the field of state aid and antidumping as well as against implementing acts; actions for damages; actions based on contracts which give the CFI jurisdiction; and actions relating to Community trade marks. An appeal lies against rulings of the CFI to the Court of Justice, however, only on a point of law. While Article 225(3) EC, inserted by the Nice Treaty, also provides for the CFI to hear preliminary


\(^{23}\) Council Decision 2004/752, [2004] OJ L 333/7. An appeal against a ruling by the Civil Service Tribunal lies with the CFI, but only on a point of law, and in exceptional cases to the Court.

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rulings, the necessary amendment of the Statute for this purpose has not yet been made. It should, however, not be forgotten that national courts play an increasingly important role in the system of judicial review of Community acts. While national courts are not empowered to set aside Community acts their role as fora for the scrutiny of Community acts, and in particular those of general application, for the purpose of Article 234 EC has assumed greater importance with the rulings of the Court in *UPA* and *Jégo Quéré*.

Judicial supervision of EU acts is considerably more restricted outside the Community pillar. While Article 46 EU does not provide the Court with any jurisdiction under the second pillar, Article 46(b) EU states that the Court of Justice has jurisdiction in the third pillar under the conditions set out in Article 35 TEU. Direct actions can be brought under Article 35(6) TEU by a Member State or the Commission against a framework decision or a decision. Article 35(1) TEU provides for an indirect way of challenging third pillar acts by providing the Court jurisdiction to give preliminary rulings, *inter alia* on the validity of framework decisions and decisions. However, the jurisdiction of the Court under this provision must first be accepted by the Member States, which under Article 35(3) EU have a choice as to whether to limit the possibility of making a reference to the national court of last instance or to allow any national court to make a reference.

Despite the criticism in academic literature of the restrictive nature of direct access by private parties to the Community Courts, the reform of the system of judicial review played only a minor role on the recent reform agenda. It was discussed within the Convention on the Future of Europe first by Working Group II and then by a Discussion Circle, which had

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26 Case C-50/00P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677.
28 Article 46(f) TEU entrusts the Court of Justice, however, with jurisdiction to apply Article 47 TEU, which states that ‘nothing in this Treaty [on European Union] shall affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying or supplementing them’. Under Article 47 TEU the Court has therefore the task ‘to ensure that the acts which, according to the Council, fall within the scope of Title V of the EU Treaty and which are capable of having legal effects do not encroach upon the powers conferred by provisions of the EC Treaty on the Community’, see Case C-91/05 *Commission v Council*, judgment of 20 May 2008, para. 56. Similar considerations apply in relation to third pillar acts, see Case C-176/03 *Commission v Council* [2005] ECR I-7879, at para. 39 and Case C-440/05 *Commission v Council* [2007] ECR I-9097, at para. 53.
29 See Article 35(2) EU. For a list of Member States which have accepted the jurisdiction of the Court, see OJ [2005] L 327/19.
30 Working Group II was concerned with the incorporation of the Charter of Fundamental Rights of the EU and with the accession to the European Convention. On the positions within
been set up rather belatedly as an *ad hoc* working group to discuss matters related to the Community Courts. Given the divisions amongst the group\(^{31}\) only modest amendments resulted from its discussions. At the same time reforms in other parts of the Constitutional Treaty also had repercussions for judicial review. The Lisbon Treaty\(^ {32}\) has incorporated many of the amendments of the now abandoned Constitutional Treaty, including the ones pertaining to judicial review.

This book aims at providing a comprehensive discussion of the various avenues for judicial review of EU action. It will first assess actions for annulment (Chapter 1) and failure to act (Chapter 2) before turning to incidental forms of review under Articles 241 and 234 (Chapter 3). The focus of the discussion will then shift to the remedy of compensation for damages (Chapter 4) and a study of interim relief proceedings (Chapter 5). The changes brought about by the Lisbon Treaty will be set out in the book in the context of the specific remedy under discussion and again in the conclusions to give as accurate a picture as possible on the impact of the reform and the potential issues facing judicial review in the European Union.

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\(^{31}\) On the various proposals advanced within the group, see Final Report of the Discussion Circle on the Court of Justice under ‘on question (d) of the framework’ (CONV 636/03). See also C. Koch, supra note 16; P. Craig, supra note 20, p. 344.