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The Court goes “all in”

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Abstract

Between 2005 and 2008 the European Court of Justice has proven to be brave and patient, often endorsing a cautious but evolutionary interpretation of rules. By doing so the Court managed to ensure the consistency of a legal order that seems to be about to change constantly (see the Constitution and the Lisbon Treaty bottlenecks). The use of First Pillar’s legal principles beyond the reach of the Community competences has 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. This paper examines the above mentioned judicial policies, describing the Court’s behaviour when the boundaries of its competence are questioned. It will also comment on the possible activist trends underpinning the Court’s choices, bearing in mind the innovations that the Reform Treaty is supposed to bring about in the future, 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

The Court goes ‘all in’^o

Filippo Fontanelli*

SUMMARY: Preliminary remarks. - (A) From the I to the III: the migration of principles.- a) consistent interpretation - indirect effect - loyalty.- ; b) judicial protection - effective remedies - standing – damages. – (B) The urgent procedure for preliminary ruling.- (C) The Art. 47 saga, and the Kadi conclusions.- Conclusions.

Preliminary remarks

The role of the European Court of Justice (“ECJ”) is linked to the laws it must enforce: it would not be fair to evaluate the ECJ’s decisions without taking into account the limits within which it must work, and the deficiencies currently existing in the legal doctrine as regards a clear distinction between the European Community and the European Union.¹ In fact, theoretical debates, although fascinating, are destined to be reflected either in a hesitating case law or, on the contrary, in a resolute case law which always results in criticism.²

It would be opportune to recall the model of incomplete contract in order to interpret the 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 to a contract between two parties, which may be deemed incomplete 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 both cases, the task of clarifying the terms of the agreement lies in the subject entrusted with its interpretation in case of dispute, specifically the judge.

^o This is a preliminary draft version. Please do not quote. Comments are welcome at: f.fontanelli@sssup.it

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¹ See C. Herrmann, *Much Ado about Pluto? The 'Unity of the Legal Order of the European Union' Revisited*, (2007), No 5, EUI-RSCAS Working Papers from European University Institute (EUI), Robert Schuman Centre of Advanced Studies (RSCAS), available at http://cadmus.eui.eu/dspace/bitstream/1814/6974/1/RSCAS_2007_05.pdf.

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 on the *Frankfurter Allgemeine Zeitung*, 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.

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

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 roughly defined

The same scenario applies to the whole of EU and EC 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, over their heads, are constantly struggling to reform, under terms partially inspired by the ECJ's jurisprudence, 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 ECJ's behaviour when its jurisdiction is challenged by borderline and controversial issues. This analysis does not claim to be comprehensive, nor should it be, given the ECJ's constantly changing approach,⁵ the diversity of the strategies it adopts to assess its functions, its case-by-case 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, the terms of the Reform Treaty.⁶ One of the post-Lisbon institutional scenario's most apparent features will be the merging of the I and the III Pillar, with the consequent integration of the respective legal instruments and the expansion of the ECJ's jurisdiction;⁷ accordingly, an entire part of this paper will address the ECJ's current way of handling III Pillar's 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") (A). 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 (B). The dichotomy between Union and Community is the real subject of the following section (C), concerning the use of Article 47 EU by the ECJ, and we will comment upon the decisions reported in the light of the concepts of activism and interpretative competition.

⁵ See J. H. H. Weiler, *The Transformation of Europe*, (1991) *The Yale Law Journal*, Vol. 100, No. 8, 2403-2483.

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.

⁷ Subject both to a transitional regime that will probably suspend the application of the Reform Treaty for 5 years, and to the exception of Art. 276 RT, precluding the Court from reviewing the validity and proportionality of 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*, (2008) *European Law Review*, volume 33, issue 2, 137-166. 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*, (2008) *European Law Review*, volume 33, issue 4, p. 507-529.

(A) From the I to the III: the migration of principles

a) consistent interpretation - indirect effect - loyalty; b) judicial protection - effective remedies - standing - damages

a) 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 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 methods in order to achieve the result pursued by the EC law, must make every effort to succeed.¹¹

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 it has been extensively noted by scholars, the ECJ in this case somehow approached the legal instrument of the Framework Decision by highlighting the common nature between EC directives and the Framework Decisions adopted under the III Pillar.¹⁴ In Luxemburg in particular, the judges partially

⁸ See *Pfeiffer* cit., para 117.

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 note], *The Charming Betsy canon, separation of powers, and customary international law*, (2008) 121 Harv. L. Rev. 1215-1236.

¹⁰ *Pfeiffer and Others*, Joined Cases C-397/01 to C-403/01 [2004] ECR I-8835, see para 113.

¹¹ *Ibidem*, see para. 116.

¹² The principle can be traced back to the *Marleasing* case (C-106/89, *Marleasing* [1989] 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?*, (2007) Statute Law Review 28(3), 165-181; see also G. Betlem, *The doctrine of Consistent Interpretation – Managing Legal Uncertainty*, (2002) Oxford Journal of Legal Studies, XX-3, 397-418 and M. Amstutz, *In-Between Worlds: Marleasing and the Emergence of Interlegality in Legal Reasoning*, (2005) European Law Journal, XI-6, 766-784.

¹³ C-105/03, *Criminal proceedings against Maria Pupino* [2005] ECR I-5285, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62003J0105:EN:HTML>.

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 a Framework Decision must be adopted unanimously by the Council, it 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 legitimisation, is merely consulted during the lawmaking process (see Article 39.1 of the Treaty on European Union), 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, Much ado cit., at 3.

overlooked the clear provision of Art. 34.2(b),¹⁵ and somehow acknowledged the indirect effect of Framework Decisions.¹⁶

As Borgers sharply points out,¹⁷ indeed this result was achieved by borrowing ‘half’ of the EC directives’ direct effect feature. Definitely, whilst the proper direct effect of the directive is explicitly ruled out by the EUT, the ECJ acknowledges an indirect effect of the Framework Decision, when it states that “*when applying national law, the national court that is called upon to interpret it must do so as far 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 interpretive method not only on the application of single provisions, but also on “the whole of national law”.¹⁹ This means that, 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 EC.

The loyal cooperation principle (just as the *effet utile* one) is rooted in the Community, and although it is a principle of general reach, it is interesting to look through the legal reasoning by which its application was extended by the ECJ 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 in carrying out its duties in the fields of policing and judicial cooperation in criminal matters given that the mentioned competence is “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

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.enelsyn.gr/papers/w4/Paper%20by%20Darinka%20Piqani.pdf>

¹⁷ M. J. Borgers, *Implementing Framework Decisions*, CMLRev 44: 1361–1386, 2007, 1367.

¹⁸ See *Pupino* cit. para. 43. On this point, see also M Fletcher, *Extending ‘Indirect Effect’ to the Third Pillar: the Significance of Pupino*, (2005), *European Law Review*, 862 ff.

¹⁹ See *ibidem*, para. 47. The same wording appears in the *Pfeiffer* case commented above, at paras. 115-6.

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

²¹ The ECJ recalls the reasoning of the Advocate General Colomer in his Opinion in this case (available at [http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=Rechercher\\$doctrequire=alldocs&numaff=C-105/03&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100](http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=Rechercher$doctrequire=alldocs&numaff=C-105/03&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100)) 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.”

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 the *Pupino* case, indeed, the ECJ stated that the national judge could enact certain precautionary measures when questioning children witnesses (a praxis consistent with one of the purposes of the Framework Decision,²² that is the protection of vulnerable victims), even though national laws²³ did not provide for such special arrangements in respect of offences other than sexual offences,²⁴ and 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 the 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 EC 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's preliminary ruling (those concerning the admissibility of referrals, the definition of referring court and the division of duties between the ECJ and the referring courts) 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*), by lodging a preliminary referral, asked the ECJ whether the EAW Framework Decision and the surrender procedures between Member States therein regulated were compatible with Art. 34(2)(b) EU. 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

²² Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings. 2001/220/JHA, OJ L 82.

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

²⁴ 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 529/2002 of 18 December 2002, available at http://www.cortecostituzionale.it/giurisprudenza/pronunce/scheda_indice.asp?sez=indice&Comando=LET&NoDec=529&AnnoDec=2002&TrmD=&TrmM=. Besides, it should be noted that in a way the ECJ disproved the Italian Court's reasoning. Indeed, the Constitutional Court stated that “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 See C-467/05, *Dell'Orto* [2007] ECR I-5557.

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

²⁸ See C-467/04 *Gasparini* [2006] ECR I-09199, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004J0467:EN:NOT>

²⁹ See C-500/05 *Van Straaten* [2006] ECR I-9199.

³⁰ Case 303/05, *Advocaten voor de Wereld*, Judgment of 3 May 2007. Opinion of AG Kokott delivered on 12 September 2006.

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 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: 1) to the correctness of the chosen legal instrument (the claimant contends that a convention rather than a Framework Decision should have been adopted, given its purpose and the limits set by Art. 43(2)(b) EU); 2) to the possible infringement of Art. 6(2) EU (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.

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,³⁴ 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.³⁵

As for the possible clash with the fundamental principle of the rule of law,³⁶ and its corollary in the criminal area, the ECJ has basically recognised the existence of a general legality principle of criminal offences, further proved by the provisions of the Nice Charter.³⁷ 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.³⁸

In sum, the Framework Decision was found not to have a harmonising purpose, although 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 is referred to Art. 6 EU 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's measures. As required by the terms of the preliminary questions, the ECJ agreed to carry out the interpretation of Art.

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*, (2008) *European Constitutional Law Review*, 4: 149–161, at 151.

³³ See V Hatzopoulos, *With or Without You ... Judging Politically in the AFSJ*, (2008) 33 *ELRev*, 44–65,

³⁴ And by the consideration that the EAW Framework Decision explicitly replaced some conventions on the same matters.

³⁵ See para. 28 of the judgment.

³⁶ See Case 294/83 of 23 April 1986, *Parti écologiste "Les Verts" v European Parliament*, [1986] *ECR* 1339, para. 23.

³⁷ See Articles 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, p. 1).

³⁸ See para. 53 and 54 of the judgment.

34(2)(b) EU, whilst Art. 35 EU would provide for the interpretation by the ECJ only of certain measures of secondary legislation.³⁹ This reading of Art. 35 EU marks its closeness to Article 234 and 68 EC

b) The issue of the legal effects of III Pillar legal sources is not the only one that arose in the ECJ's case-law, since 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's measures, the (connected) principle of rule of law, and the exhaustibility of actions for damages.

In the *Eurojust* case,⁴⁰ the ECJ concluded that an act issued by the III Pillar agency Eurojust could not be challenged in annulment proceedings.⁴¹ 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 EC, which lists the acts that can be subject to annulment proceedings, nor was it included in Art. 35(6) EU.

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

However, 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) EU. 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 Article 91 of the Staff Regulations, and for the Member States to intervene in such proceedings under Art. 40 of the Statute of the Court of Justice.⁴²

We are just going to mention 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 *Eurojust* decision wherein she had been dismissed.⁴³ This action was commenced under Art. 236 EC (and Art. 152 EA), rather than under Art. 230 EC (as it had been in the in *Eurojust* case), in keeping with the view of the ECJ in *Eurojust*: When applying the Staff Regulation, Third Pillar bodies are subject to the review of EU Courts.⁴⁴

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

³⁹ See para. 18 of the judgment, assessing the ECJ's implicit powers.

⁴⁰ Case C-160/03 *Spain v Eurojust*, [2005] ECR I-2077, available at http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=603J0160

⁴¹ See para. 40.

⁴² See paras. 42-3.

⁴³ See the decision of 10 July 2008 C-61/06, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006W0061:EN:HTML>.

⁴⁴ S. Peers, *Salvation outside the Church: Judicial protection in the third Pillar after the Pupino and Segi judgments*, (2007) CMLRev, Vol. 44, N° 4, 883-929, at 889.

The ECJ then took the opportunity to develop the issue of the “rule of law”, in the *Gestoras* and *Segi* cases.⁴⁵ *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.⁴⁶ This Common Position had been adopted on a mixed legal basis, namely under Article 15 EU, which comes under Title V of the EU Treaty (CFSP) and Article 34 EU, 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 EU and 34 EU, 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 EU, 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) EU), nor among the acts the legality of which is subject to the ECJ’s review under Art. 35(6) EU.

The ECJ held that the list of Art. 35(1) EU could not be read narrowly, inferring that measures listed 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,⁴⁷ and for the same reason their legality can be challenged by either a Member State or the Commission under Art. 35(6) EU.⁴⁸ This praetorial refurbishment of Art. 35 EU is justified, in the ECJ’s view, because of the atypical nature of the challenged measure, as para. 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.”

The ECJ explicitly deplores the lack of procedural means ensuring compensation for individuals affected by an illegal III Pillar measure,⁴⁹ 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

⁴⁵ See *Segi* C-354/04 and *Gestoras Pro Amnistia* et al, C-355/04, judgment of 27 February 2007 nyr.

⁴⁶ Common Position 2001/931/PESC.

⁴⁷ See the *Segi* judgment cit., para. 53, referring to some precedents “by analogy”: Case 22/70 *Commission v Council* (ERTA) [1971] ECR 263, paras 38 to 42, and Case C-57/95 *France v Commission* [1997] ECR I-1627, paragraph 7 and ff.

⁴⁸ Despite its wording, it provides for judicial review of Framework Decisions and decisions only.

⁴⁹ 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.”

in force at supranational level, by following the treaty's amendment procedure set forth in Art. 48 EU.⁵⁰

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”,⁵¹ and that “[i]t is even less extensive under Title V”,⁵² 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 was Third Pillar.⁵³

In the Reform Treaty this instance is made clear by the universal reach of the preliminary ruling (see Art. 267 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).

After having appreciated the effort made by the ECJ, however, we must stress that the protection system against the 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 “saviour” 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.⁵⁴ That is to 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: the RT would provide for the legality review of acts adopted by former III Pillar entities,⁵⁵ and for actions of damages.

(B) The urgent procedure for preliminary ruling

During the Brussels European Council dated November 2004⁵⁶ the Presidency called for an amendment of the ECJ's Rules of the Court, in order to adapt the preliminary

⁵⁰ These terms, as Peers correctly points out in *Salvation* cit., 895, are almost identical to the terms used by the ECJ in the C-50/00 P, *Uniones Pequeños Agricultores vs Council* case [2002] ECR I-6677, see para. 45.

⁵¹ See *Pupino* judgment cit., 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: “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”, available at [http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=Rechercher\\$dorequire=alldocs&numaff=C-160/03&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100](http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=Rechercher$dorequire=alldocs&numaff=C-160/03&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100).

⁵² See the *Segi* judgment cit., para 50.

⁵³ See E Herlin-Karnell, *In the wake of Pupino: Advocaten voor der Wereld and Dell'Orto*, (2007) 8 GLJ, 1147-1160, 1160.

⁵⁴ 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, *Salvation* cit., 900-901.

⁵⁵ See Art. 263 RT.

⁵⁶ 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

ruling procedure to the entrusted new competences, especially in the fields of freedom, security and justice.

Finally, after following an extensive process of consultation,⁵⁷ on 20 December 2007 the Council, acting under Art. 245.2 of the TEC,⁵⁸ adopted a decision⁵⁹ 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 Procedure⁶⁰ with a view to setting up a new procedure.⁶¹ 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 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 giving priority to urgent cases, thus delaying and 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.⁶²

Furthermore, after the Parliament approved the draft directive concerning common standards and procedures in the Member States for the repatriation of illegal aliens,⁶³ the need for speed in 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

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."

⁵⁷ See the request of the Court of Justice of 11 July 2007, the opinion of the Commission of 20 November 2007 and the opinion of the European Parliament of 29 November 2007.

⁵⁸ Setting the legislative procedure to follow in order to amend the Rules of Procedure of the ECJ.

⁵⁹ See Council Decision 2008/79/EC of 20 December 2007 amending the Protocol on the Statute of the Court of Justice (2008/79/EC, Euratom), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:024:0042:0043:EN:PDF>.

⁶⁰ See the amendment dated 15 January 2008, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:024:0039:0041:EN:PDF>.

⁶¹ See E. Bernard, *La nouvelle procédure préjudicielle d'urgence applicable aux renvois relatifs à l'espace de liberté, de sécurité et de justice*, *Europe* 2008 (5), 5-8.

⁶² See also on this point K. Lenaerts, *The rule of law and the coherence of the judicial system of the European Union*, (2007) *CMLR* 44, 1625-1659, at 1654.

⁶³ See the consolidated text (A6-0339/2007), adopted by the Parliament on 18 June 2008, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2008-0293+0+DOC+XML+V0//EN&language=EN#BKMD-5>.

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.⁶⁴ Mrs Rinau, a Lithuanian national, after divorcing her German husband, moved back to Lithuania with their daughter.⁶⁵ 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 2201/2003,⁶⁶ 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.⁶⁷

This certificate was somehow necessary because the local - Lithuanian - first instance court (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,⁶⁸ in spite of the fact that a Lithuanian Court had already ruled in favour of the child's return to Germany. In the light of the interest of 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 behaviour

A few weeks later, on 12 August 2008, the ECJ adopted another preliminary ruling under the urgent procedure,⁶⁹ this time on an issue concerning the European Arrest

⁶⁴ See C-195/08 PPU, Rinau, nyp, available at [http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=Rechercher\\$dorequire=alldocs&numaff=C-195/08](http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=Rechercher$dorequire=alldocs&numaff=C-195/08)

⁶⁵ 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>.

⁶⁶ 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 L 338, 23.12.2003, p. 1).

⁶⁷ 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 documents also reports a clear description of the two alternative urgent procedures that were proposed.

⁶⁸ See question 5 of the preliminary reference (2008/C 171/42), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:171:0027:0027:EN:PDF>: "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?"

⁶⁹ See C-296/08 PPU *Santesteban Goicoechea*, nyp, available at [http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=Rechercher\\$dorequire=alldocs&numaff=C-296/08](http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=Rechercher$dorequire=alldocs&numaff=C-296/08)

Warrant Framework Decision.⁷⁰ 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 favourable 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 having already served 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 EC applies to the Court's jurisdiction under Art. 35 EU, subject to the conditions laid down in this latter provision.⁷¹

Furthermore, the Court recalls the French acceptance of the Court's jurisdiction in this respect, under Art. 35(3)(b) EU.

As in *Dall'Orto* (see supra), the lack of any reference to Art. 35 EU in the referral (it mentions Art. 234 EC 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 EC.⁷² 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,⁷³ 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 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. 32.⁷⁴

⁷⁰ 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, p. 1).

⁷¹ See para. 36 of the decision, where the *Pupino* and *Dall'Orto* decisions are referred to as precedents. In para 46-7 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 EC (Case 44/65 *Singer* [1965] ECR 965, at p. 970, and Case C-412/96 *Kainuun Liikenne and Pohjolan Liikenne* [1998] ECR I-5141, paragraph 23).

⁷² See para. 39-40.

⁷³ The referring judge asked whether the "replacement" of previous extradition systems with the EAW decision could prevent Spain, who had not made any declaration under Art. 32, from applying the 1996 Convention on extradition (Convention relating to extradition between the Member States of the European Union of 27 September 1996).

⁷⁴ 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.

As seen above, the joint effort of the EU institutions has led to the full implementation of this urgent procedure,⁷⁵ 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”⁷⁶ 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.

(C) The Art. 47 saga, and the Kadi conclusions

In recent years the use of Art. 47 EU⁷⁷ as the stronghold of the Community’s supremacy has undergone a veritable revival,⁷⁸ due to the enlargement of the Union’s competences. A short – for this purpose preferable to a more detailed - description of the very well known *Commission vs Council* 176/03⁷⁹ and 440/05 cases concerning the criminal sanctions’ attachment to wrongful environmental acts .⁸⁰ will be of help to introduce a third more recent case, on which a larger comment is necessary.

In the 176/03 case the Commission sought the annulment of a Framework Decision on the protection of the environment,⁸¹ since it required 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 this should have been legislated in EC as opposed to EU law, through the legal instrument of 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 EC,⁸² and, consequently, it violated Art. 47 EU. In particular, some provisions of such measure entailing a certain degree of harmonisation 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 EC.”⁸³

⁷⁵ 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>.

⁷⁶ See Art. 267 RT, last paragraph.

⁷⁷ Reading: “[...] nothing in this Treaty shall affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying or supplementing them.”

⁷⁸ The seminal case, however, remains C-170/96 *Commission v Council* [1998] ECR I-2763, see para.

38.

⁷⁹ Case C-176/03, *Commission v. Council*, [2005] ECR 2005, I-7879.

⁸⁰ C-440/05, *Commission v. Council*, [2007]. ECR I-9097.

⁸¹ 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).

⁸² See more generally the Title XIX of the EC Treaty, on the environmental protection.

⁸³ See para. 51 of the decision.

As a matter of fact, neither criminal law nor the rules of criminal procedure fall within the Community's competence.⁸⁴ Nevertheless, the ECJ states 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 dissuasive criminal sanctions to dissuade from violating the EC rules.⁸⁵

The same rationale was applied in the 440/05 case decided by the ECJ, in relation with Framework Decision 2005/667.⁸⁶ Again, the challenged measure provided for the duty upon Member States to sanction certain misconducts related to sea pollution with criminal penalties. Suffice here to recall the wording of para. 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 the ancillary nature of such instructions to 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, that felt that the ECJ had unexpectedly risen to the office of re-distributing the competences of the Community and the Union, taking away from the intergovernmental scenario (the only one that is naturally compatible with State sovereignty) the criminal law competence, at least partly.

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 EC and EU instruments.⁸⁷

In other words, the ECJ somehow decided upon its own competence, not under an explicit *Kompetenz - Kompetenz* rule, but rather favouring a side (the EC) of the overall system where its jurisdiction is far wider, in comparison with the other side (the EU - intergovernmental one).⁸⁸

⁸⁴ See 203/80 *Casati* [1981] ECR 2595, para. 27; Case C-226/97 *Lemmens* [1998] ECR I-3711, para. 19.

⁸⁵ See para. 48.

⁸⁶ 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, p. 164).

⁸⁷ 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.

⁸⁸ See the considerations by J. H. H. Weiler in *The Transformation* cit., at 2414, fn 26: *Kompetenz Kompetenz*, as reasonable as it may seem, is a principle that implies supremacy over the competitors.

This remark is not intended to represent a censure of the ECJ's behaviour⁸⁹: 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 choice, hence the continuous allegations of judicial activism that it is called to face. Given the above warning about the delicacy of its application, it is opportune to monitor the interpretation of Art. 47 EU given by the ECJ.

It is therefore inevitable to examine the recent *ECOWAS* judgment closely.⁹⁰ In this case the ECJ for the first time applied Art. 47 with respect to a CFSP measure, namely a Council decision⁹¹ supporting the moratorium on small arms and light weapons in West Africa, by which the Union awarded a contribution to *ECOWAS* to facilitate its mission in this field.

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 EU.

As for the point that the Court has no jurisdiction to rule on the legality of a measure falling within the CFSP,⁹² 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 ' 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)." ⁹³

Such construction of Art. 47 EU is sensible, as far as it represents a safeguard for the *acquis communautaire*: in extirpating Second and Third Pillar's measures unduly rooted in the field of the Community, the ECJ does nothing but to prevent the involution of the competences accrued upon the EC.⁹⁴

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 it is said to apply also in borderline situations, like the one under consideration. 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 pillar, (better: on legal bases related to different

⁸⁹ Wee borrow J. H. H. Weiler's considerations, from *The transformation cit.*, 2438: "the analysis [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."

⁹⁰ See C-91/05 *Commission v. Council*, judgment published on 8 May 2008, nyr.

⁹¹ 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, p. 65).

⁹² See para. 30 of the decision.

⁹³ See A. Fulford, draft report to the Italian Higher Council of the Judiciary (*Consiglio Superiore della Magistratura*) dated 21 January 2008, para. 18, available at <http://www.csm.it/ENCJ/pdf/PaperCriminalJusticeLegislationEN.pdf>.

⁹⁴ 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*."

pillars), none of them being of a merely incidental importance. Therefore, such act can indeed be founded on the various corresponding legal bases.⁹⁵ Nevertheless, even in cases where the different legal bases are each essential to the content/aim of the act, the Art. 47 EU applies, and the First Pillar's legal basis prevails. In other words, Art. 47 EU applies not only when the measure "should have been adopted", but also when it "could also have been adopted" within the Community system.⁹⁶

In the *ECOWAS* case, the ECJ admits 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."⁹⁷ b) Even when the EC competence invoked to trigger the application of Art. 47 EU is 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 EU.⁹⁸ 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.⁹⁹

This finding is absorbed and synthesised by the formula of paragraph 62 of the judgment, borrowed from the well-known *MOX Plant* case:¹⁰⁰

[...] 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 this precedent, which, on its face, represented a case where the Court availed itself of the powerful position it had been entrusted, to maintain its privileged place in the EC legal system.¹⁰¹

⁹⁵ See para. 75, mentioning two precedents in this respect: C-211/03 *Commission v Council*, paragraph 40, and C-94/03 *Commission v Council*, paragraph 36.

⁹⁶ See para. 77.

⁹⁷ 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."

⁹⁸ See para. 60.

⁹⁹ 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."

¹⁰⁰ See C-459/03 *Commission v Ireland* [2006] ECR I-4635, paragraph 93.

¹⁰¹ See F. Fontanelli - G. Martinico, *The hidden dialogue, when judicial competitors collaborate in Global Jurist Advances*, Vol. 8, Issue 3, Article 7, 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)."

As noted above, the ECJ finds himself in the enviable position where it has the power to decide what is actually 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:

- 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*].¹⁰²

It is apparent how in both cases the ECJ, either directly or indirectly, bears the power to autonomously extend its jurisdiction,¹⁰³ or, at least, to “absorb” external jurisdiction under the Community framework, although the Community cannot have “original legislative jurisdiction.”¹⁰⁴

In September 2008, the ECJ issued the long-awaited decision on the *Kadi* case.¹⁰⁵ This decision introduced a significant innovation, by stating that Community courts can review the lawfulness of the challenged regulation,¹⁰⁶ which was designed to give effect to the resolutions adopted by the Security Council, in the light of those fundamental rights forming an integral part of the general principles of Community law.¹⁰⁷

For our purpose, however, it is more interesting to study the lines of the judgment concerning the legal basis of the regulation at stake.¹⁰⁸ In brief, the claimants contended that the regulation providing for freeze of their assets could not be adopted on the basis of Articles 60 and 301 EC, as its purpose fell within the purpose of the CFSP, and therefore the EU’s competence. In particular,¹⁰⁹ Art. 301 EC could not be

¹⁰² In this respect, see also I. Kvesko, *Is there Anything Left Outside the Reach of the European Court of Justice?*, (2006) *Legal issues of economic integration*, Vol. 33, N° 4, 405-422, concerning the *C-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.

¹⁰³ “Extension is the mutation in the area of autonomous Community jurisdiction”, see J. H. H. Weiler, *The transformation cit.*, 2437.

¹⁰⁴ *Ibidem*, 2441. Both “extension” and “absorption” are listed among the methods by which the Community’s jurisdiction mutates, along with “incorporation” and

¹⁰⁵ See *C-402/05 P and C-415/05, Yassin Abdullah Kadi, Al Barakaat International Foundation* [2008], nyp. See also judgments of 21 September 2005 in *T-306/01 Yusuf and Al Barakaat International Foundation v Council* and *T-315/01 Kadi v Council and Commission*.

¹⁰⁶ 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, p. 9).

¹⁰⁷ 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.

¹⁰⁸ 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 *Mojahedines* (T-228/02) of 12 December 2006, 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.”

¹⁰⁹ See para. 124 of the judgment.

used as a ‘bridge’ between the EC normative and the EU’s objectives, nor could Art. 308 EC cover other than “EC’s objectives.”¹¹⁰

A clear-cut distinction is made between the EC and 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 EC¹¹¹ cannot create a link towards the Union;
- the regulation’s essential purpose is to combat terrorism, and does not relate directly with the regulation of international trade;
- as seen in the 440/05 case, the aim of the measure univocally affects its legal basis;
- Art. 308 EC’s wording cannot cover the implementation of an EU objective.¹¹²

Para. 202 of the judgment seems to put this question to and 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.

But the ECJ continues its reasoning and, quite surprisingly, comes back over Articles 60 and 301 EC (capable, *rationae materiae*, of forming part of the regulation’s legal basis) and over Art. 308 EC: Articles 60 and 301 EC, in the ECJ’s view, are “the expression of an implicit objective” of the Community, that of making it possible 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 EC applies.¹¹³

The ECJ refrained from using the expansive tool of Art. 308 to draw from EU’s 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 respective implicit powers. Moreover, the objective under consideration could be phrased as “the EC’s objective of implementing EU’s objectives through economic measures.”

In this case, contrarily to the *ECOWAS* case, the Second Pillar’s regulation purpose was probably prevailing on its First Pillar nature. Thus, it would have been difficult to

¹¹⁰ See para. 126, quoting the Opinion 2/94 of the ECJ: “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.”

¹¹¹ 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.

¹¹² See para. 199.

¹¹³ See paras. 226 and 227.

apply Art. 47 EU: 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 Lisbon's outcome), even it is maybe more correct to note that the ECJ's judicial policy, rather than consisting in a "de-pillarising" action, was rather in the sense of "first-pillarisation".¹¹⁴ 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,¹¹⁵ but that of reinforcing them, in order to attract or absorb concurring powers.¹¹⁶

CONCLUSIONS

It would not be a daring attempt to compare the ECJ's current behaviour with its heroic approach 30 years ago. After all, the same situation keeps coming cyclically: the Community was born to regulate the market, and held at first a narrow mandate, it extended its reach to include what are now its prerogative competences only through an incremental process: at first they fell within EC's jurisdiction because of their links with trade policies, then gradually they became matters covered by autonomous EC powers. The 'wild Court'¹¹⁷ 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.¹¹⁸

Another hint revealing the likeness of the two critical periods is the current revival of irreconcilable clashes between the ECJ and national constitutional courts on primacy issues: obliging doctrines such as the *Solange* or the Italian counter-limits are

¹¹⁴ The well known example of the opposite outcome is represented by the *PNR* Joined Cases C-317/04 and C-318/04, *Parliament v. Council*, 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 (Official Journal L 235 , 06/07/2004)- 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 (Official Journal L 183 , 20/05/2004)- 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). A similar case is pending before the ECJ, and will be decided in October 2008, *Ireland v Council of the European Union and European Parliament* (Case C-301/06), see the pleas of law available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:237:0005:0005:EN:PDF>

¹¹⁵ See J. K. Cogan, *Competition and Control in International Adjudication*, (2007) *Virginia Journal of International Law*, Vol. 48, 411-449, 444. 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) (1998) *The European Court and National Courts – Doctrine and Jurisprudence. Legal Change in its Social Context*, Oxford: Hart Publishing, 1997, 227-252.

¹¹⁶ Once again, a referral to the categories of jurisdictional mutation used by J. H. H. Weiler in *The transformation of Europe* cit. is necessary.

¹¹⁷ We refer to Cappelletti's well known definition. See M. Cappelletti, *Is the European Court of Justice Running Wild?*, (1982) 12 *ELRev*, 3. 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*, (1988) 13 *ELRev*, 28; and G. F. Mancini, *The Making of a Constitution for Europe*, 26 (1989) *CMLRev*, 595.

¹¹⁸ See, for instance, J. Komárek, *Federal elements in the Community judicial system: Building coherence in the Community legal order*, (2005) 42 *CMLRev*, 9.

probably unable to settle this new set of conflicts,¹¹⁹ nor does the contra punctual approach supported by Advocate General Maduro¹²⁰ help to solve the crisis: this is due to the long feared actual situation where a EU measure would be supposed to supersede a national constitutional norm, the deadlock is inevitable, at the moment being.¹²¹

Now, again, the time is ripe for the Community to move one step beyond: non-Community competences are often overlapping the EC jurisdiction,¹²² and sometimes it is not easy to distinguish the essential legal basis of an EC/EU measure, as the above described cases point out. The true mandate of the EC judicature, little by a little, is starting to include the typical obligations 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,¹²³ for the possibility to establish new specialised tribunals,¹²⁴ for a generalised 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 put to test 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.¹²⁵ On the other hand, the ECJ's interpretive 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).

Therefore, both the "constitutional tribunal" and the "supreme court"'s mission is fuelled by the principle of rule of law, as specified in the dense case law we have described above. 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 of the whole of EC and EU law's need for constitutionality has forced the ECJ to involve national courts when the EU system is

¹¹⁹ 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.

¹²⁰ See M. P. Maduro, *Contrapunctual Law: Europe's Constitutional Pluralism in Action*, in: N. Walker (ed), *Sovereignty in Transition* (Hart Publishing, 2003). See also N. Walker, *The Idea of Constitutional Pluralism*, (2002) *Modern Law Review*, Vol. 65, 317-359, 2002

¹²¹ 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. The next episode of this renewed struggle is just about to be screened: presumably in November 2008 the Bundverfassungsgericht will issue its judgment on the very same matter of the ECJ's case *Mangold* (Case C-144/04, *Werner Mangold v. Rüdiger Helm* [2005] ECR I-9981, where the ECJ made general EC principles prevail over German constitutional interests.

¹²² See C. Lebeck, *Sliding Towards Supranationalism? The Constitutional Status of EU Framework Decisions after Pupino*, (2007) *German Law Journal*, 501-532.

¹²³ See Articles 254 and 256 and of the RT.

¹²⁴ See Art. 257 of the RT.

¹²⁵ This is one of the many harsh allegations raised by Roman Herzog, in *Stop the Court cit.*

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 the national courts with the indispensable task of protection of individuals, establishing a complementarity device that can be interpreted as a ‘judicial subsidiarity’.¹²⁶

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.¹²⁷ 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.

These words reflect our consideration about the ECJ’s (constitutional) activism, the central role of the rule of law and the judicial protection principle.¹²⁸

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*”;¹²⁹ but other new fields are just about to be glided down on the judges’ desk,

¹²⁶ See F. Fontanelli and G. Martinico, *Alla ricerca della coerenza: le tecniche del “dialogo nascosto” fra i giudici nell’ordinamento costituzionale multi-livello*, (2008) Rivista Trimestrale di Diritto Pubblico, Vol. 2, 351-387.

¹²⁷ 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 page 47 of the e-book available at http://www.courdecassation.fr/IMG/pdf/cour_cassation-rapport_2006.pdf.

¹²⁸ Ibidem, at 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.”

¹²⁹ In the RT a strong instance of constitutionalisation is already present: Art. 67 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) 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

and we deem that the ECJ or its successor, the Court of Justice, will use its toolbox to fix the coherence of the EU system once again.

directives setting minimum rules intended to foster the harmonization of criminal national orders on cross-border criminal matters.