The ECJ Under Siege: New Constitutional Challenges for the ECJ

Giuseppe Martinico
Filippo Fontanelli, Sant'Anna School of Advanced Studies

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The ECJ under Siege – New Constitutional Challenges
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An Introduction

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THE ECJ UNDER SIEGE – NEW CONSTITUTIONAL CHALLENGES

Filippo Fontanelli and Giuseppe Martinico (eds.)
The ECJ under Siege – New Constitutional Challenges

Editors: Filippo Fontanelli and Giuseppe Martinico
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E-mail: info.amicus@iupindia.org, ssd@icfai.org
Website: www.amicus.iupindia.org

Editorial Team: Veena, C Sri Devi, Ch R K Naga Sri and K Gowrinath
Layout Designer: V V S S Sai Babu, V R S C Prasad, M S M Lakshmi, N Jaya Bharathi,
P S R A S V Prasad and R V Srinivas
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Giuseppe Martinico obtained a PhD in “Individual Person and Legal Protection” (curriculum EU Constitutional law)” from the Sant’Anna School of Advanced Studies, Pisa, Italy, where he is also conducting his post-doctoral research. His research focuses on the techniques of judicial dialogue among Courts in the multilevel system. He is currently Lecturer in Law at the University of Pisa (Center for Peace Studies), teaching “Legal Issues in Cooperation for Development”. Alongside his PhD research, Giuseppe regularly collaborated with the Chairs of European and Comparative Constitutional Law of the Sant’Anna School of Advanced Studies, Pisa and served as teaching assistant at the University of Pisa. He spent long research periods abroad (Université de Montreal, Université de Genève, Universitat de Barcelona, Institute of Advanced Legal Studies) and he is member of the Editorial Board of the Bibliographical Bulletin on Federalism of the Centre for Studies on Federalism, Moncalieri (http://www.csfederalismo.it/User/index.php?PAGE=Sito_it/bollettino) and of the Publishing Advice Board of Panoptica. Revista Eletrônica Acadêmica de Direito, Vitoria http://www.panoptica.org.

In 2009, he wrote a monograph devoted to the constitutional activity of the ECJ (“L’integrazione silente. La funzione interpretativa della Corte di giustizia e il diritto costituzionale europeo”, Jovene 2009).
Filippo Fontanelli is completing a PhD in “Individual Person and Legal Protection” at the Sant’Anna School of Advanced Studies, Pisa, Italy, and he is currently LLM Global Hauser Scholar at the New York University Law School. His research concerns the way international law studies tackle the issue of normative and institutional fragmentation, and the possibility of applying the outcome of these studies also onto the European Union legal order, with a particular focus on the role played by the European Court of Justice in such framework. He carried out some specific studies on International Trade Law (at the World Trade Institute, Berne) and European Union and International Dispute Settlement (at the European University Institute, Fiesole), and is member of the Society of International Economic Law.
I am very delighted to write this foreword of the volume that Filippo Fontanelli and Giuseppe Martinico edited for ICFAI press. This book is the final outcome of a workshop organized in Pisa, at the Sant’Anna School of Advanced Studies (19-20 December 2008), where I teach European and Comparative Constitutional Law.

Ideally, that workshop closed the first year of STALS (Sant’Anna Legal Studies), a project made possible, thanks to the financial support of the Sant’Anna School of Advanced Studies, issued within the framework of the School’s internationalisation policy.

Let me introduce STALS in a few words: STALS is neither a journal nor a mere paper archive, it is in fact something different. STALS is – first and foremost – a ‘space’ where both young and experienced scholars can debate on the issues analysed in short papers. These papers are collected and classified by topic (European politics and policies; local law and devolution; new constitutional experiences; judicial dialogue; welfare and markets; global legal pluralism; human rights), the editors committed to choose and publish contributions by authoritative scholars and young researchers, whilst the authors, as well as the readers, are invited to comment or discuss the legal issues treated in the written essays. This parallelism between discussion and research is the main feature of the STALS project, and we think that it will foster the discussion between Italian and foreign scholars.

STALS is an initiative of a group of Sant’Anna School students, who are interested and active in the field of constitutional legal studies. It is designed to provide young scholars from all around the world with a concrete opportunity of having their ideas published along with contributions by long-time professors: our strict policy is to favour the discussion between students and lecturers, rather than stressing their formal role, and by accepting papers written not only in English but also in French or Spanish; our purpose is to enlarge as much as possible both the pool of contributors and the reach of the audience: everyone is invited to submit a paper, and everyone is welcome to read and discuss STALS on-line materials.
This project represented a splendid opportunity to invite in Pisa prominent scholars or young colleagues who are interested in European Constitutional and EU Law: along these lines, we were enthusiastic to plan and implement the international workshop “The ECJ under Siege: New Constitutional Challenges for the European Court of Justice”.

The recent evolutions of European process have forced anyone who is interested in the process of European constitutionalisation to carefully reflect about new concepts and old categories: for instance, now it seems clear that the traditional “interpretation” of the relationships among levels of government is proving inadequate. As for the relationship between the European system and domestic legal orders, I believe that, as of today, it would be superfluous to avail ourselves of the traditional categories of monism or dualism, and to enter a debate about the integration or separation of the two respective legal orders could end up being just a time-consuming activity.

In my capacity as constitutional law scholar, I acknowledge that it is very difficult to apply concepts and theories rooted in international or domestic law to the peculiarities of the European building, but “difficult” does not mean “impossible”, and definitely it does not mean “wrong”: the aim of theories such as multilevel constitutionalism or constitutional pluralism responds to this need for an adaptation to the supranational European order of schemes that were – in fact – conceived in different contexts, and that are not fully comparable to the Union one. Traditional categories are unquestionably useful to provide a dogmatic picture of European Union – Member States relations, and they are still a necessary starting point for any analysis of the interplay between national and supranational sources of law; however, they have little to add when these relations are considered realistically, that is dynamically, in motion.

The idea of multilevel governance or multilevel constitutionalism forms part of a general effort to provide a picture of a legal system where various inter-coordinated levels of governance coexist (the EU, nation States, regions – whatever these might be called: member states, Länder, Communidades Autonomas, etc. – and local authorities). The term ‘multilevel’ entails a descriptive value: it portrays the process fragmentation of power. This process, which started from the unitary and centralized State of the nineteenth century, has led to the current situation of power fragmentation, at least in Europe. Nowadays, power is articulated on many ‘levels’ (three, according to some; four, five or more, according to others), hence the function of government is no longer unitary, but fractioned into multiple governments.

Another very useful contribution in order to understand the constitutional evolution of the EU can be found in the theory of the federalizing process coined by Carl Friedrich, since it pays attention to the unwritten dynamics of the power, rather than the formal provisions of the constitutions.
It is common knowledge that the judgments of the European Court of Justice have been fundamental in building (and shaping) the structure of an European constitution: in carrying out this task, the ECJ has gone beyond the text of the Treaties, by recalling “hidden” elements such as the “spirit” of the Treaties, and by taking advantage of what Eric Stein called once the “benign neglect” of the other actors. My impression is that this golden age of the ECJ is now definitely closed; in recent times many new factors arose that have altered the balance of the successful cooperation between the ECJ and national courts, the most apparent being the series of enlargements that posed before the Courts new and fascinating challenges, resulting in a remarkable increase of cultural diversity that is hardly manageable by means of the classic tools of the integration phase.

All these elements concurred in making the modern landscape of the EU very different from the past, and the role of the ECJ seems to be changing against this background as well: it is currently committed to a backyard battle whose aim is not just of ensuring the effectiveness of the Treaties (by reassessing primacy and direct effect), but also of preserving the uniformity of applicable and applied law in certain fields, such as in the protection of human rights. When looking at judgements like Schmidberger, Omega, Laval, Viking line, it is possible to notice the high degree of diversity of the issues tackled and of the solutions offered: the role of the ECJ is becoming more delicate as its jurisdiction expands, and every solution chosen carries within the risk of undue activism.

Despite the case law seems to reflect a pattern of judicial ambiguity, it might be possible to appreciate a precise design followed by the ECJ, aimed at the identification of a core of fundamental rights that can be shared by Member States’ different constitutional experiences. A selective doctrine of fundamental rights seems to emerge across the recalled judgements, since they tend to distinguish between – at least – two categories of rights: “absolute” rights (admitting no restrictions) and other fundamental rights. As for this second category, the Court of Justice acknowledged the necessity of an assessment of the proportionality of any measure implying their possible restrictions, carried out according to a case-by-case approach:

Whilst the fundamental rights at issue in the main proceedings are expressly recognised by the ECHR and constitute the fundamental pillars of a democratic society, it nevertheless follows from the express wording of paragraph 2 of Articles 10 and 11 of the Convention that freedom of expression and freedom of assembly are also subject to certain limitations justified by objectives in the public interest, in so far as those derogations are in accordance with the law, motivated by one or more of the legitimate aims under those provisions and necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued...
Thus, unlike other fundamental rights enshrined in that Convention, such as the right to life or the prohibition of torture and inhuman or degrading treatment or punishment, which admit of no restriction, neither the freedom of expression nor the freedom of assembly guaranteed by the ECHR appears to be absolute but must be viewed in relation to its social purpose.

Similar judgments show the existence of an essential core of untouchable values that cannot be jeopardized or questioned, and this seems to be the best counter-argumentation against those theories, according to which any European constitution would result in a set of merely procedural principles.

Procedural principles (such as subsidiarity, proportionality, etc.) have indeed a crucial role; whilst this is undisputable, we should also note that one of their main function is to connect the two groups of rights (absolute and relative) singled out by the ECJ. In this sense, they do not exhaust the constitutional essence of the EU, they rather reinforce it.

My impression is that this set of undisputable principles and rights represent the non-negotiable basis for a judicial dialogue among Courts in the multilevel constitutionalism: in other words, the actors of such a dialogue are required to act consistently with these principles if they want to take a part in the judicial conversation. A common language based on rights represents a precondition for entering the dialogue session, and for having it succeed.

These are just a few thoughts, they should be developed and refined but I am sure that there will be many other opportunities to discuss them in workshops or conferences that the STALS will patronize: as I noted at the beginning, this book is just the first step of a long-lasting project.

Paolo Carrozza

17th, January 2009
Pisa

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1 Full Professor of European and Comparative Constitutional Law, Sant’Anna School of Advanced Studies. STALS Editor in Chief (www.stals.sssup.it): paolo.carrozza@sssup.it
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Introduction

Filippo Fontanelli and Giuseppe Martinico

This book collects the proceedings of the international workshop “The ECJ under Siege: New Constitutional Challenges for the ECJ”, held at the Sant’Anna School of Advanced Studies of Pisa on 19th and 20th of December 2008.

The event was made possible thanks to the cooperation between the STALS (Sant’Anna Legal Studies) project and the Institute of Chartered Financial Analysts of India, and we would like to thank Prof. Paolo Carrozza who granted us the financial support for such an initiative, as well as all the participants to the workshop for their high-quality papers.

The subject of the collective volume that will represent the tangible outcome of this project is the constitutional actor par excellence of the EU scenario, i.e., the European Court of Justice (ECJ).

The history of European integration is usually portrayed as having been driven by the evolutionary activity of the ECJ’s. The most famous image of this trend was given by Eric Stein in this well known passage: “tucked away in the fairyland Duchy of Luxembourg and blessed, until recently, with the benign neglect by the powers that be and the mass media, the Court of Justice of the European Communities has fashioned a constitutional framework for a federal type structure in Europe” (E. Stein, 1981).

We cannot ignore, as Joseph H.H. Weiler explained, that certain structural theories that contributed to the establishment of a clearer distinction between International Law and EC Law (based on direct effect and direct applicability) were inspired by the ECJ’s rulings: in brief, the ECJ was the main player in the process of “emancipation” that led the Community out of the inter-State dimension of International Public Law.
In doing this, the ECJ did not found its “creativity” on a set of written norms, it rather looked at the “spirit” of the Treaties and provided the Community with a somehow mystic theological engine.

As of today, the ECJ has to deal with new and important challenges, arising from the enlargement, the prospected reforms of the EU and the international obligations undertaken by the old Communities. The Reform Treaty, which the scholarship harshly defines as being, at best, a post-constitutional treaty, was signed by the Member States with the aim of increasing the rationality and effectiveness of the enlarged EU. Its scope and purpose are much more limited than the Constitutional Treaty’s ones, as the disappearance of terms like “constitution” or “law” demonstrates; however, it still intends to bring about certain significant changes in the life of the Union.

Many essays and some commentaries already exist on the Reform Treaty (although it has not yet come into force), but they tend to analyse the new Treaty’s provisions in a descriptive fashion, whilst our aim is to study the impact of the Reform Treaty on the ECJ’s activity. It would be simplistic, in fact, to conclude that, after the entry into force of the Lisbon treaty, no room would be left to the constitutional functions of the ECJ, as we have become accustomed to know them.

On the contrary, in the occasion of the recent failure of the Constitutional Treaty, the ECJ reaffirmed its pivotal role: soon after the Dutch and French referenda, indeed, the ECJ fostered the so called depillarisation process of the EU (see the _Pupino_ judgement), anticipating some effects that would otherwise be delayed until the entry into force of the Reform Treaty.

This book is divided into four parts, each focusing on one of the challenges faced by the ECJ: the Reform Treaty, the enlargement, the relationship with other Courts and the recent threat to security represented by the rise of the international criminal network.

The First Chapter by Giuseppe Martinico represents an attempt to give a contribution to the general debate regarding the theoretical implications of the concept of a “Constitution for Europe”, especially after the rejection of the Constitutional Treaty. After a brief survey on the relevant literature, the essay tries to show how the ECJ has reacted to the fragmentation which would characterize the current phase of the integration. The final impression is that there is a merciless guardian (the ECJ), who does not want to renounce his interpretative monopoly, and is constantly fighting his battle against any attempt of centrifugal interpretation. In order to deal with the extreme fragmentation characterising multilevel legal systems, the ECJ avails itself of a strategy based on authority and rationality.
Filippo Fontanelli, instead, provides an overview of the latest developments in the ECJ’s activity. Between 2005 and 2008, the European Court of Justice has proven to be brave and patient, often endorsing a cautious but evolutionary interpretation of rules. By doing so, the Court managed to ensure the consistency of a legal order that constantly seems to be about to change (see the Constitution and the Lisbon Treaty bottlenecks). The use of First Pillar’s legal principles beyond the reach of the Community competences has allowed a first praetorian constitutionalisation of the Area of Freedom Security and Justice, and so has the application by the Court of Art. 47 EU. This paper examines the above-mentioned judicial policies, describing the Court’s behaviour when the boundaries of its competence are questioned.

Giulio Itzcovich, whose paper closes the first part of the volume, provides an account of the legal reasoning of the European Court of Justice. On the one hand, there seems to be no absolute specificity of the legal interpretation methods of the ECJ: its decisions are drafted in such a way as to be comprehensible to the national legal communities, and the Court employs interpretation arguments which are largely common to the legal traditions of the Members States. On the other hand, the case law of the ECJ has been characterized by an extensive application of the so-called teleological argument, i.e., it has often been purpose-oriented. In light of the interpretative methods employed by the Court, the article aims at figuring out what kind of conception of the EC Treaties underlines its case-law. The article suggests that, in the ECJ’s view, the EC Treaties give rise to a constitution of a special kind: a sort of project-constitution, a constitution-in-progress or dynamic constitution; such a constitution intends not only to establish the rights and duties of the contracting parties, but also to initiate a constitutional project which is open-ended and evolutionary.

Anna Magdalena Jaroń deals with the question of the EU Charter of Fundamental Rights: as we know, according to the Lisbon Treaty, the Charter is not incorporated in the Treaties, but instead, it is referred to as a primary law of the European Union. This problematic picture is enriched by the UK/Poland Protocol and in the second part of her piece the author focuses on the possible interpretations of such a document.

The second part of the book is devoted to the “challenge” of the enlargement.

The enlargement had a double immediate impact on the ECJ: it caused the increase of the judges’ number (with obvious consequences on the functioning of the Court) and the introduction of new legal cultural elements (coming also from the old tradition of Soviet law) that could result in affecting the legal reasoning and the argumentative techniques used by the European judges.
The article by Oreste Pollicino highlights, through a case law-based analysis, that not only did the Central and Eastern Constitutional courts learn to speak that language very quickly, but also that they are starting to express new ideas through that same language of constitutional pluralism. The author focuses on the latest developments of the two European Courts (ECHR and ECJ), by stressing the different reactions caused in the domestic judges’ activity.

With regard to the ECJ, the main idea is that the enlargement has played a pivoting role in increasing the judicial awareness of the European court of justice towards the respect of the national identity of the single member states. With the addition of 12 not always homogeneous constitutional identities, the ECJ case law reference to the concept of common constitutional traditions becomes unsuitable.

Emanuele Pollio analyses the factors that accounted the critical concerns about the ECJ “judicial activism”. In particular, a consistent scholarly literature stressed how the role played by the ECJ amounts to a specimen of the EU “democratic deficit”. Starting from the failure of the Constitutional Treaty ratification, it focuses on the controversial debate about the nature of the ECJ activism in the “depillarisation phase” (with a particular attention both to the academic literature and to the press reaction). The impact of the Lisbon Treaty and the enlargement process will lastly be examined as powerful factors that might account the move towards the “Europe des juges”.

Another delicate aspect is the status of the network of the European courts: judicial interactions between the ECJ and the other judicial actors are becoming more and more important in light of the progressive transformation of the EU. On the one hand, in fact, the “humanization” of EC Law (i.e., the increasing relevance of the human rights discourse in the EC activity) caused the necessity to deal with the issue of the consistency between EC law and ECHR (it is a fact, in addition, that the Reform Treaty itself provides the adhesion of the EU to the ECHR). On the other hand, the discipline of the WTO requires the consistency between WTO (para-judicial) bodies and the ECJ, and a new set of criteria to harmonize the reciprocal influence of their respective legal orders.

The third part of the volume starts thus from the idea of the ECJ as a cooperative judicial actor that needs to coordinate its activity with other judicial (or para-judicial) interlocutors.

The contribution by Angioletta Sperti investigates the possibility to compare the ECJ to national Constitutional Courts, as regards the use of comparative law. The author describes the purposes of the use of comparative law by the ECJ, and remarks the
Introduction

analogy and differences with the use of comparative law by nationals constitutional
courts, concluding that the experiences of ECJ and national constitutional courts cannot
be completely assimilated.

In his essay, Laurent Scheeck argues that the European courts’ increasingly nested
linkage has given rise to new forms of supranational judicial diplomacy between judicial
actors of the European scene, that is, the European Court of Justice and the European
Court of Human Rights. Such diplomacy has had a deep impact on law - as well as on
policymaking.

This work explores how supranational lawyers have endeavoured to establish trans-
national epistemic communities that serve as a vehicle for integration. This evolving
relationship, which is simultaneously underpinned by hierarchical conflicts, competitive
and cooperative logics, appears to have become one of the foremost ways to harmonise
the rather fragmented European normative space and to empower each of the two
European Courts.

Petros Mavroidis and Alberto Alemanno, in their respective pieces, investigate the
relationship between WTO and EC orders in the light of the Fedon saga.

The work by Petros Mavroidis discusses the Fedon decision of the Court of First
Instance, taking a critical stance against the exercise of discretion advocated by the judges,
both as a matter of principle and as a matter of legal technicalities.

Alberto Alemanno gives a commentary of the ECJ’s decision on the appeal of the
same case (Joined Cases C-120/06 P and C-121/06 P FLAMM and Giorgio Fedon & Figli v
Council and Commission).

The ECJ held that the EC cannot be called upon to compensate damages resulting
from a failure of its institutions to comply with WTO rulings – neither based on liability
for unlawful conduct, nor based on liability for a lawful act. In so doing, the ECJ seems
to have definitely closed the door, at least for now, to all attempts by traders hit by
retaliatory measures to obtain some form of compensation from the Community.

The last part of the book insists on the challenges of security (especially after the
after 11/9), attempting to collect the reflections on the possibility of a European Criminal
Law and of an anti-terrorism policy.

The potential conflict between rights and security and the depillarization process
mentioned above are two factors that endows the ECJ with a fundamental role in this
phase.
In her chapter, Marta Simoncini analyses how that balance has been stricken, dealing with the case law on counter-terrorism matters and focusing especially on the cases related to the legitimacy of blacklists. The author attempts to read the European case law in light of the distinction between two different kinds of terrorists’ lists: those drawn up on the grounds of the Member States’ international obligations and those founded on autonomous decisions of the EU institutions, by insisting on a legal sources based classification rather that on a classification based on the chronological reading of such a jurisprudence.

The work by Eulalia Sanfrutos Cano dwells on the limitations of judicial supervision both under Title IV EC and under Title VI EU, that have been always pointed out as some of the main deficiencies of the AFSJ.

Even if this assertion was watered down by the reforms operated by the Treaty of Amsterdam, it remains a fact that the Court’s powers within this field do not compare favorably to those it holds within the first pillar. This contribution displays at first the main problems that derive from the institutional setting established by the Treaty of Amsterdam and the way the European Court of Justice tries to fill the lacunas of an incomplete system, that was meant to be temporary, but will end up being applied for more that 15 years. Secondly, it scrutinizes the reforms operated by the Treaty of Lisbon and the consequences of the abolition of the pillars structure form a judicial protection point of view.
Constructivism, Evolutionism and Pluralism: The Constitutional Grammar of Europe†

Giuseppe Martinico*

The aim of this paper is to provide a contribution to the general debate on the theoretical implications of the idea of a “Constitution for Europe”.

After a brief survey on the relevant literature this work will dwell on the dichotomy between evolutionary (programmatic) and revolutionary (achievement) constitution, as proposed by Besselink, and will frame this interpretive option in the wider reflection on the so called “post-modern constitutionalism”.

Finally, this essay will stress the peculiarity of European Constitutional Law, that can be found in a strong (and, in this sense, “proudly” modern) axiological core.

† Paper presented at the STALS (Sant’Anna Legal Studies) International Workshop: “The ECJ under siege: new constitutional challenges for the ECJ”, 19th and 20th of December 2008. I would like to thank Stanislav Adam, Filippo Fontanelli, Giulio Itzcovich and András Jakab for their comments and remarks. Usual disclaimers apply.

* Lecturer in Law, University of Pisa (Center for Peace Studies); STALS Senior Assistant Editor (www.stals.sssup.it). Visiting Research Fellow at Centre of European Law, King’s College, London (http://www.kcl.ac.uk/schools/law/research/cel).
1. Introduction

The debate on the EU’s constitutionalization is at a crossroads: if constitutionalization is conceived as a constructivist design which is characterized by a written document and led by a precise and linear political will, we are forced to conclude for the constitutional failure of the EU. On the other hand, when constitutionalization is conceived as a spontaneous process sprung from the activity of “cultural” forces, the latest judicial trends can be regarded as the strongest attempts to ensure the coherence of the EU’s “constitution composée”.1

This paper is divided into two parts: in the first part, by adopting the “constructivist” approach to constitutionalization, I am going to describe the feeling of fragmentation which would characterize the EU after the national referenda (in France, in the Netherlands and in Ireland). In the second part – through the adoption of another perspective – the paper tries to show how the ECJ has reacted to the centrifugal judicial forces which would threaten the interpretive monopoly of the real master of treaties.2

The main argument of this paper is that this change of perspective (from the viewpoint of the political sources of law to that of the cultural sources of law) could lead to a less disenchanted evaluation of the current phase of EU integration than that which currently seems to characterize the main literature.

Part I: Constructivism v. Evolutionism: A Theoretical Debate

2. Is There Any Room for a “Constructivist” Constitutionalization?

At first glance, the rejection of the Constitutional Treaty (CT) by a majority of the French and Dutch voters and the Irish “No” to the Reform Treaty (RT) may give the impression of an inescapable constitutional crisis for Europe. Although the RT does not include any reference to the word “Constitution”, in fact, the substantial continuity between this document and the Constitutional Treaty is evident. As Ziller

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stressed, a “constitutional substance” would have been “rescued” despite the elimination of some “dirty words” such as “constitution”, “law”, and “minister” in the text of the Lisbon Treaty.³

From this point of view, as Corthaut points out, “the Reform Treaty looks more like the (evil?) twin of the Constitutional Treaty than its distant cousin”.⁴ Something similar is argued by Ziller,⁵ when he writes that the possible major changes (the primacy clause’s disappearance, for example) were just functional to overcoming the risk of the Member States’ refusal. Despite this substantial relative continuity, other authors have stressed the sense of disappointment which would characterize the document defining it as a “Postconstitutional Treaty”.⁶

According to Somek:

A postconstitutional ordering, by contrast, cannot settle contested issues, for it cannot find sufficient support for a clear solution. A postconstitutional norm does not speak with one voice. It is a document recording the adjournment of an ongoing debate. Maybe this is addressed by those talking about the Union’s alleged lack of a pouvoir constituant. Ideally, a constitution is about channelling political dealings, not about postponing their resolution.⁷

According to such a scholarship the RT cannot be regarded as a constitution since it limits itself to reflect the problems without solving them: it seems to suffer the social forces rather than leading them. This point is crucial because a very similar criticism was expressed by Bast with regard to the CT, as follows:

Wading through the complete text – some 474 pages of reading material in the Official Journal – one experiences how far away the Constitutional Treaty is from the ideal of a concise, expressive constitutional document. This is not, or at least not primarily, an editorial deficiency. The structure and length of the constitutional

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⁵ J. Ziller, Il nuovo Trattato o.c., at pp. 27 ff.
⁷ Ibid., at pp. 1126-1127.
text reflect the unsolved problems involved with fostering unity [...] The tension between – only partially “correct” – self-description (Part I) and normative reality (Part III) cannot, for the most part, be resolved by jurisprudence, but by constitutional politics. This confers on the Constitutional Treaty the status of a reflexive constitution. Such a constitution makes normative demands of itself, without (yet) fully accounting for them.8

The real issue thus concerns the nature of a whichever Constitution for Europe: what kind of Constitution would it be? And, would the idea of a Constitution as such be applicable to the European Union experience? A very good contribution to the debate on the notion and the nature of the Constitution for Europe was furthered by Leonard Besselink,9 in his view, the notion of Constitution itself as applied to the EU results in an ambiguous picture, that of a fundamental law (Grundgesetz rather than Verfassung) being more suitable.

This seems to imply a sceptical approach to the issue of the European Constitution’s ‘formalization’, conceived as a real constitutional moment. The author himself reaches this conclusion after having distinguished between two categories of constitutions: ‘revolutionary’ and ‘evolutionary’ ones: “These revolutionary constitutions tend to have a blueprint character, wishing to invent the design for a future which is different from the past ... Old fashioned historic constitutions are, to the contrary, evolutionary in character”.10 When observing the evolutionary/historical constitutions one could realize that: “Codification, consolidation and adaptation are more predominant motives than modification. The constitution reflects historical movements outside itself”.11

The semi-permanent revision process of Treaties12 makes the attempt to transpose the idea of Constitution into a supranational level very difficult: the Constitution, in fact, should be the fundamental charter, that is, a document characterized by a certain degree

10 Ibid.
11 Ibid.
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of resistance and continuity. Against this background the European Treaties seem to be unable to lead the social forces: they can only “reflect the historical movements”, thus seeming mere snapshot constitutions. This is precisely what Besselink argues, writing that: “a formal EU ‘constitution’, if ever realized, would only be a momentary reflection, no more than a snap-shot”, hence the comparison with a Grundgesetz.

This idea of Constitution implies the premise of a “constructivist” nature in every “real” constitutional moment. By constructivism we mean here “a conception which assumes that all social institutions are, and ought to be, the product of deliberate design”. The dualistic structure of Hayek’s thought links the idea of constructivism to that of ‘order,’ which can be conceived in two different ways: ‘order’ as κοσμος (a spontaneous order) and ‘order’ as ταξις (a constructed order).

The Constitutions conceived as binding and normative (not merely descriptive) documents are supposed to be “constructivist” since they are directed to the achievement of an ideal society which should be characterized by those values the Constitution itself considers as fundamental. This is the case, for example, of the concept of constitution that can be inferred from Art. 16 of the “Declaration of the Rights of Man and of the Citizen”: a document aiming at a society characterized by the division of powers and the protection of rights.

Rather than limiting itself to providing a snapshot of the society, this kind of constitution (and constitutionalism) is aimed at changing it, addressing the social forces toward a common goal.

The kind of constructivism which seems to accompany modern (continental, at least) constitutionalism seems to show a clear preference for the political sources of law. The political sources of law are the conclusive result of a debate where opposing political

13 L. Besselink, “The Notion” o.c.
14 Ibid.
16 “... the situation where one author could argue with regard to a given phenomenon that it was artificial because it was the result of human action, while another might describe the same phenomenon as natural because it was evidently not the result of human design”. A. Hayek, Law, Legislation o.c., at p. 20.
17 Declaration of the Rights of Man and of the Citizen, at Art. 16: “A society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all”.
forces entered into conflict in order to influence the state will’s manifestation, represented by the law and its content; the cultural sources are inferred from the experience of the past (customs, judicial precedents) or from the rational analysis of legal phenomena (the role of the scholars for example).

The most famous example of political sources of law, the “loi” (legge, statute, ley) is an act characterized by abstractness and generality and in this sense laws are the product of a rational legislator who is moved by a clear intent to build coherence, unity and order conceived as τάξις (constructed order). Under this perspective, the (second) European Convention had given us the illusion of the existence of a strong and constructivist will at supranational level, which has miserably failed. The consequence of this failure would be the absence of legitimacy and unity or, in other words, fragmentation, disorder and obscurity.

3. Europe, Don’t be Afraid!

In these first pages, I have tried to sum up the feeling of scepticism which dominates the literature (with a few exceptions) on the current phase of EU integration and the fear of plurality which seems to emerge after the recently failed attempt to govern the complexity of European integration and combine the multiple hierarchies (constitutional supremacy versus EC law primacy)18 that coexist in a context of constitutional pluralism. The concurrent presence of several constitutional poles is the essence of what Maduro calls “constitutional pluralism”.19 According to Maduro generality, comprehensiveness and coherence – that is, the values of constitutionalism as a project of modernity – can be reached, in the context of constitutional pluralism, without an “authoritative definition”.20

18 Quoting the language of the Spanish Tribunal Constitucional: “Supremacy and primacy are categories which are developed in differentiated orders. The former, in that of the application of valid regulations; the latter, in that of regulatory procedures. Supremacy is sustained in the higher hierarchical character of a regulation and, therefore, is a source of validity of the lower regulations, leading to the consequent invalidity of the latter if they contravene the provisions set forth imperatively in the former. Primacy, however, is not necessarily sustained on hierarchy, but rather on the distinction between the scopes of application of different regulations, principally valid, of which, however, one or more of them have the capacity for displacing others by virtue of their preferential or prevalent application due to various reasons”, declaración 1/2004, www.tribunalconstitucional.es.


According to Baquero Cruz, instead, this absence of an authoritative decision would imply the addition of a “post-modern flavour to constitutionalism” since it involves the end of constitutional law and of constitutionalism as an ideal:

By post-modern, I mean all that is fluid and fragmented. And that is what pluralism tries to reflect, the reality of a fragmented law which is always in flux. Perhaps it is more realistic, if the reality of law is more like that, and not at all like the modern constitutional ideal. But there may be a risk in that step. Lawyers have probably been the last to embrace postmodernism. First were the architects, then philosophers, linguists, etc., and a minority of academic lawyers have been the last to embrace it, and perhaps they have done it with a risk to their social role, because they may not be compatible. We renounce to an ideal of constitutional law if we embrace the post-modern view of law which is reflected in radical pluralism, not only in the European Union but also in state constitutional law.\(^{21}\)

How could such a view be assessed? Is constitutional pluralism a form of postmodernism?\(^{22}\) Against this interpretation Maduro argues that unity and coherence can be reached in absence of authority because the latter does not automatically imply the absence of power,\(^{23}\) and the virtues of cooperation inspired by the principles of contrapunctual law\(^{24}\) can substitute the tools of hierarchy. Anyway, Baquero Cruz opens

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\(^{21}\) *Ibid.*


\(^{23}\) As S. Cassese argues, in fact: “Power, not authority, is central in the global arena. Power can be exercised through authoritative means (such as the ‘command and control’ models familiar from domestic administrative systems), but also through agreements, contracts, incentives, standards and guidelines” S. Cassese, “Is there a Global Administrative law?”, available at http://www.irpa.eu/public/File/Articoli/is%20there%20a%20gal.pdf.

post-modernity’s Pandora’s box and stresses the risk of fragmentation when he says that “the costs [of pluralism] in terms of clarity, certainty and effectiveness may be too high”.  

As Douzinas, Warrington and McVeigh have noticed, in their role of supreme laws of the land, Constitutions decide “the question of validity of all parts of the legal system”. According to this view, constitutional jurisprudence is the third grand narrative of modernity, since every theory of constitutionalism expresses a claim to the constitution’s supremacy (conceiving the constitution as the highest law) while, on the contrary, the actual postmodern jurisprudence’s goal is to deconstruct the justificative feature of constitutionalism.

In this sense, postmodern jurisprudence, focusing on its politics of deconstruction, challenges the sense of unity coming from the constitutions, emphasizing “plurality over authoritarian unity, a disposition to criticise rather than to obey, a rejection of the logic of power and domination in all their forms, an advocacy of difference against identity, and questioning of state universalism”.  

Although the emphasis on plurality is present in Maduro’s concept of contrapunctual law, one has to acknowledge that his constitutional pluralism does not barely accept the mere plurality. On the contrary, the procedural principles of contrapunctual law aim to ensure coherence in a context characterized by the existence of several constitutional poles: constitutional pluralism attempts to “rationalize” the plurality and in this sense its intent is proudly modern.

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27 “As law, it is a text comprised of clear words whose meaning is given in the intentions of its authors; as a legal rule, it has a normative content that empowers and limits political power. The unity of the law is to be found in the original text that authorises all laws”, C. Douzinas, R. Warrington, S. McVeigh, Postmodern jurisprudence o.c., at p. 28.
This work of rationalization finds its roots in the substantial action of several actors, especially by the judges through their interpretive activity. The feeling of fragmentation caused by the lack of a constructivist constitution seems to fade away when considering the latest judicial trends and the struggle conducted by the ECJ to dominate the interpretive centrifugal forces coming from the plurality which characterizes the “constitution composée”. 

Part II: The ECJ’s Reaction to Centrifugal Judicial Trends

4. Why Dwelling on Interpretive Competition?

In my opinion, all the recalled theories that have read sceptically the EU’s constitutionalization process, present a common core: they do not accept the idea of a material constitution deriving from the judicial acquisitions of a culture-based development. They do not trust the activity of rationalization ensured, in this phase at least, by the judges, and they disregard the judicial dialogue’s systematic function in the multilevel and pluralistic constitutionalism.

Maduro rightly recognizes the systemic function of judicial actors, by contextualizing their activity, stressing that they are part of a political bargaining process and that the “motives behind the [judicial] transactions may vary greatly. Judicial criteria are not simply a result of judicial drafting but of a complex process of supply and demand of law in which the broader legal community participates”. The judicial actors contribute to the development of a new legal order, which is the outcome of the coordination between national and supranational level, providing interconnections and links between different legal cultures, mediating values (interpretation comes from the Latin “inter-pretia” i.e., intermediation among values), comparing experiences, as it has been the case, for instance, with the many seasons of the proportionality principle.

29 On this concept, see: I. Pernice-F. Mayer, “De la constitution composée” o.c., pp. 623 ff.
31 The principle of proportionality was clearly “extracted” from the German legal tradition, although the classic three-step partition (Geeignetheit, Erforderlichkeit, Verhältnismäßigkeit in engeren Sinne) elaborated by the German judges is rarely respected by the ECJ (EC, Cases C-96/03 and C-97/03, A. Tempelman and Coniugi T.H.J.M. van Schaijk c. Directeur van de Rijksdienst voor de keuring van Vee en Vlees, 2005 ECR I-1895). A broad distinction between the cases involving the EU institutions and the ones involving Member States can be found in the ECJ activity. In the former the ECJ seldom declares the illegitimacy of the measures. On the contrary in the latter, involving the Member States, the Court seems to insist on the reasons of integration, declaring the
In order to define the impact of judicial actors on the EC system’s evolution we may use the notion of cultural sources of law. Cultural sources, as mentioned above, are not the result of an activity purposely aimed at the creation of law, and their acceptance is based on the idea that the law is not only the pursuance of the sovereign’s will (the king, the people or the parliament) “but responds to the need for rationally determined justice”.\textsuperscript{32}

The ECJ’s interpretative rulings belong to the group of cultural sources of law. They played a fundamental role in pushing forward the reasons of integration, while political sources (directives, regulation) were trapped into the intergovernmental mechanisms. Why? Quite simply, they are flexible sources, more adaptable to the changing aims of “functionalism”, less “exposed” to the attention of national governments, due to the “benign neglect”\textsuperscript{33} of the Member States, described by Eric Stein.

The cultural sources of law renounce to the constructivist aim, and contribute to reflect of a κόσμος (a spontaneous order) that is the outcome of a case-by-case judicial violation of the “loyalty duty” to the Treaties. Then the transposition of the German principle into the supranational context was enriched by the French experience of the ‘bilan avantages-coûts’ (costs/advantages analysis) as elaborated in the Conseil d’État case law. Such bottom-up flows (from the national traditions to the supranational level) induced the creation of a supranational principle. As said above, the constitutional exchange among levels is continuous and implies a second constitutional flow from the EU level to the national levels. Due to the diversification of the national legal orders, we can distinguish different “spill over” effects. Galetta (D.U. Galetta, “Il principio di proporzionalità comunitario e il suo effetto di spill over negli ordinamenti nazionali”, Nuove autonomie, 2005, pp. 541-557) has identified three examples of different reactions to this top-down flow. The first case is that of England where the judges refused to apply the proportionality test opting for the so-called “Wednesbury-test” until 1998, year of adoption of the Human rights Act, which has represented a fundamental turn in this sense. Another example could be the Italy case, where national judges misunderstood the test of proportionality: a clear evidence of such mistake is the confusion between reasonableness and proportionality (TAR Lecce, Bari, Sez. III, decisions from no. 2483/2004 to 2493/2004, available at: www.giustizia-amministrativa.it). Last but not least, the German case: here the principle of proportionality itself has come back after the “supranational transformation”, causing an evolution in the judges’ activity, in order to adapt the case law to the new supranational demands (Gundesverwaltungsgericht, BVerwG- Federal Administrative Court, Deutsches Verwaltungsblatt (DVBl) 613, 1993; Gundesverwaltungsgericht, B VerwG- Federal Administrative Court, Deutsches Verwaltungsblatt (DVBl) 68, 1997).


cooperation. I would start from this double dichotomy (political sources / constructivism versus cultural sources / evolutionism) to suggest the very different impressions that a one-sided reading of the current phase of European constitutionalism could give, from the point of view of law in action (the case law of the ECJ).

The theoretical framework supporting the need for a research like the one I am proposing can be linked to the existence of a multi-level constitutional legal order and of a constitution resulting from the never-ending comparison and dialectic between “closely interwoven and interdependent”) levels of governance (states and EU). The interplay between levels gives the idea of how difficult it is to draw a distinction between the territorial actors’ legislative domains.

As a matter of fact, one of the most relevant difficulties in the multilevel legal system is represented by the existence of shared legal sources which make the attempt of defining legal orders as self contained regimes very difficult. This is coherent with the effort of providing an integrated and complex (i.e., interlaced) reading of the various levels, and represents one of the most fascinating challenges for constitutional law scholars. At the same time, as a consequence of the lack of a precise distinction within the domains of legal production, it is sometimes impossible to solve the antinomies between different legal levels on grounds of the prevalence of a legal order (e.g., the national) on another (e.g., the supranational).

Moreover, in this context, because of the inextricability of such a complex system, many legal conflicts present themselves as conflicts of norms (conceived as the outcome of the interpretation of legal provisions) rather than conflicts of laws. Interpretative competition thus represents the dynamic side of among its actors. In the following sections I am going to describe briefly the interpretation position of the ECJ in the multilevel legal system and then how the ECJ seems to respond to the need of interpretive uniformity in such a context.

36 According to the distinction between statements (disposizioni) and norms (norme), see V. Crisafulli, entry “Disposizione (e norma)”, in Enc. Dir., XIII, Milano, Giuffrè, 1964, pp. 195-209, at p. 195.
5. Interpretive Struggle: The Latest Judicial Trends

The interpretive position of the ECJ is well described in Art. 220 ECT, par. 1, reading: “The Court of Justice and the Court of First Instance, each within its jurisdiction, shall ensure that in the interpretation and application of this Treaty the law is observed”. Before the Nice Treaty the ECJ was granted by the ECT the final power to ensure the interpretation and application of EC law, thus becoming the “lord” of interpretation. This role has been repeatedly confirmed by a careful reading of the ECT after the Nice Treaty; for instance, according to Art. 225 ECT, par. 3:

Where the Court of First Instance considers that the case requires a decision of principle likely to affect the unity or consistency of Community law, it may refer the case to the Court of Justice for a ruling.

Decisions given by the Court of First Instance on questions referred for a preliminary ruling may exceptionally be subject to review by the Court of Justice, under the conditions and within the limits laid down by the Statute, where there is a serious risk of the unity or consistency of Community law being affected.

The interpretation function of the ECJ is not limited to the preliminary ruling mechanism (Art. 234 ECT) as the ECJ itself acknowledged in the famous Cilfit case, where it excluded the duty of the national judge of last instance to raise the question, also when: “previous decisions to the Court have already dealt with the point of law in question, even though the questions at issue are not strictly identical”. Irrespective of the nature of the proceedings which led to those decisions (emphasis added). This is further confirmed by Art. 104, para. 3, of the ECJ Rules of procedure, where no distinction can be traced (under this perspective) between the preliminary ruling and other proceedings.

The importance conferred by the ECJ upon its relevant case law is due to the need of guaranteeing stability and interpretive uniformity to EC law since “[a]ny weakening,
even if only potential, of the uniform application and interpretation of Community law throughout the Union would be liable to give rise to distortions of competition and discrimination between economic operators, thus jeopardizing equality of opportunity as between those operators and consequently the proper functioning of the internal market”.41 Moreover, national constitutional courts themselves acknowledged the particular nature of the ECJ’s interpretive rulings (once again, irrespective of the nature of the proceedings which led to those decisions): the best example of this fact is represented by judgments no. 113/85 and 389/8942 of one of the ECJ’s most important ‘enemies,’ the Italian Constitutional Court.

In the Italian Constitutional Court’s reasoning, interpretative rulings present the normal effect of the classical EC legal sources when they contain the interpretation of EC legal provisions and entail the following effects: direct applicability and direct effect. In this way, the Italian Court put the classic EC acts (regulations, directives) on an equal footing with the Court of Justice interpretative rulings. Following this reasoning, the ordinary judge’s duty to non-apply domestic norms contrasting with the EC law has to be extended to the case of contrast between the national norm and those interpretative rulings of the Court of Justice. The reasoning of the Italian Constitutional Court takes as its starting point the particular position covered by the Court of Justice in the EC legal system.

The interpretative rulings of the Court of Justice would be second grade sources because they derive their legal power from the interpreted provisions. Indeed, the Italian Court acknowledged these rulings with the content and the effects of the classic communitarian sources (direct effect and direct applicability) only if the interpreted provisions bear such effects.43

This is an indirect recognition of the strong role of the Court of Justice, and implies (for the national judge) the extension of the obligation of non-application of national law contrasting with the interpretative rulings of the Court of Justice.

43 Unfortunately, there is no room to insist on this point. I have tried to deal with these issues in G. Martinico, “The interpretative rulings of the ECJ as a legal source in the EC law”, STALS Research Paper, n. 2/2008, available at http://www.stals.sssup.it/site/files/stals_Martinico.pdf.
6. The ECJ and Its Struggle for Coherence in a Constitutional “Fragmented” Legal Order

As seen above, if we observe the current situation of the European integration we could perceive a general sense of constitutional fragmentation which jeopardizes the unity and coherence of the multilevel legal system. This leads to the following question: how can the ECJ deal with the issue of coherence in such a context?

Traditionally, the preliminary ruling mechanism has allowed the ECJ to develop a successful alliance with the national judges: judgments such as *Van Gend en Loos* \(^44\) and *Costa/Enel* \(^45\) were possible thanks to the cooperation between the ECJ and national ordinary judges. As Weiler said in 1993:

> In the past the European Court was always careful to present itself as primus inter pares and to maintain a zone of autonomy of national jurisdiction even at the price of non uniformity of application of Community law. If the new line of cases represents a nuanced departure from that earlier ethos, the prize may be increased effectiveness, but the cost may be a potential tension in the critical relationship between the European Court and national courts. \(^46\)

After *Köbler*, *Commission versus Italy* \(^47\) and *Kühne & Heitz* \(^48\) Komarek wrote about the “end of the sincere cooperative relationship” \(^49\) and about a judicial attempt to build coherence and unity by establishing a *de facto* hierarchy, which looks like that of the classical federal judicial systems. This is the core of the so-called appellate theory, according to which “One possible way of reading Köbler is to see the referral sent in the context of the claim of liability for a judicial breach as a special kind of an appellate

\(^44\) ECJ, Case C-26/62, *Van Gend en Loos*, 1963 ECR 3.

\(^45\) ECJ, Case C-6/64, *Costa/ENEL*, 1964 ECR 1141.


\(^47\) ECJ, Case C-224/01, *Köbler*, 2003 ECR I-10239.

\(^48\) ECJ, Case C-129/00, *Commission v. Italy*, 2003 ECR I-14637.

\(^49\) ECJ, Case C-453/00, *Kühne & Heitz*, 2004 ECR I-837.

procedure whereby the questions of Community law, improperly treated by the national court the judgement of which gave rise to the liability action, may eventually reach the Court of Justice on the second attempt” or, in other words, “liability action can be seen as an indirect possibility to appeal and reach the Court of Justice”. \(^{51}\)

As Komarek specified, the term ‘appeal’ is used in metaphoric way, since “the decision whether to refer a preliminary question to the Court of Justice remains exclusively in hands of the national judge, not the parties”. \(^{52}\) Irrespective of the acceptance of the “appellate theory”, it is unquestionable that the ECJ has chosen to govern the centrifugal judicial forces by insisting on the authority and equating the infringement of EC Law’s obligations (coming from the classical sources of law as described in art. 249 ECT) with the violation of its own case law. \(^{53}\)

In Köbler the ECJ answered to the preliminary reference raised by the Landesgericht für Zivilrechtssachen Wien (Austria) for a preliminary ruling in the proceedings, pending before that court, between Prof. Gerhard Köbler and the Austrian Republic. In that case the a quo judge asked, among other things, whether the Francovich\(^{54}\) doctrine was also applicable when the conduct purportedly contrary to Community law was a decision of a Member State’s Supreme Court. The ECJ’s answer was affirmative, but in such case the infringement caused by the judicial body would have to be “manifest”:

In order to determine whether the infringement is sufficiently serious when the infringement at issue stems from such a decision, the competent national court, taking into account the specific nature of the judicial function, must determine whether that infringement is manifest. It is for the legal system of each Member State to designate the court competent to determine disputes relating to that reparation.

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\(^{51}\) Ibid., at p. 33.

\(^{52}\) Ibid., at p. 14.

\(^{53}\) In the Köbler case, for example, it acknowledges that: “The principle that it is for the legal system of each Member State to determine which court or tribunal has jurisdiction to hear disputes involving individual rights derived from Community law, subject to the reservation that effective judicial protection be ensured, is applicable to actions for damages brought by individuals against a Member State on the basis of an alleged breach of Community law by a supreme court”. And before: “In any event, an infringement of Community law will be sufficiently serious where the decision concerned was made in manifest breach of the case-law of the Court in the matter”.

\(^{54}\) ECJ, Cases C-6/90 and C-9/90, Francovich and Bonifaci v. Italy, 1991 ECR I-5357.
Along Köbler’s lines, in *Traghetti del Mediterraneo* the ECJ ruled that: “Community law precludes national legislation which excludes State liability, in a general manner, for damage caused to individuals by an infringement of Community law attributable to a court adjudicating at last instance by reason of the fact that the infringement in question results from an interpretation of provisions of law or an assessment of facts or evidence carried out by that court. Community law also precludes national legislation which limits such liability solely to cases of intentional fault and serious misconduct on the part of the court, if such a limitation were to lead to exclusion of the liability of the Member State concerned in other cases where a manifest infringement of the applicable law was committed”.

In the Köbler case, one of the counterarguments supported by the national governments (Austria, France and UK), in order to avoid the extension of the Francovich doctrine to the judicial field, was the principle of the mandatory nature of the *res judicata* principle at the national level. In order to rebut this argumentation the ECJ specified that:

It should be borne in mind that recognition of the principle of State liability for a decision of a court adjudicating at last instance does not in itself have the consequence of calling in question that decision as *res judicata*. Proceedings

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55 ECJ, Case C-173/03, *Traghetti del Mediterraneo*, 2006 ECR I-5177. This judgment was given after a preliminary reference lodged by the Tribunale di Genova in the proceedings "*Traghetti del Mediterraneo SpA versus Italian Republic*". The a quo judge asked the following questions to the ECJ: (1) Is a Member State liable on the basis of non-contractual liability to individual citizens for errors by its own courts in the application of Community law or the failure to apply it correctly and in particular the failure by a court of last instance to discharge the obligation to make a reference to the Court of Justice under the third paragraph of Article 234 EC? (2) Where a Member State is deemed liable for the errors by its own courts in the application of Community law and in particular for failure by a court of last instance to make a reference to the Court of Justice under the third paragraph of Article 234 EC, is affirmation of that liability impeded in a manner incompatible with the principles of Community law by national legislation on State liability for judicial errors which: – precludes liability in relation to the interpretation of provisions of law and assessment of facts and of the evidence adduced in the course of the exercise of judicial functions; – limits State liability solely to cases of intentional fault and serious misconduct on the part of the court?"

56 “For their part the Republic of Austria and the Austrian Government (hereinafter referred to as ‘the Republic of Austria’), and the French and United Kingdom Governments, maintain that the liability of a Member State cannot be incurred in the case of a breach of Community law attributable to a court. They rely on arguments based on *res judicata*, the principle of legal certainty, the independence of the judiciary, the judiciary’s place in the Community legal order and the comparison with procedures available before the Court to render the Community liable under Article 288 EC”. ECJ, Case C-224/01, *Köbler*, 2003 ECR I-10239, par. 20.
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seeking to render the State liable do not have the same purpose and do not necessarily involve the same parties as the proceedings resulting in the decision which has acquired the status of *res judicata*. The applicant in an action to establish the liability of the State will, if successful, secure an order against it for reparation of the damage incurred but not necessarily a declaration invalidating the status of *res judicata* of the judicial decision which was responsible for the damage. In any event, the principle of State liability inherent in the Community legal order requires such reparation, but not revision of the judicial decision which was responsible for the damage.57

The problem of the equilibrium between the need for interpretive uniformity and the respect for the *res judicata* principle was drawn up by the ECJ in *Kühne & Heitz* case. This decision was the outcome of the preliminary reference raised by the *College van Beroep voor het bedrijfsleven* (Netherlands) to obtain a preliminary ruling in the proceedings pending before that court between *Kühne & Heitz NV* and *Productschap voor Pluimvee en Eieren* on the interpretation of Community law and, in particular, the principle of cooperation arising from Art. 10 ECT.

The *a quo* judge asked the ECJ whether, under said provision, an administrative body was required “to reopen a decision which has become final in order to ensure the full operation of Community law, as it is to be interpreted in the light of a subsequent preliminary ruling”. In order to provide an answer the ECJ recalled that:

... the answer to the question referred must be that the principle of cooperation arising from Article 10 EC imposes on an administrative body an obligation to review a final administrative decision, where an application for such review is made to it, in order to take account of the interpretation of the relevant provision given in the meantime by the Court where,

- under national law, it has the power to reopen that decision;
- the administrative decision in question has become final as a result of a judgment of a national court ruling at final instance;
- that judgment is, in the light of a decision given by the Court subsequent to it, based on a misinterpretation of Community law which was adopted without a question being referred to the Court for a preliminary ruling under the third paragraph of Article 234 EC; and

57 ECJ. Case C-224/01, Köbler, 2003, ECR I-10239.
the person concerned complained to the administrative body immediately after becoming aware of that decision of the Court”.

Here the Court clearly expresses its preference for the overcoming of the national res judicata (with regard to administrative decisions), where allowed by the national law. This reference to the national autonomy (which was suggested by the a quo judge himself when he raised the preliminary question) seems to mitigate the strong acceleration for the ECJ’s interpretation uniformity.

In Kapferer, the ECJ answered to a preliminary question raised by the Landesgericht Innsbruck (Austria) in the proceedings Rosmarie Kapferer versus Schlank & Schick GmbH. The a quo judge expressly proposed the possibility to extend the Kühne & Heitz principle to the case of a res judicata in a judicial decision. With regard to this possible extension the ECJ stressed that:

It should be added that the judgment in Kühne & Heitz, to which the national court refers in Question 1(a), is not such as to call into question the foregoing analysis. Even assuming that the principles laid down in that judgment could be transposed into a context which, like that of the main proceedings, relates to a final judicial decision, it should be recalled that that judgment makes the obligation of the body concerned to review a final decision, which would appear to have been adopted in breach of Community law subject, in accordance with Article 10 EC, to the condition, inter alia, that that body should be empowered under national law to reopen that decision (see paragraphs 26 and 28 of that judgment). In this case it is sufficient to note that it is apparent from the reference for a preliminary ruling that that condition has not been satisfied”.

The Kapferer doctrine seemed to have resolved the issue but a few months after that decision the ECJ dealt with another interesting case: Lucchini. In Lucchini the ECJ, following

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58 ECJ, Case C-453/00, Kühne & Heitz, 2004 ECR I-837.
59 ECJ, Case C-234/04, Kapferer, 2006 ECR I-2585, par. 23.
the Opinion of General Advocate Geelhoed, concluded that: “Community law precludes
the application of a provision of national law, such as Article 2909 of the Italian Civil
Code, which seeks to lay down the principle of res judicata in so far as the application of
that provision prevents the recovery of State aid granted in breach of Community law
which has been found to be incompatible with the common market in a decision of the
Commission which has become final”.

Is it a blatant overruling? What about the consequence of such decision on the
national legal orders? As Komarek rightly recalled, in fact: “Otherwise the Court may,
when promoting coherency of the Community legal order in a narrower sense (i.e., only
on a Community level), create serious disturbances for national legal orders. We should
have in mind that the multilevel system of the Community legal order is ‘composed of two
complementary constitutional layers, the European and the national, which are closely interwoven and
interdependent’.”

7. Lucchini’s Doctrine and the New Frontiers of Judicial Dialogue

My impression is that the final conclusion reached in Lucchini could be explained by the
fact that the contested decision was issued ultra vires. As recalled by the ECJ itself, indeed,
that judicial act had been adopted in a field covered by an undisputed Community
competence, given that national courts “do not have jurisdiction to give a decision on
whether State aid is compatible with the common market”.

As Geelhoed said the principle of res judicata cannot permit the persistence of a
judicial decision which amounts to a clear violation of the simplest separation of
competences between ECs and States. This would better explain the particularity of that
case and, at the same time, it should enable us to confirm the persistence of the judicial
dialogue. More generally, the idea that the dialogue between national judges and ECJ has

63 “In short, the key question is whether a final judgment which came about in the circumstances
referred to above, which, as is evident from the previous point, may have serious implications for
the division of powers between the Community and the Member States, as this results from the
Treaty itself, and which would also make it impossible for the powers assigned to the
Commission to be exercised, must be considered inviolable. To my mind, that is not the case”.
been endangered by the *Lucchini* case does not seem to be correct, for the following reasons:

1. firstly, these cases regard the preliminary ruling mechanism, which is only a part (although the most important one, perhaps) of the phenomenon. Looking at relationship between constitutional courts and the ECJ, one can appreciate how the judicial dialogue in this case has followed alternative ways to those of the preliminary ruling. One of the most important cooperative techniques between judges is the consistent interpretation (*Marleasing* doctrine)\(^64\) and it represents, at least formally, an exception to the preliminary ruling. Therefore, we can conclude that the judicial dialogue cannot be restricted to cooperation through preliminary references;

2. as we have seen, the ECJ seems to respect the Member States’ autonomy by setting aside the *res judicata* principle only when it is permitted by the national law (see *Kühne & Heitz*). Moreover, the ECJ seems to maintain a strong distinction between the principle of *res judicata* concerning a decision of an administrative body and its application with regard to a judicial decision. The *Lucchini* case, in this sense, could be seen as an exception, due to the manifest violation of one of the most elementary European principles: the division of competences between the ECJ and national judges. In normal circumstances the overcoming of the *res judicata* does not seem to be possible, the ECJ keeping a behaviour of *careful pro-activeness*\(^65\) and avoiding to touch some sensitive issues for the national structure;


\(^{65}\) I am indebted with Stanislas Adam for this image.
3. The ECJ started to pay attention to national constitutional structures, quoting the constitutional materials of the national judges or finding in national (rather than common) constitutional traditions exception to EC obligations: “In that connection, it is not indispensable that restrictive measures laid down by the authorities of a Member State to protect the rights of the child, referred to in paragraphs 39 to 42 of this judgment, correspond to a conception shared by all Member States as regards the level of protection and the detailed rules relating to it (see, by analogy, *Omega*, paragraph 37). As that conception may vary from one Member State to another on the basis of, *inter alia*, moral or cultural views, Member States must be recognised as having a definite margin of discretion”. These statements reveal the necessity to preserve national diversity as a fundamental value of integration, as expressed (also) in Art. I-5 of the Constitutional Treaty (Art. 4 of EUT after the Reform Treaty of Lisbon);  

4. there is a new intriguing frontier for the judicial dialogue, represented by the beginning of a cooperative era between the ECJ and some

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66 This approach can be seen in many other cases, recently, for example, in *Gouvernement de la Communauté française et Gouvernement wallon*, where the ECJ attempted to avoid that the effectiveness of EC law be impeded by the national constitutional law but, in the meantime, leaving manoeuvring room for those constitutional courts dealing with such issues (see p. 17, point 4, “the ECJ started to pay attention to the national constitutional structures”). ECJ, Case C-212/06, *Gouvernement de la Communauté française et Gouvernement wallon*, not yet published. For a comment on this case see P. Van Elsuwege, S. Adam, “Situations purement internes, discriminations à rebours et collectivités autonomes après l’arrêt sur l’assurance soins flamande”, *Cahiers de droit européen*, 2008/5-6, forthcoming.

67 ECJ, Case C-244/06, *Dynamic Medien*, 2008 ECR I-505.

68 The model of Art. I-5 is undoubtedly Art. 6 EUT (‘current’ version), which has efficaciously described the proximity between common constitutional traditions and national fundamental principles: in this article, in fact, these two kinds of legal sources (common constitutional traditions and national fundamental principles) are mentioned in two subsequent paragraphs. Here it suffices to recall the reference that Art. 6 (‘current’ version), par. 2 makes to the common constitutional traditions, and the reference to the “national identities” of its Member States that is set in par. 3 of Art. 6. I argue that, within a legal context, by the formula “national identities” the European legislator meant the constitutional identities of the Member States, that is, the counter-limits, as defined by each national constitutional court. In this sense, we can say that Art. I-5 of the Constitutional Treaty has only codified such an interpretation expressly, by speaking about “constitutional structure”, and this way it has delivered the interpretation of the counter-limits to the ECJ.
constitutional courts. Recently, the Belgian,\(^{69}\) Austrian,\(^{70}\) Lithuanian,\(^{71}\) and – lastly – Italian\(^{72}\) Constitutional Courts have accepted to raise the preliminary reference to the ECJ. Probably this decision can be explained looking at the progressive acquisition (by the ECJ) of some of the national Member States’ constitutional principles. This progressive constitutionalization of Europe has created a sort of common field between those courts that facilitate communication. A strong confirmation of such a constitutionalization process can be seen in the *Kadi*\(^{73}\) case, where the ECJ stated that:

Fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. In that regard, the ECHR has special significance ... It is also clear from the case-law that respect for human rights is a condition of the lawfulness of Community acts (Opinion 2/94, paragraph 34) and that measures incompatible with respect for human rights are not acceptable in the Community ... It follows from all those considerations that the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness.

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72 *Corte Costituzionale*, sentenza no. 102/2008 and ordinanza no. 103/2008, available at www.cortecostituzionale.it. The preliminary reference was raised during *principaliter* proceedings.

which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty.

These conclusions, and the increasing use of the comparative method by the ECJ make me think of a new cooperative era between courts rather than a rough centralization of the interpretation. By supporting the validity of the judicial dialogue I am not suggesting the complete adhesion to the principles of contrapunctual law.

I could only hypothesise without any certainty – this issue requiring further research-precise and consciously deliberated cooperation strategies to be employed by the courts; nor am I cognizant whether these prospective strategies could be read in light of the principles described by Maduro: instead, it seems to me a sort of judicial catallaxy – here again, I am using a notion by Hayek – a cooperation without planned ends.

However, what I attempted to stress is that the so-called “constitutional failure” is not such at all and the vitality shown by the judicial formant demonstrates the

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74 On this issue, see the paper by O. Pollicino in this book. More in general, see M.P. Maduro: “The methodology of comparative law to be employed by the Court has, therefore, to balance the respect of national legal traditions with the need to accommodate them to the specific needs of the EU legal order ... in other words, it is not simply a question of determining what legal solution is common to the national legal orders. It is also, or mostly, a question of determining what legal solution fits better with the EU legal order (in the light of its broader set of rules and principles and of its context of application). Comparative law becomes, in this way, one more instrument of what is the prevailing technique of interpretation at the Court: teleological interpretation”, M. Poiares Maduro, “Interpreting European Law: Judicial Adjudication in a context of constitutional pluralism”, European Journal of Legal studies, 2/2007, available at http://www.ejls.eu/2/25UK.htm.

75 Catallaxy is “the order brought about by the mutual adjustment of many individual economies in a market” (F.Hayek, Law, Legislation o.c., Vol.2, at pp. 108–9. The word comes from Greek καταλλάσσω which means not only “to exchange” but also “to admit in the community” and “to change from enemy into friend”. F. Hayek, Law, Legislation o.c, Vol. 2, at pp. 108-109.

76 “The term ‘formant’ comes from phonetics, and a legal formant is the body of rules and propositions that contribute to “forming” the legal system. Without establishing any hierarchy between them, the comparativist studies the relevance of the legislative, scholarly and jurisprudential formants, along with constitutional conventions and interpretative usages, etc. Naturally, the number of legal formants and their comparative importance vary enormously from one legal system to another”. A. Vespaziani, “Comparison, Translation and the Making of a Common European Constitutional Culture”, German Law Journal, 5/2008, pp. 547-574, at p. 563. The term “formant” was introduced by Rodolfo Sacco, (R. Sacco, “Legal Formants: A Dynamic
possibility to conceive a European Constitutional Law as a phenomenon moved by “cultural” forces.

Observing the current phase of the European integration from the perspective of the political sources of law the final impression is that of an extremely fragmented law, resulting in a postconstitutional disorganised mass of legal material. Looking at the same situation from the perspective of the cultural sources of law, instead, the final impression is that of a merciless guardian (the ECJ) who does not want to renounce his interpretation monopoly, and is fighting his battle against any attempt of centrifugal interpretation.

In order to deal with the extreme fragmentation which characterizes multilevel legal systems, the ECJ avails itself of a strategy based on authority and rationality. However, I would not say that the ECJ is building a federal jurisdiction, nor would I talk about an appellate theory, due to the persistence of a spirit of cooperation with the national judges, which is rooted in the reference to national legislation.

The Court Goes ‘All in’

Filippo Fontanelli*

Between 2005 and 2008 the European Court of Justice has proven to be brave and patient, often endorsing a cautious but evolutionary interpretation of rules. By doing so the Court managed to ensure the consistency of a legal order that constantly seems to be about to change (see the Constitution and the Lisbon Treaty bottlenecks). The use of First Pillar’s legal principles beyond the reach of the Community competences has allowed a first praetorian constitutionalisation of the Area of Freedom Security and Justice, and so has the application by the Court of Art. 47 EU. This paper examines the above mentioned judicial policies, describing the Court’s behaviour when the boundaries of its competence are questioned. It will also comment on the possible activist trends underpinning the Court’s choices, bearing in mind the innovations that the Reform Treaty is supposed to bring about in the future, and the commitment the Court has always shown in the continuous attempt of fixing the ever-changing European legal order’s constitutional structure.

* f.fontanelli@sssup.it. PhD candidate, Sant’Anna School of Advanced Studies, Pisa. LL.M. Candidate, NYU School of Law, 2010. Many thanks to N. Walker, N. Lavranos and G. Martinico for their valuable comments. Usual disclaimer applies.
1. Introduction

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

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

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

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² A recent and exemplary case of full-fledged criticism is reflected in the fierce attack moved to the ECJ by Roman Herzog, former Federal President of Germany, in an article appeared on 8 September 2008 on the Frankfurter Allgemeine Zeitung, named “Stop the European Court of Justice – Competences of Member States are being undermined. The increasingly questionable judgments from Luxembourg suggest a need for a judicial watchdog.”


⁴ The vagueness of the terms of the agreement, in turn, could be a consequence of either the unwillingness of the contracting parties to be bound by strict obligations, or the forced outcome of a deadlock in the negotiation phase: none of the parties could impose on the other the specific clauses of the contract reflecting its interest, therefore the final text agreed by both parties is roughly defined.
Moreover, negotiations are still under way: judges are attempting to elaborate a consistent case law by applying a fairly inhomogeneous set of sometimes unclear rules which the Contracting Parties, over their heads, are constantly struggling to reform, under terms partially inspired by the ECJ’s jurisprudence, as we will see below. However, this ever-changing framework results in the ECJ enjoying a significant margin of action, and action is just a step away from activism.

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

Where possible, we will refer to the Lisbon Treaty in order to comprehend whether the ECJ is trying to anticipate, under certain aspects, the terms of the Reform Treaty. One of the post-Lisbon institutional scenario’s most apparent features will be the merging of the I and the III Pillars, with the consequent integration of the respective legal instruments and the expansion of the ECJ’s jurisdiction; accordingly, an entire part of this paper will address the ECJ’s current way of handling III Pillar’s measures. Our aim is to demonstrate that the Court tends to borrow its tools from the Community experience and to use them in the Area of Freedom, Security and Justice (“AFSJ”) (A). The new competences entrusted to the Court, moreover, will also require some procedural

6 In particular, it is worth to recall here how the brand new Title V of the RT (titled “Area of Freedom, Security and Justice”) has gathered together policies on borders, asylum and immigration (Ch. 2), judicial cooperation in civil matters (Ch. 3), judicial cooperation in criminal matters (Ch. 4) and police cooperation (Ch. 5). This Title is intended to be the field where the CJ would unfold its new competence, or – better – over which it would expand its ordinary jurisdiction, formerly limited to the area of EC law.
adjustments, such as the new accelerated procedure for preliminary ruling: we will try to follow the course of this newly established instrument, and to illustrate its use by the ECJ (B). The dichotomy between Union and Community is the real subject of the following section (C), concerning the use of Article 47 EU by the ECJ, and we will comment upon the decisions reported in the light of the concepts of activism and interpretative competition.

2. From the I to the III: The Migration of Principles

a. Consistent Interpretation – Indirect Effect – Loyalty

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

The ECJ, once the principle of consistent interpretation became strong in the Community area,12 extended its application also to Third Pillar’s acts in the well-known *Pupino* case.13 As it has been extensively noted by scholars, the ECJ in this case somehow approached the legal instrument of the Framework Decision by highlighting the common

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8  ECJ, Joined cases C-397/01 to C-403/01, *Pfeiffer and Others*, 2004 ECR I-8835, par. 117.
9  This mechanism resembles the one of the Charming Betsy doctrine used in the US constitutional practice, the “consistent interpretation” obligation of international judges vis-à-vis other international sources and the constitutional/conventional interpretation the national judge is called to exhaust before calling for incompatibility between a domestic norm and, respectively, the constitution and the European Convention of Human Rights. For a recent overview of the application of this canon, see [anonymous note], “The Charming Betsy canon, separation of powers, and customary international law”, Harv. L. Rev., 2008, pp. 1215-1236.
10  See *Pfeiffer* cit., see par. 113.
11  *Ibidem*, see par. 116.
13  ECJ, Case C-105/03, *Criminal proceedings against Maria Pupino*, 2005 ECR I-5285.
nature between EC directives and the Framework Decisions adopted under the III Pillar. In Luxemburg in particular, the judges partially overlooked the clear provision of Art. 34.2(b), and somehow acknowledged the indirect effect of Framework Decisions.

As Borgers sharply points out, indeed, this result was achieved by borrowing ‘half’ of the EC directives’ direct effect feature. Definitely, whilst the proper direct effect of the directive is explicitly ruled out by the EUT, the ECJ acknowledges an indirect effect of the Framework Decision, when it states that “when applying national law, the national court that is called upon to interpret it must do so as far as possible in the light of the wording and purpose of the Framework Decision in order to attain the result which it pursues”.

The judge is called to carry out this interpretation method not only on the application of single provisions, but also on “the whole of national law”. This means that, if a national provision appears, at face value, to be in conflict with the Framework

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

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


19 See Pupino cit., par. 47. The same wording appears in the Pfeiffer case commented above, at parr. 115-116.
Decision, a second attempt at “rescuing” it is due to be enacted by the judge, by contextualizing the single provision within the framework of the whole national law, with a view to construing it in a EU-consistent way. By doing this, the court has the obligation to preserve, as far as possible, the *effet utile* of the Framework Decision; therefore it is called to strive to apply the domestic rules in line with the Framework Decision’s purpose and objective; if necessary, this must also be achieved through a more general examination of the domestic legal order and its principles.20 This obligation is based on the principle of loyal cooperation enshrined in Art. 10 ECT.

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

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

In the *Pupino* case, indeed, the ECJ stated that the national judge could enact certain precautionary measures when questioning children witnesses (a praxis consistent with one of the purposes of the Framework Decision,22 that is the protection of vulnerable victims), even though national laws23 did not provide for such special arrangements in respect of offences other than sexual offences,24 and the Italian Constitutional Court had

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

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


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

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stated that only a domestic primary legal instrument could enlarge the set of measures for
the protection of victims in the criminal proceedings.25 The ripeness of the consistent
interpretation principle in the AFSJ was further demonstrated by the subsequent case law,
see for instance Dell’Orto,26 para. 28.

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

In the subsequent Gasparini28 and Van Straaten29 cases the ECJ took the opportunity
to confirm this first statement, and to detail its meaning, establishing that many of the
principles applied under the EC’s preliminary ruling (those concerning the admissibility of
referrals, the definition of referring court and the division of duties between the ECJ and
the referring courts) also apply to Third Pillar cases. The Goicoechea case, commented on
below, further confirms this trend, thereby reiterating this position.

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

The EAW’s legality was being challenged for the first time, and the referral had
come from one of the very few Constitutional Courts in Europe that had agreed to apply
the preliminary ruling procedure.31 The ECJ dismissed the plaintiff’s allegations, hence

Besides, it should be noted that, in a way, the ECJ disproved the Italian Court’s reasoning. Indeed,
the Constitutional Court stated that “la scelta legislativa che sta a base della norma speciale
invocata non è priva di giustificazione, trattandosi di reati rispetto ai quali si pone con maggiore
intensità ed evidenza l’esigenza di proteggere la personalità del minore.”
26 ECJ, Case C-467/05, Dell’Orto, 2007 ECR I-5557.
27 See par. 28 of the Pupino judgment.
28 ECJ, Case C-467/04, Gasparini, 2006 ECR I-09199.
29 ECJ, Case C-150/05, Van Straaten, 2006 ECR I-9327.
30 ECJ, Case C-303/05, Advocaten voor de Wereld, 2007 ECR I-3633 . Opinion of AG Kokott delivered
on 12 September 2006.
“restoring calm to the EU’s Third Pillar”.\(^{32}\) The importance of this judgment, therefore, goes beyond its occasional outcome: it served the EU institution as a general clearance to carry on developing the judicial cooperation in criminal matters. In this sense, it is not difficult to understand why this ruling has been pointed out as being a political decision.\(^{33}\)

The two questions raised referred: (1) to the correctness of the chosen legal instrument (the claimant contends that a convention rather than a Framework Decision should have been adopted, given its purpose and the limits set by Art. 43.2(b) of the EUT); and (2) to the possible infringement of Art. 6.2 of the EUT (establishing the Union’s obligation to respect fundamental rights), namely the violation of the legality principle in criminal matters determined by the partial abandonment of the double criminality rule.

The first question was supported by an accurate reading of Articles 29.2 third indent, 31.1(e) and 34.2(b) of the EU Treaty,\(^{34}\) but the ECJ rejected the assumption that the issue of mutual recognition (the purpose of the Framework Decision) could be pursued through approximation of national laws, and therefore confirmed that the Framework Decision had been duly adopted.\(^{35}\)

As for the possible clash with the fundamental principle of the rule of law,\(^{36}\) and its corollary in the criminal area, the ECJ has basically recognised the existence of a general legality principle of criminal offences, further proved by the provisions of the Nice Charter.\(^{37}\) Nevertheless, the Court held that the challenged Framework Decision was to refer to domestic laws for the definition of the crimes listed (in vague terms) in Art. 2.2, and – therefore – passed upon Member States the responsibility to comply with the principle of legality of criminal offences.\(^{38}\)

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

35 See par. 28 of the judgment.


38 See parr. 53 and 54 of the judgment.
In sum, the Framework Decision was found not to have a harmonising purpose; its vague definitions, however, did not represent grounds for annulment for violation of the general principles of law. It is worth to note that the shift on Member States of the obligation to respect fundamental rights in defining criminal offences might be seen as a step backwards of the Union in this field, but the very fact is that the mentioned compliance is referred to Art. 6 EUT which, enshrining fundamental rights and fundamental legal principles, seems to establish a EU-related standard of review for the potential ECJ’s right to pronounce on national laws.

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


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

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

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

39 See par. 18 of the judgment, assessing the ECJ’s implicit powers.
40 ECJ, Case C-160/03, Spain v Eurojust, 2005 ECR I-2077.
41 See par. 40.
Nevertheless, the *Eurojust* judgment could not be seen as an admission by the ECJ that no judicial remedy exists against such typologies of acts, as this would run counter to the principle of “rule of law”, recalled in Art. 6.1 of the EUT. The Court mentions the possibility for the candidates to the various positions in the contested recruiting processes to have access to the Community Courts under the conditions laid down in Article 91 of the Staff Regulations, and for the Member States to intervene in such proceedings under Art. 40 of the Statute of the Court of Justice.42

We are just going to mention the recent decision handed down by the newly established EU Civil Service Tribunal (“CST”), concerning the claim brought by a former staff member to challenge the decision by Eurojust wherein she had been dismissed.43 This action was commenced under Art. 236 of the ECT (and Art. 152 of the EAT), rather than under Art. 230 of the ECT (as it had been in the *Eurojust* case), in keeping with the view of the ECJ in *Eurojust* when applying the Staff Regulation, Third Pillar bodies are subject to the review of EU Courts.44

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

The ECJ then took the opportunity to develop the issue of the “rule of law”, in the *Gestoras* and *Segi* cases.45 Gestoras pro Amnistía is a Spanish (Basque) association, which brought an action for damages before the TFI and, in appeal, before the ECJ, claiming compensation for having been included (along with two of its spokespersons) in a list of potential terrorists that was attached to a Common Position, presumably for its connection with the terrorist organization ETA.46 This Common Position had been adopted on a mixed legal basis, namely under Article 15 of the EUT, which comes under Title V of the EU Treaty (CFSP) and Article 34 of the EUT, which comes under Title VI of the EU Treaty (Third Pillar), with the intent of implementing the United Nations’ Security Council Resolution 1373 (2001). On 2 May and 17 June 2002, in addition, the Council adopted, still on the basis of Articles 15 and 34 of the EUT, Common

42  See parr. 42-3.
46  Common Position 2001/931/PESC.
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Positions 2002/340/CFSP and 2002/462/CFSP, updating said Common Position 2001/931. The annexes to these two Common Positions contain the name “Gestoras Pro Amnistía”, which appears in the same way as it does in Common Position 2001/931. Segi is a French (Basque) organization that brought a twin action before the TFI; all the relevant factual and legal issues are identical to the ones described in the Gestoras case.

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

The ECJ held that the list of Art. 35.1 of the EUT could not be read narrowly, inferring that measures listed therein were all legal acts intended to create obligations vis-à-vis third parties. In sum, the ECJ has stated that every act adopted by the Council and creating legal effects vis-à-vis third parties can be subject to a preliminary reference by the national judge,47 and for the same reason their legality can be challenged by either a Member State or the Commission under Art. 35.6 of the EUT.48 This praetorial refurbishment49 of Art. 35 of the EUT is justified, in the ECJ’s view, because of the atypical nature of the challenged measure, as para. 54 of the decision contends: “As a result, it has to be possible to make subject to review by the Court a Common Position which, because of its content, has a scope going beyond that assigned by the EU Treaty to that kind of act”.

The ECJ explicitly deplores the lack of procedural means ensuring compensation for individuals affected by an unlawful III Pillar measure,50 but it is steady in denying such a possibility at the Union level. On the contrary, it calls the Member States to enforce in

47 See the Segi judgment, par. 53, referring to some precedents “by analogy”: Case 22/70, Commission v Council (ERTA), 1971 ECR 263, parr 38 to 42, and Case C-57/95, France v. Commission, 1997 ECR I-1627, parr 7 and ff.
48 Despite its wording, it provides for judicial review of Framework Decisions and Decisions only.
50 See par. 60 of the Segi judgment, where the ECJ states that compensation is “a legal remedy not provided for by the applicable texts”, and the brief statement of par 46 of the Gestoras judgment: “Article 35 EU confers no jurisdiction on the Court of Justice to entertain any action for damages whatsoever.”
the national order an effective protection for their citizens (including compensation procedures), and reminds them of the possibility to act in order to change the system in force at supranational level, by following the treaty’s amendment procedure set forth in Art. 48 of the EU.51

Given that it has been peacefully acknowledged that “the jurisdiction of the Court of Justice is less extensive under Title VI of the Treaty on European Union than it is under the EC Treaty”52 and that “[i]t is even less extensive under Title V”,53 this judicial attempt to postulate the completeness of the judicial protection system in the EU, especially in the AFSJ, is another trend which deserves attention, and which has paved the way for the merger of the Pillars and the thereto attached extended jurisdiction. In particular, it has been noted how in these cases the notion of loyalty developed in Pupino was surprisingly regarded to as being ‘especially binding’ – because of the gaps in its structure – in the Third Pillar.54

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

After having appreciated the effort made by the ECJ, however, we must stress that the protection system against Third Pillar measures is really far from being complete, not only because some typical remedies are either expressly or implicitly ruled out (action for damages and actions for annulment brought by individuals), but also because the preliminary reference, that is the “saviour” remedy singled out by the ECJ in the Third Pillar, is still a solution that not all the Member States have agreed

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51 These terms, as Peers correctly points out in a.c., at p. 895, are almost identical to the terms used by the ECJ in Case C-50/00, Uniones Pequenos Agricultores vs Council, 2002 ECR I-6677, see par. 45.

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

53 See the Segi judgment cit., para 50.

upon, by rejecting the ECJ’s preliminary ruling jurisdiction.\textsuperscript{55} That is to say, the entry into force of the Reform Treaty would bring about some relevant changes for which the ECJ could not manage to find a surrogate as of today: the RT would provide for the legality review of acts adopted by former III Pillar entities,\textsuperscript{56} and for actions of damages.

3. The Urgent Procedure for Preliminary Ruling

During the Brussels European Council dated November 2004\textsuperscript{57} the Presidency called for an amendment of the ECJ’s Rules of the Court, in order to adapt the preliminary ruling procedure to the entrusted new competences, especially in the fields of freedom, security and justice. Finally, after following an extensive process of consultation,\textsuperscript{58} on 20 December 2007 the Council, acting under Art. 245.2 of the TEC,\textsuperscript{59} adopted a decision\textsuperscript{60} by which a new Article was added to the Protocol on the Statute of the Court of Justice, providing for the possibility to establish an accelerated preliminary ruling procedure in cases of urgency.

\textsuperscript{55} For a description of the shortcomings caused by this situation, and of the difficulties which are likely to be faced by national judges when they are called to ensure judicial protection without being able to refer to the ECJ, see S. Peers, o.c., 900-901.

\textsuperscript{56} See Art. 263 of the RT.

\textsuperscript{57} See the presidential conclusions of 4/5 November 2004 (doc. 14292/1/04 REV 1, available at http://EU.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/82534.pdf), in particular par. 3.1, reading: “thought should be given to creating a solution for the speedy and appropriate handling of requests for preliminary rulings concerning the area of freedom, security and justice, where appropriate, by amending the Statutes of the Court.” Reference is made to Art. III-369.4 of the Constitutional Treaty (Part III is available for consultation at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:310:0055:0185:EN:PDF), reading: “If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court shall act with the minimum of delay.”

\textsuperscript{58} See the request of the Court of Justice of 11 July 2007, the opinion of the Commission of 20 November 2007 and the opinion of the European Parliament of 29 November 2007.

\textsuperscript{59} Setting the legislative procedure to follow in order to amend the Rules of Procedure of the ECJ.

Accordingly, the ECJ shortly thereafter amended its Rules of Procedure\(^61\) with a view to setting up a new procedure.\(^62\) The main change is represented by the introduction of Art. 104b of the Rules of Procedure, the first paragraph of which (first sentence) reads:

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

This new accelerated procedure has a different rationale from the one provided for under Art. 104a of the Rules of Procedure, and the ECJ did not consider the possibility of applying it to urgent AFSJ matters, as explained in Whereas (2) of the amendment: speed is achieved under Art. 104a simply by giving priority to urgent cases, thus delaying and all other pending cases. Such a solution can be envisaged in a few exceptional cases, and cannot become the regular method for the AFSJ competences.\(^63\)

Furthermore, after the Parliament approved the draft directive concerning common standards and procedures in the Member States for the repatriation of illegal aliens,\(^64\) the need to speed up the judicial treatment of individual claims is expected to increase significantly. This new directive is intended to set minimum standards for the legal treatment of immigrants who are eligible for expulsion, it is therefore likely that national courts handling expulsion orders will often have to conform to the text of this directive and, where opportune, ask the Court of Justice to clarify its content.

On 11 July 2008 the first preliminary ruling in compliance with the new accelerated procedure was drawn by the ECJ.\(^65\) Mrs Rinau, a Lithuanian national, after divorcing her German husband, moved back to Lithuania with their daughter.\(^66\) The husband then

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61 See the amendment dated 15 January 2008.
64 See the consolidated text (A6-0339/2007), adopted by the Parliament on 18 June 2008.
65 ECJ, Case C-195/08 PPU, Rinau, not yet published.
obtained from his local court (the *Amtsgericht Oranienburg*) the definitive divorce decision, according to which he was awarded custody of the daughter. The Amtsgericht ordered Mrs Rinau to send her daughter back to Germany, and to entrust Mr Rinau with her custody. In particular, the Amtsgericht issued the certificate conferring, under Regulation 2201/2003, enforceability to the ruling on the girl’s return to Germany, thus enabling its automatic recognition in a Member State other than the one of issue.

This certificate was somehow necessary because the local – Lithuanian – first instance court (the regional *Klaipėda* court) had initially rejected the application through which Mr Rinau requested his daughter’s return. Nevertheless, in the meanwhile, the Lithuanian appellate court had overruled this decision, allowing the return of the child. The referring judge (the Lithuanian Supreme Court) thus asked the ECJ, among other things, whether the German Court was still entitled to issue a recognition order, in spite of the fact that a Lithuanian Court had already ruled in favour of the child’s return to Germany In light of the interest of the child, urgent procedure in dealing with the preliminary reference had been requested by the referring court and agreed upon both by the appointed Judge-Rapporteur and by the Court.

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

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

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

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

70 ECJ, Case C-296/08 PPU, Santesteban Goicoechea, not yet published.
Warrant Framework Decision. 71 The question had been referred to the ECJ by a French court (Chambre de l'instruction of the Cour d'appel de Montpellier) which, in turn, had been asked by the French public prosecutor (Procureur Général) to issue a favourable opinion on an order by which the Spanish authorities were requesting the extradition of Mr Goicoechea.

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

It is worth noting that the ECJ, as a preliminary remark, took care of clarifying once more that the system under Art. 234 of the ECT applies to the Court's jurisdiction under Art. 35 of the EUT, subject to the conditions laid down in this latter provision. 72

Furthermore, the Court recalls the French acceptance of the Court’s jurisdiction in this respect, under Art. 35.3(b) of the EUT.

As in Dall’Orto (see supra), the lack of any reference to Art. 35 of the EUT in the referral (it mentions Art. 234 of the ECT instead) is not deemed to be determinant for its validity. In addition, the administrative nature of the indictment division is not seen as preclusive for it to be considered a “court or tribunal” within the scope of Art. 234 of the ECT. 73 This last specification can further reveal the willingness of the ECJ to make use of the preliminary ruling instrument in the AFSJ even in matters that are often regulated and ruled at domestic level by bodies entrusted with administrative powers.

For the records, the Court has specified the meaning of Articles 31 and 32 of the Framework Decision, 74 and has stated that the fact that Spain had not made any

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72 See par. 36 of the decision, where the Pupino and Dall’Orto decisions are referred to as precedents. In par 46-7 the Court refuses to answer a question raised by Mr Goicoechea himself, as it is for the national court or tribunal, not the parties to the main proceedings, to bring a matter before the Court of Justice. Precedents mentioned in this respect refer to Art. 234 of the ECT (Case 44/65, Singer, 1965 ECR 965, at p. 970, and Case C-412/96, Kainuun Liikenne and Pohjolan Liikenne, 1998 ECR I-5141, at par. 23).

73 See par. 39-40.

74 The referring judge asked whether the “replacement” of previous extradition systems with the EAW decision could prevent Spain, who had not made any declaration under Art. 32, from applying the 1996 Convention on extradition (Convention relating to extradition between the Member States of the European Union of 27 September 1996).
declaration under Art. 32 (by which it could choose to apply the 1996 Convention on Extradition to extradition requests concerning acts committed up to a chosen date, in any case no later than 7 August 2002) did not keep France from applying the 1996 Convention to requests related to acts committed before the entry into force of the Maastricht Treaty (1 January 1993), that is the date chosen by France in its declaration under Art. 32.75

As seen above, the joint effort of the EU institutions has led to the full implementation of this urgent procedure,76 which was literally inserted in the legal texts in force. It is no surprise, therefore, that the RT expressly provides for a duty of the Court of Justice to act “with the minimum of delay”77 when the preliminary question is raised in a case regarding a person in custody.

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

4. The Art. 47 Saga, and the Kadi Conclusions. Addendum

In recent years, the use of Art. 47 of the EUT78 as the stronghold of the Community’s supremacy has undergone a veritable revival,79 due to the enlargement of the Union’s competences. A short – for this purpose preferable to a more detailed – description of

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


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

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

79 The seminal case, however, remains C-170/96, Commission v. Council, 1998 ECR I-2763, see par. 38.
the very well known *Commission v. Council* 176/0380 and 440/05 cases concerning the criminal sanctions’ attachment to wrongful environmental acts81 will be of help to introduce a few more recent cases, on which a larger comment is necessary.

In the 176/03 case the Commission sought the annulment of a Framework Decision on the protection of the environment,82 since it required Member States to criminalise certain wrongful acts capable of endangering the environment. The Commission (supported by the Parliament) maintained that the questioned act could not be adopted, arguing before the ECJ that this should have been legislated in EC as opposed to EU law, through the legal instrument of a Directive.

The ECJ found that the challenged Framework Decision, being based on Title VI of the EU Treaty, indeed encroached upon the powers conferred on the Community by Art. 175 of the ECT,83 and, consequently, it violated Art. 47 of the EUT. In particular, some provisions of such measure entailing a certain degree of harmonisation of domestic criminal laws concerning various criminal offences committed to the detriment of the environment “on account of both their aim and their content, have as their main purpose the protection of the environment and, therefore, they could have been properly adopted on the basis of Article 175 of the ECT”.84

As a matter of fact, neither criminal law nor the rules of criminal procedure fall within the Community’s competence.85 Nevertheless, the ECJ states that the Community legislature can take the necessary measures to ensure the application of environmental norms, even when these measures relate with the Member States’ criminal law, in particular when they request Member States to adopt effective, proportionate and incisive criminal sanctions to dissuade from violating the EC rules.86

83  See more generally the Title XIX of the EC Treaty, on the environmental protection.
84  See par. 51 of the decision.
86  See par. 48.
The Court Goes ‘All in’

The same rationale was applied in the 440/05 case decided by the ECJ, in relation with Framework Decision 2005/667.87 Again, the challenged measure provided for the duty upon Member States to sanction certain misconduct related to sea pollution with criminal penalties. Suffice here to recall the wording of para. 69 of the judgment:

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

In both cases, the ECJ took a firm position, by approving the intervention of the Community’s legislative action in issues directly related to procedural and substantive criminal law (better, by preferring it to the Union’s action), provided the ancillary nature of such instructions to the safeguard of a field controlled by the EC. Much of the ado related to this case law concerned the reasonable suspicion of Member States, that felt that the ECJ had unexpectedly risen to the office of re-distributing the competences of the Community and the Union, taking away from the intergovernmental scenario (the only one that is naturally compatible with State sovereignty) the criminal law competence, at least partly.

These judgments, however, are relevant for this study under another aspect, that is obviously linked to the one just mentioned: the migration of certain measures from the Third to the First Pillar (better, the obligation to regulate some matters only in the Community framework) carries along an automatic expansion of the ECJ’s jurisdiction, given the said difference between its power on EC and EU instruments.88

In other words, the ECJ somehow decided upon its own competence, not under an explicit Kompetenz – Kompetenz rule, but rather favouring a side (the EC) of the overall


88 See, in this respect, the Communication of the Commission to the Parliament and the Council on the implications of the Court’s judgment of 13 September 2005 (Case C-176/03 Commission v Council) of 23 November 2005, doc. COM(2005) 583 final/2, by which the Commission, partly overlooking the ECJ’s considerations, submits a memorandum listing the conditions under which criminal sanctions can be attached to EC law.
system where its jurisdiction is far wider, in comparison with the other side (the EU – intergovernmental one). 

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

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

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

As for the point that the Court has no jurisdiction to rule on the legality of a measure falling within the CFSP, put forward by the defendants (namely the

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89 See the considerations by J.H.H. Weiler in o.c., at p. 2414, fn 26: Kompetenz Kompetenz, as reasonable as it may seem, is a principle that implies supremacy over the competitors.

90 Wee borrow J.H.H. Weiler’s considerations, ibid., at p. 2438: “the analysis [jurisdiction’s] extension is intended [...] to be value-neutral. I do not present these examples as critique of the Court “running wild” or exceeding its own legitimate interpretative jurisdiction.”

91 ECJ, Case C-91/05, Commission v. Council, 2009 ECR I-0000.


93 Another case was decided by the Court of First Instance, which was to first to assess the jurisdiction over II Pillar acts; see Case T-228/02 Organisation des Modjahedines du peuple d’Iran v. Council, 2006 ECR II-4665 (OMPI). In this case, the CFI had accept its jurisdiction on the CFSP measure challenged “only strictly to the extent that, in support of such an action, the applicant alleges an infringement of the Community’s competences”. For a comment on this decision, and for a general overview of the case law on Art. 47 of the EUT, see N. Lavranos, "In dubio pro first pillar: Recent developments in the delimitation of the competences of the EU and the EC", European Law Reporter, 2008, pp. 311-319, at p. 312.

94 See par. 30 of the decision.
Council, backed by various Member States), the ECJ recalled the two above described precedents, and confirmed its entitlement to ensure the Community’s integrity by intervening, if necessary, on CFSP measures. The Court, in other words, “has oversight in the case of a breach of procedure or a conflict over competence (in effect, patrolling the frontier between the first and second pillar)”.

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

This judgment, furthermore, adds upon the principles applied in the 176/03 and 440/05 cases. In particular the “First Pillar supremacy” is spelled out in detail, and it is said to apply also in borderline situations, like the one under consideration. In fact, based on the peaceful assumption that, whenever the EC owns a competence, any measure regarding such competence must be adopted through a Community instrument, the Court further specifies that: a) an act could be based, in the light of its content and scope, on more than one pillar, (better: on legal bases related to different pillars), none of them being of a merely incidental importance. Therefore, such act can indeed be founded on the various corresponding legal bases. Nevertheless, even in cases where the different legal bases are each essential to the content/aim of the act, the Art. 47 of EUT applies, and the First Pillar’s legal basis prevails. In other words, Art. 47 of EUT applies not only when the measure ‘should have been adopted’, but also when it ‘could also have been adopted’ within the Community system. In the ECOWAS case, the ECJ admits that “the contested decision pursues a number of objectives, falling within the CFSP and development cooperation policy [EC] respectively, without one of those objectives being incidental to the other”.

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


98 See par. 77.

99 See par. 99. See also the similar statement regarding the joint action that the contested decision implements, at par. 88: “the objectives of the contested joint action can be implemented both by the Union, under Title V of the EU Treaty, and by the Community, under its development cooperation policy.”
In addition, (b) even when the EC competence invoked to trigger the application of Art. 47 of the EUT is merely potential (that is: the EC has not yet adopted any measure on that issue) or shared with the Member States (mixed competence), it is still capable to preclude EU legislation to step in. As for the first aspect, the ECJ rejects the argument that it would be necessary “to examine whether the measure prevents or limits the exercise by the Community of its competences” before declaring its annulment: the mere attribution of a competence to the EC entitles the ECJ to apply Art. 47 of the EUT.100 As regards mixed competences, instead, the ECJ deems it just irrelevant to underline that Member States could exercise their shared competences, either jointly or individually, therefore precluding a further intervention by the Community.101

This finding is absorbed and synthesised by the formula of paragraph 62 of the judgment, borrowed from the well-known MOX Plant case:102

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

It is significant that the ECJ recalls this precedent, which, on its face, represented a case where the Court availed itself of the powerful position it had been entrusted, to maintain its privileged place in the EC legal system.103 As noted above, the ECJ finds himself in the enviable position where it has the power to decide what is actually under its competence. The identical sentence of the ECOWAS and the MOX Plant cases shows us more clearly how far reaching this conflict of interest can be:

– the ECJ can claim its jurisdiction on a matter (decision), because the latter is part of the EC competences (justification) [MOX Plant]; but at the same time.

100 See par. 60.

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

102 ECJ, Case C-459/03, Commission v. Ireland, 2006 ECR I-4635, par. 93.

103 See F. Fontanelli, G. Martinico, “The hidden dialogue, when judicial competitors collaborate” Global Jurist Advances, Vol. 8, Issue 3, Article 7, available at http://www.bepress.com/gi/vol8/iss3/art7, where it is noted how the ECJ punished Ireland for trying “to elude the exclusive monopoly that the ECJ has over the interpretation and application of EC law, even in cases where the facts at issue are only partially regulated by its norms (mixed agreements).”
the ECJ can decide whether a matter falls within the EC competences (decision), and therefore it has jurisdiction on such matter (consequence) [ECOWAT].

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

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

For our purpose, however, it is more interesting to study the lines of the judgment concerning the legal basis of the regulation at stake. In brief, the claimants contended

104 In this respect, see also I. Kvesko, “Is there Anything Left Outside the Reach of the European Court of Justice?”, Legal issues of economic integration, 2006, pp. 405-422, concerning Case C-293/02, Jersey Produce Marketing Organisation, 2005 ECR I-9543, where the ECJ extended the effectiveness of Community law onto internal matters of a Member State.

105 “Extension is the mutation in the area of autonomous Community jurisdiction”, see J.H.H. Weiler, o.c., at p. 2437.

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


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

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

110 This decision is an ideal follow up of a series of previous cases where the legal bases of “smart sanctions” such as the claimant’s assets’ freezing were challenged. See, for instance, the CFI Case T-228/02, Mojahedines, ECR II-4665, at par. 56: “the Court of First Instance has jurisdiction to hear an action for annulment directed against a Common Position [...] strictly to the extent that [...] the applicant alleges an infringement of the Community’s competences.”
that the regulation providing for freeze of their assets could not be adopted on the basis of Articles 60 and 301 of the ECT, as its purpose fell within the purpose of the CFSP, and therefore the EU’s competence. In particular, \textsuperscript{111} Art. 301 of the ECT could not be used as a ‘bridge’ between the EC normative and the EU’s objectives, nor could Art. 308 of the ECT cover other than “EC’s objectives”\textsuperscript{,112}

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

– Articles 60 and 301 EC\textsuperscript{113} cannot create a link with the Union;

– the regulation’s essential purpose is to combat terrorism, and does not relate directly to the regulation of international trade;

– as seen in the 440/05 case, the aim of the measure univocally affects its legal basis;

– Art. 308 EC’s wording cannot cover the implementation of an EU objective\textsuperscript{114}.

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

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

\textsuperscript{111} See par. 124 of the judgment.

\textsuperscript{112} See par. 126, quoting the Opinion 2/94 of the ECJ: “the fact that an objective is mentioned in the Treaty on European Union cannot make good the lack of that objective in the list of the objectives of the EC Treaty.”

\textsuperscript{113} Art. 60 refers to measures against third countries, rather than against individuals. Art. 301 (see par. 176) cannot build a procedural bridge between the Community and the European Union.

\textsuperscript{114} See par. 199.
But the ECJ continues its reasoning and, quite surprisingly, comes back over Articles 60 and 301 EC (capable, _ratione materiae_, of forming part of the regulation’s legal basis) and over Art. 308 EC: Articles 60 and 301 of the ECT, in the ECJ’s view, are “the expression of an implicit objective” of the Community, that of making it possible to adopt EC measures to implement actions decided on under the CFSP. Therefore, since the regulation intends to pursue one of the EC’s objectives, Art. 308 of the ECT applies.  

The ECJ refrained from using the expansive tool of Art. Of the ECT 308 to draw on EU’s purposes or to create a bridge between the Community and the Union: it was enough to add an implicit objective, and to provide the Community with the respective implicit powers. Moreover, the objective under consideration could be phrased as ‘the EC’s objective of implementing EU’s objectives through economic measures’.  

In this case, contrarily to the ECOWAS case, the Second Pillar’s regulation purpose was probably prevailing on its First Pillar nature. Thus, it would have been difficult to apply Art. 47 of the EUT: nevertheless, the ECJ found that the regulation pertained to the EC’s competence. In this light, we could confirm our first impression (the ECJ, as regards the Pillars’ structure, has somehow anticipated Lisbon’s outcome), even if it is maybe more correct to note that the ECJ’s judicial policy, rather than consisting in a “de-pillarising” action, was rather in the sense of “first-pillarisation”. In passing, we record that, at least as regards the boundaries between the pillars, the ECJ’s strategy in the interpretative competition (_vis-à-vis_ Member States) has not been that of reducing its

115 See parr. 226 and 227.

competences to keep the monopoly, but that of reinforcing them, in order to attract or absorb concurring powers.

**Addendum**

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

Ireland had argued that such Directive could not be adopted on the basis of Art. 95 of the ECT, since its sole (or predominant) objective is to facilitate the investigation, detection and prosecution of crime, including terrorism. Moreover, the use of a EUT legal basis would not encroach upon the powers of the Community, since the use of the word “affect” in the formula of Art. 47 of the EUT would obviously imply a certain degree of interference, that cannot consist in a merely “random or incidental overlap of unimportant and secondary subject matter between instruments of the Community and those of the Union”.

In fact, the amendments brought by Directive 2006/24 to certain Articles of Directive 2002/58 were indeed intended to answer “the need to combat crime,

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118 Once again, a referral to the categories of jurisdictional mutation used by J.H.H. Weiler, o.c., is necessary.


120 Directive 2002/58/EC.

121 See par. 29 of the decision.

122 See par. 32 of the decision.

123 Such amendments essentially resulted in the obligation of the subjects processing data to retain them for a certain period, rather than erasing them as soon as practicable, in order to have them available to law-enforcement authorities at least for six months from the date of communication.
including terrorism”, as the Council concedes.\(^{124}\) Nonetheless, since the effects of these amendments obviously affect the applicability of Directive 2002/58, at least in part, the ECJ seems to uphold the view of the Council, according to which “the adoption of such an instrument [based on Title VI of the EU Treaty] would affect the provisions of that directive, in breach of Article 47 EU”.\(^{125}\)

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

This dividing line is certainly not exempt from criticism and may appear artificial in some respects. I agree that it would be more satisfactory if the overall issue of data retention by the providers of electronic communications services and the detailed rules on their cooperation with the competent national law-enforcement authorities were the subject of a single measure which would ensure coherence between those two aspects. Although it is regrettable, the constitutional architecture consisting of three pillars nevertheless requires that the areas of action be split up. The priority in this context is to guarantee legal certainty by clarifying as far as possible the respective boundaries between the spheres of action covered by the different pillars.\(^{126}\) (emphasis added).

Moreover, the subject matter of the challenged measure was somehow similar to that of the measure challenged in the PNR case,\(^{127}\) and the outcome of that case (the ECJ acknowledged the competence of the EU) led the applicants to assume that a similar result could be appropriate also in respect of Directive 2006/24. On the contrary, the ECJ recalled its precedent in order to remark the differences with the case under consideration, and explain the reason of a totally different conclusion.

124  See par. 42 of the decision.
125  See parr. 45 and 78 of the decision.
127  See supra, footnote 115.
Indeed, the ECJ provided a careful distinction between the two measures: “Unlike Decision 2004/496, which concerned a transfer of personal data within a framework instituted by the public authorities in order to ensure public security, Directive 2006/24 covers the activities of service providers in the internal market and does not contain any rules governing in the activities of public authorities for law-enforcement purposes”. \(^\text{128}\) In sum, the ECJ rejected the claims for annulment, and strengthened the “first-pillar presumption” established by means of the cases commented above.

**5. Conclusions**

It would not be a daring attempt to compare the ECJ’s current behaviour with its heroic approach thirty years ago. After all, the same situation keeps coming cyclically: the Community was born to regulate the market, and held at first a narrow mandate, it extended its reach to include what are now its prerogative competences only through an incremental process: at first they fell within EC’s jurisdiction because of their links with trade policies, then gradually they became matters covered by autonomous EC powers. The ‘wild Court’\(^\text{129}\) undertook the integration mission with commitment, and gave its fundamental contribution in shaping the structure of the Community, and in leading it to a higher level.\(^\text{130}\)

Another hint revealing the likeness of the two critical periods is the current revival of irreconcilable clashes between the ECJ and national constitutional courts on primacy issues: obliging doctrines such as the *Solange* or the Italian counter-limits are probably unable to settle this new set of conflicts,\(^\text{131}\) nor does the contra punctual approach

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\(^{128}\) See par. 91 of the decision.


\(^{131}\) See the three decisions by the German (Judgment of 18 July 2005, 2 BvR 2236/04), Polish (Judgment of 27 April 2005, P 1/05), and Cypriot (Judgment of 7 November 2005, Ap. No. 294/2005) constitutional courts regarding the EAW Framework Decision.
The Court Goes ‘All in’

supported by Advocate General Maduro\(^{132}\) help to solve the crisis: this is due to the long feared actual situation where a EU measure would be supposed to supersede a national constitutional norm, the deadlock is inevitable, at the moment being.\(^{133}\)

Now, again, the time is ripe for the Community to move one step beyond: non-Community competences are often overlapping the EC jurisdiction,\(^{134}\) and sometimes it is not easy to distinguish the essential legal basis of an EC/EU measure, as the above described cases point out. The true mandate of the EC judicature, little by a little, is starting to include the typical obligations of an ordinary local court: urgency procedures, extended standing for individual claims and for actions for damages, an increasing difficulty to declare its own incompetence as regards a challenged measure, on the basis of its content or aim; it is no surprise that the Reform Treaty provides for the transformation of the CFI in a veritable General Court,\(^{135}\) for the possibility to establish new specialised tribunals,\(^{136}\) for a generalised jurisdiction over the former I and III Pillars, and for a new liability of the EU and its bodies.

At the same time, the ECJ’s double nature (constitutional tribunal / supreme court) is put to test more than ever. The enormous effort made to interpret the growing system under a constitutional perspective cannot be interrupted, at the cost of blending constitutional adjustments on, and application of, the same law.\(^{137}\) On the other hand, the ECJ’s interpretive task is absolutely necessary to ensure at least some minimum standard of judicial review on the entire set of EC and EU law (see above the preliminary ruling as being the only instrument of the ECJ entailing a quasi-universal reach).

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133 This situation is described in M. Kumm, “European Constitutional Pluralism and the European Arrest Warrant: Contrapunctual Principles in Disharmony”, Jean Monnet Working Paper No. 10/05, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=934067. The next episode of this renewed struggle is just about to be screened: presumably in November 2008 the Bundverfassungsgericht will issue its judgment on the very same matter of the ECJ’s case Mangold (Case C-144/04, Werner Mangold v. Rüdiger Helm, 2005 ECR I-9981, where the ECJ made general EC principles prevail over German constitutional interests).


135 See Articles 254 and 256 and of the RT.

136 See Art. 257 of the RT.

137 This is one of the many harsh allegations raised by Roman Herzog, o.c.
Therefore, both the “constitutional tribunal” and the “supreme court”’s mission is fuelled by the principle of rule of law, as specified in the dense case law we have described above. The principle of rule of law also serves as a means of self-restraint, which prevents the ECJ from amplifying its interpretive powers in an inopportune direction.

Moreover, the consciousness of the whole of EC and EU law's need for constitutionality has forced the ECJ to involve national courts when the EU system is not capable of ensuring a complete protection against EU measures. The ECJ proved wise in the abovementioned Segi – Gestoras case: it kept the responsibility of reviewing the solidity of the overall III Pillar system, but entrusted the national courts with the indispensable task of protection of individuals, establishing a complementarity device that can be interpreted as a ‘judicial subsidiarity’.138

There is nothing better than the possibility to test our assumptions on the ECJ President’s words and declarations, in charge when most of the facts described herein occurred, Prof Vassilios Skouris.139 He explicitly confirmed the transplant of legal principles of the Community onto the Union in the AFSJ, and asserted:

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

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


These words reflect our considerations about the ECJ’s (constitutional) activism, the central role of the rule of law and the judicial protection principle.140

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

These lines, instead, strengthen the “supreme court’s” mandate: it is necessary to ensure the uniform interpretation and application of law, “especially in the new field of AFSJ”;141 but other new fields are just about to land on the judges’ desk, and we deem that the ECJ or its successor, the Court of Justice, will use its toolbox to fix the coherence of the EU system once again.

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140 Ibidem, at par. 58: “C’est toujours dans l’esprit des principes déjà développés dans le cadre du marché intérieur que la Cour a abordé la coopération judiciaire en matière pénale.”

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

Giulio Itzcovich*

This article provides an account of the legal reasoning of the European Court of Justice (ECJ). On the one hand, there seems to be no absolute specificity of the legal interpretation methods of the ECJ: its decisions are drafted in such a way as to be comprehensible to the national legal communities, and the Court employs interpretative arguments which are largely common to the legal traditions of the Members States. On the other hand, the case law of the ECJ has been characterized by an extensive application of the so-called teleological argument, i.e. it has often been purpose-oriented. In light of the interpretative methods employed by the Court, the article aims at figuring out what kind of conception of the EC Treaties underlines its case-law. The article suggests that in the ECJ’s view the EC Treaties give rise to a constitution of a special kind: a sort of project-constitution, a constitution-in-progress or dynamic constitution.

* Researcher, University of Brescia. I am grateful to Giuseppe Martinico and to all participants in the workshop “The ECJ under siege: new constitutional challenges for the ECJ”, Sant’Anna School of Advanced Studies, Pisa, 19-20 December 2008, for their suggestions and observations. A special thank goes to Stanislas Adam and Riccardo Guastini for their many helpful comments and corrections to an earlier version of this article. The errors that remain are, of course, my own.
The Interpretation of Community Law by the European Court of Justice

Such a constitution intends not only to establish the rights and duties of the contracting parties, but also to initiate a constitutional project which is open-ended and evolutionary.

1. Premise

In the legal literature on European integration there is a rather stereotyped tendency to constantly discover new elements of rupture with the past. In the legal domain, at every step we are confronted with some revolutionary novelty arising from European institutions and practices; on a regular basis, we face innovations which are said to mark significant developments in respect of the traditional forms of international governance as well as in respect of the traditional forms of national federalism. The vast literature on the interpretation criteria followed by the European Court of Justice (hereafter the ‘ECJ’) only partially escapes this tendency.1 Surely the experience of European legal integration

has known many revolutionary ruptures and, also from the viewpoint of legal argumentation, it is true that the interaction between jurists coming from different legal experiences has produced some novelties: for example, an increasing hybridization and crossover effect (‘Europeanisation’) between patterns of legal reasoning which are characteristic of different national legal cultures. However, this phenomenon has been largely tempered by the typically French syllogistic judicial style of ECJ’s rulings. Moreover, despite the novelties identified, the literature on Community law interpretation must acknowledge that the interpretation criteria and, more generally, the legal argumentation techniques of the ECJ are essentially the same ones which are familiar to the national legal contexts. It would be surprising if this were not the case, since the judges of the ECJ are trained within the national legal systems and, what is more, the judgments of the Court are generally expected to be implemented by the national courts: their grounds must thus be perceived as being legally sound, and not merely political or evocative.

However, even if there is no absolute specificity of Community law as to its interpretation, there are nonetheless some peculiarities of the ECJ’s case law which are worth to be stressed, systemised and theoretically discussed. Building on the existing literature on Community law interpretation, this study will make some observations in this regard. I will avoid the usual approach of deriving normative consequences and directives from a theoretical reconstruction of the legal nature of the European Community/European Union (hereafter the ‘Community’). On the contrary, I will


3 J. Bengoetxea, N. Mac Cormick, L. Moral Soriano, Integration and Integrity, o.c., p. 48: “there is no special case of European legal reasoning, nor anything particularly European about the way the ECJ proceeds to justify its decisions”.

investigate the legal nature of the Community on the basis of a survey of the interpretation criteria actually employed by the ECJ. The question I will address is whether Community law is generally conceived and interpreted as international law or as constitutional law, and, in the latter case, I will try to explore which kind of constitution it embodies according to the case law of the ECJ.

Let us preliminary remark that the subject of this study is the interpretation of Community law, not the consistent interpretation of domestic law in the light of Community law. This topic is highly controversial after the Marleasing judgment, in which the ECJ stated that national courts are bound to interpret their domestic law “as far as possible, in the light of the wording and purpose of the directive” in order to avoid conflicts between national law and Community law. The requirement of consistent interpretation and the topic of the purposive and result-oriented approach to statutory interpretation give rise to various interesting issues – practical problems and also problems of theoretical import – which nonetheless exceed the subject area of this study.

2. Rules on Community Law Interpretation – The Problem of the Sources

The treaties establishing the European Communities and their subsequent modifications do not contain any provision concerning the interpretation of Community law. Moreover, there are no provisions of secondary Community law (regulations, directives, decisions, etc.) aimed at regulating the interpretation of the EC Treaties, or the interpretation of the legal instruments adopted by the Community. The Charter of Fundamental Rights of the European Union (also known as ‘Nice Charter’) marks an exception, as it details the criteria to be followed in its interpretation. The European Council at Nice, however, did not include the Charter in the Nice Treaty and therefore the Charter is not legally binding – it is a typical act of soft law. The Treaty establishing a Constitution for Europe and the Treaty of Lisbon integrated the Charter within primary Community law. After the negative referenda in France, the Netherlands and Ireland, the future of the Charter

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remains uncertain. As of today, the Charter has mainly a political value and, at the most, it might play an auxiliary role in the implementation of the general principles of Community law.\textsuperscript{6} I will not deal here with a regulation concerning the criteria to be adopted in interpreting a document which almost lacks any legal relevance, although such regulation is of some interest with regard to the issues of ‘multilevel’ protection of fundamental rights within the EU.\textsuperscript{7}

As already mentioned, there is no provision concerning the interpretation of Community law, there is no explicit legal norm on the matter. By ‘explicit legal norm’ I mean here a norm establishing the right meaning, among all possible meanings, of a legal provision.\textsuperscript{8} Explicit legal norms are codified in normative texts, which are (a) texts, i.e., written documents, that (b) encompass norms which are generally regarded as binding, authoritative, mandatory upon every interpreter, and endowed with \textit{erga omnes} effects. This does not mean, however, that we also lack implicit legal norms on the interpretation of Community law, that is, norms which are not based upon normative texts, either because (a) they are customary norms – they are not derived by texts, but emerge from a practice which is constantly followed under the belief that it is obligatory, or because (b) they are norms established by the legal doctrine or in the case law – they do not stem from an authoritative source; but from an influential source; they have no binding force, but they enjoy a persuasive force.

In fact, in Community law we may find some criteria of interpretation which are established by the case law of the ECJ: in other words, there are certain interpretation techniques which the ECJ is used to following but which are not codified in a normative text, because they have not been prescribed by the Community legislator. Moreover, these interpretation criteria have often been ‘reconstructed’ (described and/or prescribed)

\textsuperscript{6} The Charter of Nice has played such an auxiliary role in some judgments of the ECJ: see for instance ECJ, Case C-540/03, \textit{Parliament v Council}, 2006 ECR I-5769, on family reunification (“While the Charter is not a legally binding instrument, the Community legislature did, however, acknowledge its importance”), and ECJ, Joined Cases C-402/05 P and C-415/05 P, \textit{Kadi v. Council and Commission}, 2008, not yet published, on the freezing of funds of persons suspected of terrorism.


by Community legal doctrine. Legal doctrine enjoys a persuasive force: it is not binding upon the interpreter, but it interacts with the system of courts and ends up directing the judges; the legal doctrine formulates guidelines and criteria which may be actually followed because they are influential, and not because they are formally binding.

3. Community Law and International Law – Autonomy and Heteronomy

In order to ascertain the interpretation methods of Community law it is necessary to analyse Community doctrine and jurisprudence. Before engaging in such an analysis, however, it is necessary to take into consideration one possible objection to this approach. One may indeed argue that a formal regulation of Community interpretation exists, and that such regulation ought to be found in the Vienna Convention on the Law of Treaties of 1969.

Article 31 of the Vienna Convention provides that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. In addition, the interpreter is bound to take into account “any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions” and “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”.

The last rule is fairly important for our analysis. It means that the actual behaviour of the contracting parties is a relevant factor for interpretation of treaties. In case of doubt on the content and extension of the duties accepted by the states, it is necessary to take into consideration, among other things, the way in which the parties intended to comply with the treaty when they attributed to it a certain content and a certain scope. The will of the parties is the formal source of validity of the treaty and, in order to trace it, it is necessary to pay attention to conduct adopted by the parties after the execution of the treaty.

All this is not surprising. International treaties are, to a certain extent, contracts between sovereign states. It is a very traditional and perhaps old-fashioned conception of treaties, but it still holds some descriptive and normative force. It is – or maybe was – generally said that, since the contract stems from the convergence of the wills of the private parties, treaty derives their validity from the gathering of the ‘wills’ of the states. This conception is reflected, among other things, in the legal terminology: the German word Vertrag means contract as well as treaty, in English, French, Spanish and in other
languages the parties of a treaty are called ‘contracting parties’; we also speak exchangeably of ‘international treaty’ and ‘international convention’.

However, the fundamental theoretical point is the following: an international treaty is, just like a contract, an expression of autonomy. In the case of contracts one generally speaks of ‘private autonomy’; in the case of treaties one speaks of external sovereignty, i.e., the capability of the state of becoming a party to an international treaty and of binding itself through manifestations of will. When we have a legal source that is an expression of autonomy, the individual who is bound by the legal norm is the same one who has contributed to create the norm and to endow it with certain content. Statutes, on the contrary, are not an expression of (private) autonomy but rather of (public) authority. To put it differently, statutes are heteronomous legal sources. The author of a statute may be bound by the norm he has enacted, but such norm is in general directed to regulate the behaviour of a community of people who have not directly taken part into its enactment.

This has some consequences on the interpretation criteria of the heteronomous legal sources and of the autonomous legal sources. In the case of contracts, the interpreter may be called to take into account the “common intention” of the contracting parties and, in order for him to be able to assess such common intention, he may be required to pay attention to “their overall behaviour, even if subsequent to the conclusion of the contract” (Article 1362 Italian Civil Code). The same applies, as we have already seen, in the case of treaty interpretation. So, to take just one example, in one of the most influential treatise on international law of the 20th century in Continental Europe we may read that “the international treaty is not only called convention, but it is actually a convention [Vertrag: treaty, contract]. Therefore, for its interpretation the principles which have been developed by private law doctrine are largely applicable”.$^{9}$ On the contrary, in case of statutory interpretation, the interpreter is required to give effect to the literal meaning, i.e., “the sense [...] exposed by the proper meanings of the words”, and to the will of the legislator (Article 12 Preliminary Provisions of the Italian Civil Code). It would make no sense that the judge, in order to determine the extension of the ban on theft, were to take into consideration the general behaviour of the citizens or, in hypothesis, the behaviour of a class of citizens, such as the thieves.

These observations are pretty obvious, but they bear an important consequence on the problem of Community law interpretation, as they hint at a fundamental theoretical

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and political issue, which may be expressed in the following terms: is Community law an expression of the autonomy (better, sovereignty) of the states, or is it an autonomous, authoritative source of law, which is binding upon the states even when it conflicts with their wills?

To this question, there is no clear-cut, simple and neutral solution. As a matter of fact, it is a question which still sharply divides the legal theory on European integration. Is the Community an international organisation whose effectiveness still depends on the ongoing will of the states to comply with its norms? Or may the Community be compared, to a certain extent, to a state, and in particular to the federal state, because it is capable of enacting norms that are binding and effective upon the states and their citizens even when they conflict with state’s will and interests?

One may think to a differentiated answer. It may be argued that EC Treaties continue to be international treaties, i.e., an expression of a common will of the states, and that the Community secondary law, on the contrary, is an expression not of state sovereignty, but of the authority of Community institutions. Nonetheless, if we are interested in the interpretation of Community law as it is practised by the ECJ, this differentiated solution has no bearing on our topic: with regard to Community law interpretation, no difference can be drawn between primary and secondary Community law. Although the ECJ tends to be more creative when it interprets the Treaties, the legal arguments and interpretation criteria it employs seem to be essentially the same ones in the case of primary and secondary Community law.

It is perhaps proper to circumscribe the importance of the alternative which opposes the federal state and the international organisation, and which conceives Community law as being either an expression of the sovereignty of the states or a limit to their sovereignty. With regard to the legal nature of the Community, already in the early sixties a standard answer had emerged from the scholarly debate: the Community is not a federal state, not even a federal state ‘in the making’, nor is it an international organisation; on the contrary, it shall be regarded as a *sui generis* legal order, i.e., as a legal order which remains distinct both from federal law and from international law.10 This was a

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paradoxical definition of the legal nature of the Community: being purely negative and content-void, it showed the impossibility of a 'systematic capture' of the Community and it aimed solely at expressing the crisis of the international/national law dichotomy.

Moreover, with regard to the interpretation of Community law, it is possible to set aside the controversy on the legal nature of the Community, in order to approach the topic in a different way, by simply taking into consideration the interpretation techniques actually used by the ECJ. That is to say, instead of deriving directives on the better ways to interpret Community law from general theories on the nature of the Community (international, federal or *sui generis*), it is possible to proceed in the opposite way, by looking at the way in which, as a matter of fact, Community law is interpreted and applied, in order to sketch out some hypothesis on the legal nature of the Community. Staying on this analytical and realistic plan, as it is opposed to a dogmatic and conceptualist approach, we may make the following observations.

One may note that the possibility of extending the interpretation criteria established by the Vienna Convention to Community law, or even solely to Community primary law, is precluded by the long-standing and well-established case law of the ECJ, which denies that Community law may be equiparated to international law. In the leading case *Van Gend en Loos* of 1963, the ECJ still considered Community law as constituting “a new legal order of international law”, but soon the ECJ started to underline the autonomy of Community law until it came to their sharpest distinction already in the *Costa* case of 1964.11

Why did the ECJ, already in the first part of the Sixties, feel the necessity to differentiate Community law from international law? One of the reasons surely has been the will of the ECJ to exempt Community law from some well-established international law doctrines and interpretation methods. Amongst these interpretation methods, there was, as a direct consequence of the principle according to which limitations of sovereignty should not be presumed, that the treaties should be interpreted strictly. To presume limitations of sovereignty, i.e., to create new obligations upon the states by means of legal interpretation, would have meant a multiplication of potential breaches to

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conventional international law. In order to avoid international conflicts, the early legal
document, from Grotius and Vattel since the Lotus decision of the Permanent Court of
International Justice, recommended to interpret international law in a strict way, so that
mutual rights and duties of the states were to be clearly defined; sometimes, that doctrine
used to remind the general private law principle of the favor debitoris.\footnote{Permanent Court of International Justice, SS Lotus Case: France v Turkey, 1927 PCIJ Rep Ser A 10, p. 18: “International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages [...]. Restrictions upon the independence of States cannot therefore be presumed”. After the II World War, the growing tendency toward international organisation eroded this hermeneutic principle. See International Court of Justice, Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, ICJ Reports 1949, p. 174, at p. 180: “the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice”. See also H. Lauterpacht, “Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties”, The British Yearbook of International Law, 1949, pp. 48-85.}

Moreover, a fundamental interpretation principle was the one already mentioned,
which required – and which still requires, according to the Vienna Convention – to take
into account “any subsequent practice in the application of the treaty which establishes
the agreement of the parties regarding its interpretation”. But in the Sixties and in the
Seventies the ECJ and the Community legal doctrine wanted to broaden, rather than to
limit, the mutual rights and duties of the states, by extending the scope and the
effectiveness of Community law; in order to achieve that goal, the ECJ and the
Community legal doctrine should conceive Community law as constituting an
autonomous legal order, i.e., a legal order which distinguishes itself from international law
ECJ and the Community legal doctrine aimed at transforming Community law in a
heteronomous, authoritative legal source: Community law should rule not just as an
expression, but also as an effective limit to States’ sovereignty.
The achievement of this transformative objective could not but reflect upon the criteria adopted in the interpretation of Community law: evolutionary and dynamic interpretation of Community law should become the main instrument of such policy. This will be shown in the following pages, which will focus principally, although not exclusively, on the Community law interpretation during the years of the constitutionalization of the Treaties.

4. The Preliminary Ruling Procedure

Before we move to the analysis of the interpretation methods of the ECJ, it is necessary to consider the subject of the preliminary ruling proceedings. The very existence of this procedure explains why it is so important what the ECJ says about the interpretation of Community law. The reason is that the preliminary ruling procedure is designed to secure the uniform interpretation of Community law throughout the Community. According to Article 234 (formerly 177) of the EC Treaty, the ECJ has jurisdiction to give preliminary rulings concerning the interpretation of the Treaty and the validity and interpretation of acts of the institutions of the Community. Where any such question is raised in a case pending before a national court, the court can (or must, if it is a court of last instance) refer the question to the ECJ.

Following Wróblewski, in legal theory it is common to distinguish three uses of the word ‘interpretation’. Firstly, interpretation in the widest sense signifies an understanding of a cultural object – e.g., interpretation of a painting. Secondly, interpretation in a wide sense is meaning attribution to any spoken or written language: interpretation signifies understanding of language. Thirdly, interpretation in a strict sense refers to the situation in which there are doubts concerning the proper understanding of a text: interpretation signifies removing these doubts. Given this last strict significance of interpretation, we may say that Article 234 establishes the ECJ’s monopoly on the interpretation of Community law. Obviously the effectiveness of the interpretation

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15 See also Article 292 (formerly 219) EC Treaty: “Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for therein”. In the *Mox-case* (ECJ, Case C-459/03, *Commission v Ireland*, 2006 ECR I-4635), the ECJ concluded that, by instituting dispute-settlement proceedings against the UK under the UN Convention on the Law of the Sea, Ireland had violated the ‘interpretation monopoly’ of the ECJ under Article 292 EC Treaty: according to the ECJ, the provisions of the UN Convention formed an integral part of the Community legal order, and thus Ireland should have abstained from submitting a dispute concerning its interpretation and application to an arbitral tribunal.
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monopoly depends upon the willingness of national judges to comply with their duty to address the ECJ questions on the interpretation of Community law. Nonetheless, from a legal point of view, it is apparent that EC law attributes an interpretation monopoly to the ECJ. To describe such monopoly, Community jurists often say that in preliminary ruling proceedings the ECJ is competent to interpret Community law and the national judge is competent to enforce it. If the national court can enforce Community law without interpreting it, because its meaning is clear, then the national court must enforce it; if, instead, it is necessary to make recourse to interpretation because there are doubts on the meaning of Community law, sooner or later the question on the interpretation must be referred to the ECJ.

This distribution of competences between the ECJ and national judges may be reconstructed in terms of interpretation vs. application and in terms of hard cases vs. easy cases. If the case pending before the national court is easy because the meaning of Community law is clear and non-controversial, then the national judge must enforce it; if the case is hard because there is some doubt on the meaning of a Community provision, then the national judge of last instance must refer it to the ECJ.

However, as we will shortly see, this clear-cut distinction may not be in practice as clear as one might think.

5. The Hard Distinction between Easy and Hard Cases – The Cilfit Case

Within the preliminary ruling proceedings the distribution of competences between national courts and ECJ is centred on the distinction between interpretation (in the strict sense) and application (or enforcement) of Community law, or, to put it differently, it is centred on the distinction between easy cases, where no interpretation is required, and hard cases, where it is necessary to interpret. But how shall we distinguish between hard cases and easy cases, i.e., between interpretation and immediate understanding followed by an unproblematic application?

16 The distinction between interpretation and application has originally been drawn by the ECJ, Joined Cases C-28/62, C-29/62 and C-30/62, Da Costa en Schaake v. Administratie der Belastingen, 1963 ECR 61: "When it gives an interpretation of the Treaty in a specific action pending before a national court, the Court [of Justice] limits itself to deducing the meaning of the Community rules from the wording and spirit of the Treaty, it being left to the national court to apply in the particular case the rules which are thus interpreted".
The ECJ has decided that the very notion of interpretation under Article 177 (now 234) may be subject to interpretation controversies. The issue has been confronted by the ECJ in the Cilfit case. The Italian Corte di Cassazione had referred the ECJ a question concerning the scope and the limits of the duty to submit a preliminary ruling request to the ECJ under Article 177. The Corte di Cassazione asked the ECJ whether Article 177 lays down an obligation to submit the case which precludes the national court from determining if the question raised is justified or whether Article 177 makes that obligation conditional on the prior finding of a reasonable interpretation doubt. In other words, is the national judge always bound to suspend the proceeding and to refer the question to the ECJ when one of the parties to the case raises some doubts on the interpretation of Community law? This would certainly be an excessive conclusion: the parties would have been given the right to suspend the proceedings at their discretion, by submitting groundless and purely speculative questions. On the other hand, a broad and penetrating control of the national judge on the soundness of the interpretation question would contravene the ratio legis of the preliminary ruling proceeding, because such control could jeopardize the objective of a uniform application of Community law among all the Member States of the Community.

In the Cilfit case, the ECJ adopted a midway solution between these two possible extremes. The ECJ ruled out that the national judge would be bound to suspend the proceedings and refer the question to the ECJ when the solution of the interpretation question is “not relevant”, because “the answer to that question, regardless of what it may be, can in no way affect the outcome of the case”. In addition, the ECJ ruled out the existence of a duty upon the national judge to refer to the ECJ when the interpretation question, although relevant, is “materially identical with a question which has already been the subject of a preliminary ruling in a similar case”, or when “previous decisions of the ECJ have already dealt with the point of law in question, irrespective of the nature of the proceedings [...] even though the questions at issue are not strictly identical”.

In case of an interpretation question which is relevant and substantially new, the ECJ held that the national judge is obliged to suspend the proceedings and refer the question to the ECJ, “unless it has established that the correct application of Community law is so

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17 ECJ, Case C-13/61, De Geus en Uitdenbogerd v. Bosch, 1962 ECR 89: “Since the meaning of the words ‘the interpretation of the Treaty’ in Article 177 may itself raise a question of interpretation, the National court is free to put its request in a simple and direct form, leaving to the Court of Justice to rule on that question only within the limits of its jurisdiction”.

18 ECJ, Case C-283/81, Cilfit v. Ministero della Sanità, 1982 ECR 3415.
obvious as to leave no scope for any reasonable doubt”. Any reasonable doubt must thus be solved by the ECJ and solely by the ECJ. Instead, when the doubt is unreasonable, because it amounts to a pretext to suspend the proceedings, then the national court can decide not to refer the matter to the ECJ and it can directly rule on the ‘question’. The point is that in the former case – the hard case, the reasonable doubt – the interpreter enjoys discretion, and such discretion must be exercised by the ECJ, while in the latter case – the easy case, the unreasonable doubt – the interpreter enjoys no discretion, because he is clearly bound by the letter and spirit of the law and no genuine interpretation question arises.

However, the distinction between easy cases and hard cases is highly problematic: it is a distinction which is more or less clear in theory, but in practice it cannot be easily drawn. The distinction between the cases in which the judge enjoys discretion and the cases in which he does not enjoy such discretion depends – in turn – on a highly discretionary decision of the judge. It may happen – and it has happened on several occasions – that a judge, by holding that the case at hand is clear and that there is no doubt whatsoever, adjudicates in a way which is incompatible with Community law and the case law of the ECJ. The ECJ was fully aware of this danger and therefore in the Cilfit case it laid down directives concerning the criteria to be adopted by the national judge in order to assess the soundness of the preliminary question.

19 R. Guastini, L’interpretazione dei documenti normativi, Milano, Giuffrè, 2004, pp. 36 ff.; R. Guastini, Dalle fonti alle norme, o.c., pp. 77 ff., at p. 80: “the uncertain boundaries between ‘light’ and ‘penumbra’ are the object of interpretation decisions [...] the penumbra is the outcome of the discretion of the interpreters”. See also J. Bengoetxea, N. MacCormick, L. Moral Soriano, Integration and Integrity, o.c., at p. 55: “The distinction between clear cases and hard cases is pragmatic. Cases are problematized or clarified depending on different circumstances”.

20 Most recently, see Italian Consiglio di Stato, Judgment of 08/08/2005, n. 4207, Giurisprudenza costituzionale, 2005, pp. 3391 ff.; by making reference to – and by misinterpreting – the Cilfit judgment of the ECJ, the Consiglio di Stato avoided to refer a preliminary question which was undoubtedly relevant (see G. Itzcovich, Fundamental Rights, Legal Disorder and Legitimacy: The Federfarma Case, Jean Monnet Working Paper, No. 12/08, http://www.jeannotworkingpapers.org/papers/08/081201.html). Among the most famous cases of omitted preliminary reference, see the Cohn-Bendit case in 1978 (French Conseil d’État, Judgment of 22/12/1978, n. 11604, Common Market Law Review, 1979, pp. 701 ff.), in which the French Council of State openly challenged the ECJ, as it blocked a request from a lower French administrative court for an ECJ preliminary ruling, and it held that the Community directives cannot be relied upon by individuals in action for annulment of individual administrative decisions (a deportation order on the well-known political agitator Daniel Cohn-Bendit).
We already mentioned the first criterion laid down in the *Cilfit* case: there is a genuine ‘interpretation question’ only when the “correct application of Community law is [not] so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved”. Moreover, if the judge comes to the conclusion that the case is clear and that it poses no serious question, that is not enough: “the national court or tribunal must [also] be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice”. In order to conduct such evaluation, the national judge shall take into consideration “the characteristic features of Community law and the particular difficulties to which its interpretation gives rise”.

What are these characteristic features and particular difficulties? In the *Cilfit* case the ECJ held that the national judge shall bear in mind that “Community legislation is drafted in several languages and that the different language versions are all equally authentic. An interpretation of a provision of Community law thus involves a comparison of the different language versions”. Moreover, even where the different language versions are entirely in accord with one another, the national judge shall bear in mind that “Community law uses terminology which is peculiar to it”, because it employs “legal concepts” that “do not necessarily have the same meaning in Community law and in the law of the various Member States”. Finally, the ECJ ruled that “every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied”.

6. The Interpretation Methods of Community Law

So, in the *Cilfit* case the ECJ tries to clarify what is a reasonable interpretation doubt and proposes a set of criteria for interpreting Community law. By borrowing and freely adapting a useful classification of Bengoetxea,21 it is possible to order such criteria in the following way:

1. **Linguistic (or semiotic) criteria.** They derive legal arguments from the semantic and syntactic features of the language in which legal provisions are expressed, or from the comparison of the different language versions in which legal provisions are formulated (*Cilfit*: the judge shall bear in mind that “Community legislation is drafted in several languages” and that “Community law uses terminology which is peculiar to it”).

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21 J. Bengoetxea, *The Legal Reasoning*, o.c., pp. 234 ff. See also J. Bengoetxea, N. MacCormick, L. Moral Soriano, *Integration and Integrity*, o.c., p. 58 (Table 3.1.).
2. Systemic (or contextual) criteria. They take into consideration the normative context in which the legal provision is placed and derive consequences – in a logically binding way or, more often, in a way which is not logically binding, but which is persuasive – from other legal norms belonging to the same normative text, or belonging to the same area of the legal system, or belonging to different areas of the same legal system (Cilfit: “every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole”). The comparative argument may be ranked amongst these systemic criteria of interpretation, because it derives interpretation consequences from legal norms belonging to different legal systems.

3. Dynamic criteria. They take into consideration not the wording of the provisions, nor the ‘static system’ to which they belong, but the objectives which Community law pursues, or which Community law should pursue according to the interpreter. The foreseeable consequences of the decision are taken into consideration, as well as the opportunity of granting the effectiveness of Community law and the opportunity of promoting the development of Community law towards its pre-eminent purpose: the integration of the legal orders of the Member States within a supranational legal order and their evolution towards “an ever closer union among the peoples of Europe”, according to the words of the Preamble of the Treaty (Cilfit: “every provision of Community law must be [...] interpreted in the light of [...] the objectives [of Community law] and to its state of evolution at the date on which the provision in question is to be applied”).

In this respect, it is possible to recall another leading case: in the Costa decision the ECJ invented the famous phrase “the spirit, the general scheme and the wording of the EEC Treaty”. Without forcing the text, it can be said that the ‘wording’ corresponds to the linguistic criteria, the ‘general scheme’ corresponds to the systemic criteria and the ‘spirit’ of the Treaty corresponds to the dynamic criteria of interpretation.

6.1 The ‘Wording’ of Community Law – The Linguistic Criteria

Among the linguistic criteria employed by the ECJ there is the traditional one of the ‘proper meaning of the words’, which is at the basis of literal interpretation and a contrario reasoning. In claris non fit interpretatio: if the meaning of a provision is clear, then there is no room for interpretation.

However, this is certainly not the most typical argumentative directive followed by the ECJ. On the contrary, on several occasions the ECJ has departed from the proper
and ordinary meaning of the words;\textsuperscript{22} its systemic and evolutive interpretations of the EC Treaties have been so bold as to give the impression that the Court perceived its role not as that of a judge who is bound to apply the law ‘as it is’, but as that of an autonomous political actor, which is capable of pursuing and imposing its own constitutional policy, shaping the law ‘as it ought to be’.\textsuperscript{23} One may praise or criticize such judicial activism; however, there is no doubt that the ordinary meaning of the words is not a conclusive argument within the ECJ’s case law: it is an argument that may be overridden by competing considerations, which may suggest the interpreter to adopt a more creative approach.

With regard to linguistic criteria one further point shall be stressed. The proper meaning of the words may be the meaning which anybody with normal linguistic skills and knowledge would understand when, in a given context, a certain word or a combination of words is proffered: it is the proper meaning of the words in ordinary language. But the proper meaning of a word may also be the meaning which a jurist understands when a legal concept is used: this is the proper meaning of the words of the legal language, and it can hardly be distinguished from the ‘systemic meaning’ of the provision – thus, linguistic criteria of interpretation and systemic criteria may often overlap. The technical meaning of the legal concepts is regularly subject to controversy, it is described but also modified (‘constructed’) by the legal doctrine, it may vary significantly from state to state and, within the same state, it may vary from court to court.

Since its first judgments, the ECJ has maintained that it is not bound by this kind of ‘proper meaning’ of the words of the legal language – i.e., the technical meaning of the legal concepts as it results from the legal culture of the Member States. The ECJ has thus vindicated its power to create a new ‘proper meaning’, a meaning which is specific to

\begin{itemize}
\item \textsuperscript{22} During the so called ‘constitutionalisation’ of EC Treaties, the ECJ departed from literal interpretation in all its leading cases, such as Case C-26/62, Van Gend en Loos v. Administratie der Belastingen, 1963 ECR 3; Case C-6/64, Costa v. ENEL, 1964 ECR 1141; Case C-29/69, Stauder v. Stadt Ulm, 1969 ECR 419; Case C-11/70, Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, 1970 ECR 1125; Case C-41/74, Van Duyin v. Home Office, 1974 ECR 1337; Case C-120/78, Rewe v. Bundesmonopolverwaltung für Bramtwein, 1979 ECR 649 (‘Cassis de Dijon’). On this case law, some references supra at note 11.
\end{itemize}
Community law and which best fit to its enforcement. For instance, the ECJ held that it is within the jurisdiction of the ECJ, and not within the jurisdiction of the national legal orders, to decide what is a court or tribunal within the meaning of Article 234 (former Article 177) of the EC Treaty: even the Dutch Arbitration Tribunal of the Fund for non-manual workers employed in the mining industry,\(^\text{24}\) the Appeals Committee for General Medicine of the Royal Netherlands Society for the Promotion of Medicine,\(^\text{25}\) or even the Finnish Rural Businesses Appeals Board,\(^\text{26}\) are, according to the ECJ, courts and tribunals under Article 234, and are therefore competent to submit to the ECJ a request for preliminary ruling. The very fact that “Community law uses terminology which is peculiar to it” (ECJ, \textit{Cilfit}) may be seen as a consequence of the autonomy of Community law, which means autonomy from international law as well as autonomy from domestic laws.

With regard to linguistic criteria of interpretation, it is worth noting that the standard of the proper meaning of the words encounters an additional difficulty in Community law. Community provisions, in fact, are drafted in all the official languages of the European Union, which currently amount to 23 official languages for 27 Member States. It is clear that such linguistic complexity may produce not just one but several ‘ordinary meanings’ and raise serious interpretation questions when the different language versions are not entirely in accord with one another. How to choose? Which is the ‘most official’ language of the Community?

The ECJ denies the existence of a ‘most official’ language within the Community and therefore it cannot rely on a favourite and most reliable linguistic version of the provisions it interprets.\(^\text{27}\) When two or more versions diverge, the general approach of the ECJ has been to interpret the provision in a way which is consistent with all except one versions.\(^\text{28}\) If this is not possible, the ECJ tends to make recourse to systemic

\(^{26}\) ECJ, Joined Cases C-9/97 and C-118/97, Jokela, 1998 ECR I-6267.
\(^{27}\) ECJ, Case C-296/95, \textit{The Queen v. Commissioners of Customs and Excise, ex parte EMU Tabac and others}, 1998 ECR I-1605: “All the language versions must, in principle, be recognised as having the same weight and this cannot vary according to the size of the population of the Member States using the language in question”.
\(^{28}\) ECJ, Joined Cases C-283/94, C-291/94 and C-292/94, \textit{Denkavit Internationaal and others v. Bundesamt für Finanzen}, 1996 ECR I-5063: “It follows from the wording of that provision, and in particular from the use of the present tense [...] in all language versions except the Danish, that…”; see also ECJ, Case C-30/77, \textit{Régina v. Bouchereau}, 1977 ECR 1999: “A comparison of the different language versions of the provisions in question show that with the exception of the Italian text all the
interpretation and to teleological or consequentialist interpretation. The Court takes into consideration, on the one side, the normative context to which the provision belongs and, on the other side, it takes into consideration its purpose, or the purpose of the piece of legislation to which the provision belongs: “The different language versions of a Community text must be given a uniform interpretation and hence in the case of a divergence between the versions the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part”.29

6.2 The ‘General Scheme’ of Community Law – The Systemic Criteria

The systemic criteria of interpretation assume that legal provisions shall be interpreted, in case of doubt, in a way which is consistent with the ‘system’, that is to say, coherent with the principles, the rules and the concepts characteristic of the same area of the legal system to which the provision belongs, or characteristic of distinct areas within the same legal order, or, finally, characteristic of a different legal order (comparative argument).

The ECJ makes recourse to all these kinds of legal arguments. The systemic criteria are here intended in the broadest sense, and they include most of the interpretation technique familiar to the legal culture of the Member States: *a contrario* interpretation, recourse to analogy, *a fortiori* reasoning, *ad absurdum* argument, argument from precedent, principled argumentation, balancing reasons,30 etc. It shall be noticed that in the case law of the ECJ the comparative arguments are much rarer than one would expect and they

other versions use different terms in each of the two article, with the result that no legal consequences can be based on the terminology used”; ECJ, Case C-372/88, *Milk Marketing Board v. Cricket St Thomas*, 1990 ECR I-1345: “the English version [...] cannot serve as the sole basis for the interpretation of that provision, or be made to override the other language versions in this regard. Such an approach would be incompatible with the requirement for the uniform application of Community law”; ECJ, Case C-56/06, *Euro Tex Textilverwertung*, 2007 ECR I-4859: “Consequently, as the Commission argued, the interpretation [...] is not contrary to any language version of that protocol, whereas the interpretation suggested by Euro Tex – involving distinguishing between simple and complex matching operations – is inconsistent, at the very least, with the language versions mentioned in the preceding paragraph”.


are instead more frequent in the opinions of the Advocates General. We can easily imagine that the recourse to legal comparison is a widespread and everyday argumentative tool in the closed door sessions of the ECJ: jurists belonging to different legal cultures confront themselves and discuss the various possible solutions to the legal question under consideration; inevitably, they tend to make references to the law of their Member State of origin. From a practical as well as a theoretical viewpoint, the comparative argumentation is opposite to those linguistic and systemic arguments which make reference to the autonomy of Community law, because, as we have seen, autonomy is autonomy from international law and domestic law; the doctrinal and jurisprudential concept of autonomy of the Community legal order encompasses the idea of the autonomy of its legal concepts.

6.3 Intermediate Reflection – The Genetic Argument

The genetic argument, also called ‘historical’ argument or ‘psychological’ argument, is typical of the French Exegetic School and of the tradition of the so-called ‘legislative legal positivism’. It prescribes to interpret the legal provisions in a way corresponding to the will of the legislator. It is a well-established interpretation technique, which is commonly used for interpreting the heteronomous legal sources – i.e., the sources which are binding upon subjects who did not enact them. This interpretation directive may be ranked among the linguistic criteria as well as among the systemic criteria: it is a linguistic criteria if we maintain that the meaning of a (normative) statement is influenced by the intentions of the speaker (the legislator); it is a systemic criteria if we hold, as it seems preferable to do, that the relevance of the speaker’s (the legislator’s) intentions depends upon a choice of the addressee (the interpreter), or that it depends upon a context which is external to the communication (such as a certain legal culture), which may be more or less favourable to this kind of considerations.

According to a widely held opinion, this interpretation criterion, although it is not at all alien to the case law of the ECJ, plays a marginal role within its legal reasoning. Surely, the genetic argument is subordinated to other interpretive techniques, which – especially

in the case of dynamic and evolutionary interpretation – may limit the scope of the genetic argument to that of an auxiliary argument, which is endowed with a narrow persuasive force and is never conclusive.

Thus, the ECJ has resolutely denied any binding or even persuasive force to the will of the contracting parties of the Treaties. This interpretation and constitutional choice of the ECJ has had a paramount impact on its case law: on several occasions the ECJ challenged the will of the Member States – or, to say it better, the will of the national governments – by adopting decisions which were unpopular among the majority of the national political élites, and which were far beyond the intentions of the framers of the Treaties. The reason to refuse to take into consideration the original intention of the contracting parties is that the ECJ cannot rely on documents which have not been published and which are not, therefore, accessible to the general public.

In order to modify this interpretation attitude of the ECJ and, above all, in order to include the public opinion of the Member States in the constitutional process of the European Union, the Member States have recently changed their work method: at the Intergovernmental Conferences of 1996 (Amsterdam Treaty), 2000 (Nice Treaty), 2003-2004 (Rome Treaty), 2007 (Lisbon Treaty), and at the European Conferences of 1999-2000 (Charter of Fundamental Rights) and of 2002-2003 (Rome Treaty establishing a Constitution for Europe) several preparatory documents (travaux préparatoires) were published and made accessible to the general public. In particular, the documents discussed and approved by the second European Convention (the so called Convention on the Future of Europe, which drafted the Rome Treaty) were immediately published online, ensuring accessibility for (inter)national and (non-)governmental organisations and individuals worldwide. In that occasion, a ‘Praesidium’ was established, consisting of the Convention Chairman and Vice-Chairmen and nine members of the Convention, and it was committed to the task of drawing interpretation guidelines for the Constitutional Treaty. 32

Apart from these recent developments, it shall be stressed that the enactment of secondary Community legislation is always accompanied by an intense preparatory activity consisting of political negotiation and economic, scientific and legal research and

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32 Preamble of the Charter of Fundamental Rights of the Union, as modified by the Treaty establishing a Constitution for Europe: “The Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention”. See also Article II-112, par. 7 of the Treaty establishing a Constitution for Europe.
grounding. In interpreting Community law, the ECJ may pay attention to these working documents only if they have been published. Such documents can be considered as a source of ‘soft law’, since they express norms which are not legally binding, but can nonetheless direct in many ways the process of Community law implementation. Note, however, that the Community normative processes result in a highly complex institutional dynamic involving several actors and, therefore, even when the ECJ decides to take into consideration these acts of soft law and the various preparatory documents, what may emerge is not necessarily the will of the legislator, but it is often an incoherent and inconclusive plurality of viewpoints and opinions.

6.4 The ‘Spirit’ of Community Law – The Dynamic Criteria

The dynamic criteria of interpretation are certainly the most characteristic of the ECJ’s legal reasoning: the ECJ is not the only court which makes recourse to dynamic and evolutionary interpretation, but it is a widely accepted fact that the ECJ makes frequent recourse to such interpretation criteria in its landmarks decisions, in its most creative and less predictable judgments. Always following Bengoetxea, the dynamic criteria may be ranked in three classes as follows.

1. **Functional Interpretation.** It assumes that in case of doubt a legal provision must be interpreted in a way which warrants its effectiveness, its ‘useful effect’ (French: effet utile) and its capability of functioning in an efficient and effectual way.

2. **Teleological (or Purposive) Interpretation.** It assumes that in case of doubt a legal provision must be interpreted in a way which is coherent with the goals and purposes explicitly or implicitly established by a rule or set of rules of the legal order. The judge must therefore justify the interpretation from the perspective of its instrumental function, in relation to such goals and purposes.

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33 ECJ, Case C-15/60, Simon v. Court of Justice, 1961 ECR 225: “In the absence of working documents clearly expressing the intention of the draftsmen of a provision, the Court can base itself only on the scope of the wording as it is and give it a meaning based on a literal and logical interpretation”; ECJ, Case C-292/89, Queen v. Antonissen, 1991 ECR I-745: “A declaration recorded in the Council minutes at the time of the adoption of a provision of secondary legislation cannot be used for the purpose of interpreting that provision where no reference is made to the content of the declaration in the wording of the provision in question and the declaration therefore has no legal significance”; ECJ, ECJ, Joined Cases C-283/94, C-291/94 and C-292/94, Denkavit Internationaal and others v. Bundesamt für Finanzen, 1996 ECR I-5063: “Expressions of intent on the part of Member States in the Council [...] have no legal status if they are not actually expressed in the legislation. Legislation is addressed to those affected by it. They must, in accordance with the principle of legal certainty, be able to rely on what it contains”.

34 J. Bengoetxea, The Legal Reasoning, o.c.
3. **Consequentialist Interpretation.** It assumes that in case of doubt a legal provision must be interpreted taking into consideration the foreseeable consequences of the interpretive decision.

This classification is useful, although it may be criticized in several ways. First of all, the distinction between dynamic criteria and systemic criteria of interpretation may be partially or totally missing: teleological interpretation may be regarded as a kind of systemic interpretation, if the goal that it takes into consideration has been explicitly established by the legislator, or if the goal is part of the system ‘constructed’ by the legal doctrine. Also consequentialist interpretation overlaps with systemic interpretation, if the consequences that are taken into consideration are not the practical effects ‘out there’, in the world, but rather the internal legal repercussions within the system.

Moreover, the dynamic criteria of interpretation often operate jointly and reinforce each other; they are mixed and confused, so that any distinction between them may sometimes be artificial and questionable. Indeed, the distinction may occasionally be clear-cut. For instance, when in *Van Gend en Loos* (1963), the ECJ holds that “the objective of the EEC Treaty, which is to establish a common market […] implies that this treaty is more than an agreement which merely creates mutual obligations between the contracting states”, it is making recourse to teleological interpretation (“the objective […] implies”). When the ECJ holds that “a restriction of the guarantees against an infringement of Article 12 by Member States to the procedures under Article 169 and 170 would remove all direct legal protection of the individual rights of their nationals”, it is making recourse to a consequentialist reasoning (“a restriction […] would remove”), which is then supplemented by a functional argument: “There is the risk that the recourse to the procedure under these Articles *would be ineffective* if it were to occur after the implementation of a national decision taken contrary to the provisions of the Treaty”. Another functional argument, taken from the same decision, is the following: “the vigilance of the individuals concerned to protect their rights amounts to an *effective supervision* in addition to the supervision entrusted by Articles 169 and 170 to the diligence of the Commission and of the Member States” (our emphasis).

Nevertheless, other times the distinction between the dynamic criteria of interpretation fades away or simply cannot be traced. To take just one example, in the *Costa* case (1964) the ECJ established the primacy of Community law on the basis of this crucial argument: “the executive force of Community law cannot vary from one state to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty”. Here the ECJ takes into consideration the practical
consequences of a negative decision (the executive force of Community law would “vary from one state to another”, the objectives of the Treaty would be “jeopardized”), but also takes into consideration the necessity to secure the effectiveness of Community law (its “executive force”), and finally takes into consideration the necessity to secure the achievement of EC’s goals (“the attainment of the objectives of the treaty”).

In any case, the dynamic criteria present a common feature: they promote a transformation, an evolution of Community law. In the alternative, which is typical of constitutional law, between ‘originalist’ interpretation and ‘evolutionary’ interpretation, the dynamic criteria are all set on the side of the latter. Indeed, dynamic criteria have no regard to the literal wording of the provision: the literal wording must be repealed in order to pursue a goal of Community law and avoid the negative consequences of a mechanical enforcement of the provision. The dynamic criteria set aside the original intentions of the drafters of the provision: instead of binding the interpreter to a ‘historical’, ‘genetic’, ‘original’ will, they project the activity of meaning attribution towards an objective that must be achieved. Finally, the dynamic criteria can also be conceptually distinguished from the systemic criteria of interpretation in this important respect. The systemic criteria bind the interpreter to a given set of norms: a ‘static’ system, as it has been fixed by the legislator, by the doctrine, by the settled case law. On the contrary, the dynamic criteria charge the interpreter with the burden of contributing to the evolution of Community law. They attribute to the judge a sort of legislative function and a responsibility: the responsibility of creating new norms exceeding the literal wording, the original intention of the legislator and a well-established system.

7. Conclusions

The analysis of the interpretation methods of the ECJ allows us to summarize its main conclusions and derive some further theoretical implications.

Since the beginning of the Sixties, Community legal norms have been construed by the ECJ as deriving from an autonomous source, i.e., a source of validity which is separated from national laws as well as from international law. The very language in which Community provisions are drafted is, according to the ECJ, an autonomous legal language that is not constrained by the legal culture of the Member States and by domestic case law and jurisprudence. Therefore, from the states’ standpoint, Community legal norms are not an expression of autonomy, but are heteronomous norms: they are not the expression of sovereignty, as they amount to a limit to state sovereignty.
It follows that the interpretation criteria generally adopted in case of sources which are an expression of autonomy, such as contracts and treaties (in particular: research of the common intention of the parties, as it results from their behaviour subsequent to the conclusion of the contract), do not operate in Community law. Nonetheless, we have also seen that the genetic argument, which is typical of the interpretation of the authoritative legal sources, is not operative or that it has a marginal importance with regard to Community law. In Community law that criterion is often overridden by the dynamic criteria of interpretation, i.e., by arguments based on consequences, purposes and efficiency.

There appears to be no specificity of Community law interpretation. Apart from the problems arising from the multilingual nature of Community law and the criteria for their solution, we may say that the arguments employed by the ECJ are the same that we find to be used in any other jurisdiction: literal interpretation, genetic arguments, systemic arguments, principled argumentation, evolutionary interpretation, etc. Nevertheless, among these argumentative tools, the *a contrario* argument and the genetic argument occupy a subsidiary position, while the dynamic criteria of interpretation hold a prominent rank.

A conclusion may be drawn. Apart from the way in which we may be tempted to answer the question regarding the legal nature of the Community – international organization or federal state? – it is clear that the interpretation techniques of Community law are significantly nearer to constitutional interpretation than to treaty interpretation. The EC Treaties are interpreted as if they were the constitution of the Community, instead of being an international convention among sovereign and independent states. This is implicit in the very concept of autonomy of Community law: the Community legal order is autonomous because, according to the ECJ, it does not derive its validity from international law or domestic laws, and the Treaties are thus the ‘constitution’, the formal source of validity, of this new legal order.

There remain, nonetheless, some important differences between this Community ‘constitution’ and the constitutions of the Member States. Some of these differences are pretty clear: I will only point out those affecting the interpretation of Community law. One may expect that a constitution draws a line: it traces a distinction between what the public powers can legally do and what they ought not to do. The EC Treaties also do this, obviously. But because of the way in which they are interpreted by the ECJ, they essentially formulate a project: they set out the objectives of the Community, including that of achieving “an ever closer union among the peoples of Europe”, and thus they aim
at the change (integration) of the legal orders of the Member States. Also the national constitutions contain programmatic norms, but only EC Treaties are imbued with teleology from top to bottom, as they are functional to a project of transformation of the legal orders of the Member States.\footnote{A further argument in support of teleological argumentation has been recently provided by M. Poiares Maduro, “Interpreting European Law”, o.c., at p. 8: “Reasoning through telos will be an increased necessity in the context of a pluralistic legal order”. Note the usual dogmatic, conceptualist structure of the argumentation, which derives a normative consequence (the opportunity of teleological reasoning) from a theoretical reconstruction of the legal nature of the Community (a pluralistic legal order).} Here the distinction between what Community institutions can do and what they cannot do must be structurally uncertain: the limit must vary in the course of time, as it must move along with the deepening of integration.

This structural uncertainty may also depend on the drafting style of the EC Treaties: they establish the goals of the Community institutions, contain programmatic norms, broad directives, and set the procedures for their implementation. The first Community jurists used to say that they were a \textit{traité-cadre}, an outline-treaty, a framework-treaty, or a plan-constitution: “they plan out the framework for the dynamic development that they should put in motion”.\footnote{C.F. Ophüls, “Die europäische Gemeinschaftsverträge als Planungsverfassungen”, in J.H. Keiser (ed.), \textit{Planung}, Vol. I, Baden-Baden, Nomos, 1965, pp. 229 ff.; see also P. Reuter, “Aspects de la Communauté économique européenne”, \textit{Revue du Marché Commun}, 1958, at p. 161 ("\textit{traité-cadre}"); P. Reuter, “Juridical and Institutional Aspects of the European Regional Communities”, \textit{Law and Contemporary Problems}, 1961, at p. 382 (“What appears is the framework for a treaty”), p. 389 (“a framework, a carte blanche”), p. 397 (“a skeletal agreement”); W. Hallstein, “The EEC Commission: A New Factor in International Life”, in \textit{International and Comparative Law Quarterly}, 1965, at. p. 727 (“outline-treaty”).} The Treaties do not so much establish mutual obligations between the contracting states, as they advance a project and create the institutions entrusted to pursue that project. But the structurally dynamic and evolutive nature of the Community ‘constitution’ depends also, and to a great extent, on the interpretation criteria adopted by the ECJ: the functional, teleological and consequentialist arguments which repeal the literal wording of the provisions, disregard the intentions of the framers and modify the system in consideration of the necessity to pursue the Community project.

The analysis of the interpretation criteria adopted by the ECJ suggests, if not an answer to the question on the legal nature of the Community, at least an answer to the question on the way in which the ECJ conceives of the Community. The ECJ conceives...
the Treaties as a constitution\textsuperscript{37} and as a constitution of a special kind. The organization shaped by this ‘European constitution’ is not a structural defined and functionally open-ended political community (such as the state, structurally endowed with the monopoly on the legitimate use of force and capable of pursuing whatever objective it chooses); on the contrary, the organization shaped by this ‘European constitution’ is a structurally uncertain political community (it is a process of transformation of national legal orders), which is functionally defined on the basis of the fundamental objective of states’ integration. This conception of the European constitution results from the ECJ’s recourse to teleological interpretation, from its refusal to construct a ‘static Community legal system’ and from its refusal to pay attention to the ‘historical will’ of Community legislator.

\textsuperscript{37} See supra § 3. It is not surprising that the assumption of the constitutional nature of EC Treaties has been common among Community scholars since the beginning of the experience of European integration: see, for instance, C.F. Ophüls, “Juristische Grundgedanken des Schumanplans”, Neue Juristische Wochenschriften, 1951, at pp. 290 f.; P. Reuter, “Aspects de la Communauté économique européenne”, o.c., at p. 163; R. Monaco, “Caratteri istituzionali della Comunità economica europea”, Rivista di diritto internazionale, 1958, at p. 11. See also ECJ, Case C-294/83, Les Verts v. Parliament, 1986 ECR 1339: “It must first be emphasized in this regard that the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional Charter, the Treaty”.

The EU Charter of Fundamental Rights in the Reform Treaty and Its Protocols – A Blurred Picture of the EU Fundamental Rights Protection Regime?

Anna Magdalena Jaromír

The long-awaited EU bill of rights meets consecutive obstructions in attaining legal effect along with ratification of subsequent EU Treaties. The Charter of Fundamental Rights already proclaimed at 2000 European Council meeting in Nice, was at first included in the Constitutional Treaty, but its failed ratification necessitated a different approach. As a result, the Lisbon Treaty refers to the Charter as to one of the Unions’ primary law. The ultimate adoption of the Charter will constitute an important change in the EU fundamental rights protection regime, although horizontal provisions contained therein provide for a narrow effect of the Charter on national laws. Still, the UK, Poland and the Czech Republic sought to restrict the interpretation of the Charter by the European Court of Justice and their domestic courts. This resulted in adoption of additional Protocols and Declarations, which reflect political fears to which these countries are sensitive rather than clarify Charter provisions.

* PhD Candidate at Law Department, European University Institute, Florence; Visiting Scholar at the Law School, University of Wisconsin in Madison. anna.jaromir@eui.eu
1. Introduction

The system of protection of fundamental rights in the European Union is often referred to as a three level structure. Its first level encompasses the jurisdictional heritage and inspiration of the European Convention of Human Rights (ECHR). The second level draws from the case law of the community courts that opened up the process of streaming of mechanisms for fundamental rights protections, based on general principles of EC law; finally, it looks at the national laws and practices of the EU Member States by referring to the common constitutional traditions on its third level. Such a depiction of a complex and diverse structure of the EU fundamental rights protection suggests the hierarchy of rights and values in the EU27. It touches upon a pertaining question on nature of the principle of supremacy of EU law, which so far, although recognized by the Member States,1 is still a hot potato when it comes to its application on domestic levels, especially by national Constitutional Courts.2 A more nuanced, and still grasping the whole range of complexity and intricacy is the theory of the multi-centered system of law within the European Union (the national, the EU and ECHR center).3 The multicentrism theory is based on an assumption of mutual and complementary impact of the centers which create consequent systems of fundamental rights protection, as well as on the role of judges, who materialize adequate provisions. According to Prof. Łętowska, EU Member States no longer have monopoly over drafting national laws. Consequently, individuals are not limited to a single set of legal instruments when they are seeking protection of their fundamental rights; they are subject to and benefit from a fundamental rights protection regime which has many centers. However, the existence of different sets

1 Although the Article on Union Law enclosed in the Treaty establishing a Constitution for Europe (Article I-6) concerning primacy of EU law over the law of Member States was not repeated in the Lisbon Treaty, the EU Member States have agreed to recognize this principle under the Declaration (No. 17) Concerning Primacy annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon. The Declaration is followed by the Opinion of the Council Legal Service of 22 June 2007, and it says: “The Conference recalls, that in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law.”

2 See, e.g., German Constitutional Court, Internationale Handelsgesellschaft mbH v. Einfuhr und Vorratsstelle für Getreide und Futtermittel (Solange I), 2 BVL 52/71 (esp. at par. 285), German Constitutional Court, Wünsche Handelsgesellschaft (Solange II), 2 BVL 197/83 (esp. at 282 f); Italian Constitutional Court, Frontin v. Ministero delle Finanze, 183/73 [1973] Giurisprudenza Constitutionale, at p. 2406; Polish Constitutional Court, Application of the European Arrest Warrant to Polish citizens, P 1/05, OTK ZU No 4/A/2005, item 42.

of rights and remedies does not mean that the individual is better protected. The operation of the whole regime is not fully clear and transparent, and therefore it needs a careful study and reflection.

The proclamation of the Charter of Fundamental Rights\(^4\) in December 2000 provided the basis for an alternative system centered around a future written bill of rights for the Union.\(^5\) Protection of fundamental rights based on the case law and the role of ECJ, which developed fundamental rights on the basis of and by analyzing constitutional common traditions to the Member States and the European Court of Human Rights (ECtHR), remained hard to specify. Therefore, the initiative of codification of the already protected rights in the EU has been greatly appreciated. At first, the idea was to fully incorporate the Charter into the Constitutional Treaty (CT) thus giving it effect of Union’s primary law and conferring upon it binding legal status. This initiative lead to strengthening the protection of fundamental rights in the European Union, since by the Constitutional Treaty the Charter was granted the status of primary law. Due to failure of ratification of the Treaty Establishing a Constitution For Europe, the conferment of binding legal status to the Charter of Fundamental Rights has been suspended.

2. Incorporation of the Charter to the Treaties

Although the Charter is not yet a legally binding source of Union law, it has been already referred to in the community case law,\(^6\) both by the community courts and Advocate Generals,\(^7\) as well as by EU institutions and bodies,\(^8\) politicians, scholars and

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representatives of the civil society who took part in the process of drafting of the Charter. While the Constitutional Treaty envisaged integration of the Charter in its text, the new Article 6(1) of the Treaty of Lisbon refers to the Charter as to a binding, primary law of the European Union. Article 6(1) TEU-L gives legal effect to the CRF by stating that:

“The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.”

The Charter is not incorporated in the Lisbon Treaty, as it has been envisaged in the Constitutional Treaty, but instead it is referred to as a primary law of the European Union. From the legal point of view, the reference contained in Article 6(1) TEU-L has the same force as the incorporation of the Charter in the Treaty itself. The difference seems to be more of a political nature. The Lisbon Treaty has been drafted after the failure over ratification of its precedent, the Constitutional Treaty. The issue was therefore not to create significant resemblance and not to draft the Reforming Treaty as if it was a next, veiled constitution. The result was then that the Chapter containing the Fundamental Rights Charter has been extracted back again out of the main body of the Lisbon Treaty, but is referred to as a treaty constituting primary EU law. This technique is known to a number the EU Member States, where Charters containing human rights provisions are separate constitutional legislative acts, which are considered as a part of the constitutional order.9

3. Scope and Current Status of CFR

The Charter of Fundamental Rights (hereby: CFR), solemnly proclaimed in December 2000, is a primary document that provides for protection of fundamental rights of EU citizens and residents. For the first time in the EU history, a single text sets out a range of civil, political, economic and social rights, which are based on the fundamental rights and

freedoms recognized by a number of international conventions to which the EU or its Member States are parties. In particular, the reference is made to the European Convention on Human Rights, the Council of Europe’s Social Charter of 1961, and the Community Charter of Fundamental Social Rights of Workers of 1989. At the same time the CFR rights are derived from the constitutional traditions common to the EU Member States.

Throughout the elaboration of the Charter, the question has been raised on the actual scope and extent to which the EU fundamental rights should be formulated. The prevailing fear was that the creation of a new EU system for the protection of human rights and fundamental freedoms would compete with the existing ECHR system. Even more, therefore, it became necessary to work out a solution which would lead to the coherence between the European Convention on Human Rights and the Community law. The task was a complex one. On the one hand, the fundamental and human rights which the European Convention protects are also components of the Community legal order. The Article 6(2) of the European Union Treaty (TEU) recognizes the Convention rights as general principles of the Community law. The European Court of Justice has considered the ECHR rights as the, so far unwritten, source of the EU fundamental rights. On the other hand, however, the Communities have avoided formal commitments to the Strasbourg Convention, and yet action by the Community bodies cannot be judged directly by the standards of the Convention.\(^\text{10}\) The proposed change of Article 6(2) of the Lisbon Treaty (TEU-L) foresees the EU’s accession to the European Convention on Human Rights. The said Article reads as follows:

> The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union’s competences as defined in the Treaties.

From the above, it is understood that EU will become a party to the Convention as a separate, individual entity of the international law. The existing situation, where the EU Member States who are members of the Convention, and thus subjects of the Strasbourg jurisdiction, will be changed. The Strasbourg based European Court of Human Rights (ECtHR) will gain the powers of direct control over the EU laws. The EU will be able to stand before the ECtHR, represent and defend its positions. The discrepancies between ECJ and ECtHR decisions should be therefore avoided, leading to a greater legal certainty

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and providing for a uniform level of the protection of fundamental rights in Europe. Moreover, this is yet another step that confirms the EU’s legal personality,\(^\text{11}\) which is granted to the Union on the basis of the Lisbon Treaty.\(^\text{12}\)

The need of making the already recognized and applicable fundamental rights at Union level more visible, led to the consolidation of these rights in the Charter. The reference to the already mentioned international treaties and the constitutional traditions of the EU Member States suggest, on the one hand, that the Charter in itself was not intended to serve as a source of new rights, but rather as record of rights that already receive protection in the Union.\(^\text{13}\) It nevertheless puts in words certain rights that may be considered as an expression of modern and progressive catalogue of fundamental rights; these are: the prohibition of eugenic practices, the prohibition on making the human body and its parts as a source of financial gain, the prohibition of the reproductive cloning of human beings (Article 3 on the right to integrity of the person), recognition of the rights of the elderly (Article 25), recognition of the environmental (Article 37) and consumer (Article 38) protection. These rights shall be considered as “new” to these EU Member States who are not parties of the European Convention of Human Rights and Biomedicine of 1997. The Charter also explicitly introduces the so called “solidarity rights” (under Chapter IV) and the right to good administration (Article 41). These rights are neither new in so far as that they are known to the most of the constitutional traditions of Member States. However, the formulation of these rights is new and innovative. Moreover, the same reservation applies as to the biomedicine rights: these Member States who are not a party of the revised European Social Charter (e.g., Poland, which has signed the Charter in 2005, but has not ratified it yet) would in a way be faced with “new” social rights, like the right of elderly.

\(^\text{11}\) The arguments listed above recapitulate basic advantages of the EU accession to the ECHR. Apart from the great value resulting from this fact, the integration of the European Union into the Strasbourg Convention System is a highly complex and complicated process. For an elaborated discussion on the issue see for example: H.C. Krüger, “The European Union” \textit{o.c.}, at pp. xvii–xxvii.

\(^\text{12}\) Article 47 of TEU-L grants the EU legal personality.

\(^\text{13}\) A. Dashwood, “The paper tiger that is no threat to Britain’s fundamental rights”, \textit{Parliamentary Brief}, 10 March 2008, \url{http://www.parliamentarybrief.com/articles/the-paper-tiger-646.html} For an interesting discussion on the informal application of some of the institutional or substantive rules contained in the earlier Constitutional Treaty see: B. de Witte, “The Process of Ratification of the Constitutional Treaty and the Crisis Options: A Legal Perspective”, EUI Working Paper LAW No. 2004/16, available at \url{http://cadmus.eui.eu/dspace/bitstream/1814/2831/1/law04-16.pdf}. De Witte discussed the already existing tendency of the political institutions that apply and the European Court of Justice that effectively use the Charter provisions without basing them on the formal authority that would have resulted from the entry into force of the Constitutional Treaty.
It is not clear, however, as neither the Charter nor the Lisbon Treaty itself are clear on the point, which provisions contain rights and which are principles. The Charter provisions are not homogeneously formulated, neither they are grounded in an equal manner in the same sources. The language used in the formulation of the provisions vary from “everyone has the right to…”, through “the Union recognizes and respects …”, and ends up at “Union policies shall ensure…”.

In order to address this problem the Explanations relating to the Charter have been drawn up to provide a guidance in the interpretation of the CRF. The affirmation of the statement, that the Charter serves as the codification of existing rights, but does not create new rights, is also to be found in the additional Protocol on the Application of the Charter to Poland and the UK, which will be further discussed in detail. The 5th Recital to the said Protocol says that: “[…] the Charter reaffirms the rights, freedoms and principles recognized in the Union and makes those rights more visible, but [it] does not create new rights or principles”.


The fear among Member States arose when the Charter has been formulated and then incorporated in both the Constitutional and Reforming Treaties. It was a general concern of many EU national governments that the Charter would have a broad scope of application and that it would have to much of an influence over national laws. Despite of applying merely to the EU institutions and bodies, it has been envisaged that the Charter applies also to the Member States. The so-called horizontal provisions of the Charter have been strengthened, giving thus a guarantee to Member States that their competences would not be degraded.

The provisions which deal with the scope of Charter application are enclosed in Title VII on General Provisions Governing the Interpretation and Application of the Charter. Article 51(1) of the Charter limits the scope of application of the Charter to a situation when Member States are implementing Union law. It therefore means that the Charter does not apply to the entire legal order of a Member State, but only to the situation when EU law is implemented. Article 51(1) of the Charter of Fundamental Rights says:

The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law (…) (emphasis added).

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The current jurisprudence of the ECJ envisages a wider circumstances for which Member States are taken due account of their actions in the field of fundamental rights. Namely, the ECJ considers that human rights law applies to Member States not only when they are implementing EU law but also whenever they are acting within the scope of Community law.\textsuperscript{16} The reference to “the scope of Union law”, confirmed in the Explanations relating to Article 51(1) of the Charter, induces situations when Member States not only implement but also derogate from the Union law.

The only question at this point relates to the binding force of the Explanations. So far, the Charter ascertains that they are “given due regard by the courts of the Union and of the Member States” in the interpretation of the Charter.\textsuperscript{17} From what it stems from Article 52(7), they are not given binding force, but are considered as guidance on the interpretation of the Charter. It shall not be forgotten, however, that the literal interpretation is highly improbable since the ECJ case-law constitutes a strong reference point to the constitutive elements of the EU regime of fundamental rights protection, and in this sense they form yet another source of interpretation of Charter provisions.

Article 51(2) contains guarantees that the Charter does not extend the scope of application of the Union law over the EU competences, it does not create any new competences nor tasks for the Union, neither does it change the competences that are defined in the Treaties. This provision has been strengthened in Article 6 TUE-L, which repeats the general idea expressed in Article 51(2) of the Charter that the provisions of the Charter do not extend the competences of the Union as defined in the Treaties. Yet another reinforcement of this provision has been formulated by a reference to the Explanations to the Charter in Article 6(1) of the Treaty. It is underlined that the said Explanations set out the sources of the general provisions provided for in Title VII of the Charter governing its interpretation and application. Additionally, the Declaration concerning the Charter of Fundamental Rights and Freedoms, attached to the Treaty, confirms that:

The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or the task for the Union, or modify powers and tasks as defined by the Treaties.\textsuperscript{18}

\begin{itemize}
\item \textsuperscript{17} Article 52(7) CRF.
\item \textsuperscript{18} Declaration No. 1 concerning the Charter of Fundamental Rights of the European Union.
\end{itemize}
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Taking into consideration the legal position of the Charter, the said Declaration does not have much of significance. It only repeats what has been already said in Article 51 of the Charter. The Declaration has a political significance, and in these terms it is only an added-value to the provisions of the Treaty or of the Charter.

Article 52 of the Charter sets out rules on the actual scope of the recognized rights and principles, as well as derogations from them. Article 52(1) starts with a general rule on limitations, that is with the principle of necessity and the principle of proportionality.

It recognizes that restrictions on the exercise of rights and freedoms can only be admissible if they are necessary (“respect the essence of those rights and freedoms”), and genuinely meet objectives that serve common welfare recognized by the Union or if they serve the protection of rights and freedoms of the individual. The wording of restrictions is familiar to the Articles 8 to 11 of the ECHR, but new to the Community standard of limitations. On the contrary, the principle of proportionality, also named in Article 52(1), is common to both the EC and ECHR rules on limitations, although it does not appear expressly in the ECHR.

Article 52 then follows with the specific rules that speak about the scope of the rights, which, either if under specific provisions made in the Treaties will be exercised under the conditions within the limits defined by those Treaties (Article 52(2)), or in so far as they correspond to the rights guaranteed by the ECHR their meaning and scope will be interpreted in the same way laid down by the Strasbourg Convention (Article 52(3)). It is stipulated however, that the Union may provide for a more extensive protection in the latter case. Subsequently, Article 52(4) refers to and recognizes interpretations stemming from the constitutional traditions common to Member States. This rule of interpretation, as elucidated in the Explanations, has been based on Article 6(3) TEU.19

Next is Article 52(2) aimed at clarifying the distinction between “rights” and principles”. Reading it together with Article 51(1) it draws a primary distinction between rights and principles by stating that rights shall be respected, whereas principles-observed.

It underlines that the provisions of the Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law (Article 52(5)). Accordingly, they become significant for the Courts only when such acts are interpreted or reviewed. Following the text of the Explanations, it should be

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19 It also reminds that the approach to base the interpretation of Charter rights on the common constitutional traditions has been already followed by the Constitutional Court of Justice by a reference to the “lowest common denominator” aimed at offering a high standard of protection which is adequate for the Union law and in harmony with the common constitutional traditions. See, e.g., ECJ, Case 44/79, Hauer, 1979 ECR 3727; ECJ, Case 155/79, AM65S, 1982 ECR1575.
apparent that principles do not give rise to direct claims for positive action by the Union or by Member States. Although examples for principles were given in the Explanations to Article 52(5), it has also been admitted that some of the Charter provisions may contain both elements of a right and of a principle. The latter being: provisions on equality between women and men (Article 23), provisions on family and professional life (Article 33), and provisions on social security and social assistance (Article 34).

In what follows, Article 52(6), in the spirit of the principle of subsidiarity, reaffirms the full account to national laws and practices that apply to the Articles in the Charter. Then, Article 52(3) specifies that “nothing” in the Charter can lower other human rights standards. When juxtaposed with Article 52(1), it seems that the two provisions on limitations overlap, creating thus a confusing doubt on the precedence of limitation rules and the impression of diverging standards of limitations or derogations on the Charter rights. Finally, Article 54 addresses the prohibition of abuse of rights by saying:

Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognized in this Charter or at their limitation to a greater extent than is provided for herein.

5. Protocols and Declarations to the Charter

5.1 The UK/Poland Protocol

It may seem that the cross-recognition of the limits of application of the Charter, made both in the Lisbon Treaty and in the Charter itself, together with the Explanations provided for the reassurance on the limits to unexpanded over-competence of the Union
to legislate in the field of fundamental rights. And on the other hand, that the interpretation of principle-like and right based provisions of the Charter, have been reassured, confirmed and agreed upon. One can also claim that the cross-recognition of horizontal provisions has been complex enough not to add new explanations,23 but perhaps leave it to the ECJ for further interpretation. Notwithstanding this fact, the government of The United Kingdom decided that it needs to be reassured of inapplicability of a possible direct effect the principles may have, and of the fact that the Charter would not extend the field of application of the EU law in a way they are provided for in the Treaties. This has led the UK government to negotiation of a special, additional Protocol that would be applicable only to the UK and would clarify some aspects of the use of the Charter with reference to the UK legal system. In course of work over the Protocol, two other delegations, Polish and Irish, have reserved themselves a right to join the Protocol. Ultimately, it was Poland who has joined the UK Protocol, without having it adapted to its national legal system. In effect, as the author claims, it caused an increased uncertainty as to the legal impact of the Protocol on Poland.

The Polish-UK Protocol is an international agreement that supplements the Treaties (the TEU and TEU-L) and forms its integral part (Article 51 TEU). Hence, once the Lisbon Treaty is ratified, the Protocol will automatically become a part of EU primary law. Once in force, the Protocol will be binding only in relation to Poland and the UK, and, as confirmed in its Preamble, its reference to the operation of specific provisions of the Charter would be “strictly without prejudice to the operation of other provisions of the Charter.” As also referred to in the Preamble, the Protocol serves as a clarification of the application of the Charter and its justiciability in relation to the laws and administrative action of Poland and United Kingdom. From the above it stems that both the UK and Poland will be bound by the Charter. The question is, how far would the Protocol modify, if ever, application of the Charter to these two countries.

The said Protocol, formally called the Protocol on the Application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom, is composed of two articles.

According to Article 1(1) of the Protocol:

The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find

23 On this issue see the comments by S. Peers, “Taking Rights Away”, o.c., on the suggestions by the EU Convention Working Group to extend the limitation clauses by further provisions.
that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.

In the first place, this Article confirms that the Charter does not give neither to the ECJ, nor to national courts greater powers than they already have under the Treaties. It means that the Charter does not grant to any of these courts such competences that would allow them to find that the national laws and practices are incompatible with fundamental rights confirmed by the Charter. The wording used in the first phrase of Article 1(1) “does not extend”, signifies that the courts can still rely on the Charter to declare national law inconsistent with the right in connection to which the national law is implementing Community law. The words used “does not extend” do not have the same meaning as “excludes”, what confirms the inappropriateness of calling the Protocol an opt-out from the Charter. If it were for the opt-out, in the meaning of exclusion from the Charter provisions with respect to Poland and the UK, the wording of Article 1(1) should have been different.

The reading of Article 1(1) has to be made in connection with Article 1(2) and Article 2 of the Protocol. Article 1(2) confirms that the rights and principles provided for in the “Solidarity” Chapter may be invoked before the courts as long as the said rights and principles come within the scope provided for by Polish and UK law respectively.

Article 1(2) provides:

- In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the UK except in so far as Poland or the United Kingdom provided for such rights in its national law.

Once again it has been confirmed that nothing in the Charter can be interpreted in isolation from national law. Through this reference the Protocol seems to guarantee that the rights and principles from Charter could be evoked, on the condition that they were already ensured under the national legal system. It serves therefore as a reminder to national courts that they should apply the Charter only to national law when implementing Union law and not to the issues of exclusively internal law. In this sense, the provision also confirms Article 51(1) of the Charter with respect to the field of application of the Charter, as well as its Article 51(2) by affirming that the Charter is not a universal bill of rights.

Subsequently, Article 2 of the Protocol states that:

- To the extend that a provision of the Charter refers to national laws and practices, it shall apply only to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognized in the law or practices of Poland or of the United Kingdom.
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It therefore reminds the necessity of the observance of the national law of EU Member States, but it does not add anything new. This article may be read in a way that it addresses some Charter provisions, in particular those referring to Member States’ national laws, since there are provisions in which a direct reference of Member States’ competence is made. Such is, for example, Article 9 of the Charter, which says: “The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.”

The Charter, therefore, does not give a definition of marriage, nor does it determine the right to marry. In so far as Article 9 is concerned, it only guarantees protection of this right in the Union, as defined accordingly to the given national law.

5.2 UK Objections towards CFR – Justiciable Social Rights v. Guiding Principles

The UK government was particularly concerned that social and economic rights are included in the Charter and that the provisions of Title IV are potentially enforceable in the ECJ and in the national courts when Community law issues were dealt with. As a result the UK government steered the process of amending horizontal provisions to the Charter to ensure that principles enclosed in Title IV will not be directly enforceable, and that the Charter does not create new power or tasks for the Union. Indeed, proclamation of indivisible values and reference to solidarity alongside with dignity, equality and freedom was perceived in the UK as a threat to the national law. 24 Namely, the provisions in the Solidarity Title, Article 28 on collective agreements and collective action, and Article 30 on unfair dismissal, appear to be drafted as rights, thus potentially being directly effective. A threat of direct applicability of these rights consequentially led to drafting of the Protocol on Application of the Charter, which was intended to ensure that the said Articles, would not be directly effected in the UK. In domestic debates the Protocol has been mostly presented as an op-out from the Charter. 25 After some time


however, when the ratification of the Treaty came close, and when the trade unions were threatening to throw their weight down behind a campaign for a referendum, the government shifted the rhetoric to a more nuanced explanation, saying that the Protocol was merely a clarification given to the Charter provisions rather than an “opt-out”, and that instead the Charter will create no new rights anywhere across the EU.

5.3 Polish Objections towards CFR – Protection of Customs and Morals

At the beginning, Polish accession to the British Protocol on Application of the Charter was presented as means of exclusion from Charter provisions applicable to Poland. The overriding objective of joining the “opt-out” Protocol was to exclude jurisdiction of the European Court of Justice and Polish courts with regard to the Charter, led by the motivation of a fear that the EU could impose its “moral standards” on Polish law. In public debates on objections towards the Charter three major concerns were put forward by the then government. Namely, the concerns related to the fear of imposition to the Polish legal system standards in the field of: (1) social issues, (2) customs and morality, and (3) property rights. The latter being presented with regard to German claims ensuing from property rights. In the course of time, mainly due to heavy criticism of Polish trade union who rebuked the government for its willingness to opt-out from the application of the Title IV of the Charter to Poland, the governments position has changed. The question, according to the government, was not any longer an exclusion of Poland from the application of Charter solidarity provisions, but a focus was made on the issue to prevent any interpretations of law that would lead to a change in the definition of the family and would force the Poland to recognize same-sex marriages. On the other

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26 In June 2007 Robert Szaniawski, the spokesman for the Ministry of Foreign Affairs, said that during the EU summit in Brussels, the UK had negotiated the right to exclude certain aspects of the application of the Charter for the UK, and that Poland and Ireland have kept the possibility to take a similar decision. see: Czy Polska przyjmie Kartę praw podstawowych, Rzeczpospolita, 28 June 2007. See also: E. Siedlecka, “Cicha furtka w sprawie praw człowieka”, Gazeta Wyborcza 2007, Nr 148, p. 4.

27 See for example: Fotyga: przyjęcie Karty Praw Podstawowych – szkodliwe dla Polski, Rzeczpospolita, 24 October 2007; Fotyga: Nie pozwolę na Kartę Praw Podstawowych, Gazeta Wyborcza, 24 October 2004. Anna Fatyga, Minister of Foreign Affairs, ascertained that the Charter contains provisions on property rights, which may be applicable to German claims for damage with relation to properties left on the territory of Poland, which before the World War II were a part of territory of Germany.

28 See e.g., D. Pszczółkowska, “Czego nie ma w traktacie UE”, Gazeta Wyborcza 02 October 2007.
hand, the Protocol itself was more carefully and correctly interpreted. In October, Paweł Kowal, Deputy Minister of Foreign Affairs, said that Poland does not reject the Charter as such, but the principle of its direct application by Polish courts.29

6. Meaning and Effectiveness of the Polish/UK Protocol

There are in large two possibilities in which the Protocol may be interpreted. First approach assumes that the Protocol effectively deprives for the opportunity of invocation of the Charter when questioning national regulations and practices. Second possibility claims that the Protocol in itself does not change much. After all, the possibility of invoking the already existing and well-established general principle of the community law, namely the principle of the protection of fundamental rights, allows citizens of Poland and the United Kingdom to assert their rights. There are decent arguments on both sides, but the problem seems to have a practical dimension, rather than purely interpretative one; it is more the question of the effectiveness of the protocol and its implications, rather than to what extent it changes the provisions in the Charter. This is simply because the extent to which the provisions provided for in the Charter and applicable to the parties of the Protocol did not bring anything new. What changes with the introduction of the Protocol is the scope of the possibilities available the citizens of Poland and of the UK they will have once asserting individual rights. In order to substantiate this observation further, a careful consideration will be given to the question of the actual effectiveness and legal implications the Protocol brings.

Even if it is assumed that the Protocol would alter the possibility of direct reference to the Charter when national legislation or action by a Member State when implementing Union law would be called into question, it could only happen if a given right guaranteed by the Charter could not have been derived from another applicable legal basis. Taking into account the fact that all Charter provisions stem from either ECHR, the Social Charters adopted by the Union and by the Council of Europe, or from the constitutional traditions of the EU Member States, it is hard to imagine a right which would not be covered by either of these sources. Furthermore, the principle of fundamental rights protection as a general principle of the Union’s law, now guaranteed by Article 6(2) TEU and as amended by Article 6 (3) TEU-L, allows to indirectly assert fundamental rights already protected in the European Union. This means that the Charter cannot be invoked

29 See at: www.tvn24.pl/0,1526148,wiadomosc.html.
directly, but in any circumstance the rights contained therein will be protected. The situation that the Protocol has created is therefore vague. Not only the final purpose of its introduction is unclear, but also its legal effect did not bring any particular change.

The question is however, whether the national courts will be willing to use the Charter, and, consequently, whether the lack of a possibility of a direct invocation of the Charter would not lead to growing opportunism of national courts. This would only create a vicious circle and further tension within the centers of the multi-centered regime of fundamental rights protection in the EU. The possible reluctance of the national courts to refer to the Charter seems to be a practical implication of the UK/Polish Protocol.

As it comes to the analysis of Article 2 of the Protocol, it is even harder to justify its actual meaning, especially with reference to the Polish legal situation once the Declaration No. 62 on the Solidarity Chapter has been added.

7. Declarations

Despite of having joined the UK Protocol on Application of the Charter, Poland has also issued two Declarations. First, to safeguard its national interest with respect to morality and customs,30 and second to clarify the scope of application of the Protocol on the application of the Charter.31 The aim of Declaration No 61, expressed by the President and the then government, was to avoid the alleged possibility of imposition on the Polish legal system of moral standard “in the sphere of public morality, family law, as well as the protection of human dignity and respect for human physical and moral integrity”.32 Indeed, the Polish government feared the “dictate of European moral standards”, and in its form of absolute prohibition of discrimination it saw a particular danger to imposition of moral standards in the sphere of discrimination on the ground of sexual orientation.


32 See: Declaration No 62 by the Republic of Poland on the Charter of Fundamental Rights of the European Union.
From a legal point of view, however, a Declaration is a unilateral statement of interpretative character given by a party(s) to the Treaty. As argued by Prof. Wyrozumska, while discussing legal effects of Declarations by Member States concerning the Charter of Fundamental Rights, it is important to put to the record that these declarations have more of a political than legal significance. Taking into account its legal nature, declaration does not modify competences in the Union, in any way does it change division of powers between the EU and Member States, nor does it modify State's obligations arising from the Treaties. With this respect Declaration cannot serve as an interpretative tool to the Treaty (also Charter) provisions. It can only be considered as one element in the process of interpretation. Being a one sided statement, a declaration is an expression of opinion, which is acknowledged by the remaining parties to the Treaty. According to the conventional understanding, a unilateral declaration of an interpretative character is not given the same legal significance as provisions of Treaties or its Protocols. Consequentially, Declaration does not express a reservation that could lead to legal consequences, such as exclusion from the application of Treaty/Charter provisions. In this understanding, the Declaration No. 61 does not serve to achieve its intended aim; that is it does not preclude Charter's influence on domestic legislation in the fields of morality or dignity.

The second Polish Declaration concerning the Protocol on the application of the Charter, Declaration No. 62, has been made by the next government appointed after early-election. The Declaration was also a result of growing dissatisfaction of trade unions, which accused the government of its willingness to exclude application of Chapter IV of the Charter, the solidarity provisions, to Poland. As Barnard rightly notices, there is a perplexing irony about the Polish position under Article 1(2) of the Charter, which the Protocol refers to. Namely because of, first, the tradition of Solidarity movement was very influential with challenging the Communist regime, and second, because the rights addressed in the Charter are already guaranteed in the Polish Constitution of 1997. The trade unions felt therefore threatened by the attempt of the government to limit the application of the Charter provisions in this field. These

postulates were then used by the government in the Declaration No. 62 to reassure that there is no intention to “opt-out” from the Charter with respect to solidarity provisions. Polish Declaration to the Protocol says:

Poland declares that, having regard to the tradition of social movement ‘Solidarity’ and its significant contribution to the struggle for social and labour rights, it fully respects social and labour rights, as established by European Union, and in particular those reaffirmed in Title IV of the Charter of Fundamental Rights of the European Union.

This Declaration proves that Poland’s concerns are not with social and labour rights. Poland’s real preoccupation concentrates on subjects related to morality and customs. Notwithstanding the fact that it is hard to define what does the concept of “morality and customs” embrace, one can assume, on the basis of the most frequent arguments raised by the government when the Declaration was made, that it deals with such issues as gay marriage and abortion. However, primo, neither the Protocol, nor the Charter itself addresses these issues, secondo, the said Declaration is an interpretative and not a legally binding instrument; it does not change the primary law, here Article 1(2) of the Protocol. The Declaration may serve at most as an additional argument in the interpretation of the Protocol, but it does not exclude application of Article 1(2) of the Protocol to Poland.

8. Czech Declaration on the Charter of Fundamental Rights

One of the main concerns in the Czech Republic (not for the government though, but rather for the President) with respect to consequences of the effective nature of the Charter, was the relation of the EU Charter to the domestic catalogues of human rights enclosed in the Charter for Fundamental Rights and Basic Freedoms (CFRBF). Especially, the question was whether the EU Charter would not enter in open conflict with the CFRBF, and more specifically the belief was that there may be a reduction of standard, due to the application of the EU Charter, of the domestic level of protection of fundamental human rights and basic freedoms. Also, the problem of the hierarchisation of the relations between the European Court of Justice and the Czech Constitutional Court where voiced, suggesting that the relationship should be based on complementary activities rather than on the feared superiority of the ECJ. 36 Czech government took a position that in contrary to Polish and UK governments it does not consider important to

The government deemed it necessary, however, to proclaim a Declaration when it was signing the Treaty of Lisbon. First of all, in Declaration No. 53 the Czech Republic recalls that the provisions of the EU Charter are addressed to the institutions and bodies of the EU with due regard for the principle of subsidiarity and division of competences between the EU and its Member States, as reaffirmed in Declaration (No. 18) in relation to the delimitation of competences. The Czech Republic stresses that Charter's provisions are addressed to the Member States only when they are implementing Union law. It also emphasizes that the provisions of the Charter are not addressed to the Member States when they are adopting and implementing national law independently from Union law. This way of interpretation of application of the Charter is fully compatible with the Treaties provision and Article 51 of the Charter. It therefore, reiterates earlier provisions. Secondly, the Czech Republic also emphasizes that the charter does not extend the field of application of Union law nor does it establish any new power for the Union. This statement clearly corresponds with the core of Article 51(2) of the Charter. Declaration then continues with affirmation that the Charter does not diminish the field of application of national law and does not restrain any current powers of the national authorities, which is an added, deductive interpretation to the Charter Article 51(2). Next, a reiteration of Article 52(4) of the Charter and of Article 6(3) TUE follows, by stating that, in so far as the Charter recognizes fundamental rights and principles as they result from constitutional traditions common to the Member States, those rights and principles are to be interpreted in harmony with those traditions. Finally, the last part of the Declaration repeats Article 53 of the Charter. It says:

The Czech Republic further stresses that nothing in the Charter may be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective field of application, by Union law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human rights and Fundamental Freedoms, and by the Member States' Constitutions.

37 In the opinion of Czech government the Polish/UK Protocol “does not constitute an exemption but only affirms that the Charter does not extend the jurisdiction of the EU courts to review national legislation or other acts if such do not refer to the application of EU law.” See: source referred to above.

38 Declaration by the Czech Republic on the Charter of Fundamental Rights of the European Union (Declaration No 53), in Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, Official Journal, 9 May 2007, C 115/01.
Thereby, the Czech Declaration sheds a light on the issues to which the Czech Republic is sensitive.\textsuperscript{39} It therefore serves political aims and confirms the objective of Declarations made by Member States that seeks to underline these aspects of the Treaty that were considered important for a given society or for a given domestic political purpose.

\section*{9. Conclusions}

The overriding objective following the introduction of the EU Charter of Fundamental Rights was, as it has been mentioned in the text, codification of the already applicable fundamental rights in the EU. The Charter has a large symbolic significance; it reinforces EU axiology in the field of human rights promotion and protection by giving an individual a reference catalogue of rights and freedoms. The Charter makes rights more visible to the EU citizens, but also to the EU institutions and to its Member States.

It is worth noting, that despite national concerns on the scope of application of the Charter and potential intensified tensions between the EU and national courts in the domain of interpretation of fundamental rights provisions, in all of its aspects the Charter creates challenges for further constitutional dialogue between the courts in the aim of enhancing fundamental rights protection in the EU. The blurred picture of fundamental rights regime, so far, and its consistency is a result of both inadequacies of wording of the Charter provisions, mentioned earlier in the text, but it is even more watered down by the introduction of the Protocols and Declarations concerning the application of the Charter in Member States. Instead of clarifying legal uncertainties, they bring in general repetitions that seek to underline national fears and often misunderstandings to the need to building a comprehensive and efficient EU fundamental protection regime.

\textsuperscript{39} A. Wyrozumska, “Inkorporacja Karty” \textit{o.c.}, at p.100.
Strasbourg and Luxembourg at the Forefront of the Enlargement of Europe: An Antithetical Judicial Approach?

Oreste Pollicino*

The present paper will highlight, through a case law-based analysis, that not only did the Central and Eastern Constitutional courts learn to enter a dialogue with the ECJ very quickly, but also how they are starting to express new ideas through that same language of constitutional pluralism.

For instance, by reading the recent decisions about the European arrest warrant saga, two main ideas can be identified.

The first one is the emerging of a judicial route, designed by the Constitutional Courts in (Central-Eastern) Europe, more and more independent from the interpretative path marked by the relevant constitutional parameter. The distance between the “sovereign” character of the Check Constitution related to the extradition ban of nationals and the cooperative and friendly European approach of the relevant decision of the Check constitutional court, is indeed, quite clear.

* Associate Professor of Comparative Public Law, Bocconi University of Milan. Thanks to András Jakab for his comments on an early version of this paper.
The second new idea is the end of the inverse proportionality relation between the activism of the courts and the intervention of the legislative powers of the Member States. From the constitutional courts standpoint, the parliamentary action as such is not sufficient anymore, whereas it is not supported by the quommodo of the latter.

Secondly, the enlargement has played a pivoting role in increasing the judicial awareness of the European Court of Justice towards the respect of the national identity of the single member states. With the addition of 12 not always homogeneous constitutional identities, the ECJ case law reference to the concept of common constitutional traditions becomes unsuitable.

The Court has two potential alternative routes: either the further centralization of the adjudication powers, favoured by the Court of Strasbourg, or the exploitation of local constitutional peculiarities which, according to the principle of constitutional tolerance, seems to inspire the action of the Court of Justice.

A comparison between the different responses of the two European Courts to the same phenomena is necessary.

Furthermore, it will as well outline the implementation of the new policy in the framework of the adoption, at a European level, of an administrative law for human rights, in accordance with the same trend in a global perspective.

1. Introduction

This paper will focus on the reaction of the European Courts to the potential increase in the risk of constitutional conflict between the national and supranational legal dimensions, caused by the recent accession of ten new Member States to the EU. In this regard, in spite of the risk of simplification implied in every attempt at synthesis, it is possible to identify two potentially alternative judicial routes. On the one hand, a further centralisation of the adjudication powers, which the European Court of Human Rights at Strasbourg seems to be favouring after the Council of Europe’s enlargement to the east, and, on the other hand, the appraisal of national constitutional values, which the
European Court of Justice seems to have privileged since the major enlargement of 2004. A comparison of the two European Courts’ different responses to the same phenomenon appears instrumental to our main conceptual file rouge, that attempts to analyse the consequences of the enlargement, taking into account multiple, interacting legal regimes.

However, before doing so, a clarification is necessary. The following remarks claim to be neither exhaustive nor conclusive. At the risk of over-simplifying very complex, diverse, and seldom consistent judicial attitudes, my only defence is that what truly matters, for the purposes of this paper, is the identification of a general (although not always homogeneous) trend.¹

Since the end of the Cold War, beginning with the European Court of Human Rights’ reaction to the enlargement (as it has already been stressed),² the Council of Europe has experienced a dramatic increase in the number of members. In 1989, the Council of Europe was an exclusively Western European organisation, counting 23 Member States. By 2007, its membership had grown to 47 countries, including almost all the former communist states of Central and Eastern Europe.

Here, my main assumption continues to be that the European Court of Human Rights has reacted to the Council of Europe’s enlargement to the east with a more explicit understanding of itself as a pan-European constitutional court, as a result of both the exponential growth of its case load and the realistic possibility for it to ascertain systemic violations of human rights in EEC countries. This has implied a shift away from an exclusively subsidiary role as “secondary guarantor of human rights” to a more central and crucial position as a constitutional adjudicator.³

It is arguable that this change in the European Court of Human Rights’ judicial attitude emerged for the first time in 1993, in Judge Martens’ concurring opinion in the Branningan case.⁴ On that occasion the majority of the Court, recalling a judgment from 1978,⁵ stated that the choice to determine whether the life of the nations is

1 The x-ray of the thousand pieces composing the judicial puzzle is then postponed.
3 It has been astutely noted that it was probably not an accident that the Court chose a highly controversial case against Turkey (Loizidou v. Turkey, judgment of 23-3-1995) to affirm, for the first time in its jurisprudence, the central place of ECHR as “an instrument of the European public order”.
4 ECHR, Branningan and McBride v. the United Kingdom, 26 May 1994, par. 43.
5 ECHR, Ireland v. the United Kingdom, 18 Jan.1978, par. 207.
threatened by a “public emergency” has to be left to the wider margin of the Member States. By reason of their direct and constant contact with the current, pressing needs of the moment, in fact, it was observed that the national authorities are in a better position than the international judges when it comes to decide both on the actual occurrence of such an emergency, and on the nature and scope of the necessary derogations to avert it. Conversely, in his concurring opinion, Judge Martens argued that:

Since 1978 “present day conditions” have considerably changed. Apart from the developments to which the arguments of Amnesty refer, the situation within the Council of Europe has changed dramatically. It is therefore by no means self-evident that standards which may have been acceptable in 1978 are still so. The 1978 view of the Court as to the margin of appreciation under Article 15 was, presumably, influenced by the view that the majority of the then Member States of the Council of Europe might be assumed to be societies which (as I put it in my aforementioned dissenting opinion) had been democracies for a long time and, as such, were fully aware both of the importance of the individual right to liberty and of the inherent danger of giving too wide a power of detention to the executive. Since the accession of Eastern and Central European States that assumption has lost its pertinence.

Another call for a more proactive role for the European Court of Human Rights as a reaction to the Council of Europe’s enlargement came from (again, the same) Judge Martens’ separate opinion on the Court’s 1995 decision in the *Fisher v. Austria* case. To the then typical self-restraint of the Strasbourg Court, according to which “the European Court should confine itself as far as possible to examining the question raised by the Court before it”, Judge Martens objected that:

No provision of the Convention compels the Court to decide in this way on a strict case by case basis. This self-imposed restriction may have been a wise policy when the Court began its career, but it is no longer appropriate. A case law that is developed on a strict case-by-case basis necessarily leads to uncertainty as to both the exact purport of the Court’s judgment and the precise content of the Court’s doctrine.  

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7  ECHR, *Fisher v. Austria*, cit., par. 44.  
8  ECHR, *Fisher v. Austria*, separate opinion of Judge Martens, par. 16.
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The message was indeed quite clear: an explicit invitation addressed to the Court to take on a more general constitutional and centralised role. But it was only some years later (very recently indeed), that the European Court of Human Rights seemed ready to accept that invitation. Since 2004, in fact, with regard to some areas of law and, not surprisingly, especially in certain judgments directed to EEC Member States, the Strasbourg Court has started to go beyond the strict case-by-case approach of past years. More precisely, in a decision of 2004, the Court held that a violation of the ECHR had instead originated in a systemic problem connected with the malfunctioning of domestic legislation, which involved 80,000 persons. The Court suspended 167 complaints pending before it on the same issue until the respondent State secured, through appropriate legal measures and administrative practices, the implementation of the fundamental rights protected by the ECHR (in that case the right to property). In particular, the Court argued that:

Although it is in principle not for the Court to determine what remedial measures may be appropriate to satisfy the respondent State’s obligations under Article 46 of the Convention, in view of the systemic situation which it has identified, the Court would observe that general measures at national level are undoubtedly called for in execution of the present judgment, measures which must take into account the many people affected. Above all, the measures adopted must be such as to remedy the systemic defect underlying the Court’s finding of a violation so as not to overburden the Convention system with large numbers of applications deriving from the same cause… In this context the Court’s concern is to facilitate the most speedy and effective resolution of a dysfunction established in national human rights protection (par. 193).

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9 First of all, the freedom of expression, under Article 10 ECHR, in relation to which the margin left to Member States has never been very broad, and, secondly, the right to property. In some other areas as, for example, the right to a private life under Article 8 ECHR, when issues of a morally and ethically delicate nature are raised (such as transsexuals, in vitro fertilisation and subsequent use of embryos), the margin of appreciation left to the Member States, even after the enlargement, has remained very broad. See ECHR, UK v. Pretty, 29 April 2002, and UK v. Evans, 10 April 2007). In other words, every time consensus is lacking within the Member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin is wider (see X., Y. and Z. v. the United Kingdom, 22 April 1997, par. 44; Frette v. France, 26 Feb. 2002, par. 41). There will also usually be a wide margin if the State is required to strike a balance between competing private and public interests or Convention rights (see Odièvre v. France, 13 Febr. 2003, parr. 44-49 and Frette, cit., par. 42). I am indebted to Prof. Andras Sajo for the distinctions underlined above.

Consequently, the impression is that recently, as a (late) reaction to the Council of Europe’s enlargement to the east, the European Court of Human Rights, with a view to supporting the respondent (very often a CEE State) in fulfilling its obligations under Article 46, has sought to indicate the type of measure the same State might take to put an end to the systemic situation identified in the present case. In doing so, the Court seems to welcome a new activist approach, commensurate with the enlargement of the Council of Europe, towards the Member States’ legislative and judicial powers. Those States, in turn, seem gradually to be losing freedom of choice as to the appropriate means to comply with a judgment notifying a breach of the ECHR, and determine the appropriate remedial measures to satisfy the respondent State’s obligations under Article 46. It is not a coincidence, then, that this approach was introduced in certain decisions addressed to EEC Member States.

11 See, *mutatis mutandis*, and in connection with the lack of independence and impartiality of a trial Court, ECHR, *Gencel v. Turkey*, 23 Oct. 2003, par. 27; *Assanidze c. Georgia*, 8 April 2004; *Ilascu and o. v. Moldova and Russia*, 8 July 2004, where the Court went so far to order that “the respondent States must take every measure to put an end to the arbitrary detention of the applicants still detained and to secure their immediate release” (par. 490). The further attenuation, by the last mentioned judgment, of Member States’ margin of appreciation, did not pass unobserved. In his partially dissenting opinion, Judge Loucaides states: “Lastly, I realise the objective impossibility for the second respondent State of enforcing the Court’s judgment to the letter, going over the head of sovereign Moldova, particularly in order to put an end to the applicants’ detention. In *Drozd and Janousek*, the Court said: ‘The Convention does not require the Contracting Parties to impose its standards on third States or territories’ (*Drozd and Janousek v. France and Spain*, 26 June 1992, par. 110). When that is translated into the language of international law, it surely means that neither the Convention, nor any other text requires signatory States to take counter-measures to end the detention of an alien in a foreign country unless, upon reading our judgment, people welcome the appearance right in the heart of old Europe of a new condominium like the New Hebrides. But I very much doubt that that would be a desirable development”.

12 Membership in the Council of Europe has soared from 23 to 41 (including 17 Central and East European countries) between 1990 and 1999.

13 According to previous constant case law, the Court of Strasbourg has regularly stated that “the contracting parts are free to chose the means whereby they will comply with a judgment in which the Court has found a breach”. See, *ex plurimis*, ECHR, *Marcx c. Belgium*, 13 June 1979, par. 58; *Campbell c. UK*, 22 March 1983, par. 34.

14 See, along the same lines, the ECHR, *Somogyi*, 18 May 2004, where the Court of Strasbourg advised Italy that, where an applicant had been convicted despite a potential infringement of his right to participate in his trial, the most appropriate form of redress would, in principle, be a trial *de novo* or the reopening of the proceedings, in due course, and in accordance with the requirements of Article 6 of the Convention.
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As already stressed, the reason for the new judicial strategy described above has to be identified in the European Court of Human Rights’ lack of the necessary trust in the EEC constitutional-democratic standards. This is quite puzzling, one might say, considering that, since 1989, the Council of Europe has represented the key reference point and a source of inspiration for the EEC’s constitutional momentum. However, upon closer scrutiny, it is only apparently paradoxical: is there anyone more aware of a constitution’s weaknesses than those who actively contributed to its birth?

The further centralisation of the Court’s adjudication powers, along with the reduction of the appreciation margin, namely, at the level of EEC Member States, may not be regarded as a foolish activist jump but rather as a considered step aimed at reducing the exploding case load, bearing in mind Sadursky’s words: “If there is a domain in which concern over national identity and accompanying notions of sovereignty are obviously weak in Central and Eastern Europe is in the field of protection of individual rights”. The same does not apply to the different scenario of the EU constitutional dimension, where the European law’s penetration into the domestic legal orders and the constitutional conflict between the national and the supranational levels do not seem destined always to extend, as in the case of the European Court of Human Rights’ intervention, the content of the constitutional rights, but rather, to the contrary, as the EAW saga shows, at least occasionally, to force constitutional change with a restrictive result for certain Member States.

Against this background, and with regard to the new “season” of the centralised judicial activism of the European Court of Human Rights, the relevant question is whether (and in case of a positive answer, in which direction) the European Court of Justice has somehow developed a new judicial sensitiveness after the 2004 and 2007 enlargements. The addition of twelve, not always homogeneous, constitutional identities seems in fact to entail that the ECJ’s exclusive reference to the concept of common constitutional traditions is starting to become progressively less suitable, especially if it is

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15 The main reason, according to Sadursky, is that “the legacy of Communism under which individual rights were systematically trampled on is still fresh in many peoples’ minds”. See W. Sadurski, “The Role of the EU charter of fundamental rights in the process of the enlargement”, in G.A. Bermann, K. Pistor, (eds.), Law and Governance in an Enlarged European Union, Oxford, Hart, 2004, pp. 61-95, at p. 80.

considered, with particular emphasis on EEC Member States, that: “After the fall of communism, national identity (often perceived in an ethnic rather than civic fashion) has been either the only or the most powerful social factor, other than those identified with social foundations of the ancien regime, capable of injecting a necessary degree of coherence into society and of countervailing the anomie of a disintegrated, decentralised and demoralised society”. The situation is even more complicated because, within the EEC, there exist more identities asking for recognition: the majority one and the many minorities.

Bearing these considerations in mind, the key question may be: how is the ECJ responding to the change, in a pluralistic identity-based direction, of the dynamic nature of constitutional tolerance? As it was rightly noticed, before the enlargement, the ECJ, in order to foster constitutional tolerance by Member States, applied a two-level argumentative strategy: the first level approach addressed national legislative and executive bodies, and the second, the national courts. Briefly, it appears that, with regard to that first aspect, the ECJ seems to have understood the extent of the change in the relationship between the European dimension and the Member States’ constitutional dimensions after 2004. As to the second, however, there is still a long way to go, even if certain steps in the right direction have already been taken. The next section of the paper is dedicated to the attempt of finding some empirical support for these assumptions.


19  The constitutional ingredient which shapes the European legal order’s uniqueness, according to which, in Joseph Weiler’s usual brilliant terms, “constitutional actors in the Member States accept the European Constitutional discipline not because as a matter of legal doctrine…. They accept it as an autonomous voluntary act endlessly renewed by each instance of subordination …. The Quebecois are told in the name of the people of Canada, you are obliged to obey. The French or the Italians or the Germans are told: in the name of peoples of Europe, you are invited to obey….When acceptance and subordination is voluntary, it constitutes an act of true liberty and emancipation from collective self-arrogance and constitutional fetishism: a high expression of Constitutional Tolerance”. See J.H.H. Weiler, “Federalism and Constitutionalism: Europe’s Sonderweg”, 13 Harvard Jean Monnet Paper (10-2000), at p. 13.

2. The (EEC) Member States’ Political Bodies as ECJ Interlocutors

It has been argued\(^\text{21}\) that, in order to prevent potential “sovereignist” reactions by Member States and, namely, in order to enhance this miraculous “voluntary obedience”, the last few decades the ECJ has resorted to applying the “majoritarian activist approach”\(^\text{22}\). According to this approach, among the various solutions to a case, the European judges may opt for the final ruling, which is most likely to meet the highest degree of consensus in the majority of Member States\(^\text{23}\). The European judges seem to have understood that if such an approach had been partially\(^\text{24}\) able to convince Germans and Italians when they were “invited” to obey the European discipline in the name of the peoples of Europe, the same “invitation” would have proven much less successful when applied to Estonians or Hungarians.

The post-2004 era has called, then, for a new ad hoc judicial strategy to combine with the pre-2004 majoritarian activist approach. After all, what the new Member States need to be reassured about seems to be that even if, with regard to those national values relating to a peculiar constitutional identity to protect, they have found themselves in a minority or isolated position, the European judges would not sacrifice them on the altar of the majoritarian-activist approach. It does not seem a coincidence, indeed, that some months after the 2004 enlargement, the Court stated, against an exclusively majoritarian


\(^{\text{22}}\) Miguel Maduro identifies the same judicial approach in the different field of European economic constitution. See M. P. Maduro, We, the Court. The European Court of Justice and Economic Constitution, Oxford, OUP, 1998, at pp. 72-78.

\(^{\text{23}}\) In particular, a previous work has tried to prove how the reference to the majoritarian approach has been able to explain how it is not unusual in the European case law that a couple of cases, which are very similar in their factual and/or legal background, are decided in an opposite, thus almost schizophrenic, way by the ECJ. The key to the apparent enigma has been found by reflecting upon the prospective impact of a decision on the national legal systems by the application of the majoritarian activism approach, as is proved by the following case law analysis of two decisions in the field of protection of sexual minorities. See O. Pollicino, “Legal Reasoning”, o.c., at pp. 283 ff.

\(^{\text{24}}\) Doubts about the real persuasion attitude of the mentioned judicial strategy have been advanced by Matey Avbely, by arguing that “The damaging effect of the “supranational” counter-majoritarian difficulty on legitimacy appears to be doubled: the whole ‘national demos’ is turned into minority and the prevailing value-based view – the identity of the majority of the ‘national demos’, is compromised in favour of a distinct European demos”. See M. Avbely, “European Court of Justice and the Question of Value Choices: Fundamental human rights as an exception to the freedom of movement of goods”, Jean Monnet Working Papers 6/2004, Jean Monnet Chair.
logic, for the very first time, that “it is not indispensable in that respect for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected”.  

The factual background of the above-mentioned Omega decision is too well-known to be brought up now. It is enough here to recall that the question was whether the aim of protecting a constitutional right, in that case the right of human dignity, representing a top priority issue for one Member State (in that case, Germany), could possibly justify a restriction of freedom of services, a fundamental freedom but also a fundamental right of the European Economic Constitution. The outcome of the decision is even more famous: “Community law does not preclude an economic activity consisting of the commercial exploitation of games simulating acts of homicide from being made subject to a national prohibition measure adopted on grounds of protecting public policy by reason of the fact that that activity is an affront to human dignity”.  

What seems instead to have been undervalued in several commentaries on the case, is the circumstance that the European judges, in order to acknowledge the protection of the single Member State’s constitutional values, had to manipulate their previous judgment which clearly reflected the then prevailing approach of the majoritarian (if not unanimous) logic at the heart of the justification grounds for the restriction of fundamental freedoms.  

The ECJ was then able to give an authentic (manipulated) interpretation of its precedent explaining how:

Although, in paragraph 60 of Schindler the Court referred to moral, religious or cultural considerations which lead all Member States to make the organisation of lotteries and other games with money subject to restrictions, it was not its intention, by mentioning that common conception, to formulate a general criterion for assessing the proportionality of any national measure which restricts the exercise of an economic activity.

In other words, there emerges a shift in the judicial reasoning of the ECJ, from a pre-accession majoritarian activist approach to a post-accession reference to the need for protection, at least in the most sensitive cases, of the fundamental rights peculiar even to

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26 Omega, cit., par. 41.
27 Case C-275/92, Her Majesty’s Customs and Excise v. Gerhart and Jörg Schindler, 1994 ECR I-1039.
28 Omega, supra par. 37.
a single Member State’s constitutional identity. Upon closer inspection, the attention to national values, far from being a post-2004 accession novelty, has always been a main feature of the ECJ case law related to the achievement of a European single market. This is, in particular, with regard to consumer protection and to the preservation of public order as a legitimate national justification for the hindrance to fundamental freedoms, especially freedom of establishment and freedom to provide services. It is enough to consider the case law related to gambling where, since 1994, the Court has admitted that moral, religious and cultural factors, and the morally and financially harmful consequences for individuals and societies associated with gambling could serve to justify the existence, on the part of the national authorities, of an appreciation margin sufficient to enable them to determine what kind of consumer protection and public order preservation should be applied. The innovative element of the post-accession phase, connected mainly with the need to provide a reassurance argument for the strong, identity-based, demand of recognition coming from the new EEC Member States, is instead the willingness of the ECJ to take a step back if the protection of a national constitutional right is at stake. If it is true, as it has been objected, that: “the phase of justification before the ECJ is a phase in which the Court strikes a balance between competing values of the Member States and the economic values of the Union and makes the final determination”, the added value of the relevant post-accession case law is that fundamental rights become a legitimate justified obstacle to the further enhancement of the European economic constitution even if that ground of justification is not at all enshrined in the founding Treaties.

29 ECJ, Schindler, cit., 21-9-1999, Case C-124/97, Markku Juhani Läärrä, Cotswold Microsystems Ltd. and Oy Transatlantic Software Ltd v. Kihlakunnansyöttäjä (Jyväskylä) and Suomen valtio, 1999 ECR I-6067. Along the same lines, more recently, see Case C-243/01, Procuratore della Repubblica v. Piergiorgio Gambelli, 2003 ECR I-13031 and Joined Cases C-338/04, C-359/04 and C-360/04, Massimiliano Placanica and others, 2007 ECR I-1891, where the Court expressly states that “context, moral, religious or cultural factors, as well as the morally and financially harmful consequences for the individual and for society associated with betting and gaming, may serve to justify a margin of discretion for the national authorities, sufficient to enable them to determine what is required in order to ensure consumer protection and the preservation of public order (par. 47)”. I am indebted to Alberto Alemanno for having pointed out the named decisions to me.

30 See M. Avbely, “European Court” o.c.

The same vision, even more clearly expressed, was confirmed recently in a judgment of 14 February 2008, which so far has gone strangely unnoticed. Its faint echo calls for a brief overview of the case. The dispute in the main proceedings concerned the importation by a German company of Japanese cartoons called ‘Animés’ in DVD or video cassette format from the United Kingdom to Germany. The cartoons were examined before importation by the British Board of Film Classification (BBFC). The latter checked the audience targeted by the image storage media by applying the provisions relating to the protection of young persons in force in the United Kingdom and classified them in the category “suitable only for 15 years and over”. Said image storage media bear a BBFC label stating that they may be viewed only by persons aged 15 years or older.

Dynamic Medien, a competitor of Avides Media, brought proceedings for interim relief before the Landgericht (Regional Court) of Koblenz (Germany) with a view to prohibiting Avides Media from selling such image storage media by mail order. Dynamic Medien argued that the legislation on the protection of young persons prohibits the sale by mail order of image storage media which have not been examined in Germany in accordance with that law, and which do not bear an age-limit label corresponding to a classification decision from a German higher regional authority or a national self-regulation body (‘competent authority’). By decision of 8 June 2004, the Koblenz Landgericht held that mail-order sales of image storage media bearing an age-limit label from the BBFC alone was contrary to the provisions of the law on the protection of young persons and constituted anti-competitive conduct. On 21 December 2004, the Oberlandesgericht (Higher Regional Court) of Koblenz, ruling in an application for interim relief, confirmed that decision. The Koblenz Landgericht, called to rule on the merits of the dispute and unsure whether the prohibition provided for by the law on the protection of young persons complied with the provisions of Article 28 EC, decided to stay the proceedings and to refer to the ECJ for a preliminary ruling. The German Court asked the ECJ whether the principle of free movement of goods laid down in Article 28 EC precluded the German law from prohibiting the sale by mail order of DVDs and videos that were not labelled as vetted by the German authorities as to their suitability for young people. The German Court also asked whether the German prohibition could be justified under Article 30 EC. The ECJ held, in the first place, that the German rules constituted a measure having equivalent effect to quantitative restrictions within the meaning of Article 28 EC, which in principle is incompatible with the obligations arising from that article unless it can be objectively justified. The Court then considered whether the German measures could be

32 ECJ, Case C-244/06, Dynamic Medien Vertriebs GmbH. v. Avides Media AG, 2008 ECR I-505.
justified as being necessary to protect young people, being an objective linked to public morality and public policy, which are recognised as grounds for justification in Article 30 EC. The Court held that the German measures were so justified. The Court stated in particular:

…that it is not indispensable that restrictive measures laid down by the authorities of a Member State to protect the rights of the child, correspond to a conception shared by all Member States as regards the level of protection and the detailed rules relating to it (see, by analogy, Omega, paragraph 37). As that conception may vary from one Member State to another on the basis of, inter alia, moral or cultural views, Member States must be recognised as having a definite margin of discretion.33

Despite the reference to the analogy of the Omega case, in Dynamic Medien the ECJ seems to have gone further with the appraisal of the national constitutional values of the particular Member State, in the direction of indirect reassurance towards the new Member States. In my opinion, the case presents a twofold innovation. Firstly, by making express reference to the different levels of the protection of fundamental rights within Member States (rather than way of protection as in Omega), and by acknowledging for the first time a definite discretion margin to the individual Member State, the ECJ has achieved a double objective. On one hand, the Court refused to follow the highest standard-based conception of fundamental human rights34 whilst, on the other, it has explicitly confirmed its willingness to adhere to the substantive nature of the fundamental rights. In Alexy’s words,35 they are substantively fundamental because they enshrine the basic normative structures of state and society.36 It would be difficult not to catch the link between, on one hand, the Court’s step back, facing the fundamental boundaries37 of the

33 Dynamic Medien, cit., par. 48.
36 M. Avbelj, “European Court” o.c.
Member States’ basic value-oriented choices, in its obsessive enhancement of the European law’s uniformity and, on the other hand, the aim to reassure (also) EEC States that their constitutional identity will not be sacrificed in the name of the achievement of the European economic values.

Secondly, the reference to the European Charter of Fundamental Rights is also very innovative in this regard. Apart from other cases where the ECJ has made explicit reference to the Charter, here the mentioned reference is the sole means to assert European primary legal protection of the fundamental right in question. In the author’s view it is not a coincidence that, in light of this judicial strategy of reassurance being implemented, the ECJ started to make express reference in its reasoning, after years of indifference, to the Charter, almost immediately after the accession of the EEC Member States. As it has been astutely argued: “There is a high degree of congruence between the structure of constitutional rights in the post-communist countries of Central and Eastern Europe and the structure of the rights as displayed in the EU Charter”.40

On account of the scenario that the last pages have tried to delineate, it is perhaps possible to advance further in the attempt to systematise the reactions to the enlargement, which have characterised the judicial approach of the ECJ. The ECJ seems, in fact, increasingly committed to work on a self- restriction of the EC primacy principle, when


39 The Court of Justice (at par. 41) stated that “the protection of the child is also enshrined in instruments drawn up within the framework of the European Union, such as the Charter of Fundamental Rights of the European Union, proclaimed on 7 December 2000 in Nice (OJ 2000 C 364, p. 1), Article 24(1) of which provides that children have the right to such protection and care as is necessary for their well-being”.


41 This ECJ recent attitude to the exploitation of EC primacy, combined with the opposite tendency of further centralization of the adjudicatory powers, favoured by the ECHR, seems to have reduced the distance dividing the characteristics of EU law and ECHR law, in relation to their interface with domestic law. On the one hand, absolute primacy no longer seems to be a cornerstone of EU law and, on the other hand, the progressive realisation by the European Court of Strasbourg of its constitutional role has endured the consequence of increasing the acknowledgement of the (relative) primacy of the European Court of Strasbourg’s interpretation over domestic national law. In support of such impression, one may recall a recent decision in
it comes to the protection of identity-based constitutional dimensions of one or more Member States. A precise strategy of the ECJ, whose aim seems, in line with the Solange approach, to prevent further positions (also) of the EEC Courts by somehow “internalising”, as we have seen in Omega and Dynamic Medien, the “ contradiction” (counterlimits) doctrine in its case law.

In other words, the “evolutionary nature of the doctrine of supremacy” \(^{42}\) seems to have undergone another transfiguration phase after the 2004 enlargement, from an uncompromising version \(^{43}\) to a compromising one. It is not a coincidence that the Treaty establishing the European Constitution of 2004 provided, immediately prior to the EC primacy principle codification, at I-6, the following complementary principle:

The Union shall respect the equality of the Member States before the constitution as well their national identity, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall

which the ECHR, after having ascertained that the Italian highest civil Court did not interpret Italian law consistently with its previous relevant case law, through which it had many times sanctioned the excessive length of Italian judicial procedures, has permitted private suits against the Italian State in Strasbourg, even without having first exhausted all the instances of national jurisdiction. See the relevant judgments of the Court of Strasbourg in the Scordino saga, and, in particular, decisions 27 March 2003, 29 July 2004 and 15 July 2004. It is, from the ECHR, another way to say “if the national judge does not follow my jurisprudence, than it is not necessary to go in front of that judge before going in front of me”. The Italian Constitutional Court seems to have finally accepted this new activist attitude of the Court of Strasbourg. Recently, in decisions 348-349 of 2007, it had the chance to state that the Court of Strasbourg case law, apart from the eventual breach of the Constitution, is mandatory for the national judges See, regarding these cases, O. Pollicino, “The Italian Constitutional Court at the crossroads between constitutional parochialism and cooperative constitutionalism. Case note on judgments no. 348 and 349 of 2007”, European Constitutional Law Review, 2008, pp. 363-382. In sum, the reaction that the enlargement has provoked to the European Court of Strasbourg seems to be a reduction, in some ways forced, of (in Maduro’s words) the degree of “institutional awareness”, according to which “Courts must increasingly be aware that they do not have a monopoly over rules and they often compete with other institutions in their interpretation”. See M. P. Maduro, “Interpreting European law: Judicial adjudication in a context of constitutional pluralism”, European Journal Legal Studies, 2008, at pp. 2 ff.. The latter approach, if in a certain sense it is forced by the objective difficulty to take into full consideration the constitution and institutional peculiarities of 46 Member States, is certainly focused on reducing the space that, in the reasoning of the Strasbourg judges, is reserved to the Member States’ Constitutions.


respect the entire state functions, including the territorial integrity of the state, maintaining law and order and safeguarding national security.

Moreover, it does not appear to be coincidence either that in the “substantial reincarnation” of that Treaty agreed in Lisbon in December 2007, notwithstanding the lack of an express codification of the principle of primacy of EC law, the principle enshrined in Article 1-5 of the Treaty establishing the European Constitution has been textually provided by Article 4.2 of the Lisbon Treaty (with the further specification that national security remains the sole responsibility of each Member State).

In a different context, Mattias Kumm has stated the primacy principle’s new “season” following the 2004 enlargement, with a view to the new Treaty of Lisbon, which should enter into force on 1 January 2009, and requires that: “When EU law conflicts with clear and specific national constitutional norms that reflect a national commitment to a constitutional essential, concerns related to democratic legitimacy override considerations relating to the uniform and effective enforcement of EU law”44. In other words: “Guarantee of the constitutional identities of Member States in the constitutional Treaty should be interpreted by the ECJ to authorise national Courts to set aside EU law on certain limited grounds that derive from the national constitutions”.45

If this impression was to be confirmed in the future, the ECJ would have found, thanks to the new parameter provided by Article 4.2 of the Lisbon Treaty, the appropriate judicial mechanism to prevent the occurrence of the most frequent constitutional conflict between the EC and national levels – the dualistic tension between the irresistible, overriding vocation of the ECJ’s Simmenthal mandate and the equally monolithic national constitutional mandate to preserve the core of fundamental rights from an EC “invasion”.

As a matter of example, an EC norm that would take precedence over a Member State’s constitutional provision which asserts its constitutional identity, would clash, in fact, with EU law itself, and with Article 4.2 of the Lisbon Treaty, which requires, as we have seen, that EU Law respects the national identity of the Member States. Consequently, in case of such a conflict, the hypothesis of annulment of a piece of EC law by the Member States’ constitutional courts would appear even less realistic. Conversely, the circumstance that a parameter of European law is violated would imply the competence

45 M. Kumm, “The jurisprudence” o.c., at p. 303.
of national ordinary judges, in their European mandate role, to set aside that piece of EC law clashing with the principle enshrined in Article 4.2 of the Lisbon Treaty. of the same opinion is A. Ruggeri, “Riforma del titolo V e giudizi di ‘comunitarietà’ delle leggi”, paper presented at the seminar Diritto comunitario e diritto interno, Palazzo della Consulta, Italian Constitutional Court, 20 April 2007, at p. 15. It should be noted that the above mentioned provision it is not the only one that in the treaty of Lisbon makes an express reference to the recognition of the national peculiarities. Art. 61, first par. of the new Lisbon Treaty, provides that “The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States”.

3. The (EEC) National Judicatures as ECJ Interlocutors

The previous sections have pointed out the changes that, following the 2004 and 2007 enlargements, have characterised the new approaches of the European judiciary towards Member States’ political powers. It now remains to consider if something has changed – or still needs to change – at European judicial level, with regard to the relationship between the European legal order and the Member States judicial bodies, with particular reference to the EEC judicatures. In this regard, a distinction has to be made between constitutional courts and the ordinary judges in EEC Member States. The former, as indicated above, seem well prepared to play a leading role in the new season of European cooperative constitutionalism through a creative and often activist approach. Further, as third-generation constitutional courts, they are characterised by being born into the global constitutional movement which favours the interaction between legal regimes, but the same does not apply to the ordinary courts. It has been rightly observed, in fact, that the judiciary in EEC countries is still enslaved by textual positivism. In other words, the EEC ordinary judges still maintain a rather formalistic approach, almost mechanical and deferent to the national legislature, not enthusiastic about the new chances of judicial communication offered by the European law and, in particular, by its preliminary ruling procedure, almost allergic to creativity as well as judicial activism, and far from any intent to participate in a transnational discourse. This is not exactly the best start to build up a virtuous process of mutual assistance between the legal constitutional dimension and the European one.

Against this background, my assumption is that the ECJ has already put forward actions aimed at urging EEC ordinary courts to cooperate, but a lot still remains to be done, especially with regard to judicial style, in order to improve the virtuous cycle of

46 Of the same opinion is A. Ruggeri, “Riforma del titolo V e giudizi di ‘comunitarietà’ delle leggi”, paper presented at the seminar Diritto comunitario e diritto interno, Palazzo della Consulta, Italian Constitutional Court, 20 April 2007, at p. 15. It should be noted that the above mentioned provision it is not the only one that in the treaty of Lisbon makes an express reference to the recognition of the national peculiarities. Art. 61, first par. of the new Lisbon Treaty, provides that “The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States”.


reciprocal influence between the European and national courts, including the constitutional ones. With regard to achievements, we refer to the need, strongly felt in the pre-accession period, for a rule that EEC national judges might have perceived as an incentive not to disregard the correct domestic application of European law. The solution was found, one year before the major 2004 enlargement, in the Köbler case,\(^{49}\) where the ECJ extended the case law in Francovich\(^{50}\) and Brasserie,\(^{51}\) related to State liability in case of actions taken in breach of the national obligations stemming from European law, to the judiciary of the Member States. In other words, the ordinary courts of the new Member States, at the moment of their entrance in the European judicial arena, have been welcomed by the updating of the ECJ doctrine of Member State liability, which now enables an individual to bring suit for damages on a claim that a prior decision of a Member State’s court violated European law.\(^{52}\) It is difficult to deny that the decision’s effect (or, at least, its intention) was to motivate (also) EEC Member States’ courts, which will now have an obvious incentive for making referrals concerning doubtful questions of European Community law to the ECJ, in the attempt to avoid any possible subsequent liability.

This is what we should also read between the lines of the ECJ decisions of December 2003, where the ECJ found the infraction procedure brought by the Commission against Italy legitimate, due, *inter alia*, to the persisting practice of the Italian


\(^{50}\) ECJ Joined cases C-6/90 and C-9/90, Andrea Francovich and Danila Bonifaci v. Italian Republic, 1991 ECR I-5357.


\(^{52}\) See J.E. Pfander, "Köbler v. Austria: Expositional Supremacy and Member State Liability", *European Business Law Review*, 2006, pp. 275-302. Along the same lines, the Court of Justice, in its subsequent decision *Traghetti del Mediterraneo* held that “Community law precludes national legislation which excludes State liability, in a general manner, for damage caused to individuals by an infringement of Community law attributable to a Court adjudicating at last instance, by reason of the fact that the infringement in question results from an interpretation of provisions of law or an assessment of facts or evidence carried out by that Court. Community law also precludes national legislation which limits such liability solely to cases of intentional fault and serious misconduct on the part of the Court, if such a limitation were to lead to exclusion of the liability of the Member State concerned in other cases where a manifest infringement of the applicable law was committed” (par. 46). See ECJ, Case C-173/03, *Traghetti del Mediterraneo SpA in Liquidation v. Italian Republic*, 2006 ECR I-5177.
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...Corte di Cassazione in breach of Community law. As has been noted, the possibility of infringement proceedings against the judicial misapplication of European law has been regarded with suspicion by the ECJ and excluded by mainstream scholarship: “By the argument the co-operation and the trust between the Court of Justice and national Courts would have been disrupted. We may see this infringement procedure as a warning to national Courts in the new Member States to take Community law seriously”.

If the abovementioned decisions represent the result of the substantive efforts of the ECJ to adapt its judicial attitude to the new post-enlargement era, what seems to remain inappropriate is the ECJ’s language towards the new judicial interlocutors. Especially on the strength of what still seems to characterise the EEC ordinary judicatures, the actual judicial style and the argumentative structure of the ECJ legal reasoning do not appear fully adequate.

As Mauro Cappelletti perceptively wrote: “Unlike the American Supreme Court and the European constitutional courts, the ECJ has almost no powers that are not ultimately derived from its own prestige, [and the] intellectual and moral force of its opinions”. With special regard to the Member States’ judicial interlocutors, the main factors at the heart of the ECJ’s legitimacy still remain the clearness of the legal reasoning of its judgments and the persuasive force of its arguments. This attitude has strongly characterised the first years of the ECJ case law, when the European judges applied to their legal reasoning, by way of a didactic methodology, “a judicial style which explains as it declares the law”. This is particularly true with specific reference to the procedure of Article 234 EC. It was not easy for the ECJ to induce national judges to feel confident...

53 ECJ, Case C-129/00, Commission v. Italy, 2003 ECR I-14637.


56 J. Komarek, “Inter-Court Constitutional” o.c., at p. 87.


about such a new and sophisticated judicial conversation tool, but during years of “courteous pedagogy”, \(^{60}\) they managed to persuade them.\(^{61}\)

Apparently, over the years, the ECJ judicial style has progressively lost its original didactic and pedagogic character. The reasons seem easily identifiable: on one hand the national courts of first-generation Member States soon learnt to “digest” the impact of the EC law’s novelty over time, thus gradually losing the didactic and pedagogic needs. On the other hand, the growing case load combined with the difficulty of finding a compromise at the same time has become, from being a convincing and persuasive position in an enlarged ECJ, an increasingly difficult task for the European judges. However, now, with twelve new Eastern European ordinary national judicatures that “will have the time to learn more than the mere basics of Community Law”, \(^{62}\) the ECJ again needs to find a judicial style which explains, as well as it states, the law and the persuasive strength of its arguments, which it somehow lost. A good example of this evolution in the ECJ judicial style is, in line with our research focus, the awaited decision of the ECJ regarding the EAW.\(^{63}\)

Due as well to the great deal of interest aroused by the German, Polish and Czech Constitutional Courts’ decisions, there was a long wait for the ECJ’s decision, which had been requested under Article 35 EU by the Belgian Cour d’Arbitrage, on the validity of Framework Decision 2002/584. As the Advocate General stressed in his conclusions,\(^{64}\) the referring Belgian court expressed doubts on the Framework Decision’s compatibility with the EU Treaty on both procedural and substantive grounds. The first of these questions related to the legal basis of the European Council’s decision. In particular, the referring court was unsure that the Framework Decision was the appropriate instrument,


\(^{61}\) In this regard, it should not be forgotten that the national Courts have followed the instructions from Luxembourg even when these instructions have been against their constitutional mandate. It is enough to recall here the Simmenthal case, *Case 106/77, Amministrazione delle finanze dello Stato v Simmenthal*, 1978 ECR 585, “the culmination of the principle of direct effect and supremacy, in which the ECJ held that the Italian Courts simply had to defy Italian constitutional rules to the Corte costituzionale”. See M. Gaes, *The National Courts’ Mandate in the European Constitution*, Oxford, OUP, 2006, at p. 4.

\(^{62}\) J. Komarek, “Inter-Court Constitutional” o.c.

\(^{63}\) ECJ, *Case C-303/05*, cit.

\(^{64}\) *Ibidem*, see conclusions.
holding that it should be annulled because the EAW should have been implemented, instead, through a Convention provided by Article 34(2)(d) EU. In this case, in fact, according to the Belgian court, it would have gone beyond the limits of Article 34(2)(b) EU, pursuant to which framework decisions are to be adopted only for the purpose of approximation of the laws and regulations of the Member States. Secondly, the Belgian court asked whether the innovations brought by the Framework Decision regarding the EAW, even when the facts in question do not constitute an offence under the law of the executing State, were compatible with the equality and legality principles in criminal proceedings in their role of general principle of European law as enshrined in Article 6(2) EU.

More specifically, the alleged infringement of the principle of equality would have been due to the unjustified dispensation, within the list of 32 offences laid down in the Framework Decision, with, the double criminality requirement, which is held instead for other crimes. Conversely, the principle of legality would have been breached owing to the Framework Decision’s lack of clarity and accuracy in the classification of the offences. It was opinion of the Belgian court, in fact, that should Member States have to decide whether to execute an EAW, they would not be in the position to know whether the acts for which the requested person is being prosecuted, and for which a conviction has been handed down, actually fall within one of the categories outlined in the Framework Decision.

The Advocate General, in his conclusions, had no doubts about the high relevance of the preliminary request which should have been included, also subsequent to the German, Polish, Cypriot and Czech rulings:

…in a far-reaching debate concerning the risk of incompatibility between the Constitutions of the Member States and European Union law. The ECJ 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. 65

The decision’s first reading leads to much disappointment. The second reading does not really give a different impression. It was opined, indeed, that the ECJ had failed to engage fully in undertaking the role of “protagonist” it had been assigned by the Advocate General and more harshly that “the Court’s decision may serve as an example of how judicial discourse should not be conducted, particularly when the issues at the

65 Ibidem, par. 8. Of the same opinion is Alonso García in Justicia constitucional y Unión Europea, Civitas, Madrid, 2005, expressly mentioned by AG in his conclusions.
The stake involves decisions of national constitutional courts. The ECJ refused to declare the EAW invalid and, consequently, to reset the balance carried out by the Council through the adoption of the Framework Decision between the exigency of enhancing the cooperation in criminal matters and to respect the constitutional values of the Member States.

There are few doubts that the ECJ steered clear of protagonist leading roles, but given the inter-legal orders constitutional tension preceding the judgment, it could have been the right option that one followed which, in the light of low-profile approach therefore, reached the conclusions that the legislative instrument of the EAW Framework Decision was, indeed, legally valid, if it would not have achieved that output through a succinct, not persuasive, cryptic and in some parts even apodictic reasoning in which the comparative argument is an unjustified absent.

The ECJ settled the dispute over the appropriateness of the Framework Decision as a legal instrument to govern the EAW, stating that EU Treaty provisions may not be interpreted as granting the sole adoption of framework decisions falling within the scope of Article 31(1)(e) EU. It is true, the Court held, that the EAW could have been governed by a Convention as per Article 34(2)(d) EU, but, at the same time, it stated that the Council enjoys discretion to decide upon the appropriate legal instrument, where, as in this case, the conditions governing the adoption of such a measure are satisfied. The carte blanche, given without further explanations to the Council in the choice of the appropriate legal basis to pursue the sensitive goal of enhancing the cooperation of the Member States in criminal matters, does not seem the best strategic move to reassure the EEC national parliaments and judges about the European Union's commitment to the principle of legal certainty, so important in the constitutional structures of the post-communist legal orders. However, the more unsatisfactory and cryptic part of the reasoning is related to contesting the alleged breach of fundamental rights by the EAW framework decision.

With regard to the alleged violation of the legality principle, the ECJ operates an artificial transposition of the playing field from the European level to the national level, arguing that Article 2 of the Framework Decision, which abolishes the requirement of

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66 See D. Sarmiento, “European Union” o.c., at p. 183.

67 With regard to the progressive adoption of measures for the setting of offences and their punishments' constituent elements in matters relating to organised crime, terrorism and drug trafficking.
double criminality from the list of 32 offences, does not itself harmonise the criminal
offences in question, in respect of their constituent elements or penalties to be attached.\textsuperscript{68}

Consequently, even if the Member States reproduce word-for-word the list of
the categories of offences set out in Article 2(2) of the Framework Decision for
the purposes of its implementation, the actual definition of those offences and
the penalties applicable are those which follow from the law of the issuing
Member State. The Framework Decision does not seek to harmonise the
criminal offences in question in respect of their constituent elements or of the
penalties which they attract. (par. 52).\textsuperscript{69}

This is a clever but risky means of sending back “the hot (constitutional) potato” to
the national courts. It is clever because the fundamental issue of respect by European
legislation of the fundamental principle of the criminal offences and penalties’ legality
suddenly becomes, and almost magically so, a matter determined by the law of the issuing
Member State, which must respect fundamental rights and fundamental legal principles as
enshrined in Article 6 EU (par. 55).\textsuperscript{70} It is risky because this ECJ judicial attitude of
“washing one’s hands of the problem”, without further explanation, does not exactly
seem to be the right approach to foster the confidence of the national (especially of
Central and Eastern European) courts, so essential in the enhancement of the European
area of freedom, security and justice, in the European Union’s commitment to
fundamental rights.

In response to the third argument concerning the alleged violation to the principles
of equality and non-discrimination of the EAW, owing to the unjustified differentiation
between the offences listed under Article 2(2) providing for the abolition of the double

\textsuperscript{68} Under Article 2(2) FD, the offences listed “if in the (issuing) Member State the punishment or the
custodial sentence incurs a maximum of at least three years” provide for surrender pursuant to a
EAW, regardless of the fact that the acts constitute an offence in both the issuing and the
executing Member State.

\textsuperscript{69} Case C-303/05 cit.

\textsuperscript{70} Accordingly, the European judges have not missed the opportunity to stress how the principles of
legality and non-discrimination fall within the “supra-primary” parameters on the basis of which
they ascertain the validity of an EC secondary law not only through the usual “transfiguration” of
Member States’ constitutional principles into common constitutional practice first, and then EC
law’s general principles, but also by the express acknowledgement of these principles, by
Articles 49, 20 and 21 of the Fundamental Rights’ Charter, which is mentioned for the fourth time
in a ruling by the Court of Luxembourg. See par 46. The other three references to the Nice
Fundamental Rights’ Charter may be found in the decisions, respectively, of Cases C-540/03,
C-423/05 and C-244/06, cit.
criminality requirement, on one hand, and all the other crimes where surrender is conditional on the executing Member State’s recognition of the criminal liability on which the Arrest Warrant is based on the other hand, the ECJ has played, in just one passage, that protagonist role the AG referred to in his conclusions. Such a ‘judicial activism regurgitation’, in the absence of a proper argumentative and persuasive basis and, in the light of the heavy inter-constitutional perturbation which anticipated the ECJ ruling, makes the interaction between the European dimension and the constitutional one on this delicate issue even more problematic. The ECJ, in fact, in an attempt to justify the rationale behind the abovementioned differentiation, made an express reference to the mutual trust between Member States as an indispensable tenet at the heart of any third pillar action – an argument openly questioned, as noted above, by the German Federal Constitutional Court – thus stating that according to the classification as per Article 2(2):

The Council was able to form the view, on the basis of the principle of mutual recognition and in the light of the high degree of trust and solidarity between the 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. (par. 57).71

In other words, the different treatment of persons suspected of having committed offences featured in the list set out in Article 2(2) of the Framework Decision and those suspected of having committed offences other than those listed is justified, according to the apodictic, cryptic and unpersuasive reasoning of the ECJ, by a presumption of the existence of mutual trust in the Member States for the guarantees provided by each other’s criminal law. Furthermore, the said presumption was contested less than two years earlier by the most prestigious Constitutional Court in Europe, the Federal Constitutional Court of Germany. There was not a single word, instead, which could have been read as an answer to the constitutional objections raised in relation to the EAW by many constitutional courts in Europe. As has been correctly argued, “the ECJ’s sparse reasoning in the decision contrasts with the firm and outspoken approach of the national constitutional Courts”.72

The lack of persuasive strength in the reasoning and the lost talent for the original pedagogical intent, are not the only facets of the ECJ’s current style that hinder, in the

71 Case C-303/05.
72 D. Sarmiento, “European Union” o.c., at p.182.
current post-enlargement times, the communication between the European level and the domestic constitutional level. The EAW decision could in fact represent a (bad) model for speculation on the ECJ’s need to expand eventually its legal reasoning equipment to include a method until now too dangerously disregarded: the comparative one. It is well-known that the ECJ has always been sparing in direct reference to Member States’ comparative law, leaving this “delicate business” to the Advocate Generals’ conclusions.

Two reasons seem to support this choice. Firstly, in the early years, the ECJ devoted all its argumentative efforts to stressing the peculiar features of the ‘new legal order’, distinguishing Community law from national and international law. The absence of reference to comparative law in the ECJ’s reasoning would be instrumental to that aim. Secondly, with the further enlargements and the risk of emphasising the reference to certain legal orders to the detriment of others, the ECJ very quickly understood that the strategic reference to the “common constitutional traditions” formula as a source of inspiration for European judges could have served to legitimise the European integration process in a more diplomatic way in the Member States’ eyes.

Now the question is whether, after the latest 2004 and 2007 enlargements to the east, the time has come for the ECJ to take seriously the comparative law argument in its legal reasoning. In the past, it has been possible to justify the exclusive reference to the common constitutional traditions under the “majoritarian activist approach” judicial strategy. Conversely, today, also in order to ensure a correspondence between the judicial argumentation level and the content-based level, in the light, on one hand, of the new value-based season increasingly committed to taking into consideration the single Member State’s constitutional identity and, on the other, of the more and more heterogeneous national constitutional humus, the exclusive reference to the common constitutional tradition has seemingly become unsuitable. On the contrary, a more audacious recourse to the explicit comparative reference to Member States’ law would serve a twofold purpose: enhance the judicial acceptance of the European legislation within the EEC Member States, thus providing a role-model to national Courts, and

73 P. Pescatore, “Le recours, dans la jurisprudence de la Cour de justice des Communautés europeenne, à des normes déduites de la comparaison des droits des Etats membres”, Rev. In. Dr. Comp., 1980, pp. 337-359; K. Lenaerts, “Interlocking Legal Orders in the European Union and Comparative Law”, Int. & Comp. Law Quart., 2003, pp. 873-906, at pp. 887 ff.. Perhaps the more direct and broad reference to comparative law may possibly be found in one of the very first decisions of the ECJ. See Joined cases 7/56, 3/57 to 7/57, Dineke Algera and others v. Common Assembly of the European Coal and Steel Community, ECR 1957, 39, parr. 55-56.

also fit the growing tendency towards an effective interaction between the European legal order and the national ones, the *file rouge* of the present paper.


Before ending our analysis, it is perhaps worth dwelling on possible further legal developments within the EU, apparently originated or consolidated by the recent enlargements to the east. Such development is entirely internal to the EU legal system and consists of the positive spill-over effect of the “conditionability” policy which played, as we saw above, a key role in the EU pre-accession negotiations with EEC candidate countries. Upon closer inspection, in fact, the European Union’s constant and demanding monitoring of the EEC candidate countries’ respect for human rights, under one of the Copenhagen criteria, has been nothing other than a de-facto exercise of the EU’s own human rights policy, which internally has never been fully implemented nor legally legitimised. Besides the discrimination argument highlighted above, this lack of consistency between the European external and internal legal dimensions led to, as a positive effect, increased pressure on EU institutions to work further on the internal legal sphere to reduce the double standard, which earlier had been identified as the worst risk to a credible EU human rights policy.\(^75\) Such internal pressure was also due to the fact that, as was noted,\(^76\) “the imminence of the 2004 enlargement and the disparity between the level of scrutiny of external and internal human rights policy as compared with existing Member States, had raised the additional question of whether the EU was suddenly to cease its pre-accession scrutiny and lose all interest in the policies of the candidate countries which had been so strictly monitored during the accession process, once they became full members”. On the other hand, applying the human rights scrutiny standard of the pre-accession period to new Member States alone would have represented a highly discriminatory EU internal policy, in sharp contrast with the principle of non-discrimination based on nationality.


In other words, as a reaction to the above described bifurcation, along with the need to uphold the principle of equality in the advent of the new millennium, something has begun to change within the European Union, as regards legal practice and a new formal legal basis, to favour the development, long sought after by insiders, but as yet not achieved, of an EU institutional human rights policy. As it has been argued, the first codification with regard to the respect for fundamental rights enshrined in Article 6 of the Maastricht Treaty, was already, at least partially, “a reaction by the Member States to the recent fall of the Communist regimes and to the likelihood of a wave of applications for membership from the countries of Central and Eastern Europe”. If, however, the first codified reference to fundamental rights had something to do with the 2004 enlargement, the abovementioned EU internal reaction to the external human rights policy de-facto exercised over the EEC candidate countries, seems able to produce an exponential acceleration in this regard. It would, in fact, determine an effective promotional protection of fundamental rights within the EU, something quite different from the existing situation, where the respect of fundamental rights represents a legally-required condition (even if not always adequately enforceable) for the validity of EU legislation. Among the factors supporting the plausibility of such a development, one may recall the following, in chronological order: (a) the growing attention to social rights’ protection and the fight against discrimination within the European Union; (b) the


79 According to Armin von Bogdandy, “there are some competences of the Union allowing for approaches to develop a harmonised diversity policy, especially Articles 7(1) and (2), 29, 34(2) TEU, Article 13(1) and (2) as well as Article 63 TEC”. See A. Bogdandy, “The European Union as Situation” o.c., 34.

80 It is enough to think, on the one hand, to the open method of coordination launched by the Lisbon Council of 2000 and to the growing relevance progressively acquired by the European Charter of Social Rights within the European Committee of Social Rights and, on the other hand, to the post-Amsterdam Article 13 EC and later the adoption of a) Directive 2000/43 ([2000]OJ L180/22), which prohibits discrimination on grounds of racial or ethnic origin, both within the labour market and in other important aspects of social life such as housing, healthcare and education, b) Directive 2000/78 ([2000] OJ L 303/16) which prohibits discrimination on grounds of religion or belief, disability, age and sexual orientation in employment and vocational training.
possibility, as per Article 7 (as amended in both the Amsterdam Treaty and the Treaty of Nice) for the Commission to petition the Council to ascertain whether there is a serious risk of breaching the principles enshrined in Article 6(1); (c) the interpretation of the abovementioned revised provision, which was recently provided by the European Parliament. As in fact Grainne De Burca has reminded us, the European Parliament recently declared in its annual report that: “It is the particular responsibility of the European Parliament, by virtue of the role conferred on it under the new Article 7(1) ... to ensure (in cooperation with the national parliaments and the parliaments of the applicant countries) that both the EU institutions and the Member States uphold the rights set out in the various sections of the Charter”; 81 (d) the launch of action programmes in areas, such as education, which had previously been left to the exclusive competence of the Member States; 82 (e) the provision of Article 51 of the Charter of Fundamental Rights, according to which Member States and the European Union “respect the rights, observe the principles and promote the application thereof in accordance with their respective powers”; (f) along the same lines, the European Council’s adoption, in November 2004, of “the Hague programme” to ensure security, freedom and justice within the European Union, the text of which provides: “incorporating the Charter into the Constitutional Treaty and accession to the European Convention for the protection of human rights and fundamental freedoms 83 will place the Union, including its

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82 In the aim of creating an “effective European legal area for the education”, the Socrates and Leonardo da Vinci Program (with regard to professional formation) and the Copenhagen Declaration of 10-11-2000 and Bologna Process (with regard to higher education) surely constitute the main developing steps.

83 As it is known, the Lisbon Treaty, despite its non-incorporation of the Charter, achieves substantially the same result, providing at Article 6 that “The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions. 2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union’s competences as defined in the Treaties. 3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and
institutions, under a legal obligation to ensure that in all its areas of activity, fundamental rights are not only respected but also actively promoted; and (g) last but not least, the recent establishment of the European Agency of Fundamental Rights has contributed to consolidate and develop innovatively the trend outlined above. The innovative development results in an assessment of the administrative law potential included in every effective (but until now, unevaluated at EU level) human rights policy, which may no longer be left to the creativity of the courts, but rather implemented (as originally advocated by Weiler and Alston and more recently supported by Von Bogdandy’s conversion) by specialised bureaucracies in conjunction with non-governmental organisations.

In this sense, it would be plausible to imply, leaving a further analysis on the topic to a future occasion, that the 2004 enlargement has favoured the emergence of a new area of EU administrative law of fundamental rights.

Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.


87 See, for a positive anticipation of the above-mentioned trend, the establishment of a network of fundamental rights experts, which was created by the European Commission in response to a recommendation in the European Parliament’s report on the state of fundamental rights in the European Union (2000) (2000/2231(INI)). Along the same lines, as recalled by Armin Von Bogdandy, Articles 8-10 of the Council Regulation establishing a European Agency for fundamental rights arranged for cooperation and the respective governmental and not governmental organisations, albeit only within the range of application of European Union law. See A. Von Bogdandy, o.c., at p. 35.
The ECJ's Judicial Activism after the Enlargement and the Lisbon Treaty: An Inevitable Move towards "the Europe of the Judges"?

Emanuele Pollio*

This paper aims to analyse the factors that accounted the critical concerns about the ECJ’s "judicial activism" (Rasmussen). In particular, a consistent scholarly literature highlighted the role played by the ECJ, as a specimen of the EU “democratic deficit”.

Starting from the failure of the Constitutional Treaty ratification, the paper will focus on the controversial debate about the nature of the ECJ activism in the “depillarisation phase” (with a particular attention both to the academic literature and to the press reaction). The impact of the Lisbon Treaty and the enlargement process will lastly be examined as powerful factors that might account the move towards the "Europe des juges".

* Master Student (IEE – ULB, Institute of European Studies - Université Libre de Bruxelles).
Introduction

The EU, as so many times before, is at a crossroads. [...] Any suggestions that are not grounded in a thorough contextual understanding of the Court’s role thus far run a serious risk of irrelevance or worse.

[Harm Schepel]¹

This paper aims to analyse the structural factors that accounted for the role played by the EU judicial actors in the European polity historical and current development. Indeed, the “benign neglect” surrounding the European Court of Justice (ECJ) gradually coming to an end, a consistent scholarly literature uttered some critical concerns about the ECJ-driven EU constitutionalisation process. In particular, authors like Rasmussen and Neill highlighted the role played the ECJ as a specimen of the EU “democratic deficit”, deeply connected to the “elitist” nature of the Europe des Juges.

Starting from a brief historical description of the role played by the ECJ in the “emancipation of the EC” from International Public Law, the first section will focus on the dynamical aspects that enforced such an influential ECJ attitude.

The second part will analyse the actual evolution of the ECJ activism; a particular attention is paid to the mediatic dimension of the EU constitutionalisation process, as to the critical aspects linked to the ECJ role (notably, the restrictive access under Art. 230, and the “open government” question).

Finally, we will assess the impact of the two main institutional reforms of the EU on the ECJ role: on the one hand, the competing factors linked to the enlargement process will be identified in the overall context of the EU decision-making process; on the other hand, the effectiveness of the Lisbon Treaty answer to the ECJ “ideological crisis” after the failure of the Constitutional Treaty ratification will be put into discussion.

A closing reflection will examine the case for a substantial status quo concerning the ECJ role in the European political system.

1. The Historical Role Played by the ECJ in the Transformations of Europe.

1.1 The ECJ Judicial Activism as a Factor of “Emancipation” of the EC and Its Critical Perspectives

The history of the European integration has often been described as intimately connected to the judicial activism of the European Court of Justice (ECJ). Indeed, the historical role played by the ECJ in the development of the *sui generis* European polity has been consistently emphasised by a large interdisciplinary scholarly literature.² The most famous illustration of the ECJ-driven constitutionalisation of Europe was likely given by Eric Stein in his well-known piece:

Tucked away in the fairyland Duchy of Luxembourg and blessed, until recently, with the benign neglect by the powers that be and the mass media, the Court of Justice of the European Communities has fashioned a constitutional framework for a federal-type structure in Europe.³

In fact, as Joseph Weiler pointed out,⁴ the ECJ has established the fundamental basis for the construction of those theories (notably, direct effect and direct applicability) that contribute to the distinction between International Law and EC Law: thus, the ECJ can be considered the main actor in the process of “emancipation” of the EC from the (merely) inter-state dimension of International Public Law. In doing this, however, the ECJ did not base its “creativity” on written grounds. It rather looked at the “spirit” of the Treaties, providing the EU with a mystic and intriguing nature, powerfully summarised by the notion of “silent integration”.⁵ Nevertheless, in parallel with the widening and the

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The deepening of the European integration process, the ECJ lost, since the 1980’s, the ‘benign neglect’ of both European institutional actors and scholarly literature, in so becoming “the target of harsh accusations and the beneficiary of valiant defences for the way in which it has interpreted its judicial function”.

In 1986, Hjalte Rasmussen’s contribution, *On law and policy in the European Court of Justice: a comparative study in judicial policymaking* proved for the most part iconoclastic, by drawing the distinction between legal interpretation (conceived as a normal and proper expression of the judicial activity) and judicial activism (conceived as a degeneration of the judicial activity, as an interference in the political arena). Of course, the ultimate aim of such a clear-cut distinction was all but neutral: Rasmussen openly conferred a negative meaning to the “judicial activism” formula.

As we know, in order to shape those *enfants terribles* that are the general principles of EC/EU Law, the ECJ usually draws on the teleological interpretation; as declared in the CILFIT case, indeed: “*Every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied*”.

Now, the teleological (or purposive) method of interpretation could be seen as perfectly consistent with the dynamic and evolving nature of the European Community. However, against this background, the history of the ECJ looks like that of a progressive shift from an international law perspective to a more constitutional/federal frame. As Avbelj recently stressed out:

The novel legal practices of European integration: the principles of primacy, direct effect, human rights protection, implied powers and others that the supranational narrative conceived of as sui generis, supranational in nature and held them as profoundly different from the international law were now simply


baptized as fully constitutional. Subsequently attention turned away from
to emphasize how constitutional in nature it has and it still should become.10

One can thus remark that the constitutional reading of the European integration
may be connected to the constitutional perspective assumed by the first members of the
Court, as it was emphasized by Rasmussen11 and by Ole Spiermann.12 In particular,
Rasmussen pointed out that, behind the idea of direct effect (a Van Gend en Loos-
originated concept), there was a “certain idea”13 of European integration, which implied a
reluctance for the EEC’s existence as an international organization and the move towards
a federal order.

The presumptive ECJ “federal” tendencies thus constitute one of the key arguments
of Rasmussen’s critical concerns. Nevertheless, it has to be recalled that in Pescatore, for
example, the awareness of a certain idea of Europe does not correspond to a federal vision
of the European Communities. In fact, in his “Law of integration”,14 Pescatore highlights
the sui generis nature of the European Communities, in differentiating the EU legal order
either from that of a State or from that of a Federation.

Anyway, even denying any “federalist” attitude rooted in the ECJ judicial activism,
the substantial element of its critical perspective resists: in fact, was this ‘struggle’ for the
EC emancipation a political strategy chosen by the ECJ to overcome the logics and the
interpretive rules of the International law, first of all, the rule of the interpretation pro
Member States?

Although it is not easy to distinguish between judicial interpretation and judicial
activism, Rasmussen’s unquestionably opened a controversial debate on the presumptive
ECJ abuse of teleological interpretation, and its implications on the overall European

10  M. Avbelj, “The Pitfalls of (Comparative) Constitutionalism for European Integration,” Eric Stein
11  H. Rasmussen, The European Court of Justice, Copenhagen, Gadjura, 1998.
12  O. Spiermann, “The other side of the story: an unpopular essay on the making of the European
Community Legal Order”, European journal of international law, 10, 1999, pp. 763-789, available
also at: http://www.ejil.org/journal/Vol10/No4/art5.html
13  P. Pescatore, “The doctrine of direct effect: an infant disease of Community law”, European Law
integration process. Nonetheless, without a convincing definition of the “border” between legitimate legal reasoning and “non-legal sources of inspiration”, Rasmussen’s argument seems to vanish in merely normative baselines.15

Concerned about the “partisan” view expressed by the notion of “judicial activism”, some authors preferred to use the notion of “evolving dynamism”, which presents the advantage to distinguish the ECJ’s conduct from that of the US Supreme Court and the institutional factors linked to it. Apart from these semantic disputes, it should be said that the distinction from a merely “neutral” conducted of the judicial actors and their commitment to a precise political design may often prove unclear. As Oreste Pollicino and Giuseppe Martinico have pointed out:

In scholarly debate we often come across the conviction that a clear distinction exists between legal interpretation and judicial activism. According to this distinction, the former is considered a legitimate expression of judicial function and the latter its degeneration, involving a judge’s arbitrary intrusion into the political arena by giving priority to values other than legal ones, such as, in the case of the ECJ, supporting the process of European integration. It must be emphasised that the aforementioned conviction is misplaced, being based on an old and reductive concept of judicial function, whereby the judge was seen as an inanimate, robot-like spokesman of the law. This concept confirms the idea that by purely deductive logic the judge could ascertain the law without personal responsibility or creative means. By contrast, it must be underlined that judicial function involves per se not only the interpretation of law but also its creation. If one accepts this fundamental observation, there is no clear distinction between legal analysis or interpretation on the one hand and judicial law-making on the other. In fact both of them, far from belonging to different spheres, the former legal and the latter political, fall within the boundaries of legitimate judicial function.16

For these kinds of reasons, instead of defining the ECJ role in a precise abstract expression, it might be more useful to identify the institutional factors that accounted for such a particular relationship between the political and judicial actors in the European

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politics. Putting the ECJ in the overall European political system constituted the basis of an increasingly relevant interdisciplinary approach, which also constitutes the basis of the current reflection.

1.2 The ECJ Role in the Broader European Decision-making Process: A “Compensatory” Logic between Legislative and Judicial Actors

Among the multiple attempts to explain the “reasons” of the ECJ judicial creativity, it has been argued that the lack of a strong legislative power might have “forced” the ECJ to solve problems which should have been dealt with by the legislature. Certainly, the historical evolution seems to confirm such structural trend, in the sense that the most transformational ECJ rules occurred in times of political stagnation within the Council. It is particularly interesting to note that, in this sense, the ECJ judicial activism can be considered as both a consequence and a propulsive factor of the EU democratic deficit. Moreover, authors like Takis Tridimas pointed out the “systemic nature” of the ECJ attempting to read its behaviour as dialectical with that of the other institutions or the member states:

The fact that the case law has prompted law reform in that way is telling of the Court’s contribution to the political process and the evolution of the Union. This is not to say that the Member States have always willingly endorsed judicial developments nor that the Court is always a step ahead of the legislature. In some cases, the ECJ has anticipated legislative amendments by interpreting existing provisions in the light of forthcoming changes or has heeded interpretations formally endorsed by the Member States or has refused to take a step forward, seeking instead guidance from the politicians. Yet in other areas, Member States have sought to limit the remit of the Court as a quid pro quo for allowing Community competence.”


A confirmation a contrario of this “trade-off” logic between the European judicial and legislative powers, can be seen in the ratio that inspired the Member States during the Maastricht Treaty Intergovernmental Conference, in the attempt to limit the ECJ judicial activism, by constitutionalising the principles of proportionality and subsidiarity and trying to preserve the sovereignty core.

On the other hand, the German and Italian Constitutional Courts had already “opened the dance” of the constitutional objections to the primacy (or supremacy) doctrine, raising the famous Solange doctrine: the reasons of EC Law primacy could not in any case affect the constitutional identity of the member states. It is thus interesting to note how, in order to deal with these new resistances, the ECJ started to adopt a different political strategy: it chose, in fact, the self-restraint route and started to show a judicial deference towards the reinforced legislative power of the European Union. Emblematic in this sense are cases like Grogan,23 Meng,24 Keck,25 Kalanke,26 Opinion 2/9427, Grant.28

Once again, the “compensatory” nature of the European judicial power seemed to be confirmed: the more powerful and propulsive the EU legislature is, the more deferent the ECJ shows in relation to the European political actors.

A second process that shaped the relation between the European judicial and political institutional actors has been identified by Renaud Dehousse through the notion of “juridification” of the European politics.29 By setting up a “constitutional” system from relatively unpromising Treaties, the Court has in parallel created the basis of a controversial inter-institutional debate, where the European Parliament (EP) used the judicial power in order to enforce its influence and prerogatives vis-à-vis the Council and the Commission. In this sense, the struggle of the EP to obtain a privileged access under Art. 230 of the EC Treaty can be considered as a powerful example of Dehousse’s

24 ECJ, Case C-2/91, Meng, 1993 ECR I-5751.
26 ECJ, Case C-450/93, Kalanke, 1995 ECR I-3051.
27 ECJ, Opinion 2/94, cit.
28 ECJ, Grant, cit.
“juridification” process. As Harm Schepel has put it, “the Court’s constitutionalisation of the Treaties has thus juridified Community politics, a process that has led inevitably to the politicisation of Community law”.30

In fact, Dehousse’s fundamental contribution to the definition of the ECJ’s influence on the overall European decision-making does consist in the thorough description of the anomalous “transformation” of a judicial actor that is dragged into political fights:

On the one hand, we have a Court being called upon to rule a growing number of socially sensitive issues and, on the other hand, we find a set of institutions within which party political cleavages seem destined to become increasingly significant. All of this at a time when public opinion is more and more attuned to European issues, and where consensus on the European integration process is failing apart at the seam.

Now, what is particularly worth highlighting is Dehousse’s turnaround in the European constitutionalisation path. Without underestimating the emancipation role of the ECJ (partly described by the Europe par le droit or Rechtsgemeinschaft notions), Dehousse considers an ECJ retreat from the basic democratic principles agreements as a sign of “normalisation” of the EU political system, “a sign that […] political decisions tend to be left to the political process, with judges ensuring the fairness of the correct functioning of the system”.31

Nevertheless, in the current evolution of the European integration, and particularly after the 2005 Constitutional Treaty crisis, effectiveness of the described normalisation may be questioned, basically enforced through the “political question doctrine”. Firstly, has the ECJ effectively avoided any “running wild” temptation? Secondly, and more significantly, has the political counterpart emerged in order to balance the compensatory logic of the EU system?

The second part will try to analyse such compelling questions, by giving a particular attention to public opinion concerns and to the “ideological” evolutions of the EU constitution-in-the-making stage.

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30 H. Schepel, “Reconstructing constitutionalisation”, o.c., at p. 450.
31 R. Dehousse, The European Court of Justice, o.c., at p. 186.
2. The Limits of the ECJ-driven European Constitutionalisation Process and the Impact of the Enlargement and the Lisbon Treaty on the ECJ Role

2.1 The Current Development of the ECJ Judicial Activism

In spite of the increasing politicisation of the European constitutionalisation process, due to the semi-permanent revision of the Treaties started with the Single European Act (1986), the propulsive role of the ECJ hardly took a consistently declining path. Indeed, since the beginning of a new European constitutionalisation “logic”, the democratic strength of the European polity had to face several structural difficulties.

Firstly, though the successive Intergovernmental Conferences aimed to the envisaged “normalisation” of the legislative-judicial power relationship, the ambiguity of the Treaty reforms on the specific issue of the ECJ role failed in the main objective to clarify the nature of the European judicial actor.32 Particularly in a British perspective, more than a few controversial questions on the ECJ principles barely found any answer. For instance, the IGC did not adequately deal with the actual restriction to the ECJ access under Art. 230 ECT.

Far from resulting in a merely technical debate, the “Art. 230 question” represented, in the British and Scandinavian view, the contradictory nature of the ECJ judicial activism: on the one hand, the ECJ enforced the economic integrationist principles through the teleological interpretation; on the other hand, the European judicial actor seemed to maintain a conservative attitude on the “judicial democratization” principles (as in Union de Pequenos Agricultores, and notwithstanding Advocate General Jacob proposal to change the standing requirement from “directly and individually affected” to a wider “sufficient interest” criterion).

Linked to the ECJ “democratization” controversy, mostly en vogue during the Constitutional Treaty Convention, the extension of the “open government” principles to the ECJ organization came across comparable resistances. The publication of dissenting opinions, particularly solicited by the Scandinavian governments, remained an ECJ internal organizational issue, despite the proclamation of the “open government” principles in the Nice Charter of Fundamental Rights.33 Now, the reluctance shown by

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the Council in dealing with such controversial issues, could be considered as an evident symptom of the difficulties related to the change of the “judicial” logic that has led so far the European constitutionalisation process.

A second, and likely more considerable, barrier to the EU politicization concerns the lack of a clear popular support. The continuous failures to introduce openness and democratic participation in the European constitutional process (from the 1992 Danish rejection of the Maastricht Treaty to the 2008 Irish rejection of the Lisbon Treaty) persuaded some prominent political scholars that the EU is not “ripe for politicization”. Indeed, the case for keeping the “integration through law” logic and avoid democratic procedures has been argued by a consistent scholarly literature. As Moravscik and Majone have pointed out, not only would democratic legitimacy not be essential to legitimize the EU action; but it might also prove counterproductive, in the sense that it would be “inconsistent with basic empirical social science about how advanced democracies work”.

In fact, the constitutional strategy of achieving a deepening of the European integration through democratic participation has fundamentally undermined the credibility of the EU problem-solving capacity. Instead of attacking such attempts by the denying the necessity of any democratic legitimacy, however, a reversal argumentation may be made: far from representing an obstacle to the EU output-legitimacy enforcement, the substantial change from the “judicial” approach of “integration through law” to a “democratic” approach failed to attract a wide European popular support just because it was hardly perceived.

The Ulricke Liebert and Hans Jorg comparative discourse analysis on the constitutional Treaty debate is particularly interesting in this sense: it surprisingly highlights how the national media did not ignore the European dimension, notably after the French and Dutch popular reject of the ratification of the Constitutional Treaty; on the contrary, “a substantial degree of attention was paid to the supranational policy issues as well as to the European interests”. Though, such mediatic attention failed to erode

36 A. Moravcsik, o.c., at p. 221.
The fundamental “elitist” nature of the European constitutionalisation process: although satisfactorily informed, the European people expressed, through the referendum tool, their dissatisfaction not only on the national dimension, but more specifically on the fragile European “democratization compromise”.

As a result of such a problematic “politicisation”, the reasons of the supranational interest, after a relatively “deferential phase”, characterized by the prevalence of the political sources of law (Maastricht, Amsterdam, Nice), again found a “guardian” in the mission of the ECJ. In cases like Pupino, the Court tried to apply its principles of EC Law (the first pillar) to other pillars, in order to extend the prerequisites of the supremacy ([in-]direct effect) to the “Framework Decision on the Arrest warrant”. This approach shows an attempt by the ECJ to “horizontally” extend the principles of the first pillar to the other two pillars.

A confirmation of such a newly pervasive attitude can be found in the new resistance of the national Constitutional Courts with regard to the European arrest warrant, considered as one of the Trojan horses of the European judge in this new phase.

After Pupino, in fact, some scholars argued about the existence of a “de-pillarisation” caused by the above discussed ECJ case-law, or even about a third pillar’s attempted “supranationalization” or “constitutionalization”, conversely, other authors have pointed out that the direct effect’s principle has not been extended to the framework decision (as it would have been in contrast with the terms of art. 35 EUT): the Court has “only” extended the obligation of the framework decisions’ consistent interpretation (which is a form of “indirect” effect).

39 See also the contributions by E. Sanfrutos Cano and F. Fontanelli, in this volume.
41 ECJ, Case C-105/03, *Criminal Proceedings against Maria Pupino*, 2005, ECR I-5285.
43 In other words, the ECJ performed a sort of scission between direct effect and supremacy (better: primacy), in the attempt of avoiding the clash with the letter of the EU Treaty. Obviously, the lack of direct effect with regard to the framework decisions and the ECJ limited jurisdiction – according to art. 35 EUT – provides for an obligation of consistent interpretation that is vested with a very peculiar role, in the third pillar.
In a political perspective, the “de-pillarisation” view adopted by the ECJ present a mostly divisive aspect, given the Member States’ lack of “implied endorsement”: indeed, not only the Lisbon ICG accepted the extension of ECJ’s prerogatives under the Third Pillar, but some Member States confirmed their reluctance to let the ECJ intervene in the preliminary ruling on framework decisions. Such an evident lack of consensus may certainly represent a detrimental element to the achievement of any new balance of power within the European polity.

As Reed has pointed out, “given the existing shortfalls in the Union’s democratic legitimacy, the societal consensus in which the Court can exercise its discretion must be expressed through the Council and its reaction to judicial normative pronouncements”\(^44\), which is exactly what the Pupino jurisprudence failed to do.

This brings us to assess the impact of the most recent EU institutional changes (notably, the enlargement process and the Lisbon Treaty ratification process) on the overall European balance of powers after the “de-pillarisation” debate.

### 2.2 The Impact of the Enlargement and the Lisbon Treaty on the ECJ Judicial Activism

As Hjalte Rasmussen noted,\(^45\) a wider crisis overshadowed the target of achieving a closer Union after the rejection of the Constitutional Treaty. At the outset, the almost doubled EU membership (from 15 Member States in 2004 to 27 Member States three years later), in the absence of a substantial decision-making reform, would deeply affect not only the European political institutions, but also the EU judiciary branch of government. Moreover, the general EU ideological turmoil, following the 2005 French and Dutch referenda results, and reinforced by the 2008 Irish popular rejection of the Lisbon Treaty, will doubtlessly play a significant role as an ‘external’ source of the ECJ judicial reasoning.

In this sense, the successive referendum outcomes, blown up from the institutional stagnation provoked by the flaws of the Nice Treaty, should reinforce the reluctance of some Members States to follow any new ECJ ground-breaking “constitutional” law. In Josph Weiler’s words: “The actual EU political disarray will embolden constitutional organs in some Member States who have shown signs of chaffing at some of the constitutional discipline”\(^46\).

\(^{44}\) J.W.R. Reed, “Political Review of the European Court of Justice and its Jurisprudence”, EU Jean Monnet Chair NYU Law School, Jean Monnet Working Paper 13/95, at p. 27.

\(^{45}\) See H. Rasmussen, “Present and Future” o.c.

Intimately connected to this European politicization-declining path, the ECJ judicial activism is likely to be affected by competing pressures. On the one hand, the political tensions engendered by the enlargement process and the come back of a pragmatic logic in the European political cooperation will confer the ECJ a new rationale to defend the EU supranational interest, shaped by an integrationist jurisprudence. Conversely, the spectacular fall of the “closer-Union” ideology and the internal tensions on the ECJ “culture” and working methods consequential to the EU enlargement, are relatively weakening the ECJ role in the overall EU institutional transition.

As for the impact of the “enlargement factor”, it should be stressed that it has an almost “neutral” influence on the overall European polity balance of powers, in the sense that it is equally going to affect both the legislative and the judiciary branches of government. There is no need to explain why the decision-making process increasingly stagnates in relation to the number of veto-players. What is more, the persistence of the unanimity rule for any revision of the Treaties is very likely to block any acceleration through the “democratic” rationale of the EU constitutionalisation process.

It might be argued, however, and in spite of Rasmussen’s reasoning, that supranational organs may better deal with the enlargement heterogeneity than intergovernmental ones. In a social constructivist perspective, the ECJ “learning by doing” is likely to compensate the initial negative impact of the enlargement in terms of internal culture cohesion. In this direction, the Nice Treaty’s Grand Chamber innovation seems to adequately respond to the enlargement challenge. As the former Court’s President Vassilios Shouris pointed out: “The challenge here consists in distributing the tasks among the judges without endangering the coherence of the law”. (emphasis added)

Nonetheless, the emergence of potential “political” cleavages in the renewal of the Grand Chamber composition could fundamentally affect the optimist assumptions as to the ECJ’s capacity to preserve its coherent internal culture in front of the enlargement; a division between federalist standard-bearers and sovereignty-friendly, or, more generally, between the coalitions of activists and self-restrainers, would be particularly damaging in the preservation of the ECJ internal consistency.

In other words, the impact of the enlargement should not represent a decisive transformational factor of the European judiciary power, on the condition that the ECJ succeeds in facing the risks of further organizational fragmentation.

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48 H. Rasmussen, “Present and Future” o.c.
49 Ibidem, at p. 1662.
On the contrary, the impact of the Lisbon Treaty reform proved more troublesome. As Timmermans has pointed out, the ideological fall of the “closer-Union” project fundamentally affects the solidity of the ECJ internal culture, by highlighting the lack of societal consensus on the integrationist case law. Interestingly, Rasmussen compares the ECJ post-2005 ideological crisis to the 1936 US Supreme Court anti-New Deal ideological fallout, in so implying the impossibility for a judicial actor to ignore the external cultural sources. Of course, such a paradoxical comparison “does not imply that a comparable, dramatic and profound swing in the EC judicial voting from the pro to anti-Union case law is foreseeable in the next future. […]. It is that it will become difficult for the Court to continue EC-activist judicial business as usual”.

Certainly, such a premature prediction seems to ignore a fundamental historical aspect linked to the ECJ propulsive role on the overall EU political system, notably its compensatory logic in relation to the legislative power. In fact, what the post-2005 ideological crisis really pointed out, was not the unfeasibility of a persistent ECJ activism, but the insurmountable hurdles in changing the European constitutionalisation logic. If the passage from the intergovernmental bargaining logic, enforced by the ECJ activism, to a democratic-legitimated constitutionalism proves “unfit” at the European level, it is very unlikely that ECJ will get rid of its historical role of “emancipation” of the European integration.

Conclusions: An Inevitable Move towards “the Europe of the Judges”?

As this paper tried to point out, there are many competing factors that might shape the future balance of powers in the complex European architecture. On the one hand, the effects of the enlargement process are going to concern the internal cohesion of the ECJ, as well as the decision-making process within the Council. A substantial “juridification” of the EU politics, due to the increasing tensions between and within the European institutions (as the case of the Services Directive seems to confirm), is likely to consistently shape the habitus of the European integration process.

More importantly, the overwhelming difficulties linked to the politicization of the European constitution-making are going to counteract the normalization of the EU balance of powers, envisaged by Dehousse. In this sense, the rejection of the

50 Ibidem, at p. 1663.
51 Ibidem, p. 1666.
Constitutional Treaty symbolic dimension, supported by the Lisbon Treaty, seems to reinforce the come back of the traditional European constitutionalisation pattern, where the ECJ plays the decisive role of enforcing the stability of hardly-negotiated intergovernmental commitments. Moreover, the parallel reference to the Charter of Fundamental Rights seems to offer, notwithstanding the clauses in which “the Charter does not add or detract from any existing or non-existing fundamental right”, a fresh potential source to the ECJ judicial activism.54

Yet, the persistency of a consensual-restrictive logic of “quasi-constitutional arrangements” through successive Treaty reforms seems to imply a fundamental status quo about the future role of the ECJ in the overall EU polity. The relatively durable strength of the Europe des Juges view will ultimately rest on the capacity of the European judicial branch of government to unilaterally take into account the societal and political consensus surrounding it.

53  Art. 6 EUT, Treaty of Lisbon.
54  H. Rasmussen, “Present and Future”, o.c., p. 1685.
Differences and Analogies in the Use of Comparative Law by ECJ and the Constitutional Courts

Angioletta Sperti*

The present work aims at focusing on the use of comparative law as an aid to interpretation by the ECJ. The author describes the purposes of the use of comparative law by the ECJ and puts into evidence analogies and differences with the nationals constitutional courts concerning the use of comparative law as a tool. The author concludes that the experiences of ECJ and national constitutional courts cannot be completely assimilated.

1. Introduction

Studies focusing on the rising of a “global legal space” moved in the beginning from an international law perspective: after World War II, for instance, some scholars saw in the ideology of “legal globalism” an answer to the instances of protection of fundamental human rights through the intervention of international organizations.1 Other studies

* Angioletta Sperti, J.D. University of Pisa; LL.M. UCLA School of Law, Los Angeles USA; Ph.D. S.Anna School of Advanced Studies, Pisa, Italy; Researcher, Department of Public Law, University of Pisa, Italy. I would like to thank Nikolaos Lavranos and all the participants to the workshop “The ECJ under Siege: New Constitutional Challenges for the ECJ” for their comments and remarks.

rather concerned the transformation of legal systems and legal institutions (and in particular, the evolution of the role of the courts) due to technological, economical and political globalization. Scholars paid great attention to the evolution of commercial and private law as a consequence of the transformations occurring in the world economy and, more recently to their effects on the westfalian conception of the national sources of law.

Due to constitutionalism’s close link with national sovereignty, studies concerning the effects of global economy from a constitutional perspective have emerged only recently: as Teitel noticed, “constitutional law appears to be the last frontier” in the research of the effects of globalization.

There has been an extensive debate on the effects of globalization on the protection of human rights and on the adoption of judicial review in many countries, during the last decades. In this contribution, we would like to examine a specific issue which attracted great attention in the last few years, that is, the use of comparative law as a supplementary tool of interpretation for constitutional or supreme courts, especially in human rights cases.

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The use of comparative law in constitutional interpretation was first described by Peter Häberle in a well-known article published in 1989, but the issue has gained great attention from the scholars, and has been widely discussed in a large number of casenotes after the United States Supreme Court handed down the controversial decisions in the cases *Lawrence v. Texas* (2003) and *Roper v. Simmons* (2005), in which the use of foreign law for the purpose of interpreting the national constitution was directly addressed by the Court.

In Italy, where the use of comparative law in constitutional cases is quite limited, due mostly to the structure of the cases, former justices of the Constitutional Court have also emphasized the importance of confrontation with other constitutional or supreme courts, in order to find “common solutions to the issues which cross national borders and touch the same root of modern constitutional constitutions”. On the basis of the comments which have been expressed also by some constitutional justices

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of other countries, the use of foreign law presents some similarities with the use of authorities in a more general perspective.

It is interesting, however, to remark that the use of foreign law involves not only the oldest constitutional courts, having a long-lasting experience of judicial review, but also constitutional courts which have been established more recently. Furthermore, the dialogue among the courts involves also courts such as the United States Supreme Court, which in the past played mostly the role of an “exporter” of judicial review models and constitutional law principles, and has been therefore considered to be less open to comparative methods.

This paper aims at analyzing the use of comparative law as an interpretation aid for constitutional and supreme courts with the purpose of highlighting analogies and differences with the use of the comparative method made by the European Court of Justice (ECJ). We shall ascertain whether it is possible to extend to the ECJ some of the conclusions suggested by scholars on the use of foreign law by national constitutional or supreme courts, and whether the ECJ might be considered to have a role in the dialogue occurring among them.

Before taking into consideration the case law some methodological premises (especially on the use of comparative law by constitutional courts) should be made: (a) in the context of this research, we will focus mostly on the case law where the issues concerning the protection of human rights are addressed. This particular topic enlightens the existence of a “common core” which is shared by most of the democracies, that is, the recognition and the protection of some fundamental rights; it is therefore possible to describe the emergence of a dialogue among the constitutional/supreme courts. Furthermore, the identification of a common legal heritage occurred also in the past, through the reception of fundamental legal principles adopted by other legal systems; the International Court of Justice (ICJ) for instance, as pursuant to Art. 38 of its statute, in its decisions applies “the general principles of law recognized by civilized nations”. Furthermore, (b) this paper will carry out an analysis of the case law explicitly quoting

11 For an overview of the opinions which have been expressed by many constitutional justices on the use of comparative law as an to constitutional interpretation and on the problems and difficulties which this technique implies, see A. Sperti, “Le difficoltà connesse al ricorso alla comparazione a fini interpretativi nella giurisprudenza costituzionale nel contesto dell’attuale dibattito sull’interpretazione”, in Diritto Pubblico Comparato ed Europeo, 2008, pp. 1033 – 1047.
foreign cases and therefore revealing an actual use of foreign cases as a tool of constitutional interpretation.

Moving from this assumption, we think that (c) decisions expressing generic references to the rule of law principles, to common law traditions, or describing the historical roots of an institute, should not be taken into consideration. This kind of arguments (which are quite common to all constitutional courts, even in countries such as Italy, where the Supreme Court does not usually make reference to foreign jurisdictions in its decisions) although relevant from a comparative perspective, usually reveals the purpose of the court to enliven her arguments, rather than stressing an actual use of comparative materials.

Furthermore, (d) references to foreign legislation – even if they are certainly relevant in the general context of the use of comparative law – should also be distinguished from references to foreign constitutional decisions. In our view, comparing statutory texts aims sometimes at different purposes, such as the evaluation of the consequences of legislative solutions which have been adopted in other countries; for this reason, citations of foreign case law and citations of foreign provisions ought to be discussed separately.

Finally, (e) reliance on international case law, treaties or custom (which may be considered one of the national sources of law of the borrowing country)\textsuperscript{14} is not relevant for the purposes of this research.

2. General Overview on the Legal Bases Concerning the Use of Comparative Law by the ECJ

As a former president of the ECJ noticed, recourse to comparative law is for the Court of Justice essentially a method of interpretation of Community law itself.\textsuperscript{15} Although in ECJ’s judgments there is little example of explicit comparative work, community judicature is “naturally” inclined to adopt a comparative approach in solving a dispute.\textsuperscript{16} This is due first of all to composition of the ECJ itself since every Member State is entitled to nominate one of the twenty-seven judges sitting on the Court.

\textsuperscript{14} The country should be a member the same international organization. This premise does not apply when reference is made to an international organization of which the borrowing country is not a member. In this case there is no relevant difference with the use of foreign cases and foreign legal materials in general.


A second reason, which facilitates a comparative approach by the Court, comes from the fact that legal texts that must be interpreted are multilingual. These factors favor an ongoing comparative dialogue among the members of the Court, and the confrontation of solutions adopted in different national contexts is therefore a natural feature of most of the cases.

However, the use of comparative law by the ECJ has some legal bases as well: we refer in particular to Art. 6(1) of the TEU that emphasizes “liberty, democracy, respect for human rights and fundamental freedoms and the rule of law” as being “common to the member states”, and to the Charter of Fundamental Rights, whose Preamble refers to the common and indivisible universal values on which the Union is founded and to the diversity of cultures, traditions and identities in Europe. Finally, the Charter refers to the “rights as they result in particular form the constitutional tradition and international obligations common to the member states”.

Further references may be found in art. Article 340 (former Article 288), second paragraph, of the ECT, which states that “in the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties” and, besides treaty provisions, in Art. 44 of the Staff Regulations of the European Investment Bank (EIB) referring to the “general principles common to the members states”, according to which such principles have to be respected in contractual relationships between the EIB and its staff.17

In any case, we should also remember that since the Internationale Handelsgesellschaft case in 1970,18 the ECJ has continually referred to the “general principles of EC law”, including protection of fundamental rights. As the ECJ later clarified in the 1974 Nold decision,19 there are two primary sources of inspiration of general principles of EC law: first, common constitutional traditions of the Member States, and, secondly, international human rights agreements. Art. 6(3) of the TEU also clarifies that “fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to

17 Ibidem, at pp. 873 ff.
the Member States, shall constitute general principles of the Union’s law”, although – as ECJ stressed in *Internationale Handelsgesellschaft* – the protection of fundamental rights, “whilst inspired by the common constitutional traditions must be ensured within the framework of structure and objectives of the Community”.20

In the *Brasserie du Pêcheur* and *Factortame* cases21 concerning the principle of state liability, the ECJ referred to the application of general principles shared by the Member States as a “generally accepted method of interpretation”, and stressed that “it is for the Court, in pursuance of the task conferred on it by Article 164 of the Treaty of ensuring that in the interpretation and application of the Treaty the law is observed, to rule on such a question in accordance with generally accepted methods of interpretation, in particular by reference to the fundamental principles of the Community legal system and, where necessary, general principles common to the legal systems of the Member States”.

As far as international treaties are concerned, the Court has treated the European Convention on Human Rights (ECHR) as a special source of inspiration for the general principles of EU law22 (to which Art. 6 of the EUT and the Charter explicitly refer to), but it also found a model in other regional or international documents such as the European Social Charter, the Convention no. 111 of the International Labor Organization, the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Rights of the Child.23

Finally, both primary and secondary Community legislation is influenced by rules of municipal law and makes use of legal terminology, which has a similar content in the Member States. “The use of common (national) terms in EU legislation is an indication that judges applying EU law should at least seek guidance in national law when ascertaining the precise meaning of particular rules in their judgment”.24


22  See, ECJ, Case C-36/75, *Rutili v. Minister for the Interior* 1975 ECR 1219 where the Court first described the general principles of Community law as inspired by ECHR.


3. The Purpose of the Adoption of a Comparative Method in ECJ Case Law

Detailed examinations of the “teleology” of comparative law in ECJ cases which have been carried out in the past, have already stressed that references to national law and case laws of the Member States aims – first of all – at filling gaps of the Community legal order. Since the Algera case, for instance, the ECJ declared that, unless it amounts to a denial of justice, the ECJ cannot simply assess the existence of a vacuum in Community law. It has, therefore, the duty to fill the gaps by reference to the general principles common to the Member States.

The Brasserie du Pêcheur and Factortame cases of 1996, in which the ECJ described the principle of non-contractual liability of the Community expressly laid down in Article 215 of the Treaty as being “an expression of the general principle familiar to the legal systems of the Member States” (instead of relying on the principle of effectiveness and on Art. 10 of the TEC) further demonstrates the importance of the comparison with national legal systems in order to overcome potential lacunas in Community law, even if the solution runs counter the regulation of certain Member States.

Secondly, where there are no gaps to fill, comparative law represents a tool that helps the Court in the interpretation of Community law itself. Although the ECJ usually does not endorse a specific national solution, some cases reveal the intent of the Court to interpret Community law in light of common criteria followed in domestic legal systems, in order to strengthen her conclusions.


ECJ, Joined Cases C-7/56 and C-3/57 to C-7/57, Algera and Others v. Common Assembly 1957 ECR 39, 55.

ECJ, Joined cases C-46/93 and C-48/93, Brasserie du Pêcheur SA v. Bundesrepublik Deutschland and The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and others, 1996 ECR 1-1029.

See, K. Lenaerts, “Interlocking legal orders” o.c., at pp. 873 ff.

See ECJ, Case C-155/79, AM & Europe Ltd. V. Commission, 1982 ECR 1575.
In other cases, the ECJ makes use of comparative law so as to assess the compatibility of a national legal solution with the Community law. In these cases, it aims at conferring upon the Community law an appearance of acceptability and “it can therefore be said that comparative approach contributes in quite an essential way to guaranteeing the primacy, effectiveness and uniform application of Community law”.30

The *Omega* case31 – where a German company operating an installation known as a “laserdrome” normally used for the practice of laser sports in Bonn had challenged an administrative order of the local police authority prohibiting the use of the machine as it “constituted an affront to human dignity, a concept established in the first sentence of Paragraph 1(1) of the German Basic (Constitutional) Law” – well illustrates the purpose of the use of comparative law by means of the referral to common constitutional traditions, that is, to identify the substantive content of Community human rights.

The Advocate General Stix-Hackl32 emphasized that “on the assumption that there are different thresholds of protection under fundamental law within the Member States, the question at issue is whether and in what manner those differences should affect the admissibility of such a national measure under Community law whilst having proper regard for the Community’s commitment to fundamental rights”.

The Advocate argued that “an established restriction on freedom to provide services cannot immediately be justified by the protection of specific fundamental rights guaranteed by the Constitution of a Member State. It is also necessary to examine the extent to which the restriction can be justified on grounds acknowledged in Community law, such as the safeguarding of public policy. A common conception among the Member States on the matter of protecting public order is not a precondition for such a justification”.33 She then engaged in a deep analysis concerning the protection of human dignity in EU law because, she argued,

> if such an examination should show that the restrictive national measure concerned is based on an evaluation of national protection of fundamental

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33 *Ibidem*, at p. 71.
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rights that reflects general legal opinion in the Member States, a corresponding requirement of protection could (also) be inferred from Community protection of fundamental rights – which would mean, methodologically speaking, that it would no longer be necessary to examine whether the national measure is to be considered a justified, because permissible, exception to the fundamental freedoms enshrined in the Treaty, but, according to the formula in the Schmidberger judgment, “how the requirements of the protection of fundamental rights in the Community can be reconciled with those arising from a fundamental freedom enshrined in the Treaty”.34

The ECJ followed this reasoning, stating: “It should be recalled ... that, according to settled case-law, fundamental rights form an integral part of the general principles of law the observance of which the Court ensures, and that, for that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. The European Convention on Human Rights and Fundamental Freedoms has special significance in that respect”. As the Advocate General argues, “... the Community legal order undeniably strives to ensure respect for human dignity as a general principle of law. There can therefore be no doubt that the objective of protecting human dignity is compatible with Community law, it being immaterial in that respect that, in Germany, the principle of respect for human dignity has a particular status as an independent fundamental right”.

The Court draws from the concept of human dignity in the German order, to identify a more general principle, which could be shared by all the Member States.

The case is interesting, as it also shows that the ECJ refers to the extensive and explicit comparative analysis previously conducted by the Advocate General. As I mentioned above, comparative analysis is rarely evident in ECJ’s judgments. This is probably due to the fact that the ECJ usually prefers not to endorse a specific national solution or to list its sources of inspiration.35 At the same time, the style of the ECJ’s

34 Ibidem, at p. 72.
35 See B. Markesinis, J. Fedtke, “The Judge as a Comparatist”, o.c., at p. 90, arguing that “for many years, the Court has had to fight for recognition vis-a-vis the Member States, and too much comparative work or a highly visible use of the method could have been interpreted as a sign of the Court’s insecurity, jeopardised its position in the many conflicts the ECJ had to survive, and put in question the autonomous nature of Community law. Open reliance on one particular national model also bears the danger of alienating other Member States and can draw the Court into undesirable political discussions as to why a particular legal solution was found by reference to one country and not another.”
judgments should be also considered: decisions represent single rulings of the whole Court. The absence of concurring or dissenting opinion does not make it possible for the members of ECJ to express their own opinions on the issues at stake and to quote foreign solutions in order to strengthen their own arguments. Furthermore, there are no footnotes in ECJ’s judgments. In other countries, such as in the United States, footnotes allow the quotation of foreign cases or the mention of foreign experiences, yet without emphasizing the commitment on a specific legal principle formulated abroad.

The comparison with other countries is for these reasons taken into consideration ‘silently’ by ECJ and reference to “common constitutional traditions” is, in fact, “often a code for comparative work previously conducted by the Advocate Generals”.36

The opinion of Advocate General Poiares Maduro in the Al Barakaat International Foundation case37 concerning an entity suspected of supporting terrorism, whose funds and other financial resources were subjected to freezing measures, is rather relevant under a comparative perspective. The Advocate General engages in a detailed discussion concerning restrictions of fundamental rights in other legal systems. Moving from the assumption that “the claim that a measure is necessary for the maintenance of international peace and security cannot operate so as to silence the general principles of Community law and deprive individuals of their fundamental rights” and that “this does not detract from the importance of the interest in maintaining international peace and security”, the Advocate General takes into account not only European cases but also the United States Supreme Court decision in the Korematsu case38 in order to demonstrate the jurisdiction of the Community Courts to determine whether the contested regulation violates fundamental rights.39 Then, addressing the alleged

36 B. Markesinis- J. Fedtke, “The Judge as a Comparatist” o.c., at p. 89.


39 Ibidem, at § 34.
breaches of fundamental rights, the Advocate General takes into account a 2006 case of the Supreme Court of Israel concerning a similar issue.40

Another interesting example is the opinion of the Advocate General in *Lili Georgieva Panayotova and Others v. Minister voor Vreemdelingenzaken en Integratie*41 concerning the scope of the provisions on establishment of an agreement between the European Community and the Slovak Republic, the Republic of Poland and the Republic of Bulgaria. The Advocate General argues that it is “important to note that the judicial protection of fundamental rights is particularly important with regard to the treatment accorded to third country nationals, since the latter constitute discrete and insular minorities”. He also stresses that “these are often particularly vulnerable groups that are deprived of other means, in particular political means to influence legislation and the political process, for the protection of their rights”. The analogies with the rationale of the famous footnote 4 in the United States Supreme Court case *US v. Carolene Products*42 are very clear; the Advocate expressly refers to famous footnote and also mentions the doctrinal debate which followed the case.

4. The Purpose of the Adoption of Comparative Law in National Supreme or Constitutional Cases

On the basis of the case law analysis which I have been conducting in my previous works on this topic,13 constitutional courts make use of comparative law for several purposes. It is possible to distinguish in particular three different models concerning the use of comparative law in constitutional cases.

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40 The opinion quotes President Barak concerning the protection of fundamental rights in the context of the fight against terrorism in Supreme Court of Israel, HCJ 769/02 2006, *The Public Committee Against Torture in Israel et. al. v. The Government of Israel et. al.*, par. 61 and 62 (“It is when the cannons roar that we especially need the laws ... Every struggle of the state – against terrorism or any other enemy – is conducted according to rules and law. There is always law which the state must comply with. There are no black holes. ... The reason at the foundation of this approach is not only the pragmatic consequence of the political and normative reality. Its roots lie much deeper. It is an expression of the difference between a democratic state fighting for its life and the fighting of terrorists rising up against it. The state fights in the name of the law and in the name of upholding the law. The terrorists fight against the law, while violating it. The war against terrorism is also law's war against those who rise up against it.”)


43 See, *supra*, footnotes 9 and 11.
The first model, which can be described as a “cautious” use of foreign cases—might be found in the United States Supreme Court’s case law, in particular after the well-known decision *Lawrence v. Texas* (2003). In that case, the Supreme Court reviewed a Texas statute which made it a crime for two persons of the same sex to engage in certain intimate sexual conduct (a so-called “sodomy law”). The Court held that the convictions under the Texas statute violated the two men’s vital interests in liberty and privacy protected by the due process clause of the Constitution. In reaching such a conclusion, the Court relied on a European Court of Human Rights (ECHR) precedent, concerning a statute with analogous content. In the opinion of the Court, Justice Kennedy relied “on values we share with a wider civilization” and held that as the European Court of Human Rights, “other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct”.

In another case, *Roper v. Simmons* (2005), concerning the imposition of the death penalty on offenders under the age of 18, the Supreme Court did not quote explicitly foreign case law as in *Lawrence*, but it relied on several international treaties and looked into the legislation adopted by other countries. This gave to Justice Kennedy the opportunity to clarify that:

> Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility. […] The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.

He also stressed that:

> [The Constitution] sets forth, and rests upon, innovative principles original to the American experience, such as federalism; a proven balance in political mechanisms through separation of powers; specific guarantees for the accused in criminal cases; and broad provisions to secure individual freedom and

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preserve human dignity. These doctrines and guarantees are central to the American experience and remain essential to our present-day self-definition and national identity. […] It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.

This case makes it possible to suggest that foreign case law is used by the Supreme Court of the US as a confirmation of national principles and solutions. Furthermore, although the Court is aware that some fundamental principles have a tradition, which is shared by other democracies, it strictly abides by the written text of the Constitution.

Other countries reveal a more extensive use of foreign cases and in particular the willingness of the courts to engage in a real dialogue with other constitutional courts. This second model might be described therefore as a “dialogic model”; the most preminent example is perhaps the case law of the Supreme Court of Canada. Judgments thereof are usually very interesting from a comparative perspective, since they contain a large number of references to foreign cases and foreign legislation. In particular, there is often a particular attention to the decisions of the United States Supreme Court and European national and supranational courts (such as the ECHR). References are often used to find specific directions for the interpretation of fundamental rights proclaimed by the 1982 Canadian Charter of Rights and Freedoms.47

It is interesting to observe how the Canadian Supreme Court does not hesitate to highlight the differences with the United States Supreme Court’s interpretation of fundamental rights, and to express her favor for solutions adopted by the European national courts or by the ECHR.48 Sometimes references to foreign cases are justified by the importance of comparison with countries which faced similar issues in the past. In these cases, comparison is useful to solve flaws of national regulation and case law, since Justices really draw on the expertise and experience of other colleagues who interpreted

similar documents or who took into consideration similar problems. This approach is very significant if we consider that court decisions are a formal source of law in Canada. Furthermore, it is interesting, from this perspective, the relationship between the emergence of new forms of dialogue among constitutional courts and the circumstance that similar issues (in particular concerning the protection of human rights) appear in many constitutional courts’ agendas.

Finally, a third approach to the use of foreign materials could be found for instance in the Supreme Court of South Africa’s case law, where solutions which have been adopted elsewhere prove useful to the court’s intent to show the advancement of the country in the protection of human rights. In this case, the use of comparative materials is considered not only useful but sometimes a real duty for the interpreter. Furthermore, it should be noticed that Art. 39, section I, of the South Africa Constitution reads: “when interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law”.

The following quotation from Justice Sachs’ opinion in the 1997 S. v. Lawrence case can be useful to clarify this kind of approach to comparative law as an additional instrument of constitutional interpretation:

I draw on statements by certain United States Supreme Court Justices […] not because I treat their decisions as precedents to be applied in our Courts, but because their dicta articulate in an elegant and helpful manner problems which face any modern court. Thus, though drawn from another legal culture, they express values and dilemmas in a way which I find most helpful in elucidating the meaning of our own constitutional text.

Some scholars and some constitutional justices – especially in the United States – have envisaged behind constitutional cross-fertilization the emergence of a new form of

49 “Given the similarities of constitutional drafting and sources one would not be surprised by the new dialogue among judges and lawyers drawing on the expertise and experience of interpreters of similar documents. Moreover, because the legal protection of human rights is a novel phenomenon in many countries, sometimes, little or no previous domestic jurisprudence exists to give meaning to the rights, making judgments from elsewhere particularly useful and necessary. Deciding on applicable legal principles and solutions increasingly involves a consideration of the approaches that have been adopted for similar legal problems elsewhere” (C. L’Heureux-Dube, “From Many Different Stones: A House of Justice”, Alberta Law Review, 2003, pp. 659-670, at p. 661).
universal or natural law, whilst others have referred to a form of \textit{generic constitutional law}.\footnote{D.S. Law, “Generic Constitutional Law”, \textit{Minn. L. Rev.}, 2005, pp. 652-742, but see also, for a different interpretation of US SC case law, R.A. Posner, “A Political Court”, \textit{Harv. L. Rev.}, 2005, pp. 31-102.}

We do not endorse the idea, which has been expressed, according to which the intent of constitutional courts to remark the similarities with other constitutional courts’ rulings hides the adoption of a new natural law approach to constitutional law. A case that rests only on principles formulated by other constitutional courts will probably never occur.

The former president of the Italian Constitutional Court, G. Zagrebelsky, also argued that “the circulation of case law principles does not endanger the identity of national case laws. The communication of solutions among different countries is always filtered because it is based on minimum standards of homogeneity and similarities among texts and contexts. These conclusions always rest on National courts. There is no reduction of their sovereign powers”.\footnote{G. Zagrebelsky, “Relazione sui cinquant'anni di attività della Corte costituzionale”, o.c.}

\section*{5. Differences and Analogies with the Use of Comparative Law by National Supreme or Constitutional Courts}

To perform a final balancing, comparative law plays a very relevant role in EU case law and may be considered as a means of interpretation of EU law in the same way as comparative law could be considered as a fifth method of interpretation for national constitutional courts.\footnote{P. Häberle, “Grundrechtsgeltung”, o.c., at pp. 913 ff.}

Further similarities could be found in the fact that, as it happened for instance in the United States where at the end of the XIX century reliance on comparative materials from England and Europe subsided when the country developed its case law and legislation,\footnote{D.S. Clark, “The Use of Comparative Law by American Courts”, in U. Drobnig, S. Erp (eds.), \textit{The Use of Comparative Law by Courts}, The Hague/Boston, Kluwer, 1997, pp. 297 ff.} the development of an autonomous Community legal system has reduced the use of comparative law. Markesinis and Fedtke have recently stressed that “fifty years into its existence, the EU has matured into a highly developed and increasingly autonomous system of law. This has clearly reduced the need for comparative considerations, though new developments and concepts – such as the accession of
further countries, the introduction of a coherent regime of human rights protection, or the principle of subsidiarity – are more than likely to result in a renaissance of national legal influence on Community law”.

However, there are also some very important differences and, to some extent, they outweigh the analogies. It has been argued also by Markesinis and Fedtke that “though clothed in different words, [the] “discovery” of an “integral part of the general principles of law protected by the Court of Justice” is technically nothing else than judicial borrowing”. Nevertheless, the authors point out that “when compared to the other examples of legal transplants [...] the only apparent differences seem to be the absence of a constitutional text in the borrowing system and, more importantly, the fact that foreign – Member State – law is, apparently, not ‘borrowed’ at all but rather “inherent in Community law”.

We would like to stress this difference because, in our view, it is crucial in the comparison with national supreme or constitutional courts, since it involves a completely different perception of the purposes of comparative law. Even though, as we mentioned above, the comparative law has several other functions, it also may be considered as a source of positive law especially in the case that there is a lacuna in the Community legal order, and as the “primary source of inspiration” of the general principles of EC law. Furthermore, the court is bound to draw inspiration from constitutional traditions common to the Member States. Constitutional courts did not express any similar view, nor did constitutional courts ever treat foreign cases as a national source of law. We also believe that the European experience cannot be assimilated to the one of South Africa because the provision of the South Africa Constitution only establishes that the Court ‘may’ take into account foreign constitutional case law, rather than setting a proper obligation to that end.

In addition, the Community and its Member States are much closer to each other than other courts are with respect to legal orders from which, from time to time, they borrow. The importance of the willingness of national authorities to ensure the correct

54 See, B. Markesinis – J. Fedtke “The Judge as a Comparatist” o.c., at p. 90.
55 Ibidem, at p. 86.
56 Ibidem, at p. 86.
57 See K. Lenaerts, “Interlocking Legal Orders” o.c., quoting ECJ, case C-25/70, Koster, 1970 ECR 1161.
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application of community law or, for instance, the German resistance to the supremacy of EC law due to the lack of an acceptable level of protection of fundamental rights which pushed towards the development of a human rights jurisprudence support this conclusion. The \textit{Internationale Handelsgesellschaft} case provides an important example of the difficulties faced by the ECJ in seeking to incorporate the “common constitutional principles” of the Member States as part of the Community legal order.

However, the use of comparative law by ECJ can be considered more similar to the use performed by national constitutional courts; suffice it to consider the reference to constitutional cases of the Supreme Court of the United States or of other constitutional courts of states other than Member States. This kind of reference is very frequent in the opinions of the Advocate General, as we tried to argue above. Such use of comparative law actually reveals the opportunity and the desire to engage in a dialogue with other constitutional systems, where similar issues have been already tackled.
The Supranational Diplomacy of the European Courts: A Mutually Reinforcing Relationship?

Laurent Scheeck*

The European courts’ increasingly nested linkage has given rise to new forms of supranational judicial diplomacy between judicial actors of the European Court of Justice, the European Court of Human Rights that has had a deep impact on law – as well as policymaking. This article explores how supranational lawyers have endeavoured to establish transnational epistemic communities that serve as a vehicle for integration. This evolving relationship, which is simultaneously underpinned by hierarchical conflicts, competitive and cooperative logics, appears to have become one of the foremost ways to harmonise the rather fragmented European normative space and to empower each of the two European Courts.

1. Introduction

Human rights in Europe exemplify a situation where the strategic socialization of legal elites has led to the emergence of a common transnational culture of rights that has become tightly knotted to the mobilisation for a shared view of the EU’s political and institutional architecture. This borderless socialization of European judges, entrenched into a complex set of intertwined jurisprudence and upheld by supranational judicial

* Lecturer at the Institute for European Studies, Université Libre de Bruxelles.
institutions, has contributed in setting up a sophisticated mechanism of supranational human rights supervision which had not been planned at the beginning of the construction of Europe. The European Court of Justice (ECJ) and the European Court of Human Rights (ECHR) are at the core of this mechanism.

Similarly, the European Union’s judge-made system of human rights was developed long before Member States agreed on including it into the treaties – the European Constitution and the Lisbon treaty,¹ which then proved to be hard to ratify, while the judges keep the existing jurisprudential system up and running. Beyond the idea of protecting people from the actions of European institutions and Member States implementing EU politics – this is what the question of human rights at the EU level of governance is concretely about – fundamental norms have been given a deeper political meaning over time. Human rights at the EU level have indeed become an instrument for a federalist cause driven by lawyers in or around the ECJ. Their constitutional discourse has not been limited to judicial politics. For more than forty years, Europe’s lawyers have been calling for a rights-based supranational constitutionalism in their dialogue with policy-makers, and have argued for the incremental constitutionalization of the European political order.

This article aims to empirically demonstrate that there is a mutually reinforcing relationship between both European courts resulting from the mobilisation of some leaders in both courts who opted in favour of a high profile, diplomatic socialization after years of indirect jurisprudential interactions. The objective is to provide explanations for the emergence of common interests between judicial actors through transnational socialization.

On the one hand, this research is a case of inter-institutional socialization where institutions are not seen as mere arenas for the convergence of national representatives but as supranational platforms of an emerging multilevel system of government. In particular, this study can be seen as a case study of supranational institutions in Europe’s multilevel system, in which national constitutional actors also play a very important role when it comes to judicial dialogues and all the various forms of inter-level communication between courts.² On the other hand, it studies how ‘normative

¹ See for instance Article 6.2. of the new Treaty of Lisbon and the Treaty establishing the European Community signed by the EU Member States (13 December 2007).
entrepreneurs’ seek to be continually present on in specific judicial and political environments in order to spread shared ideas gained through previous inter-institutional socialization.

First, this article will study the mobilisations of a transnational legal elite focusing on the judges of the two European Courts, who, against strong internal and external political and judicial resistance, engaged in a cooperative dialogue at a supranational level. Secondly, it analyses the overall political effects of the socialization between Europe’s lawyers on European politics, institutions and treaty-making.

2. Courts and Socialization

Tracing the emergence of new policy agendas also implies looking at the strategic mobilization of stakeholders acting in often unexpected configurations, beyond the borders of institutions they formally belong to. In this vein, this article aims to study the relationship between the ECJ and the ECHR. The ECJ’s fundamental role in the process of European integration has been studied extensively by political scientists. The ECHR’s role in this regard has not been as fully investigated in political science. Legal scholars have of course always had a keen interest in fundamental rights at the EU level and in the EU-ECHR relationship. While they generally address the competition and conflicts of the ECJ and the ECHR, this paper also addresses the cooperative nature of the fundamental rights dialogue of supranational judges and the unexpected mutually empowering relationship of the two European courts. Moreover, the ECJ has played an important role in the making of the European constitution – not only from a judicial


point of view, but as Marie-Pierre Granger has demonstrated, also through the activism of the European judges in political arenas. Yet, the relationship between fundamental rights and the judicial constitutionalism of the ECJ and the ECHR remains largely unexplored.

Historically, the study of socialization in Europe has been a way to explain how elites from different member states get together in order to construct Europe. More recent studies also have emphasised the role of elite socialization in the emergence of a “common European identity” and tried to explain how national actors are being transformed into European-minded agents through regular cooperation in highly institutionalised settings. While these studies have shown how institutions matter as “promoters of socialization in public arenas”, the conceptualisation of international or, in this case, European institutions as mere receptacles of processes of socialization, has several limits.

Such an approach implies the emergence of a common identity limited to elites. This is a narrow approach to identities since the study of loyalty shifts ignores the possibility of multiple and overlapping loyalties. It is also overly normative because it makes general conclusions about the European system from the evolution of individual positions of actors in a European environment. Another blind spot is that studies of socialization have not been able to highlight concrete causal links between supposedly converging discourses, values or even identities and EU decision-making, policy outputs or the changing political power of European institutions.

In this article, the phenomenon of elite socialization in Europe is approached from a different, non-cognitive angle. The phenomenon of socialization is defined in a symbolic interactionist sense, as a set of socially rooted, continuous, not necessarily voluntary or successful transmission of practices, know-how and knowledge that are highly dependent

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on a permanently (re-)negotiated and changing order. While socialization can lead to a broad range of not necessarily compatible or expected outcomes, it produces particular behaviour and normative outcomes that are specific to a particular social sphere, leading to reflexive effects on the set of institutions in which actors socialise.

When it comes to assessing effects and outcomes, as Norbert Elias argued, the obligations, rights and forms of reciprocal empowerment that derive from socialization have to be taken into account. While neo-functionalist accounts of judicial integration have shed light on the macro-processes of integration, the socialisation of judicial actors might also help counterbalance the often too abstract and mechanical explanations of spill-over theories by insisting on the sociological properties of individuals working inside and around European courts and who shape European law in their daily activities as well as the complex web of social relations they evolve in. Contrary to traditional neo-institutional studies, our emphasis is on the “sociological study of the European political space” and the sociability of normative entrepreneurs.

3. From Judicial Politics of Fundamental Rights to Judicial Constitutionalism

Despite occasional clashes and disagreements, the formation of an inter-institutional ‘common interest’ between the European courts turns out to be the direct result of the strategic socialization between the leaders of these courts and their subsequent common mobilisation in political, judicial and academic circles – a multifaceted diplomacy of the European courts which then led to an institutional policy shift in both institutions where inter-institutional linkage began to matter more than institutional egoisms.

Moving the protection of human rights to the European level was a highly political act. Unlike in the context of the Council of Europe, protecting rights from the level of the
European Union could imply a much stronger and autonomous control of European but also national actors implementing EU policies and law. For this reason, most debates and concrete advances have been about protection rights at the EU level of governance (i.e., protecting persons with regard to the working of the European institutions, as opposed to a EU supervision of purely national polities).

But at this particular level, there has been a lot of controversy about human rights because these norms have become instruments for the judicial constitutionalization of the EU, and for the deepening of integration. The evolution of jurisprudence as well as discourses of judges and politicians show that human rights have indeed been used, quite often successfully, to uphold the legal foundations of the EU, to improve the implementation of EU law at the national level and to extend the scope of EU competences. Many federalists have tried to create a human rights catalogue similar to the German Grundgesetz. All these activities have of course met with strong resistance, less by human rights opponents, than by those seeking to protect spheres of national sovereignty and those fearing that the discourse of a European federal state could become reality with the creation of a rights-based constitution.

The EU’s constitutional failure in 2005 was a turning point. As we are moving away from the possibility of a state-like entity at the European level, we are also reminded that the constitutional discourse of many European actors has always been questionable when describing and qualifying the nature (or the future) of the EU political regime. Now that Europe’s ‘constitutional fever’ has passed, it is still possible to argue that the EU has some aspects of a federal structure, but it lacks a constitutive moment which would enable the Union to present itself as a federation and be identified as such. Yet, the emergence of rights at the EU level is so tightly linked to the idea of a federal Europe that the constitutional activism of the protagonists of this configuration needs to be taken into account.

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Historically, the origins of EU rights lie in the courts. Member States only took up this matter decades after the courts started to deal with it. Even today the EU treaty has no fully-fledged human rights provisions. The link between European federalism and constitutionalism has been created parallel to this evolution. It can be synthesized as a four-step process:

1. As of the 1970, the ECJ started to eagerly protect human rights, most of all because some national constitutional courts did not accept the primacy of European law, arguing that rights were not sufficiently protected in the European Communities.

2. The emergence of a constitutional fundamental rights-based jurisprudence in the European courts by the end of the 1970s, when the ECJ started to be confronted with many human rights cases and when its judges increasingly relied on the ECHR.

3. Increasing interaction between jurisprudence and treaties, as of the late 1980s. The human rights provisions of the Maastricht and subsequent EU treaties as well as the Charter of Fundamental Rights, are strongly inspired by the ECJ jurisprudence, itself derived from the ECHR.

4. Increasing mobilization of judges beyond the courts, by positioning themselves as constitutional courts, through the development of inter-institutional socialization between judges and more direct interaction with the masters of the treaties.

18 The first references to human rights and the ECHR only appeared in the preamble of the Single European Act and later in article 6 of the Maastricht treaty. The ECJ effectively started to protect human rights in 1969 (ECJ, Case C-29/69, Stauder/Stadt Ulm, 1969 ECR 419) and started using the ECHR explicitly in 1974 (ECJ, Nold KG / Commission, 1974 ECR 491). Some human rights-related parts of the Nold decision have been used literally for the 1977 EU declaration on human rights (27 April 1977, JO n. C 103).

19 Only the Constitutional treaty and the subsequent Lisbon treaty were to give a legal value to the Charter of fundamental rights and created the legal basis for a EU accession to the ECHR.

The question of human rights protection at the European level only appeared gradually when private actors started to mobilize this repertoire before the ECJ,\(^{21}\) when some judges and law professors\(^ {22}\) started to write about this problem and when national constitutional courts bound the fate of the European Communities to their ability to protect rights.\(^ {23}\) In the 1950s, the drafters of the European Treaties did not plan for any kind of protection of citizens with regard to the action of Community institutions. It also appeared that the Council of Europe’s European Convention of Human Rights and its human rights court were hardly competent to provide external control on the European Communities. Since national constitutional courts bound their acceptance of the primacy of European law to the existence of appropriate human rights control mechanisms at the European Community level in the 1970s, protecting rights became important, even if EU treaties did not focus on this issue. ECJ judges therefore felt compelled to invent their own competencies and expertise in this area. In parallel, the Strasbourg based human rights court somewhat unexpectedly provided for an incremental external control of EU institutions, including the ECJ, and EU Member States implementing EU law.\(^ {24}\)

As the ECJ became a second European court dealing with human rights issues at a supranational level and the relationship between the EU and the Council of Europe became increasingly nested in the 1990s, the judges of the two European courts given increasing attention to their relationship. Despite a history of tensions between these two jurisdictions, linked to very different organisations holding a historically competitive, but now converging position,\(^ {25}\) judges of the European courts have chosen to proceed in a cooperative manner.

Their common mobilisation can be explained as a means to regulate bilateral conflicts and inter-institutional competition, but also by their joint exposure to (new)

\(^{21}\) ECJ, Case 1/58, Stork & Cie v. ECSC High Authority, 1959 ECR, par. 43.


\(^{23}\) See the German Constitutional Court’s famous Solange decision (29 May 1974, BVerfGE 37, 271) and the Italian Constitutional Court’s Frontini Pozzani decision of 27 Dec. 1973.

\(^{24}\) For an analysis on how both courts “intruded” into each other’s legal order, see L. Scheeck, “The relationship between the European Courts” o.c., at pp. 837 ff.

political and judicial forms of resistance to supranational adjudication. In addition, the drafting of the Charter of Fundamental Rights, the agreement, after decades of dissention, to make it legally binding in the next treaty and to make the necessary provisions to make the EU accede to the European Convention of Human Rights, controlled by the European Court of Human Rights, have set a new context for the relationship between their institutions.

4. A Nested Relationship

Beyond the institutional context, cooperation between the ECJ and the ECHR has been favoured for two further reasons. On the one hand, each court has hung a Damocles sword over the head of the other. The Strasbourg court has positioned itself in a way to be able to sanction EU law and ECJ decisions — yet a bad human rights record might trigger more national resistance with regard to the primacy of EU law. A withdrawal of the jurisprudential and symbolic support for the ECourtHR by the very powerful EU court might also considerably weaken the Strasbourg court. On the other hand, the growing awareness of this risk, has led both courts to uphold their respective work in practice.


27 In Strasbourg, EU-related applications, which have allowed the ECHR to intrude into EU politics and to “annex” the latter via its case law politics, are quite often related to previous ECJ decisions. For example, on 30 June 2005, in the Bosphorus Airways v. Ireland case, the ECHR made its latest move forward in its incremental annexation of the EU. Although the court unanimously decided to a non-violation of the ECHR and hinted to the idea that it is willing to be patient until the EU has formally adhered to the ECHR, its judges have also made clear that they feel ready to sanction States for EU-related acts if they violate the ECHR (for further details, see L. Scheeck, “The relationship between the European Courts” o.c., at pp. 837 ff). The European Court of Human Rights effectively applied its Bosphorus principle, for instance in the case Coopérative des agriculteurs de Mayenne and Cooperative laitière Maine-Anjou v. France (10 Oct. 2006) where the court considered “that a case such as this does not disclose a manifest deficiency in the protection of Convention rights capable of rebutting the presumption of protection of those rights by Community law, as expounded by the Court's Grand Chamber in the Bosphorus Airways case, cited above. It follows that this complaint is manifestly ill-founded and should be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.”
Until now, the European Court of Human Rights has never sanctioned an ECJ decision as such, as doing so would qualify the ECJ as a transgressor of human rights and put into question the supremacy of EU law, a principle which does not appear in the treaties and only holds in constitutional courts as long as fundamental rights are respected. The more the ECJ aligns itself on Strasbourg, the more it reduces the risk of being disavowed by the European Court of Human Rights. Such a move could have a delegitimizing effect on its overall institutional position within the EU, especially since its authority with regard to national courts and institutions continues to be questioned by some national (judicial) actors.28

Conversely, the less the European Court of Human Rights puts the ECJ under pressure, the more it reduces the risk of being sidelined by the ECJ. Just as the ECJ’s supranational authority is not carved in stone, the European Court of Human Rights has also been increasingly put under pressure by national courts and institutions.29 This might not be surprising, as Strasbourg spends its time assessing whether or not national institutions have violated the Convention. Here, the ECJ could exert pressure by intentionally or unintentionally encouraging national actors to make diverging interpretations from Strasbourg case law by issuing preliminary rulings that diverge from established ECHR jurisprudence.

If Strasbourg, for its part, started to sanction EU acts before the EU’s formal accession to the Convention, it would run the risk of reprisals from ECJ judges. As the EU grows larger, the ECJ would, in theory, have the institutional power and political resources to sideline the ECHR and its court, especially since some governments would have no objections to a less prominent human rights court. The ECJ could, for example, stop aligning its case law or exclusively rely on the Charter of Fundamental Rights, which provides a slightly higher level of protection than the ECHR for EU citizens.

Apart from reciprocal intrusions, there can also be direct conflict between the European courts. The Senator Lines case at the European Court of Human Rights (10 March 2004), which was directed against all EU member states is a recent illustration of inter-institutional conflict and an example of how a private actor, marching into both


supranational arenas at the same time with the help of lawyers, strategically and successfully managed to bring unwelcome turbulence into the relationship between the two courts at the very moment when judges tried to insist on the positive side of their linkage.30

So there has been a concern in Strasbourg about the ECJ’s power to undermine its case law in the absence of a formal accession to the Convention, which could put the ECHR into a hierarchically more comfortable position with regard to the ECJ and the Charter of Fundamental Rights. In Luxembourg, many fear that one day Strasbourg could declare an ECJ decision void, opening up the Pandora’s box of a potential national judicial refusal to respect the primacy of EU law in the absence of sufficient human rights observance.

The balance between the two courts remains very delicate. By confronting each other, the courts run the risk of reciprocally untying the authority of their increasingly overlapping legal orders to the benefit of those actors that are generally suspicious of independent judicial institutions, especially when they perform an external control with regard to human rights. Yet by respecting and referring to each other’s work, the European courts uphold their own position and, incidentally, the other court’s. The latter scenario is now clearly favoured in Strasbourg and in Luxembourg given their common supranational specificity, their comparable exposure to sovereignist actors, as well as their comparable objective of upholding supranational institutions and legal orders.

Their discreet solidarity has translated into strong dynamics of ‘cross-fertilisation’. This cooperation allows them to prevent public and private actors from increasing the fragmentation of EU and European human rights law and, hence, increases their autonomy within their basic organisational units. The European judges would themselves be the first victims of a war of European judges. Although the European judges don’t always trust each other – thus the need to keep all channels of dialogue open –, ostentatious references to Strasbourg’s case law in Luxembourg and Strasbourg’s occasional support of the supremacy of EU law have an appeasing effect.

30 Senator Lines (10 March 2004) was directed against all EU Member States so that the 15 governments had to defend themselves before the ECHR. The long awaited ruling of the Strasbourg court ended in a rather unexpected way. The ECHR was forced to cancel the hearing, because on 30 September 2003, three weeks before the decision due to take place on 22 October 2003, the European Court of First Instance in Luxembourg decided to set aside a fine imposed on the company Senator-Lines (and 15 other companies) by the European Commission (CFI, Joined cases T-191/98 and T-212/98 to T-214/98, Atlantic Container Line and Others v. Commission, 2003 ECR II-3275). This fine was at the very basis of the Strasbourg case, which thus had to be declared void.
5. Inter-institutional Judicial Cooperation

These dynamics of cross-fertilisation have not only led to an enrichment of both courts’ ability to protect human rights. They also increased both courts’ autonomy with regard to the EU and Council of Europe Member States and private actors. Intentionally or not, Strasbourg has been promoting the supremacy of European law invented by the ECJ in the 1960s, but which has sometimes been difficult to enforce on the national level. For example, in *Dangeville* and *Cabinet Diot et S.A Gras* cases against France (16 April 2002 and 22 July 2003), the European Court of Human Rights condemned France for failing to align French law with EU law, thus promoting the implementation and coherence of European law.

The European Court of Human Rights judges also have made use of the EU treaties and they have increasingly been referring to Luxembourg’s case law in order to fortify their decisions. Similarly, the ECJ has radically aligned itself on Strasbourg’s jurisprudence and increasingly refers to its decisions. Whereas Luxembourg sometimes gave the impression of avoiding a submission to the ECHR (see opinion 2/94 in 1996, where the ECJ ruled against an EU submission to the ECHR), its current approach is less defiant. By using the ECHR the Court of Justice has filled its own void of human rights instruments and it has ‘charmed’ the ECHR by using the Convention without being formally obliged to. Given its authority over national courts, the ECJ’s recent approach has a legitimizing effect on Strasbourg’s activities. References to the ECHR have indeed increased dramatically over the last ten years.

As shown in Graph 1, the references to the ECHR by ECJ and CFI judges and advocate-generals have been increasing constantly since 1998. It also shows that the use of the ECHR has become the main human rights instrument of the ECJ. From 1998 to 2005, the ECHR is referred to 7.5 times more often than all the other human rights instruments the ECJ relies on, including the Charter of fundamental rights, taken together. Regarding the Charter, references to this human rights instrument will no doubt increase if it becomes legally enforceable. However, this is probably not going to happen to the detriment of the ECHR because of the frequent dialogue of the European judges and their view that the ECHR is an ‘external’ human rights instrument, while the Charter

is an ‘internal’ document. Above and beyond this complementarity, the standing *Bosphorus* case law as well as the possibility of an EU accession to the ECHR will assure that there references to the ECHR and the Charter will not be handled in a mutually exclusive way.

From a qualitative point of view, ECJ references to Strasbourg’s case law are a way to streamline case law in the rather fragmented European normative space and reducing the gaps that enable resistance to EU and human rights law. The *Schmidberger, Internationale Transporte und Planzüge* case (12 June 2003) is a good example where the Luxembourg court put human rights before fundamental freedoms, *de facto* favouring rights protected by the ECHR – more specifically freedom of expression – over economic rights – freedom of movement of goods – granted by the EU treaties.32

Similarly, the ECJ also upholds human rights in newer, more politicised areas, like in the *Yusuf and Kadi* case delivered on 3 September 2008, where the Court set aside the

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much criticised judgments of the Court of First Instance of 21 September 2005 (Case T-315/01 Kadi v Council and Commission and Case T-306/01 Yusuf and Al Barakaat International Foundation v Council and Commission), removing the appellant from the list of those actors whose funds were to be frozen on suspicion of financing terrorism, on the grounds that the previous decisions did not sufficiently respect certain fundamental rights (the right to be heard, the right to property and the right to an effective legal remedy).

In this vein, the ECJ has helped to put an end to the debate on the clash between the ‘Europe of human rights’ and the ‘Europe of trade’ by relying on the ECHR and its case law. By referring to each other’s case law, the web of ‘judicial law’, as opposed to ‘political law’, which emerged from the interactions of the two courts, has had a reinforcing effect on both judicial institutions. Whereas the Strasbourg court has found an ally in protecting human rights in EU Member States, the inclusion of the ECHR in ECJ case law increases the legitimacy of its judgments and its impact on the national level. By respecting a set of compulsory fundamental norms, which all EU Member States have subscribed to, the ECJ indeed increases the impact of the entire European legal system on national polities and, sometimes, manages to extend its competences on national spheres. Human rights and the primacy of European law have thus become inextricably linked in the EU – they are not only about protecting individuals or groups against governments but about protecting and constitutionalizing the institutional and legal architecture of the EU.

This might appear paradoxical in the sense that human rights usually tend to diminish the power of public actors, whereas in the European case, human rights empower supranational public actors. Upholding rights is a means for the ECJ to protect the EU’s constitutional system and to become more autonomous, the active protection of rights at the supranational level has even become a way to deepen integration and, if not to erode national sovereignty, at least to circumvent the resistance of national judicial systems to European politics and to anchor supranational norms at the national level. As they relate to each other in order to prevail over national and private actors in supranational courts, the European courts have thus brought up a common supranational ‘jurisprudential screen’ to protect their institutional interests. However, these various forms of mutual assistance, which uphold and strengthen each court, would not have emerged without the continuous socialization of the European judges.

6. A Supranational Judicial Diplomacy

Since the ECHR became a permanent and more independent institution in 1998, the judges and court officials of the ECJ and the Strasbourg court have been meeting on a regular, but not formally institutionalised basis. After having communicated with each other for many years through their respective case law, their direct encounters take many different forms: the judges have been holding regular bilateral meetings since the ECHR became permanent in 1998, they invite each other to make speeches at the other court and, according to an ECJ judge, some have regular contact by phone or email and even meet privately. The dialogue of European judges finds a broader audience in political institutions, legal fora, when they meet at conferences on European issues or even at colloquia on their own relationship. In the same vein, they jointly give interviews on their courts’ relationships and they actively contribute to the body of literature on the

35 Interview at the ECJ (June 2004). Statement confirmed in Strasbourg (February 2005).
36 G-C. Rodriguez Iglesias “Discours” o.c.
37 Interview at the ECJ (June 2004).
38 Among many examples, see the joint appearance of ECHR judge Tulkens and ECJ judge Levits at the EP LIBE Commission Public Seminar “Judges and legislators, for a multi-level protection of fundamental rights in Europe” of 8 October 2007.
41 For example, the Luxembourg symposium on the relationship between the Council of Europe Human Rights and the Convention and EU Fundamental Rights Charter, Schengen, 16 September 2002; the “Globalization and the Judiciary” conference organised in Texas on September 4 and 2003; the conference “Europe of the courts” at the Institute for European Studies of the Université Libre de Bruxelles (21 September 2007).
42 With the notable exception of French judges, European judges are often themselves academics. This is of course another reason why so much has been written on the two courts’ relationship.
43 Puissochet [the French judge at the ECJ] and Costa [the French judge at the ECHR], (2001).
subject.44 As the judges contribute to shape the image of their relationship (toward more cooperation), it appears that the objective of these new judicial politics, no longer restricted to courtrooms, is to shape wider political and judicial processes on European, as well as national levels of governance.

Some of these legal entrepreneurs emphasise the courts’ inter-jurisdictional “cross-fertilisation”.45 It is also asserted that the impression of mutual defiance between the two courts is “in fact the opposite of what happens in reality.”46 For ECJ judge Allan Rosas, “the thesis, often put forward in the legal literature, that there is a tension or even conflict between Luxembourg and Strasbourg case-law is somewhat exaggerated, to put it mildly. Harmony, rather than conflict, is a much more likely scenario.” During his joint interview with the ECHR judge Jean-Paul Costa in the political science journal *Pouvoirs*, the ECJ judge Jean-Pierre Puissochet declared that the ECJ is “extremely cautious” not to distance itself from Strasbourg’s interpretation, that diverging case law between the two courts law

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46 J.-P. Puissochet and J.-P. Costa, o.c. – ECJ judge Puissochet speaking.
have been “misunderstandings” and that “the relationship between the two courts has to be seen in the light of a dialogue on principles and not in the light of a struggle for supremacy.”

According to some judges and court officials, the presidents of the two courts, Luzius Wildhaber (ECHR) and G.C. Rodriguez Iglesias (ECJ) have played the most important role in the effective rapprochement between the two institutions. Since October 2003, the ECJ’s new president, Vassilios Skouris, has continued in this vein. Advocate general Francis Jacobs (now retired), who regularly went to Strasbourg when working for the ECJ, also played a pivotal role in this respect. He already argued in favour of a rapprochement between the two courts in the early 1990s and many see him as the driving force behind the reinforced relationship between the courts. However, as in both institutions, not everybody was overjoyed by this inter-institutional endeavour, Wildhaber and Rodriguez Iglesias provided crucial leadership to overcome mutual mistrust. The presidents’ most cordial dialogue took place at the solemn opening audience of the ECHR in Strasbourg on January 31st 2002. Luzius Wildhaber stated:

“The European Union now intends to consider the future of the Charter and the question of the European Community’s accession to the European Convention on Human Rights. The Council of Europe has always regarded those two options as complementary rather than as alternatives. Indeed, it is legitimate to ask whether, in view of the level of interdependence which has naturally evolved between the Convention and European Union law, and which will no doubt continue to grow, it is still justifiable to envisage the future of the two systems and their subsequent developments as if they were completely impermeable, whereas in reality they are not”.

For his part, the president of the ECJ, guest of honour for this special occasion, assured that “the two Courts share an essential commitment to basic values forming an integral part of the common heritage of Europe, founded on democracy and fundamental
rights, by virtue of which they contribute, together with the Supreme Courts and Constitutional Courts, to the emergence of what has been termed a “European constitutional area”.51

In the same speech, the president of the ECJ confirmed that his court was finely attuned to the ECHR’s jurisprudence. “The Court of Justice, together with the Court of First Instance, has clearly shown its willingness to respect not only the provisions of the Convention but also the case law of the European Court of Human Rights”.52 Despite the general enthusiasm, Rodriguez Iglesias reiterated in his Strasbourg speech that the Court of Justice considers the ECHR as a “source of inspiration”53 in order to remind those present of his own court’s autonomy. The role of supranational judges in regulating the inflation of international norms and institutions has become increasingly important. The European judges are conscious of the role they have to play in order to deal with Europe’s human rights puzzle and of the importance of a modus vivendi between the courts.

As Rodriguez Iglesias stated in his Strasbourg speech: “As regards the protection of fundamental rights, it is well known that there does not currently exist any normative system comprehensively covering the relationship between the European Convention for the Protection of Human Rights and the Community legal order. Because of that lacuna, the two Courts have a special responsibility for organising relations between those two legal orders”.54 Rodriguez Iglesias also stressed the fact that he was personally in favour of the EU’s accession to the ECHR.”55

Speculation on the contents of the more confidential regular discussions between judges are proportional to the culture of secret that surrounds their gatherings. According to interviewed judges in Strasbourg and in Luxembourg,56 the European judges’ bilateral meetings, alternately held in Luxembourg and in Strasbourg on an annual rhythm, are rather informal. Not all judges participate in these gatherings. The delegations that are sent to the other court usually comprise the president and the judges who are most familiar with the EU-ECHR relationship.

52 Ibid.
53 Ibid.
54 Ibid.
55 Ibid.
56 Interviews at the ECJ (June 2004) and at the ECHR (February 2005).
According to the judges interviewed, these discussions tend to avoid direct confrontation on institutional issues and their encounters do not take the form of direct bilateral conflict resolution. Instead, presentations and debates on the evolution of their respective case law are central, allowing judges to compare their approach to similar judicial problems. Comparisons of recent case law are not only useful for reciprocal inspiration, but also help avoid divergent case law on similar cases, and hence lessen the risks of inter-institutional conflict. Yet the judges’ meetings have played an important role in streamlining case law as they produce a trust-building effect. Whereas the judges of the ECHR, and above all its president, have pleaded in favour of the EU accession to the Convention on a regular basis, the ECJ judges increasingly welcome it as well. For ECJ judge Allan Rosas, the EU’s accession would “remove an outdated anomaly in today’s European human rights system”. Taking good care of the courts’ relationship is both a way to protect their institutions’ respective position within their respective organizations and to consolidate the supranational protection of human rights in Europe. Since both courts’ case law simultaneously contains the seeds of possible convergence or conflict, the judges’ direct dialogue has taken the form of high-profile diplomatic consultations. While norms and institutions proliferate and increasingly overlap, the linkage between institutions has not only become a way to overcome a highly fragmented process of regional integration, but also provides a means for coherence without uniformity.

In Luxembourg it is now commonly considered that formal accession to the ECHR would not change the current state of affairs and the judges appear to be aware of their joint influence on European politics. According to an ECJ judge “by citing other courts we keep the member states together. If a member state does not comply with a certain interpretation, it is important that all international courts have the same analysis”. The European judges have indeed learned to prefer a mutual reinforcement of the two supranational courts, rather than run the risk of weakening both institutions by asserting a claim to be the “highest court” in Europe. As the courts are entangled in a web of constraining relations, it now seems that a formal accession would have more advantages than disadvantages – even for member states that have traditionally opposed the EU’s accession to the Convention.

58 A. Rosas, “Fundamental Rights” o.c., at pp. 164 ff.
59 Interviews at the ECHR (February 2005).
60 Interview at the ECJ (June 2005).
The European courts have played a decisive legal and political role with regard to the planned EU accession to the European Convention on Human Rights, which we have understood as a mainly unintended effect of the ECJ’s and ECHR’s simultaneously competitive, conflicting and cooperative position in the general institutional and organisational configuration leading to the progressive emergence of a relation of strategic interdependence. In other words, in the absence of EU member state agreement on human rights, the European governments have been pushed to proceed to such an accession to the Convention as a result of the somewhat turbulent interaction between European courts. Of course, while the European courts remain agents for the politicisation of the EU and while each court individually increases its domination over national and private actors by engaging into a networked relationship with the other European court, the political agreement between Member States to create a legal basis for accession to the ECHR does not mean that there will be such an accession anytime soon, as the UK and Poland opt-out of the Charter of Fundamental Rights or the difficult ratification of the Council of Europe’s Protocol 14 amply demonstrates. From this perspective, the strategic interdependence of the ECJ and the ECHR is all the more essential.

The reasons why many actors of this inter-jurisdictional configuration take a positive stand with regard to the EU’s accession to the Convention are closely linked to the effects of both courts’ previous reciprocal arrangements and the mobilisation of the leaders of both courts. The socialization of a small group of judges, advocate-generals and law clerks, worried about the possibly damaging jurisprudential conflicts of the European courts and the continuing political pressures on their courts, is indeed the main explanatory factor for the overall convergence of the two courts and not simply – as one might spontaneously assume – the fact that some judges who used to work in Strasbourg became judges in Luxembourg.

In 2005, 23.5 % of the ECJ’s main actors (judges, advocate generals and clerks) had a previous working experience in the Council of Europe. This rather high percentage certainly contributes to maintain the ECHR’s momentum in Luxembourg. While the

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61 L. Scheeck, La diplomatie des cours européennes. L'influence de la relation entre la Cour européenne des droits de l'homme et la CJCE sur la construction européenne, Editions de l'Université de Bruxelles, to be published.

62 It appears that there has never been a judge, advocate general or law clerk who went from Luxembourg to Strasbourg. This percentage has only risen in recent years, mostly because of the last EU enlargements.
concerned judges and officials sometimes participate in the dialogue of the two European courts, their role does not help to explain, however, why the ECJ became interested in the ECourtHR’s work in the first place – this relationship indeed emerged years before their transfer.

This also shows that the reciprocal influences and the direct cooperation between the courts cannot be reduced to inter-institutional exchanges of judicial actors. The EcourtHR-experience of many ECJ lawyers might help to stabilise the relationship between the two courts. Yet, the creation of a cooperative link pre-dates the rise of the number of lawyers transferred from Strasbourg to Luxembourg. This link is much more an effect of an inter-institutional socialization of a minority of powerful judicial actors, reacting to the dangers of the jurisprudential overlap of the two courts. These leaders very often have personal and professional paths that show a special interest in public and human rights law. But their interest for the “other” court hardly stems from cross-organisational multiple loyalties but rather from their multi-positioned professional profile and their political and institutional interests to drive human rights and constitution-making in an interdependent European polity that is in many ways larger than the EU itself.

7. Conclusion

The European courts’ increasingly nested linkage has given rise to new forms of supranational judicial diplomacy between judicial actors of the ECJ and the ECHR that goes beyond traditional understandings of adjudication and has had a deep impact on law- as well as policymaking. The strategic interactions of judges fostered a common discursive and jurisprudential “thread”, allowing each of the two European institutions to increase their domination of those public and private actors who march into “judicial arenas”.63 The judges and lawyers of both courts have strategically engaged into these networks because the upholding and reinforcing the institutional architecture and the policies of the European Union have become intrinsically linked to the protection of human rights. Since the end of the 1990s, the convergent case law of these courts no one had expected, the annual high profile meetings between European judges, a joint discourse on jurisprudential cross-fertilisation between their courts, the positive complementarity of the Charter and the ECHR, as well as similar positions regarding the

future of human rights in Europe and their own courts’ relationship in political, judicial
and academic fora are indicators of what can be qualified as the emergence of a ‘common
supranational diplomacy’ of European judges. Entirely based on fundamental rights, this
transnational normative and discursive web tends to encompass European politics and to
change the direction of integration itself. This linkage did not evolve in a linear way, nor
are the European courts monolithic institutions.64 However, through their jurisprudential
and face-to-face dialogue and their multifaceted investment in emerging transnational
networks, Europe’s supranational judges have produced path-making effects on the
process of European integration.

64 On the contrary, as shown by dissenting opinions in the ECHR as well as increasing internal
tensions in the ECJ after the recent EU enlargements and new political turbulences in the EU (H.
Rasmussen, “Present and Future European Judicial Problems after Enlargement And The Post-
It's Alright Ma, I'm Only Bleeding
(A Comment on the Fedon Jurisprudence of the Court of First Instance)†

Petros C. Mavroidis*

This paper discusses the Fedon decision of the Court of First Instance. This decision is typical of the restrictive manner in which the European Courts have traditionally interpreted the conditions under which the Community might be obliged to compensate individuals hurt by its actions. In this case, the European Community, by failing to comply with a ruling by the Appellate Body of the World Trade Organization (WTO), opened the door for countermeasures against it. Such countermeasures were indeed adopted several months later. The European Community decided not to comply and thus guaranteed a segment of its society (bananas distributors and some bananas producers) a legal 'shield' against competition from other sources. The countermeasures hit, among others, manufacturers of glasses such as the Fedon company. Consequently, by not complying with its international obligations, the

† For critical remarks on this paper, I am indebted to Bruno de Witte and Claus-Dieter Ehlermann. This essay was already published in “Challenging boundaries: essays in honor of Roland Bieber”, Zürich, 2007.

* Petros C. Mavroidis: Edwin B. Parker Professor of Foreign & Comparative Law at Columbia Law School, NY and Professor of Law, University of Neuchâtel.
European Community was de facto operating redistribution of income across segments of its society. This paper takes a critical stance against such exercise of discretion both as a matter of principle, and as a matter of legal technicalities.

1. Introduction

This paper discusses the Fedon case-law of the Court of First Instance. Although at the moment of writing an appeal was pending, the case-law is typical of the restrictive manner in which the European Courts have traditionally interpreted the conditions under which the Community might be obliged to compensate individuals hurt by its actions. In this case, the European Community by failing to comply with a ruling by the Appellate Body of the World Trade Organization (WTO), opened the door for countermeasures against it. Such countermeasures were indeed adopted several months later. The European Community decided not to comply and thus guaranteed a segment of its society (bananas distributors and some bananas producers) a legal ‘shield’ against competition from other sources. The countermeasures hit, inter alia, producers of glasses such as Fedon. Consequently, by not complying with its international obligations, the European Community was de facto operating redistribution of income across segments of its society. This paper takes a critical stance against such exercise of discretion both as a matter of principle, and as a matter of legal technicalities.

2. The Facts

Following the lack of implementation of the Appellate Body (AB) report on EC – Bananas III,¹ the United States requested authorization to impose counter-measures against products originating in the European Community. In the absence of agreement between the two interested parties as to the level of countermeasures, their dispute was submitted to arbitrators.² So far, countermeasures in the WTO have taken one form only: suspension of concessions, whereby the injured state imposes trade harm on the author of the illegal act.³

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¹ The EC import regime for bananas was found to be inconsistent with a number of WTO provisions, including Art. 1 GATT (the notorious MFN, most favoured nation, clause). EC – Bananas III is the official abbreviation of the final report, available at www.wto.org.

² As per Art. 22.6 of the WTO Dispute Settlement Understanding (DSU).

³ By adhering to the WTO, a state accepts, among other things, disciplines on its trade instruments: following negotiations to this effect, a ceiling will be imposed on the level of tariffs.
The arbitrators revised the US request downwards and, subsequently, the WTO (through the DSB, the Dispute Settlement Body) authorized the United States to impose countermeasures of 191.4 million dollars against products originating in the European Community. The United States included in the list of products the concessions on which they suspended products by Fedon, an Italian company producing articles of a kind normally carried in the pocket or in the handbag, with outer surface of sheeting of plastic, of reinforced or laminated plastics (cases for eyewear). The United States imposed in April 1999 duties of 100% ad valorem on Fedon products. Following negotiations between the European Community and the United States, the former agreed to suspend provisionally the high duties imposed on June 30, 2001. During this period, the product market where Fedon participates suffered a considerable damage.

Fedon requests that the Commission reimburse the damage suffered during that period as a result of the extra duty imposed on its products.

3. The CFI Decision

The plaintiff raised two claims before the CFI: (i) that the European Community had acted illegally (by practising a WTO-inconsistent bananas import regime) which provoked the US countermeasures and, as a result, Fedon suffered trade damage; (ii) that, even assuming that the EC authorities had not acted illegally, Fedon should still be compensated for the damage suffered since, under EC law, the European Community can, under diverging conditions albeit, be held responsible irrespective whether it has committed an illegality or not.

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4 Throughout the paper I refer to Fedon (the company) and Fedon (the judgment).
5 See the CFI, Case T-135/01, Giorgio Fedon & figli v. Council and Commission of 14 December 2005, ECR, II-29. By moving it to 100% ad valorem, the United States had imposed an extra duty of 95.4% on Fedon products, par. 34.
6 CFI, Case T-135/01, Fedon (note 5), par. 45.
7 As evidenced in the EC Commission’s own statistics, see CFI, T-135/01, Fedon (note 5), par. 46.
8 The exact quantification of the damage by Fedon is included in CFI, Case T-135/01, Fedon (note 5), par. 56 (€ 2,289,242.07, plus interest rate).
The CFI rejected both claims. With respect to the first claim, it held that there is no illegality on behalf of the EC institutions involved anyway, consequently, since one of the three conditions (commission of an illegal act, damage, causal link between the two) that must be cumulatively met is missing, the European Community bears no obligation to compensate (par. 142 of the CFI judgment). With respect to the second claim, the Court first noted that, for the European Community to be held responsible, the damage resulting from a (legal) behaviour must be unusual and special. In the case at hand, the CFI held that the damage suffered by Fedon was not unusual; hence, its claim should be rejected.

4. Why the CFI is Wrong

I. The Claim on Responsibility because of an Illegal Act by the EC Institutions

Constant case-law has settled that, for the European Community to incur non-contractual liability, the conduct alleged against the Community institutions must be unlawful, the damage must be real and there must be a causal link between that conduct and the damage complained.\(^9\) Unlawful conduct has been further narrowed down to situations where:

> There has been a sufficiently serious breach of a rule of law intended to confer rights on individuals … As regards the requirement that the breach be sufficiently serious, the decisive test for finding that it is to be fulfilled is whether the Community institution concerned manifestly and gravely disregarded the limits on its discretion. Where that institution has only a considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach.\(^10\)

This test has been reproduced \textit{verbatim} in \textit{Fedon} (parr. 81-82). The CFI rejected the claim that the EC institutions had committed an illegality in the instant case (par. 142). The CFI's reasoning could be summarized as follows: WTO law is no benchmark for the legality of EC law (par. 103) except for two cases: where the European Community intended to execute a particular obligation assumed at the WTO-level, and where EC legislation reflects an explicit referral to WTO law (par. 107). WTO law is not a

\(^9\) CFI, Case T-64/01, \textit{Afrikanische Frucht Compagnie}, 2004 ECR II-521, par. 70.

\(^10\) CFI, Case T-64/01, \textit{cit.}, par. 71.
benchmark for the legality of EC law in any other case since the incidence of WTO law in
various domestic legal orders is asymmetric (par. 104); on the other hand, were the Court
to use WTO law as benchmark, it would deprive EC negotiators of important negotiating
tools (par. 105). As a consequence, the Court will examine whether we are in presence, in
the case at hand, of one of two limited conditions under which WTO law becomes the
benchmark to evaluate the legality of EC law. It concludes that this is not the case (parr.
109 – 129 dedicated on the first condition, and par. 135 on the second).

In my view, the CFI’s judgment is wrong on all accounts. I take each point in turn.

i. WTO Law is No Benchmark of Legality Except for Two Cases

The Court gives two reasons to justify this ruling. The first grounds invoked sounds like a
reciprocity argument: I will not, in principle, recognize WTO law if you do not do the
same; I will do so only in limited, ex ante un-identified\(^\text{11}\) by my partners, circumstances.

Assuming this is a reciprocity argument, it is not right: any signatory of the WTO
must observe its disciplines, by virtue of its adherence to the WTO contract. This much is
clear by a mere reading of Art. 26 of the Vienna Convention on the Law of Treaties
(VCLT) which reflects the customary principle \textit{pacta sunt servanda}: “Every treaty in force is
binding upon the parties to it and must be performed by them in good faith.”

Those who do not do so risk legal challenges before the WTO, the exclusive forum
to adjudicate WTO-covered disputes, as per Art. 23.2 DSU. Reciprocity (\textit{non adimplenti
contractus}) could be a valid legal reason for violating a bilateral, not a multilateral contract;
this much is known in both the EC and the WTO law.

On the other hand, the Court does not cite who are the other trading partners who
do not use WTO law as benchmark and how many good guys are required for the
European Community to act in good faith as well.\(^\text{12}\) Indeed the Court, as in previous
cases, did not embark on a comprehensive analysis of how the trading partners of the

\(^{11}\) As will be made clear \textit{infra}, the Court will accept that the WTO law is a benchmark to test the
legality of EC law only in cases where the European Community intended this to be the case, and
in cases where there is explicit reference in EC law to the WTO law. The latter is by definition
unknown to the other WTO signatories since such acts take place post signature of the WTO
agreement. The former is also, in all likelihood, unknown to the rest of the world, since in an
asymmetry of information-context, detecting intentions could be a quixotic test. This is probably
why Art. 26 VCLT imposes a blunt requirement to respect an international treaty and such
requirement cannot be further conditioned on any unilateral action.

\(^{12}\) Recall that this is not a discussion about direct effect, a point to which I will return later.
European Community receive WTO law in their legal order. As a result, we are left wondering as to the basis for Court’s decision. We are thus left to suspect that the EC attitude critically depends on the attitude by its transatlantic partner on this score. At the end, the attitude of the European Community will depend on the attitude of others. This attitude is hard to reconcile with Art. 26 VCLT.

**ii. The European Community Did not Intent to Abide by the DSb Decision**

Having decided that WTO law is not, in principle, a benchmark for the legality of EC law, the Court moved on to evaluate whether, exceptionally so, this is the case. The first exceptional grounds is provided, as per its prior jurisprudence, by the response to the question whether the European Community intent to abide by the international law norm? In this case, the pertinent norm is the DSb decision adopting the WTO Appellate Body (AB) report condemning the EC practices (the EC – Bananas III report). In the Court’s view, there is an inherent vicissitude in WTO law which distinguishes it from other legal systems: once inconsistency has been established, the author of the illegal act does not have to implement its obligations; it can negotiate some form of compensation (parr. 109, 113). Hence, the European Community did not intend to assume a particular obligation when the DSb decision fell. Were the CFI to grant Fedon compensation, it would have had ipso facto, so the argument goes, deprived the EC executive (the Commission here) from negotiating a deal with its trading partners (parr. 117-129).

This is hardly logical proposition for many reasons:

First, from a practical perspective, a CFI decision in favour of the plaintiff does not have any effect on the Commission’s discretion: Fedon requests money it has already paid the United States from 1999-2001. As of 2001 the United States has stopped imposing the mark-up against Fedon products. The ongoing negotiations between the European Community and the United States focus on the future and not on the past. The European Community committed an illegality and the question is whether it will change its policies. No matter what the European Community decides to do in the future it cannot affect the payments Fedon has made. Hence, on practical grounds the CFI decision is wrong.

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14 DSb stands for *Dispute Settlement Body*, that is the WTO organ adopting reports by WTO adjudicating bodies.
Second, the Court mischaracterizes completely the WTO: Art. 22 DSU has a clear preference in favour of property rules (specific performance of the contract). Liability rules are an interim solution. The obligation imposed on the European Community by virtue of the DSB decision, in other words, is to remove the illegal practice; in the meantime, that is, until the moment when compliance has occurred, the European Commission could be paying compensation. In this respect, there is no difference between WTO and EC law: indeed the latter also provides for a payment of fines until compliance has been achieved. None of the two legal orders could prejudge when compliance will occur, and many factors (which we could encompass in the term ‘opportunity cost of non-compliance’) can affect whether and if so, when compliance will occur. Moreover, in contrast to Art. 228 ECT (European Community Treaty), WTO law makes it clear (Art. 22 DSU) that liability rules are an interim solution only, and are meant to function as a device persuading WTO Members to eventually comply with their obligations. If the CFI aims to say that all systems with interim liability rules are, because of this idiosyncratic element, systems which do not require specific performance, then, it will have to also think of the implications of this statement for the EC legal order as well.

15 The discussion on liability/property rules is also discussed in literature in terms such as the rebalancing/compliance paradigm and has to do with the objective function of the WTO dispute settlement system: is its purpose to compensate those affected by non-compliance (liability, rebalancing), or to ensure execution of the contract (property/compliance)? Art. 22 DSU clearly takes a position in favour of the latter keeping the former as an interim solution. Personally, I side with W. Schwartz, A.O. Sykes (“The economic structure of renegotiation and dispute resolution in the WTO/GATT system”, Journal of Legal Studies, 2002, pp. 179-207, reprinted in: P.C. Mavroidis, A.O. Sykes (eds.), The WTO and International Trade Law/Dispute Settlement, Northampton, Mass, Edward Elgar Publishing, 2005, pp. 52 ff.) and believe liability rules should be a permanent exit strategy. On this score, see also R.Z. Lawrence, Crimes and Punishment, Retaliation under the WTO, Washington DC, Institute for International Economics, 2003. But see also, for a different opinion, J.H. Jackson, Sovereignty o.c., at pp. 195 ff.


17 To avoid any misunderstandings, I am not claiming here that the WTO law system guarantees respect of the contract. I have argued elsewhere that enforcement critically depends on the identity of the players. I am making a formal argument only since this is exactly what the CFI also did (a formal argument).
Third, the Court pays disproportionate attention to the WTO liability rules (compensation) anyway: compensation will be paid only if the defendant agrees to do so. In practice, it has happened only once since 1995. This is not a basic feature of the WTO system, an inherent vicissitude as the Court claims; it is de facto rather exceptional.

For all these grounds, the CFI’s analysis in this respect makes little sense. More importantly, however, it is indeed disturbing to hear from the Court that an international treaty will be the benchmark if and only if the European Community intended it to be the case. So our partners should now know (by virtue of backwards induction) that, when the European Community signs international treaties, sometimes it might and sometimes it might not intend to use them as benchmark for its subsequent actions coming under the purview of the international regime to which it voluntarily adhered. Our judges should think about the incentives they provide our (trading) partners with.

iii. No Express Reference to WTO Law

This question was much easier for the Court to handle. The Court found nowhere in the relevant EC documents an explicit reference to WTO law. The conclusion, in the eyes of the judges was inescapable. Pause for a moment and reflect on this other exceptional grounds: what are the CFI judges really saying? The EC (domestic) law contains no explicit reference to WTO law hence, although the subject matter of the former in this respect is actually the subject-matter of the latter, the latter is no benchmark for the legality of the former. But is not this construction tantamount to stating that it is on domestic law-grounds that the performance of international obligations will be decided? Such an attitude is clearly in contradiction with yet another customary international law rule enshrined in Art. 27 VCLT: “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”

iv. Preliminary Conclusion

In a nutshell, the Court excludes the possibility for an international wrong to be a violation in the sense of EC law because of the interim liability rules embedded in the WTO legal system. Despite the factual mistake that the Court committed (by saying yes to Fedon’s claims, it does not deprive the Commission of any negotiating tool), this

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attitude is problematic because, if applied to other regimes with liability rules, it risks constructing EC law in isolation from the EC international obligations: very often, international regimes are subjected to liability rules because of the flexibility that such rules provide. Flexibility in turn incites participation.\textsuperscript{19} The customary public international law remedy (\textit{restitutio in integrum}) is a liability rule and is applicable any time execution of the contract is not feasible.

II. The Claim on Responsibility because of a Legal Act by the EC Institutions

i. The Legal Test

The Court first explained (par. 153) that, as \textit{per} constant case-law,\textsuperscript{20} the European Community can be held responsible for legal actions as well if three conditions have been cumulatively met:

\begin{itemize}
  \item a damage exists;
  \item a causal link between the damage and actions by the EC institutions has been demonstrated; and
  \item the damage is unusual and special.
\end{itemize}

The discussion in \textit{Fedon} hinges on the interpretation of the underlined term (unusual), since the Court satisfied itself that a damage indeed existed (par. 162) and a causal link between the damage and the EC bananas import regime had been established (par. 183).

ii. Not So Unusual

The Court found that the damage suffered by Fedon was not unusual\textsuperscript{21} and for this reason rejected the claim of the plaintiff. The Court’s finding rests on the definition of the term ‘unusual’ and the inherent vicissitude of the WTO system explained above: damage is unusual, if it is beyond the limits of economic risks inherent in the sector concerned (par. 191). In this case, the risk is not ‘unusual’ because Fedon could have

\textsuperscript{19} Property rules have the merit to encourage investment in the regime, assuming a regime has been agreed upon.


\textsuperscript{21} Because of this finding, it did not proceed to establish whether the damage was special or not (par. 200).
been exposed in this risk by exporting its products in the US market (par. 198). Why is this the case? Simply, because there is an inherent vicissitude in the WTO system, which allows for countries to take counter-measures, when they are facing illegality (parr. 194 – 197). Since counter-measures can hit anyone, they can hit Fedon as well.

iii. Not So Unusual? An Unusual Understanding of the (Un)-usual

So what is the Court saying here? Recall that the starting point of its analysis is the definition of ‘unusual’, where it implicitly made reference to the distribution of risk across economic sectors. There are many problems with this part of the judgment as well:

First, the Court uses the wrong words (concepts?). Risk is not uncertainty; risk-distribution pre-supposes knowledge of the probability that an event will occur. No such knowledge exists in a state of uncertainty. Taken literally, the Court decision should be dismissed only on this account, for it is simply impossible for Fedon to calculate the risk of being exposed to counter-measures. The rest of our analysis takes it for granted that what the Court meant was uncertainty.

Second, when it comes to measuring uncertainty, it is only normal that we first establish some reasonable benchmark. Take the facts of Fedon as an example: Fedon, in the Court’s view, when deciding to export its product to the US market, should have calculated that:

- eventually, the European Community would adopt the bananas regime it adopted;
- that it would hurt US interests;
- that the US would decide to challenge the EC regime before the WTO;
- that the GATT first would find against the European Community;
- that the European Community would not comply and would modify instead its regime;
- that the United States would challenge the EC regime again and again;
- that the third EC regime would have been found WTO-inconsistent (this time by a WTO, not a GATT panel);

22 At the moment of writing no English translation of the judgment is available. Par. 198 reads in French: “il s’ensuit que les risques auxquels pouvait être exposée de ce fait la commercialisation par les requérantes de leurs lunettes sur le marché américain ne sont pas à regarder comme étrangers aux aléas normaux du commerce international, en l’état actuel de son organisation.”
that the European Community, would again not comply;
• that the United States would take counter-measures pending compliance; and
• that US counter-measures would hit Fedon products among the myriad of EC exports to the US market that could potentially be hit.

Importantly, Fedon should accept that it is usual that the importers of bananas-lobby in the EC market is more powerful than the lobbies of producers hit by US counter-measures and that the European Community would prefer to satisfy the former by keeping its illegality intact. I wonder, how many entrepreneurs can foresee all of the above? And what is the remedy in case they do? Stop exporting? But is not the very purpose of the WTO to liberalize exchanges?

III. Bite the Bullet, Fedon (So Says the Court)

By keeping the illegality in place the European Community is essentially re-distributing wealth across segments of its society: the bananas-importers (those selling ACP bananas) are not exposed to international competition and thus keep their profits intact; Fedon and those hit by US-countermeasures pay the price of the illegality since they lose export income. If switching (to another export market) costs were meaningless, the harm would have been minimized. Empirical research, however, shows that more often than not this is not the case. This is probably what motivated the complaint by Fedon. And what is the remedy that the Court suggests? None. Fedon should bite the bullet. There is nothing wrong with assigning the competence to the European Community to decide on such issues.23 This is the essential reason why I do not support direct effect of WTO law, as will be shown in Section 4. It is, however, disturbing to shield the European Community away from any responsibility when through its actions it provokes harm to its citizens.

IV. The Court is Aid to the Commission: Should It be?

On numerous occasions in the judgment the Court repeats its resolve not to deprive the EC institutions of an important negotiating tool. To do that, the Court goes so far as to suggest that an international wrong (the WTO finding of inconsistency of the EC bananas import regime) is not wrong as a matter of EC law; all in the name of not depriving an EC institution from a negotiating option. The analysis above shows that the

It’s Alright Ma, I’m Only Bleeding

(A Comment on the Fedon Jurisprudence of the Court of First Instance)

Court was quite over-zealous in its role of Commission’s helper this time since, had it agreed with Fedon it would have not at all prejudiced the Commission’s actions: bygones are bygones and the Commission does not negotiate money already paid, but rather the end of the dispute.24 Saying yes to Fedon, in other words, amounts to no restraint on the European Community’s executive branch.

But most importantly, is this the role of the Court? The Court is there to test, inter alia, the legality of the actions of the agents of the European peoples, the EC institutions. The Court has established through its case-law an elaborate system25 to test the legality of their activity. Illegality can take place because either domestic or even international law has been breached. The European Community has signed an agreement whereby it has accepted that WTO adjudicating bodies will have the monopoly of deciding on the legality of actions by all trading partners (Art. 23.2 DSU). This is the contractual promise of the European Community to the rest of the world. Now that the WTO adjudicating bodies have done as much, the Court turns back and says that a wrong in the eyes of the WTO is not a wrong in the eyes of the European Community institutions. It might be a wrong only in two circumstances that the Court, based on its own perceptions (that is, on internal and not on international law), accepts to use WTO law as benchmark for testing the legality of EC institutions.

It is true that some actions by the executive are, for good reasons, non-justiciable. In such cases either the legislator, or even the judge explain why this should be the case. The latter will do so when the original contract is incomplete.26 But are we facing such a situation here? Not at all. Art. 23.2 DSU states the exact opposite: the actions by the Community are to be judged exclusively before the WTO. Private traders originating in the European Community, aware of this provision, will legitimately organize their activities expecting that the Community will behave like a Rechtstaat that it is, in accordance with its international obligations. Yet through Fedon, the Court has weakened the legitimacy of Art. 23.2 DSU. This construction of the relationship between EC and WTO law cannot find respectable intellectual refuge in the relationship between national

24 Indeed, this is very much in line with the Commission’s attitude at the WTO to always support prospective remedies and consistently oppose retroactivity in this respect.


26 ECJ, Case C-7295, Kraaijefeld and Others, 1996 ECR I-5403. Usually this will be the case when the legislative will is expressed in general terms, or by using an indicative list of non-justiciable transactions so as to avoid Type-II errors.
and international responsibility: yes, the Community can pay (liability rules) pending implementation (property rule). Implementation should, however, occur. Moreover, who pays? As stated above, the EC non-compliance amounts to re-distribution of wealth from Fedon to the EC importers of Bananas. It is hardly compatible with the idea of Rechtsstaat to accept that, in the name of an international wrong, we should accept re-distribution of wealth from innocent to bystanders to those providing the motive for the violation.

5. Instead of Conclusions: Who’s Afraid of Direct Effect?

To avoid any misunderstandings, I am not advocating direct effect of WTO law. Fedon is not about direct effect, just like the ECJ Bananas judgment was not about it either. Fedon has not been arguing that by virtue of a WTO provision it is entitled to a sum of money; Fedon has been arguing that because of actions by the European Community (irrespective whether in breach of its international obligations or not), it has suffered a trade damage. The source of its claim is not WTO law, it is EC actions.

In fact, more generally, I side with Levy and Srinivasan who showed why it makes good sense to assign the responsibility to decide on such issues to the central government. Allowing for direct effect of WTO law could jeopardize this endeavour and indeed prove a welfare-reducing strategy. Trade liberalization, in general, is welfare enhancing but this does not mean that there are not losers in individual national markets. Assigning the responsibility to a government guarantees (assuming the governments’ function is to increase social welfare) that the society as a whole will profit from opening up the market. It is up to the government then to compensate losers.

The point here is that using the WTO law as benchmark for testing the legality of EC actions is dissociated from direct effect altogether. There is some sort of analogy with the Kraajeveld jurisprudence of the ECJ, where the Court moved away from direct effect-type of considerations to evaluate the legality of Dutch law. Fedon could have been the Kraajeveld-equivalent for using international law to evaluate the legality of EC law. The

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Court failed to do that. This attitude however, can only incite similar reactions by others and at the end is detrimental to international cooperation. The Court should probably keep in mind that the WTO is probably the only existing paradigm in international relations where cooperation is proved by the dismantling of trade barriers, and where disputes are resolved in a peaceful manner (compulsory third-party adjudication).
The Fiamm Judgment or “Going Bananas”!
A Missed Opportunity to Distribute the Costs of European Community’s Non-compliance with WTO Rulings Across Society

Alberto Alemanno*

This chapter discusses, in the aftermath of the long-awaited FIAMM judgment by the European Court of Justice, the controversial issue of a possible non-contractual liability of the Community stemming from its breach of WTO obligations. As exemplary illustrated by the Hormones and Bananas disputes, when the EC fails to comply with a ruling by the WTO Dispute Settlement Body, even though it does so in pursuit of a greater public interest, it opens the door for countermeasures against it. In particular, by deciding not to bring its measures into conformity with WTO law, the EC offers protection to those categories of operators active in the sector in which the trade conflict has arisen from external competition, while at the same time it exposes other categories of traders, which have nothing to do with the original dispute, to countermeasures. By doing so, the Community de facto give rise to a redistribution of income across segment of society, without being in control though of which category of Community economic operators will bear the cost of its decision not to

* Alberto Alemanno is an Associate Professor of Law at HEC Paris.
1. Introduction

The recurrent attempts made by several private operators to recover damages incurred as a result of the Community deliberate non-compliance with the Hormones and Bananas DSB’s rulings before the EC Courts had unveiled, though still left unanswered, the question of a possible Community liability for such damages. Although the Courts recognised in Biret 1 that the question of legal effects of DSB rulings is independent from that relating to the direct effect of WTO law, by thus paving the way for a possible recognition of the invokability of DSB rulings in the framework of actions for damages, in Van Parys 2 and Chiquita 3 they have trivialised such a distinction by arguing that reliance on DSB rulings, similarly to reliance on WTO rules, would be capable of interfering with the solutions available to the Community to implement the DSB decisions. This is somewhat surprising as a successful compensation action leads to pecuniary compensation and not to an annulment of the relevant EC act. As a result, the Community cannot in principle incur non-contractual liability by reason of any infringement of the WTO rules by its institutions. This outcome seems to be particularly unacceptable when the applicants, facing the retaliatory measures enacted as a consequence of EC non-compliance, are innocent bystanders, i.e., traders active in a different sector than that in which the trade conflict has originally arisen. Why should they bear the costs of the Community deliberate non-compliance with WTO rulings?

Due to this equity concern, the Court of first instance has recently revealed, in FIAMM, 4 another route for holding the EC liable for compensation: a liability for lawful EC acts. An appeal against this judgment has recently offered the Court of Justice the opportunity to rethink its case law, but – as will be illustrated along this analysis – this has led to Court to definitely close the door to any attempt made by innocent bystanders to recover compensation for the damages suffered as a result of the Community’s non-compliance with WTO rulings.

Before analysing in detail the ECJ judgment in FIAMM, this article will provide a background of the dispute as well as a sum up of the relevant case law preceding this judgment.

1 ECJ, Case C-93/02, Biret, 2003 ECR I-10565, at par. 55 ff.
3 CFI, Case T-19/01, Chiquita Brands, 2005 ECR II-315, at par. 161.
4 CFI, Case T-69/00, FIAMM, 2005 ECR II-5393.
2. Background: Who Bears the Costs of EC Non-compliance with WTO Rulings?

In 1997, the WTO determined that the EC import regime for bananas violated WTO nondiscrimination rules. After the Community failed to bring its measures into compliance, in 1999 the DSB authorized the US to suspend tariff concessions on up to $191.4 million per year in imports of EC products. The US chose to levy 100% ad valorem customs duties on imports of various EC-origin goods, such as batteries, bed linen, paper boxes, spectacle cases and bath products. After the EC and US reached a settlement in 2001, the increased duties were revoked prospectively. As a matter of fact, during the period of application of higher duties, the abovementioned product markets suffered a considerable damage. Therefore, as a result of Community’s decision not to comply with the WTO bananas ruling, bananas distributors operating in Europe have been offered protection against competition from other sources, whereas traders active in a different sector have been hit by the countermeasures. Who should bear the costs of EC non-compliance with WTO law? Should these costs be distributed across society, through the recognition of an EC liability, or should they be left where the winning country decides to inflict them? Once again, these were the questions facing the European Courts.

3. The Judgment of the Court of First Instance

Unlike other previous cases where the applicants made an attempt at recovering damages suffered directly because the Community did not implement a DSB ruling,\footnote{ECJ, Case C-94/02, Biret International v. Council, 2003 ECR I-10565; Case C-377/02, Léon Van Parys v. Belgisch Interventie- en Restitutiebureau, 2005 ECR I-1465; and CFI, Case T-19/01, Chiquita Brands v. Commission, 2005 ECR II-315. Also other European traders brought an action for damages before the CFI in the past, see on the previous case-law, G. Zonnekeyn, “EC liability for non-implementation of adopted WTO panel and Appellate Body Reports – The example of innocent exporters in the Banana case”, in: V. Kronenberger (ed.), The EU and the International Legal Order: Discord or Harmony?, The Hague, T.M.C. Asser Press, 2001, pp. 251-272 at pp. 253 ff; and I. Blázquez Navarro, “Sobre la responsabilidad extracontractual de la Comunidad Europea por el}
Fedon and four other European exporters\(^9\) claimed compensation for damages allegedly caused by the US retaliatory measures authorised by the DSB since the Community was still in breach of its obligations under the WTO agreements.\(^10\) Indeed, after the Community had failed to comply with the 1997 DSB decision in *Bananas*,\(^11\) the DSB authorised the US to levy increased customs duty on imports of *inter alia* stationary batteries from various Member States.\(^12\)

Relying on its settled case-law denying direct effect of both WTO law and DSB rulings, the CFI dismissed the applicants’ main claim for compensation by refusing to

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\(^11\) On 25 September 1997 the DSB adopted the panel reports as well as the AB report following complaints by Ecuador, Guatemala, Honduras, Mexico and the USA (WT/DS27/AB/R). The DSB found the Community governing the import of bananas established by Council Regulation No 404/93 of 13 February 1993 on the common organization of the market in bananas incompatible with the WTO Agreements, as it included preferential provisions benefiting bananas from ACP countries and recommended that the Community bring it into conformity before the expiry of a reasonable period, set for 1 January 1999.

\(^12\) The other affected products were bed linen, paper box, spectacle cases, and bath products. The US obtained authorization from the DSB to levy customs duty on imports from the EC up to an annual amount of trade of $191.4 million, corresponding to the level of nullification and impairment it had suffered.
identify an «unlawful act» for which the EC could held liable.\(^{13}\) Being this one of the three conditions that must cumulatively be met (together with the existence of a “real damage” and a “causal link between the unlawful act the damage”), the EC bears no obligation to compensate. Nonetheless, facing a subsidiary liability claim by the plaintiff, the CFI recognized for the first time that the Community can incur non-contractual liability even in the absence of unlawful conduct of its institutions.\(^ {14}\)

In particular, the Court held that “Where, as in the present case, it has not been established that conduct attributed to the Community institutions is unlawful, that does not mean that undertakings which, as a category of economic operators, are required to bear a disproportionate part of the burden resulting from a restriction of access to export markets can in no circumstances obtain compensation by virtue of the Community’s non-contractual liability”.\(^ {15}\)

By showing awareness of the limited support existing in its previous case law to build such a principle,\(^ {16}\) the CFI immediately made an attempt to develop a solid


\(^{14}\) According to the applicants’ submission, even if the defendants could lawfully have disregarded the DSB’s ruling, the conditions which the EC case-law imposes for the incurring of non-contractual liability by the Community for damage caused by its institutions even in the absence of unlawful action by them were in any event met.


\(^{16}\) ECJ, Case 54/96, *Dorsch Consult v. Council and Commission*, 2000 ECR I-4549. In this judgment, the Court did not lay down an EC liability regime for lawful acts, but it merely formulated the conditions triggering its invocation.
The Fiamm Judgment or “Going Bananas”! (A Missed Opportunity to Distribute the Costs of European Community’s Non-compliance with WTO Rulings Across Society)

argument of text in order to sanction this innovative liability regime. Thus, it stated that Article 288 EC, by referring to the “general principles common to the laws of the Member States”, does not restrict the ambit of those principles “solely to the rules governing non contractual liability for unlawful conduct of those institutions”. As national laws on non-contractual liability allow individuals, “albeit to varying degrees, in specific fields and in accordance with differing rules”, to obtain compensation “even in the absence of unlawful action by the perpetrator of the damage”, the EC can also incur non contractual liability, when damage is caused by the conduct of one of its institutions not shown to be unlawful. Similarly as to when it identifies fundamental rights through the filter of the constitutional traditions common to the Member States, the CFI came to this conclusion without neither listing the Member States recognising such a liability regime nor counting them.

Once it recognised the existence of such a new liability regime, the Court, by pointing to former case law, added that, in any event, it is subject to “[...] the conditions as to sustaining actual damage, to the causal link between that damage and the conduct of the Community institution and to the unusual and special nature of the damage in question ...”.

It follows that the central criterion triggering this liability regime is the «unusual and special» damage. It might be observed that this requirement introduces a relevant evidence shift in the non-contractual liability regime. Indeed, under this new liability system, the focus is not on the conduct of the EC institutions, but rather on the nature of the damage caused by the institutions’ activity. In other words, it is not the “unlawfulness” of the Community behaviour that justifies compensation, but – according to the CFI – the “exceptional” character of the damage suffered.

17 This point has also been made to reply to the defendant’s counterargument according to which such a regime could not be considered a general principle common to the laws of the Member States within the meaning of the second paragraph of Article 288 EC. At par. 158.

18 Ibidem, par. 158.

19 Ibidem, par. 159.

20 ECJ, Dorsch cit., at par. 19.

21 CFI, FIAMM, at par. 160. Emphasis by the authors.

22 ECJ, Case 267/82, Développement SA et Clemessy v. Commission, 1986 ECR 1907, at par. 33; ECJ, Case Dorsch cit., at parr. 59 and 76.
But what did the CFI mean with “unusual and special” damage?

After the Court found that the applicants’ complaint met the first two criteria found in *Dorsch Consulting* (conduct and causal link), it had to clarify the last rather ambiguous requirement.²³ By pointing to its case-law,²⁴ the CFI indicated that damage is:

- “unusual”, when it exceeds the limits of the economic risk inherent in operating in the sector concerned; and
- “special”, when it affects a particular circle of economic operators in a disproportionate manner by comparison with other operators.

Considering that the possibility of tariff concessions being suspended as provided for by the WTO Agreements, which had come about in the present case, is “among the vicissitudes inherent in the current system of international trade”, the Court concluded that the damage suffered by the applicant, though “actual and certain”,²⁵ cannot be considered “unusual”. The CFI came to this conclusion after stressing that the risk of retaliatory measures, due to their expressed legal basis within the DSU²⁶ and due to their predictability, cannot be considered to be “beyond the normal hazards of international trade as currently organised”.²⁷ It should be noted that this, as the CFI pointed out, should be the case even when the retaliatory measures are implemented as a result of a dispute which has arisen in a sector quite different from the applicant’s.

The direct consequence stemming from this reading of the «unusual» requirements is that the risk of the «retaliation vicissitude» has to be borne by every operator who decides to sell its products on the market of one of the WTO members.²⁸ In other words, it is a normal risk that is inherent in exporting (and importing) activities. But is it reasonable to

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²³ According to the Court, were it not for the existence of the EC regime at issue governing the import of bananas and the finding by the DSB of its incompatibility with WTO rules, the USA would not have been able to obtain from the DSB authorization to suspend its tariff concessions on products originating in the Community in an amount up to the level of nullification or impairment resulting from retention of the Community regime at issue. Par. 181.

²⁴ ECJ, Case *Dorsch cit.*, at parr. 18 and 53.

²⁵ According to the Court, the defendants could not deny that FIAMM must have necessarily suffered commercial damage by reason of the incontestable rise in the price of their products determined by the sudden increase of the United States ad valorem duty to 100%.

²⁶ The DSS provides for retaliatory measures for the case the trader’s home country does not comply with a DSB’s ruling. See Article 23 DSU.

²⁷ CFI, Case *FIAMM cit.*, at par. 209.

²⁸ *Ibidem*, at par. 205.
affirm that Fiamm, and the other companies affected by the countermeasures, when entering the US market could have expected that the EC Community would have adopted a WTO-incompatible bananas regime, that the EC would have not complied with the WTO ruling and that, finally, “among the myriad of EC exports to the US market”\(^{29}\), their products would have been hit by the US countermeasures?

Being that such a “finding [is] sufficient to preclude any entitlement to compensation on this basis”, the CFI deemed it unnecessary to rule on the condition requiring special damage and, accordingly, dismissed the applicant’s claim for compensation founded on an EC liability regime for lawful acts.\(^{30}\)

4. The Appeal before the European Court of Justice

Only two of the original six plaintiffs, FIAMM and Fedon, decided to appeal the judgments of the CFI and requested the ECJ to set them aside. The appellants raised identical pleas in support of their actions and claimed, first, that the CFI in the contested judgments erred in law regarding the circumstances in which liability for unlawful conduct of the Community can found an action (first plea). Second, they alleged an error of law in the reasoning which led the CFI to conclude that the damage was not unusual (second plea). Third, the Council and the Kingdom of Spain cross-appealed on the point that they could be held liable in the absence of illegality when they act in their legislative capacity (cross-appeals).

4.1 The Opinion of the Advocate General

The Opinion of Advocate General Maduro consists of two main parts.\(^{31}\) The first is devoted to the issue of invocability of DSB decisions in the framework of a non-contractual liability of the Community based on the unlawful conduct of its institutions, while the second investigates the principles and conditions for no-fault liability on the part of the Community.

a. EC Liability for Unlawful Conduct

Regarding the claim of the parties that it should be possible to rely on a DSB decision for the purpose of establishing the illegality of the Community’s conduct when seeking damages under Article 288 EC when Community law is in breach of the WTO rules, the AG engaged in an in depth review of the relevant case law of the Court. Ascribing the

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29 See the contribution by P.C. Mavroidis in this volume.
30 CFI, Case FIAMM cit., at parr. 212-214.
31 Opinion of AG Maduro, delivered on 20 February 2008.
strong criticisms developed against this case law to a generalised poor understanding of its own rationale and logic, he summed up the dilemma underlying such a case law by asking: “How can an international agreement be a rule of the Community legal system but at the same time not a criterion for reviewing the legality of Community acts?” In his view, the answer should be found in the crucial difference existing, in both concept and scope, between the conditions relating to the direct effect of international agreements and the direct effect of Community law. Indeed, “by reason of the object and general scheme of the Treaty establishing the Community, Community law as a whole has a capacity to produce direct effects; an ability confirmed when the Community legislation at issue is clear, precise and unconditional. Nothing of the kind applies to international agreements binding on the Community”. These may produce direct effect “only subject to the condition that the terms, nature and general scheme of the agreement does not prevent its being relied upon appear, in the light of both the object and purpose of the agreement and of its context, to unconditional and sufficiently precise”. According to the AG, by applying these conditions, the WTO agreements are to be interpreted as leaving EC institutions a margin of political freedom that would be likely to be jeopardised if the direct effect of the agreements were recognized. Although not producing direct effect, WTO law nevertheless constitutes a “rule of the Community legal system”. To prove such a claim, the AG reminds that the case law has established through time that: EC legislation and national measures must be interpreted in accordance with WTO law (Commission v. Germany and Hermès); WTO law may be used not only as a basis for a finding that a Member State has failed to fulfil its obligation (Commission v. Germany) but also to challenge the legality of a Community act where the EC intended to implement a particular obligation assumed within the WTO (Nakajima) or where the EC measure, by

32 AG, par. 22.
33 AG, par. 24.
34 AG, par. 27.
35 AG, par. 27.
36 AG, par. 35.
37 AG, par. 37.
40 AG, par 40.
41 ECJ, Case 69/89, Nakajima All Precision Co. Ltd v. Council of the European Communities, 1991 ECR I-2069
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referring to the precise WTO provision, conferred on its citizens the right to invoke them before the courts (Fediol).42, 43 To what extent can this case law denying direct effect to WTO rules be extended to cover DSB reports? In answering to this question, the specific facts of the case, which distinguished it from the precedents tackled by the EC Courts, were given thorough attention by the AG. The applicants’ argument that, the EC Institutions’ negotiating autonomy in the WTO would not be limited or impaired, if it in order to establish the unlawful conduct of the Community would be possible to invoke a DSB ruling or another WTO decision after the time limit to implement it had expired, was rejected by the AG. According to him, under the WTO agreements, the Community even after the end of the reasonable period would still enjoy the discretion not to comply with the WTO decision and, according to Art. 22 DSU, face retaliatory measures. While he concedes that the purpose of a finding of illegality pursued by the parties is not to have a EC measure contrary to WTO declared invalid or to have it annulled, the AG argues that such a judicial ruling would undoubtedly affect the ability of the Community’s legislative and executive organs to seek a negotiated solution, since “they would be under an obligation to eliminate that illegality by repealing or withdrawing the legislation concerned”.44

b. EC Liability in the Absence of Fault

Having confirmed the ruling of the CFI to refuse review of the legality of the conduct of EC institutions in the light of WTO rules, which the WTO has found to have been infringed by the Community, the AG moved on to the other claim set forth by the parties before the CFI to seek damages.

Although the principle of no-fault liability exists only in Spanish and German law, the AG argues that this fact cannot prevent its being recognised in EC law, since “even a minority solution may be preferred if it best meets the requirements of the Community system”.45 Rejecting a narrow reading of Article 288 EC (“general principles common to the laws of the Member States”), he welcomed the enshrinement of such an innovative regime into the EC legal order. Indeed, adopting this principle would make it possible “to offset the severity of the conditions for incurring the Community’s culpable liability […] in order to give the victims of particularly serious damage suffered as a result of the

42 ECJ, Case 70/87, Fédération de l’industrie de l’huilerie de la CEE (Fediol) v. Commission of the European Communities, 1989 ECR 1781.
43 AG, par. 41.
44 AG, par. 49.
45 AG, par. 55.
conduct of the Community institutions the possibility of obtaining compensation”.
In addition, the acceptance of such a liability regime would force politicians, without reducing their discretionary power in the WTO context, to better assess the costs that could ensue for citizens of the Union and set them against the advantages that would accrue the economic sector concerned, should they decide to maintain EC legislation that did not comply with the WTO system. Lastly, to recognise a principle of no-fault liability would enable the EC legal system to distribute the consequences of the institutions’ freedom of action in the WTO context within the Community. As a result, it would no longer be at the discretion of the trading partners to choose which imports from the EC should be subject to the retaliatory measures, but it would be for the Community to decide whether that cost must be borne solely by the undertakings affected by such measures or distributed over society.

After listing the advantages that might stem from the enshrinement in EC law of a principle of no-fault liability on the part of the Community, the AG, by showing awareness of the rather thin grounds underpinning this principle in the CFI’s judgment, expresses the need to “take the case law of the Court a step further”. In particular, he suggests drawing inspiration from the notion of equality of citizens in bearing public burdens, on which French national administrative law has based liability arising out of legislation, and also on the Sonderopfertheorie in German national law, according to which individuals who suffer a “special sacrifice” by reason of a lawful public action must be granted reparation. As to the conditions to which the no-fault liability of the Community must be subject, the AG, after endorsing the CFI’s reading of the “unusual and special damage”, found an error in law in the way in which the requirement “unusual” had been applied in concreto by the CFI. Contrary to the CFI’s view, the damage claimed by FIAMM and Fedon could not be regarded as the manifestation of a normal commercial risk against which a prudent operator could have protected himself. Indeed, – he argues – there is no link between the adoption and retention of the legislation on the EC scheme for banana imports and the damage suffered as a result of the retaliatory measures on EC exporters of industrial batteries. The point is clear: How stationary batteries’ makers could have reasonably foreseen to be hit by the adoption of

46 AG, par. 57.
47 AG, par. 59.
48 AG, par. 60.
49 AG, par. 61.
50 AG, parr. 62-63.
countermeasures finding their origin in the WTO-incompatible EC regime for the import of bananas? For this reason, the AG proposed the ECJ to annul the contested judgment as vitiated by an error in law.51

4.2 The Judgment of the Court of Justice

a. The First Plea

Under the first plea, the applicants claimed that the judgments of the CFI lacked reasoning and that they were unfounded regarding one of their main arguments – the direct effect of decisions of the DSB, the ground of which they claimed damages by reason of unlawful conduct of the EC.52

In the judgment, the ECJ first assessed the argument of the parties that the existence of a decision from the DSB against the EC, with regard to the legal effects that such a decision have attached to it, constitute a third category – next to the Nakajima and the Fediol case law – according to which it is possible to plead a breach of the WTO agreements by the EC institutions before the EC courts, in particular exclusively for purposes of compensation (damages). According to the applicants, the existence of the ruling from the DSB left the Community with only two options to act: either to comply with the decision or not to comply with it. This would, the argument goes, mean that there is no flexibility of negotiated settlements and political decisions in regard to decisions from the DSB. A decision from the DSB is different from the rules of WTO law.53 As a result, the applicants argued, it is possible to review the legality of EC legislative acts (in this case the banana regulations) in the light of the DSB decision and nothing precludes the direct effect of a DSB decision in such circumstances. They also alleged that the CFI did not take appropriate account of the arguments of the applicants that an action for compensation cannot result in the EC measure concerned being eliminated or rendered inapplicable and that there has to be made a difference between different types of actions.

The Council argued that the appeals should be dismissed, primarily on the ground that the distinction of legal effects between the WTO agreements and the DSB decisions were artificial and irrelevant. The Commission and the Spanish government also stated

51 AG, parr. 82-83.

52 Since the argument that the CFI did not state reasons regarding this plea touched upon substantial issues related to these questions, the ECJ decided to make a more thorough assessment on the merits in this regard.

53 For a formulation of this argument in the aftermath of the Biret judgment, see A. Alemanno, “Judicial Enforcement” a.c.
that the distinction between actions for annulment and claims for compensation was irrelevant and unjustified.

The ECJ divided the first plea into two parts: the first part concerning the lack of reasoning, and the second part concerning the circumstances under which the EC can be found liable for unlawful conduct.

Concerning the alleged failure by the CFI to state reasons in its judgment regarding the direct effect of the ruling of the DSB, the ECJ first reminded of the fact that the obligation to give reasons does not mean that the CFI is obliged to respond in detail to every single argument advanced by the appellant, especially if the argument is not clear and precise. On this point, FIAMM and Fedon did not explicitly address the issue concerned (the expiration of the time-limit) with sufficient clarity and precision in their applications to the CFI. Second, the ECJ reminded of the fact that the obligation to state reasons does not require the CFI to provide an account which follows exhaustively and one by one all the arguments put forward by the parties, and that the reasoning can also be implicit. The appellants, as has been outlined above, had demanded that the judgment be annulled because the CFI did not state sufficient grounds regarding the fact that the time limit for the implementation of the DSB decision had expired. The ECJ, however, found that the CFI had given sufficient reasons in the judgment, particularly by pointing to the fact that the end of the time limit did not mean that the methods for settling disputes made available by the DSU were exhausted, and by stating that the review of the legality could have the effect of weakening the position of the EC negotiators in the search for an acceptable position. Finally, the CFI stated that the applicants were wrong when they inferred, from Articles 21 and 22 of the DSU, an obligation on the WTO member to comply, within a specified period, with the recommendations and rulings of the WTO bodies and in contending that DSB rulings are enforceable unless the contracting parties unanimously oppose this.

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54 ECJ, Case of 9 September 2008, C-120/06 P and C-121/06 P, FIAMM v. Council and Commission, not yet published, available at www.curia.eu, at par. 91; see also Case C-274/99, Connolly v. Commission, 2001 ECR I-1611, at par. 121; Case C-197/99, Belgium v. Commission, 2003 ECR I-8461, at par. 81; Case C-232/02, Technische Glaswerke Ilmenau, 2002 ECR I-8977, at par. 90

55 ECJ, FIAMM, at par. 96; see also ECJ, Case C-204/00, Aalborg Portland and Others v. Commission, 2004 ECR I-123, at par. 372; and Case C-167/06 P, Komninou and Others v. Commission, not yet published, available at www.curia.eu, par. 22.

56 ECJ, FIAMM, at par. 101.

57 This refers to the so-called sequencing issue. The WTO framework is slightly unclear on the sequence in the legal texts concerning the right for a party to retaliate when the implementation
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As to the second part of the first plea, the applicants claimed that the EC had acted unlawfully by failing to comply with the WTO agreements within the period of time that the EC was allowed after the DSB ruling.

The ECJ started out by reminding that EC liability, according to Article 288 EC, is subject to a number of conditions, relating to the unlawfulness of the conduct of which the institutions are accused, the fact of damage and the existence of a causal link between that conduct and the damage complained of. The ECJ also reminded that it is for the ECJ to interpret the effect of the international agreements that the EC has entered into under the central negotiating power of “Community institutions, which have power to negotiate and conclude such an agreement”. On the basis of these criteria, it falls to the ECJ to determine whether such an agreement confers on persons subject to Community law the right to rely on such an agreement. But this competence is subject to the condition that the nature and the broad logic of the international treaty does not preclude a possibility for the ECJ to undertake this assessment and the treaty’s provisions appear to be unconditional and sufficiently precise. In relation to the WTO, the ECJ reminded of the case-law regarding the direct effect of WTO rules and emphasized that in principle the WTO agreements are not among the rules in the light of which the Court is to review the legality of acts adopted by the Community institutions. The only exceptions are when the EC aimed at implementing a particular obligation that it has assumed under the WTO, or where the EC measure explicitly refers to a precise provision of the WTO agreements.

The ECJ pointed to the case law and reminded that the common organization of the market of bananas is not designed to insure the implementation in the EC legal order of a particular obligation and the provisions do not expressly refer to specific provisions of the WTO agreements. Moreover, the DSB ruling did not mean that the EC intended to assume a particular obligation.

A central issue in the assessment of the ECJ is the nature of the WTO system. As the ECJ has held in Van Parys, the WTO system is based on negotiations between the contracting parties. Moreover, the simple fact that the implementation period of the measures allegedly violate the DSB ruling. To some extent the issue has been settled through negotiated bilateral agreements. See M. Schmauch, “Non-compliance” o.c., at pp. 99 ff.

58 Here the ECJ refers to, inter alia, Case 26/81, Oleifici Mediterranei v. EEC, 1982 ECR 3057, at par. 16; and Case C-146/91, KYDEP v. Council and Commission, 1994 ECR I-4199, at par. 19.
59 ECJ, Fiamm, at par. 108; see also Case 104/81, Kupferberg, 1982 ECR 3641, par. 17.
60 ECJ, Van Parys cit.
DSB decision ended does not imply that the Community has exhausted its negotiating options. If a DSB ruling would have produced such an effect, it would have seriously hampered the negotiating power of the Community, and even «deprive the Community’s legislative or executive organs of the scope for manoeuvre enjoyed by their counterparts» within the trading partners of the Community. Any such lack of reciprocity would risk introducing an imbalance in the negotiating power and the application of WTO law.

After thus having described the effects of a decision from the DSB, the ECJ stated that the legal effects of its own decisions, regardless whether they are actions for annulment under Article 230 EC or requests for a preliminary ruling under Article 234 EC, are similar. Any decision of the ECJ that a measure is unlawful has the effect of res judicata and also means that the Community must take the necessary measures to remedy the illegality. Thus, the distinction that the applicants advanced between the direct effect of the WTO rules and that of a ruling from the DSB cannot be upheld, since in fact the two are part of the one and same system and have similar characteristics that make them different from the rulings of the ECJ.

It is, according to the ECJ, not possible to make such a distinction. The fact that the WTO rules that have been infringed cannot be relied upon before the Community courts means that it is also not possible to rely on the DSB decision itself before these courts. The DSB decision cannot be distinguished from the substantive rules, which convey the obligations in such a ruling, and that for two reasons. First, because “[t]he Community institutions continue in particular to have an element of discretion and scope for negotiation vis-à-vis their trading partners with a view to the adoption of measures intended to respond to the ruling or recommendation, and such leeway must be preserved”\(^{61}\). Second, the rulings from the DSB do not add or diminish the rights and obligations provided in the WTO agreements. As a consequence, it is not possible to confer rights on a person that they do not already have. As a result, the first plea was dismissed in its entirety.

**b. The Second Plea and the Cross-appeals**

According to the appellants, the CFI misapplied the “unusual damage” requirement when it held that the alleged damage falls within the normal risk which an exporter must assume, given the current arrangement for world trade. Indeed, damage caused by customs penalties imposed by a non-member State in the industrial-battery and spectacle-case sector following a dispute in the banana sector could not be considered, in their view, neither “inherent” in the first two of those sectors nor foreseeable because of its novel punitive nature.

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\(^{61}\) ECJ, FIAMM, at par. 130.
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Before tackling such a claim though, the ECJ had to address the plea formulated both by the Council and the Kingdom of Spain in their respective cross-appeals and which put into question the very existence of a principle of EC liability in the absence of unlawful conduct. Here the Court clearly stated that “contrary to what the CFI stated in the judgments under appeal, it cannot be deduced from the case-law prior to those judgments that the Court of Justice has established the principle of such a regime”. 62 Indeed, by providing an authentic interpretation to the Dorsch judgment, which had been chosen by the CFI as the starting point for the recognition of such an innovative regime, the ECJ notes that in this judgment the CFI actually “limited itself to specifying some of the conditions under which such liability could be incurred in the event of the principle of Community liability for a lawful act being recognised in Community law”.63

After putting the Dorsch judgment in perspective, the Court notes that as the conduct which the appellants allege to have caused them damage falls within the context of the establishment of a common organisation of the market, this clearly falls “within the sphere of legislative activity of the Community legislature”. As regards liability for legislative acts, the Court reminds that it pointed out “at a very early stage” that, although the principles in the legal systems of the Member States governing such a liability for legislative activity vary considerably from one Member State to another, it is possible to state that the “public authorities can only exceptionally and in special circumstances incur liability for legislative measures which are the result of choices of economic policies”.64 In particular, they may incur liability only if “a sufficiently serious breach of a superior rule of law for the protection of the individual has occurred”.65 This may occur when the rule of law the breach of which must be found is intended to confer rights on individuals.66

But why did the ECJ adopt such a strict approach toward the EC liability in the exercise of its legislative activities? The same Court provides a dual explanation for that. First, “exercise of the legislative function must not be hindered by the prospect of actions for damages”67 whenever the general interest of the Community requires legislative intervention which may adversely affect individual interests. Second, in a legislative

62 Ibid., at par. 168.
63 Ibid., at par. 169.
64 Ibid., at par. 171.
65 Ibid., at par. 172.
66 Ibid., at par. 173.
67 Ibid., at par. 174.
context characterised by the exercise of a wide discretion, the EC cannot incur liability unless the institution concerned has «manifestly and gravely» disregarded the limits on the exercise of its powers.68

It is in the light of the above that the Court concludes that, “as Community law currently stands, no liability regime exists under which the Community can incur liability for conduct falling within the sphere of its legislative competence in a situation where any failure of such conduct to comply with the WTO agreements cannot be relied upon before the Community Court”.69 As a result, it found that the CFI erred in law in affirming in the judgments under appeal the existence of a regime providing for EC non-contractual liability on account of the lawful pursuit by it of legislative activities. Yet, the Court added a caveat. It explained that a Community legislative measure whose application leads to restrictions of the right to property and the freedom to pursue a trade or profession could give rise to non-contractual liability of the Community where it entails “disproportionate and intolerable impairment of the very substance of those rights […] perhaps precisely because it makes no provision for compensation calculated to avoid or remedy that impairment”.70 However, as previously judged, an economic operator cannot claim a right to property in a market share which he held at a given time, since such a market share constitutes only a momentary economic position, exposed to the risks of changing circumstances.71 An economic operator whose business consists in exporting goods to a non-member State must therefore be aware that that business may be affected by various circumstances, including the possibility that that non-member State will adopt measures suspending tariff concessions, as provided by the WTO agreements.72

5. Conclusion

This judgment seems to rule out, at least for the time being, the possibility that Community institutions could be held liable for damages stemming from EC non-compliance with WTO law. This outcome seems to be particularly controversial when the applicants, facing the retaliatory measures enacted as a consequence of EC non-compliance, are, like in the present cases, innocent bystanders, i.e., traders active in a

68 Ibid., at par. 174.
69 Ibid., at par. 177. Emphasis by the authors.
70 Ibid., at par. 184.
71 Ibid., at par. 185, referring to Case C-280/93, Germany v. Council [Bananas], 1994 ECR I-4973, at par. 79.
72 Ibid., at par. 186.
different sector than that in which the trade conflict has originally arisen. Due to this equity concern, the CFI made an attempt at laying down a new route for holding the EC liable for compensation: a liability for lawful EC acts. This innovative regime, although based on shaky grounds at Community level, would have enabled the parties to circumvent the major obstacle towards the triggering of the Community’s non contractual liability: the lack of direct effect of WTO rule. In so doing, as argued by the Advocate General, it “would advance the case-law from potential to settled, from the era of uncertainties to that of solutions”. It is however difficult to understand, in the AG’s reasoning, why the exposure to the recovery of damages resulting from unlawful conduct would be likely to exert pressure over the Community while a similar threat under the different label of lawful conduct would not trigger the same pressure. Indeed, showing some reticence in endorsing the AG’s position, the ECJ clearly denied, “as Community law currently stands”, the existence of a Community non-contractual liability on account of the lawful pursuit of its activities falling within the legislative sphere. It must be observed that, once more, the Court ascribed such a conclusion to the lack of direct effect of WTO rules (this was a “situation where any [legislative] failure to comply with the WTO agreements cannot be relied upon before the Community Courts”). Therefore, according to a contrario interpretation, the Court might have suggested that, outside of the WTO context, an EC liability from lawful (legislative) conduct may exist. It remains to be seen in which situations the Court might recognise it in the future. The “two further points” made by the ECJ after the rejection of the existence of such a regime in the circumstances of the case seem not only to support such an interpretation but also provide some useful hints. Indeed, the Court recognises, at least in abstracto, that an EC legislative measure whose application leads to restrictions of the right to property and the freedom to pursue a trade that “impair the very substance of those rights in a disproportionate and intolerable manner […] could give rise to non-contractual liability on the part of the Community”. The rationale underpinning such recognition would seem to be the lack of a provision providing for «compensation calculated to avoid or remedy that impairment”. In any event, according to the Court, even if this regime should be considered applicable to the present cases, it could not lead to compensation insofar as the plaintiffs could not validly invoked a breach of the right to property “since their market shares constitute only a momentary

73 AG, at par. 61.
74 Ibid., at par. 176.
75 ECJ, FIAMM, at par. 177.
76 Ibid., at par. 184.
77 Ibid.
economic position, exposed to the risk of changing circumstances”. It is surprising that the ECJ felt the need to draw Fiamm and Fedon’s attention to the non-contractual liability as a possible solution to their claims, to then immediately bar them this option, by holding that, in any event, economic operators never retain a right of property on market shares.

The Court, by ruling out all forms of Community’s liability in these circumstances, is legitimising the Community decision not to comply with WTO rulings and this notwithstanding that the fact that, by so doing, it is hitting innocent bystanders, such as Fiamm and Fedon. In a Community “based on the rule of law”, where Community action is subject to judicial review, it is somehow troubling that the Community may not respond for the harm it causes to its citizens. This seems especially when the harm caused, contrary to what the Court argued, cannot reasonably be considered as usual, within the limits of economic risks inherent in the sector concerned. Once more, it is submitted that accepting innocent bystanders demands does not amount to restraining the European Commission’s margin of manoeuvre, but it is what a Community based on the rule of law is supposed to do.

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78 Ibid., at par. 185.

The EC Courts and the Struggle Against Terrorism: Unveiling Liberty in the Blacklists Case-Law

Marta Simoncini*

This paper analyses the main EC courts’ case-law with regard to counter-terrorism policies, insisting on the EC regulations on freezing assets of terrorists and people and entities associated with the terror network.

In this respect, the analysis deals with the issue of legitimacy of such freezing lists, by distinguishing between those founded on EU decisions and those on UN resolutions.

In light of the relevant case-law, this work examines the role of ECJ in the construction and the protection of fundamental rights (which the EU is based on) in the EU anti-terrorism policies. Starting from these considerations, the paper intends to dwell on the effectiveness and the consistency of the protection of rights in counter-terrorism matters.

From a methodological point of view, the research pays attention to two “sides”: the inner one, where limits to the discretion of Institutions are the principal means of protection, and the outer one, where the protection of individual rights is qualified by the relation between EU and UN legal systems.

* Ph. D. in Administrative Law, University of Pisa, marta.simoncini@sp.unipi.it.
Eventually we will portrait the current scenario of the interpretation of the European model of protection of rights in anti-terrorism policies, and we will point out its limits and its chances.

1. Introduction

European courts have been playing a central role in balancing the protection of individual liberties with the collective interest of security. In order to analyse how that balance has been stricken, this paper deals with the case-law on counter-terrorism matters and focuses on the jurisprudence related to the legitimacy of blacklists as the key pattern, through which it is possible to understand the major questions at stake and, consequently, the solutions adopted by the EC courts.

The goal of such a survey is to contribute to the construction of a European model of security of rights in counter-terrorism scenarios, bringing to light the European Union (EU)’s effective capability to protect fundamental rights in the implementation of security-related policies. From this standpoint, the EU courts’ crucial position appears as a demiurge of the effectiveness and coherence of the European model of protection of rights.

In this perspective, the analysis of the European case-law must distinguish between two different kinds of terrorists’ lists: those drawn up on the grounds of the Member States’ international obligations and those founded on autonomous decisions of the EU institutions. Such a classification, based on the legal sources, is paramount for a full and correct comprehension of the courts’ reasoning, and it is crucial for understanding the discrepancies between the statements of the Court of First Instance (CFI) and the ECJ. On the contrary, a chronological reading of the European case-law could imply a justificatory dimension, which risks to shift the attention from the problematic feature of the analysis, thus, missing out on the critic profiles of the two EU courts’ competing interpretations. The chronological perspective, however, is a good instrument to understand the progress in the whole EU jurisprudence. In this regard, in the final remarks, the most recent pronouncements of the courts come to constitute the basis for the characterisation of the effective state of the protection of fundamental rights in the EU.

I would like to thank Federico Fabbrini for his valuable comments and remarks and all the people who attended the international workshop “The ECJ under siege: new constitutional challenges for the ECJ”. Usual disclaimers apply.

For an interesting chronological reading of the EU courts case-law, in comparison with the one of the US Supreme Court, see F. Fabbrini, “From Hamdi to Kadi: comparing the role of the American and European judiciaries in times of emergencies”, on file with author.
2. Brief Key Notes on the Legal Strategy Against Terrorism

The struggle against international terrorism is based on multilevel policies, conducted in different ways to hit the hard-core of the phenomenon and to prevent doomed attacks from occurring. To this end, Western democracies have enhanced the threshold of public control in order to use the information gathered as a precious weapon to fight terrorism and, in the meanwhile, reassure citizens on the State’s capability of reacting to such indiscriminate violence.  

Nonetheless, the problem at stake is the guaranteeing of public security through the limitation of the so-called *subjective rechtstellung*, restricted by public ruling, in the attempt to implement a preventive protection system against terrorism. In this respect, the restriction of fundamental rights and liberties is striking: it is instrumental in overcoming emergency situations, but it is likely to become an authentic Trojan horse if maintained much longer than the persistence of the crisis. In this perspective, international terrorism constitutes a real legal challenge to the system of the EU, putting to test the effectiveness of the European model of protection of fundamental liberties and the principles of the integration process, well-granted in the Community pillar. Moreover, it spotlights the weakness and the fragmentation of the European building in the security matters.

From this point of view, the restriction to the free movement of capitals, one of the European Community (EC)’s founding liberties, is emblematic. It consists in the enforcement of precautionary measures, aimed at freezing the assets of those people and entities (suspected to be) linked to the terror network, but non-connected to the territory or the administration of a third country. These are also called *smart* sanctions, due to their ability to affect the interested parties, individually rather than whole countries and their governments. To this purpose, after being identified, the subjects are included in lists, drafted at different levels of government and according to the evidence of their association to terrorism.

Whereas the cut of resources and funds of financing could be an efficacious method of combating the phenomenon at the root, such an operation has to comply with some proper guarantees in the attempt to restrict fundamental rights lawfully. In this context, the case-law related to those EC regulations on listing represents paradigmatically the attempt to impede the financing of terrorism by freezing the suspect assets. At the same time...

time, tackling the issue of the fairness of proceedings and the effectiveness of the judicial protection, the European courts, and the European Court of Justice (ECJ) in particular, have played a key role in the maintenance of the coherence of the EU system.

3. International Blacklisting and EU Courts; to Judge or not to Judge on Individual Rights: that is the Question

3.1 UN Blacklists

A full comprehension of the case-law on the lists drafted by an international organisation, such as the United Nation, requires a preliminary reconstruction of the main characteristics of said instruments. In particular, it is essential to understand the sources of information and the process, leading to their drawing up.

Since 1999, the United Nation Organisation, being the foremost responsible for the maintenance of peace and security all over the world, has adopted some resolutions in order to freeze assets of people and entities linked to Osama bin Laden and the Talibans, which have been implemented seamlessly after the fall of the Taliban regime, in concurrence with the spreading of international terrorist attacks.

To this end, the UN Security Council set up a listing system, relied upon a Sanction Committee, instituted inside the Council itself and implemented by the same Committee in collaboration with the States. In time, the listing process has been improved in the attempt of surrounding the name-inserting procedure with more guarantees, but it remains an essentially diplomatic course of action. First of all, it is not clear whether the Sanction Committee’s assessment is preceded by a fact-finding carried out by the Committee itself, or whether it is based merely on the Applicant State’s report. Notwithstanding, the UN Resolution no. 1617/2005 contributes to overcome the vague character of the previous provisions about the feasibility of listing requests, instituting a monitoring team to support the activity of both the States and the Committee.

Likewise, the delisting procedure at national level is subordinated to a preliminary process, in which applications for cancellation from the list are subject to the state consent, which has to be taken into account by the Sanction Committee when settling on

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4 The system of lists has been introduced in the UN Resolution no. 1333/2000.
5 The Sanction Committee was created in the UN Resolution no. 1267/1999, at par. 6.
6 It is noteworthy that the UN Resolution 1526/2004 provides for the applicant State’s obligation to make a statement on the case, in which the reasons of the request must be specified.
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the case. In particular, a bargaining process could take place between the State who proposed the insertion of the name in the list and the State of residence of the petitioner.

Unanimous agreement on the assessment of the application is essential: should this requirement not be met, the case will be passed on the Security Council, which in turn has to decide with one consent. However, the UN Resolution no. 1730/2006 has set up a Focal Point, invested with the power to screen preliminarily the delisting applications. In the end, an attempt to overcome the deliberative deficit in the Security Council stems from the UN Resolution no. 1822/2008, which has introduced the duty for the Sanction Committee to act complying with a fair and clear procedure and has provided an obligation to communicate charges to the parties involved and to check delisting applications opportune.7

The highly diplomatic nature of such a procedure is evident. First of all, it means that the sources of information underlying the motions of the States are deeply rooted in intelligence activities. Furthermore, it shows an incontrovertible weakness of those legal instruments provided to oppose to being included in such lists. From this point of view, the fair interpretation rendered by the Italian Supreme Court ("Corte di Cassazione") on the probationary value conferred to the lists must be remarked: in the endeavour to prove a terrorist offence, they are not considered suitable to bind the free convincement of the judge, because the method of inclusion does not provide a sufficient certainty over the affiliation to terrorist networks.8

3.2 The Approach of EU Courts to UN Blacklists: Finding a Way to Protect Rights

Given this legal framework, the European Union (EU)’s role in the implementation of that kind of instruments to struggle against terrorism has to be analysed, paying a specific attention to the case-law developed on the legitimacy of UN blacklists.

First of all, it has to be underlined that the EU puts into effect those international resolutions though two different actions in the EU’s pillar-shaped legal framework: at


8  Italian Supreme Court of Cassation, First criminal Section, 17 Jan. 2007, no. 1072. On the probational relevance of freezing lists the Court of Cassation has already pronounced in the decision nal, 30 Sept. 2005, n. 35427.
first, by adopting Common Positions in the Second Pillar (CFSP), it intended to implement peace policies at the European intergovernmental level, and then enact them through EC regulations aimed at giving a direct applicability to the UN discipline.

The realisation of the asset-freezing precautionary measures tests the EU system of protection of fundamental rights, targeting in particular the fairness of the administrative proceedings and the effectiveness of the subsequent jurisdictional protection. The core of the matter lies on the relations between National, EU and UN legal orders, because the EC regulations restrict their action to the fulfilment of UN blacklists.

More specifically, given the prevalence of the UN legal order, laid down in the Art. 103 UN Charter, States must comply with the Security Council’s decisions.9 Respecting the duty resting upon Member States, the European Community Treaty (ECT) left unprejudiced their UN obligations, ruling that its provisions do not apply to previously stipulated treaties and to agreed measures for peace and security.10 Nevertheless, the EU position in the joint of legal orders is problematic, because it is not clear the kind of relation between the EU and the UN systems, considering that the EU is not a member of the UN organisation. The application of a mathematic transitive clause, according to which the respect of UN Law imposes on EU in force of the loyalty of Member States to the UN legal order, is not deprived of not foregone corollaries.

In this perspective, the Kadi case is emblematic, since it shows two different interpretations of the same legal premises, rendered by the Court of First Instance and by the European Court of Justice respectively, on the relation between EU and UN. Whilst the lower court built on the EC Treaty a pure hierarchical subordination of the EU to the UN global order, the higher court raised a functional dependence, recognising the primacy of UN Law without jeopardising the European system of competence. In other words, the Tribunal of First Instance pleaded incompetent to control the legitimacy of EC regulations, because the latter were acts bound to the implementation of provisions settled by the UN, which the EU courts have no power to examine.11 On the contrary,

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9 Art. 25 UN Charter. Furthermore, in accordance with Art. 48 (2) of the UN Charter, those “decisions shall be carried out by the Members of the United Nations directly and through their action in appropriate international agencies of which they are members.”

10 See, respectively, Art. 307 and Art. 297 ECT.

the ECJ overruled that decision, stating that the EC is founded on the respect of the rule of law and no Community act can shirk judicial control. As a consequence, the implementation of UN provisions cannot imply a jurisdictional immunity of some acts, even if the courts cannot extend their control to the legitimacy of the UN decisions. These different interpretations of the EU position in the global order have involved antithetic attitudes of the courts on the core of the problem, that is which level of protections of rights can be guaranteed by European courts with regard to counter-terrorism matters.

Following the hierarchical principle and reflecting a realistic, rather than a legalistic, approach to the pursuit of public interests, the CFI declared itself unable to assure any effective judicial control, and it deferred the competence to other actors. In particular, it found that in the absence of a specific EU power the guarantees of fair proceeding and, above all, the right to be heard would be decided at the Security Council level; moreover, the respect of the fundamental EC principle of effective judicial protection would be ensured at the national level, where the refuse of the competent authorities to submit delisting requests to the UN Security Council Sanction Committee would be a reason to resort to national courts. On one hand, such a model of protection seems to presume a global equivalence of national legal systems; on the other hand, it is worth noting that following the same reasoning the Court could have come to the conclusion of the necessity to respect the international human rights law laid down in the ECHR, which is binding for each EC Member State, but not for the Community as a whole. The only competence that rested upon the EC court is an incidental control on the conformity of

2005 ECR II-3649. The same conclusions were worked out in the CFI, Joined cases T-253/02 and 49/04, Chafiq Ayadi, Hassan v. Council of European Union, 2006 ECR II-2139 and 2006 ECR II-52.


15 In this sense see C. Eckes, “Judicial Review of European Anti-Terrorism Measures – The Yusuf and Kadi Judgments of the Court of First Instance”, European Law Journal, 2008, pp. 74-92, at pp. 89-90. More precisely, the Author considers that if EU law is classified as international law, the UN resolution at stake ought to be in compliance with EU Law, and so with the ECHR and the general principles of EC Law; on the contrary, if EU law is domestic law, the international law shall prevail, but in so doing the Court has to apply not only the UN Law, but also the international human rights law, including the ECHR.
UN Law to the universal standards of protection of rights settled in the *jus cogens*.\(^\text{16}\) This means a *de facto* suspension of the efficacy of the principle of laying claim, introducing an evident dichotomy with the standards of protection generally granted at the EC level\(^\text{17}\) and moving the stage of defence from the judiciary to the diplomacy. As a result, the sentence attests the EC difficulty (if not its ineffectiveness) in assuring the respect of a fair proceeding and an effective jurisdictional protection, remedy that seems barely suited to the EC legal order’s substantial characteristics.\(^\text{18}\)

Conversely, moving from the recognition that the prevalence of UN Law does not imply derogation of the primary EC Law, the ECJ reaffirms its own power to control EC acts, restoring the respect of general principles and the protection of fundamental rights in the process of effectuation of a higher, and hence unquestionable, law. Bringing back the effectiveness of the rule of law, the court does not introduce an indirect check over the legitimacy of UN provisions, but implies that no provision, in spite of its provenience, can alter the autonomy of the European legal order, introducing a counter-limit to the entry of rules conflicting with the standards of protection of rights recognised by the system itself.\(^\text{19}\) This way the Court sets the distinction between international


\(^{19}\) In particular, the Court prohibition to derogate to the clause of protection of rights, settled in Art. 6 EUT, stems from the lack of any opposite indication in artt. 297 and 307 ECT. Moreover, it finds the counter-limit premise in Art. 300, par. 6, ECT, according to which every new agreement requires favourable opinion of the same court, as it concerns the compatibility with the Treaty. See ECJ, Joint cases C-402/05 P e C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. European Council*, [2008] nyr, www.curia.eu.int, at parr. 301-306.
agreements and the EC Treaty, raising the latter to the constitutional charter of the Community legal order.  

In this perspective, the court reaffirms its own power to control the guarantees of fair proceeding in the listing process assured by the European Institution, allowing the parts subjected to restrictive orders to exercise their right to defence, first of all in the administrative stage and then in the judicial one, and also enabling the judges to verify the legitimacy of the measures adopted by EU institutions.

Notwithstanding, the court acknowledges the security objective, pursued with the introduction of precautionary measures, and takes into account the collective interests in that matter, tempering to this end the guarantees of due process of law with the reasons of the adopted orders’ effectiveness. As a consequence, even though both the judges move from the acceptance of a functional restraint to the individual property right in order to satisfy some interests of general relevance, the granted protection is very different in the two sentences: whilst the Court of First Instance does not identify in the precautionary restrictions a breach to jus cogens, the Court of Justice holds the same limitation to be unjustified for not being founded on a proper due process of law and resulting in the court nor being able to control the legitimacy (or the proportionality) of the measure.

In this perspective, it is worth mentioning the sharp analysis of M.T. Karayigit, who criticised the CFI judgment in the Yusuf and Kadi cases, because it fails to acknowledge the difference between the international and the Community legal order, “which is far from being as sub-system of international law [thanks to its] constitutionalisation process”, anticipating the core of the ECJ pronouncement on appeal. See M.T. Karayigit, “The Yusuf and Kadi Judgments”, o.c., at p. 395. Furthermore, for a comment on the development of a counter-limit theory at EC level, see A. Sandulli, “Caso Kadi: tre percorsi a confronto”, Giornale di diritto amministrativo, 2008, pp. 1088-1090, at p. 1089; E. Chiti, “I diritti di difesa e di proprietà nell’ordinamento europeo”, ibid., pp. 1093-1095, at pp. 1094-1095. More specifically, the latter Author finds in the position of the Court not only the result of the UN Law’s translation on a regional scale, but also a source of a further development of global law.

See ECJ, Joined cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v. European Council, o.c., at par. 344. Before the annulment of the CFI judgment for error in law and of the Council Regulation (EC) no. 881/2002, as far as it concerns Mr Kadi and the Al Barakaat International Foundation, the effects of the contested regulation are, by virtue of Article 231 EC, maintained for a brief period that may not exceed three months, in order to allow the Council to repair to the tort without prejudicing the effectiveness of the restrictive measures imposed by the regulation in a serious and irreversible manner (see parr. 373-376). For a comment, see M. Savino, “Libertà e sicurezza nella lotta al terrorismo: quale bilanciamento?”, o.c., at p. 1097; G. Vesperini, “Il principio del contraddittorio e le fasi comunitarie di procedimenti globali”, o.c., at p. 1100.
More specifically, the CFI excluded the inhuman and degrading nature of the UN measures on the basis of the fact that the contested regulations do admit some derogation, in order to fulfil the fundamental needs of people. In this perspective, the Tribunal deemed contrary to *jus cogens* only arbitrary deprivations of the property right, although the fundamental public interest safeguarded through the fight against international terrorism and through the legitimate UN action does not affect the very substance of the right.

On the other side, the ECJ develops the right to property in the light of both the general principles of Community Law and the First Additional Protocol to the European Convention of Human Rights (ECHR). In this perspective, the Court is going to evaluate the proportionality of such measures, but if in principle the contested regulation imposes restrictions, which might be justified, in the circumstances of the case the evaluation is prevented by the absence of any reasonable guarantee of opposing to the decision for the plaintiffs.

4. EU Blacklisting and EU Courts: Ruling within and among the Pillars

4.1 EU Blacklists

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22 In accordance with Art. 1 of Regulation no. 561/2003, Art. 2a is added to the contested regulation and it provides, at par. 1, that “Art. 2 shall not apply to funds or economic resources where: (a) any of the competent authorities of the Member States, as listed in Annex II, have determined, upon a request made by an interested natural or legal person, that these funds or economic resources are: (i) necessary to cover basic expenses, including payments for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges; (ii) intended exclusively for payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services; (iii) intended exclusively for payment of fees or service charges for the routine holding or maintenance of frozen funds or frozen economic resources; (iv) necessary for extraordinary expenses; and (b) such determination has been notified to the Sanctions Committee; and (c) (i) in the case of a determination under point (a)(i), (ii) or (iii), the Sanctions Committee has not objected to the determination within 48 hours of notification; or (ii) in the case of a determination under point (a)(iv), the Sanctions Committee has approved the determination”; see CFI, *Kadi*, cit., at parr. 288-291.

23 *Ibidem*, at par. 248.


Aside from the implementation of UN lists, the European Union has also developed an autonomous system of precautionary listing of people and entities suspected to be associated with terror networks, focusing on different kinds of terrorism. In particular, the EU blacklists deals not only with the international feature of the phenomenon, but also with the local, intra-communitarian, violence, founded on nationally focused strategies and claims. This distinction is functionally connected with the kind of counteraction to be taken: with regard to the affiliation to international terrorism, listing is aimed at freezing assets; on the contrary, it is a means to stimulate judicial and police cooperation against those phenomena of intra-communitarian salience.26

Compared with the UN procedure of listing, the insertion in EU lists is founded on a more reliable legal basis, because the request can be carried out only if a criminal proceeding was initiated or the criminal action for the offence of terrorism was exercised by a judicial authority, or by an equivalent one; moreover, a six-month revision of the list allows the verification on the suitability of the names enclosed.27 It is self-evident how the connection with the criminal charge provides the precautionary tool with a different legal value, although the initiation of the preliminary inquiry is susceptible of different interpretations. Notwithstanding, the absence of a hearing in the listing stage and obstacles to the cancellation from the list bring about some complaints on the use of such instruments to fight terrorism. More specifically, the EC listing process is based on warning submissions by Member States, which are not necessarily endorsed by the jurisdictional authorities. At the same time, there are no EU guidelines on the drafting method and no organism has been set up within the Council to controls the process. As a consequence, the drawing up stage sees no specific role played by the EU institutions with respect to fair proceeding.

4.2 Judging on EU Blacklists

In this context, it is important to recognise the fundamental role played in the protection of individual rights by another European actor: the system of courts. Resuming their own competence to rule on the legitimacy of those lists, the courts have based it upon the control of the correct use of discretion, by European institutions, in the exercise of their

26 European Council Common Positions 27 December 2001, 2001/930/CFSP, on combating of terrorism, 2001/931/CFSP, on the application of specific measures to combat terrorism. In particular, the distinction between the insertion in the list with an assets-freezing purpose and that finalised to the police and judicial cooperation is specified in the Annex to the Common Position 2001/931/CFSP.

27 Art. 1, parr. 4 and 6, European Council Common Position 2001/931/CFSP.
Community competences. In keeping with the European framework, the courts have restored the guarantees of effectiveness in administrative and judicial proceedings, moving from a set of powers conferred by the Treaties and not from a binding competence of international derivation. In this regard, it is particularly meaningful the OMPI saga, that is the judgments of the CFI on the legitimacy of the inclusion of the People’s Mojahedin Organization of Iran in the freezing list. In those cases the Tribunal developed the statements laid down in the first pronouncement, focusing on the control over the correct exercise of discretionary power by the Council.

More specifically, the respect of procedural guarantees becomes the key element to verify the legitimacy of such discretion, so that the procedure determines the definition of what is lawful. In this perspective, substantial errors turn into errors of procedure. In particular, the correct use of the discretionary power implies, first of all, that in the fact-finding stage of the proceeding all the relevant information are taken into account, in order to assess the situation and substantiate the conclusions; and, moreover, it entails that the final decision is consistent (namely its content complies with the presuppositions of the exercise of the discretionary power), and coherent with the legal order and the general principles. Finally, the duty to give reasons or, more generally the duty to

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28 See CFI, Case T-228/02, Organisation des Modjahedines du peuple d'Iran v. Council of European Union, 2006 ECR II-4665, where the right to a fair hearing has been reaffirmed “since the identification of the persons, groups and entities contemplated in Security Council Resolution no. 1373 (2001), and the adoption of the ensuing measure of freezing funds, involve the exercise of the Community’s own powers, entailing a discretionary appreciation by the Community” (par. 107) and “the Community does not act under powers circumscribed by the will of the Union or that of its Member States” (par. 106). It happens on the assumption that, “although Security Council Resolution no. 1373 (2001) provides inter alia in Paragraph 1(c) that all States must freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts, of entities owned or controlled directly or indirectly by such persons, and of persons and entities acting on behalf of, or at the direction of, such persons and entities, it does not specify individually the persons, groups and entities who are to be the subjects of those measures. Nor did the Security Council establish specific legal rules concerning the procedure for freezing funds, or the safeguards or judicial remedies ensuring that the persons or entities affected by such a procedure would have a genuine opportunity to challenge the measures adopted by the States in respect of them” (par. 101). Later, the CFI carried through the same reasoning in Case T-47/03, Jose Maria Sison v. Council of European Union, 2007 ECR II-2047, at parr. 139-154, and Case T-327/03, Stichting Al-Aqsa v. Council of European Union, 2007 ECR II-79, at parr. 53-65.

29 CFI, Case T-256/07, People’s Mojahedin Organization of Iran v. Council of European Union, [2008] nr, www.curiu.eu.int, at parr. 130-139; CFI, Case T-284/08, People’s Mojahedin Organization of Iran v. Council of European Union, [2008] nr, www.curiu.eu.int, at parr. 54-55. The last word on this saga is for the ECJ, which is about to pronounce on the pending case C-576/08.
disclosure, plays a central role, because it compels the administration to show the
evidence of its decisions and, as a consequence, allows the affected parties to organise
their defence and the judge to control the adequacy of public measures.

In this perspective, at first the CFI stated that the Council had to take into account
the pronouncement of the UK judicial authority competent to review the lawfulness of
the Home Secretary’s acts, the Proscribed Organisation Appeal Commission (POAC), allowing
the appeal against the decision of proscription of OMPI, and ordering the Home
Secretary to lay before the Parliament the draft of a new order removing the applicant
from the blacklist.30 On the contrary, the Council did not demonstrate to comply,
presenting instead an insufficient statement on the reasons of the inclusion in the EU list,
which was completely inadequate to provide a legal justification for continuing to freeze
the applicant’s funds.31 Similarly, in the next judgment on the case, the same court found
that the Council had failed again to motivate suitably its decision of continuing to include
OMPI in the EU list, despite the cancellation of the organisation from the UK blacklist,
after that the POAC’s findings had been upheld by the Court of Appeal. In particular,
basing its conclusion on the new information gathered from the judicial inquiry opened
by the anti-terrorist prosecutor office of the Tribunal de Grande Instance of Paris, the
Council had not clarified the reasons why the French authority could be considered
competent pursuant to the meaning of Art. 1 (4) of the Common Position
2001/931/CFSP32 and, consequently, why the French proceeding could constitute a
suitable legal source to endorse the OMPI’s inclusion in the EU list.

Whereas the capability to protect fundamental rights against any unlawful use of
powers conferred by the Treaties proved to have been recovered by the CFI, said
competence was implemented by the ECJ, which prevented that the EU’s formal
architecture from turning into a substantial limit to the guarantee of the effectiveness of
rights. In this respect, the ECJ’s activism is particularly palpable in Gestoras pro Aministia
and Segi cases, where the challenge posed to the protection of fundamental rights by the
counter-terrorism policies risked collapsing with the EU’s pillar construction. In the
mentioned cases, the ECJ performed an operation of substantial interpretation of the
rights involved, extending its jurisdiction over the formal assessment of the provisions, in
order to grant the plaintiffs an effective level of protection.

30 CFI, Case T-256/07, cit., at par. 170.
31 CFI, Case T-256/07, cit., at parr. 176-185.
32 CFI, Case T-284/08, People’s Mojahedin Organization of Iran v. Council of European Union, o.c., at parr.
56-57.
More specifically, the EC judge recognised the necessity of granting effective protection also in the areas of II and III pillars, extending its jurisdiction to those *abnormal* common positions capable of producing legal effects in relation to third parties, derogating to Art. 35 EU Treaty. In a broad interpretation of the competence provision, the Court demonstrates to be a factual, and not only a formal, guardian of the Treaties, competent to go beyond the strict limits of the pillars should a different approach be required by this case, with particular care for the complexity of the whole legal system. This is the reason why the right of listed parties to resort to EC courts and the capability of national judges to issue preliminary ruling on the same matters was recognised by the Court. However, in this context, it is noteworthy that the ECJ denied any faculty of the plaintiffs to claim for damages, although the Council of European Union stated the right to reparation of torts in Art. 1, par. 6, of the Common Position 2001/931/CFSP and reaffirmed it on the 8th whereas of Council Decision 2003/48/JHA. This deceptive restriction of a legitimate right is the result of the adherence of the court’s rulings to the order established by the Treaties: in the absence of any ECT provision on the applicability of Art. 288 of the EC Treaty, which regulates the liability of Community institutions, but in the first pillar area, the acknowledgement of a right to reparation of tort in the secondary sources of law is exorbitant from the Treaty legal system and, as a result, it is unable to constitute a suitable remedy, given the incapability of derived law to amend the primary legislation.

In this perspective, the ECJ’s decision on appeal in the case *Osman Ocalan and Serif Vanly v. Council* seems quite interesting. Declaring the annulment of the CFI statement and the returning of the question to the judge of first instance for a merit judgment represents the first chance for the Tribunal to start developing the ECJ substantial approach to terrorism matters.

Moreover, it must be noted that the admission of the legitimacy control on EU lists does not imply an unconditioned admissibility of the rights to defence, the need to strike a balance between liberty rights and security remaining indispensable. In this perspective, the key issue is finding a proper equilibrium between the individual interest to participate in the administrative proceeding and to the transparency in the administrative action on


34 See *Gestoras cit.*, at par. 60; *Segi*, cit., at par. 60.

one hand, and the opposite interest of the Administration in secrecy, which guarantees effectiveness of measures, on the other hand.

The core of the individual rights toward the Administration is summed up in the right to a sound administration, laid down in Art. 41 of the Charter of Fundamental Rights, which gathers the minimum requirement to guarantee protection or, under a more confident point of view, a kind of foreseeable EU administrative fair proceeding at its embryonic state. In particular, this norm provides for the European citizens’ right to a fair hearing, the right to know and the administrative duty to give reasons for decisions. In this perspective, it is worth noting the Sison case, which shows the attention paid by EC courts to the mixture of such different instances. In fact, both the Tribunal of first instance and the ECJ on appeal denied the plaintiff the right to know the Council’s documents which his insertion in EU lists was based on, decreeing the prevalence of the public interest of EC institutions to secrecy on the individual right to a fair procedure, in accordance with the exemption of laid down in Art. 4 of Regulation No 1049/2001.

5. Assessing the Findings of the EU Courts on Blacklists

The analysis of the European jurisprudence on listing measures confirms the central role played by the courts in the process of integration.

Both the CFI and the ECJ worked out a balance between the reasons of security and the liberty guarantees, but there is no doubt that the reasoning of the court of appeal goes further ahead, pushing the integration forward. In fact, whilst the Court of First Instance has identified an insuperable limit in the effectiveness of the European legal order, the Court of Justice demonstrates not to fear the Hercules columns, going beyond the apparent border of its competence, setting up counter-limits. Before the recognition of incompetence to control the legitimacy of UN resolutions, the CFI gives up the

36 Art. 41, parr. 1-2, disposed that “every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union. 2. This right includes: a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken; b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy; c) the obligation of the administration to give reasons for its decisions.” Even though the Charter is legally enforceable not yet, however it has been incorporated in the Treaty establishing a Constitution for Europe and, after the failure of that project, actually it is part of the Treaty of Lisbon.

protection of fundamental EC rights, while the ECJ claims its living competence to rule on the EU institutions’ respect of rights and general principles. This way, the dichotomy “bound vs. discretionary competence” of the EU Institutions fades away in their general duty to respect the principle of fairness in the realisation of every policy, which is able to prejudice subjective rechtstellung. This way, the Court of justice tries to avoid the fragmentation of institutional competences, which would involve a breaking of the judicial protection. It emerges in the field of international obligation not only through the introduction of the mentioned counter-limit reasoning, but also within the reconstruction of the normative foundation of the contested regulation. In this last case, the ECJ finds a connection between artt. 60 and 301 ECT, on one hand, and Art. 308 ECT, on the other hand. The first two norms set up the material ambit of application of smart sanctions, while the second one is a closing disposition, it fills the gap where no specific provision of the Treaty confers on the Community institutions express or implied powers to act, but such powers are nonetheless necessary to enable the Community to carry out its functions. Without falling in a misleading assessment of the CFI, which used Art. 308 EC as a ‘bridge’ between the CFSP and the EC,38 the ECJ finds a common interest across the different pillars, although aimed at pursuing different purposes: the implementation of actions decided under the CFSP through the imposition of restrictive measures of an economic nature on one hand, and the achievement of the objectives of the Community, in particular the correct working of the common market, on the other.39 So reasoning, the Court demonstrates to recognise “the coexistence of the Union and the Community as integrated but separate legal orders, and the constitutional architecture of the pillars, as intended by the framers of the Treaties now in force”.40

However, this systemic approach also urges the ECJ to cross the formal order of the pillars, leading the train of thought to a substantial reconstruction of the EU domain, in order to pursue a real protection of rights through an effective judicial review. From this point of view, the judicial depillarisation process represents a functional enlargement of the jurisdiction posed by the Treaties, which reveals a gap in the European legal order. Providing solutions rebus sic stantibus, the Court is far from being at the mercy of an


39 See also the contribution by F. Fontanelli, in this volume.

activist behaviour, but it is facing the challenge posed by the terrorism issue to the EU’s fundamental rights and general principles.\textsuperscript{41}

6. Perspectives on the ECJ Role in the Construction of a European Model of Protection of Rights: Open Issues and Problematic Remarks

The delineated framework demonstrates that it is possible to consider the ECJ statements on blacklists as an achievement, which raises a new interpretation of counter-terrorism matters.

In other words, the ECJ demonstrated to recognise the necessity to continue to protect rights in terrorist situations. In this perspective, the court overcame the political-question approach to terrorism, which involves a structural judicial deference to emergency decisions, coming to a more confident attitude towards the management of such circumstances. In this regard, it is very persuasive in the \textit{Kadi} case-law the Opinion of Advocate General Poiares Maduro, who asserts that –

\begin{quote}
the claim that a measure is necessary for the maintenance of international peace and security cannot operate so as to silence the general principles of Community law and deprive individuals of their fundamental rights. This does not detract from the importance of the interest in maintaining international peace and security; it simply means that it remains the duty of the courts to assess the lawfulness of measures that may conflict with other interests that are equally of great importance and with the protection of which the courts are entrusted.\textsuperscript{42}
\end{quote}

On these premises, he continued in a very evocative manner, noting that –

certainly, extraordinary circumstances may justify restrictions on individual freedom that would be unacceptable under normal conditions. However, that


\textsuperscript{42} Opinion of Advocate General Poiares Maduro, in the case \textit{Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities}, o.c., at par. 34.
should not induce us to say that ‘there are cases in which a veil should be drawn for a while over liberty, as it was customary to cover the statues of the gods’. On the contrary, when the risks to public security are believed to be extraordinarily high, the pressure is particularly strong to take measures that disregard individual rights, especially in respect of individuals who have little or no access to the political process. Therefore, in those instances, the courts should fulfil their duty to uphold the rule of law with increased vigilance. Thus, the same circumstances that may justify exceptional restrictions on fundamental rights also require the courts to ascertain carefully whether those restrictions go beyond what is necessary.43

On this ground, he ended up to the conclusion that –

the fact that the measures at issue are intended to suppress international terrorism should not inhibit the Court from fulfilling its duty to preserve the rule of law. In doing so, rather than trespassing into the domain of politics, the Court is reaffirming the limits that the law imposes on certain political decisions. This is never an easy task, and, indeed, it is a great challenge for a court to apply wisdom in matters relating to the threat of terrorism. Yet, the same holds true for the political institutions. Especially in matters of public security, the political process is liable to become overly responsive to immediate popular concerns, leading the authorities to allay the anxieties of the many at the expense of the rights of a few. This is precisely when courts ought to get involved, in order to ensure that the political necessities of today do not become the legal realities of tomorrow. Their responsibility is to guarantee that what may be politically expedient at a particular moment also complies with the rule of law without which, in the long run, no democratic society can truly prosper.44

From this standpoint, the administrative proceeding becomes the elected centre for the definition of the relationship between Authority and Liberty, that is, between the imposing public power and the autonomous \textit{subjective rechtsstellungs} of citizens. In fact, if the contested regulations are norms, the procedure of blacklisting people and entities suspected to be affiliated to the terror network is administrative in nature: smart sanctions are administrative decisions based on intelligence or law enforcement activities and are

43 \textit{Ibid.}, at par. 35.
44 \textit{Ibid.}, at par. 45.
aimed at affecting the listed parties individually; it is indeed prescriptive the general prohibition to accept any transaction related to those frozen capitals.

More specifically, the characteristics and the degree of the citizens’ participation in public decisions determine the kind of relation between those terms; in particular, the institutions of participation, and their complementary means of transparency – inasmuch as the nature of such security-related proceedings permits – allows the discretionary power to be limited, in order to pursue the public interest through the correspondence between individual and collective needs. This procedure grants private parties the chance to protect their rights and interests before the adoption of decisions, that try to preserve the common good.

In the attempt to guarantee the effectiveness of the adopted measures, emergency regulations reduce the procedural protection of *positionrechts*, limiting the matching profiles of participation and transparency. From this point of view, the recognition that no derogation can be admitted to the fundamental *due process* clause allows the restoration of that basic transparency in the decision-making activity. More precisely, identifying the proceduralisation as a guarantee of the protection of rights, the Court seems to replace the traditional approach to terrorism as an emergency situation with a more fact-fitting assessment, that is its threatening nature. In fact, if emergency is constitutively a temporary state, terrorism seems to fall beyond this category. Notwithstanding, legislations deal with it as an emergency issue, endorsing the establishment of a kind of counter-terrorist state. As a consequence, such a disguised emergency regime places in true danger the solidity and the respect of the rule of law, core principle shaping the nature of Western democracies. This happens because the real mission of those derogating legislations, approved with a contrasting function, is the protection against the threat of terrorism, ignoring or underestimating the hazard of keeping in force emergency norms, which largely pursue the different function to regulate risks. Shortly speaking, the inner danger of such a misleading purpose is that rights tend to be overlooked in emergency cases and the different attitude toward the same problem bears its consequences in terms of judicial protection.

The acknowledgment of the permanence of the threat, condition that is radically at odds with the nature of any emergency, involves the necessity to redraft emergency legislations, basing them on the different assumptions of risk regulation. More precisely, the latter founds the management of the risk at issue on a preliminary assessment of the nature, the probability, and the possible occurring damages of such risk. This kind of regulation is currently implemented in the environmental and food safety issues, and also
in economic matters; its application to counter-terrorism matters could appear quite new, but it has already constituted the substance and the main goal of the antiterrorism regulations.

Indeed, in the *Kadi* case law this perspective was clearly upheld by Advocate General Maduro, who recognised the duty of the Court of Justice to verify the existence of “high security risks”, and not emergency situations, and then strike a “proper balance” between the nature of such risks and fundamental rights.45

So far, although every decision taken is a precautionary measure, it is based on a previous analysis of the evidence. In counter-terrorism matters, this means the necessity to restore the guarantees of fairness – first of all the right to a hearing – in the decision-making procedures; at the same time, it implies paying back effectiveness to judicial remedies. In fact, the lack of the emergency state reduces the judges’ margin of deference, allowing them to conduct a strict reasoning on the legitimacy of restrictive measures, which will be based on the respect of the due procedure. From this perspective, the ECJ jurisprudence, above all the *Kadi* case law, restoring the procedural protection of rights proves to be dealing with the real nature of terrorism, as an actual risk and not as a permanent emergency.

The reinstatement of fundamental guarantees in the decision-making process allows the balance of all the interests at stake in accordance with the rule of law and the general principles, that run the discretionary powers. Reference is made to the key principles of proportionality and precaution, the connected action of which allows avoiding abuses in the implementation of security policies. Both principles guide the striking of a fair balance between the common good of security and the individual expectation of protection of rights.

In particular, proportionality control satisfies the necessity to establish whether a breach of a fundamental right is lawful, asking “a series of integrated questions”46 aimed at grasping when that limitation is necessary and justified on the ground of a superior public interest and it is carried out in a proper manner, which reduces to the minimum

45 *Ibid.*, at par. 35.

the prejudice to the exercise of fundamental rights. In this perspective, proportionality is not a mere element of reasonableness, but it becomes an autonomous declension of the basic principle of rule of law: being not merely an instrument aimed at striking a fair balance between different interests, but also the structured justification of the decisions’ foundation, proportionality rises to a specific criterion to measure the legitimacy of acts.

On the other side, the precautionary principle stands at the core of the risk regulation, but it shall not be considered as a predetermined decision-making rule in

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cases where information lacks, as it often happens in the environmental matters,50 but as a further ground of the fact-finding stage in the decisional process. That means it may not to be assumed as a fixed, value-founded, criterion of choice, but as an epistemological instrument, helpful to understand the actuality of the risk and to reflect on the best way to tackle it. Otherwise, precautionary action rises at a mechanism able to justify every security measure, even when unreasonable.51

In this perspective, proportionality and precaution supply the fact-finding with new means of analysis, contributing to the adoption of more reliable and better-pondered decisions. The success of such methodology, derived from the interpretation of counter-terrorism policies as risk regulations, is granted by the system of responsibility that it introduces in the decision-making process. In short, it has the capability to connect the respective charge of the burden of proof to the attribution of decisional power. In fact, the precautionary principle imposes the liability of the decision on the settling institution, so that the same responsibility of the risk assessment is on the administrations, which pronounce on the management of the risk.

On the other hand, conceiving the proportionality principle as a structured justification involves the administrative burden to demonstrate that the restrictions on the fundamental rights are limited to the strictly necessary measure to pursue the public interest.52 In line with this reasoning, the possibility of individuals to protect their fundamental rights tends to increase in correspondence with the restoration of accountability in administrative action.

50 In this regard a good example is provided by principle 15 of the Rio Declaration on Environment and Development, 3-14 Jun. 1992, which provides “in order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”

51 A due reference is the sentence of the Bundesverfassungsgericht, 1 BvR 357/05, 15 Feb. 2006, who declared unconstitutional the Art. 14 (3) of Luftsicherheitsgesetz (LuftSiG) 11 Jan. 2005, the Act on security of flights, inasmuch as it authorised the army to shoot down an hijacked airplane, whether there were a reasonable certainty that that plane would be used as an improper weapon against national targets. The court, deemed the right to life of passengers and the crew untouchable and stopped any national preventive action on the threshold of the Constitutional State, governed by the rule of law. In this perspective, the court allowed the precautionary intervention only in those cases in which hijackers were on the plane, in accordance with the proportionality principle. For a comment to the judgment, see V. Baldini, “Stato di prevenzione v. Stato costituzionale di diritto: un nuovo capitolo di una storia infinita”, Jus, 2006, pp. 463-483.

In this perspective, the setting up of European security can thwart the *drawing of a veil* over the rule of law and the principles of democratic States and on this legal framework it can anchor the research of a European model of security of rights.
Along Comes the Court
The Role of the European Court of Justice within the Area of Freedom, Security and Justice

Eulalia Sanfrutos Cano*

The role played by the judiciary, both at a centralised (European Court of Justice) and a decentralised level (national courts) has been fundamental in the process of consolidation of the European Community legal order as a Community based in the rule of law. Over the past 50 years the European Court of Justice has become unarguably one of the main architects of the EC constitutional order. Its XXI century challenge is to assume such a role as to the European Union legal order. The institutional distinctiveness of the objective of the creation of Area of Freedom, Security and Justice (AFSJ), situated midway between the supranational and the intergovernmental, between the European Community and the European Union, has revealed as the ultimate front line for the Court to make its contribution to the process of constitutionalisation of the new law, a sort of judicial activism for a single European legal order.

However, the jurisdiction of the European Court of Justice within this field has been traditionally incomplete and the limitations of judicial supervision both under Title IV EC and under Title VI EU have been always pointed out

* Eulalia Sanfrutos Cano is Teaching Assistant at the Department of Legal Studies of the College of Europe, Bruges, and PhD candidate at the Utrecht University.
as one of the main deficiencies of the AFSJ. This contribution will present the main problems that derive from the institutional setting established by the Treaty of Amsterdam and it will scrutinize the reforms operated by the Treaty of Lisbon and the consequences of the abolition of the pillars structure from a judicial protection point of view.

1. Introduction

“The role of courts is a function of the hermeneutics, institutional constraints and normative preferences that determine judicial outcomes in the light of an existing body of rules”.1 The role of the European judiciary within the Area of Freedom, Security and Justice will be therefore a result of the institutional parameters of its own jurisdiction, the normative elements that give a legal shape to the political objective (the creation of an area of freedom, security and justice) and of course the methods of interpretation that the Court applies to decipher all these logics. These elements are not privative of the AFSJ but derive from general legal theory of judicial interpretation. But they present some peculiarities in this field as the jurisdiction of the European Court of Justice has been traditionally incomplete, revealing an inherent fear to judicial intervention at an European level that inexorably will influence judicial outcomes. Indeed, the limitations of judicial supervision both under Title IV EC and under Title VI EU have been always pointed out as one of the main deficiencies of the AFSJ. Even if this assertion was watered down by the reforms operated by the Treaty of Amsterdam, it remains a fact that the Court’s powers within this field do not compare favorably to those it holds within the first pillar.

This chapter will analyse first the main problems that derive from the institutional setting established by the Treaty of Amsterdam and the way the ECJ tries to make for the lacuna of an incomplete system that was meant to be temporary but would finally be applicable for more than 15 years (I) Secondly, it will scrutinize the reforms operated by the Treaty of Lisbon and the consequences of the abolition of the pillars structure from a judicial protection point of view (II). Some final considerations on the impact of the role of the ECJ on the AFSJ in the EU constitutional legal order will close this contribution (III).

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2. The Current Institutional Framework: Asymmetric Judicial Protection within a Single AFSJ

The first developments of Justice and Home Affairs matters within the EU were characterised by a lack of a generalised system of judicial control. Article L of the Treaty of Maastricht explicitly excluded the jurisdiction of the Court of Justice over the newly created third pillar.2 A dissymmetry was already introduced at that stage between the different areas that nowadays are included under the rubric “Area of freedom, security and justice”, as the issue of visas was introduced by the Treaty of Maastricht in the EC treaty,3 and therefore was subject to the supervision of the Court of Justice.4

This absence of judicial review understandably attracted acute criticism following the outcome of the Treaty of Maastricht, in particular because the new pillar included matters such as rules governing the crossing by persons of the external borders, immigration and asylum or police and judicial cooperation in criminal matters,5 where crucial freedoms and liberties are put at stake.

Notwithstanding, it must be acknowledged that the exclusion of the jurisdiction of the Court of Justice did not imply a total vacuum of judicial remedies in these fields. National courts had of course an important role to play regarding the judicial control of the implementation of all third pillar measures. But the judicial control exercised at national level turned out to be incomplete and varied considerably from one national system to another.6 Moreover, the risk that some measures would evade any control of conformity with fundamental rights was clear.7

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2  With the exception of conventions concluded under Article K3(2)(c) which specifically stipulated that the Court of Justice may have jurisdiction to interpret their provisions and to rule on any disputes regarding their application, in accordance with such arrangements as they conventions may lay down.

3  Article 100C EC.


5  Article K 1 TEU.

6  For a further development of the shortcomings of the system under the treaty of Maastricht see D. O’Keeffe, “Recasting the Third Pillar”, o.c.; O. de Schutter, “Le rôle de la Court de Justice des Communautés européennes dans l’espace judiciaire pénal européen”, in G. de Kerchove and A. Weyembergh (eds.), Vers un espace judiciaire penal européen / Towards a European Judicial Criminal area, Brussels, PUB, 2000, pp. 55-75.

7  O. De Schutter, “Le rôle de la Court de Justice”, o.c.
The reforms operated by the Treaty of Amsterdam were highly focused on the need to put an end to the complete absence of jurisdiction of the Court of Justice over these matters, even if the jurisdiction conferred to the Court of Justice would differ significantly between the two branches of the trans-pillar objective that the AFSJ is meant to be. Indeed, if its powers within the Title IV of the EC treaty are – with some notable exceptions regarding the preliminary references procedure – equivalent to those it holds over the rest of Community law, the Court’s action within the third pillar would remain considerably limited.

A. The Post Amsterdam Institutional Setting

Since its “communitarisation” by the Treaty of Amsterdam, the subjects covered under Title IV EC, “Visas, asylum, migration and others policies related to free movement of persons”, are subject in principle to the general Community system of judicial protection. This alignment with the general Community competence of the Court has to be welcomed. In particular, the possibility for the Commission to bring infringement proceedings against Member States can have a very positive impact on the effective implementation of legislative measures under this Title. The application of the Article 230 EC system for review of the legality also improves judicial accountability in this field, as the actions brought by the European Parliament in this context illustrate.

However, Article 68 EC introduces two important restrictions to the competence of the ECJ. The first one relates to the application of the preliminary references mechanism. Article 68(1)EC restricts the possibility of making a reference to national courts of final instance. In a field that affects fundamental rights of e.g., immigrants and asylum seekers this restriction of the preliminary references procedure cannot be overlooked, as it obliges the applicant to exhaust all judicial remedies offered by the national system, which can have important consequences both in terms of time and financial effort. Secondly,

8 See ECJ, Case C-102/06, Commission v. Austria, 2006 not yet reported; ECJ, Case C-48/06, Commission v. Luxembourg, 2006 not yet reported; ECJ, Case C-26/07, Commission v. Greece, 2007 not yet reported; ECJ, Case C-5/07, Commission v. Portugal, 2007 not yet reported; ECJ, Case C-4/07, Commission v. Portugal, 2007 not yet reported; ECJ, Case C-3/07, Commission v. Belgium, 2007 not yet reported; ECJ, Case C-59/07, Commission v. Spain, 2007 not yet reported; ECJ, Case C-34/07, Commission v. Luxembourg, 2007 not yet reported; ECJ, Case C-112/07, Commission v. Italy 2007 not yet reported; ECJ, Case C-57/07, Commission v. Luxembourg, 2007 not yet reported; ECJ, Case C-294/07, Commission v Luxembourg, 2007 not yet reported.

9 See ECJ, Case C-540/03, Parliament v. Council, 2006 ECR I-5769.

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Article 68(2) EC excludes from the Court’s jurisdiction any measures or decisions taken with a view to ensuring the absence of controls on persons when crossing internal borders and relating to the maintenance of law and order and the safeguarding of internal security.

Regarding Title VI of the EU treaty, the principle of the jurisdiction of the Court of Justice set up by Article 46 TUE is nevertheless subject to the conditions laid down in Article 35 TUE. On this basis, the Court has jurisdiction to give preliminary rulings on the validity and interpretation of framework decisions and decisions, the main legally binding instruments under the third pillar, and on the interpretation of third pillar conventions and their implementing measures. Common positions, meant to be more political than legally binding instruments, are in principle excluded from the preliminary reference mechanism. Nevertheless, this jurisdiction must be explicitly accepted by Member States, “by a declaration made at the time of signature of the treaty of Amsterdam or at any time thereafter”.¹¹ When a Member State makes such a declaration, it must specify – according to Article 35(3) EU – whether only national courts or tribunals against whose decisions there is no judicial remedy under national law may request a preliminary ruling (under Article 35(3)(a)) or whether any national court or tribunal may do so (under Article 35(3)(b)). The perverse effects of this “variable geometry of the ECJ jurisdiction in the third pillar” have been largely pointed out.¹² First of all, Member States are not compelled to accept the Court’s jurisdiction to give preliminary reference. Three old Member States, the United Kingdom, Ireland and Denmark, have not accepted this jurisdiction. Consequently, national courts within these Member States are not able to refer to the Court of Justice questions concerning the validity or the interpretation of third pillar instruments that may arise before them. As regards the new Member States, only the Czech Republic, Hungary, Slovenia, Latvia and Lithuania have opted in.¹³ Secondly, substantial differences remain even within those Member States that have actually accepted the jurisdiction of the Court, as some of them have restricted the possibility to refer to their final courts. The use of this alternative introduces important differences between Member States as it can lead to the imposition of considerable burdens in terms of timing and finances, as was commented above.

¹¹ Article 35 par. 2 TEU.


regarding the equivalent restriction in Title IV EC. Moreover, Declaration 10 in the Final Act of the Treaty of Amsterdam allows Member States to reserve the possibility of obliging its final courts to send questions on pending cases to the Court of Justice. Nine of the sixteen Member States that accepted the preliminary reference jurisdiction of the Court have made use of this possibility.

The following table gives the reader an idea of the complex backdrop to Article 35 EU:

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The Court also has jurisdiction to review the legality of these instruments under Article 35 (6) EU. This power is similar to that which the Court exercises under Article 230 EC annulment actions, the main distinction being that the *locus standi* to bring such an action under Article 35 (6) EU is limited to Member States and the Commission and even then only on specific grounds. Therefore, both the European Parliament and individuals lack *locus standi* to challenge the legality of third pillar instruments. However, according to Article 39 (1) EU the Council shall consult the European Parliament before


15 Lack of competence, infringement of an essential procedural requirement, infringement of the EU treaty or any rule relating to its application or misuse of powers.
alonging Comes the Court (The Role of the European Court of Justice within the Area of Freedom, Security and Justice)

adoptiong framework decisions, decisions or establishing conventions, so it is highly regrettable that the European Parliament has not been afforded the possibility to defend its prerogatives under Article 39(1) EU16 by bringing an annulment action before the Court of Justice in cases where the Council disregards its right to be consulted.17 It cannot be completely ruled out, taking into account that latest jurisdictional developments in this area,18 that the same reasoning that guided the Court to recognise such power to the European Parliament within the communitarian pillar19 will be reproduced within the third pillar. Individuals are also denied the possibility to bring an annulment action before the Court alongside the European Parliament. Although the exclusion of the latest raises concerns regarding the institutional balance within the EU, the lack of *locus standi* of individuals raises major concerns about the right to effective judicial protection under the third pillar; This is compounded when the possibility for national courts to make preliminary reference to the Court of Justice does not always exist.

Article 35(7)EC confers jurisdiction on the Court to rule on any dispute between Member States regarding the interpretation or the application of third pillar acts whenever this dispute cannot be settled by the Council within six months of it being referred to that institution by one of its members. This mechanism is a mirror image of the procedure set out in Article 227 EC procedure within the Community pillar. The Court shall also have jurisdiction to rule on any dispute between Member States and the Commission regarding the interpretation or the application of third pillar conventions, “reminiscent of the Article 226 procedure in Community law”.20 But the scope of these procedures does not compare favourably to their counterparts within the first pillar and clearly do not make up for the lack of a genuine infringement procedure within the third pillar. The Commission’s prerogatives to control the correct application of third pillar instruments are significantly restricted, as it can only bring the question before the Court in relation to third pillar conventions. It is unable to act with regard to

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16 According to this article, the Council shall consult the European Parliament before adopting framework decisions, decisions or establishing conventions.

17 K. Lenaerts and L. Jadoul, “Quelle contribution”, o.c.

18 See below.


the non implementation or incorrect implementation by a Member States of key third pillar instruments, i.e., framework-decisions. Moreover, even then the dispute has to be treated by the Council at a first stage. This lacuna is meant to be balanced by the possibility for a Member State to bring a dispute regarding the interpretation or application of any third pillar act before the Court, if the Council has not been able to settle it before. The effectiveness of such a mechanism is quite uncertain, as Member States are often reluctant to bring actions against other member States, as the practice of Article 227 EC illustrates.

Finally, Article 35(5)EU excludes from the jurisdiction of the Court operations carried out by the police or other law enforcement services of a Member States or the exercise of responsibilities regarding the maintenance of law and order and the safeguard of internal security. The scope of this “public order exception” cannot be neglected. It implies a complete absence of control by the Court of the validity or proportionality of such measures. Nevertheless, some authors consider that the Court would at least be competent to check if the facts in a specific case can be regarded as relating to the maintenance of law and order or the safeguard of public security.21

But the description given in the proceeding section is no longer sufficient to understand the powers exercised by the Court of Justice within the Area of Freedom, Security and Justice. Over the last four years, a non negligible body of case-law has progressively interpreted the provisions on Article 35 EU, in an attempt to make up for the shortcomings of the system that was put in place. But the action of the judiciary, though audacious, cannot substitute the pouvoir constituant and the issue of the jurisdiction of the Court over the AFSJ has therefore been placed in the spotlight throughout the process of institutional reform.

B. Bringing into Play the Court’s Jurisdiction

The Court has interpreted its jurisdiction over the “new law” widely since the outset. Even prior to the Treaty of Amsterdam, in the Airport transit visas case,22 the Court had already stated that its tasks included ensuring that the activities within the new intergovernmental pillar do not encroach upon the powers conferred by the EC Treaty

21  O. De Schutter, “Le rôle de la Court de Justice”, o.c.
on the Community, deriving a sort of “incidental competence” over the third pillar.\(^{23}\) Since then, the Court has ruled on the system of remedies under the third pillar in on several occasions, clarifying some important questions regarding its jurisdiction in this field.

At a first stage, preliminary references by national courts have allowed the Court to define the contours of the Court’s jurisdiction, by “mirroring the role of Article 234 EC in the development of the Community legal order”.\(^{24}\) Indeed, the application of the provisions of Article 234 EC to the title VI of the treaty on the European Union, though subject to the conditions laid down by Article 35 EU, has been stated clearly by the Court since its ruling in *Pupino*:\(^{25}\)

“[…] the system under Article 234 EC is capable of being applied to the Court’s jurisdiction to give preliminary rulings by virtue of Article 35 EU, subject to the conditions laid down by that provision”.\(^{26}\)

Consequently, the Court has applied its case-law on the admissibility of a reference for preliminary ruling to preliminary references under Article 35 EU.\(^{27}\) More recently, and given that the reference for interpretation was in accordance to Article 35(1) EU, the Court has refused to declare the inadmissibility of a reference on the sole basis that it had been presented by the national court on the basis of Article 234 EC and without any mention to Article 35(1) EU. It has done so by applying by analogy its traditional case-law concerning the absence of any formal requirement to present a reference under Article 234 EC.\(^{28}\) However, the very likely practical effect will actually be that national courts will be able to make references for preliminary rulings on third pillar law just by referring to Article 234 EC, provided the conditions of Article 35(1) EU are met, and even at times when these conditions are not so clearly met.\(^{29}\)


\(^{24}\) M. Fletcher, “The European Court of Justice”, o.c.

\(^{25}\) ECJ, Case C-105/03, *Criminal proceedings against Maria Pupino*, 2005 ECR I-5285.

\(^{26}\) At par. 19 of the judgment.

\(^{27}\) ECJ, Case C-467/04 *Criminal proceedings against Giuseppe Francesco Gasparini* et a., 2006 ECR I-2333, paragraphs 41-44. See also ECJ, Case C-150/05, *Van Straaten v. Staat der Nederlanden ad Republiek Italië*, 2006 ECR I-2333, paragraphs 31-39.

\(^{28}\) ECJ, Case 13/61 *De Geus*, 1962 ECR, at parr. 45-50.

These clarifications made by the Court of Justice have visibly shaped the jurisdiction conferred to the Court by Article 35 EU. But “the bigger question is whether the EU courts have any Third Pillar jurisdiction besides that conferred upon them by Article 35 TEU”. Advocate General Maduro pioneered the comprehensive approach in Case C-160/03, Spain v. Eurojust. This case originated from an action brought by Spain against calls for applications for the recruitment of temporary staff to work within Eurojust. In particular, Spain questioned the compatibility of this call with the language regime of the institutions and bodies of the European Union. Eurojust is an autonomous body not forming part of the institutional framework of the Union as established in Article 7 EC and Article 5 EU. Neither Article 230 EC nor Article 35 EU allows an action to be brought against measures issued by Eurojust.

The Advocate General declared the case admissible by drawing a parallel between Article 230 EC and Article 35 EU, stating that the principle of effective judicial supervision which has guided the Court’s reasoning within the first pillar could be extended to the EU Treaty provisions. Advocate General Maduro therefore pleaded for the prevalence of the principles of legality and effective judicial review, upheld in the Community context, in the context of the European Union, as a “logical implication of a Union based on the rule of law”. Whilst acknowledging that the rules and arrangements for reviewing legality are not identical within the two pillars, Advocate General Maduro put the emphasis on the parallels rather than the disparities between the two. He invited the Court to apply effective judicial protection, notably Les Verts v. Parliament, to European Union law and in particular to acts enacted by a Union body such as Eurojust.

Advocate General Maduro’s progressive interpretation went too far in the view of the Court, or maybe it was simply a little too avant-garde. In a brief judgment, the

31 E. Sanfrutos Cano, “The third pillar and the Court of Justice”, o.c.
32 Opinion delivered on 16 December 2004.
33 At par. 17 of the Opinion.
34 At par. 17 of the Opinion.
36 E. Sanfrutos Cano, “The third pillar and the Court of Justice.?” o.c.
37 ECJ, Case C-160/03, Spain v. Eurojust, 2005 ECR I-2077.
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Court ruled on the inadmissibility of the action in the light of Article 230 EC. Concerning the right to effective protection in a community based on the rule of law, the Court neither confirmed nor disputed Advocate General Maduro’s appeal for its extension to Union law, but simply points out that the acts contested in the particular case are not exempt from judicial review as the main parties concerned by the Eurojust decision would always be able to contest it under the conditions laid down in the Staff Regulations.

But the Court’s judgment in Eurojust “did not expressly state whether Article 35 TEU must be considered to set out its Third Pillar jurisdiction exhaustively”. The issue arose again in cases Gestoras Pro Amnistia and Segi. In these cases, the Court of First Instance had dismissed the actions brought by the organisations Gestoras Pro Amnistia and Segi and their respective spokespersons against the Council of the European Union for compensation for damage allegedly suffered as a result of their inclusion on the list of persons, groups and entities to which Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to terrorism applies. The Court of First Instance ruled that it lacked jurisdiction to hear the appellants’ actions for damages as no judicial remedy for compensation is available in this context. It admitted that this probably led to a situation where no effective judicial remedy was available to the applicants, but concluded that, as stated by the Court of Justice in Union de Pequeños Agricultores, “the absence of a judicial remedy cannot in itself give rise to Community jurisdiction in a legal system based on the principle of conferred power”.

The applicants appealed the decision of the Court of First Instance, essentially arguing that the Court of First Instance should have based its jurisdiction on Article 6(2) EU and that therefore it had erred in law.

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38 At parr. 35 to 37 of the judgment.
39 At parr 41 to 43 of the judgment.
40 S. Peers, “Salvation outside the church”, o.c.
41 ECJ, Case C-354/04 P, Gestoras po Amnistia and others v. Council, 2007 ECR I-1-1579
42 ECJ, Orders of 7 June 2004, Cases T-333/02, Gestoras Pro Amnistia and Others v. Council (not published in the ECR) and T-338/02, Segi and Others v. Council, 2004 ECR II-1647.
44 ECJ, Case C-50/00, Union de Pequeños Agricultores, 2002 ECR I-6677.
45 Par. 38 of the Order.
Advocate General Mengozzi presented his Opinion on the 26 October 2006. He analyses the lack of effective judicial protection alleged by the appellants which had, to a certain extent, been admitted by the Court of First Instance. He develops in extenso the consequences that such a lack of judicial protection would have in a Union founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, alerting of a possible external censure by the European Court of Human Rights. But subsequent to these statements, the Advocate General finds that in the case at hand the appellants are not deprived of effective judicial protection of their rights. He claims that their judicial protection is assured by national courts as in his view, the rule established by the Court in Foto-Frost that national courts have no jurisdiction themselves to declare acts of Community institutions invalid does not apply in the context of Title VI of the EU Treaty, where the jurisdiction to give preliminary rulings is optional to Member States and not always compulsory for national courts.

The Court did not follow Advocate General’s option for “decentralisation” of third pillar judicial control. It denied that the appellants were deprived of all judicial protection, but it did so by a progressive reading the system of legal remedies under Title VI of the Treaty of the European Union. It overlooked the fact that Article 35 (1) EU, defining the Court’s jurisdiction to give preliminary rulings within the third pillar, does not extend to common positions, by applying by analogy its case law on the right to make a reference within the EC treaty, which exists “in respect of all measures adopted by the Council, whatever their nature or form, which are intended to have legal effects in relation to third parties”. The Court opens the way for preliminary references concerning a type of instrument, commons positions, that was specifically excluded by the EU Treaty. Moreover, it goes even further, by suggesting that “the Court would also have jurisdiction to review the lawfulness of such acts when an action is brought by a

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46 Par. 38 of the Order: “Concerning the absence of an effective remedy invoked by the applicants, it must be noted that indeed probably no effective judicial remedy is available to them, whether before the Community Courts or national courts […]”

47 Parr. 85-86 of the Opinion.

48 Par. 99 of the Opinion.

49 ECJ, Case 314/85, Foto Frost, 1987 ECR 4199.

50 ECJ, Cases C-354/04 P and C-355/04 P, o.c.

51 ECJ, Case 22/70, Commission v. Council (ERTA), 1971 ECR 263, at parr. 38 to 42, and Case C-57/95, France v. Commission, 1997 ECR 1-1627, parr. 7 ff.
Member State or the Commission under the conditions fixed by Article 35 (6) EU”. 52
The Court goes beyond the limitations set out in the EU treaty by appealing to principles
developed under the EC Treaty. 53

This case serves as an illustration of the tendency of the Court towards a
“decentralised system of judicial control”, that emphasises an open conception of the
preliminary reference mechanism rather than further opening of the direct challenge. But,
as has been sharply pointed out by Peers, one of the most surprising aspects in the
Court’s judgment in Segi is the absence of any mention to the situation in Member States
which have not opted in to the Court’s preliminary rulings jurisdiction. 54 Indeed, the
Court’s reasoning in Gestoras and Segi, making the preliminary references procedure the
central axe of the judicial protection system within title VI TEU, can be understood in
the present case as the dispute had been brought before the Spanish Supreme Court, 55
which could have referred the question to the European Court. But the situation would
be completely different in one of the Member States that have not accepted the
jurisdiction of the Court to give preliminary rulings. In such circumstances, the applicant
would have been seriously deprived of any judicial protection. The only solution would
be therefore, as some authors have pointed out 56 and Advocate General Mengozzi
proposed in his conclusions in this case 57 the non application of the Foto-frost
jurisprudence in Member States that have not accepted the preliminary references
jurisdictions of the Court. This way their national courts would be able to judge the
validity of third pillars acts and eventually declare them void. The right to effective
judicial protection would thus be safeguarded, at the price of the uniformity in the
application of EU law.

But solving the problem of the lack of effective judicial protection by extending the
scope of its preliminary references jurisdiction can also be insufficient in Member States
having accepted this mechanism, given that national implementation measures will not

52 At par. 55 of the judgment.
53 E. Sanfrutos Cano, “The third pillar and the Court of Justice”, o.c.
54 S. Peers, “Salvation outside the church”, o.c.
56 K. Lenaerts and L. Jadoul, “Quelle contribution de la Cour de justice”, o.c.
57 See above.
always exist. A more direct remedy would have been possible if the Constitutional Treaty had been ratified, as the applicant would have been able to bring an action for annulment (Article III-365) or for damages (Article III-370 and the second paragraph of Article III-431) before the Community Court from then on, as was rightly pointed out by Advocate General Mengozzi in his Opinion. The future Reform Treaty, though less ambitious, will also provided a better scenario for judicial protection.

III Judicial Protection within the AFSJ after the Treaty of Lisbon: All Problems Solved?

The extension of the jurisdiction of the Court has been envisaged since the creation of the AFSJ by the Treaty of Amsterdam. Indeed, Article 67(2) EC requires the Council, at the end of the transitional period of five years following the entry into force of the Treaty of Amsterdam, to take a decision by unanimity as to the adaptation of the provisions limiting the jurisdiction of the Court to give preliminary rulings over Title IV EC. However, no initiative of the Council had been launched at the expiry of the transitional period on 1 May 2004. Regarding the third pillar, Article 42 EU contains also a “passerelle clause” that allows the Council, acting unanimously on the initiative of the Commission or a Member State, and after consulting the European Parliament, to decide the transfer of areas falling under the third pillar to Title IV of the EC treaty. Such an initiative would however require ratification by Member States according to their constitutional requirements. In terms of judicial protection such a “partial communitarisation” would be though rather unsatisfactory, as the regime for preliminary references can sometimes be stricter under Title IV EC than under Article 35 EU.

The entry into force of the Constitutional Treaty would have rendered unnecessary the recourse to the “passerelle clauses”. It putted an end to the pillars structure, harmonising instruments and judicial remedies in Community and Union law. The halting of the ratification process made necessary a reminder of the Commission, which

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58 Advocate General Mengozzi mentions this problem, underlining that a reference for a preliminary ruling, including one regarding validity, “is not a remedy in the true sense but a means of cooperation between national courts and the Community court in the context of an action that can be brought before national courts,” paragraph 95 of the Opinion.


60 At par. 100 of the Opinion.

61 See for further analysis E. Guild, S. Carrerra, “No Constitutional Treaty?”, o.c.
presented a Communication on the Adaptation of the provisions of Title IV of the treaty establishing the European Community relating to the jurisdiction of the Court of Justice with a view to ensuring more effective protection on 28 June 2006. With this Communication the Commission aimed to remind the Council of its legal obligation to amend the current rules. Making appeal to uniformity and effective judicial protection, it proposes a full alignment of the jurisdiction of the Court in the fields covered by Title IV EC on the general scheme of the treaty. This would mean that any national court will be able to apply to the Court for preliminary rulings and that the current exclusion of the Court’s jurisdiction for measures relating the maintenance of law and order and the safeguarding of internal security would be eliminated.

The re-launch of the reform process by the European Council of June 2007 put the question of Article 67 (2)EC and Article 42 EU aside. The Treaty of Lisbon essentially maintains the developments concerning the pillars structure contained in the Constitutional treaty. The division between the first, community pillar and the EU third pillar will be formally abolished, and the European Union will be recognised as a single legal personality. The current Title IV of the Treaty of the European Union will be included as the fifth chapter of a new title, “Area of Freedom, Security and Justice”, contained within the Community Treaty, newly named Treaty on the Functioning of the Union. The “Community method” will apply to police and judicial cooperation in criminal matters, meaning in short the application of the co-decision procedure, the homogenisation of legal instruments and the full jurisdiction of the Court of Justice. However, one could object that compared to the Constitutional Treaty, the new Reform treaty gives a greater place to “exceptionalism” and “differentiation”.

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62 Communication from the Commission to the European parliament, the Council, the European Economic and Social Committee, the Committee of the regions and the Court of Justice of the European Communities, Brussels, 28 June 2006, COM (2006)346 final.

63 In favour of the existence of a legal obligation to reform see S. Peers, “The future of the EU judicial System and EC Immigration and Asylum law” o.c.


A. The Abolition of the Pillar Structure and the General Application of the “Community Method”: Repercussions on Judicial Protection

The entry into force of the Treaty of Lisbon will finally imply the full alignment of the jurisdiction of the Court in the AFSJ on the general scheme of the treaty. This alignment will undoubtedly represent an important step towards better judicial protection within this field as current restrictions to direct and indirect challenge will be abolished. At the same time, horizontal modifications to the general system of judicial remedies will also benefit the AFSJ.

First of all, this alignment will imply the full application of Article 263 TFEU (ex Article 230 EC) to all AFSJ matters, including current third pillar. If this is already the case for Title IV EC, it means an important change for the implementation of justice and police cooperation in criminal matters, as under Title VI EU only the Commission and the Member States are entitled to bring annulment actions. Indeed, the importance of the recognition of locus standi for annulment actions to institutions others than the Commission, notably the European Parliament, which will become with the Treaty of Lisbon co-legislator in AFSJ matters, can not be neglected, as it has already shown its willingness to challenge legislative acts in this field within Title IV EC (see above). But without doubt the recognition of the possibility for individuals to challenge the legality of acts within this is the major advance. Moreover when the Treaty of Lisbon ameliorates considerably the conditions under which individuals can challenge acts that affect their interests.67 Furthermore, Article 263 (5) TFEU expands the category of acts that can be actually challenged before the European Court of Justice: “Acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them”. In a field such as the AFSJ, where agencies and bodies multiply, this inclusion is highly welcome and will actually give an answer to problems that have already being raised before the European Court of Justice.68

Regarding indirect challenge, the main step up is clearly the end of the restrictions to the preliminary reference procedure under the AFSJ, described above. National courts will be able to refer to the European Court of Justice questions on the validity or the interpretation of acts within this field without need of an specific acceptance by the Member State, whether they are last instance courts or not, putting an end to the current

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67 See last paragraph of article 263 (4) TFEU.

68 See Case Spain v.Eurojust, cit.
dissymmetry. As the new legal instruments will be directly effective and therefore individuals will be able to invoke them before national courts, the possibility for such courts to refer questions to the European Court of justice without restrictions is fundamental to ensure a homogenous enforcement of AFSJ policies. Such enforcement will also be reinforce by the possibility both by the Commission and a Member State to bring enforcement actions before the European Court of justice, a possibility currently excluded under title VI EU.

Finally, the communitarisation of the judicial remedies within the AFSJ will also entail the possibility of bringing an action for damages against the Union, which is currently excluded. Some authors question however the impact of such an action.69

But as stated above, the improvements in judicial supervision will not only derive from the ending of the pillars system and the full jurisdiction of the Court but also from horizontal modifications to the general system. The improvements in terms of judicial protection that the reform of current Article 230 (4) EC implies has been already mentioned, but it is not the only one. Article 257 TFEU for example, which allows the creation of specialised courts attached to the General Court, can be a crucial provision for the development of European law within this Area. Indeed, the specificities of the matters included under the rubric AFSJ have already lead the European Court of Justice to adapt the preliminary ruling procedures to the specificities of the matters covered by the AFSJ. Indeed, the length of procedure70 is blatantly quite inappropriate for the matters covered under the AFSJ, which frequently leads to situations where a person is detained or deprived of his liberty or where the answer to the question raised is decisive as to the assessment of that person’s legal situation. The Treaty of Lisbon reflects these concerns,71 but the ECJ has anticipated such a need and an urgent preliminary ruling procedure applicable to references concerning the AFSJ is already in place.72 This time concerns, together with the particular nature of the matters covered under the AFSJ, would easily justify the creation of a specialised chamber or Court.

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70 According to the President of the Court, the average duration of proceedings in 2007 was 19.3 months; see the Annual Report of the European Court of Justice 2007.

71 Article 267 of the TFEU (consolidated version, OJ C115, 9.5.2008) states that if a question for a preliminary ruling is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

But the alignment of the Court’s jurisdiction within the AFSJ alongside with the general system has not been though accepted without any condition. The Court’s jurisdiction has indeed been the objects of several restrictions and “opt outs”, and this in a triple dimension: *ratione materiae, ratione temporis et ratione loci*.

**B. The Persistence of Different Sub-legal Regimes: Material, Temporal and Geographical Flexibility**

*Ratione materia*, Article 276 TFEU establishes that, when exercising its powers regarding ex-third pillar matters, the Court of justice “shall have no jurisdiction to review the validity or proportionality of operation carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security”. This exclusion is not a new creation but an old third pillar provision, Article 35 (5) TEU, that has been imported into the TFEU, and it was also kept in the aborted CT. 73 The scope of this “public order exception” cannot be neglected. It implies a complete absence of control by the Court of the validity or proportionality of such measures. Nevertheless, some authors consider that the Court would at least be competent to check if the facts in a specific case can be regarded as relating to the maintenance of law and order or the safeguard of public security. 74

These permanent material derogations to the ECJ’s jurisdiction are complemented by temporal limitations that will considerably delay the entry into force of the Lisbon treaty changes regarding the former intergovernmental pillars. Indeed, Title VII of the Protocol no. 36 on Transitional Provisions contains specific provisions concerning acts adopted on the basis of Titles V and VI of the TEU prior to the entry into force of the Treaty of Lisbon.

The first temporal limitation regards the “legal effects of the acts of the institutions, bodies, offices and agencies of the Union adopted on the basis of the Treaty on European Union prior to the entry into force of the Treaty of Lisbon”. According to Article 9 of the Protocol, these effects “will be preserved until those acts are repealed, annulled or amended”. The effective implementation of this provision will cause two types of interpretation problems. The first one is related to the uncertainty as to the exact legal effects that certain acts adopted under the TEU entail. This is the case notably of

73 Article II-377.
74 O. de Schutter, “Le rôle de la Court de Justice”, *o.c.*
framework-decisions. The Court’s approach towards this instrument in the post-Amsterdam period has shown a clear tendency to approach them as much as possible to their counterparts in the first pillar, the directives. Faced to such a temporary situation, where framework-decisions are destined to disappear, we can expect the Court to blur even more the legal differences between both types of acts. The second one relates to the concept of amendment. The Court will be probably called upon to lie down criteria regarding this question.

The second temporal limitation concerns only acts of the Union in the field of police cooperation and judicial cooperation in criminal matters which have been adopted before the entry into force of the Treaty of Lisbon. Indeed, Article 10 of the Protocol establishes a temporary limitation of the powers of the classical supranational institutions, the European Commission and the Court of Justice. For a period of five years after the date of entry into force of the Treaty of Lisbon, the Commission’s power to start enforcement proceedings against Member States that have failed to fulfil their obligations shall not be applicable and the powers of the Court of justice shall remain the same it holds under current Title VI of the Treaty on European Union.

The amendment of an act during this transitional period would imply the application of the normal powers of the institutions, what would again raise the question of determining when it can be considered that an act has been amended.

Finally, the United Kingdom obtained during the negotiations the possibility to maintain an opt-out over criminal matters after the expiry of the transitional period. According to paragraph 4 of Article 10 of the Protocol, the UK may notify to the Council, at the latest six months before the expiry of the transitional period, that it does not accept the enforcement powers of the Commission and the ECJ’s jurisdiction regarding acts of the Union in the field of police cooperation and judicial cooperation in criminal matters which have been adopted before the entry into force of the Treaty of Lisbon.

This possibility of opting out conferred to the UK brings us to the last type dimension of diversity: geographical diversity. The matters covered by the intergovernmental pillars have been, though no exclusively, a fertile ground for the establishment of enhanced cooperation between Member States. Not in vain the Schengen Agreement and its latter integration within the EU institutional framework constitute one of the insignia of the “two –speed” Europe. Under the existing treaties, several protocols allow the UK, Ireland and Denmark to maintain a special position.

75 See ECJ, Pupino, cit.
regarding justice and home affairs matters. The Treaty of Lisbon not only will maintain, subject to some technical amendments, these protocols, but will render more flexible the position of the UK towards measures in the field of freedom, security and justice. Renamed “Protocol on the position of the United Kingdom and Ireland in respects of the Area of Freedom, Security and Justice”, the current Title IV Protocol will be modified to extend the right to opt-in to all areas under the AFSJ and will include an Article 4a that clarifies that the UK and Ireland are not compelled to participate in all measures amending existing measures in which they participate. The new Schengen Protocol will also give more freedom to the UK and Ireland to participate in Schengen measures.

IV The ECJ, the AFSJ and the Constitutionalization of the EU Legal Order: Some Final Considerations

The ECJ has played a key role in the development of the intrinsic principles that characterise the Community legal order (supremacy, direct effect, respect of fundamental rights). The lack of jurisdiction that has long time characterised the matters covered under the AFSJ has constituted a strong argument for those who deny the application of such principles outside the scope of the first and communitarian pillar. However, the current jurisdiction of the ECJ in this field, though limited, has already shown its willingness to apply the same integration logics to the new law, a sort of “migration of principles” or “praetorian communitarisation” of former intergovernmental cooperation. The ECJ’s decision in Pupino, by extending the duty of loyal cooperation and the principle of consistent interpretation to Third Pillar instruments, constitute the cornerstone of this tendency. The Treaty of Lisbon, by putting and end to the pillar structure and abolishing the current main restrictions to the ECJ’s jurisdiction, will mean the definitive merger of the Community and the Union.

76 Protocol on the Schengen acquis integrated into the framework of the European Union; Protocol on the position of the UK and Ireland in respect of the Area of Freedom, Security and Justice; Protocol on the position of Denmark; Protocol on the application of certain aspects of article 26 of the TFEU to the UK and Ireland.

77 See the contribution by F. Fontanelli, “The Court goes ‘all in’”, in this same volume.

78 See in this sense E. Sanfrutos Cano, “The third pillar”, a.c.

79 ECJ, Case C-105/03, Criminal proceedings against Maria Pupino [2005] ECR I-5285.

Along comes the Court (The Role of the European Court of Justice within the Area of Freedom, Security and Justice)

But the European Court of Justice is not the only judicial actor within the AFSJ. The EU legal order interrelates, and eventually conflicts, with other legal orders, both at a national and international level. At an internal level, national courts play a fundamental role in assuring the effective enforcement of European rules and guaranteeing the rights of the individuals and this role is enhanced in the AFSJ. Indeed, in a field traditionally linked to State sovereignty and where human rights and liberties are often at stake national courts are more reticent to renounce to its own scrutiny. Judicial cooperation and judicial confrontation within the AFSJ will impose a new formulation of classical Community principles such as primacy, direct effect or mutual trust and the European Arrest Warrant Saga constitutes a good example of the necessity of such a dialogue. The Court will also have to reformulate its conception of the relationship between the EU and the international legal order and its recent decision in the Kadi case\(^\text{81}\) illustrates its constitutional approach to this question. The system of the European Convention of Human Rights will also be a major reference, as it constitutes a case of “legal integration (where the EU participates in another legal order)”\(^\text{82}\) that influences the EU legal order by imposing material constraints and exercising an external control and the ECJ has been recently asked to reconsider the relationship between the EU legal order and the ECHR within a single AFSJ.\(^\text{83}\)

The jurisdiction of the Court under the AFSJ, though limited, has allowed it to influence the progressive introduction of an area of freedom, security and justice. But its case law over this field, both on institutional and substantial aspects, goes to the core of the principles defining this area and brings to the for more general questions relating to the nature of the Union and the characteristics of EU law.

Nevertheless, the Court’s jurisdiction, though audaciously interpreted, remains limited, and its practice raises important concerns about the respect of the right to judicial protection and questions the European Union as an Union based on the rule of law. The modifications envisaged by the Constitutional treaty were therefore more than welcome and the moves backwards of the Treaty of Lisbon are highly regrettable. Indeed, even if the Treaty of Lisbon would have entered into force the 1st January 2009, as foreseen, judicial supervision under the AFSJ will remain incomplete as until 2013. The blockage of


\(^{82}\) Ibid.

\(^{83}\) ECJ, Case C-465/07, M. Elgafaji, N. Elgafaji v Staatssecretaris van Justitie, not yet reported.
the ratification process put again this date back. It will be to the ECJ to make for the lacuna of an incomplete system that was meant to be temporary but would finally be applicable for more than 15 years. Under the guidance of the general principles of EU law, and more particularly fundamental rights, might the Court be able to fill this gap?
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SNAPSHOT

This book focuses on four challenges faced by the European Court of Justice: the Reform Treaty, the enlargement, the relationship with other courts and the recent threat to security represented by the rise of the international criminal network.

The Reform Treaty’s scope and purpose are much more limited than the Constitutional Treaty’s ones, however, it still intends to bring certain significant changes in the life of the Union. Many essays and some commentaries already exist on this Treaty (although the Reform Treaty has not yet come into force), but they tend to limit the new Treaty’s provisions in a descriptive fashion, whilst the aim of this work is to study the impact of the Reform Treaty on the ECJ’s activity. The enlargement had a double immediate impact on the ECJ: it caused the increase of the judges’ number and the introduction of new legal cultural elements that could result in affecting the legal reasoning and the argumentative techniques used by the European judges. Another delicate aspect is the status of the network of the European and non-European courts: judicial interactions between the ECJ and the other judicial actors are becoming more and more important in light of the progressive transformation of the EU. On the one hand, in fact, the “humanization” of EC Law (i.e. the increasing relevance of the human rights discourse in the EC activity) triggered the necessity to deal with the issue of the consistency between EC law and ECHR. On the other hand, the discipline of the WTO requires the consistency between the action of WTO bodies and the ECJ, and a new set of criteria to harmonize the reciprocal influence of their respective legal orders. Finally, the concern for security spread after the rise of international terrorism, along with the birth of a European criminal law make it necessary to analyze the potential conflict between rights and security and the de-pillarization process, two factors that invest the ECJ with a fundamental role in these sensitive matters.