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VI.

Nikolaos Lavranos, Florence*

In dubio pro first pillar: Recent developments in the delimitation of the competences of the EU and the EC

(1) **Introduction**

One of the main innovations of the Maastricht Treaty[1] that entered into force back in 1993 was the creation of the so-called ***pillar structure*** that supposedly resembled a Greek temple.[2] This pillar structure neatly separated the newly established intergovernmental competences of the EU in the second pillar (Common and Foreign and Security Policy, CFSP) and third pillar (Justice and Home Affairs, JHA) from the original supranational EC competences in the first pillar.

The aim of the Member States by using this structure was to avoid that supranational characteristics, such as supremacy, direct effect and judicial review, which have been firmly established by the European Court of Justice (ECJ) regarding Community law, i.e. the first pillar, would also be applied to the second and third pillars. Consequently, the ***jurisdiction of the ECJ*** was fully excluded regarding the second pillar and substantially limited regarding the third pillar. This strict separation worked well in those days as only one cross-pillar case, the *Transit visa*[3] case, made it before the ECJ.

However, with the Amsterdam Treaty that entered into force in 1999,[4] the strict separation between

the pillars was to some extent relaxed, in particular because parts of the third pillar were transferred to the first pillar – albeit under a special regime.[5] Moreover, closer institutional and substantive overarching linkages between the first and third pillar were introduced. Also, the interaction between the second and first pillar has becoming more intense recently. This is in particular due to the increasing importance of Article 301 EC,[6] which functions as a bridge between the second and first pillar when it comes to the adoption of combined measures, such as in the case of the implementation of UN sanctions through CFSP Common Positions and EC Regulations.

In other words, the fairly simple Greek temple was substituted by a complex Gothic cathedral, with a main middle part (the first pillar) and several components at both sides connected by various alleys (second and third pillars).[7] This allowed supranational characteristics to permeate into the third pillar, while the second pillar still remained largely unaffected by this closer cross-pillar interaction.[8]

The Member States still found this situation advantageous as it allowed them to adopt far-reaching measures based on the second and third pillars without having to fear serious interventions by the European Parliament (EP), the ECJ or the Commission. This was particular convenient for adopting a massive amount of far-reaching measures in the area of police and judicial co-operation as well as a wide range of criminal law harmonizing legislation.

The European Commission and the EP increasingly became aware that this development could ***undermine their existing powers*** under the first pillar. Accordingly, in recent times the number of cases that have been brought by those institutions challenging the legal basis selected by the Council has steadily increased. All these cases essentially revolve around the delimitation of the competences of the EC and the EU. The crucial provision, which enabled the ECJ to overcome its restricted jurisdiction in the second and third pillars and thus play a central role in these cross-pillar cases, is ***Article 47 EU***. The provision reads as follows:

«*Subject to the provisions amending the Treaty establishing the European Economic Community with a view to establishing the European Community, the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community, and to these final provisions, nothing in this Treaty shall affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying or supplementing them*». [emphasis added]

This provision essentially protects the EC Treaty, i.e. the first pillar, from being affected by measures adopted in the second and/or third pillars. Moreover, it is important to note in this context Article 220 EC,[9] which states that it is the task of the ECJ to ensure that the law is observed, while Article 46 EU[10] explicitly includes Article 47 EU into the ECJ's jurisdiction.

The main purpose of this contribution is to present some of the highlights of the ECJ's jurisprudence on Article 47 EU – without, however, being able to be exhaustive as this would go beyond the scope of this contribution. The contribution is structured as follows: The next section will examine as a background the jurisprudence of the ECJ on Article 47 EU relating to third pillar measures. This is followed by an analysis of the more recent second pillar cases involving Article 47 EU. Finally, a commentary will wrap this contribution.

(2) **The third pillar cases on Article 47 EU**

In a first step the ECJ had to establish its jurisdiction to ***review indirectly third pillar measures*** as back in the time of the Maastricht Treaty, the ECJ's jurisdiction did not extent to review Joint Actions adopted under former Article K EU.

(a) The Transit visa case

In the *Transit visa*[11] case, the Council had adopted a Joint Action based on former Article K(3) EU that harmonized the Member States policy regarding the requirements of airport transit visas for third state nationals. The Commission argued that the correct legal basis should have been former Article 100c EC that provided for a legal basis for measures regarding the Schengen *aquis*.

The ECJ established its jurisdiction by arguing that it was ***not reviewing the Joint Action as such***, but that it was only ascertaining whether the Joint Action affects the powers of the Community under Article 100c EC. If it appears that the Joint Action should have been adopted on the basis of Article 100c EC, the ECJ would have to annul it.[12] The crucial test is thus whether a measure could have been based on a legal basis of the EC Treaty, i.e. ***whether the EC has competence*** in the particular policy area in question.

If that is the case, the measure must be adopted on the EC Treaty legal basis. In this way, the ECJ established a ***priority of the EC Treaty over the EU Treaty*** in the sense that a possible EC Treaty legal basis must be selected. By the same token, the ECJ also elegantly established its juris-

diction to indirectly review the compatibility of third pillar measures with the EC Treaty, which otherwise was not possible.

In substance, the ECJ concluded that the Joint Action on transit visas did not fall within the ambit of Article 100c EC and therefore did not encroach upon the competence of the EC.

(b) The first criminal enforcement of environmental law case
More recently, the ECJ was confronted again with the issue of selecting the correct legal basis, this time regarding the requirement of Member States to impose ***criminal law penalties for serious violations of EC environmental legislation***.[13]

In reaction to a serious accident with a large oil tanker, the Commission had proposed legislation based on Article 175 EC that would require Member States to punish serious violations of EC environmental legislation by criminal penalties. During the legislative process, the Council changed the legal basis and selected Articles 29, 31(e) and 34(2)(b) EU for the adoption of a Framework Decision. The Commission objected from the beginning against the change of legal basis by arguing that it should have been adopted on the basis of Article 175 EC, which provides for the competence of the EC to adopt legislation in the area of environment. Accordingly, the Commission brought the case before the ECJ.

Referring to its *Transit visa*-judgment, the ECJ restated that it is its task to ensure that third pillar acts do not encroach upon the competences of the EC. The ECJ also reiterated that according to Article 47 EU «*nothing in the Treaty on European Union is to affect the EC Treaty. That requirement is also found in the first paragraph of Article 29 EU, which introduces Title VI of the Treaty on European Union*».[14] The ECJ continued its analysis by stating that the ***choice of the legal basis*** for a Community measure must rest on objective factors which are amenable to judicial review, including in particular the ***aim and the content of the measure***.[15]

The ECJ concluded that on account of both the aim and content, the Framework Decision has as its main purpose the ***protection of the environment*** and thus could have been properly adopted on the basis of Article 175 EC.[16] Consequently, since according to the ECJ, the Framework Decision is indivisible, the whole measure infringed Article 47 EU as it encroached upon the environmental law powers which Article 175 EC confers to the EC.[17]

(c) The second criminal enforcement of environmental law case
In a subsequent related case, the issue arose whether the Framework Decision regarding the strengthening of the criminal law framework for the enforcement of the law against ship-source pollution should have been based on Articles 31(1)(e), 34(2)(b) EU or rather on Article 80(2) EC, which provides a competence in ***(maritime) transport matters*** for the EC.[18]

The ECJ started off by emphasizing again that «*under Article 47 EU, none of the provisions of the EC Treaty is to be affected by a provision of the EU Treaty*»[19] It is interesting to note that the ECJ this time used the expression «none», rather than «nothing». However, in the French language version the term «*aucune*» is used in both the first and second criminal enforcement of environmental law cases, so the difference in terminology is probably not important. In any case, in a first step the ECJ concluded that in the absence of any explicit limitations in Article 80(2) EC regarding the nature of the specific common rules, the EC is competent to lay down, *inter alia*, «measures to improve transport safety» and «any other appropriate provisions» in the field of maritime transport.[20]

In a second step, despite the fact that the EC has – in general – no competence to lay down criminal law or criminal procedural rules, the ECJ accepted that the EC may adopt legislation that imposes ***effective, proportionate and dissuasive penalties*** in order to ensure the *effet utile* of Community law.[21] In this context, the ECJ determined that «*[…] 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*».[22] [emphasis added].

But the ECJ also concluded that «*[…] the determination of the **type and level of the criminal penalties** to be applied does not fall within the Community's sphere of competence*».[23] Thus, as far as these provisions are concerned Article 47 EU was not infringed.

In sum, the ECJ is prepared to go a long way in protecting the competence of the EC within the

first pillar. Only, in cases that clearly fall in the exclusive competence of the EU or rather the Member States acting together within the intergovernmental framework of the EU, such as for instance determining the type and level criminal penalties, is the ECJ ready to allow the use of a third pillar legal basis.

(3) **The second pillar cases on Article 47 EU**

In contrast to the third pillar cases, second pillar cases involving Article 47 EU were only very recently adjudicated by the European courts. Presumably, the main reason for this is the ***generally excluded jurisdiction*** of the ECJ and CFI regarding the second pillar as enshrined in Article 46 EU. This makes it extremely difficult for applicants to convincingly construct their arguments in a manner that would overcome the exclusion of the jurisdiction of the ECJ and CFI.[24]

(a) The OMPI case

The first second pillar case in which the issue of Article 47 EU was explicitly discussed appears to be the *Organisation des Modjahedines du peuple d'Iran (OMPI)* case concerning the implementation of UN Security Council sanctions on the freezing of financial assets of suspected terrorists decided by the CFI.[25]

The applicant OMPI argued that the basing of the contested Common Position on CFSP provisions is illegal. Accordingly, in the light of, *inter alia*, the primacy of Community law as enshrined in Article 47 EU, OMPI claimed that the CFI is competent to declare illegal an act adopted on the basis of CFSP provisions.

From the outset the CFI affirmed that CFSP Common Positions are generally outside the jurisdiction of the CFI and thus cannot be reviewed.[26] However, that is not the end of the story. The CFI found a way of accepting its jurisdiction in this case by the following reasoning:

«*56 […] the Court of First Instance has jurisdiction to hear an action for annulment directed against a Common Position adopted on the basis of Articles 15 EU and 34 EU only strictly to the extent that, in support of such an action, the applicant alleges an* ***infringement of the Community's competences*** *(Selmani v Council and Commission, paragraph 45 above, paragraph 56). The Community Courts have jurisdiction to examine the content of an act adopted pursuant to the EU Treaty in order to ascertain whether that act affects the Community's competences and to annul it if it should emerge that it ought to have been based on a provision of the EC Treaty (see, to that effect, Commission v Council, paragraph 40 above, paragraphs 16 and 17, and Case C-176/03 Commission v Council [2005] ECR I-7879, paragraph 39; Segi and Others v Council; Gestoras Pro Amnistía and Others v Council, paragraph 45 above, paragraph 41; see also, by analogy, Case C-124/95 Centro-Com [1997] ECR I-81, paragraph 25).*

57 In the present case, to the extent that the applicant alleges misuse of powers on the part of the Council acting in Union matters in disregard of the Community's competences, in order to deprive it of all forms of judicial protection, the present action therefore comes within the jurisdiction of the Community Courts». [emphasis added].

In other words, even though the jurisdiction of the CFI and ECJ regarding second pillar Common Positions is generally excluded, exceptionally, this may be overcome by relying on Article 47 EU as a tool for opening up an otherwise closed avenue. The CFI concluded that the Council used the appropriate legal basis of Articles 301, 60 EC for the adoption of the EC law measures implementing the CFSP measures. Therefore, according to the CFI, the contested Common Position did not infringe the Community's competence.[27] But in substance the CFI annulled, in so far as it concerned OMPI, the relevant Council Decision 2005/930/EC of 21 December 2005 implementing Article 2(3) of Regulation (EC) No 2580/2001 on the grounds that minimum procedural rights of OMPI were infringed by the EC.[28]

(b) The ECOWAS case

Most recently, another case involving the choice between second and first pillar legal basis came before the ECJ. The case concerned the issue whether the contribution of the EC/EU to help ***combating the spread of small arms*** and light weapons within the framework of the Cotonou Agreement, the Economic Community of West African States (ECOWAS) and the West African Economic and Monetary Union (WAEMU) should be based on second pillar measures or on the EC's ***competence for development cooperation*** (Article 177 EC).[29]

The Council adopted a CFSP Council Decision and CFSP Joint Action to that effect, while the Commission argued that the measures should have been adopted on the basis of Article 177 EC. Therefore, according to the Commission, the EC's competence has been encroached upon by the adoption of the second pillar measures.

(aa) The Opinion of AG Mengozzi

As a preliminary point regarding the admissibility of the case, AG *Mengozzi* concluded that

«*31. Following the example of what has been inferred from Articles 46(f) and 47 EU with regard to the judicial review of acts of the Council adopted on the basis of the present Title VI of the EU Treaty (the third pillar), it is therefore the task of the Court to ensure that acts which, according to the Council, fall within the scope of Title V [i.e. second pillar] of the EU Treaty do not encroach on the powers conferred by the EC Treaty on the Community*».[30]

In this way AG *Mengozzi* drew a ***parallel between the second and third pillar cases***, thereby, apparently, considering the situation of both pillar cases to be similar vis-à-vis Article 47 EU.

Turning to the interpretation of Article 47 EU, AG *Mengozzi*, first, recalled the jurisprudence of the ECJ in the third pillar cases discussed above. Accordingly, no provision of the EC Treaty can be affected by a provision of the EU Treaty.[31] Moreover, the function of Article 47 EU is to protect the competences which the provisions of the EC Treaty confer on the Community against any encroachment by acts which are claimed by the Council to fall within the scope of the second and third pillars.[32]

The next issue that was tackled by the AG was the argument raised by the UK that because of the concurrent or ***complementary nature of the Community's competences*** by comparison with those of the Member States in the field of development cooperation, CFSP measures could never encroach upon the Community's powers in the field of development cooperation. In other words, according to the UK, Article 47 EU could only be infringed in cases in which an exclusive competence of the EC is at stake. However, AG *Mengozzi* rejected this argument since «*[…] Article 47 EU makes no gradation in the protection it confers on the provisions of the EC Treaty according to the distribution of competences between the Member States and the Community and hence the nature of the competences assigned to the Community. Article 47 EU therefore appears to rest on the presumption that* ***all the competences*** *given to the Community, irrespective of the distribution that exists between the Community and the Member States,* ***deserve to be protected*** *against any encroachment on the part of the European Union by adopting a measure based on Titles V and/or VI of the EU Treaty*».[33]
Thus, he concluded:
«*[…] the nature of the competence given to the Community and the distribution of competences between it and the Member States are immaterial for the purpose of applying Article 47 EU, provided that competence exists. However, it cannot be denied that Community competence in the field of development cooperation exists, as shown by the provisions of Title XX of the EU Treaty.* [emphasis added].[34]
[…]
116. As already outlined above, Article 47 EU aims to keep watertight, so to speak, the primacy of Community action under the EC Treaty over actions undertaken on the basis of Title V and/or Title VI of the EU Treaty, so that if an action could be undertaken on the basis of the EC Treaty, it must be undertaken by virtue of that Treaty.» [emphasis in the original].

In short, according to AG *Mengozzi*, Article 47 EU applies in all cases in which EC competence exists, irrespective of the fact whether the competence is exclusive or shared. Moreover, he explicitly emphasized the primacy of EC legal basis over second and third pillar legal basis.

However, this case is particularly complicated compared to the other cases discussed above because the measures in question do not fall clearly within either CFSP or development cooperation. AG *Mengozzi* approached this problem as follows:
«*173. Where a measure is likely to fall within the scope of the aims of the CFSP and also to contribute to the social and economic aims of the Community development cooperation policy, it is necessary, having regard to the content and purpose of that measure, to seek its* ***main aim*** *in order to secure a balance between the observance of Article 47 EU and of Article 5 EC.*
174. That approach was taken by the Court in Case C-176/03 Commission v Council, in which, it will be recalled, the Court annulled Articles 2 to 7 of Framework Decision 2003/80/JHA although they entailed partial harmonisation of the criminal laws of the Member States in so far as an examination of their aim and content had shown that they had «as their main purpose the protection of the environment». [emphasis in the original].
175. Reading Articles 47 EU and 5 EC in conjunction must also lead to the conclusion that, if a European Union action pursues the main aim of preserving peace and strengthening international security (and a fortiori if that is the exclusive aim) while at the same time contributing indirectly to the social and economic development of developing countries, any encroachment on the Community's competences is precluded. [emphasis in the original].
176. On the other hand, if the two aims of the measure are indissociably linked, without one

being secondary and indirect in relation to the other, the special nature of the relationship between the European Union and the Community should lead to priority being given to the Community legal basis because, in the context of that relationship, it seems to me particularly difficult, if not impossible as the law of the European Union stands at present, to contemplate recourse to a dual legal basis without breaching Article 47 EU». [emphasis added]

In other words, the conclusion whether the EC competence has been encroached upon in this case depends on the identification of the main aim of the measures in question. However, if a main aim cannot be clearly identified, but instead two aims are considered to be equally pursued, than preference must be given to the EC legal basis. After a long and detailed analysis AG *Mengozzi* concluded that
«*212. As we have found, the purpose of the contested decision, in the light of the contested Joint Action, is, at least mainly, of a security nature. Moreover, the fact that, as the Commission submits, the contested decision makes a contribution to institutional strengthening, in particular by setting up a small arms unit in the ECOWAS Technical Secretariat, does not invalidate that assessment, since the strengthening of public administrations, whether national, regional or international, cannot constitute an end in itself but must, in order to fall within development cooperation, pursue a development objective.* [emphasis in the original].
213. In those circumstances, the contested decision does not fall within the scope of development cooperation but pursues, at least principally, the objectives set out in Article 11(1) EU, in particular those of preserving peace and strengthening international security, objectives which, as the Commission concedes, do not correspond to any of the aims assigned to the Community. [emphasis in the original].
[…]
221. For all those reasons I consider that the contested decision could not have been adopted by the Community pursuant to Title XX of the EC Treaty [i.e. Article 177 EC]. Furthermore, the contested Joint Action cannot be declared inapplicable in the present case, as it did not authorise the Council to adopt the contested decision in breach of Article 47 EU. Consequently, I propose that the Court dismiss the action».

(bb) The judgment of the ECJ
The Grand Chamber of the ECJ started off its analysis by declaring without much ado that it has jurisdiction to consider the action for annulment brought by the Commission under Article 230 EC and, in that context, to consider the pleas invoked in accordance with Article 241 EC in so far as they allege an infringement of Article 47 EU.[35] In addition, like the AG, the ECJ explicitly made the caveat that CFSP measures can only be challenged by claiming an infringement of Article 47 EU. The ECJ also ***sided with the AG*** regarding the functions of Article 47 EU by repeating 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*».[36]

What is interesting to note in this context is that the ECJ adds an explanatory note by describing the ***function of Article 47 EU*** as «*to* ***maintain and build on the acquis communitaire***». This seems to be a softer description of the function of Article 47 EU compared to the rather tough and straightforward statement used in the other cases that «nothing» or «none» of the EU provisions «may encroach upon the competences of the EC». It remains unclear as to the consequences this different use of terminology may have.

In a second step, the ECJ also firmly rejected the argument of the UK that the invocation of Article 47 EU depends on the fact whether the competence in question is exclusive to the EC or shared with the Member States.[37] Indeed, the ECJ considers it «unnecessary» to examine whether the contested measure prevents or limits the exercise the Community's competence.[38]

In a third step, the ECJ examined whether the contested measures fall within CFSP, within development cooperation or both. At the outset, however, it must be noted that, in the view of the ECJ and unlike in the case of the first pillar, Article 47 EU excludes the possibility that a measure can be simultaneously based on both a CFSP and EC Treaty legal basis. The ECJ explained this as follows:
«*76 However, under Article 47 EU, such a solution is impossible with regard to a measure which pursues a number of objectives or which has several components falling, respectively, within development cooperation policy, as conferred by the EC Treaty on the Community, and within the CFSP, and where neither one of those components is incidental to the other*».

Thus, it is of crucial importance to determine the main aim of the measure in question. If it appears

impossible to identify one main aim, because two or more aims are pursued at the same footing covering second and first pillar aspects, the measure must be adopted on the basis of the first pillar. This confirms the position adopted by AG *Mengozzi* in para 176 of his Opinion quoted above.

Finally, after an extensive analysis, the ECJ concluded – in contrast to the AG – that the measures pursue two equal aims falling within the scope of both CFSP and development cooperation.[39] Consequently, the Council infringed Article 47 EU by adopting the contested decisions on the basis of the second pillar provisions, even though they also falls within Article 177 EC, i.e. within the development cooperation competence of the EC. Hence, the ECJ annulled the contested decision.

(4) **Commentary**

This brief review of the jurisprudence of the ECJ and CFI on Article 47 EU highlights the following aspects.

First, it appears that both the ECJ and CFI interpret Article 47 EU broadly, which enables them to overcome the limitations of their jurisdiction regarding second and third pillar measures. But the ECJ and CFI use a detour by focusing on the question whether the contested measure could have been adopted on a first pillar legal basis, rather than reviewing the validity of the second or third pillar measures as such.

In this way the ECJ firmly established its ***indirect jurisdiction*** regarding second and first pillar measures for the sake of effectively protecting the competences of the EC conferred to it by the EC Treaty. This also conveniently enables the ECJ to protect the scope of its jurisdiction regarding second and third pillar measures. In view of the fact that the Council continues to adopt far-reaching measures in the sensitive policy areas of the second and third pillar, it is important to ensure that ***judicial review*** is possible. Indeed, by using vague terms such as «main» aim, the ECJ is able to determine with quite some flexibility and on the basis of its own interpretation whether or not a measure could have been reasonably based on a first pillar legal basis. In this context, the ECJ's jurisprudence clearly exhibits a ***preference for first pillar legal basis*** as much as is reasonably possible. Besides, this preference or primacy of first pillar legal basis ensures that the Commission and EP are as much as possible involved in the legislative process, in particular by the generally applicable co-decision procedure (Article 251 EC), which is not applicable in the second and third pillars. In other words, the ECJ has constructed its jurisdiction in a way that allows for maximum permeation of Community law characteristics into the second and third pillars. Indeed, it seems to me that the ECJ has in fact been applying the tool of «anticipatory interpretation» by taking into account the effects of the entering into force of the European Constitution or rather the Lisbon Treaty, which – if the Lisbon Treaty actually enters into force – will result in the transfer of the third pillar into the first pillar, thereby eliminating the special regime under which the third pillar so far has been operating.

Second, even though the ECJ and AG throw the ***second and third pillar cases*** in the same basket by referring simultaneously to both types of cases and by drawing parallels between them, the ECJ seems to be less bold and softer regarding the function of Article 47 EU. Whereas in the third pillar cases, the function of Article 47 EU is to ensure that nothing encroaches upon the competences of the EC, with regard to second pillar cases the function of Article 47 EU is merely to «maintain and build on the *acquis communautaire*». The ECJ does not explain the reasons for this ***different use of terminology*** nor any possible consequences that may result from this. If one were to speculate, a reason could be found in the fact that the jurisdiction of the ECJ is completely excluded in the second pillar, whereas it exists – albeit with limitations – in the third pillar. Another related reason could simply be the fact that the second pillar policy area is more sensitive and closer to security and defence issues, which apparently induces the ECJ to show more judicial restraint.

Third, it seems that the ECJ signalled to the Council and the Member States that they should not attempt to circumvent the – for them – more inconvenient and cumbersome first pillar procedures by trying to use second and third pillar legal basis. In this way, the ECJ is trying to ***curb the freedom of the Council*** and the Member States to choose a legal basis of their liking. Put differently, the Council and the Member States have to put considerably more effort and go through great lengths in order to successful argue that a certain measure could not *also* be based on a first pillar legal basis. Indeed, this exercise is becoming increasingly difficult since the competences of the EC continue to expand, supported to a significant extent by the jurisprudence of the ECJ. This is, for instance, illustrated by the fact that after the Commission won the first criminal enforcement of environmental law case it immediately announced

that it would propose similar criminal penalties legislation for several other policy areas.[40]

In this context it is important to recall the flat rejection by the ECJ of the UK's argument that an infringement of Article 47 EU can only take place in cases in which an exclusive competence of the EC is at issue. The ECJ emphasized that the ***mere existence of an EC competence*** is sufficient for a possible infringement of Article 47 EU – irrespective of the fact whether the competence at issue is exclusive, shared or indeed whether it has been exercised at all by the EC. This approach conveniently eliminates right from the beginning any long-winding discussions and difficult delimitation problems as to whether a certain competence is exclusive or shared.

Finally, the firm establishment of the preference or primacy of first pillar legal basis vis-à-vis second and third pillar legal basis seems to be also induced by an effort of the ECJ to ensure ***maximum consistency*** within the *aquis communitaire* as well as in relation to the other pillars. In other words, all measures that predominantly belong in a certain EC competence should also be adopted on the same legal basis and according to the ***same decision-making procedure***. This consistency aspect is highly important since the issues that need to be regulated increasingly cut across two or even more policy areas and are indeed often connected with each other. Therefore, preserving or at least promoting a high level of consistency ensures maximum overall effectiveness of the measures adopted. Moreover, the primacy of first pillar legal basis over second and third pillar legal basis also contributes to more convergence between related measures that are adopted on the basis of different pillars. Put differently, due to the primacy of the first pillar, second and third pillar measures must be complementary to the first pillar measures or otherwise an infringement of Article 47 EU is imminent.

In sum, the cases discussed in this contribution show that the issue of the correct choice of legal basis is not simply an academic exercise, but rather has fundamental ***institutional implications***. Therefore, the choice of the legal basis must take place on the basis of a careful and objective analysis in order to ensure that the fundamental decision-making rules as well as the existent balance of power are fully respected. Indeed, the jurisprudence of the ECJ on Article 47 EU illustrates that the pillar structure that was chosen back in the time of the Maastricht Treaty causes nowadays more problems and is more damaging for the Council and the Member States than in the past. In fact, by merging the third pillar with the first pillar, the Member States have basically acknowledged that the supranational Community law method is more efficient and thus to be preferred for the adoption of legislative measures. Not only does the use of qualified majority voting help in a union of 27 members, but also the full involvement of the Commission, EP and the ECJ ensures that sufficient ***democratic and judicial guaranties*** are in place – at least as far as third pillar measures are concerned.

Unfortunately, that cannot be said for the ***second pillar*** measures. Here the situation will remain critical and it can only be hoped that the Commission and the EP will continue to be vigilant and bring the relevant cases before the ECJ by relying on Article 47 EU in order to ensure that Community law will be fully protected. It is good to know that the ECJ is ready to adjudicate such disputes whenever possible in favour of Community law.

Who knows, may be that will help to dismantle over time the remaining second pillar, so that ultimately all European law is based on one legal foundation, namely, on supranational Community law, so that we could finally speak of one truly single European legal order.[41]

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[1] Treaty on European Union (Maastricht Treaty), 7.2.1992, entered into force on 1.11.1993, OJ, C 191, 29.7.1992.

[2] See eg: *Bruno de Witte*, The Pillar Structure and the Nature of the European Union: Greek Temple or French Gothic Cathedral?, in: *T. Heukels*, *N. Blokker*, *M. Brus* (eds.), The European Union after Amsterdam – A Legal Analysis, The Hague, Kluwer Law International, 1998, pp. 51-68.

[3] ECJ [1998] ECR I-2763 *Commission ./. Council*.

[4] Treaty of Amsterdam, 2.10.1997, entered into force on 1.5.1999, OJ, C 340, 10.11.1997.

[5] *Eckart Wagner*, The integration of Schengen into the Framework of the EU, 25 Legal Issues of Economic Integration, 1998, pp. 1-60.

[6] Article 301 EC reads as follows: «*Where it is provided, in a common position or in a joint action adopted according to the provisions of the Treaty on European Union relating to the common foreign and security policy, for an action by the Community to interrupt or to reduce, in part or completely, economic relations with one or more third countries, the Council shall take the necessary urgent measures. The Council shall act by a qualified majority on a proposal from the Commission*».

[7] *Bruno De Witte*, op. cit. (note 2).

[8] See generally: *Dawes / Lynskey*, The ever-longer arm of EC law: The extension of Community competences into the field of criminal law, 45 Common Market Law Review [2008] 131-158.

[9] Article 220 EC reads as follows: «*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*».

[10] Article 46 EU reads as follows: «*The provisions of the Treaty establishing the European Community, the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community concerning the powers of the Court of Justice of the European Communities and the exercise of those powers shall apply only to the following provisions of this Treaty:*
(a) provisions amending the Treaty establishing the European Economic Community with a view to establishing the European Community, the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community;
(b) provisions of Title VI, under the conditions provided for by Article 35;
(c) provisions of Title VII, under the conditions provided for by Articles 11 and 11a of the Treaty establishing the European Community and Article 40 of this Treaty;
(d) Article 6(2) with regard to action of the institutions, in so far as the Court has jurisdiction under the Treaties establishing the European Communities and under this Treaty;
(e) the purely procedural stipulations in Article 7, with the Court acting at the request of the Member State concerned within one month from the date of the determination by the Council provided for in that Article;
(f) Articles 46 to 53». [emphasis added]

[11] ECJ [1998] ECR I-2763 *Commission ./. Council*. See for a case-note: *Oliveira*, 36 Common Market Law Review [1999] 149-155.

[12] *Ibid*., paras 17, 18.

[13] ECJ [2005] ECR I-7879 *Commission ./. Council*. See for an analysis: *Herlin-Karnell*, Commission v. Council: Some reflections on criminal in the first pillar, 13 European Public Law [2007] 69-84.

[14] *Ibid*., para 38.

[15] *Ibid*., para 45.

[16] *Ibid*., para 51.

[17] *Ibid*., para 53.

[18] ECJ [2007] ECR I-9097 *Commission ./. Council*. See for an analysis: *Peers*, The European Community's criminal law competence: The plot thickens, 33 European Law Review [2008] 399-410; see also *Emmans*, Die strafrechtliche Annexkompetenz der EG umfasst nicht Art und Mass der einzuführenden Kriminalstrafen – sie besteht aber auch jenseits des Umweltrechts, ELR [2008] 103.

[19] *Ibid*., para 52.

[20] *Ibid*., para 58.

[21] *Ibid*., para 66.

[22] *Ibid*., para 69.

[23] *Ibid*., para 70.

[24] See generally on the second pillar: *Bono*, Some Reflections on the CFSP legal order, 43 Common Market Law Review [2006] 337-394.

[25] CFI [2006] ECR II-4665 *Organisation des Modjahedines du peuple d'Iran ./. Council*. See for a case-note: *Eckes*, 44 Common Market Law Review [2007] 1117-1129.

[26] *Ibid*., para 52.

[27] *Ibid*., para 59.

[28] See generally on the implementation of UN sanctions by the EC/EU: *Lavranos*, UN Sanctions and Judicial review, 76 Nordic Journal of International Law [2007] 1-17.

[29] ECJ (Grand Chamber) of 20 May 2008, C-91/05 *Commission ./. Council*.

[30] Opinion AG *Mengozzi* of 19 September 2007, C-91/05 *Commission ./. Council*.

[31] *Ibid*., para 91.

[32] *Ibid*., para 92.

[33] *Ibid*., para 98.

[34] *Ibid*., para 100.

[35] ECJ (Grand Chamber) of 20 May 2008, C-91/05 *Commission ./. Council*, para 34.

[36] *Ibid*., para 59.

[37] *Ibid*., para 60.

[38] *Ibid*.

[39] *Ibid*., paras 88-108.

[40] Communication from the Commission to the EP and the Council on the implications of the Court's judgment of 13 September 2005 (Case C-176/03 *Commission ./. Council*), Brussels, 24.11.2005, COM (2005) 583 final/2; and Communication from the Commission to the Council and EP on Implementing The Hague Program, Brussels, 28.6.2006, COM (2006) 331 final.

[41] See generally: *von Bogdandy*, The legal case for unity: The European Union as a single organization with a single legal system, 36 Common Market Law Review [1999] 887-910.