

The Court Goes ‘All in’

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Abstract

Between 2005 and 2008 the European Court of Justice has displayed courage and patience, often endorsing a cautious but evolutionary interpretation of the Treaties. By doing so, the Court managed to ensure the consistency of a legal order that has undergone continuous amendments (see the Constitution and the Lisbon Treaty bottlenecks). The expansive use of First Pillar’s legal principles allowed a first praetorian constitutionalisation of the Area of Freedom Security and Justice, and so has the application by the Court of Art. 47 EU, which reinforced the primacy of the First Pillar over the other two. This article examines these mentioned judicial policies, as well as the new urgent preliminary ruling procedure, describing the Court’s behaviour when the boundaries of its competence are questioned. Possible activist trends underpinning the Court’s choices are remarked, bearing in mind the innovations that the Reform Treaty is supposed to bring about, and the commitment the Court has always shown in the continuous attempt of fixing the ever-changing European legal order’s constitutional structure.

Key-words: European Court of Justice, Pillars, Reform Treaty, Art. 47 Treaty of European Union, Data Protection Author, please provide abstract.

A. Introduction

The role of the European Court of Justice (ECJ) is linked to the law it must enforce. A fair assessment of the ECJ case law must take into account the limits within which the ECJ operates and the deficiencies existing until recently in the legal doctrine as regards a clear distinction between the European Community and the European Union.¹ Such state of uncertainty, in fact, is fated to be reflected either in a hesitating case law or, on the contrary, in a resolute one which might give place to criticism.²

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¹ C. Herrmann, *Much Ado about Pluto? The ‘Unity’ of the Legal Order of the European Union’ Revisited*, EUI Working Paper, available at http://cadmus.eui.eu/dspace/bitstream/1814/6974/1/RSCAS_2007_05.pdf (2007).

² A recent and exemplary case of full-fledged criticism is reflected in the fierce attack moved to the ECJ by Roman Herzog, former Federal President of Germany, in an article appeared on 8 September 2008 named *Stop the European Court of Justice – Competences of Member States Are Being Undermined. The Increasingly Questionable Judgments from Luxembourg Suggest a Need for a Judicial Watchdog*, *Frankfurter Allgemeine Zeitung*. For a general insight on ‘cross-pillar’ litigation, see R. van Ooik, *Cross-Pillar Litigation Before the ECJ*, 4 *EuConst* 399 (2008).

It would be opportune to recall the incomplete contract model in order to interpret the EC order's current situation. The 'incomplete contract' imagery is widely used in international law³ studies to describe the dynamics of interpretation and application of international treaties. It is based on the comparison of a treaty with a contract between two parties; it may be incomplete either because the parties have deliberately drafted the terms of the agreement in a vague and ambiguous fashion,⁴ or just because they have failed to cover every issue that could arise from its enforcement. In either case, the task of clarifying the terms of the agreement belongs to the subject entrusted with its interpretation in case of dispute, specifically the judge.

The same applies to the whole of EU and EC Treaty law, given the objective difficulty in adopting new primary legislation, amending the existing one and finding an agreement on detailed provisions. Legislative action must be seen as an exceptional phase, and it is incumbent upon the ECJ to find a correct and coherent interpretation of the legal order and of its single provisions.

Moreover, negotiations are still under way: judges are attempting to elaborate a consistent case law by applying a fairly inhomogeneous set of sometimes unclear rules which the Contracting Parties (that is, the Member States), over their heads, are constantly struggling to reform, under terms partially inspired by the ECJ case law, as we will see below. However, this ever-changing framework results in the ECJ enjoying a significant margin of action, and action is just a step away from activism.

This paper is aimed at outlining the behavior of the ECJ when its jurisdiction is challenged by borderline and controversial issues. This analysis does not claim to be comprehensive, nor could it be so, given the ECJ's constantly changing approach,⁵ the diversity of the strategies it adopts to assess its functions, its case-by-case pattern of intervention (as opposed to planned law-making), and the high degree of uncertainty regarding the current and future developments of the basic legal texts of the Community/Union.

Where possible, we will refer to the Lisbon Treaty in order to comprehend whether the ECJ is trying to anticipate, under certain aspects, its terms.⁶ One of the most apparent features of the post-Lisbon institutional scenario will be the merging of the I and the III Pillars, with the consequent integration of the respective

³ In particular WTO law, see for instance P. C. Mavroidis, *Market Access in the GATT*, Stals Working Paper, available at http://stals.sssup.it/site/files/stals_Mavroidis.pdf, at 9 (2007).

⁴ The vagueness of the terms of the agreement, in turn, could be a consequence of either the unwillingness of the contracting parties to be bound by strict obligations, or the forced outcome of a deadlock in the negotiation phase: none of the parties could impose on the other the specific clauses of the contract reflecting its interest, therefore the final text agreed by both parties is defined roughly.

⁵ J. H. H. Weiler, *The Transformation of Europe*, 100 YLJ 2403 (1991).

⁶ In particular, it is worth to recall here how the brand new Title V of the RT (titled 'Area of Freedom, Security and Justice') has gathered together policies on borders, asylum and immigration (Ch. 2), judicial cooperation in civil matters (Ch. 3), judicial cooperation in criminal matters (Ch. 4) and police cooperation (Ch. 5). This Title is intended to be the field where the CJ would unfold its new competence, or – better – over which it would expand its ordinary jurisdiction, formerly limited to the area of EC law.

legal instruments and the expansion of the ECJ's jurisdiction;⁷ accordingly, an entire part of this article will address the ECJ's current way of handling III Pillar measures. Our aim is to demonstrate that the Court tends to borrow its tools from the Community experience and to use them in the Area of Freedom, Security and Justice (AFSJ) (B). The new competences entrusted to the Court, moreover, will also require some procedural adjustments, such as the new accelerated procedure for preliminary ruling: we will try to follow the course of this newly established instrument, and to illustrate its use by the ECJ, so as to provide an example of how the ECJ acts when changes are necessary (C). The dichotomy between Union and Community is the real subject of the final (and most important) section (D), concerning the use of Article 47 of the European Union Treaty (EUT) by the ECJ, and we will comment upon the decisions reported in the light of the concepts of activism and interpretative competition.

B. From the I to the III: the Migration of Principles

I. Consistent Interpretation – Indirect Effect – Loyalty

The principle of consistent interpretation binds the referring judge to interpret (and consequently apply) national law “so far as possible” in keeping with the relevant EC law,⁸ before lodging the preliminary referral.⁹ As regards the EC law, this principle has been recently confirmed by the ECJ in the *Pfeiffer* case.¹⁰ The national judge, who is bound to use the aforementioned method in order to achieve the result pursued by the EC law, must make every effort to succeed.¹¹

⁷ Subject both to a transitional regime that will probably suspend the application of the Reform Treaty (RT) for 5 years, and to the exception of Art. 276 of the RT, precluding the Court from reviewing the validity and proportionality of the police operations, and of the domestic action intended to ensure internal security. Moreover, UK, Ireland and Denmark will have a general opt out from the Area of Justice and Home Affairs, see an analysis of this point by S. Peers, available at <http://www.statewatch.org/news/2007/aug/eu-reform-treaty-uk-ireland-opt-outs.pdf>. For an overview of the innovations brought about by the Reform Treaty, see P. Craig, *The Treaty of Lisbon: Process, Architecture and Substance*, 33 ELR 137 (2008). For a description of the developments of EU criminal law in the Reform Treaty, see S. Peers, *EU Criminal Law and the Treaty of Lisbon*, 33 ELR 507 (2008).

⁸ Judgment of 5 October 2004 in *Cases 397/01 to 403/01, Pfeiffer and Others*, [2004] ECR I-8835.

⁹ This mechanism resembles the one of the Charming Betsy doctrine used in the US constitutional practice, the ‘consistent interpretation’ obligation of international judges vis-à-vis other international sources and the constitutional/conventional interpretation the national judge is called to exhaust before calling for incompatibility between a domestic norm and, respectively, the constitution and the European Convention of Human Rights. For a recent overview of the application of this canon, see Anonymous, *The Charming Betsy Canon, Separation of Powers, and Customary International Law*, 45 Harv. L. Rev. 1215 (2008).

¹⁰ *Cases 397/01 to 403/01, Pfeiffer*, see para. 113.

¹¹ *Id.*, see para. 116.

The ECJ, once the principle of consistent interpretation became strong in the Community area,¹² extended its application also to Third Pillar's acts in the well-known *Pupino* case.¹³ As the scholars have noted, the ECJ in this case somehow approached the legal instrument of the Framework Decision by highlighting the common nature of the EC directives and Framework Decisions adopted under the III Pillar.¹⁴ In particular, the ECJ partially overlooked the clear wording of Art. 34.2(b),¹⁵ and somehow acknowledged the Framework Decisions' indirect effect.¹⁶

As Borgers sharply points out,¹⁷ indeed, this result was achieved by borrowing 'half' of the EC directives' direct effect feature. Indeed, whilst the directive's proper direct effect is explicitly ruled out by the EUT, the ECJ acknowledges an indirect effect to the Framework Decision, by claiming that "when applying national law, the national court that is called upon to interpret it must do so as far

¹² The principle can be traced back to the *Marleasing* case (judgment of 13 November 1990, in *Case 106/89, Marleasing v. Comercial Internacional de Alimentación*, [1990] ECR I-4135), for a recent contribution on this issue see K. Sawyer, *The Principle of 'interprétation conforme': How Far Can or Should National Courts Go when Interpreting National Legislation Consistently with European Community Law?*, 28 *Statute Law Review* 165 (2007); see also G. Betlem, *The Doctrine of Consistent Interpretation – Managing Legal Uncertainty*, 22 *Oxford Journal of Legal Studies* 397 (2002) and M. Amstutz, *In-Between Worlds: Marleasing and the Emergence of Interlegality in Legal Reasoning*, 8 *ELJ* 766 (2002).

¹³ Judgment of 16 June 2005, in *Case 105/03, Criminal proceedings against Maria Pupino*, [2005] ECR I-5285.

¹⁴ See para. 34: "The binding character of Framework Decisions [are] formulated in terms identical to those of the third paragraph of Article 249 EC." After a few weeks, the German Constitutional Court, probably unhappy with the ECJ's evolutionary view, issued the decision by which the unconstitutionality of the German measures implementing the EAW Framework Decision was declared. Moreover, in a passage, the difference between directives and Framework Decisions is recalled with an assertive language: "As a form of action of European Union law, the Framework Decision is situated outside the supranational decision-making structure of Community law (on the difference on European Union law and Community law, see BVerfGE 89, 155 (196)). In spite of the advanced state of integration, European Union law is still a partial legal system deliberately assigned to public international law. This means that the Council must adopt a Framework Decision unanimously, that this latter requires incorporation into national law by the Member States, and incorporation is not enforceable before a court. The European Parliament, autonomous source of European law legitimization, is merely consulted during the lawmaking process (see Article 39.1 of the EUT), which, in the area of the 'Third Pillar', meets the requirements of the democracy principle because the Member States' legislative bodies retain the political power of drafting in the context of implementation, if necessary also by denying implementation," see judgment of 18 July 2005, available at http://www.bundesverfassungsgericht.de/en/decisions/rs20050718_2bvr223604en.html, and an accurate comment in Herrmann, *supra* note 1, at 3.

¹⁵ See last sentence, reading: "[Framework Decisions] shall not entail direct effect."

¹⁶ For a description of the method followed by the ECJ to separate primacy and direct effect in the *Pupino* case, through the consistent interpretation, see D. Piqani, *Supremacy of European Law revisited: New developments in the context of the Treaty Establishing a Constitution for Europe*, 2007, available at <http://www.enel.syn.gr/papers/w4/Paper%20by%20Darinka%20Piqani.pdf>.

¹⁷ M. J. Borgers, *Implementing Framework Decisions*, 44 *CMLR* 1361, at 1367 (2007).

as possible in the light of the wording and purpose of the Framework Decision in order to attain the result which it pursues."¹⁸

The judge is called to carry out this interpretation method not only on the application of single provisions, but also on "the whole of national law."¹⁹ Thus, if a national provision appears, at face value, to be in conflict with the Framework Decision, a second attempt at 'rescuing' it is due to be enacted by the judge, by contextualizing the single provision within the framework of the whole national law, with a view to construing it in a EU-consistent way. By doing this, the court has the obligation to preserve, as far as possible, the *effet utile* of the Framework Decision; therefore it is called to strive to apply the domestic rules in line with the Framework Decision's purpose and objective; if necessary, this must also be achieved through a more general examination of the domestic legal order and its principles.²⁰ This obligation is based on the principle of loyal cooperation enshrined in Art. 10 ECT.

The loyal cooperation principle (just as the *effet utile* one) is rooted in the Community, and although it is in itself a principle of general reach, it is interesting to look through the legal reasoning by which its application was extended to the EU. In para. 42 of the judgment, the ECJ does not exert significant effort to support its position: it just states the difficulty of carrying out its duties in the fields of policing and judicial cooperation in criminal matters, given that competences related thereto are "entirely based on cooperation between the Member States and the institutions."²¹

Although perfectly reasonable, the ECJ's line of argumentation does not appear to be truly different from the one that led to the implicit powers' rise: States must be loyal to the EU, this being a necessary condition for the EU powers' implementation. An activist, and yet EU-friendly outbreak may be spotted in these lines.

In *Pupino*, namely, the ECJ stated that the national (Italian) judge could enact certain precautionary measures when questioning children witnesses²² even though national laws²³ did not provide indiscriminately for such special

¹⁸ *Case 105/03, Pupino*, para. 43. On this point, see also M. Fletcher, *Extending 'Indirect Effect' to the Third Pillar: the Significance of Pupino*, 30 ELR 862 (2005).

¹⁹ *Case 105/03, Pupino*, para. 47. The same wording appears in the *Pfeiffer* case commented above, at paras. 115-116.

²⁰ However, the interpretation adaptation cannot result in an application which worsens the individual's conditions.

²¹ The ECJ recalls the reasoning of Advocate General Colomer in his Opinion of 11 November 2004, at para. 26. Actually, this part seems to base the need for loyalty on a sensible but not really authoritative terminological consideration: "Loyal cooperation between the Member States and the institutions is also the central purpose of Title VI of the Treaty on European Union, appearing both in the title – Provisions on Police and Judicial Cooperation in Criminal Matters – and again in almost all the articles."

²² Thus putting into practice one of the purposes of the Framework Decision, that is the protection of vulnerable victims, see Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings, OJ 2001 L 82/1.

²³ See Art. 392(1a) and 398(5a) of the Italian Code of Criminal Procedure.

arrangements,²⁴ and notwithstanding that the Italian Constitutional Court had stated that only a domestic primary legal instrument could enlarge the set of measures for the protection of victims in criminal proceedings.²⁵

The ripeness of the consistent interpretation principle in the AFSJ was further demonstrated by the subsequent case law, see for instance *Dell'Orto*,²⁶ para. 28.

The *Pupino* judgment also represented a landmark for positioning the conditions set by Art. 234 ECT in the framework of the AFSJ preliminary ruling procedure. The ECJ, indeed, clearly stated that “the system under Article 234 EC is capable of being applied to Article 35 EU, subject to the conditions laid down in Article 35.”²⁷

In the subsequent *Gasparini*²⁸ and *Van Straaten*²⁹ cases the ECJ took the opportunity to confirm this first statement and to detail its meaning, establishing that many of the principles applied under the EC preliminary ruling (those concerning the admissibility of referrals, the definition of referring court and the division of duties between the ECJ and the latter) also apply to Third Pillar cases. The *Goicoechea* case, commented on below, further confirms this trend, thereby reiterating this position.

The Belgian Constitutional Court (at the time, *Cour d'Arbitrage*) lodged a preliminary referral and asked the ECJ whether the European Arrest Warrant (EAW) Framework Decision and the surrender procedures between Member States therein regulated were compatible with Art. 34.2(b) of the EUT. The ECJ handed down the judgment in September 2006.³⁰

The EAW's legality was being challenged for the first time, and the referral had come from one of the very few Constitutional Courts in Europe that had agreed to apply the preliminary ruling procedure.³¹ The ECJ dismissed the plaintiff's allegations, hence “restoring calm to the EU's Third Pillar.”³² The importance of this judgment, therefore, goes beyond its occasional outcome: it served the EU

²⁴ The Italian law provided for such possibility only in case of sexual offences. See the exact terms of the preliminary referral, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2003:146:0016:0016:EN:PDF>.

²⁵ See decision No. 529/2002 of 18 December 2002, available at <http://www.cortecostituzionale.it>. Besides, it should be noted that, in a way, the ECJ disproved the Italian Court's reasoning. Indeed, the Constitutional Court stated that the different treatment between victims of sexual offences and other victims was fully justified by the very fact that the former deserve a deeper protection than the latter: “la scelta legislativa che sta a base della norma speciale invocata non è priva di giustificazione, trattandosi di reati rispetto ai quali si pone con maggiore intensità ed evidenza l'esigenza di proteggere la personalità del minore.”

²⁶ Judgment of 28 June 2007, in *Case 467/05, Dell'Orto*, [2007] ECR I-5557.

²⁷ See para. 28 of the *Pupino* judgment.

²⁸ Judgment of 28 September 2006 in *Case 467/04, Gasparini and others*, [2006] ECR I-9199.

²⁹ Judgment of 28 September 2006 in *Case 150/05, Van Straaten*, [2006] ECR I-9327.

³⁰ Judgment of 3 May 2007 in *Case 303/05, Advocaten voor de Wereld*, [2007] ECR I-3633. Advocate General Kokott delivered his opinion on 12 September 2006.

³¹ See *Cour d'Arbitrage*, arrêt no. 124/2005.

³² Quoting from F. Geyer, *Judgment of 3 May 2007, Case C-303/05, Advocaten voor de Wereld VZW v. Leden van de Ministerraad*, 4 ECLR 149, at 151 (2008).

institution as a general clearance to carry on developing the judicial cooperation in criminal matters. In this sense, it is not difficult to understand why this ruling has been pointed out as being a political decision.³³

The two questions raised referred: (i) to the correctness of the chosen legal instrument;³⁴ and (ii) to the possible infringement of Art. 6.2 of the EUT (establishing the Union's obligation to respect fundamental rights), namely the violation of the legality principle in criminal matters determined by the partial abandonment of the double criminality rule.

(i) The first question was supported by an accurate reading of Articles 29.2 third indent, 31.1(e) and 34.2(b) of the EU Treaty,³⁵ but the ECJ rejected the assumption that the issue of mutual recognition (the purpose of the Framework Decision) could be pursued through approximation of national laws, and therefore confirmed that the Framework Decision had been duly adopted.³⁶ (ii) As for the possible clash with the fundamental principle of the rule of law,³⁷ and its corollary in the criminal area, the ECJ has basically recognized the existence of a general legality principle of criminal offences, further proved by the provisions of the Nice Charter.³⁸ Nevertheless, the Court held that the challenged Framework Decision was to refer to domestic laws for the definition of the crimes listed (in vague terms) in Art. 2.2, and – therefore – passed upon Member States the responsibility to comply with the principle of legality of criminal offences.³⁹

In sum, the Framework Decision was found not to have a harmonizing purpose; however, its vague definitions did not represent grounds for annulment for violation of the general principles of law. It is worth to note that the shift on Member States of the obligation to respect fundamental rights in defining criminal offences might be seen as a step backwards of the Union in this field, but the very fact is that the mentioned compliance refers to Art. 6 EUT which, enshrining fundamental rights and fundamental legal principles, seems to establish a EU-related standard of review for the potential ECJ's right to pronounce on national laws.

This decision further proves the process of assimilation between the procedures of preliminary ruling regarding the EC and the EU measures. As required by the terms of the preliminary questions, the ECJ agreed to carry out the interpretation of Art. 34.2(b) of the EUT, whilst Art. 35 EUT would provide for the ECJ to interpret only certain measures of secondary legislation.⁴⁰ This reading of Art. 35 EUT marks its closeness to Article 234 and 68 of the ECT.

³³ See V. Hatzopoulos, *With or Without You ... Judging Politically in the AFSJ*, 33 ELR 44 (2008).

³⁴ The claimant contended that a convention rather than a Framework Decision should have been adopted, given its purpose and the limits set by Art. 43.2(b) of the EUT.

³⁵ And by the consideration that the EAW Framework Decision explicitly replaced some conventions on the same matters.

³⁶ See para. 28 of the judgment.

³⁷ Judgment of 23 April 1986 in *Case 294/83, Parti écologiste "Les Verts" v. European Parliament*, [1986] ECR 1339, para. 23.

³⁸ See Arts. 49, 20 and 21 of the Charter of Fundamental Rights of the European Union, proclaimed in Nice on 7 December 2000 (OJ 2000 C 364/1).

³⁹ See paras. 53 and 54 of the judgment.

⁴⁰ See para. 18 of the judgment, assessing the ECJ's implicit powers.

II. Judicial Protection – Effective Remedies – Standing – Damages

The issue of the III Pillar legal sources' legal effects is not the only one that arose in the ECJ case law. In fact, many of the differences among the ECJ's competences (or, under another perspective, the applicants' rights) in the two Pillars have recently come under the judicial spotlight: we refer to the issues of judicial protection and existence of legal remedies against III Pillar measures, the (connected) principle of rule of law, and the exhaustibility of actions for damages.

In the *Eurojust* case,⁴¹ the ECJ concluded that an act issued by the III Pillar agency Eurojust could not be challenged in annulment proceedings.⁴² The action had been brought by a Member State against a call issued by Eurojust for the recruitment of temporary staff members. The measure under consideration, as the ECJ clarifies, could neither be regarded as being covered by Art. 230 of the ECT, which lists the acts that can be subject to annulment proceedings, nor was it included in Art. 35.6 of the EUT.

Under Art. 46(b) EUT, in fact, the ECJ's competence in the AFSJ is strictly defined by reference to Art. 35 EUT, where only Framework Decisions and decisions are listed as measures whose legality can be subject to the Court's review.

Nevertheless, the *Eurojust* judgment could not be seen as an admission by the ECJ that no judicial remedy exists against such typologies of acts, as this would run counter to the principle of 'rule of law', recalled in Art. 6.1 of the EUT. The Court mentions the possibility for the candidates to the various positions in the contested recruiting processes to have access to the Community Courts under the conditions laid down in Art. 91 of the Staff Regulations, and for the Member States to intervene in such proceedings under Art. 40 of the Statute of the ECJ.⁴³

We also mention in passing the recent decision handed down by the newly established EU Civil Service Tribunal (CST), concerning the claim brought by a former staff member to challenge the decision by Eurojust wherein she had been dismissed.⁴⁴ This action was commenced under Art. 236 of the ECT (and Art. 152 of the EAT), rather than under Art. 230 of the ECT (as it had been in the *Eurojust* case), in keeping with the ECJ's view in *Eurojust*: when applying the Staff Regulation, Third Pillar bodies are subject to the review of EU Courts.⁴⁵

Eventually, the CST accepted to hear the claim (before rejecting it as groundless on the merits), confirming that Art. 236 of the ECT applies to Third Pillars bodies as well, at least as far as decisions on the staff's terms and conditions of employment are concerned.

⁴¹ Judgment of 15 March 2005 in *Case C-160/03, Spain v. Eurojust*, [2005] ECR I-2077.

⁴² See para. 40.

⁴³ See paras. 42-43.

⁴⁴ Civil Service Tribunal, judgment in *Case F-61/06, Sapara v. Eurojust*, [2008] not yet reported.

⁴⁵ S. Peers, *Salvation Outside the Church: Judicial Protection in the Third Pillar After the Pupino and Segi Judgments*, 44 CMLR 883, at 889 (2007).

The ECJ then took the opportunity to develop the issue of the 'rule of law', in the *Gestoras* and *Segi* cases.⁴⁶ *Gestoras pro Amnistía* is a Spanish (Basque) association, which brought an action for damages before the TFI and, in appeal, before the ECJ, claiming compensation for having been included (along with two of its spokespersons) in a list of potential terrorists that was attached to a Common Position, presumably for its connection with the terrorist organization ETA.⁴⁷ This Common Position had been adopted on a mixed legal basis, namely under Article 15 EUT, which comes under Title V of the EU Treaty (CFSP), and Article 34 of the EUT, which comes under Title VI of the EU Treaty (Third Pillar), with the intent of implementing the United Nations' Security Council Resolution 1373 (2001). On 2 May and 17 June 2002, in addition, the Council adopted, still on the basis of Articles 15 and 34 of the EUT, Common Positions 2002/340/CFSP and 2002/462/CFSP, updating said Common Position 2001/931. The annexes to these two Common Positions contain the name 'Gestoras Pro Amnistía', which appears in the same way as it does in Common Position 2001/931. *Segi* is a French (Basque) organization that brought a twin action before the TFI; all the relevant factual and legal issues are identical to the ones described in the *Gestoras* case.

The argument of the 'rule of law' has been put forward to contend that, despite Art. 6 of the EUT, no actual judicial remedy is available against a Common Position, since this legal instrument is neither among the acts the validity and interpretation of which the ECJ is entitled to assess through the preliminary reference mechanism (see Art. 35.1 of the EUT), nor among the acts whose legality is subject to the ECJ's review under Art. 35.6 EUT.

The ECJ held that the list drafted in Art. 35.1 EUT could not be read narrowly, and inferred that measures referred to therein were all legal acts intended to create obligations *vis-à-vis* third parties. In sum, the ECJ has stated that every act adopted by the Council and creating legal effects *vis-à-vis* third parties can be subject to a preliminary reference by the national judge,⁴⁸ and for the same reason their legality can be challenged by either a Member State or the Commission under Art. 35.6 of the EUT.⁴⁹ This praetorial refurbishment⁵⁰ of Art. 35 EUT is justified, in the ECJ's view, in light of the atypical nature of the challenged measure, as par. 54 of the decision contends:

As a result, it has to be possible to make subject to review by the Court a Common Position which, because of its content, has a scope going beyond that assigned by the EU Treaty to that kind of act.

⁴⁶ Judgment of 27 February 2007 in *Case 354/04, Gestoras Pro Amnistia et al v. Council*, [2007] ECR I-1579; Judgment of 27 February 2007 in *Case 355/04, Segi v. Council*, [2007] ECR I-1657.

⁴⁷ Common Position 2001/931/PESC.

⁴⁸ See *Case 355/04 Segi*, para. 53, referring to some precedents 'by analogy': Judgment of 31 March 1971 in *Case 22/70, Commission v. Council (ERTA)*, [1971] ECR 263, paras. 38-42, and Judgment of 20 March 1997 in *Case 57/95, France v. Commission*, [1997] ECR I-1627, paras. 7 ff.

⁴⁹ Despite its wording, it provides for judicial review of Framework Decisions and Decisions only.

⁵⁰ For an overview on this process, see E. Sanfrutos Cano, *The Third Pillar and the Court of Justice. A "praetorian communitarisation" of Police and Judicial Cooperation in Criminal Matters?*, in E. Guild & F. Geyer (Eds.), *Security v Justice? Police and Judicial Cooperation in the EU 51* (2008).

The ECJ explicitly deplores the lack of procedural means ensuring compensation for individuals affected by an unlawful III Pillar measure,⁵¹ but it is steady in denying such a possibility at the Union level. On the contrary, it calls the Member States to enforce in the national order an effective protection for their citizens (including compensation procedures), and reminds them of the possibility to act in order to change the system in force at supranational level, by following the treaty's amendment procedure set forth in Art. 48 of the EU.⁵²

Given that it has been peacefully acknowledged that “the jurisdiction of the Court of Justice is less extensive under Title VI of the Treaty on European Union than it is under the EC Treaty,”⁵³ and that “[i]t is even less extensive under Title V,”⁵⁴ this judicial attempt to postulate the completeness of the judicial protection system in the EU, especially in the AFSJ, is another trend which deserves attention, and which has paved the way for the merger of the Pillars and the thereto attached extended jurisdiction. In particular, it has been noted how in these cases the notion of loyalty developed in *Pupino* was surprisingly regarded to as being ‘especially binding’ – because of the gaps in its structure – in the Third Pillar.⁵⁵

In the Reform Treaty this instance is made clear by the universal reach of the preliminary ruling (see Art. 267 of the RT) and by the Court's exceptional jurisdiction with respect to CFSP “decisions providing for restrictive measures against natural or legal persons adopted by the Council,” stated in Art. 275.2 thereof.

After appreciating the effort made by the ECJ, however, we must stress that the protection system against Third Pillar measures is really far from being complete, not only because some typical remedies are either expressly or implicitly ruled out (action for damages and actions for annulment brought by individuals), but also because the preliminary reference, that is the ‘savior’ remedy singled out by the ECJ in the Third Pillar, is still a solution that not all the Member States have agreed upon, by rejecting the ECJ's preliminary ruling jurisdiction.⁵⁶ That is to

⁵¹ See para. 60 of the *Segi* judgment, where the ECJ states that compensation is “a legal remedy not provided for by the applicable texts,” and the brief statement of para. 46 of the *Gestoras* judgment: “Article 35 EU confers no jurisdiction on the Court of Justice to entertain any action for damages whatsoever.”

⁵² These terms, as Peers correctly points out (*see supra* note 45, at 895), are almost identical to the terms used by the ECJ in its Judgment of 25 July 2002, in *Case 50/00, Uniones Pequeños Agricultores v. Council*, [2002] ECR I-6677, *see* para. 45.

⁵³ See the *Pupino* judgment, para. 35, stating also that there is not a complete system of legal actions and procedures to ensure the legality of Third Pillar bodies' acts. See also the words of Advocate General A. G. Maduro in the Opinion in the *Eurojust* case of 16 December 2004: “Although the principles of legality and effective judicial review, upheld in the Community context, also prevail in the context of a Union governed by the rule of law, it does not follow that the rules and arrangements for reviewing legality are identical.”

⁵⁴ See the *Segi* judgment, *supra* note 46, para. 50.

⁵⁵ See E. Herlin-Karnell, *In the Wake of Pupino: Advocaten voor der Wereld and Dell'Orto*, 8 GLJ 1147, at 1160 (2007).

⁵⁶ For a description of the shortcomings caused by this situation, and of the difficulties which are likely to be faced by national judges when they are called to ensure judicial protection without being able to refer to the ECJ, *see* Peers, *supra* note 45, at 900-901.

say, the entry into force of the Reform Treaty would bring about some relevant changes for which the ECJ could not manage to find a surrogate as of today: both the legality review of acts adopted by former III Pillar entities⁵⁷ and the actions for damages would be provided for by the RT.

C. The Urgent Procedure for Preliminary Ruling

During the Brussels European Council in November 2004⁵⁸ the Presidency called for an amendment of the ECJ's Rules of the Court, in order to adapt the preliminary ruling procedure to the entrusted new competences, especially in the field of freedom, security and justice. On 20 December 2007, after an extensive process of consultation,⁵⁹ the Council adopted a decision⁶⁰ acting under Art. 245.2 of the TEC,⁶¹ by which a new Article was added to the Protocol on the Statute of the Court of Justice, providing for the possibility to establish an accelerated preliminary ruling procedure in cases of urgency.

Accordingly, the ECJ shortly thereafter amended its Rules of Procedure⁶² with a view to setting up a new procedure.⁶³ The main change is represented by the introduction of Art. 104b of the Rules of Procedure, the first paragraph of which (first sentence) reads:

A reference for a preliminary ruling which raises one or more questions in the areas covered by Title VI of the Union Treaty or Title IV of Part Three of the EC Treaty may, at the request of the national court or tribunal or, exceptionally, of the Court's own motion, be dealt with under an urgent procedure which derogates from the provisions of these Rules.

This new accelerated procedure has a different rationale from the one already provided for under Art. 104a of the Rules of Procedure, and the ECJ did not consider the possibility of applying it to urgent AFSJ matters, as explained in Whereas 2) of the amendment: speed is achieved under Art. 104a simply by

⁵⁷ See Art. 263 RT.

⁵⁸ See the presidential conclusions of 4/5 November 2004 (doc. 14292/1/04 REV 1, available at http://EU.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/82534.pdf), in particular para. 3.1, reading: "thought should be given to creating a solution for the speedy and appropriate handling of requests for preliminary rulings concerning the area of freedom, security and justice, where appropriate, by amending the Statutes of the Court." Reference is made to Art. III-369.4 of the Constitutional Treaty (Part III is available for consultation at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:310:0055:0185:EN:PDF>), reading: "If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court shall act with the minimum of delay."

⁵⁹ See the Court of Justice's request of 11 July 2007, the Commission's opinion of 20 November 2007 and the European Parliament's opinion of 29 November 2007.

⁶⁰ See the Council Decision 2008/79/EC of 20 December 2007 amending the Protocol on the Statute of the Court of Justice (2008/79/EC, Euratom).

⁶¹ Setting the legislative procedure to follow in order to amend the ECJ's Statute.

⁶² See the amendment dated 15 January 2008.

⁶³ See E. Bernard, *La nouvelle procédure préjudicielle d'urgence applicable aux renvois relatifs à l'espace de liberté, de sécurité et de justice*, 18 Europe 5 (2008).

giving priority to urgent cases, thus delaying all other pending cases. Such a solution can be envisaged in a few exceptional cases, and cannot become the regular method for the AFSJ competences.⁶⁴

Furthermore, after the Parliament approved the draft directive concerning common standards and procedures in the Member States for the repatriation of illegal aliens,⁶⁵ the need to speed up the judicial treatment of individual claims is expected to increase significantly. This new directive is intended to set minimum standards for the legal treatment of immigrants who are eligible for expulsion, it is therefore likely that national courts handling expulsion orders will often have to conform to the text of this directive and, where opportune, ask the Court of Justice to clarify its content.

On 11 July 2008 the first preliminary ruling in compliance with the new accelerated procedure was drawn by the ECJ.⁶⁶ Mrs Rinau, a Lithuanian national, after divorcing her German husband, moved back to Lithuania with their daughter.⁶⁷ The husband then obtained from his local court (the *Amtsgericht Oranienburg*) the definitive divorce decision, according to which he was awarded custody of the daughter. The *Amtsgericht* ordered Mrs Rinau to send her daughter back to Germany, and to entrust Mr Rinau with her custody. In particular, the *Amtsgericht* issued the certificate conferring, under Regulation 2201/2003,⁶⁸ enforceability to the ruling on the girl's return to Germany, thus enabling its automatic recognition in a Member State other than the one of issue.⁶⁹

This certificate was somehow necessary because the Lithuanian court of first instance (the regional *Klaipėda* court) had initially rejected the application through which Mr. Rinau requested his daughter's return. Nevertheless, in the meanwhile, the Lithuanian appellate court had overruled this decision, allowing the return of the child. The referring judge (the Lithuanian Supreme Court) thus asked the ECJ, among other things, whether the German Court was still entitled to issue a recognition order,⁷⁰ in spite of the fact that a Lithuanian Court had already ruled in favor of the child's return to Germany. In light of the interest of

⁶⁴ On this point also see K. Lenaerts, *The Rule of Law and the Coherence of the Judicial System of the European Union*, 44 CMLR 1625, at 1654 (2008).

⁶⁵ See the consolidated text (A6-0339/2007), adopted by the Parliament on 18 June 2008.

⁶⁶ Judgment of 11 July 2008 in *Case 195/08 PPU, Rinau*, not yet published.

⁶⁷ For a detailed report of the facts of this case, see the press release 52/08 issued by the ECJ on 11 July 2008, available at <http://curia.europa.eu/en/actu/communiqués/cp08/aff/cp080052en.pdf>.

⁶⁸ Council Regulation (EC) No 2201/2003 (the Brussels IIa Regulation) of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (OJ 2003 L 338/1).

⁶⁹ See the letter (document 13272/06) of 28 September by the President of the ECJ V. Skouris, where he underlines that the new urgent procedure would be especially useful with respect to some secondary legislation instruments including, precisely, the Brussels IIa Regulation. The final part of this document also reports a clear description of the two alternative urgent procedures that were proposed.

⁷⁰ See question 5 of the preliminary reference (2008/C 171/42): "Do the adoption of a decision that the child be returned and the issue of a certificate under Article 42 of Regulation No 2201/2003 in the court of the Member State of origin, after a court of the Member State in which the child is being unlawfully kept has taken a decision that the child be returned to his or her State of origin, comply with the objectives of and procedures under Regulation No 2201/2003?"

the child, urgent procedure in dealing with the preliminary reference had been requested by the referring court and agreed upon both by the appointed Judge-Rapporteur and by the Court.

For the records, the ECJ held that it was irrelevant, for the purposes of the certificate of recognition provided for in Art. 42 of the 2201/2003 Regulation, that a first decision of non-return would be thereafter suspended, overturned, or set aside, thus legitimating the German Court's behavior

A few weeks later, on 12 August 2008, the ECJ adopted another preliminary ruling under the urgent procedure,⁷¹ this time on an issue concerning the European Arrest Warrant Framework Decision.⁷² The question had been referred to the ECJ by a French court (*Chambre de l'instruction of the Cour d'appel de Montpellier*) which, in turn, had been asked by the French public prosecutor (*Procureur Général*) to issue a favorable opinion on an order by which the Spanish authorities were requesting the extradition of Mr. Goicoechea.

The referring court stated, as grounds for the urgent procedure request, that Mr. Santesteban Goicoechea, after serving a sentence of imprisonment, was being detained on the sole basis of detention for the purpose of the extradition, which had been ordered in the extradition proceedings object of reference.

It is worth noting that the ECJ, as a preliminary remark, took care of clarifying once more that the system under Art. 234 of the ECT applies to the Court's jurisdiction under Art. 35 of the EUT, subject to the conditions laid down in this latter provision.⁷³ Furthermore, the Court recalls the French acceptance of the Court's jurisdiction in this respect, under Art. 35.3(b) of the EUT.

As in *Dall'Orto* (see *supra*), the lack of any reference to Art. 35 of the EUT in the referral (it mentions Art. 234 of the ECT instead) is not deemed to be determinant for its validity. In addition, the administrative nature of the indictment division is not seen as preclusive for it to be considered a 'court or tribunal' within the scope of Art. 234 of the ECT.⁷⁴ This last specification can further reveal the willingness of the ECJ to make use of the preliminary ruling instrument in the AFSJ even in matters that are often regulated and ruled at domestic level by bodies entrusted with administrative powers.

For the records, the Court has specified the meaning of Articles 31 and 32 of the Framework Decision,⁷⁵ and has stated that the fact that Spain had not made any declaration under Art. 32 (by which it could choose to apply the 1996 Convention

⁷¹ Judgment of 12 August 2008 in *Case 296/08 PPU, Santesteban Goicoechea*, not yet published.

⁷² Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190/1).

⁷³ See para. 36 of the decision, where the *Pupino* and *Dall'Orto* decisions are referred to as precedents. In paras. 46-47 the Court refuses to answer a question raised by Mr Goicoechea himself, as it is for the national court or tribunal, not the parties to the main proceedings, to bring a matter before the Court of Justice. Precedents mentioned in this respect refer to Art. 234 of the ECT (judgment of 9 December 1965 in *Case 44/65 Hessische Knappschaft Singer*, [1965] ECR 965, at 970, and judgment of 17 September 1998, in *Case 412/96, Kainuun Liikenne and Pohjolan Liikenne*, [1998] ECR I-5141, at para. 23).

⁷⁴ See paras. 39-40.

⁷⁵ The referring judge asked whether the "replacement" of previous extradition systems with the EAW decision could prevent Spain, that had not made any declaration under Art. 32, from applying

on Extradition to extradition requests concerning acts committed up to a chosen date, in any case no later than 7 August 2002) did not keep France from applying the 1996 Convention to requests related to acts committed before the entry into force of the Maastricht Treaty (1 January 1993), that is the date chosen by France in its declaration under Art. 32.⁷⁶

As seen above, the joint effort of the EU institutions has led to the full implementation of this urgent procedure,⁷⁷ which was literally inserted in the legal texts in force. It is no surprise, therefore, that the RT expressly provides for a duty of the Court of Justice to act “with the minimum of delay”⁷⁸ when the preliminary question is raised in a case regarding a person in custody.

In fact, the RT provision is not particularly innovative, if one takes into consideration the afore-described developments. It is obviously preferable to have a reference to the urgent procedure in a primary normative instrument such as the RT, but we can appreciate that in this case the ECJ has once again anticipated the impact of the Lisbon Treaty, by setting up, and getting used to, a new procedural tool.

D. The Article 47 Saga

I. Environmental Sanctions

In recent years, the use of Art. 47 of the EUT⁷⁹ as the stronghold of the Community’s supremacy has undergone a veritable revival,⁸⁰ due to the enlargement of the Union’s competences. A short description – for this purpose preferable to a more detailed – of the very well known *Commission v. Council* 176/03⁸¹ and 440/05 cases concerning the attachment of criminal sanctions to wrongful environmental acts⁸² will be of help to introduce a few more recent cases, on which a larger comment is necessary.

the 1996 Convention on extradition (Convention relating to extradition between the Member States of the European Union of 27 September 1996).

⁷⁶ The Court also answered the second question raised by the referring judge, stating that Art. 32 of the Framework Decision (reading “the extradition system applicable before 1 January 2004” must be interpreted as not precluding the application by an executing Member State of the 1996 Convention, even where that convention became applicable in that Member State only after 1 January 2004).

⁷⁷ See also the Court’s information note on the application of the new procedure, available at <http://curia.europa.eu/en/instit/txtdocfr/txtsenvigueur/noteppu.pdf>.

⁷⁸ See Art. 267 of the RT, last paragraph.

⁷⁹ Reading: “[...] nothing in this Treaty shall affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying or supplementing them.”

⁸⁰ The seminal case, however, remains judgment of 12 May 1988, in *Case 170/96, Commission v. Council*, 1998 ECR I-2763, see para. 38.

⁸¹ Judgment of 13 September 2005, in *Case 176/03, Commission v. Council*, [2005] ECR 2005, I-7879.

⁸² Judgment of 23 October 2007, in *Case 440/05, Commission v. Council*, [2007] ECR I-9097.

In the 176/03 case, the Commission sought the annulment of a Framework Decision on the protection of the environment⁸³ requiring Member States to criminalize certain wrongful acts capable of endangering the environment. The Commission (supported by the Parliament) maintained that the questioned act could not be adopted, arguing before the ECJ that it should have been an instrument of EC as opposed to EU law, namely a Directive.

The ECJ found that the challenged Framework Decision, being based on Title VI of the EU Treaty, indeed encroached upon the powers conferred on the Community by Art. 175 of the ECT,⁸⁴ and, consequently, it violated Art. 47 of the EUT. In particular, some provisions of such measure entailing a certain degree of harmonization of domestic criminal laws concerning various criminal offences committed to the detriment of the environment,

on account of both their aim and their content, have as their main purpose the protection of the environment and, therefore, they could have been properly adopted on the basis of Article 175 of the ECT.⁸⁵

As a matter of fact, neither criminal law nor the rules of criminal procedure fall within the Community's competence.⁸⁶ Nevertheless, the ECJ stated that the Community legislature can take the necessary measures to ensure the application of environmental norms, even when these measures relate with the Member States' criminal law, in particular when they request Member States to adopt effective, proportionate and incisive criminal sanctions to dissuade from violating the EC rules.⁸⁷

The same rationale was applied in the 440/05 case decided by the ECJ, concerning Framework Decision 2005/667.⁸⁸ Again, the challenged measure provided for the duty upon Member States to sanction certain misconduct related to sea pollution with criminal penalties. Suffice here to recall the wording of par. 69 of the judgment:

[...] since Articles 2, 3 and 5 of Framework Decision 2005/667 are designed to ensure the efficacy of the rules adopted in the field of maritime safety, non-compliance with which may have serious environmental consequences, by requiring Member States to apply criminal penalties to certain forms of conduct, those articles must be regarded as being essentially aimed at improving maritime safety, as well as environmental protection, and could have been validly adopted on the basis of Article 80(2) EC.

In both cases, the ECJ took a firm position, by approving the intervention of the Community's legislative action in issues directly related to procedural and substantive criminal law (better, by preferring it to the Union's action), provided

⁸³ See Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law (OJ 2003 L 29, p. 55).

⁸⁴ See more generally the Title XIX of the EC Treaty, on the environmental protection.

⁸⁵ See para. 51 of the decision.

⁸⁶ Judgment of 11 November 1981 in *Case 203/80, Casati*, [1981] ECR 2595, para. 27; judgment of 16 June 1998 in *Case 226/97, Lemmens*, [1998] ECR I-3711, para. 19.

⁸⁷ See para. 48.

⁸⁸ Council Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution (OJ 2005 L 255/164).

the ancillary nature of such instructions for the safeguard of a field controlled by the EC. Much of the ado related to this case law concerned the reasonable suspicion of Member States, which felt that the ECJ had unexpectedly risen to the office of re-distributing the Community and the Union's competences, taking away, at least partly, from the intergovernmental scenario (the only one that is naturally compatible with State sovereignty) the competence on criminal law.

These judgments, however, are relevant for this study under another aspect, that is obviously linked to the one just mentioned: the migration of certain measures from the Third to the First Pillar (better, the obligation to regulate some matters only in the Community framework) carries along an automatic expansion of the ECJ's jurisdiction, given the said difference between its power on the EC and EU instruments.⁸⁹

In other words, the ECJ somehow ruled upon its own competence; yet it did not so under an explicit *Kompetenz – Kompetenz* rule, but rather favoring a side (the EC) of the overall system where its jurisdiction is far wider, in comparison with the other side (the EU – intergovernmental one).⁹⁰

This remark is not intended to represent a censure of the ECJ's behavior:⁹¹ the ECJ often cannot help taking a decision upon sensitive issues, and obviously there is a vast audience which is likely to opine on the opportunity of each of these decisions, hence the continuous allegations of judicial activism that the former is called to face. Given the above warning about the delicacy of its application, it is opportune to monitor the interpretation of Art. 47 EUT given by the ECJ subsequent to the two cases described above.

II. ECOWAS

It is therefore inevitable to closely examine the recent *ECOWAS* judgment.⁹² In this case the ECJ for the first time applied Art. 47 of the EUT with respect to a CFSP measure, namely a Council Decision⁹³ supporting the moratorium on

⁸⁹ See, in this respect, the Communication of the Commission to the Parliament and the Council on the implications of the Court's judgment of 13 September 2005 (Case C-176/03 *Commission v. Council*) of 23 November 2005, doc. COM(2005) 583 final/2, by which the Commission, partly overlooking the ECJ's considerations, submits a memorandum listing the conditions under which criminal sanctions can be attached to EC law.

⁹⁰ See the considerations by Weiler *supra* note 5, at 2414, n. 26: *Kompetenz Kompetenz*, as reasonable as it may seem, is a principle that implies supremacy over the competitors.

⁹¹ We borrow Weiler's considerations, *Id.*, at 2438: "the analysis of [jurisdiction's] extension is intended [...] to be value-neutral. I do not present these examples as critique of the Court "running wild" or exceeding its own legitimate interpretative jurisdiction."

⁹² Judgment of 20 May 2008 in *Case 91/05, Commission v. Council*, [2008] ECR I-3651. For a wider overview of the consequences of this judgment, see E. Herlin-Karnell, *Light Weapons' and the Dynamics of Art 47 EU – The EC's Armoury of Ever Expanding Competences*, 71 MLR 998 (2008); C. Hillion & R. A. Wessel, *Competence Distribution in EU External Relations After ECOWAS: Clarification or Continued Fuzziness?*, 46 CMLR 551 (2009).

⁹³ Council Decision 2004/833/CFSP of 2 December 2004 implementing Joint Action 2002/589/CFSP with a view to a European Union contribution to ECOWAS in the framework of the Moratorium on Small Arms and Light Weapons (OJ 2004 L 359/65).

small arms and light weapons in West Africa, by which the Union awarded a contribution to ECOWAS to facilitate its mission in this field.⁹⁴

The Commission had brought the action before the ECJ, contending that the decision should have been adopted under the Community's regime, and therefore encroached with the powers of the EC, and violated Art. 47 of the EUT.

As for the point that the Court has no jurisdiction to rule on the legality of a measure falling within the CFSP,⁹⁵ put forward by the defendants (namely the Council, backed by various Member States), the ECJ recalled the two above described precedents, and confirmed its entitlement to ensure the Community's integrity by intervening, if necessary, on CFSP measures. The Court, in other words, "has oversight in the case of a breach of procedure or a conflict over competence (in effect, patrolling the frontier between the first and second pillar)."⁹⁶

Such a construction of Art. 47 EU is sensible, as far as it represents a safeguard for the *acquis communautaire*: in extirpating Second and Third Pillar measures unduly rooted in the Community field, the ECJ does nothing but to prevent the involution and retreat of the competences accrued upon the EC.⁹⁷

This judgment, furthermore, adds upon the principles applied in the 176/03 and 440/05 cases. In particular the 'First Pillar supremacy' is spelled out in detail, and finds application also in borderline situations, like the one at issue. In fact, based on the peaceful assumption that, whenever the EC owns a competence, any measure regarding such competence must be adopted through a Community instrument, the Court further specifies that:

- a. an act could be based, in the light of its content and scope, on more than one legal basis (each of which could in turn belong to different pillars), none of them being of a merely incidental importance.⁹⁸ Nevertheless, even in cases where the different legal bases are each essential to the content/aim of the act, Art. 47 EUT applies, and, if one of them belongs to the First Pillar, it shall prevail. In other words, Art. 47 EUT applies not only when the measure 'should have been adopted', but also when it 'could also have been adopted'

⁹⁴ Another case was decided by the Court of First Instance, which was the first to assess the jurisdiction over II Pillar acts; see judgment of 12 December 2006 in *Case T-228/02 Organisation des Modjahedines du peuple d'Iran v. Council*, [2006] ECR II-4665 (OMPI). In this case, the CFI had accepted its jurisdiction on the CFSP measure challenged "only strictly to the extent that, in support of such an action, the applicant alleges an infringement of the Community's competences". For a comment on this decision, and for a general overview of the case law on Art. 47 of the EUT, see N. Lavranos, *In dubio pro First Pillar: Recent Developments in the Delimitation of the Competences of the EU and the EC*, 7(9) European Law Reporter 311, at 312 (2008).

⁹⁵ See para. 30 of the decision.

⁹⁶ See A. Fulford, draft report to the Italian *Consiglio Superiore della Magistratura* of 21 January 2008, para. 18, available at <http://www.csm.it/ENCJ/pdf/PaperCriminalJusticeLegislationEN.pdf>.

⁹⁷ See para. 59: "In providing that nothing in the EU Treaty is to affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying or supplementing them, Article 47 EU aims, in accordance with the fifth indent of Article 2 EU and the first paragraph of Article 3 EU, to maintain and build on the *acquis communautaire*."

⁹⁸ See para. 75, mentioning two precedents in this respect: ECJ, Case C-211/03, *Commission v. Council*, para. 40, and Case C-94/03, *Commission v. Council*, para. 36.

within the Community system.⁹⁹ In the *ECOWAS* case, the ECJ concedes that “the contested decision pursues a number of objectives, falling within the CFSP and development cooperation policy [EC] respectively, without one of those objectives being incidental to the other.”¹⁰⁰ In addition,

- b. even when the EC competence invoked to trigger the application of Art. 47 EUT is either merely potential (that is: the EC has not yet adopted any measure on that issue) or shared with the Member States (mixed competence), it is still capable to preclude EU legislation to step in. As for the first aspect, the ECJ rejects the argument that it would be necessary “to examine whether the measure prevents or limits the exercise by the Community of its competences” before declaring its annulment: the mere attribution of a competence to the EC entitles the ECJ to apply Art. 47 of the EUT.¹⁰¹ As regards mixed competences, instead, the ECJ deems it just irrelevant to underline that Member States could exercise their shared competences, either jointly or individually, therefore precluding a further intervention by the Community.¹⁰²

This finding is absorbed and synthesized by the formula of paragraph 62 of the judgment, borrowed from the well-known *MOX Plant* case:¹⁰³

[...] the question whether the provisions of such a measure adopted by the Union fall within the competence of the Community relates to the attribution and, thus, the very existence of that competence, and not its exclusive or shared nature.

It is significant that the ECJ recalls the *MOX Plant* precedent: indeed, in this case the Court availed itself of the powerful position it had been entrusted, so as to maintain its privileged place in the EC legal system.¹⁰⁴ As noted above, the ECJ finds himself in the enviable position where – in fact – it has the power to decide which matters fall under its competence. The identical sentence of the *ECOWAS* and the *MOX Plant* cases shows us more clearly how far reaching this conflict of interest can be:

⁹⁹ See para. 77.

¹⁰⁰ See para. 99. See also the similar statement regarding the joint action that the contested decision implements, at para. 88: “the objectives of the contested joint action can be implemented both by the Union, under Title V of the EU Treaty, and by the Community, under its development cooperation policy.”

¹⁰¹ See para. 60.

¹⁰² See para. 61, where the ECJ essentially agrees with the submission by the Commission and the European Parliament (see para. 36), according to which: “in an area of shared competence, such as development cooperation policy, the Member States retain the competence to act by themselves, whether individually or collectively, to the extent that the Community has not yet exercised its competence, the same cannot be said for the Union which, under Article 47 EU, does not enjoy the same complementary competence, but must respect the competences of the Community, whether exclusive or not, even if they have not been exercised.”

¹⁰³ Judgment of 30 May 2006 in *Case 459/03, Commission v. Ireland*, [2006] ECR I-4635, para. 93.

¹⁰⁴ See F. Fontanelli & G. Martinico, *The Hidden Dialogue, When Judicial Competitors Collaborate*, 8 *Global Jurist Advances* (2008), available at <http://www.bepress.com/gj/vol8/iss3/art7> where it is noted how the ECJ punished Ireland for trying “to elude the exclusive monopoly that the ECJ has over the interpretation and application of EC law, even in cases where the facts at issue are only partially regulated by its norms (mixed agreements).”

- the ECJ can claim its jurisdiction on a matter (*decision*), because the latter is part of the EC competences (*justification*) [*MOX Plant*]; but at the same time
- the ECJ can decide whether a matter falls within the EC competences (*decision*), and therefore it has jurisdiction on such matter (*consequence*) [*ECOWAS*].¹⁰⁵

It is apparent how in both cases the ECJ, either directly or indirectly, bears the power to autonomously extend its jurisdiction,¹⁰⁶ or, at least, to 'absorb' external jurisdiction under the Community framework, although the Community cannot have "original legislative jurisdiction."¹⁰⁷

III. Kadi

In September 2008, the ECJ issued the long-awaited decision on the *Kadi* case.¹⁰⁸ This decision introduced a significant innovation, by stating that Community courts can review the lawfulness of a challenged regulation,¹⁰⁹ in the light of those fundamental rights forming an integral part of the general principles of Community law,¹¹⁰ even though such measure was designed to give effect to the resolutions adopted by the Security Council.¹¹¹

For our purpose, however, it is more interesting to study the lines of the judgment concerning the legal basis of the regulation at stake.¹¹² In brief, the claimants contended that the regulation providing for freeze of their assets could

¹⁰⁵ In this respect, see also I. Kvesko, *Is There Anything Left Outside the Reach of the European Court of Justice?*, 22 *Legal Issues of Economic Integration* 405 (2006), concerning judgment of 8 November 2005 in *Case 293/02, Jersey Produce Marketing Organisation*, [2005] ECR I-9543, where the ECJ extended the effectiveness of Community law onto internal matters of a Member State.

¹⁰⁶ "Extension is the mutation in the area of autonomous Community jurisdiction", see Weiler, *supra* note 5, at 2437.

¹⁰⁷ *Id.*, at 2441. Both 'extension' and 'absorption' are listed among the methods by which the Community's jurisdiction mutates, along with 'incorporation'.

¹⁰⁸ Judgment of 3 September 2008 in *Cases 402/05 P and 415/05 P, Yassin Abdullah Kadi, Al Barakaat International Foundation*, 2008, not yet published. See also Judgments of 21 September 2005 in *Cases T-306/01 Yusuf and Al Barakaat International Foundation v. Council* and T-315/01 *Kadi v. Council and Commission*, [2005] ECR II-3533 and ECR, II-3649.

¹⁰⁹ Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan (OJ 2002 L 139/9).

¹¹⁰ Consequently, First Instance relevant decisions, according to which no review could be ensured on acts that merely implemented UN Security Council's Resolutions, have been set aside.

¹¹¹ See the casenotes by A. Gattini, in 46 *CMLR* 213 (2009) and M. Tzanou, in 10 *GLJ* 214 (2009).

¹¹² This decision is an ideal follow-up of a series of previous cases where the legal bases of 'smart sanctions' such as the claimant's assets' freezing were challenged. See, for instance, the *Case T-228/02, Mojahedines*, at para. 56: "the Court of First Instance has jurisdiction to hear an action for annulment directed against a Common Position [...] strictly to the extent that [...] the applicant alleges an infringement of the Community's competences."

not be adopted on the basis of Articles 60 and 301 of the ECT, as its purpose fell within the purpose of the CFSP, and therefore the EU's competence. In particular,¹¹³ Art. 301 of the ECT could not be used as a 'bridge' between the EC normative and the EU's objectives, nor could Art. 308 of the ECT cover other than "EC's objectives."¹¹⁴

A clear-cut distinction is made between the EC and the EU, to an extent that is somehow surprising after the 'communitarisation' examples mentioned above. In fact, the ECJ envisaged a hyper technical explanation to bring the regulation back to the Community, a result that seemed impossible to reach, given the following premises:

- Articles 60 and 301 ECT¹¹⁵ cannot create a link with the Union;
- the regulation's essential purpose is to combat terrorism, and does not relate directly to the regulation of international trade;
- as seen in the 440/05 case, the essential aim of a measure affects its legal basis univocally;
- Art. 308 EC's wording cannot cover the implementation of an EU objective.¹¹⁶

Par. 202 of the judgment seems to put this question to an end, and to confirm the EC's lack of power as regards the contested regulation. Incidentally, it is an enthusiastic acknowledgment of the institutional (read: constitutional) nature of the Pillars' structure:

[...] the coexistence of the Union and the Community as integrated but separate legal orders, and the constitutional architecture of the pillars, as intended by the framers of the Treaties now in force [...] constitute considerations of an institutional kind militating against any extension of the bridge to articles of the EC Treaty other than those with which it explicitly creates a link.

Nevertheless, the ECJ continues its reasoning and, quite surprisingly, comes back over Articles 60 and 301 EC (capable, *ratione materiae*, of forming part of the regulation's legal basis) and over Art. 308 EC: Articles 60 and 301 of the ECT, in the ECJ's view, are "the expression of an implicit objective" of the Community (consisting in the possibility to adopt EC measures to implement actions decided on under the CFSP). Therefore, since the regulation intends to pursue one of the EC's objectives, Art. 308 of the ECT applies.¹¹⁷

The ECJ refrained from using the expansive tool of Art. 308 ECT to draw on EU purposes, or to create a bridge between the Community and the Union: it was enough to add an implicit objective, and to provide the Community with the

¹¹³ See para. 124 of the judgment.

¹¹⁴ See para. 126, quoting the ECJ's Opinion 2/94 : "the fact that an objective is mentioned in the Treaty on European Union cannot make good the lack of that objective in the list of the objectives of the EC Treaty."

¹¹⁵ Art. 60 refers to measures against third countries, rather than against individuals. Art. 301 (see para. 176) cannot build a procedural bridge between the Community and the European Union.

¹¹⁶ See para. 199.

¹¹⁷ See paras. 226-227.

respective implicit powers. In sum, the objective under consideration could be phrased as the EC's objective of implementing EU objectives through economic measures.

In this case, contrarily to the *ECOWAS* case, the Second Pillar's regulation purpose was arguably prevailing over its First Pillar nature. Thus, it would have been difficult to apply Art. 47 of the EUT; nevertheless, the ECJ found that the regulation pertained to the EC's competence. In this light, we could confirm our first impression (the ECJ, as regards the Pillars' structure, has somehow anticipated the Lisbon's outcome), even if it is maybe more correct to note that the ECJ's judicial policy, rather than consisting in a 'de-pillarizing' action, has rather been – at least so far – in the sense of 'first-pillarization'.¹¹⁸ In passing, we record that, at least as regards the boundaries between the pillars, the ECJ's strategy in the interpretative competition (*vis-à-vis* Member States) has not been that of reducing its competences to keep the monopoly,¹¹⁹ but that of reinforcing them, in order to attract or absorb concurring powers.¹²⁰

IV. Case C-301/06, Ireland v. Parliament and Council

On 10 February 2009 the ECJ handed down the decision of the C-301/06 case,¹²¹ in which the application of Art. 47 of the EUT was once more at stake. In particular, Ireland had requested the Court to annul Directive 2006/24 EC of 15 March 2006, on the ground that it was not adopted on an appropriate legal basis. This Directive amended a previous one,¹²² and concerned the retention of data generated or processed in connection with the provision of communications services or public communication networks.

Ireland had argued that such Directive could not be adopted on the basis of Art. 95 of the ECT, since its sole (or predominant) objective is to facilitate

¹¹⁸ The well-known example of the opposite outcome is represented by the judgment of 30 May 2006 in *Joined cases 317/04 and 318/04, Parliament v. Council and Commission* (PNR), [2006] ECR I-4721, where the ECJ held that 2004/535/EC Commission Decision of 14 May 2004 – on the adequate protection of personal data contained in the Passenger Name Record (PNR) of air passengers transferred to the United States' Bureau of Customs and Border Protection (OJ L 235/11, 6 July 2004) – and 2004/496/EC Council Decision of 17 May 2004 – on the conclusion of an Agreement between the European Community and the United States of America on the processing and transfer of PNR data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection (OJ 2004 L 183/83) – were void, because they had been adopted *ultra vires* (on the basis of Directive 95/46/EC, rather than on Titles V and VI of the EU Treaty).

¹¹⁹ See J. K. Cogan, *Competition and Control in International Adjudication*, 47 *Virginia Journal of International Law* 411, at 444 (2007). See also the topical essay by K. Alter, *Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration*, in A. M. Slaughter, A. Stone Sweet, J. H. H. Weiler (Eds.), *The European Court and National Courts – Doctrine and Jurisprudence. Legal Change in its Social Context* 227 (1997).

¹²⁰ Once again, it is necessary to refer to the categories of jurisdictional mutation used by Weiler, *supra* note 5.

¹²¹ Judgment of 10 February 2009 in *Case 301/06, Ireland v. European Parliament and Council of the European Union*, [2009] not yet published.

¹²² Directive 2002/58/EC.

the investigation, detection and prosecution of crime, including terrorism.¹²³ Moreover, the use of an EUT legal basis would not encroach upon the powers of the Community, since the use of the word ‘affect’ in the formula of Art. 47 EUT would obviously imply a certain degree of interference, that cannot consist in a merely “random or incidental overlap of unimportant and secondary subject matter between instruments of the Community and those of the Union.”¹²⁴

In fact, the amendments brought by Directive 2006/24 to certain Articles of Directive 2002/58¹²⁵ were indeed intended to answer “the need to combat crime, including terrorism,” as the Council concedes.¹²⁶ Nevertheless, since the effects of these amendments obviously affect the applicability of Directive 2002/58, at least in part, the ECJ seems to uphold the view of the Council, according to which “the adoption of such an instrument [based on Title VI of the EU Treaty] would affect the provisions of that directive, in breach of Article 47 EU.”¹²⁷

We just note that this argument, which is fully acceptable in the case at hand, is formulated in a rather vague way. It seems to de-activate the principle according to which an ‘incidental’ EC-related object/scope cannot trigger the application of Art. 47 (see *ECOWAS*, above). A strict application of Art. 47 EUT, in fact, seems to lead to unreasonable results, from time to time. Indeed, sometimes, the “constitutional architecture of the pillars” glorified in the *Kadi* judgment seems to represent an inefficient machinery, as the Advocate General remarks in his opinion to the case:

This dividing line [between EC and EU matters] is certainly not exempt from criticism and may appear artificial in some respects. I agree that it would be more satisfactory if the overall issue of data retention by the providers of electronic communications services and the detailed rules on their cooperation with the competent national law-enforcement authorities were the subject of a single measure which would ensure coherence between those two aspects. *Although it is regrettable, the constitutional architecture consisting of three pillars nevertheless requires that the areas of action be split up.* The priority in this context is to guarantee legal certainty by clarifying as far as possible the respective boundaries between the spheres of action covered by the different pillars.¹²⁸ (emphasis added)

Moreover, the subject matter of the challenged measure was somehow similar to that in the *Passenger Name Records* case,¹²⁹ and the outcome of this latter¹³⁰ led the applicants to assume that a similar result could be appropriate also in respect of Directive 2006/24. On the contrary, the ECJ recalled this precedent precisely to remark the differences with the case under consideration, and explain the reason of a totally different conclusion.

¹²³ See para. 29 of the decision.

¹²⁴ See para. 32 of the decision.

¹²⁵ Such amendments essentially resulted in the obligation of the subjects processing data to retain them for a certain period, rather than erasing them as soon as practicable, in order to have them available to law-enforcement authorities at least for six months from the date of communication.

¹²⁶ See para. 42 of the decision.

¹²⁷ See paras. 45 & 78 of the decision.

¹²⁸ Opinion of Advocate General Bot, delivered on 14 October 2008, at para. 108.

¹²⁹ See *supra* note 118.

¹³⁰ In which the ECJ acknowledged the competence of the EU.

Indeed, the ECJ provided a careful distinction between the two measures:

Unlike Decision 2004/496, which concerned a transfer of personal data within a framework instituted by the public authorities in order to ensure public security, Directive 2006/24 covers the activities of service providers in the internal market and does not contain any rules governing the activities of public authorities for law-enforcement purposes.¹³¹

In sum, the ECJ rejected the claims for annulment, and strengthened the 'first-pillar presumption' established by means of the cases commented above.

E. Conclusions

In the foregoing, we analyzed the choices made by the ECJ in cases where its competence encountered some obstacles: the use of EC general principles in non-EC matters, the use of the previously unavailable urgent procedure for preliminary rulings, the delicate task of drawing a line between I Pillar and III Pillar matters. In all these cases, we appreciated a certain margin of activism that exceeded the mere application of current rules (the deliberate transplant of I Pillar principles outside the scope of the Community; the committed effort to put the urgent procedure in place, and to apply it; the use of EC-friendly arguments in the interpretation and application of Art. 47 EUT).

Whilst it is undeniably true that integration is possibly the main interest underpinning this deal of activism, it is also true that this latter has another effect, that is protecting the very role of the ECJ in these unsteady times. It seems opportune to compare the ECJ's current behavior with its heroic approach thirty years ago, in order to better understand the self-interest nature of this activism.

To some extent, the same situation keeps coming cyclically: the Community initially held a narrow mandate, that subsequently extended its reach to include what are now its (non market-related) prerogative competences only through an incremental process: at first these new competences fell within the EC's jurisdiction because of their links with trade policies, then they gradually became matters covered by autonomous EC powers. The 'wild Court'¹³² undertook the integration mission with commitment, and gave its fundamental contribution in shaping the structure of the Community, and in leading it to a higher level.¹³³

Another hint revealing the likeness of the two critical periods is the current revival of irreconcilable clashes between the ECJ and the national constitutional courts, with respect to primacy issues: obliging doctrines such as the *Solange* or

¹³¹ See para. 91 of the decision.

¹³² We refer to Cappelletti's well known definition. See M. Cappelletti, *Is the European Court of Justice Running Wild?*, 12 ELR 3 (1987). On the inspired role played by an enterprising ECJ in the constitutionalisation of the Community, see also H. Rasmussen, *Between Self-Restraint and Judicial Activism: A Judicial Policy for the European Court*, 13 ELR 28 (1988); and G. F. Mancini, *The Making of a Constitution for Europe*, 26 CMLR 595 (1989).

¹³³ See, for instance, J. Komárek, *Federal Elements in the Community Judicial System: Building Coherence in the Community Legal Order*, 42 CMLR 9 (2005).

the Italian counter-limits are maybe unable to settle this new set of conflicts,¹³⁴ nor does the contra-punctual approach supported by Advocate General Maduro¹³⁵ help to solve the crisis.

This is because the ‘hard’ conflict between an EC measure and a domestic constitutional interest does no longer seem to be a merely hypothetical situation, and in the event of such conflict, for the time being, the deadlock is inevitable.¹³⁶

Now, again, the time is ripe for the Community to move one step beyond: non-Community competences are often overlapping on the EC jurisdiction,¹³⁷ and sometimes it is not easy to distinguish the essential legal basis of an EC/EU measure, as the cases described above make clear. The true mandate of the EC judicature, little by little, is starting to include the typical tasks of an ordinary local court: urgency procedures, extended standing for individual claims and for actions for damages, an increasing difficulty to declare its own incompetence as regards a challenged measure, on the basis of its content or aim; it is no surprise that the Reform Treaty provides for the transformation of the CFI in a veritable General Court,¹³⁸ for the possibility to establish new specialized tribunals,¹³⁹ for a generalized jurisdiction over the former I and III Pillars, and for a new liability of the EU and its bodies.

At the same time, the ECJ’s double nature (constitutional tribunal / supreme court) is under strain more than ever. The enormous effort made to interpret the growing system under a constitutional perspective cannot be interrupted, at the cost of blending constitutional adjustments on, and application of, the same law.¹⁴⁰ On the other hand, the ECJ’s interpretation task is absolutely necessary to ensure at least some minimum standard of judicial review on the entire set of EC and EU law (see above, the preliminary ruling as being the only instrument of the ECJ entailing a quasi-universal reach).

¹³⁴ See the three decisions by the German (Judgment of 18 July 2005, 2 BvR 2236/04), Polish (Judgment of 27 April 2005, P 1/05), and Cypriot (Judgment of 7 November 2005, Ap. No. 294/2005) constitutional courts regarding the EAW Framework Decision.

¹³⁵ See M. P. Maduro, *Contrapunctual Law: Europe’s Constitutional Pluralism in Action*, in N. Walker (Ed.), *Sovereignty in Transition* (2003). See also N. Walker, *The Idea of Constitutional Pluralism*, 65 MLR 317 (2002).

¹³⁶ This situation is described in M. Kumm, *European Constitutional Pluralism and the European Arrest Warrant: Contrapunctual Principles in Disharmony*, Jean Monnet Working Paper No. 10/05, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=934067 (2005). The next episode of this renewed struggle is just about to be screened: in early 2009 the Bundverfassungsgericht will issue its judgment on the very same matter of the ECJ’s case *Mangold* (Judgment of 22 November 2005 in *Case 144/04, Werner Mangold v. Rüdiger Helm*, [2005] ECR I-9981, where the ECJ made general EC principles prevail over certain German constitutional values). As for the rise of the constitutional courts of the Eastern countries, though, we agree with the remarks by Prof. A. Tizzano, who thinks that, at the end, their proclamations of belligerence must not be overrated, as they often bear a declaratory nature rather than being an actual threat to the ECJ (see inaugural speech of the PhD in Constitutional Law held in Pisa on 14 March 2009).

¹³⁷ See C. Lebeck, *Sliding Towards Supranationalism? The Constitutional Status of EU Framework Decisions After Pupino*, 8 GLJ 501 (2007).

¹³⁸ See Arts. 254 & 256 and of the RT.

¹³⁹ See Art. 257 of the RT.

¹⁴⁰ This is one of the many harsh allegations raised by Herzog, *supra* note 2.

Here is where the Court's integrationist approach is necessarily based upon a relevant margin of self-promotion and self-defense: in order to carry out its burdensome mission the ECJ needs both to expand its powers and to shield itself from criticism.

Whereas we have already discussed the former (the expansion of the ECJ powers is pursued by means of strengthening its interpretation monopoly), the self-defense activity must be spotted in the lines of the legal arguments of its decisions. Indeed, the judgments invariably refer to the principle of rule of law, as specified in the dense case law that we have described, regardless of whether it acts as a 'supreme court' or as a 'constitutional tribunal'. The principle of rule of law also serves as a means of self-restraint, which prevents the ECJ from amplifying its interpretive powers in an inopportune direction.

Moreover, the consciousness that a constitutionalization of the whole of EC and EU law is necessary has forced the ECJ to involve national courts whenever the EU system is not capable of ensuring a complete protection against EU measures. The ECJ proved wise in the abovementioned *Segi – Gestoras* case: it kept the responsibility of reviewing the solidity of the overall III Pillar system, but entrusted national courts with the indispensable task of protection of individuals, establishing a complementarity device that can be interpreted as a device of "jurisdictional subsidiarity."¹⁴¹

There is nothing better than the possibility to test our assumptions on the ECJ President's words and declarations, in charge when most of the facts described herein occurred, Prof Vassilios Skouris.¹⁴² He explicitly confirmed the transplant of legal principles of the Community onto the Union in the AFSJ, and asserted:

The ECJ is exploring the AFSJ step by step, through its jurisprudence. It does so, as obvious, applying interpretive instruments that it already developed for decades in the internal markets and Community policies. This inevitably leads it to interpret the uneven space of the AFSJ through the reflecting prism of those principles aimed at ensuring homogeneity, coherence and effectiveness of EC law.

[...]

Whilst the ECJ can be satisfied with its case law in the AFSJ until now, it is only at its very first steps. There will be other occasions to clarify the extent of the jurisdiction, and to try to maintain a consistent whole of the principles underpinning European law, including the principle of effectiveness of legal protection.

¹⁴¹ See F. Fontanelli & G. Martinico, *Alla ricerca della coerenza: le tecniche del "dialogo nascosto" fra i giudici nell'ordinamento costituzionale multi-livello*, 58 *Rivista Trimestrale di Diritto Pubblico* 351 (2008). For some early consideration on this formula, see V. Röben, *The Order of the UNCLOS Annex VII Arbitral Tribunal to Suspend Proceedings in the Case of the MOX Plant at Sella field: How Much Jurisdictional Subsidiarity?*, 73 *Nordic Journal of Int'l Law* 223 (2004).

¹⁴² See the speech given to the Italian Judicial High Council (*Consiglio Superiore della Magistratura*) on 14 June 2007, available at <http://appinter.csm.it/AI/pdf/AI-Conferenze-Roma14giugno2007-DiscSkouris.pdf>. Original text is in Italian; quotations are translated by the author. See also the speech given to the French Cour of Cassation in occasion of the Inaugural Conference, on 29 January 2007, see at 47 of the e-book available at http://www.courdecassation.fr/IMG/pdf/cour_cassation-rapport_2006.pdf.

These words reflect our considerations about the ECJ's (constitutional) activism, the central role of the rule of law and the judicial protection principle.¹⁴³

Radical changes in the ECJ structure will be necessary [should the load of cases it has to deal with increase enormously as many fear]. As for now, however, the ECJ takes as a starting point the exclusive competence it has on preliminary references.

These lines, instead, strengthen the 'supreme court's' mandate: it is necessary to ensure the uniform interpretation and application of law, "especially in the new field of AFSJ."¹⁴⁴

In the near future, other new fields will land on the judges' desk, and we expect that the ECJ – or its successor, the Court of Justice – will use its toolbox to fix the coherence of the EU system once again.

¹⁴³ *Id.*, at par. 58: "C'est toujours dans l'esprit des principes déjà développés dans le cadre du marché intérieur que la Cour a abordé la coopération judiciaire en matière pénale."

¹⁴⁴ In the RT a strong instance of constitutionalization is already present: Art. 67 of the RT makes clear that the Union, when constituting the area of freedom, security and justice under the terms of Title V, must respect both fundamental rights and "the different legal systems and traditions of the Member States". This formula is almost identically repeated in Art. 82.2 of the RT, stating that the European Parliament and the Council "shall take into account the differences between the legal traditions and systems of the Member States" when they adopt directives setting minimum rules intended to foster the harmonization of criminal national orders on cross-border criminal matters.