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**The European Court of Justice: Carving itself  
an influential role in the EU's Third Pillar**

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## **The European Court of Justice: Carving itself an influential role in the Third**

### **Pillar\***

This paper seeks to evaluate the role of the European court of Justice in respect of the third pillar of the European Union. With five rulings in the field of Police and Judicial Cooperation in Criminal Matters to date and several others pending, it is already clear that the Court has made its mark on this still fledgling agenda. Despite the shortcomings of the system of judicial protection and remedies in respect of the third pillar it would seem that the ECJ has the potential to exert a strong pro-integrationist influence over a field that is riddled with institutional and conceptual complexities and tensions – the extent to which this is feasible and desirable will be discussed in the paper. In addition, the paper will offer a critique of the legal reasoning of the Court and draw some conclusions about the broader impact of its rulings on internal criminal policy.

### **Outline Plan**

- Context, constraints and expectations
- Third pillar jurisprudence to date
- Critique and future challenges

### **Introduction**

Despite its limited and disparate jurisdiction, a small but significant body of caselaw has emerged from the Court<sup>1</sup> in respect of the third pillar since 2003. At the time of writing, eight ECJ judgments have been delivered and numerous are pending. Seven judgments have stemmed from references from national courts pursuant to the Article 35 EU preliminary reference mechanism and one of them was an action for annulment

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<sup>1</sup> In this paper I will refer to the Court of Justice of the European Communities as either the ‘Court’ or the ‘ECJ.’ Note the considerably outdated official title of this institution. A more accurate title would be the Court of Justice of the European Union.

of a framework decision brought by the Commission against the Council pursuant to Article 35(6) EU.<sup>2</sup>

This early jurisprudence has revealed the Court's potential for defining the limits and principles of EU law in the field of criminal cooperation and for lessening the negative impacts of the current institutional and legal settlement. It has shown its willingness to interpret third pillar law in such a way as to enhance the level of protection that it offers to individuals and as such it may play a crucial role in addressing the deficit that appears to emerge from the third pillar policy environment to date (ie a counterbalance to the emphasis on effective prosecution and enforcement.) However, the assessment and outlook is not all positive. Criticisms have been levelled at the Court for adopting an overly functionalist approach and for the generally dubious legal reasoning used in its rulings to date. Some of its most recent judgments raise important unanswered questions and this uncertainty is perhaps exacerbated by the 'paths of confrontation'<sup>3</sup> pursued by the Court with the majority of national governments. Moreover, as long as the limited and disparate jurisdiction persists in the third pillar there will be concerns about the ability of the Court to ensure legal certainty and coherence in EU law, which inevitably further calls into question the legitimacy of the AFSJ project as a whole. To what extent will the Court be constrained by the strong intergovernmental tendencies of the executive branches of national governments (and their dubious attitude towards the Court as expressed in the limited provisions on its jurisdiction in the Treaty)? Can the Court influence the

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<sup>2</sup> Case C-176/03, *Commission v Council* (Judgment of 13 September 2005) action for annulment brought under Article 35(6) EU seeking annulment of Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law (OJ 2003 L 29/55).

<sup>3</sup> D Chalmers, 'Editorial- The Court of Justice of the Third Pillar' (2005) ELRev 30(6) at 774

paths of integration in PJCC and help to secure a fair balance between the often seemingly competing objectives of freedom, security and justice?

In a field as contentious as this, it is right that the Court should come under close and sustained scrutiny.

### **ECJ in the third pillar: Constraints, Context and Expectations**

#### *Institutional and decision-making*

The institutional dynamic of the EU's third pillar has evolved considerably as the EU's role in criminal matters has developed over the decades. The role of each of the key institutional actors has been transformed incrementally as Treaty amendments rethink the constitutional objectives and limits associated with criminal law cooperation. No more is this evolution more striking than in respect of the ECJ.

Of course in the very early phases of inter-governmental cooperation in (what later became known as) 'justice and home affairs matters' which, in criminal matters is often traced back to the Trevi Group<sup>4</sup> established in 1975, cooperative activity fell outside the scope of EC law completely. Even the Schengen project, which was developed in response to the security implications of the Community single market project and which contained provisions on police and criminal cooperation, developed outside the realms of the EC and therefore beyond the judicial control of the ECJ. JHA cooperation was formally welcomed into the newly-created European Union fold by the 1992 Maastricht Treaty. JHA matters were therefore brought within a more

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<sup>4</sup> An intergovernmental forum to improve cooperation in counterterrorism.

formal and organised legal setting, although their location within a separate intergovernmental pillar of the Union, ensured that they would not be subject to the checks and balances associated with the traditional Community process. According to Article K(2)(c) of the Maastricht Treaty the ECJ had no mandatory jurisdiction over third pillar matters whatsoever. Rather an extremely limited degree of judicial review could be established if the Council decided to confer such jurisdiction by way of a third pillar Convention; prompting heated debate over each instrument, often causing delay. This miniscule and optional role for the Court emphasised clearly the continued reluctance on the part of some national governments to subject this highly sensitive policy field to any comprehensive, overarching judicial control.

Within a matter of several years however, a political consensus had been reached to enhance the role of the Court over justice and home affairs issues. The Treaty of Amsterdam also re-thought the legal boundaries of JHA issues, dividing them between the first and third pillar so that criminal matters were now the exclusive concern of the third pillar. Distinctive legal procedures and mechanisms were to continue to apply to both first and third pillar JHA issues and a newly created EU objective of maintaining and developing an 'Area of Freedom, Security and Justice (AFSJ)' became the focus of the, now 'cross-pillar', JHA policies.

In respect of the third pillar, the Treaty of Amsterdam directly conferred powers on the European Court of Justice over criminal matters for the first time. This marked a positive step in achieving greater accountability and legitimacy in a policy field that appeared increasingly prevalent, both legally and politically, at the EU level. However, as will become clear from an overview of the Court's powers, its

jurisdiction remains severely limited when compared to its role in the Community pillar.

First and perhaps foremost, Article 35 EU provides for the possibility of a dialogue between national courts and the ECJ in third pillar matters. The ECJ is empowered to give preliminary rulings on the validity and interpretation of framework decisions and decisions, the interpretation of conventions and the validity and interpretation of measures implementing them. This preliminary reference procedure is however more limited than its Community law counterpart in Article 234 EC and is different again from its JHA counterpart in Title IV EC (which deals with matters of civil law cooperation, visas, immigration and asylum).<sup>5</sup> Article 35 EU does not confer compulsory jurisdiction on the ECJ, rather Member States can choose whether they wish to recognise the Courts jurisdiction at all (in which case it must make a formal declaration) and if so, the extent of that jurisdiction. Member States are free to choose whether only national courts of *final instance* can refer questions to the ECJ<sup>6</sup> or whether *any* national court may do so.<sup>7</sup> These choices will of course impact significantly on the numbers of references made, the extent of delay involved in the search for a judicial remedy and even the content of the questions referred (lower courts being traditionally less conservative and more ‘anti-authoritarian’ than higher courts.) Furthermore it is noteworthy that no national court is *obliged* to refer a question to the ECJ pursuant to the third pillar preliminary reference procedure.<sup>8</sup> The

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<sup>5</sup> See Article 68 EC. The fragmentation of the preliminary reference system within the EU legal order is problematic and compromises the right to judicial protection. See T.Tridimas, ‘Knocking on Heaven’s Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure’ (2003) 40 CMLRev 9.

<sup>6</sup> Article 35(3)(a) EU

<sup>7</sup> Article 35(3)(b) EU

<sup>8</sup> This is in contrast to the procedure established in Article 234 EC where courts of final instance are obliged to refer. Interestingly it also differs from provisions on jurisdiction of the ECJ in respect of AFSJ issues in Title IV EC, whereby preliminary ruling requests are limited to the Courts of final

UK, Denmark and Ireland have not submitted declarations pursuant to Article 35 EU and therefore do not accept the jurisdiction of the Court at all. This is also the case for eight of the ten accession Member States, the exceptions being Hungary and the Czech Republic. Of those States who have submitted declarations all have accepted that *any* national court may refer questions to the ECJ, with the exceptions of Spain and Hungary who limit this possibility to their courts of final instance. It is clear that these variable positions create a system of ‘patchy justice’ that threatens to undermine the rule of law.

This variable and permissive jurisdiction might be seen as a manifestation of state power, however Guild and Peers argue that in reality it reveals states’ anxieties about the ECJ’s possible expansive jurisdiction to third pillar instruments which would effectively undermine their control and empower individuals.<sup>9</sup> Interestingly, the Court, in its first preliminary reference pursuant to Article 35 EU has, used this opportunity for dialogue with a national court to explore, at a general level, the nature of the EU legal order and its impact upon the national legal systems, suggesting that, despite the limitations placed upon this judicial procedure, it may still provide the conduit for the development of EU law generally; in this sense it shows early signs of mirroring the role of Article 234 EC in the development of the Community legal order in two ways. First, the Article 234 procedure in practice reflects a hierarchy in the judicial relationship between the ECJ and the national courts, enrolling national courts as the enforcers and applicers of EC law and, second, preliminary rulings have increasingly been held to have either *de jure* or *de facto* impact on all national courts,

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instance, which are traditionally more likely to show deference to the executive. However, certain Member States, when making a declaration pursuant to Article 35 EU have reserved the right to make referral mandatory in respect of national Courts of final instance in their national legislation.

<sup>9</sup> Note that his argument is made in the context of Title IV EC but could equally apply to the third pillar of the EU. E.Guild and S.Peers, ‘Deference or Defiance? The Court of Justice’s Jurisdiction over Immigration and Asylum’ in E.Guild and C.Harlow (eds) *Implementing Amsterdam* (Hart Publishing, 2001) pp. 267-289.

and not simply on those with which it is in direct dialogue.<sup>10</sup> It will be interesting to see the extent of engagement between the national courts and the ECJ pursuant to Article 35 EU, which in turn will reveal the degree of acceptance and integration of the third pillar doctrine at the national level.<sup>11</sup>

A second head of jurisdiction was introduced by the Amsterdam Treaty. The Court has jurisdiction in direct actions brought under Article 35(6) EU to review the legality of third pillar framework decisions and decisions.<sup>12</sup> These actions may be brought by a Member State or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the EU Treaty or any rule of law relating to its application, or misuse of powers.<sup>13</sup> While the grounds of review are identical to those contained in the equivalent annulment action provision in the EC Treaty (Article 230 EC), the measures subject to review are more limited and fewer actors have standing to commence an action. Notably, there is no possibility for individuals to bring an annulment action before the court, thereby denying any direct judicial remedy to individuals in respect of EU criminal matters.

Third and finally, the Amsterdam Treaty (Article 35(7) EU) conferred wider jurisdiction on the ECJ in the settlement of disputes among the Member States regarding the interpretation or application of all acts under the third pillar.<sup>14</sup> This procedure resembles the Article 227 EC dispute resolution mechanism. The ECJ shall

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<sup>10</sup> See P. Craig and G.de Búrca. 'EU Law: Text Cases and Materials' (3<sup>rd</sup> ed) (OUP, 2003) pp. 432-479

<sup>11</sup> Weiler has analysed the preliminary reference procedure in terms of compliance of the Member States and has noted that it implies a double acceptance. J.H.H. Weiler, *The Constitution of Europe* (CUP, 1999) 188-218.

<sup>12</sup> See Case C-176/03 *Commission v Council*. This case is discussed later.

<sup>13</sup> An action must be brought within 2 months of publication of the measure challenged.

<sup>14</sup> The Court's jurisdiction applies whenever the dispute cannot be settled by the Council within six months of it being referred to that institution by one of its members.



also have jurisdiction pursuant to Article 35(7) to rule on any dispute between Member States and the Commission regarding the interpretation or application of third pillar conventions.<sup>15</sup> This is reminiscent of the Article 226 procedure in Community law, although the scope of the EU equivalent is exceptionally narrow, it being applicable only to disputes regarding the inter-governmental measures known as ‘conventions.’ The effective absence of an infringement procedure in the third pillar suggests that the Member States were reluctant to establish any form of mechanism to expose their failings or to secure the effective and timely implementation of legislative measures. This reveals something about the nature of and perceived expectations created by the vertical legal relationship between the EU and the Member State and necessarily has an impact on the horizontal inter-institutional dynamic of the third pillar (limiting the traditional roles of the Commission and the Court in ensuring respect for EU law). Another notable gap in judicial accountability, also of significance to the institutional balance, is created by the absence of any equivalent to the Article 232 EC procedure which allows the Court to review the legality of a failure to act on the part of the European Parliament, Council or Commission.

The Treaty makes one sphere of action untouchable as far as the jurisdiction of the ECJ is concerned. Article 35(5) EU excludes the Court from reviewing the validity or proportionality of operations carried out by the police or other law enforcement services of Member States or Member States’ acts relating to the maintenance of law and order and the safeguarding of internal security. The purpose behind the inclusion of this provision in the Treaty was to be absolutely explicit that the Courts jurisdiction

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<sup>15</sup> The procedure applicable to dispute resolution under Article 35(7) EU is to be found in Article 109b of the Court’s Rules of Procedure.

did not extend to purely national operations in the sphere of law enforcement and internal security.

For the sake of completeness it is to be noted that the raft of judicial mechanisms contained in Article 35 EU (implicitly) apply in full to the (as yet to be activated) enhanced cooperation procedure provided for in Article 40 EU. Indeed, under Article 40(3) EU the Treaty states explicitly that all of the powers conferred on the Court by the *EC Treaty* shall apply in the enforcement of the enhanced cooperation mechanism.

This overview of the procedural and substantive restraints conferred on the Court by the Treaty suggests that the Court has only limited powers to hold the political institutions, the acts of those institutions and the Member States to account, in comparison with the judicial system established pursuant to the Community legal order.<sup>16</sup> In particular one notes the very limited possibility for individuals to seek judicial redress in respect of third pillar matters. Moreover, when one considers the governance pattern of the third pillar more generally, it becomes clear that judicial control and accountability over criminal law developments is in fact miniscule. It is clear that a notable feature of the institutional dynamic in the third pillar is the prevalence of executive power. In addition to the strong position of the European Council in driving the agenda and the Council of Ministers in the decision-making process there is an ever-increasing degree of executive power conferred upon other ‘quasi-institutions’, agencies and bodies. A raft of EU level police and judicial

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<sup>16</sup> Moreover, the Court has strictly applied the procedural limits on its own jurisdiction in respect of reviewing the acts of institutions under the third pillar; See Case C-160/03 *Spain v Eurojust* [2005] ECR I-2077. The Court declared inadmissible, actions for damages brought by national or legal persons alleging that they had sustained damage as a result of action by institutions in this field; CFI (order of 7 June 04) Case T-333/02 *Gestoras Pro-Amnistia and Others v Council*, not reported; CFI (order of June 7, 2004) Case T-338/02 *Segi and others v Council* [2004] ECR II-1647.

agencies now have a role to play in third pillar issues, most notable of course are the EU coordinating bodies of Europol and Eurojust. Formal and structured lines of accountability, both political and judicial, are conspicuously absent in respect of these operational agencies. It has been suggested that Eurojust should be granted a supervisory role over Europol, in line with the basic principle that police powers should be subject to some form of judicial supervision and control. While this argument and broader issues of judicial accountability (involving the ECJ or possibly a special ‘panel’ of the Court of First Instance) may be resisted as long as neither institution has direct EU powers of criminal investigation and prosecution, these questions will have to be revisited in the likely event of this happening in the future.<sup>17</sup>

This overview of the powers of the Court in the third pillar reveals that some of the ‘intergovernmental culture’ of restricting judicial control at the European level clearly persists post Amsterdam.<sup>18</sup> The limited and discretionary jurisdiction of the Court is problematic from the perspective of securing the uniform interpretation and application of EU law and has the potential to undermine legal certainty and the rule of law. In a policy field which ultimately concerns the protection and restriction of individuals, it is particularly disappointing that they have no recourse to judicial protection by the ECJ as of right. Guild and Carrera point out that the legitimacy and legality of an area of freedom, security and justice depend on individuals being able to rely on, and challenge EU measures in this field.<sup>19</sup>

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<sup>17</sup> As Europol has gained a greater presence in operational policing, plans have emerged to confer executive powers on this body for the first time.

<sup>18</sup> J.Monar, ‘The Dynamics of Justice and Home Affairs: Laboratories, Driving Factors and Costs’ (2001) *JCMS* 39(4) 747-64 at 760.

<sup>19</sup> E.Guild and S.Carrera, ‘No Constitutional Treaty? Implications for the Area of Freedom, Security and Justice’ CEPS Working Document No. 231/October 2005 available via <http://www.cepsd.be> at 4

Despite these constraints, certain expectations about the role of the Court might be said to arise as a result of the wider decision-making procedure in the third pillar. In particular the unanimity requirement for the adoption of legislation has encouraged a compromise culture based on the lowest common denominator – the prospect of references to the ECJ to interpret and flesh out the content of the often broadly construed legal measures is important in this context. And where the decision-making procedure results in stale-mate, the ECJ may take the opportunity, as it has done so often in the history of Community legal order, to encourage and enable the continued pursuit of the policy agenda. Besides, the legislative agenda, police and judicial cooperation in criminal matters proceeds by way of operational activity and other forms of institutional coordination activity. As the prospect of conferring EU executive powers on third pillar agencies nears, it will be crucial to consider how to secure the appropriate safeguarding of civil liberties and the possibility of judicial remedies at the European level.

Further consideration of a legitimate role for the Court in criminal matters will be explored below. For now, attention returns to the EU constitutional reform context and the on-going process of institutional transformation that this promises. While the precise nature of the future powers of the ECJ in third pillar issues remains unclear, a consensus has now emerged at both the European and national level that increased judicial control over this field should be secured.

*Institutional reform: With and without the EU constitution*

The inter-institutional dynamic of the third pillar has evolved with successive Treaty developments, and further reform is likely given the political appetite for such, as

revealed during the latest round of (ultimately fruitless) EU constitutional reform. However, despite the evolving nature of the institutional dynamic it is possible to note two general characteristics of the EU institutional system in relation to the third pillar; first, that EU cooperation in criminal matters has strengthened (national) executives and executive power, at the obvious expense of legislatures, courts and voters<sup>20</sup> and second, that the resulting system of EU governance in this field is institutionally biased towards the politics of negative, as opposed to positive, integration.<sup>21</sup> In such a context, it would be tempting to conclude that the potential role of the Court is so limited as to be insignificant. However, this would be premature. In fact, on the contrary, it might be suggested that the Court has the potential to influence these overriding dynamics. In respect of the first characteristic, that of strengthened executive power, the Court, albeit acting with limited jurisdiction, is in a position to act as a counterweight to the intergovernmental ‘empire’. It could, if it chose to do so, forge a path of integration that was at odds with the national executives.<sup>22</sup> As for the second characteristic, that of the institutional bias towards negative integration, the Court might directly or implicitly encourage the legislature to pursue further positive integration measures. This may assist in rallying the political support required to overcome the demands of the decision-making process in the third pillar, which effectively confers a veto power on individual national governments and severely limits the role to be played by the European Parliament. It may also help to secure a higher ‘minimum’ protection standards, ‘minimum rules’ being the stipulated

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<sup>20</sup> This phenomenon, which runs counter to conventional accounts of the impacts of international cooperation which emphasise loss of state autonomy and transfers of sovereignty, has been acknowledged and theorised by a growing number of scholars of EU politics: see A. Moravcsik, ‘Why the European Community strengthens the State: Domestic Politics and International Institutions’ (1994) Cambridge Centre for European Studies, Working Paper Series 52; and K. Wolf, ‘The New Raison d’État as a Problem for Democracy in World Society’ *European Journal for International Relations* 5(3) (1999) 333-363

<sup>21</sup> S. Lavanex and W. Wagner

<sup>22</sup> Indeed, as we will see later, it has chosen to do this in a number of cases (Pupino and Commission v Council)

benchmark for approximation/harmonisation legislation in this field.<sup>23</sup> Currently, the unanimity requirement all but secures a lowest common denominator approach, but it is possible that the Court might provide a ruling which affects the substantive content of a potential legislative measure, by providing a more protectionist interpretation of a provision or principle than might otherwise have been agreed by national executives in the legislative process.<sup>24</sup>

The major reforms of the Constitutional Treaty – the abolition of the pillar structure, the creation of a single EU legal order with the standardisation<sup>25</sup> of the decision-making procedure, legislative instruments and judicial procedures, the enhanced role for national parliaments in the decision-making process and the insertion of the EU Charter of fundamental rights as a justiciable component of EU law – would have been felt nowhere more heavily, and it is contended, nowhere more positively, than in the field of EU criminal matters (ie the third pillar.) More specifically, the Constitutional Treaty extended the full range of judicial mechanisms usually associated with the mainstream Community pillar to all AFSJ matters.<sup>26</sup> This is a

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<sup>23</sup> Article 31(e) EU

<sup>24</sup> In several of its rulings to date, the Court has been asked to interpret the principle of *ne bis in idem* as laid down in the Convention implementing the Schengen Agreement. The adoption of a third pillar legal instrument dealing with this principle has been on the legislative agenda for some time - Green Paper on Conflicts of Jurisdiction and the Principle of *ne bis in idem* in Criminal Proceedings COM(2005) 696, Brussels 23.12.2005. See also the Annex to the Green Paper SEC(2005) 1767, Brussels, 23.12.2005. The Court's rulings must be taken into account when drafting a forthcoming framework decision. At a general level, they are likely to provide political impetus for the adoption of the legislative instrument. More detailed analysis of the cases is provided later in this article.

<sup>25</sup> Albeit with specific, limited exceptions.

<sup>26</sup> The specific limitation currently contain in Article 35(5) EU would remain in respect of criminal matters: Article III-377 states that “the ECJ shall have no jurisdiction to review the validity or proportionality of operations carried out by police or other law-enforcement services, or the exercise of responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.” The retention of this judicial scrutiny exception has been criticised. Most notably, the House of Lords opined that “the Court (ECJ) should have jurisdiction over all EU Justice and Home Affairs matters, including co-operation in relation to criminal law and procedure.... Such matters may impinge directly on the interests and rights of the individual. The Court should be entitled to measure the legality of action, whether that of the Union or of the Member States and their authorities when implementing Union legislation, against the norms contained in the Charter

significant and hugely positive development particularly in light of the problems associated with the current, limited and disparate jurisdiction of the Court. However, following failure to ratify the Constitutional Treaty and on the assumption that the Constitutional Treaty provides a useful snapshot of political consensus in an on-going dialogue of constitutional reform and direction, attention inevitably turns to alternative options for improving the scope of judicial oversight in the third pillar. Three options present themselves in this regard.

First, the fullest exercise of discretion by Member States as regards the Article 35 EU preliminary reference procedure would secure a more coherent and hence more legitimate judicial system and remove any potential for non-participating States to ignore the rulings of the Court. The Hague Programme, offered a clear political endorsement of the amendments made in the Constitutional Treaty to the ECJ and ‘underlines the importance of the ECJ in the relatively new area of freedom, security and justice.’ In light of this political commitment to empower the Court, there would appear to be no excuses for the continued situation of ‘variable geometry’ regarding the preliminary reference procedure. Those Member States that have yet to do so are urged to acknowledge the fullest possible acceptance of the jurisdiction of the Court by way of Article 35 EU declaration at the earliest opportunity.

Second, the Hague Programme suggested that a more formal solution might be appropriate to improve the situation in respect of preliminary rulings, possibly by

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(of fundamental rights).” House of Lords European Union Committee, ‘The Future Role of the European Court of Justice,’ 6<sup>th</sup> Report of Session 2003-04 at para. 123

amending the Statutes of the Court, and it called upon the Commission to bring forward a proposal to this effect.<sup>27</sup>

Lastly, an alternative and/or additional means of achieving enhanced judicial protection in respect of EU criminal matters lies in the activation of the existing Article 42 EU. This ‘passarelle’ provision has been described by Kostokopoulou as the ‘Communitarisation constant’ in the third pillar which could not fail to exercise a ‘serious gravitational pull’ away from the intergovernmental reflexes that continue to dominate.<sup>28</sup> Article 42 EU enables the Council, acting unanimously, to decide that action in the areas referred to in Article 29 EU (third pillar) shall fall under Title IV EC (first pillar). The European Commission has announced that it will make a formal proposal to transfer the third pillar into the first pillar.<sup>29</sup>

The advantage of making such a transfer would be to bring third pillar policies under a single, more coherent and effective, legislative and judicial framework. However on closer inspection, the activation of Article 42 EU raises numerous legal complexities and queries.<sup>30</sup> Here, it is worth remembering that Title IV EC is itself subject to variations on traditional Community governance patterns, hence its description as a ‘ghetto’ within the Community legal system. So, for example a complex system of legal flexibility exists in respect of Title IV EC. Three Member States, Denmark,

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<sup>27</sup> Vervaele calls for an amendment to the Statute of the Court to provide for urgent proceedings and specialised Court sections. See J.A.E Vervaele, ‘European Criminal Law and General Principle of Union Law’ Research Papers in Law 5/2005, European Legal Studies, Belgium, 2005

<sup>28</sup> ‘The Area of Freedom, Security and Justice and the European Union’s Constitutional Dialogue’ (Find citation)

<sup>29</sup> The European Parliament in May 2004 called for the Commission to draw up a proposal on the basis of Article 42 EU, calling for the transfer of third pillar action to fall under Title IV EC and requiring that such action to be decided on by qualified majority.

<sup>30</sup> For a full consideration of the legal issues surrounding the activation of Article 42 EU, see S.Peers, ‘Transferring the Third Pillar’ Statewatch Analysis, 15 May 2006, available via <http://www.statewatch.org>.



Ireland and the UK have each secured legal opt-outs that reflect their individual concerns about participating in and being subject to Community developments in Title IV policy domains. Another variation, as mentioned earlier, lies in the field of judicial powers. For the most part, the normal Community powers of Court jurisdiction apply in respect of Title IV EC – indirect actions in the form of the preliminary reference procedure and direct actions in the form of annulment proceedings against Community measures and infringement actions against the Member States for breach of Community law. However, exceptions apply in respect of the preliminary reference procedure whereby only final instance national courts can send references to the Court (although this remains an obligation in line with the approach in Article 234 EC). This represents a more restricted system than the third pillar equivalent which enables lower courts to refer questions to the Court. The second exception and one that is familiar to the third pillar is the limit on the Court’s jurisdiction over matters relating to the maintenance of law and order and the safeguarding of internal security.

The question of the ‘transferring’ the third pillar has focused more specifically upon the jurisdiction of the ECJ and has become bound up with the duty on the Council, pursuant to Article 67(2) EC to adapt *inter alia* the Court’s powers in Title IV EC. The Commission has expressed its view that the role of the Court of Justice’ as regards Justice and Home Affairs should be aligned with the general scheme of EC jurisdiction. Certain Member States are reluctant<sup>31</sup>, and the ECJ has recently entered

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<sup>31</sup> Including the UK and Germany. See House of Lords Select Committee Report.

the debate.<sup>32</sup> The Council is now under some pressure to take action and extend the jurisdiction of the Court pursuant to Article 67 (2) EC.

An Article 42 EU decision could significantly increase the judicial control of third pillar matters, notably empowering individuals (albeit subject to the contentious rules on standing) to bring a direct action before the Court and providing a mechanism to hold recalcitrant Member States to account. But this perhaps remains an unlikely development. In practical terms, the activation of Article 42 EU may be problematic. Not only does it require unanimous approval by Council, but it may also be subject to national ratification procedures in line with the wording in Article 42, that the Council ‘shall recommend the Member States to adopt that decision in accordance with their respective constitutional requirements.’ This double approval system has led some commentators to suggest that, in fact, there is not much difference between the Article 42 EU procedure and a Treaty amendment.<sup>33</sup>

*AFSJ – changing concepts of security, predominance of prosecution in legislative development*

A further contextual factor likely to influence the role played by the Court in third pillar matters is the overarching objective of maintaining and developing the EU as an ‘area of freedom, security and justice’ (AFSJ). Adopting its familiar teleological approach to judicial interpretation in the realm of EU policing and criminal law, the Court would quickly arrive at this AFSJ objective. This now familiar ‘mantra’ was included as an objective in the European Treaties by the Treaty of Amsterdam in

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<sup>32</sup> Council Doc 7646/07

<sup>33</sup> E.Guild and S.Carrera, ‘No Constitutional Treaty? Implications for the Area of Freedom, Security and Justice’ CEPS Working Document No. 231/October 2005 available via <http://www.cepsd.be> at 9

order to provide a new focus and direction for the European Union going into the twenty-first century. Article 2 EU states that the objective is to ‘maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.’ Article 29 EU states that the ‘Union’s objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice...’

One starting point for understanding this concept is to separate out the strands of ‘freedom’, ‘security’ and ‘justice’ and study the raft of policy areas that might be said to contribute to each of them. Indeed this is the approach taken in the early Vienna Action Plan (1998) and more recently in the Hague Programme (2004).<sup>34</sup> However, this advocates a rather rigid and narrow understanding of the individual concepts which fails to appreciate the extent to which they inter-relate and overlap in practice. For example that, immigration issues ‘promote freedom’, and have no bearing on security issues is something, in reality, we all know to be incorrect.

Of course, on one level, the pursuit of a definitive definition as such is futile – the term is abstract and imprecise, and therefore capable of any number of interpretations. Individually and collectively these concepts remain contested. Conway contends provocatively that since these provisions do not mean anything specific, ‘they can mean whatever the Court would like them to mean.’<sup>35</sup> However, it is equally clear how

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<sup>34</sup> These documents refer to policy issues and priorities under the broad headings of ‘freedom’, ‘security’, ‘justice’ and ‘external relations.’ The Tampere Conclusions by contrast, were structured around four broad milestones (common EU asylum and migration policy, a genuine area of justice, a Union-wide fight against crime and stronger external action)

<sup>35</sup> Conway makes this assertion in the context of the *Gozutok* ruling in which the Court appears to have invoked the AFSJ in a general way to justify a particular interpretation of the principle of *ne bis in*

a particular interpretation or understanding of the concept might impact upon policy agendas and be used by the Court to justify more expansive or indeed more limited interpretation of those policies. It will be interesting to see the extent to which the Court is influenced by the developing political context in this regard— where a clear tension has emerged between the rhetoric of pursuing a balanced agenda and the reality of a legislative and operational agenda dominated by security considerations. To what extent will it apply existing ‘securitised’ patterns of understanding and to what extent will it attempt to forge a new understanding of the objective that might influence the future direction and content of EU policy developments?

The evolution of European cooperation in Justice and Home Affairs matters from the mid 1970s to date is notable for the extent and pace of change. However, one thing emerges as constant – the prominence of ‘security’. That is not say that the concept of security has remained the same or is uncontested (quite the contrary in fact<sup>36</sup>), but rather, as Kostokopoulou explains it, that a ‘securitisation ethos’ has characterised justice and home affairs cooperation since its inception.<sup>37</sup> The ‘Europeanisation of security’ in recent years has led to the conceptualisation of policy agendas in terms of actual or potential security threats (in particular immigration and free movement of persons) – this in turn has had an impact upon the structure, methodology and content of the JHA agenda.<sup>38</sup> Following the ‘9/11’ terrorist attacks the security impetus took on a new and reinvigorated dynamic – the internal and external security policies of the EU became inextricably linked and the ‘counter-terrorism’ agenda has been used to

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*idem*. The Court did not attempt to argue that that its interpretation was necessarily *required* by it. G.Conway, ‘Judicial Interpretation and the Third Pillar: Ireland’s acceptance of the European arrest warrant and the Gozutok and Brugge case’ (2005) *European Journal of Crime, Criminal Law and Justice* 13(2) 255-283 at 281

<sup>36</sup> Walker – insert reference

<sup>37</sup> Insert reference and reference to Bigo’s ‘security continuum’

<sup>38</sup> Anderson and Apap – insert reference

focus police and judicial cooperation activity in criminal matters. A whole raft of operational and legislative measures have been adopted or proposed on the basis of this particular security threat (with the result that ‘security’ appears, at times to be synonymous with ‘terrorism’.) Indeed, a broad survey of the legislative measures and progress in operational matters in the third pillar reveals a control and prosecution-oriented agenda over and above any protectionist and individual rights-based approach. While internal security issues have transcended the traditional state domain and emerged prominently on the EU political scenes - albeit in mutated forms and within contested parameters – there is an increasingly widespread concern that this transformation has emerged without providing a sufficient “compensating” normative frame of legitimation.<sup>39</sup> The EU policy environment exists ‘beyond the embedded liberalism of the nation state’<sup>40</sup> (Guild, 2004) and with an emphasis on security-maximizing actors rather than actors concerned with the safeguarding of individual rights (Lavanex and Wagner) the EU process contributes to a securitization of issues. The institutional and decision-making environment with its emphasis on executive power and unaccountable operational agencies contributes to the creation and the sustenance of this trend. The imbalance recorded in these agendas has been highlighted by a growing number of academics and it may be that the Court will play a role in balancing this agenda more equitably.<sup>41</sup> Through the clarification of competences and the provision of legal interpretations, the Court might contribute to a clearer conception and more coherent application of the EU as an AFSJ. It might usefully define the ‘application range’ of the internal (and external) security

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<sup>39</sup> S.Lavanex and W.Wagner Limerick paper at 5

<sup>40</sup> E.Guild, ‘Crime and the EU’s Constitutional Future in an Area of Freedom, Security and Justice’ 10(2) (2004) 218-234

<sup>41</sup> Insert references – Lenaerts and Jadoul at 200

strategy.<sup>42</sup> The adoption of a language of rights (extending beyond the fundamental right to freedom of movement) might influence the direction of future policy and secure a more balanced, normative frame of reference for the development of EU integration in criminal matters. Finally, as in the internal market field, the Court might encourage a sluggish and reluctant legislature to adopt measures of positive integration to secure acceptable conditions for the application of negative integration.

To summarise the first section of this paper, the unique and contested legal and political environment within which the Court finds itself acting reveals both constraints and opportunities. Besides the formal limits on the judicial power imposed by Title VI EU, the wider legal characteristics of the third pillar in comparison with those of the Community legal order arguably point to a more conservative and constrained role for the court in exercising its powers of review and interpretation. On this view, one might expect the Court to show a high degree of deference to the will of the national governments as expressed in the EU Treaty and the emergent legislation and to interpret EU powers restrictively to prevent any further diminution of or ‘encroachment’ on national competences. The principles of legal certainty and specificity of criminal law might also militate against a more creative interpretation of EU criminal law provisions, on the ground that such an approach would be less predictable.<sup>43</sup> Yet, simultaneously, the limited and contested nature of the legal and political environment might encourage a bold and more dynamic jurisprudence from the Court. The greatest challenge here will be to ensure that that its caselaw is consistent, coherent and rational.

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<sup>42</sup> Storbeck and Toussaint – highlight that despite the fact that the concept of internal security is hotly contested and that there is no clear application range for the development of such a strategy, the EU continues to pursue it with some vigour.

<sup>43</sup> G.Conway, *op.cit* at 271

### Third pillar jurisprudence to date

*Interpretation of the principle of ne bis in idem contained in Articles 54-58 of the Convention implementing the Schengen Agreement (CISA) of 1990.*

Three of the five third pillar judgements to date and several of the pending cases before the ECJ concern the interpretation, not of a post 1999 third pillar measure but rather of the Convention implementing the Schengen Agreement (CISA) of 1990, and in particular Articles 54-58 thereof, which deal with the principle of *ne bis in idem*<sup>44</sup>. This instrument, originally adopted outside the auspices of the EU framework became an integral part of it following the Amsterdam Treaty. In the new legal context of the Area of Freedom, Security and Justice the transnational principle of *ne bis in idem* contained in CISA emerges as a crucial safeguard, particularly in the absence of any common approach to jurisdiction and is coming under fresh scrutiny. Persistent calls for EU legislation to strengthen and clarify the *ne bis in idem* principle<sup>45</sup> have been met with the publication of a Green Paper on *ne bis in idem* and the related issue of parallel criminal jurisdiction in December 2005.<sup>46</sup> The Commission has yet to publish a draft Framework Decision.<sup>47</sup> Meanwhile, and in the absence of an appropriate EU legislative response, the national courts have asked the ECJ for assistance in interpreting the principle pursuant to the Article 35 EU preliminary reference mechanism. The Court's approach appears to be one of maximising the level of

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<sup>44</sup> The Convention implementing the Schengen Agreement of 14 June 1985 between the governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders. Signed on 19 June 1990 at Schengen, Luxembourg. See Joined Cases C-187/01 and C-385/01 *Hüseyin Gözütok and Klaus Brügge*, [2003] ECR I-1345, *Brügge*, Case C-469/03 *Filomeno Mario Miraglia*, [2005] ECR I-2009, Case C-436/04 *Leopold Henri Van Esbroeck* [2006] ECR I-2333, Case C-467/04 *Gasparini* judgement of 28 September 2006 (nyr), Case C-150/05 *Van Straaten* judgment of 28 September 2006 (nyr). Further preliminary rulings are pending on the interpretation of the CISA *ne bis in idem* rule in Case C-288/05 *Kretzinger* and Case 367/05 *Kraaijenbrink*, Opinion delivered on 5 December 2006. Case C-272/05 *Bouwens* was removed from the Court's Register by the President by an Order of 7 June 2006 following an indication by the referring Belgian court that a preliminary reference was no longer necessary in light of the judgment made in *Van Esbroeck*.

<sup>45</sup> See for example the Mutual Recognition Programme of December 2000 at point 1.1. OJ C-12/10, 15.01.2001

<sup>46</sup> Green Paper on Conflicts of Jurisdiction and the Principle of *ne bis in idem* in Criminal Proceedings COM (2005) 696, Brussels 23.12.2005. See also the Annex to the Green Paper SEC (2005) 1767, Brussels, 23.12.2005. A Greek proposal for a Framework Decision on *ne bis in idem* in 2003 (OJ [2003] C100/4) was not seriously pursued largely due to its limited scope and the retention of numerous exceptions to the principle.

<sup>47</sup> The official consultation period established by the Green Paper ended in March 2006 – this always looked over ambitious. A period of further reflection and consultation is under way as initial responses to the Green Paper called for more empirical evidence to determine the extent to which parallel prosecutions really are a problem within the EU. Pre-legislative efforts to improve the content of a particular measures takes on an added significance in a legal environment that lacks a post-legislative enforcement mechanism to bring recalcitrant Member States before the ECJ

protection owed to the individual suspect by the principle by adopting a broad and consistent interpretation of the scope of the CISA *ne bis in idem* principle (and in particular the crucial concepts of ‘bis’ and ‘idem.’). Importantly, the cases also reveal how the ECJ conceives of the AFSJ more generally. It goes without saying that any emergent legislative instrument on *ne bis in idem* will have to take account of the ECJ’s now substantial jurisprudence on the CISA principle.

The following discussion of the cases will be divided along thematic lines – namely those concerning the concept of ‘bis’, (that is the types of decisions which have the effect of precluding future proceedings on the same matter) and second, the concept of ‘idem’, (that is the appropriate comparator for the determination of whether an individual has been tried twice for the same alleged violation of the law.)

‘bis’

In the words of 54 CISA what constitutes a ‘trial’ that has been ‘finally disposed of’ in 54 CISA? Three ECJ judgments provide a clear and broad interpretation which can be summarised as follows: The 54 CISA *ne bis in idem* principle precludes further criminal proceedings in a different Member State following any decision (either convicting or acquitting the accused), which, in the jurisdiction in which it was handed down, has the effect of in principle precluding further proceedings in other MS. One ECJ judgment – *Miraglia* – outlines the limits of the scope of application of the principle.

- *Gözütok and Klaus Brügge* marked the first time that the Court responded to a preliminary reference in the context of the third pillar and the first opportunity for the Court to interpret the CISA. In this case the ECJ was asked to decide whether a financial settlement procedure that discontinued proceedings and barred further prosecution in one Member State, but which did not involve a court process or a judicial decision as such, could bar further prosecution in another Member State pursuant to 54 CISA. In other words did this “out of court” settlement procedure constitute a trial ‘finally disposed of’? The Court said yes, ruling that the principle ‘also applies to procedures whereby further prosecution is barred, such as the procedures at issue in the main actions, by



which the Public Prosecutor of a Member State discontinues criminal proceedings brought in that State, without the involvement of a court, once the accused has fulfilled certain obligations and, in particular, has paid a certain sum of money determined by the Public Prosecutor.’ (para.48.) The Court was clearly not concerned with the form of the procedures, and so the absence of a court and a judicial decision did not cast doubt on its interpretation.<sup>48</sup> Rather, it placed some emphasis on the *sanctioning character* of the settlement or decision (compliance with financial payment in this case, which, when met, could then be regarded as a penalty which had been enforced) and the *effects* of the procedure in the national legal system (that it constituted a prohibition on further criminal prosecution).

- *Miraglia*

In *Miraglia*, the Court was again asked to clarify the types of final decisions which would trigger a *ne bis in idem* effect. In this case criminal proceedings against Mr Miraglia were instituted concurrently before the Italian and Netherlands judicial authorities in connection with drug trafficking offences. Relevant authorities in both Italy and the Netherlands had cooperated in the investigation of the alleged criminal activity. The Netherlands prosecutors closed proceedings against Miraglia on the grounds that proceedings in respect of the same facts had been brought in Italy only then to refuse judicial cooperation to the Italian authorities on the basis of Article 54 CISA. In effect, the CISA principle had been used to prevent effective criminal proceedings being brought against Mr Miraglia anywhere. The Court held that a decision which discontinued national proceedings prior to any adjudication on the merits of the case, on the sole ground that proceedings had earlier been initiated in another Member State against the same defendant and for the same acts ‘cannot constitute a decision finally disposing of the case against that person’ within the meaning of Article 54 CISA<sup>49</sup>. As we will see in a moment,

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<sup>48</sup> The Court later explained at paragraph 40 its reasons for disregarding the judicial form of the decision. Essentially, if the principle could not be extended to those simplified procedures which are capable of barring further prosecution, then the principle would only be of benefit to those defendants who are guilty of more serious offences, for which the use of simplified procedures is usually precluded.

<sup>49</sup> In one sense this ruling confirms that not all decisions barring further prosecution according to the law of the Member State in which it is given should produce a *ne bis in idem* effect in other Member State.

the reasoning in this case was similar to the reasoning in *Gozutok* but the ECJ arrived at a different conclusion. It thereby confirmed that *not all* decisions barring further prosecution according to the law of the Member State in which it is given should produce a *ne bis in idem* effect in other Member State. An important consideration for the Court appears to have been that the judicial decision in question had been taken with no assessment whatsoever on the merits. However it would be wrong to read into this judgement a general rule to the effect that the Article 54 CISA principle only applies to decisions following an assessment on the merits of the case.<sup>50</sup> In fact, in its judgement in the later case of *Gasparini* the ECJ clearly rejected such a position. Rather the Court in *Miraglia* was saying that it would be wrong to rely upon 54 CISA itself and interpret its provisions in such a way that the alleged criminal conduct might never be considered.

- *van Straaten*

In *van Straaten*, the third ECJ decision that concerned the type of decisions covered by 54 CISA, the applicant had been acquitted for lack of evidence. It was suggested that such an acquittal did not constitute a decision finally disposed of and therefore should not give rise to *ne bis in idem* protection because the issue of factual guilt and innocence remained outstanding. The ECJ however, was able to conveniently sidestep the merits or demerits of this suggestion<sup>51</sup> by simply focusing on the actual *effect* of the decision in the jurisdiction in which it was handed down. If the effect was to render the applicant innocent and thereby end criminal proceedings in that Member State, that was sufficient to constitute ‘bis’ within the meaning of 54 CISA, and bar any further criminal proceedings in other Member States pursuant to the principle of mutual recognition.

- *Gasparini*

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<sup>50</sup> Although this was suggested by AG Sharpston in *Gasparini* at para 97.

<sup>51</sup> Which, as Loof points out, would require it deal with the difficult question of whether the absence of evidence of guilt necessarily implies the absence of guilt.

The fourth case, *Gasparini*, which was delivered on the same day as the judgment in *van Straaten*, concerned a judicial decision to abandon criminal proceedings on grounds that the prosecution for the offence was *time barred* under national law. With reference to its ‘settled caselaw’<sup>52</sup> it held that final acquittals based on the fact that prosecution is time-barred pursuant to national criminal law could be included with the scope of Article 54 CISA (para. 28).<sup>53</sup> This was quite a radical decision in that it confirmed that the principle of *ne bis in idem* could apply on a transnational basis to cases that have been finally closed in one Member State even where there has not been any consideration of the case on its merits – ie final disposal on mere procedural grounds is sufficient – and it did not matter that there is a wide diversity of national rules on time-bars to prosecution, where they exist at all in national criminal jurisdictions.

–‘idem’/‘same act’

- van Esbroeck

In *Van Esbroeck* the Court was faced with the question of whether the export of narcotic drugs from one Member State and import of the same drugs into another Member State are to be considered the ‘same act’ under Article 54 CISA.<sup>54</sup> Van Esbroeck, a Belgian national was sentenced to imprisonment by a Norwegian Court for *importing* drugs into Norway. After serving part of his sentence, he was conditionally released and escorted to Belgium, where he was prosecuted and sentenced to imprisonment for the *export* of the same drugs. For the ECJ, the only relevant criterion for the purposes of the application of the concept of ‘the same acts’ within the meaning of Article 54 of the CISA is the identity of material acts. Neither the legal classification of the acts or the protected legal interests were

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<sup>52</sup> *Gozutok and Brugge*, para.38 and *Van Straaten*, para.57

<sup>53</sup> That finding is not affected or undermined by Article 4(4) of the European Arrest Warrant Framework Decision 2002/584, which permits the executing judicial authority to refuse to execute a European Arrest warrant *inter alia* where the criminal prosecution of the requested person is time-barred according to the law of the executing Member State and acts fall within the jurisdiction of that state under its own criminal law (at para 31.)

<sup>54</sup> The Court also considered the scope *ratione temporis* of Article 54 CISA. On this point it held that “the *ne bis in idem* principle must be applied to criminal proceedings brought in a Contracting State for acts for which a person has already been convicted in another Contracting State even though the Convention was not yet in force in the latter State at the time at which that person was convicted, in so far as the Convention was in force in the Contracting States in question at the time of the assessment, by the court before which the second proceedings were brought ...” para 43

relevant in determining whether a person had been tried twice for the ‘same acts.’ As was pointed out by AG Ruiz-Jarabo Colomer in his opinion in *Van Esbroek*, it seems obvious that ‘a criterion based on the legal classification of the acts or on the protected legal interest might create as many barriers to freedom of movement within the Schengen territory as there are penal systems in the Contracting States.’<sup>54</sup> A legal approach would render any transnational application of the principle of *ne bis in idem* virtually impossible. The Court went on to give the national courts some useful guidance on what constitutes ‘same acts’ - The Court then concluded that the only relevant criterion is the identity of the material acts, understood in the sense of the existence of *a set of facts which are inextricably linked together ... in time, in space and by their subject-matter*. (reading paras 36 and 38 together.) Applying such an interpretation to the facts in hand, the Court held that the import and export of the same drugs could in principle be regarded as the same acts for the purpose of 54 CISA.

A similar factual definition of ‘idem’ was confirmed in *van Straaten* and has been recommended by Advocate General Sharpston in two pending cases.<sup>55</sup>

- van Straaten
- Kretzinger (AG Opinion)
- Kraaijenbrink (AG Opinion)

### ECJ Reasoning

The Court has rapidly developed some settled caselaw on the scope of 54 CISA. The reasoning in its first decision of *Gozutok* is applied consistently in its later caselaw with occasional further elucidation of this reasoning and occasional reference to other justifications. Because of the centrality of the *Gozutok* reasoning to all of the cases I will begin by discussing this case.

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<sup>55</sup> Case C-288/05 *Kretzinger* which concerns the concept of enforcement (Opinion of Advocate General Sharpston delivered on 5 December 2006) and Case C-367/05 *Kraaijenbrink* which concerns the taking into account of earlier penalties (Opinion of Advocate General Sharpston delivered on 5 December 2006.)

## Reasoning in Gozutok

The Court justified this broad interpretation of the 54 CISA by conceiving of it as imposing *mutual recognition of final decisions in criminal proceedings*. In so doing it takes its first opportunity to endorse the principle of mutual recognition, hitherto confirmed by Europe's political leaders, as the 'cornerstone' of judicial cooperation in criminal matters. The Court's argument is rather formalistic here. It begins by acknowledging that neither Title VI EU, nor the Schengen Agreement, nor CISA, require, for the application of Article 54 CISA, any 'harmonisation, or at least the approximation, of the criminal laws of the Member States relating to procedures whereby further prosecution is barred.' (para 32.) 'In those circumstances,' there is a '*necessary implication that the Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied.*' (para 33.) Accordingly the provisions of CISA are to be interpreted on the basis of an assumption that Member States have mutual trust and confidence in each other's legal systems.

Next the Court adopts its familiar interpretive technique of invoking the principle of *effet utile* of provisions (in this case Article 54 CISA) in order to support its findings. It suggests that its own wide interpretation of the *ne bis in idem* principle is the only interpretation which gives useful effect to the 'object and purpose of Article 54 CISA' rather than to procedural or purely formal matters, which, after all, vary as between Member States. Crucially then, what did the Court consider the 'object and purpose of Article 54 CISA' to be?

At paragraph 38 of its judgment the Court held that – '*Article 54 of the CISA, the objective of which is to ensure that no one is prosecuted on the same facts in several Member States on account of his having exercised his right to freedom of movement, cannot play a useful role in bringing about the full attainment of the objective unless it also applies to decision definitively discontinuing prosecutions in a Member State...*'

It reached this understanding of the CISA principle by considering it within the broader legal context of the EU's third pillar. Since the Treaty of Amsterdam and the integration of the Schengen *acquis* into the framework of the EU, Article 54 CISA

had become part of a new, broader integration objective of maintaining and developing the EU as an area of freedom, security and justice in which the free movement of persons is guaranteed and protected. – an objective outlined in Article 2 and 39 EU

The key components of the *Gozutok* reasoning can be summarised as

- the endorsement of MR as an implicit consequence of an application of 54 CISA, - with reference to the absence of a harmonisation precondition - this means diversity in MS criminal justice systems can be embraced by CISA principle because the application of the principle is not made conditional upon any requirement for harmonisation and the principle itself necessarily implies mutual trust and therefore mutual recognition of the criminal law in force in other Member States even when the outcome would be different if its own national law were applied. Securing the objectives of the principle therefore demands an approach that looks beyond procedural and purely formal matters that very often vary between Member States, to the substance and impact of the decision in question.
- object and purpose of 54 CISA being inextricably linked to achieving FM within an AFSJ
- and the need to endorse a broad interpretation of the scope of the 54 CISA principle as the only way of securing the useful effects of the object and purpose of Article 54.

This reasoning was followed in *van Straaten*. It confirmed that a failure to include a decision acquitting the accused for lack of evidence within the ambit of 54 CISA would have the effect of ‘jeopardising the exercise of the right to free movement’ (para. 58) However the court went further and added that it would also ‘*undermine the principles of legal certainty and the protection of legitimate expectations.*’ (para. 59)

In *Gasparini*, with reference to the ‘settled caselaw’<sup>56</sup> it reiterates the objective of Article 54 CISA - that it seeks to ensure that no-one is prosecuted for the same acts in several Member States on account of the fact that he or she exercises free movement rights. It explains in more detail that “*it ensures that persons who, when prosecuted, have their cases finally disposed of are left undisturbed. They must be able to move freely without having fear of a fresh prosecution for the same facts in another Contracting State.*” (para. 27) The Court also points to provisions of the European Arrest Warrant Framework decision (2002/584) to support its finding that acquittals on time bar grounds fall within the scope of 54 CISA. In particular, pursuant to Article 4(4) the *ne bis in idem* principle can act as a ground for non-execution of a European arrest, including where the criminal prosecution of requested person is time barred according to the law of the executing Member State and the acts fall within the jurisdiction of that State under its own criminal law. (Para. 31.)

The true significance of the judgement in *Gasparini* is revealed only when read in conjunction with Advocate General Sharpston’s well-argued Opinion of 15 June 2006. For AG Sharpston, answering the question of whether the 54 CISA principle included decisions acquitting the accused because their prosecution for the offence is time barred “requires the Court to define one of the fundamental aspects of the *ne bis in idem* in Article 54 of the CISA..., namely whether the principle can apply only where the first court reached its decision after an assessment of the merits.” (Para. 3 of the Opinion). She usefully presented the ECJ with a “stark choice” between a “substance-based approach” which would entail some examination on the merits within the context of the first prosecution and a “procedure-based approach” which necessitated no such examination of the merits of the case and which would enable any bar to further proceedings in the first jurisdiction to trigger the application of *ne bis in idem* and so bar proceedings in all others. The Advocate General came down in favour of the former, while the Court chose the latter. In so doing it actively endorsed a specific choice of direction for the EU in developing an AFSJ through criminal law.

In considering the concept of ‘**idem**’ the Court has applied its settled *Gozutok* approach in addition to finding support in the wording of the Article 54 CISA in order

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<sup>56</sup> *Gozutok* and *Brugge*, para.38 and *Van Straaten*, para.57

to justify a broad factual approach to the concept of ‘idem’. In endorsing the Gozutok “pro-free movement” objective of Article 54 CISA, it elaborated on the link between Article 54 principle and FM by citing the Opinion of Advocate General Ruiz-Jarabo Colomer:

‘That right to free movement is effectively guaranteed only if the perpetrator of an act knows that, once he has been found guilty and served his sentence, or, where applicable, been acquitted by a final judgment in a Member State, he may travel within the Schengen territory without fear of prosecution in another Member State on the basis that the legal system of that Member State treats the act concerned as a separate offence.’ (para 34.)

The Court went on to justify a factual approach to ‘idem’ by reference to the wording of Article 54 CISA as compared to the wording used in other international treaties which enshrine the *ne bis in idem* principle - which seem to endorse a legal classification approach. For instance, the Court notes that reference in the ECHR principle to “offence” implies that the criterion of the legal classification of the acts is relevant as a prerequisite for the applicability of the *ne bis in idem*.<sup>57</sup>

A similar factual definition of ‘idem’ was confirmed in *van Straaten* and has been recommended by Advocate General Sharpston in two pending cases.<sup>58</sup>

The reasoning of the Court might be criticised on three grounds

- absence of reference to the principle as a fundamental individual right to due process. In arriving at its broad interpretation of ‘bis’ and ‘idem’ the ECJ did not place emphasis upon the need to positively protect individuals against the *ius puniendi* of the state *per se*. Rather, it

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<sup>57</sup> However note that reference to “offence” in the definition has not prevented the European Court of Human Rights from adopting an *idem factum* approach. See *Franz Fischer v Austria*, confirmed in *W.F v Austria*. Unlike the ECJ however, its interpretation of *idem* is not consistent and indeed by its own admission appears contradictory. See J.A.E Vervaele *Utrecht Law Review* 2005 at 102. Reference to “offence” in the principle as enshrined in the EU Charter of Fundamental Rights is rather unfortunate in this regard.

<sup>58</sup> Case C-288/05 *Kretzinger* which concerns the concept of enforcement (Opinion of Advocate General Sharpston delivered on 5 December 2006) and Case C-367/05 *Kraaijenbrink* which concerns the taking into account of earlier penalties (Opinion of Advocate General Sharpston delivered on 5 December 2006.)



- emphasised, in a rather more functional way, the need to protect and promote the individual right to freedom of movement within the AFSJ
- The automatic assumption approach to mutual recognition and mutual trust has been revealed in the literature and in practice.<sup>59</sup> Indeed, the Tampere and Hague programmes accept that MR must go hand in hand with other types of approach – ie harmonisation measures, strengthened practical cooperation and mutual learning. And yet the court points to the absence of any *explicit* requirement to harmonise to support the wholesale *implicit* endorsement of the principle of MR
  - link between 54 CISA and securing FM – might be criticised on practical and conceptual grounds -

The Court's case law appears to endorse a vision of the AFSJ which prioritises freedom of movement above all else. However a wider conception of the AFSJ better explains the Court's interpretation of the principle than simply "freedom of movement." In fact a closer look at the caselaw reveals that the ECJ does consider other factors besides 'free movement' in deciding upon the appropriate scope of the 54 CISA principle. For instance in *Van Straaten* the ECJ justified a broad interpretation of 'finally disposed of' - to include a decision acquitting the accused for lack of evidence – because failure to do so would undermine the free movement objective *and the principles of legal certainty and legitimate expectations*.<sup>60</sup> Moreover in *Miraglia* the ECJ appeared to weigh the free movement objective of the AFSJ against other Treaty expressed dimensions of the AFSJ, the 'prevention and

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<sup>59</sup> A blanket assumption of mutual trust is arguably problematic, at least in practice. For a critique see A.Weyembergh, 'Approximation of Criminal Laws, the Constitutional Treaty and the Hague Programme' (2005) CMLRev 42 1567-1597 at 1575; S. Peers, 'Mutual Recognition and Criminal Law in the European Union: Has the Council Got it Wrong?' (2004) CMLRev 41 5-36. Rather, mutual trust must be built and secured through positive measures and cannot be simply implied or assumed. In other words the conditions for the smooth and effective application of mutual recognition must be created. The AFSJ strategy, as developed by the Council and the Commission now appears to acknowledge the need to 'build' trust through a variety of different approaches, including the adoption of harmonising legislation in respect of criminal procedures and practical, non-legislative measures such as judicial training and personnel exchange schemes. See Communication on the mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between Member States COM(2005) 195. For an analysis of the role of mutual trust and the means of achieving it in the context of the third pillar see G.de Kerchove and A.Weyembergh (eds) *La Confiance Mutuelle au sein de l'Espace pénal Européen. Mutual Trust in the European Criminal Area* (Éditions de L'Université de Bruxelles, 2005)

<sup>60</sup> See Case C-150/05 *Van Straaten*, judgement of 28 September 2006 (nyr) at para. 59.

combating of crime’ and the ‘attainment of a high level of safety’<sup>61</sup> in coming to its decision. Here the Court appeared to acknowledge that the promotion the free movement of persons sits alongside an equally important objective of ensuring that free movement rights are exercised with an AFSJ where there is a high level safety and in which crime is effectively controlled.<sup>62</sup> In *Miraglia* the Court appeared to give priority to the latter objective over the former in order to prevent Article 54 CISA being relied upon to prevent any effective consideration of the alleged criminal conduct. It can be seen therefore that the Court’s reasoning in *Miraglia* was similar to that in *Gozutok*, except that by emphasising the multiple components of the AFSJ (securing the free movement of persons in addition to the prevention and combating of crime) it came to the opposite conclusion. In summarising the judgment in her Opinion in the later case of *Gasparini* AG Sharpston says that the “Court gave priority to the need to ensure the penalisation of the crime, and placed less emphasis on promoting the free movement of persons.” (at 39) Wasmeier and Thwaites draw out the implications in terms of the principle of mutual recognition by saying that the judgement makes clear that mutual recognition approach is not an aim in itself, but that it may be limited by the objectives of Article 2 and 29 EU: i.e. ne bis in idem is not necessarily to be applied in all situations where a further prosecution is barred according to the relevant national law, as this could run contrary to the objective of providing citizens with a ‘high level of safety.’<sup>63</sup>

In any case, relying solely upon the protection of the freedom of movement to justify its interpretation of Article 54 CISA is problematic. Loof argues that there is no necessary *material* link between the risk of multiple prosecutions and the freedom of movement, citing the example of the ‘dual sovereignty’ doctrine of the US Supreme Court and the possibility of a trial can going ahead without the accused even being present, or even knowing about it, and this for reasons unrelated to the accused’s willingness to exercise her or his freedom of movement. He further argues that from a *conceptual* point of view there is a problem or at least confusion in determining the scope of ne bis in idem by reference to FM - the question of whether an individual

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<sup>61</sup> Enshrined in Article 2 EU. See *Miraglia* at para. 34

<sup>62</sup> Article 2 (1) EU objective which is “to maintain and develop the Union as an AFSJ in which the free movement of persons is assured *in conjunction with* appropriate measures with respect to ... prevention and combating of crime.”

<sup>63</sup> At 571

should be tried or not is always logically prior to the question of whether she or he should enjoy freedom of movement. Within a particular jurisdiction, an individual only enjoys freedom of movement as long as she or he cannot legitimately be detained. The same must pertain *mutatis mutandis* within the EU area of free movement. It follows that the legitimacy of criminal proceedings against a particular individual cannot be determined with reference to freedom of movement. Duplicious criminal proceedings in different jurisdictions within the AFSJ are therefore intolerable but *not* because they potentially affect an individual's willingness to exercise her or his freedom of movement, but because they risk undermining *structural integrity* of a single area of freedom security and justice.

To sum up, to date the ECJ has interpreted the 54 CISA *ne bis in idem* principle with clarity and consistency. Although some important issues remain to be clarified<sup>64</sup> there is already settled caselaw on the definitions of key concepts such as 'bis' and 'idem'. This degree of certainty is most welcome and, interestingly, appears to be in stark contrast to the ECHR caselaw on the interpretation of the Article 4, Protocol 7 principle which reveals a somewhat chaotic approach to the concept of 'idem' and which has yet to reveal anything definitive of the concept of 'finally acquitted or 'convicted'. The diverging interpretations in applying the principle of *ne bis in idem* both within the EU legal order (the ECJ's approach in the field of competition law differs to its approach in respect of 54 CISA) and beyond (a different approach again is adopted by the ECHR for example) are to be expected. The *ne bis in idem* principle takes on a different meaning and function according to the legal framework within which it applies.<sup>65</sup> So, the interpretation of the 54 CISA principle that one finds in the ECJ's caselaw to date represents a unique understanding of that principle – one which is influenced and informed by a preexisting legal construct (EU third pillar) which comes with its own distinctive objective (the creation of an AFSJ) and underpinning principles (mutual recognition).

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<sup>64</sup> scope of the *enforcement principle*, the extent to which *administrative punitive fines might fall within the scope of the principle and the limits of the exceptions* to the principle contained in CISA - Undoubtedly, a variety of intricate legal problems can stem from different interpretations of the *ne bis in idem* principle by different jurisdictions. For example, problems may arise from the practice unique to civil law jurisdictions which allows for an appeal by the prosecutor against acquittal as part of 'one trial.' The precise meaning and scope of the principle may therefore only emerge in time when tested on a case-by-case basis.

<sup>65</sup> Drawing upon social contract theory Loof demonstrates how the *ne bis in idem* principles contained in the ECHR and 54 CISA are in fact "completely different animals."

The impact of the ECJ 54 CISA caselaw, in terms of maximising the level of protection owed to the individual suspect by this fundamental principle, is also welcome. The broad scope of 'bis' - to include any procedure finally disposing of a case in the national jurisdiction, whether or not there has been a consideration of the dispute on the merits - and the factual approach to 'idem' drawn by the Court will in practice enhance the level of protection of individual human rights in transnational justice.

### *Interpreting a Framework Decision: the Pupino case*

In the recent *Pupino* case, the European Court of Justice was called upon for the first time to interpret a framework decision adopted pursuant to the EU's third pillar entitled Police and Judicial Cooperation in Criminal Matters. The question referred from the (lower) Italian Court concerned the interpretation of Framework Decision 2001/220/JHA on the Standing of victims in criminal proceedings. The most remarkable part of the Court's judgement however did not relate to the particular interpretation of the Framework Decision in question, but rather to its consideration of the admissibility issues. The impact of the Court's ruling in this regard is of constitutional significance. It held that the principle of interpretation in conformity with Community law as established by the Court in a series of cases in the 1980s, beginning with *Von Colson*, was applicable to framework decisions adopted under Article 34 EU. It did this by relying upon several arguments

First, the Court invokes a purposive interpretation of Article 34(2)(b) EU. It suggests that the binding character of framework decisions confers on national authorities, and particularly national courts, an obligation to interpret national law in conformity with them. It bases this finding on the similarity in wording between Articles 34(2)(b) EU

and 249(3) EC but it does not attempt to explain why it is able to apply an identical interpretation to provisions that occur within distinct legal orders.

Second, invoking similar reasoning as it had done decades earlier in its *Von Colson*<sup>66</sup> ruling, the Court justified the extension of the principle of consistent interpretation (at least in part) by relying upon the Article 10 EC principle of loyal cooperation. The Court's reliance upon the principle of loyal cooperation as a basis for the principle of harmonious interpretation is particularly notable because it was not hitherto clear that such a duty existed in the context of the EU. Previously, the principle, contained in Article 10 EC had been regarded as *Community* principle. In the absence of an express Treaty provision to that effect the Court had to infer a duty of loyal cooperation from the incredibly broad and general provisions of both Article 1 and Title VI of the EU Treaty. Despite the absence of explicit textual support for the existence of this latter principle in the context of the third pillar, the Court, adopting a purposive interpretation of the EU Treaty (Article 1 EU and Title VI EU) held that 'It would be difficult for the Union to carry out its tasks effectively if the principle of loyal cooperation...were not also binding in the area of police and judicial cooperation in criminal matters'<sup>67</sup> It follows from this judgement that the principle of loyal cooperation contained in Article 10 EC "is of general application and is especially binding in the area of JHA governed by Title VI of the EU Treaty, which is moreover entirely based on cooperation between the Member States and the institutions."<sup>68</sup> It remains to be seen what precise duties will be deduced from this

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<sup>66</sup> Case 14/83 *Von Colson & Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891

<sup>67</sup> *Pupino* at Para 42.

<sup>68</sup> Case T-228/02 *Organisation des Modjahedines du peuple d'Iran v Council*, judgement of 12 December 2006, paragraph 123

principle by the ECJ in the context of the third pillar in the future.<sup>69</sup> Of course, one noteworthy difference immediately apparent from the first and third pillars in respect of this principle relates to enforcement. In the first pillar Community context, were a Member State to breach its Article 10 EC duties it would be possible for the Commission to bring an action against it under Article 226 EC. However, this mechanism to bring recalcitrant Member States before the ECJ is not repeated in the third pillar. no similar provision for direct actions against Member States making legal enforcement of the principle of loyal cooperation impossible.<sup>70</sup>

Third, the Court at Paragraph 36 suggests that support for the contention that framework decisions should have similar (indirect) legal effects to EC directives can be derived from an implied intention on the part of the authors of the EU Treaty. It held that it is ‘perfectly comprehensible’ that the authors of the EU ‘should have considered it *useful* to make provision, in the context of Title VI of the Treaty, for recourse to legal instruments with effects similar to those provided for by the EC Treaty, in order to contribute effectively to the pursuit of the Union’s objectives.’ Moreover this implication was possible ‘irrespective of the degree of integration envisaged by the Treaty of Amsterdam in the process of creating an ever closer union among the peoples of Europe within the meaning of Article 1(2) EU.’ The Court here seems to be suggesting that even prior to the developments made to the EU’s third pillar by the Treaty of Amsterdam, the authors of the EU Treaty, back in the early

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<sup>69</sup> It will be interesting to see the extent to which the Court pays deference to the power balance as expressed in the third pillar (whereby power lies mostly with national executives and horizontal practical and operational cooperation between national police and judicial agencies is a key objective.) Respect for the existing power balance would most likely see the development of duties falling upon the EU institutions and agencies, whereas duties of cooperation upon the Member State authorities would perhaps support a consolidation of power towards the EU. In *Pupino* we see the ECJ doing the latter.

<sup>70</sup>

1990s, would have supported the Courts finding, today, that EU framework decisions can have indirect effects similar to those of EC directives. In other words, although they did not provide so explicitly, the Treaty authors would have intended that framework decisions give rise to indirect effects. This assumption by the Court does not have any clear textual support either in the Treaty or in the form of *travaux préparatoires*.<sup>71</sup> Rather it is based upon its own interpretation of what is required to achieve the effective pursuit of the Union's objectives. The flimsy nature of the Court's legal reasoning here is compounded by its failure to acknowledge the already existing Treaty-based distinction between the legal effects of directives and framework decisions – that is, according to Article 34(2)(b) EU, framework decisions cannot create direct effect.

Finally, the Court also argued that its own jurisdiction to give preliminary rulings under Article 35 EU would be deprived of 'most of its useful effect' if individuals were not entitled to invoke framework decisions in order to obtain a conforming interpretation of national law before the courts of the Member States. The Court suggested that the importance of this jurisdiction is exemplified by the possibility for any Member State to submit observations to the Court even if they have not accepted the jurisdiction of the Court pursuant to Article 35(2) EU.<sup>72</sup> The use of this policy based *effet utile* argument is perhaps not surprising; it has often been used by the Court to justify the development of remedies in Community law.<sup>73</sup> In the specific context of the third pillar, arguments relating to the *effet utile* of provisions might be

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<sup>71</sup> According to the method of historical interpretation of the EU Treaty, the Court would seek to determine what the Treaty authors originally intended, by relying upon some supporting preparatory text or texts.

<sup>72</sup> The Court does not however acknowledge that the importance of the procedure may stem from the fact that judicial remedies in respect of Title VI are curtailed more generally.

<sup>73</sup> For example it was relied upon to extend direct effect to directives (*Van Duyn*), develop the Community principle of harmonious interpretation (*Von Colson*) and introduce the concept of state liability for breach of Community law (*Francovich*).

regarded as more persuasive than they are in the Community context. This is because the third pillar does not possess a structured mechanism (similar to Articles 226-228 EC) to deal with recalcitrant Member States. In other words the full effect of third pillar measures cannot be guaranteed through the application of an infringement mechanism and therefore the invocation of a canon of construction that gives a legal provision its fullest effect appears more plausible. It is conceivable that the jurisdiction of the Court to give preliminary rulings pursuant to Article 35 would be undermined (ie could not achieve its fullest effect) if individuals were not able to rely upon framework decisions indirectly (ie through national law.) There would be no obvious need or point in providing an interpretation of a measure that could not create some form of binding legal effect. Interestingly, the Court does not talk about a total deprivation of useful effect but rather a deprivation of ‘most’ of the useful effect of its preliminary reference jurisdiction. This undoubtedly reflects the fact that its jurisdiction to give preliminary rulings extends beyond the scope of offering interpretations of framework decisions. Whereas, the duty of harmonious interpretation as developed by the Court in *Pupino* applies to framework decisions, national courts can still refer a question to the ECJ, pursuant to Article 35 EU, about the interpretation of *decision* or a *convention*, or any *implementing measures*. Moreover, the question referred from the national court may concern the *validity* rather than the *interpretation* of the measure. Therefore, the preliminary reference procedure under Article 35 EU has a much wider scope than the interpretation of *framework decisions* and so the absence of a duty of harmonious interpretation in respect of framework decisions could not deprive it of its full *effet utile*.



It would appear from this brief analysis of the Court's reasoning that the Court has invoked rather inventive means to justify a ruling of constitutional significance. With rather limited textual support in the EU Treaty the Court has relied heavily upon explicit and implied connections and similarities between the EC and EU treaties. Indeed it might even be said that the Court interpreted the EU Treaty in the light of the *acquis communautaire*.

Having found that the duty of harmonious interpretation applies in respect of framework decisions, the Court went on to discuss the inherent limits of that duty and the possibility that those limits may prevent a solution being found to the dispute in the main proceedings. It reiterated that the obligation is limited by general principles of law, particularly those of legal certainty and non-retroactivity. These prevent, for instance, the obligation from leading to the criminal liability of persons who contravene the provisions of a framework decision from being determined or aggravated on the basis of such a decision alone, independently of an implementing law.<sup>74</sup> However, the Court made clear that the reference before it does not concern the extent of the criminal liability of the person concerned (as raised by the French Government in its observations) but rather the conduct of the criminal proceedings and the means of taking evidence. The Court clarified further that the duty ceases to apply in circumstances where it would lead to an interpretation of national law *contra legem*, hence the reference to apply the duty 'so far as possible.' However, the duty requires that, where necessary, the national court consider 'the whole of national law'

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<sup>74</sup> See for example, in relation to Community directives, Joined Cases C-74/95 and C-129/95 X [1996] ECR I-6609, paragraph 24, and Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* [2005] ECR I-0000, paragraph 74. Judgment of 3 May 2005. In respect of the impact of the principles of direct and indirect effect in national criminal proceedings, the Court has previously held that these principles cannot be applied to worsen the position of a criminal suspect as regards substantive criminal law, although they can be applied to alter a suspect's position (whether positively or negatively) as regards criminal procedure.

in order to assess how far it can be applied in such a way as not to produce a result contrary to that envisaged by the framework decision.<sup>75</sup> This more detailed explanation of the extent of the duty upon the national court is reflected in the Courts final ruling, which reads, ‘the national court is required to take into consideration all the rules of national law and interpret them, so far as possible, in the light of the wording and purpose of the Framework Decision.’ The Court’s ruling does however leave some questions unanswered as regards the precise scope of the duty of consistent interpretation. This is perhaps not so surprising in the circumstances. The Court appeared content to refer to the duty in so far as it had previously been developed in the Community context. Moreover, pending before the Court at the time was the case of *Mangold*,<sup>76</sup> in which the Court was specifically required to address the temporal scope of the duty.

This important ruling sheds light on the legal consequences of framework decisions and reveals more fundamentally, a new legal conception of third pillar cooperation. The impact of the ruling in terms of judicial remedies for individuals is particularly significant. Finally, the judgment is made even more remarkable by the fact that it was handed down in the face of opposing submission from seven of the then fifteen EU governments. The Court was boldly and not uncontroversially, asserting its independent authority over the third pillar.<sup>77</sup>

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<sup>75</sup> This wording is taken from a recent case on indirect effect in the Community context; Joined Cases C-397/01 – C-403/01 *Pfeiffer*, judgment of 5 October 2004 (nyr) at paragraph 115.

<sup>76</sup> Case C-144/04 *Mangold v Rüdiger Helm*. Judgment delivered on 22 November 2005, nyr.

<sup>77</sup> The Court’s ruling provoked reaction and criticism in the national constitutional courts. Judgment of the Bundesverfassungsgericht (German Federal Constitutional Court) of 18 July 2005 (2 BvR 2236/04) German Constitutional Court, in which it declared that the national legislation implementing the European Arrest Warrant Framework Decision was incompatible with the German Constitution. In particular the dissenting opinions of Justice Lübke-Wolff and Justice Gerhardt. Interestingly, the UK House of Lords has confirmed the application of the principle developed in *Pupino* to UK judges. In *Dabas (Appellant) v. High Court of Justice, Madrid (Respondent)* (Criminal Appeal from Her

*Defining the limits of competence: Commission v Council*

Just as *Pupino* raised issues about the legal relationship between the first and third pillars – in the sense of borrowing and applying legal principles – so too does the case of *Commission v Council*.<sup>78</sup> This time, however, the issue is not about *sharing* legal principles but rather of identifying where the *divisions* of legal competence lie. The pillared structure of the Union, as well as resulting in various complex institutional configurations, has also given rise to jurisdictional conflicts owing to divergent positions about the correct legal base for an act. The ECJ was recently called upon to resolve a so-called ‘pillar battle’ in a case that raised the long-disputed issue of the extent of the powers of the European Community in matters of criminal law.<sup>79</sup> In this judgment of 13 September 2005 the Grand Chamber annulled Council Framework Decision 2003/80 on the protection of the environment through criminal law<sup>80</sup> which laid down a number of environmental offences in respect of which the Member States were required to prescribe criminal penalties. It did so on the ground that the appropriate legal basis for such measures lay in the Community legal order, and in

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Majesty's High Court of Justice) [2007] UKHL 6, 28 February 2007, a case concerning the resistance of surrender of Mr Dabas pursuant to the European Arrest Warrant Framework Decision, Lord Bingham of Cornhill reasoned that in determining how to implement the framework decision “a national authority may not seek to frustrate or impede achievement of the purpose of the decision, for that would impede the general duty of cooperation binding on member states under article 10 of the EC Treaty. Thus while a national court may not interpret a national law *contra legem*, 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 and thus comply with article 34(2)(b) EU” (*Criminal proceedings against Pupino* (Case C - 105/03) [2006] QB 83, paras 43, 47).” (para. 5)

<sup>78</sup> Case C-176/03 (13 September 2005). For analysis see Corstens and Wasmeier and Thwaites

<sup>79</sup> It should be noted that other cross-pillar litigation (between the first and third pillars) has arisen prompted by challenges to EC measures: Joined Cases C-317 and 318/04, *Parliament v Council* and *Parliament v Commission*. Judgment of 30 May 2006; Case T- 306/01 *Yusuf* and T-315/01 *Kadi*, judgments of 21 September 2005 in which Court of first instance ruled that EC objectives do not extend to combating terrorism and Article 308 EC cannot be used to permit the EC to adopt measures falling within the scope of the third pillar. These judgments are on appeal. See Peers at 73.

<sup>80</sup> OJ L 29/55

particular in Article 175 EC. The Council had previously refused to adopt a Commission proposal for a Directive on the protection of the environment through criminal law based on Article 175 EC on the ground that the Community had no power in relation to criminal sanctions.

The Court first noted that the protection of the environment constitutes one of the essential objectives of the Community and that environmental protection requirements must be integrated into the definition and implementation of the Community's policies and activities. The Court looked at both the aim and content of the Framework Decision and held that the main purpose of the Framework Decision was the protection of the environment and that as such, the appropriate legal basis for such measures is Article 175 EC. In line with Article 47 EU, which provides that nothing in the EU Treaty is to affect the EC Treaty, the Court held that the first six articles of the Framework Decision encroached on the powers which Article 175 EC confers on the Community and therefore the entire Framework Decision should be annulled (it being indivisible).

The Court ruled that, although as a general rule, neither criminal law nor the rules on criminal procedure fall within the Community's competence, that does not prevent the Community legislature from taking measures which relate to the criminal law of the Member States, when it considers that such measures are *necessary* to ensure that the rules which it lays down on environmental protection are *fully effective* and when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an *essential measure* for combating serious environmental offences.

This judgment is the first time the Court has expressly stated that the Community has the power to require Member States to establish criminal penalties for a breach of EC law.<sup>81</sup> This marks a shift from a more restrained obligation upon Member States to enforce Community rules by criminal law pursuant to the principle of equivalence to an express Community law obligation to criminalise certain activity. It is also a very clear example of how its role in settling inter-organisational disputes concerning the legal basis of legislation can have a direct influence on the legislative process – not least because the institutional dynamic in the first pillar is currently very different from that of the third pillar.

The judgement might be criticised from several perspectives;

First, the ruling might be criticised for ignoring the intentions of the Member States as expressed in the Treaty. In a recent report on the criminal competence of the EC the House of Lords observed ‘that the Court did not seem to pay any great regard to the history and the scheme set out in the Treaties.’ Although the EC Treaty contains no express power for the Community to adopt criminal law measures and in fact in certain provisions, precisely excludes such competence (Article 135 EC and Article 280(4) EC) the Court simply rules that it is ‘not impossible to infer from this’ that ‘...any harmonisation of criminal law...must be ruled out.’ The House of Lords report notes that the Court makes no reference and apparently draws no inference from the separate provisions and procedures on criminal matters laid out in the third pillar of the EU. It also suggests that the provisions in the Constitutional Treaty support a

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<sup>81</sup> Prior to that the Court had ruled that, in accordance with the doctrine of equivalence, which holds that the protection of rights under Community law must be ensured by Member States in a way that is no less favourable than the protection of similar rights under national law, Member States must impose sanctions for breach that are ‘effective, persuasive and proportionate’, which of course, might include sanctions of a criminal nature; Case C-68/88 *Commission v Greece (Greek Maize)* [1989] ECR 2965.

working assumption that the present Treaties contain only a limited power to harmonise criminal laws and procedure and that the power is contained in Title VI EU.<sup>82</sup> The degree of political consensus against such a ruling is also expressed clearly by the eleven national Governments that intervened in the case. Following the judgement, the Council and individual national Governments have expressed their preference for a limited interpretation of the Court's ruling and their alarm at the Commission's incredibly broad construction of the ruling.<sup>83</sup>

Second, the judgement has left created huge uncertainty as to the precise scope of powers of the Community in respect of criminal law. The judgement itself fails to offer a clear delineation of competence of the EC's powers, prompting hugely varying interpretations from the 'supranational'<sup>84</sup> and 'intergovernmental'<sup>85</sup> camps. The key questions raised but not resolved by the judgement are as follows; is the Court's reasoning limited to matters concerning the protection of the environment or might the ruling apply to other areas of Community action; does the Community competence extend to defining specific offences and penalties for such offences or does it merely enable the Community demand that criminal sanctions of some sort be imposed over certain types of activity? Is it to be assumed that Community competences does not extend to the related questions of jurisdiction, prosecution and

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<sup>82</sup> See Article III-271(2) which concerns the power to extend the harmonization of substantive criminal measures.

<sup>83</sup> Commission Communication on the implications of the Court's judgment of 13 September 2005 (Case C-176/03 *Commission v Council*) Brussels, 24.11.2005. COM(2005) 583 final/2. Also see Commission Proposal on criminal measures aimed at ensuring the enforcement of intellectual property rights Doc 88/66/06 which was adopted on the strength of its interpretation of the Courts judgement in C-176/03.

<sup>84</sup> The Commission and the European Parliament

<sup>85</sup> The Council and the individual Member State Governments. For a summary of the views of the UK Government and for a full analysis of the issues raised by this judgment generally see the House of Lords EU Committee Report, 'The Criminal Law Competence of the European Community' 42<sup>nd</sup> Report of Session 2005-06, HL Paper 227, published 28 July 2006.

extradition, in which case any relevant Community legislation would require ‘complementary’ third pillar legislation dealing with these issues?<sup>86</sup> Answers to some or all of these questions may be provided by the ECJ in Case C-440/05 *Commission v Council* in which the Commission seeks an annulment of the framework decision on ship-source pollution. In order to provide the required degree of clarity it seems likely that the Court will have to devise reliable tests to define such terms as ‘an essential measure’, ‘effectiveness’ and ‘measures which relate to the criminal law of the Member States’ all of which appear in the key paragraph of its judgement (at 48). In the mean time it has been suggested that until these issues are clarified by the Court, that there will effectively be a period of political and legislative stagnation.<sup>87</sup>

*Challenging the European Arrest Warrant Framework Decision – Advocaten voor de Wereld* Case C-303/05

On 3 May 2007, the ECJ delivered its judgement in the much anticipated case of *Advocaten voor de Wereld VZW v Leden van de Ministerraad*.<sup>88</sup> In this case, referred from the Belgian Constitutional Court, the Court had been asked to rule upon the compatibility of the EAW Framework Decision with the EU Treaty on both procedural and substantive grounds. The first of these questions related to the appropriateness of the legal basis of the Framework Decision (Article 34(2)(b) EU). In particular the referring court was unsure that a framework decision was the appropriate instrument bearing in mind the fact that framework decisions were to be adopted only for the purpose of the approximation of the laws and regulations of the

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<sup>86</sup> For the drawbacks of this complementary approach see S.White, ‘Harmonisation of criminal law under the first pillar’ (2006) 31 ELREv 81-92. It might be that the Commission Green Paper on criminal jurisdiction will eventually lead to an overarching legal instrument on matters of jurisdiction and prosecution, thereby extinguishing the need for separate legal instruments.

<sup>87</sup> See the comments made by the Irish, Danish and UK government officials in the House of Lords report op.cit, pp28-29

<sup>88</sup> Case C-303/05 (nyr.)

Member States. Second, the Belgian court asked whether the abolition of the double criminality verification for certain offences was compatible with Article 6(2)EU, and more specifically with the principles of legality in criminal proceedings and the principle of equality and non-discrimination. In accordance with the Opinion of Advocate General Ruiz-Jarabo Colomer, delivered on 12 September 2006, the ECJ held that the central legislative instrument of the EU's mutual recognition approach to achieving judicial cooperation in criminal matters – The EAW Framework Decision - is indeed legally valid.

In response to the argument that a Convention would have been a more appropriate instrument, the Court confirmed that the Council had discretion to decide upon the appropriate legal instrument, where, as in the present case, the conditions governing the adoption of such a measure are satisfied. In reaching this conclusion the ECJ confirmed that the

With regard to the argument concerning compatibility with the principle of legality the Court makes clear that Article 2 of the Framework Decision (which abolishes the requirement of double criminality for 32 offences) does not itself harmonise the criminal offences in question (in respect of their constituent elements or the penalties to be attached). Rather, their exact nature continues to be determined by the Member States and it is they who bare the responsibility of respecting the principle of legality and fundamental legal principles in the application of the Framework decision. The dispensation of verification double criminality does not change the role or obligations of the MS issuing the EAW in that respect.



In response to the argument that the abolition of double criminality requirement for certain offences and not gave rise to unjustified difference in treatment as between individuals and therefore amounted to an infringement of the principle of equality and non-discrimination, the ECJ held that even if one were to assume that the situation of persons accused of listed offences was comparable to the situation of persons accused of non-listed offence, that distinction is objectively justified. The Court held that ‘on the basis of the principle of mutual recognition and in the light of the high degree of trust and solidarity between Member States, that, whether by reason of their inherent nature or by reason of the punishment incurred of a maximum of at least three years, the categories of offences in question feature among those the seriousness of which in terms of adversely affecting public order and public safety justifies dispensing with the verification of double criminality.’ (Para. 57)

Furthermore the court addresses the argument that the absence of any precise definition of what facts constitute those 32 offences gives rise to the risk of disparate implementation of the FD across the MS and hence increases the likelihood of different treatment. In rejecting that argument the ECJ pointed out that the objective of the FD was not to harmonise the substantive criminal law of the MS and that nothing in Title VI EU makes the application of the EAW conditional on harmonisation of the criminal laws of the MS within the area of the offences in question (at para.59). Interestingly, this argument is applied by way of analogy with a similar argument made in para. 32 of *Gozutok* concerning the interpretation of the Article 54 CISA *ne bis in idem* principle. There, it will be recalled, the Court argued that nothing in the legal provisions makes the application of 54 CISA principle conditional upon the harmonisation of the criminal laws of the Member States and

therefore mutual trust and recognition of decisions must be assumed in the application of the principle. The argument in *Advocaten voor de Wereld VZW* is used slightly differently – to deny an accusation of discrimination. Here, the ECJ conveniently ignores the fact that the EU institutions have deemed it necessary and appropriate to harmonise the definitions of and penalties for certain of the criminal offences listed in Article 2(2) FD – such as terrorism, human trafficking, money laundering – Arguably this is an implicit acknowledgement that a common definition of (some) offences *would* facilitate more effective judicial cooperation between national authorities and hence more effective prosecution of crime within the AFSJ

It is worth returning briefly to the AG’s Opinion in this case because Advocate General Ruiz-Jarabo Colomer provided some interesting comments on the role of the ECJ in the context of the third pillar. He urges the Court to engage more fully in undertaking its role in respect of the third pillar – acknowledging the wider context and implications of the third pillar legal framework. At paragraph 8, having mentioned the judicial clashes in numerous legal systems concerning the compatibility of the transposition of the Framework Decision with constitutionally enshrined individual rights, he says “There is, therefore, a far-reaching debate concerning the risk of incompatibility between the constitutions of the Member States and European Union law, the Court of Justice must participate in that debate by embracing the prominent role assigned to it, with a view to situating the interpretation of the values and principles which form the foundation of the Community legal system within parameters comparable to the ones which prevail in national systems.” Later in the Opinion at para 78 the AG argues that the “...Court must break its silence

and recognize the authority of the Charter of Fundamental Rights as an interpretative tool at the forefront of the protection of the fundamental rights which are part of the heritage of the Member States” and makes the point that the protection of fundamental rights is equally indispensable in the context of the third pillar as it is in the Community pillar.

### **Critique and future challenges**

#### *A legitimate role for the ECJ in the Third Pillar*

The ECJ has at times exercised considerable activism and inventiveness and at times, considerable restraint in the context of the Community legal order. Typically, periods of judicial activism emerge when the political processes of integration stagnate. Conversely, the European judiciary resumes a more restrained role when the cause of integration is championed more actively by the political institutions.<sup>89</sup>

In certain policy fields, traditionally sensitive from a national perspective, such as social and economic policy, the Court has shown itself more willing to defer to national policy choices, at least where they have acted in non-discriminatory and proportionate manner. Or indeed, the Court might avoid establishing a Community solution altogether where a comparative analysis of an issue reveals profound contradictions or disparities between national legal systems.<sup>90</sup> In light of the obviously sensitive field of criminal law matters, revealed clearly in the distinctive legal and

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<sup>89</sup> This phenomenon has been identified and critiqued by numerous commentators; for instance Hjalte Rasmussen, who is the leading critic of the ECJ’s ‘judicial activism’ and Judge Mancini.

<sup>90</sup> For instance, in the field of discrimination law see Case C-249/96 *Grant v South West Trains* [1998] ECR I-621. For a comprehensive account of how the ECJ uses comparative law as a method of interpretation see K.Lenaerts, ‘Interlocking Legal Orders in the European Union and Comparative Law’ ICLQ 52 4 873

institutional framework of the third pillar, it is perhaps arguable that the Court should exercise a degree of constraint when interpreting and reviewing criminal law measures. Conway supports such an analysis. He argues that the continuing sensitivity of national sovereignty in this area calls for a more cautious interpretive approach in relation to third pillar matters and that the widely accepted principles of criminal law, such as legality and specificity, also militate against an inherently less predictable creative interpretation of criminal provisions.<sup>91</sup>

Particularly difficult is the extent to which choices expressed by national criminal justice systems should remain intact in the context of the principle of mutual recognition, which itself embraces divergence and the extent to which the latter should give way in the pursuit of over-arching principles and interests in the context of the AFSJ. Clearly the balance is a delicate one, but the stakes are high: instilling a degree of confidence in and respect for the developing legal order of the Union as a whole will be crucial if the EU is to avoid a collision course with national constitutional courts and political stagnation of the legislative process. Staving off a political and judicial backlash is not necessarily always an argument for adopting the path of least resistance, rather it is an argument for a strongly argued, principled and consistent jurisprudence.

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<sup>91</sup> G.Conway, 'Judicial Interpretation and the Third Pillar: Ireland's Acceptance of the European Arrest Warrant and the *Gözütok and Brügge* Case' *European Journal of Crime, Criminal Law and Criminal Justice* 2005 Vol 13(2) 255-283 at p.278. Conway argues that, where possible, judicial weight should be given to the expressed intentions of the legislative drafters when interpreting third pillar measures and their implementation in national law. In this piece, Conway highlights Ireland's declaration concerning the scope of the European Arrest Warrant made at the time it agreed the Framework Decision.

Perhaps a focus on safeguarding individual rights as a consistent theme in ECJ jurisprudence would be appropriate – both in and of itself and in the light of distinctive structural features of third pillar policy making.

### *The ECJ and fundamental rights*

The impact of the Court's rulings on *ne bis in idem* and in the *Pupino* case have obvious human rights implication for individuals who find themselves caught up in criminal proceedings. However, despite these potentially positive impacts, it is not the case that the Court has consistently or comprehensively justified its rulings with reference to the advancement and protection of human rights. The *ne bis in idem* principle, in addition to being a tool for securing the principle of legal certainty, is also a fundamental safeguard for a suspect facing criminal charges – and yet the ECJ failed to justify its rather broad interpretation of the principle in these latter terms, preferring to rely on considerations of mutual trust combined with the traditional and broad concept of the *effet utile* of provisions in the wider context of achieving an area of freedom, security and justice and the free movement of persons.<sup>92</sup> In *Pupino*, the Court did make reference to respect for fundamental rights (as general principles of EU law) as a limit upon the duty of consistent interpretation. It stated that the Framework Decision must be interpreted so as to respect fundamental rights, as derived from the European Convention on Human Rights and the common constitutional traditions of the Member States. In other words national rules could be interpreted in the light of the Framework Decision in order to offer child victims of

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<sup>92</sup> The Advocate General however explicitly referred to the Article 54 ISA principle as a fundamental safeguard for persons who are subject to the exercise of the *ius puniendi* in a common area C of freedom and justice.

crime an appropriate level of protection in so far as this would not make criminal proceedings against Pupino incompatible with Article 6 ECHR. Dougan suggests that this legal limitation will help to ensure that the regime of criminal law adopted by the Union will in its turn respect human rights and fundamental freedoms.<sup>93</sup> Of course, the real beneficiary of the Court's judgement in *Pupino*, was unlikely to be Mrs Pupino herself. Rather the judgement is likely to have wider human rights implications, namely the improved procedural protections of child victims of crime and of course, the improved legal protection for individuals to enforce third pillar EU rights.

There are several factors that support a more wholesale adoption of the language of rights in the jurisprudence of the Court in the interpretation of third pillar issues.

First, it would reflect the high level political and legal commitment to upholding human rights protections in EU law in general and in the development of an AFSJ in particular. From a legal perspective, respect for fundamental rights is clearly and unequivocally enshrined in the Treaty. Article 6(2) EU confirms that fundamental rights are protected as general principles of law, such that respect for fundamental rights is a condition for the lawfulness of Union acts<sup>94</sup> and all acts of the institutions are subject to review on grounds of respect for fundamental rights.<sup>95</sup> Nowhere in EC or EU law are there express derogations from the obligation to respect fundamental rights. The EU courts have a duty to ensure respect for fundamental rights. The *political* rhetoric of rights protection is also strong. All of the key path-defining documents setting out a vision of the Union's AFSJ make reference to promoting and

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<sup>93</sup> M.Dougan, 'Legal Developments' JCMS 2006 volume 44 Annual Review pp. 119-35 at 129.

<sup>94</sup> Opinion 2/94 [1996] ECR I-1759, para. 34.

<sup>95</sup> Case 294/83 *Les Verts v Parliament* [1986] ECR 1339

ensuring respect for fundamental rights and many third pillar legal instruments to date refer to human rights and fundamental freedoms in their preambles. Further expression of a commitment to strengthening the human rights dimension of the EU has come in the form of the EU Charter of Fundamental Rights of the European Union, which codifies and reaffirms the raft of rights that the Union respects (which includes the rights to a fair trial and the principles of *ne bis in idem*, equality before the law and legality of criminal offences). Moreover the Constitutional Treaty contains provisions that could have significantly transformed the promotion and protection of human rights by and in the European Union - it would incorporate the hitherto political EU Charter of Rights as a legally binding document within the EU legal order and it would make it possible for the EU to accede to the European Convention on Human Rights. Taken together, all of these developments are indicative of a remarkable legal and political commitment to securing and strengthening rights protection in the European Union – and arguably should encourage a bolder and more visible place in the legal reasoning of the Court.

And yet, there are limits and problems. The scope of the recently established EU Fundamental Rights Agency does not automatically extend to EU third pillar matters, and certain high profile cases have revealed the limits of relying upon the protection of rights at the domestic level in the application of principle of mutual recognition in judicial cooperation.<sup>96</sup> Most notably, the key legislative proposal introducing minimum procedural safeguards for suspects and defendants remains blocked in Council. It has been increasingly watered down and a small number of Member States

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<sup>96</sup> Insert references – Peers, Alegre and Leaf, Guild. Clearly the Strasbourg Court continues to play a crucial role in upholding human rights in criminal proceedings, which that remains a key remedy in a system built upon the mutual recognition of judicial decisions of individual national legal systems. Refer to Courts disappointing assumption of mutual trust.

have now put forward a draft *political* Resolution for agreement, at least in the interim.<sup>97</sup> In today's security climate, politicians tend to focus on the effective and efficient prosecution of crime in defence of 'the public interest.' Enhancing, or indeed even securing rights for individual suspects and defendants is less of a priority. We have seen this in the UK in recent years with the speedy adoption of sometimes draconian legislation in direct response to the 'terrorist threat.' In such a context, the role played by the judiciary is crucial. In the UK, the courts have curtailed the ambitions of the legislature with reference to the need to take account of human rights guarantees. Similarly, one might hope and expect the European Court of Justice to be bold in its endorsement of rights protection, even if that is to pursue a path of greatest resistance from the national governments. Of course, a failure to do so might result in a backlash from national constitutional courts themselves. The behaviour of the ECJ is watched with close interest by both national constitutional courts. The willingness of some national constitutional courts not to subject EC legislative acts to review on the basis of national constitutional standards is by no means unconditional. Rather it is dependent upon the EU legal order securing an adequate level of rights protection (the "Solange" jurisprudence). In a system of cooperation based upon mutual recognition which all but prohibits judicial testing on the merits in the country of execution and considerably reduces the grounds for refusal – the scope for legal unrest is high. It is perhaps inevitable that the room for manoeuvre left to the Member States by the mutual recognition legislation will be tested in the national courts – and as we have witnessed in respect of the implementation of the EAW framework decision, this will often raise questions about constitutionally protected fundamental rights. If and when

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<sup>97</sup> Doc 13116/06. DROIPEN 60 of 27 September 2006, Annex II



these cases reach the ECJ, all eyes will be on it - and the ECJ will want to avoid undermining the practice of ‘constitutional tolerance’ at all costs.<sup>98</sup>

Second, the Court might be more inclined to directly address individual rights in its jurisprudence where possible as a reaction against the paradox that lies at the heart of the third pillar – in an area where the Union has increased influence and impact upon the fundamental rights of individuals, the possibility for judicial remedy for individuals has been severely curtailed.<sup>99</sup> Individuals cannot have direct access to the ECJ under the limited judicial review provision in Article 35(6) EU and as we have seen access to the Court via the preliminary reference mechanism is indirect, typically slow and is, in any case not a remedy as of right. National courts may refuse to refer questions and some national courts, as in the UK, are unable to take advantage of this mechanism at all. This situation is problematic in terms of upholding the principle of effective judicial protection and the need for legal certainty. More generally, there is something uncomfortable about creating the EU as an area of freedom, security and *justice* in response to citizen’s demands and in order to meet their expectations, while denying those same citizens the right to rely on and challenge the measures taken to do so.

#### INSERT ECHR AND BOSPHOROUS

Finally, in support of a more rights-based approach by the Court in respect of the third pillar, one can point to the need for the Court to build upon its historical tradition for the protection of human rights in the Community sphere within the developing

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<sup>98</sup> JHH Weiler in Weiler and Wind, *European Constitutionalism Beyond the State*.

<sup>99</sup> Advocate General Ruiz-Jarabo Colomer makes reference to this paradox in his Opinion in C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad*, delivered on 12 September 2006

context of the human rights debate in the EU. The ECJ has itself played a crucial role in acknowledging and enforcing human rights in the Community context. That role should extend to the third pillar bearing in mind the nature of the subject matter and notwithstanding the restricted nature of the Court's powers. One way that the Court could demonstrate its commitment to upholding individual rights would be to acknowledge the EU Charter of Fundamental Rights as an interpretative tool. As noted above Advocate General Colomer in Case C-303/05 concerning the validity of the European Arrest Warrant Framework Decision, called upon the Court to do precisely this.

“...the Court must break its silence and recognise the authority of the Charter of Fundamental Rights as an interpretative tool at the forefront of the protection of the fundamental rights which are part of the heritage of the Member States. That undertaking must be approached with caution and vigour alike, in the full belief that, while the protection of fundamental rights is an essential part of the Community pillar, it is equally indispensable in the context of the third pillar, which, owing to the nature of its subject matter, is capable of affecting the very heart of individual freedom, the foundation of the other freedoms.”<sup>100</sup>

AG Colomer in coming to this view rejects the argument that the Charter is devoid of any legal force as a result of its status as a ‘political declaration.’ With reference to the developmental nature of rights protection in the EU he argues that the Charter contains rights that the Union must respect and the Court must protect, in accordance with Articles 6 EU and Article 46(d) EU. Moreover, he refers to the fact that Advocates General have previously interpreted the Charter and that the Court of First Instance has referred to it in numerous of its judgements. He points to a change of direction in the Court's own approach to the Charter in the recent case of *Parliament v Council*<sup>101</sup> in which the Court acknowledged the importance of the Charter.

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<sup>100</sup> At para.79.

<sup>101</sup> Case C-540/03 at para. 38.

The Court is in a position to send a strong signal to the political leaders that human rights ‘matter’ in the third pillar.

Tridimas summarises the prominence of fundamental rights in western societies as follows; ‘in an era where there is heightened zeal for the accountability of public authorities and the empowerment of the individual, respect for human rights is viewed as the *sine qua non* of legality but as the most important yardstick in assessing a polity’s democratic credentials.’ Of course when we are starting from a position of weakened democratic credential as is the case with the EU’s third pillar, the greater the need for judicial accountability. Van Gerven puts it succinctly when he says the less democratic legitimacy a system possesses, particularly in its legislative branch, the greater the judicial scrutiny the system should be subjected to.<sup>102</sup> It is clear that by placing human rights protections at the heart of the development of an emerging EU security and criminal policy, where the decision-making process so obviously lacks democratic input, the Court would be simultaneously building on its own jurisprudence to protect basic values implicit in the Treaties, reflecting a broad political consensus as expressed in the Constitutional Treaty and making an important statement about the kind of polity the EU seeks to be.

### **Conclusions**

The ECJ in its first rulings under the third pillar has revealed its potential for defining limits and principles of EU law in the field of criminal cooperation and for lessening the negative impacts of the current institutional and legal settlement. The Court looks set to play a more extensive and therefore more visible role in the not too distant

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<sup>102</sup> W. van Gerven, *The European Union- A Polity of States and People* (Hart Publishing, 2005) 63

future as political discussion centre around how best to expand judicial control over third pillar issues. However, it remains crucial that any *formal* legitimacy conferred by the legal framework is accompanied by a *social* legitimacy, which the Court itself might foster through the development of a coherent, rational and reasoned body of caselaw. History has revealed a broad acceptance of the Court's jurisprudence in the context of the Community law. Even national constitutional courts, have by and large, accepted the Court's more radical constitutional jurisprudence. Arnall, suggests that the main influence on the choices made by the Court from the range of possible outcomes in a given case is always the need to give effect to the fundamental policy preference of the Member State governments the Community legislature.<sup>103</sup> In the context of third pillar, where broad political preferences fail to translate easily into legislation, and where the developing legal and political environment is often hugely contested, a space emerges for the Court to play a more independent role – one that is crucial and potentially transformative, but at the same time exceptionally challenging and contentious. The stakes and limits are high, but then so too are the opportunities.

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<sup>103</sup> A.Arnall, 'The European Union and its Court of Justice' (OUP,1999) at 565