Judicial supervision under
the Area of Freedom, Security and Justice

Filling the gap

Eulalia Sanfrutos Cano*

Abstract: The European Court of Justice (ECJ)’s influence in the Area of freedom, Security and Justice has, until relatively recently, not been felt. The Court made its debut in this field in 2003, when it rendered its first judgment in the case of Gözütok and Brugge. Since then, an increasing judicial activity allows us to make a first assessment of the Court’s contribution to the realisation of this rather new EU objective. Although the interest of this enterprise derives not only from the novelty of the question but also from its trans-pillar nature, which arises key constitutional issues as supremacy or protection of fundamental right that, stated firmly by the early Court of Justice, revive within the context of this “new law”. For a full understanding of the ECJ’s role within this area we need to answer two fundamental questions: what the Court can do and what the Court is actually doing, questions that will provide the structure for this research exercise.

I Introduction

“The effective application in practice of any set of legal rules depends to a large degree on the judicial system established (if one is established) to rule on the interpretation, validity, legal effect and enforcement of those rules”.

The Treaty of Amsterdam gave the EU a new objective, the maintenance and development of the Union as an area of freedom, security and justice (AFSJ), in which the free movement of persons is assured in conjunction with appropriate measures with respect to external borders controls, asylum, immigration and the prevention and combating of crime. To attain this objective the EU would have to act between two different legal orders, as some of these

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1 Case 187/01, Gözütok and Brügge, judgement of 11 February 2003, ECR [2003], I-5689.

2 The case law concerning judicial cooperation in civil matters will not be the object of the present contribution


4 Article 2 § 4 EU.

policies were placed under a new Title in the EC treaty\(^6\) while the police and judicial cooperation remained within the intergovernmental sphere.\(^7\) The institutional distinctiveness of this new objective, halfway between the supranational and the intergovernmental, has been largely discussed by scholars for the past ten years. This paper focuses on one of the most important changes operated by the 1999 reform, the coming on stage of the European Court of Justice. Though limited, the European Court was recognised by the Treaty of Amsterdam jurisdiction over the matters relating to the new objective. Since then, an increasing judicial activity allowed us to make an assessment of the Court’s contribution.

For a full understanding of the ECJ’s role within this area we need to answer two fundamental questions: what the Court can do and what the Court is actually doing, questions that will provide the structure for this research exercise.

The first question refers to the issue of the competence or jurisdiction of the Court. The different role played by the ECJ in each pillar has been traditionally advanced by scholars, who use the distinction between judicially-controlled European law (EC law), and non-judicially-controlled European law (the second and third pillars) as a “summa divisione”.\(^8\) If this assertion has been partially watered down by the reforms operated by the Treaty of Amsterdam, it remains a fact that the Court’s powers, both under Title IV EC and under the third pillar, do not compare favourably to those it holds within the old and communitarian pillar.

The second part of this paper will look at the way the Court’s exercise its competences in this field, trying to decode the logics guiding its reasoning. Faced to highly politically controversial issues that requires adjudicating between different levels/types of governance (EU/national, supranational/intergovernmental) and different values in society (security/liberty, State interests/individual rights), the Court exercise caution in this domain and is mindful of its special features. Recent developments are however illustrative of a new trend.\(^9\) They reveal a more proactive Court that has finally overcome its past reticence and finally assume its new role as “human rights judge”.\(^10\)

II The Court’s powers within the Area of Freedom, Security and Justice

In this section it will be analysed how the limitations to the Court’s jurisdiction both within Title IV EC and under the third pillar can affect the role played by the Court and what can be the consequences of an asymmetric judicial protection within a single area of freedom, security and justice.

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\(^6\) Title IV EC, « Visas, Asylum, Immigration and other policies related to free movement of persons ».

\(^7\) Title VI EU, “Provisions on Police and Judicial Cooperation in Criminal matters”.


\(^9\) Case C-303/05 Advocaaten voor de Wereld, judgment of 3\(^{rd}\) May 2007, nyp.

However, an accurate study of the Court’s jurisdiction under the AFSJ can no longer limit itself to the relevant treaty provisions. The Court has interpreted largely its own jurisdiction over the new law since the very beginning,\textsuperscript{11} and recent judgment have almost reshaped the regime of judicial protection within the AFSJ.\textsuperscript{12} Finally, attention will be also given to recent initiatives to adapt the Court’s powers to the specific needs of this new branch of EU law.

\textbf{A The institutional setting}

The first developments of justice and home affairs matters within the EU were characterised by a lack of a generalised system of judicial control. Indeed, Article L of the Treaty of Maastricht explicitly excluded the jurisdiction of the Court of Justice over the newly created third pillar.\textsuperscript{13} 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,\textsuperscript{14} and therefore was subject to the supervision of the Court of Justice.\textsuperscript{15}

This absence of judicial review attracted understandably acute critics over the outcome of the treaty of Maastricht, moreover when 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,\textsuperscript{16} where prime freedoms and liberties are put at stake.

Notwithstanding, it has to be acknowledged that the exclusion of the jurisdiction of the Court of Justice did not imply a total vacuum of judicial remedies over 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 revealed incomplete and varied sensibly from one national system to another,\textsuperscript{17} and the risk for some measures to evade any control of conformity with fundamental rights was manifest.\textsuperscript{18}

The reforms operated by the treaty of Amsterdam were highly focused on the need to put an end to the complete absence of jurisdiction by the Court of Justice over these matters. However, the jurisdiction conferred to the Court of Justice would differ significantly between the two branches of the transpillar objective that the Area of freedom, security and Justice is meant to be. If its powers within the Title IV of the EC treaty are - with some non negligible 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.

\textsuperscript{11} Case C-170/96 Commission v Council, air transit visas [1998] ECR I-2763
\textsuperscript{13} 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.
\textsuperscript{14} Article 100C of the EC treaty.
\textsuperscript{16} Article K 1 of the EU treaty
\textsuperscript{17} For a further development of the shortcomings of the system under the treaty of Maastricht see D. O’KEEFFE, op. cit.; O. de Schutter, “Le rôle de la Court de Justice des Communautés européennes dans l’espacements judiciaire pénal européen”, in Vers un espace judiciare penal européen/Towards a European Judicial Criminal area, G; de Kerchove and A. Weyembergh (Eds), EUB, Brussels, 2000, pp. 55-79.
\textsuperscript{18} O. De Schutter, ibid.
The Court’s jurisdiction over Title IV EC

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. Article 68 CE introduces though important restrictions to the application of the preliminary references mechanism to this title, as only final national courts can send references to the Court. In a field that affects fundamental rights of e.g. immigrants and asylum seekers this restriction of the preliminary references procedure can not be neglected, 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. 19 Article 68 § 2 also excludes from the Court’s jurisdiction any measures or decisions taken with a view of 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.

Apart from these non negligible restrictions to the preliminary references procedure, the inclusion of policies under the general Community system of judicial review has to be welcome. In particular, the possibility for the Commission to bring infringements proceedings against Member States can have a very positive impact in the effective implementation of legislative measures under this Title, and some time after the expiry of the delay for implementation of the main instruments adopted under title IV EC it can be realised that the Commission in actually making use of such power. 20 The application of the article 230 EC system for review of the legality also improves the judicial accountability on this field, as the actions brought by the European Parliament in this field illustrate. 21

The Court’s jurisdiction over Title VI EU

Regarding Title VI of the EU treaty, the principle of the jurisdiction of the Court of Justice is set up by article 46 TUE, 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 of 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”. 22 When a Member State makes such a declaration, it must specify - according to Article 35 § 3 TEU - 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)).

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22 Article 35 § 2 EU.
The perverse effects of this “variable geometry of the ECJ jurisdiction in the third pillar” have been largely pointed out.\textsuperscript{23} First of all, Member Stats 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 question 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 and Lithuania have opted in.\textsuperscript{24}

Secondly, substantial differences remain even within those Member States that have actually accepted the jurisdiction of the Court, as some of them have restraint the possibility to refer to their final courts. The use of this alternative introduces important differences between Member States as it can entail an important time consuming and financial effort, as it was commented below regarding the equivalent restriction in Title IV EC.\textsuperscript{25}

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 fourteen Member States having accepted the preliminary reference jurisdiction of the Court have made use of this possibility.

The following table would give the reader an idea of the complex scenery that article 35 EU has settled in:

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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 distinctions being that *locus standi* to bring such an action under Article 35 (6) EU is limited to Member States and the Commission and this only on specified grounds.\(^ {26}\)

Both the European parliament and the individuals lack therefore *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 adopting framework decisions, decisions or establishing conventions, so it is highly regrettable that the European Parliament has not been recognised the possibility to defend its prerogatives under article 39 (1) EU\(^ {27}\) by bringing an annulment action before the Court of Justice in cases where the Council would disregard its right to be consulted.\(^ {28}\) It can not be completely ruled out, taking into account latest jurisdictional developments in this area,\(^ {29}\) that the same reasoning that guided the Court to recognise such power to the European Parliament within the communitarian pillar\(^ {30}\) will be reproduced within the third pillar.

Individuals are also excluded of the possibility to bring an annulment action before the Court alongside with the European Parliament. But if the exclusion of the latest arouses concerns concerning institutional balance within the EU, the lack of *locus standi* of individuals provokes major concerns about the effectiveness of the right to an effective judicial protection under the third pillar, moreover when the possibility for national courts to make preliminary reference to the Court of Justice does not always exist.

Article 35 § 7 EC confers the Court jurisdiction to rule on any dispute between Member States regarding the interpretation or the application of third pillar acts, whenever this dispute can not be settled by the Council within six months of it being referred to that institution by one of its members, mechanism that echoes the 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, “a reminiscent of the Article 226 procedure in Community law”.\(^ {31}\) But the scope of this procedures do not compared favourably to their “homologues” within the first pillar and clearly does not make up for the lack of a genuine infringement procedure within the third pillar. The Commission prerogatives to control the correct application of third pillar instruments are significantly restraint, as it can only bring the question before the Court in relation to third pillar conventions – being unable to act face to the non implementation or incorrect implementation by a Member States of key third pillar instruments, i.e. framework-decisions) - and even then the dispute has to be treated by the Council at a first stage. This lack is meant to be balance by the possibility by a Member State to bring a dispute on 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

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\(^ {26}\) 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.

\(^ {27}\) According to this article, the Council shall consult the European Parliament before adopting framework decisions, decisions or establishing conventions.

\(^ {28}\) K. Lenaerts and L. Jadoul, op. cit.

\(^ {29}\) See below.


\(^ {31}\) M. FLETCHER, “The European Court of Justice: Carving itself an influential role in the EU’s Third Pillar”, Paper submitted for presentation at the EUSA Tenth Biennial International Conference, Montreal, 17-19 May 2007
Member States are quite reluctant to bring actions against other Member States, as the practice of article 227 EC illustrates.

Finally, Article 35 § 5 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; still 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. 32

B The Court’s jurisdiction in prospect

The picture described above does not suffice anymore 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 corps of case-law has given the provisions on article 35 EU a progressive interpretation, in an attempt to make up for the shortcomings of the established system. But the action of the judiciary, though audacious, cannot substitute itself to the pouvoir constituant and the issue of the jurisdiction of the Court over the AFSJ is therefore in the limelight of the process of institutional reform.

The Court’s interpretation of its own jurisdiction

The Court has interpreted widely its jurisdiction over the “new law” since the very beginning. Even prior to the Treaty of Amsterdam, in the Airport transit visas case,33 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 on the Community, deriving a sort of “incidental competence” over the third pillar.34 Since then, the Court has been brought to rule on the system of remedies under the third pillar in several times, 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”.35 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.36

32 O. De Schutter, op. cit.
35 M. Fletcher, “The European Court of Justice: Carving itself an influential role in the EU’s ‘Third Pillar’”, op. cit.
36 Case C-105/03, Criminal proceedings against Maria Pupino, judgment of 16 June 2005, nyp.
“[...] 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”.

Consequently, the Court has applied to preliminary references under Article 35 EU its case-law on the admissibility of a reference for preliminary ruling. More recently, and given that the reference for interpretation was in accordance to Article 35(1) UE, 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 on the absence of any formal requirement to present a reference under article 234 EC. 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.

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. At the origin of the case was 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:

“[...] it seems to me that at present there is no obstacle preventing the Community system of law and guarantees deriving from it being extended to the European Union”.

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37 Paragraph 19 of the judgment.
38 Case C-467/04, Criminal proceedings against Giuseppe Francesco Gasparini et al. judgment of 28 September 2006, nyp, para. 41-44. See also Case C-150/05, Van Straaten v. Staat der Nederlanden ad Republiek Italië, judgment of 28 September 2006, nyp, para31-39.
42 E. Sanfrutos Cano, op.cit.
43 Opinion delivered on 16 December 2004.
44 Paragraph 17 of the Opinion.
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 and 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 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 would rise 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*:

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45 Paragraph 17 of the Opinion.
47 E. Sanfrutos Cano, op. cit.
49 See paragraphs 35 to 37 of the judgment.
50 See paragraphs 41 to 43 of the judgment.
51 S. Peers, “Salvation outside the church: Judicial protection in the third pillar after the *Pupino and Segi* judgments”, op. cit.
52 op.cit.
“[…] 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. 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.  

First of all, he develops in extenso the consequences that such a lack of judicial protection would have. Hence, Advocate General Mengozzi correctly points out that in a Union founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, admitting such a lack of effective judicial remedy would imply a recognition that:

“[…] in the sphere of police and judicial cooperation in criminal matters, situations may arise in which, where judicial remedy is absent, the action of the Union may in fact infringe with impunity all other rights and fundamental freedoms which the Union professes to respect”.

He astutely remarks that such a situation would expose the Member States to external censure, as:

“it is entirely improbable that the European Court of Human Rights would extend to the third pillar of the Union the presumption of equivalence in the protection of the fundamental rights that it has established between the ECHR and community law, or the “first pillar” of the Union […]”.

But subsequent to these statements, the Advocate General rejects that in the case at hand the appellants are deprived of effective judicial protection of their rights. While acknowledging that judicial remedies against national implementation measures or the possibility of making a reference for a preliminary ruling are inadequate to provide judicial protection of the appellants’ rights, he claims that their judicial protection is assured by national courts:

“I consider instead that a correct interpretation of the EU Treaty testifies to the fact that such protection exists, but is entrusted, in the present state of Union Law, not to the Community court but to the national courts”.

Advocate General Mengozzi states that he does not see an “imperative reason to preclude national courts from having the power to determine that framework decisions or decisions under Article 34 EU are invalid”. In his view, the rule established by the Court in 

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that national courts have no jurisdiction themselves to declare acts of Community

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56 Paragraph 38 of the Order.
57 Paragraph 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 […]”.
58 Paragraph 82 of the Opinion.
59 Paragraphs 85-86 of the Opinion.
60 Paragraph 99 of the Opinion.
61 Paragraph 121 of the Opinion.
62 Judgment of 22 October 1987, 

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\textsuperscript{63} did not follow Advocate General’s option for “nationalisation” of third pillar judicial control. It denied that the appellants were deprived of all judicial protection, but it did so by reading the system of legal remedies under Title VI of the Treaty of the European Union in a progressive manner. It overlooks the fact that Article 35 (1) EU, defining the Court’s jurisdiction to give preliminary rulings within the third pillar, does not extend to commons positions, by applying its case law on the right to make a reference within the EC treaty by analogy:\textsuperscript{64}

“The right to make a reference to the Court of Justice for a preliminary ruling must therefore exist 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 [...] 

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. [...] ”.\textsuperscript{65}

The Court opens the way for preliminary references to a type of instruments, commons positions, which were 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 has been brought by a Member State or the Commission under the conditions fixed by Article 35 (6) EU”.\textsuperscript{66} The Court goes beyond the limitations set out in the EU treaty by appealing to principles developed under the EC Treaty.\textsuperscript{67}

This case illustrates perfectly the tendency of the Court towards a “decentralised system of judicial control”, that put the emphasis on an open conception of the preliminary reference mechanism rather than on direct challenge. But, as it has been sharply pointed out by Peers, one of the most surprising aspects in the Court’s judgment in \textit{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.\textsuperscript{68} Indeed, the Court’s reasoning in \textit{Gestoras} and \textit{Segi}, making of 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,\textsuperscript{69} 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 application would have been seriously deprived of any judicial protection. The only solution

\textsuperscript{63} Judgments of 27 February 2007, Cases C-354/04 P and C-355/04 P, nyp.
\textsuperscript{65} Paragraph 53 of the judgment.
\textsuperscript{66} Paragraph 55 of the judgment.
\textsuperscript{67} E. Sanfrutos Cano, op. cit.
\textsuperscript{68} S. Peers, “Salvation outside the church: Judicial protection in the third pillar after the Pupino and Segi judgments” op. cit.
\textsuperscript{69} Judgment of the Spanish Supreme Court of 19 January 2007. (Recurso de casacion 1841/2005)
would be therefore, as some authors have pointed out \textsuperscript{70} and Advocate General Mengozzi proposed in his conclusions in this case \textsuperscript{71} the non application of the \textit{Foto-frost} jurisprudence \textsuperscript{72} 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 cases and eventually declare them void. The right to an 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 always exist. \textsuperscript{73} A more direct remedy would have been possible if the Constitutional Treaty \textsuperscript{74} 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. \textsuperscript{75} The future Reform Treaty, though less ambitious, will also provided a better scenario for judicial protection.

\textit{The perspectives of reform}

The Hague programme, “Strengthening freedom, security and justice in the European Union”, \textsuperscript{76} underlined the importance of the role of the European Court of Justice within the area of freedom, security and justice and welcomed that the Constitutional Treaty would greatly increase the powers of the European Court of Justice in that area. Moreover, it was added that:

“In this context and with the Constitutional Treaty in prospect, 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.”

In this assertion references are found to the two reform ways currently opened. The first one passes by a veritable amendment of the treaties. The Constitutional treaty would have represented an important step in this sense. The Reform Treaty tempered however its ambitions. The second way would opt for “relatively modest reforms to the current judicial system”. \textsuperscript{77} It does not imply recourse article 48 UE but make recourse to others instruments of adaptation. Both types of reforms projects do not exclude but rather complement themselves. Actually, a more accurate criterion for differentiation would be between those projects that tend to \textit{expand} the jurisdiction of the Court and those that aim to \textit{adjust} the exercise of this jurisdiction to the specific characteristics of the AFSJ.

\textsuperscript{70} K. Lenaerts and L. Jadoul, op.cit.

\textsuperscript{71} See above.

\textsuperscript{72} op. cit.

\textsuperscript{73} 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.

\textsuperscript{74} The Treaty Establishing a Constitution for Europe, O.J. C 310, 16 December 2004.

\textsuperscript{75} Paragraph 100 of the Opinion.

\textsuperscript{76} Conclusions of the Brussels European Council of 4-5 November 2004, DOC 14292/04.

\textsuperscript{77} S. Peers, “The future of the EU judicial System and EC Immigration and Asylum law”, op. cit.
Concerning the first issue, the extension of the jurisdiction of the Court was already 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 adapt 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 require though ratification by Member States according to their constitutional requirements. In terms of judicial protection such a “partial communitarisation” would be though rather insatisfactory, as the regime for preliminary references can eventually 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.\textsuperscript{78} The blockage of the ratification process made necessary a reminder of the Commission, which 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.\textsuperscript{79} This Communication from the Commission aims to remember the Council its legal obligation to amend the current rules.\textsuperscript{80} 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 than 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 will be eliminated.

The relaunchement of the reform process by the European Council of June 2007\textsuperscript{81} put the way opened by Article 67 §2 EC and article 42 EU aside. The Reform Treaty, adopted on 19 October 2007 \textsuperscript{82} and expected to be signed on 13 December 2007, essentially retrieves the developments concerning the pillars structure contained in the Constitutional treaty. The division between the first and communitarian 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

\textsuperscript{78} See for further analysis E. Guild and S. Carrerra, op.cit.
\textsuperscript{79} 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.
\textsuperscript{80} In this sense see S. Peers, “The future of the EU judicial System and EC Immigration and Asylum law”, op. cit.
\textsuperscript{81} Presidency Conclusions, Brussels European Council 21/22 June 2007, Council doc. 11177/07, CONCCL 2, 23 June 2007.
to police and judicial cooperation in criminal matters, meaning in short the application of the codecision procedure, the homogenisation of legal instruments and the full jurisdiction of the Court of Justice. The only exception to the Court’s jurisdiction is set out by Article 240b of the EC treaty, newly named treaty on the functioning of the EU, and it regards the validity and the proportionality of operations for the maintenance of law and order and the safeguarding of internal security and only applies to criminal law and policing. This restriction was already in the Constitutional treaty and in the first version of the draft Reform treaty presented in August 2007. Nevertheless, the mistrust of the Member States regarding the interpretation of the Court of exceptions based on publics order and internal security would be unfounded according to some authors, given the balanced way it has interpreted the concept within Community law. Furthermore, it has to be point out that such measures will always be subject to the external control of the European Court of Human Rights, and the exclusion of the Court’s jurisdiction does not help to the sustainability of the “equivalent protection presumption” established by the latter in its judgment in the Bosphorus case.

The extension of the jurisdiction of the Court of Justice over criminal matters was however one of the conflict subjects during the negotiations for the adoption of the new Reform treaty, due mainly to the British opposition. The final compromise could be achieved at the price of the delay of the coming on stage of the Court of Justice, contained in Title VII of Protocol n10 on transitional provisions concerning acts adopted on the basis of titles V and VI of the Treaty on European Union prior to the entry into force of the Treaty amending the treaty on European Union and the Treaty establishing the European Community. This Protocol was already contemplated by the first version of the treaty, but at that stage its provisions on this field included a sole Article 8 (finally Article 9) stating:

“The legal effects of the acts of the institutions, bodies, offices and agencies of the Union adopted on the basis of Titles V and VI of the Treaty on European Union prior to the entry into force of the Treaty amending the treaty on European Union and the Treaty establishing the European Community shall be preserved until those acts are repealed, annulled or amended in implementation of the Treaties. The same shall apply to agreements concluded between Member States on the basis of those Titles.”

This clause already had raised doubts concerning the jurisdictional regime to be applied to third pillar measures adopted before the entry into force of the Reform treaty. The final version of it solved all doubts as it address directly the question of the jurisdiction of the Court during the transitional period. A new article 10 establishes that the jurisdiction of the Court over pre-existing measures in the field of police and judicial cooperation in criminal

84 However, one could object that compared to the Constitutional Treaty, the new Reform treaty gives a greater place to “exceptionalism” and “differentiation”. Indeed, derogations in the form of “emergency brakes”, “enhanced cooperation”, “opts-ins” and “opt outs” raise doubts concerning a “material –not only a formal –end to the “Era of the Pillars” (S. Carrera and F. Geyer, op. cit.).
85 Article III-377.
87 K. Lenaerts and L. Jadoul, op.cit.
89 S. Peers, “EU Reform treaty analysis 1: JHA provisions”, op. cit.
matters would remain the same as under current Title VI EU for five years after the entry into force of the Reform treaty, which is likely to be in 2009. Nevertheless, according to the second paragraph of this article, the general jurisdictional regime will apply to an act as soon as it is amended.

The entry into force of the Reform treaty would therefore imply finally, as from 2013, the alignment of the jurisdiction of the Court in the field of the AFSJ on the general scheme of the current EC treaty, with the only exception of the public order and internal security clause and the possible opt-out of the United Kingdom. The prospect of this extension updates the second issue, the debate about the need to adapt the Court’s procedures to the specific needs of the field. Indeed, the idea of extending the jurisdiction of the Court within the AFSJ arouses concerns about the risk of overloading the Court of Justice with massive references for preliminary rulings in this field, a fear magnified following the enlargement.

The Commission in its Communication of 28 June 2006 referred to this eventuality but opted for trusting the proper functioning of the Court of Justice: “the efficiency of the means of internal organisation which it enjoys and the new possibilities created by the Nice treaty must be trusted”. Without putting into question this trust, it has to be acknowledged though that the procedure for giving preliminary rulings has become “dangerously long”.

Both the Constitutional treaty and the Reform Treaty reflect this concern about the length of the procedures before the European Court when important individual freedoms depend on the Court’s decision. Article III-369 of the Constitutional treaty requires the Court to “act with the minimum of delay” in preliminary rulings when a person is detained. The Reform treaty retains this modification in a new addition to article 234 EC.

In the in between both texts, the European Court tackled the issue and proposed a more expeditious procedure for the treatment of questions referred for a preliminary ruling concerning the whole area of freedom, security and justice. This document exposed the Court’s view on the need to contemplate the creation of a new type of procedure, the emergency preliminary ruling procedure, to be used in the AFSJ cases. It also contemplated as a possibility the designation of a specific Chamber for that purpose. At that stage, two options where envisaged as to shorten the procedure. The first one would imply the limitation of the participants at the first phase of the procedure. The second option would be rather based in the establishment of stricter practical rules. A supplement to this discussion paper was presented by the Court on 14 December 2006, in response to the Council’s demand to develop its thoughts on the two possible options. The Council, by letter of 20 April 2007, informed the Court that it could accept an urgent preliminary ruling procedure in the areas covered by title VI EU and Title IV EC, based on the second option envisaged by the Court. The Court submitted formal proposals to amend both the Protocol on the Statute of the Court of Justice and the rules of procedure on 5 July 2007. The proposals by the Court take into account the preference shown by the Council not to limit the participation in the proceedings

90 According to Article 10 § 4 of Protocol 10, the UK may notify the Council, at the latest six months before the expiry of the transitional period, that it does not accept the jurisdiction of the Court with respect to pre-existing act in the field of police and judicial cooperation in criminal matters. The Council will determine then the transitional arrangements needed and the UK might bear the direct financial consequences of such measures.
91 op.cit. paragraph 36.
93 Letter of 28 September 2006 of the President of the Court of Justice to the President of the Council.
of Member States. The urgent preliminary ruling procedure will allow them this participation, ensuring for example the availability of the translations, but it limits the procedure to the oral part. Moreover, the references for preliminary rulings in the AFSJ will be assigned to one of the Chambers of five judges of the Court, to be designated for that purpose.

Up to this point, an analysis of the powers of the European Court of Justice over the Area of Freedom, Security and Justice has been presented, both in a static and a dynamic approach. The second part of this paper will look at the way the Court’s exercise its competences in this field, trying to decode the logics guiding its reasoning.

III The Court’s contribution to the Area of Freedom, Security and Justice

The AFSJ is in permanent conflict between two paradigms: an institutional paradigm, Community/intergovernmental, and a thematic paradigm, free movement/internal security. The action of the Court will inexorably influence both the institutional and the substantial balance of this area. But the level of such influence would depend on the degree of activism adopted by the Court. On one hand, the formal limits imposed by the treaties on the judicial power within this field could argue for a “high degree of deference to the will of the national governments as expressed in the EU”. But on the other hand, “the limited and contested nature of the legal and political environment might encourage a bold and more dynamic jurisprudence from the Court.”

A National v. supranational

The main common characteristic shared by the questions put under the umbrella of the AFSJ, both under Title IV of the EC treaty (e.g. borders, immigration, asylum) or within the third pillar (criminal matters), is their special link with the idea of national sovereignty. Indeed, most of the specificities of the treatment of those matters at an European level derive from the reticence from Member States to further integration in this field, the conflict between their awareness of the necessity of a common approach within an space without internal frontiers and their fear from further external intervention. But the Court can “act as a counterweight to the intergovernmental “empire””. Its action is, though not limited to, especially relevant as to the distribution of competences between the first and the third pillar. Face to the trans-pillar objective that the AFSJ represents, the Court’s jurisprudence has undertaken a process of “depillarisation” or “praetorian communitarisation” that operates in two ways.

First of all, by recognising the possibility of imposing criminal sanctions within the first pillar, the Court rejects the traditional boundary which formerly circumscribed all issues related to criminal law to the strict inter State cooperation, blurring the material delimitation between

95 M. Fletcher, “The European Court of Justice: Carving itself an influential role in the EU’s Third Pillar”, op.cit.
96 Ibid.
97 Ibid.
98 E. Sanfrutos Cano, op.cit.
the Community and the third pillar. The departing case for this “battle of the pillars”, as authors usually refer to this issue of competence and the correct legal basis, is Case C-176/03 Commission v. Council, Criminal Sanctions for the Protection of the Environment.

At the origin of the case there is an action brought by the Commission, supported by the European Parliament, for the annulment of Articles 1 to 7 of the Framework Decision 2003/80/JHA on the protection of the environment through criminal law. The Commission argued that acting within the third pillar, using as legal basis for its action Articles 29, 31 (e) and 34(2)(b) of the Treaty of the European Union, the Council had violated Article 47 TEU, that stipulates that nothing in the Treaty of the European Union is to affect the EC Treaty. In the opinion of the Commission, Article 175 EC was the correct legal basis for the adoption of these articles. In these articles, the Framework Decision lays down several criminal offences against the environment, both intentional and negligent. The penalties for these offences, according to Article 5, must be “effective, proportionate and dissuasive”, including “at least in serious cases, penalties involving deprivation of liberty which can give rise to extradition”. It is not questioned that these articles, as the Court pointed out in its judgment, “[…] entail partial harmonisation of the criminal laws of the Member States”. The crucial question was thus to decide if measures entailing harmonisation of criminal law were possible within the Community pillar.

The Court’s judgement does not overrule the Court’s often repeated statement according to which “as a general rule, neither criminal law nor the rules of criminal procedure fall within the Community’s competence”, on the contrary it reiterated it. Nevertheless, the following landmark statement was to follow it:

“However, the last-mentioned finding does not prevent the Community legislature, when the application of effective, proportionate and dissuasive penalties by the competent national authorities is a essential measure for combating serious environmental offences, form taking measures which related to the criminal law of the member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective”.

Not long afterwards, the Commission issued a Communication on the implications of the case. In its Communication, the Commission made clear its believing that it “in addition to environmental protection the Court’s reasoning can therefore be applied to all Community

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104 Paragraph 47 of the judgment.
106 Paragraph 48 of the judgment.
policies and freedoms which involve binding legislation with which criminal penalties should be associated in order to ensure their effectiveness”.\textsuperscript{108} This use by the Community legislature of criminal law will be subject to the requirements of necessity and consistency with the Union’s system of criminal law. Finally, as an immediate consequence, the Commission enumerates, in annex, a list of tests affected by the judgment and thus adopted or proposed under the incorrect legal basis. Following this interpretation, the Commission acted in justice against texts it considers adopted under the wrong legal basis\textsuperscript{109} and presented proposals providing for criminal penalties within the first pillar out of the scope of environmental law.\textsuperscript{110}

The constitutional significance of the case was immediately realized both by institutions and Member States,\textsuperscript{111} and the Court’s decision has been vastly commented by scholars afterwards.\textsuperscript{112} Some have seen in this judgment a clear “rearrangement” of the boundary between Community and Member State competence.\textsuperscript{113}

In this context, the Court’s judgment in Case 440/03 was eagerly anticipated, as it would give the Court the occasion to precise the “circumstances in which the Community has competence to oblige the Member States to provide for criminal measures and the precise extent to which that competence may be exercised”.\textsuperscript{114}

The facts are very similar to those in case C-176/03. There is an action brought by the Commission on 8 December 2005 against the Council claiming that the Court should declare articles 1 to 10 of Council Framework Decision 2005/667/JHA of 12 July 2005, to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution, unlawful.\textsuperscript{115} In the view of the Commission and the European Parliament, and following the Court’s ruling in C-176/03, these articles could have been adopted under article 80(2) EC, relative to the common transport policy. The framework-decision would infringe thus Article 47 EU. On the contrary, the Council, supported by 20 member States, defends that the instrument has been adopted under the correct legal basis and that for two alternative reasons. First of all, because the Court’s reasoning in case C-176/03 cannot necessarily be applied to other areas of EC law, as it is linked to the special importance and transversal character of environmental policy. In the alternative, the Council argues that the provisions attacked in this case are more detailed that the ones in case C-176/03 with regard the level and the type of penalties and could not in consequence be adopted under Community law.

The Court (Grand Chamber),\textsuperscript{116} confirms the principle stated in case C-176/03: when the application of effective, proportionate and dissuasive criminal penalties is an essential

\textsuperscript{108} Paragraph 7 of the Communication of the Commission, op. cit.
\textsuperscript{109} Case C-440/05.
\textsuperscript{111} 11 States of at the time EU’15 submitted written observations.
\textsuperscript{113} S. White, “Harmonisation of criminal law under the first pillar”, ELRev 31, February 2006, pp. 81/92.
\textsuperscript{114} Opinion of the Advocate General Mazak, delivered on 28 June 2007, paragraph 2.
\textsuperscript{115} OJ 2005 L 255, p. 164.
\textsuperscript{116} Case C-440/05, Commission v. Council, judgment of 23rd October 2007, nyp.
measure for combating serious environmental offences, the Community legislature may require the Member States to introduce such penalties in order to ensure that the rules which it lays down in the field are fully effective. But it restricts notably its scope. First of all, the insistence on the environmental protection objectives of the measure strengthen the doubts concerning the possibility to apply the ruling on C-176/03 to areas not connected at all with the environment, e.g. protection of intellectual property rights or sanctions against employers for illegal employment. Advocate General Mazak has been more clear on this point and, contrary to the arguments supported by the Council and the 20 Member States intervening in the proceedings, claiming the Court reasoning in Case C-176/03 to be restricted to the specific field of the environment, shared the Commission views that “[…] there is indeed no sound basis for regarding the power to provide for criminal measures as being limited in that way”.

Secondly and more importantly, the Court firmly states that “contrary to the submission of the Commission”, the determination of the type and level of the criminal penalties to be applied does not fall within the Community’s sphere of competence.

It has to be admitted that the provisions attacked in this case were more detailed than the ones questioned in case C-176/03. Even so, it is undeniable that the Court’s decision of 23 October 2007, though it annuls the measure, restrains considerably the Community competence to impose criminal penalties. The consequences of this ruling will not take long and Member states are expected shortly to use the ruling on to challenge recent proposals presented by the Commission, “curbing the Commission ambitions in criminal law”.

It might not be completely casual that, if the Court’s ruling in case C-176/03 was delivered right after the negative referenda that blocked the process of ratification of the Constitutional treaty, the decision on Case C-440/03 has been rendered barely a few days after the adoption of the Reform Treaty, whose modifications will put an end to the problem of the “complementary method” and the legal basis conflicts between pillars. This new political context, together with the important participation of Member States at the proceedings and the reticence shown by certain Members States during the negotiations of the Reform treaty towards the Court’s jurisdiction in criminal matters, could explain the self-restraint of the Court. It is not completely true however that the issue will no longer be problematic once the pillars structure is abolished. The “battle of pillars’ is no more than a “battle of policies”, and the choice of one legal basis or another, even if both are in the EC treaty, would remain significant. Moreover when one of this legal basis gives more place to differentiation than the other.

Despite this rather restrictive follow-up, it remains a fact that the Court in Criminal sanctions against the environment used the Titanium Dioxide criteria for the first time “as a conduit for exercising its jurisdiction over the choice of pillar in cases where it would be possible to

117 Paragraph 48 of the judgment.
118 Opinion delivered on 28 June 2007.
119 Paragraph 70 of the judgment.
promulgate the measure under different treaty bases across different pillars”. The legal boundary between the first and the third pillar would be determined according to the “centre of gravity” rule and according to general principles of Community law. But this new approach to inter-pillar litigation does not always operate in favour of the Community; it can also lead in the opposite direction, as the judgments in the PNR case illustrates.

In this case, the measures at stake were Council Decision 2004/496/EC of 17 May 2004 on the conclusion of an Agreement between the European Community and the United States of America on the processing and transfer of PNR data by Air Carriers to the United States Department of Homeland Security and the Commission Decision on the compliance of the PNR system with the requirements of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. These norms were the Community answer to the troubles that carriers operating from the EU to the United States were experiencing as a consequence of the legislation passed by the latter following the terrorist attacks of 11 September 2001 and the possible conflict of this legislation with Community law. The Commission had found that air carriers’ activities clearly fall within the scope of Community law. As it was their activities involved, and not the activities of the Member States, the PNR data transferred to the American Bureau of Customs and Border protection therefore fell within the scope of Directive 95/46/EC. But the Court was of a different opinion and concluded that these activities constituted processing operations concerning public security and the activities of the State in areas of criminal law, and therefore out of the scope of Community law.

The judgments presented above illustrate that the demarcation of competences between the first and the third pillar is not clear-cut. The issue of the legal basis is a fundamental one as it settles decisive questions regarding both the adoption of the measure concerned (vote at the Council, role of the different institutions in the decision-making procedure) and its subsequent enforcement (legal effects of the instruments, jurisdiction of the Court). However, the action of the European judiciary is also rendering the disparities between Community and Union law less visible. The “robustness and power of attraction of the first and oldest pillar” has proven to be true. Moreover, the legal logic that induced the Court of Justice to emphasise the specificity of the Community legal order in the early 70s is now guiding the Court’s reasoning within the supposedly intergovernmental pillar, which is no longer made of “legal granite but of easily sculpted sandstone”. By extending the duty of loyal cooperation to third pillar matters, the Pupino judgment is a seminal example of this tendency.

125 O.J. 1995 L 281, p. 31.
126 Paragraph 56 of the judgment.
127 Legal basis disputes are not limited to First/Third pillar relations. Case C-91/05, still pending, illustrates equally the potential controversies between the Community Pillar and the Common Foreign and Security Policy. However, this issue would not be covered by this work.
129 Ibid.
130 Case C-105/03. Criminal proceedings against Maria Pupino, judgment of 16 June 2005.
In this case, the Court was asked to rule on the effects of main third pillars instruments, i.e. framework decisions. As a preliminary remark, it must be remembered that Article 34 (2) (b) EU explicitly excludes the direct effect of these instruments. This is its main distinguishing feature from Community directives deriving from the inter-governmental nature of cooperation between Member States in the context of Title VI EU. The Court would however override this obstacle, preferring to focus on the wording of the article which emphasizes the similarities with Community instruments in Article 249 EC. Therefore it found that, given the identical binding effect of both types of provisions and the need to ensure the useful effect of EU law, nothing prevents the Court from recognizing the duty on national authorities, and particularly national courts, to interpret national law in conformity.131

The Court would also reject the argument raised by the Italian and United Kingdom governments that, “unlike the EC treaty”, the Treaty on European Union does not contain any duty of loyal cooperation similar to that laid down in Article 10 EC. Following the Advocate General’s Opinion, the Court said that:

“It would be difficult for the Union to carry out its task effectively if the principle of loyal cooperation requiring in particular that Member States take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under European Union law, were not also binding in the area of police and judicial cooperation in criminal matters, which is moreover entirely based on cooperation between the Member States and the institutions […]”.132

The nature of third pillar instruments will be questioned again in the EAW case.133 It had been argued that the type of instrument chosen, a framework decision, was not adequate appropriate, inter alia, because the EAW is not an approximation of pre-existing national laws but a newly created concept.

The Court refuses to follow the restrictive views concerning third pillar legal instruments, and continuing its proactive reasoning in Pupino, it interprets extensively the material scope of framework decisions in parallel to their Community homologues, the directives.134

On this point it is worthwhile referring to the reasoning of the Advocate General Ruiz Jarabo Colomer on his opinion in this case, who clearly stated that the Court’s ruling in Pupino, “by transferring to framework decisions certain aspects of the first pillar and a number of the parameters specific to directives”, had confirmed the “vocation communautaire” of third pillar provisions.135 By referring to the Court’s judgment in Van Gend & Loos, Costa v. ENEL and Pupino in the same paragraph, Advocate General Ruiz-Jarabo Colomer promotes the latter to a constitutional status, and thus reveals the crux of the issue: the need to ensure the primacy of a branch of European law which will gradually shift from being intergovernmental to being part of the sui generis Community legal order.136 But if the Court wants to preserve EU law from national inquiries and to ensure its primacy and the

131 See paragraphs 33 and 34 of the judgment.
132 Paragraph 42 of the judgment.
133 Case C-303/05, Advocaten voor de Wereld VZW v. Leden van de Ministerraad, judgment of 3rd May 2007, nyp.
134 E. Sanfrutos Cano, op.cit.
135 Paragraph 43 of the Opinion.
136 See for further developpement E. Sanfrutos Cano, op.cit.
uniformity of its application, some “compensatory measures” will be needed, in particular concerning the protection of human rights and fundamental freedoms within the AFSJ.

B Liberty v. security

The implementation of the AFSJ implies a constant need to balance between the imperatives of the maintenance of a high level of security and the need to ensure an adequate standard of protection of fundamental rights and freedoms of the individual. The Court is called to play an important role in the safeguard of such equilibrium. Notwithstanding, the Court showed initially a certain tendency to take shelter in formal considerations and did not dare to undertake this substantive control.\(^{137}\) The resistance of national constitutional courts,\(^ {138}\) doubtful about “the EU’s ability to provide a degree of protection of the principles of the rule of law and human rights, at least equivalent to that of the most elevated standards of the relevant national communities”,\(^ {139}\) and the fears of external censure by the European Court of Human Rights\(^ {140}\) finally encouraged the Court to overcome its past reticence and finally assume its new role as “human rights judge”.\(^ {141}\)

An analysis of the substantive case law of the European Court within this field illustrates however that if the Court has adopted an approach very favourable for the individual when free movement is at stake, as the *ne bis in idem* saga illustrates, it has shown more deference for the action of the legislator when judging the validity of Community or Union instruments within the field of the AFSJ with regards fundamental rights.

The *ne bis in idem* principle (prohibition of double jeopardy) is recognised by most criminal national systems and it is also enshrined as an individual right in some international legal instruments.\(^ {142}\) It has to be noted that in all this cases the principle is exclusively recognised in its national dimension, without any trans-national application.\(^ {143}\) Article 54 of the Convention on the implementation of the Schengen Agreement (CISA) establishes the trans-national application of this principle within the Contracting parties. Incorporated in Title VI of the treaty of Amsterdam, the Court has jurisdiction to rule on the validity and interpretation of this provision.

The *ne bis in idem* rule constitutes “a principle of judicial protection for the citizen against the *ius puniendi* of the State, being part of the principles of due process and fair trial”.\(^ {144}\) Its trans-national application can reveal however quite problematic, as the scope can be different

\(^{137}\) See *Commission v. Council*, Passengers name record, op. cit.


\(^{140}\) ECtHR *Bosphorus v. Ireland*, op.cit.


\(^{142}\) e. g. Article 14(7) of the International Covenant on Civil and Political Rights.


\(^{144}\) J.A. Vervaele, op.cit.
from one criminal system to another, the definition of *idem* and *bis* varying considerably. The contribution of the Court through the preliminary rulings procedure has been decisive for the configuration of a general principle of *ne bis in idem* within the AFSJ.

Its first decision on Article 54 CISA was in joined cases C-187/01 and C-385/01, *Criminal proceedings against Hüseyin Gözutok and Klaus Brügge*. The Court, invoking the principle of mutual trust and refusing any need for previous harmonisation, would defend a broad interpretation of the concept of final decisions in criminal proceedings, and subsequent case-law confirm this extensive interpretation of “*idem*” and “*bis*” within Article 54 CISA.

The “pro free-movement” approach of the Court towards the *ne bis in idem* principle ameliorates the position of the individual face to the *ius puniendi* of the State. The same reasoning of the Court, favouring mutual trust and refusing the need of prior harmonisation, can have the opposite result, as the Court’s decision on the European Arrest Warrant case exemplifies.

A preliminary reference made by the Belgian *Cour d’Arbitrage*, asking the Court to rule on the validity of the EAW Framework Decision, allowed the Court to analyse the compatibility of the instrument, and in particular of the non appliance of the double criminality rule to an exhaustive list of offences, with Article 6(2) EU, and more specifically with the principle of equality and with the principle of legality in criminal proceedings. The Court would arrive to the same conclusion than the Advocate General in its Opinion and states, to the disenchantment of the more fervent detractors of the EAW, that the Framework Decision does not infringe Article 6 (2) EU. Without calling into question the rationale of the judgment, it remains a fact that the non application of the double criminality rule lessens the protection of the individual, and enhances the importance of prior harmonisation of substantial and procedural norms.

Finally, the first annulment action against an instruments adopted under Title IV EC constitutes another example of deference by the European judiciary towards the action of the legislator in a field such as the AFSJ, where consensus is highly problematic. The Court, in a judgment of 27 June 2006, dismisses the claims against the Family Reunification Directive and, pushing forward the interpretation of the controversial articles, ruled on its compatibility with fundamental rights and in particular, with article 8 of the ECHR. The rationale behind this judgement, that puts the accent again on the preliminary references procedure, allows us to close this section by connecting the substantial case-law with the ideas supported in the first part of this work: the Court’s conception of the AFSJ as a decentralised system of judicial supervision where national courts should be place at the firing line.

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147 Case C-303/05, *Advocaten voor de Wereld VZW v. Leden van de Ministerraad*.
IV Conclusions

The jurisdiction of the Court under the AFSJ, though limited, has allowed it to influence the progressive instauration of an area of freedom, security and justice. But its case law over this field, both on institutional and substantial aspects, goes further the thematic of this area and brings to the forum 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, raising important concerns about the respect of the right to judicial protection and questioning the European Union as a 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 Reform treaty highly regrettable. Until 2013, judicial supervision under the AFSJ will remain incomplete. Under the guidance of the general principles of EU law, and more particularly fundamental rights, might the Court be able to fill this gap?