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SALVATION OUTSIDE THE CHURCH: JUDICIAL PROTECTION IN THE THIRD PILLAR AFTER THE *PUPINO* AND *SEGI* JUDGMENTS

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1. Introduction

Eight years ago, as the Treaty of Amsterdam entered into force, when assessing the judicial system of EU Justice and Home Affairs (JHA) law, I borrowed a well-known British political metaphor and suggested that there was “something of the night” about EU cooperation in that area.¹ Four British Home Secretaries later, is it time to conclude that the judicial system of the Third Pillar is “not fit for purpose”?² To answer this question, we need in particular to examine the EU courts’ case law concerning the Third Pillar – which since Amsterdam basically covers cooperation in policing and criminal law – as it has developed in the meantime, in the context of the adoption of much far-reaching legislation which affects the rights of individuals. The issue of effective judicial protection concerns not only the jurisdiction of the EU courts, but also the basic issues of the legal nature of the Third Pillar and the legal effect of Third Pillar measures. Substantively, the general principles of Community law have also made a significant contribution to ensuring the judicial protection of individuals.

This paper therefore considers the effectiveness of judicial protection within the Third Pillar as it has been shaped to date by, in particular, the Court of Justice. To this end, an analysis is presented here of the following subjects: the jurisdiction of the EU courts over Third Pillar matters; the legal effect of Third Pillar matters in the national legal order (and the corresponding obligation upon national courts to ensure effective judicial protection); and the application of the general principles of law to the Third Pillar.

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1. Peers, “Who Judges the Watchmen”, 18 YEL (2000), 337. This phrase was used to describe former Home Secretary (Justice and Interior Minister) Michael Howard. The “Watchmen” paper also discussed the Court’s jurisdiction over the First-Pillar aspects of EU Home Affairs law (immigration, asylum and civil law); for an updated analysis of this issue, see Peers, “The ECJ’s Jurisdiction over EC Immigration and Asylum Law: Time for a Change?” in Toner, Guild and Baldaccini (Eds.), *EU Immigration and Asylum Law and Policy*, (forthcoming in Hart, 2007).

2. This phrase has been used by the current (at time of writing!) Home Secretary, John Reid, to describe his scandal-prone department.

On the other hand, this paper does not examine a number of other topics relating to the Third Pillar: the substantive law of the Third Pillar;³ the controversial issue of the dividing line between the Third Pillar and the First Pillar (Community law);⁴ the issue of competence within the Third Pillar, except for the general principles related to competence;⁵ nor does it examine the “judicial architecture” of the Union as a whole, though this might have to be reconsidered if the Court’s jurisdiction over policing and criminal law were expanded.⁶

It will be clear from the following analysis that criminal law practitioners who are involved with the practical application of EU Third Pillar measures, and who are therefore directly concerned with the need to ensure effective judicial protection for their clients, need extensive knowledge of the detailed rules of Community constitutional law in order to consider fully the relationship between Third Pillar measures and national law and to work out the implications of this relationship for specific cases. It is not the objective of this paper to explain the basics of the EC legal order for this purpose; indeed I have assumed that the readers of this *Review* are (over-) familiar with these basic rules: I do hope the paper will be useful to criminal practitioners who need to (re-)familiarize themselves with the relevant EC constitutional law.

Of course, these issues would be moot (except, perhaps, as regards previously adopted measures) if the Third Pillar were integrated into the First Pillar, as provided for by the Constitutional Treaty,⁷ or by a provision of the current Treaty on European Union which provides a *passerelle* (or bridging clause) for this purpose.⁸ But with the Constitutional Treaty on ice and the fate of any possible replacement Treaty uncertain, as well as the recent rejection of the possible use of the *passerelle*,⁹ the particular aspects of judicial protection in relation to the Third Pillar could well remain a relevant topic for some time.

3. For a recent analysis see Peers, *EU Justice and Home Affairs Law* (OUP, 2006), 2nd edition, chs. 8–10.

4. See *ibid.* at pp. 390–397 and particularly: Case C-176/03, *Commission v. Council*, [2005] ECR I-7879; Joined Cases C-317 & 318/04, *European Parliament v. Council and Commission*, [2006] ECR I-4721; Case C-440/05, *Commission v. Council* and Case C-102/06, *Ireland v. European Parliament and Council*, pending.

5. See *infra* section 4.

6. On this issue, see the analysis in Peers, “The future of the EU judicial system and EC immigration and asylum law”, 7 EJML (2005) 263, which can be applied *mutatis mutandis* to the Third Pillar.

7. O.J. 2004, C 310. See now the IGC mandate agreed in June 2007.

8. See Art. 42 TEU.

9. See COM(2006)331, 28 Jun. 2006, and the Presidency Conclusions of the European Council of 14–15 Dec. 2006.

So for the time being the Third Pillar is governed by the system of judicial protection dating from the Treaty of Amsterdam; and, as we shall see, a detailed analysis of the case law to date indicates that, despite the best efforts of the high priests of European integration, the legal system established by the Third Pillar cannot sufficiently ensure an effective and uniform application of EU law or an adequate system of judicial control of the legality of EU measures. Such “salvation” can only be found within the core Community legal order.

2. Jurisdiction of the EU courts

Any possibilities of judicial protection by the EC courts in relation to the Third Pillar are limited to situations considered by the courts to fall within their Third Pillar jurisdiction. Here, two types of situation must be distinguished. The first concerns the courts’ Third Pillar jurisdiction *per se*; the second concerns the circumstances in which the courts’ *EC Treaty* jurisdiction is applicable to Third Pillar matters.

2.1. *Third Pillar jurisdiction*

The Court of Justice’s truncated jurisdiction over Third Pillar matters is established in Article 46 TEU, in the final provisions of the EU Treaty, which provides that the EC Treaty provisions concerning the powers of the Court of Justice shall apply to “provisions of Title VI [the Third Pillar], under the conditions provided for by Article 35”, as well as a number of other specifically defined categories, including the human rights clause (Art. 6(2) TEU) with regard to action of the institutions.¹⁰ So the next question is: what jurisdiction does Article 35 TEU confer upon the EU courts? This provision was inserted by the Treaty of Amsterdam, and considerably widened the EU courts’ prior jurisdiction over the Third Pillar.¹¹ First of all, the Court of Justice has jurisdiction, “subject to the conditions laid down in this Article, to give preliminary rulings on the validity and interpretation of framework decisions and decisions, on the interpretation of conventions established under this Title and

10. The other areas are: enhanced cooperation, the procedural stipulations concerning suspension from EU membership (Art. 7 TEU) and the final Title VIII TEU.

11. Previously the Court only had jurisdiction to receive preliminary rulings or dispute settlement actions concerning Conventions, if those Conventions made provision for this. Six criminal law or policing Conventions made such a provision, and four of these are in force. For details, see Peers (op. cit. *supra* note 3), 17–19.

on the validity and interpretation of the measures implementing them.”¹² This is subject to a declaration by a Member State that it accepts such jurisdiction:¹³ fourteen Member States have made such a declaration.¹⁴ When Member States make such a declaration, they must decide whether all their courts and tribunals, or only the final courts or tribunals, may make references for preliminary rulings to the Court.¹⁵ Twelve Member States have chosen to allow all courts and tribunals to refer, whereas Spain and Hungary have limited the power to refer questions to their final courts.¹⁶ Declaration 10 in the Final Act of the Treaty of Amsterdam provides that each Member State may, if it wishes, 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 making a declaration took up this possibility (the exceptions are Greece, Portugal, Finland, Sweden, and Hungary).

All Member States can submit statements or observations when a preliminary ruling is pending before the Court of Justice, even if they have not opted in to the Court’s jurisdiction over references from national courts.¹⁷ However, the Court “shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.”¹⁸

It should be noted that Article 35(1) TEU does not (expressly) confer jurisdiction upon the Court to give preliminary rulings regarding a fourth type of Third Pillar act: Common Positions.

Next, the Court has jurisdiction to “review the legality of framework decisions and decisions” on the same grounds and under the same time limit as set out in Article 230 EC, but only the Commission and Member States are mentioned as potential applicants.¹⁹ Finally, the Court has jurisdiction over disputes between Member States as regards the “interpretation or application” of any of the measures referred to in Article 34 TEU (common positions, decisions, framework decisions and Conventions), if a dispute cannot be settled in the Council within six months of the referral of the issue to the Council by

12. See Art. 35(1) TEU.

13. See Art. 35(2) TEU.

14. These comprise twelve of the first fifteen Member States (all except the UK, Ireland and Denmark) plus Hungary and the Czech Republic. See the information in O.J. 2005, L 327/19.

15. See Art. 35(3) TEU.

16. See the information on the Court’s jurisdiction (*supra* note 14).

17. See Art. 35(4) TEU.

18. See Art. 35(5) TEU.

19. See Art. 35(6) TEU.

a Member State, and over dispute between Member States and the Commission as regards the “interpretation or application of” conventions.²⁰

Furthermore, the Protocol on the Schengen *acquis*, which governs the integration of the Schengen *acquis* into the EC and EU legal orders, provides that the Court generally exercises its “normal” Third Pillar jurisdiction over the Schengen Convention, and measures implementing it adopted before 1 May 1999, which have been allocated to the Third Pillar. On the other hand, it is not clear whether the Court has jurisdiction over treaties concluded within the framework of the Third Pillar, although the Court has assumed that it has jurisdiction to interpret the agreement associating Norway and Iceland with the Schengen *acquis*.²¹

In practice, the Court has received no dispute settlement actions, and only two annulment actions.²² It has received two references for the interpretation of Framework Decisions, and one reference on the validity of a Framework Decision.²³ The Court has also ruled on six references for interpretation of the Third Pillar provisions of the Schengen *acquis* concerning cross-border “double jeopardy”; two further such cases are pending, and two were withdrawn.²⁴ There were two references in 2001, three in 2003, two in 2004, and six in 2005, but none in 2006. As for geographical distribution, there have been five references from Belgium, three from Italy, two from Germany, and one each from Spain, France and the Netherlands.

Several of the cases so far decided by the Court have clarified some important questions regarding the Court’s jurisdiction. In the *Pupino* judgment, to which we will return in detail below, the Court stated at paragraphs 19 and 28 that, due to the reference to the Court’s EC Treaty jurisdiction in Article 46(b) TEU, “the system under Article 234 EC is capable of being applied to Article 35 TEU, subject to the conditions laid down in Article 35.” It followed that the EC law rules on admissibility of references and the definition of a

20. Art. 35(7) TEU.

21. Case C-436/04, *Van Esbroeck*, [2006] ECR I-2333.

22. Cases C-176/03, *Commission v. Council* and C-440/05, *Commission v. Council*, pending (*supra* note 7). See also the pre-Amsterdam Case C-170/96, *Commission v. Council* [1998] ECR I-2763.

23. Cases: C-105/03, *Pupino*, [2005] ECR I-5285; C-467/05, *Dell’Orto*, pending (Opinion of 8 March 2007); and C-303/05, *Advocaten voor de Wereld*, judgment of 3 May 2007, nyr.

24. Joined Cases C-187 & 385/01, *Gozutok and Brügge* [2003] ECR I-1345; Case C-469/03, *Miraglia*, [2005] ECR I-2009; *Van Esbroeck* (*supra* note 21); Case C-467/04, *Gasparini* and Case C-150/05, *Van Straaten* (both judgments of 28 Sep. 2006, nyr); and Cases C-288/05, *Kretzinger* and C-367/05, *Kraaijenbrink* (Opinions of 5 Dec. 2006, pending). On the substance of these cases, see Peers, “Double Jeopardy and EU Law: Time for a Change?”, forthcoming in (2007) *European Journal of Law Reform*. The withdrawn cases were Case C-491/03, *Hiebeler* and Case C-272/05, *Bowens*.

“court or tribunal” which could send references apply.²⁵ The Court has subsequently repeated the general point that Article 234 EC applies in principle to the Third Pillar,²⁶ and has also applied the EC Treaty jurisprudence on the respective roles of national courts and the Court of Justice,²⁷ as well as applying the EC Treaty rules on admissibility of references.²⁸ Furthermore, the Court has apparently endorsed a “concrete” interpretation of the concept of final court as regards the Third Pillar (i.e. the court which is the final court of appeal for a particular case is the final court for the purposes of the Treaty rules).²⁹ As for annulment actions, in *Commission v. Council*, the underlying principles governing annulment actions under Article 230 EC were implicitly applied.³⁰

However, the bigger question is whether the EU courts have any Third Pillar jurisdiction *besides* that conferred upon them by Article 35 TEU. This issue was first raised before the Court of Justice when Spain brought an annulment action against Eurojust, the EU prosecutors’ agency, concerning the language requirements relating to the hiring of certain Eurojust staff.³¹ However, Spain brought its challenge pursuant to Article 230 EC, and the Court ruled that this EC Treaty Article was not applicable to Eurojust.³² Nor did Article 41 TEU, which makes a number of EC Treaty provisions applicable to the Third Pillar, make this EC Treaty Article applicable in the context of the Third Pillar, “the jurisdiction of the Court in such matters being defined in Article 35 TEU, to which Article 46(b) TEU refers”.³³ However, the Court then commented on Spain’s argument concerning effective judicial protection: “As regards the right to effective judicial protection in a community based on the rule of law which, in the view of the Kingdom of Spain, requires that all decisions of a body with legal personality subject to Community law be amenable to judicial review, it must be observed that the acts contested in this case are not exempt from judicial review.”³⁴ This review flowed from the provisions of the Eurojust decision which made applicable the EC’s staff

25. See *Pupino*, *supra* note 23, paras 29 and 30 and 22.

26. See the judgments in *Gasparini* (*supra* note 24), para 41, and *Van Straaten* (*supra* note 24), para 31.

27. See the judgments in *Gasparini*, para 41, and *Van Straaten*, paras 33 and 37.

28. See the judgments in *Gasparini*, paras 42–45, *Van Straaten*, paras 31–39, and *Advocaten voor de Wereld*, *supra* note 23, paras 19–22. See further the Opinion in *Kretzinger*, *supra* note 24, paras 79–80.

29. See the judgment in *Gasparini*, *supra* note 24, paras 12, 15 and 21.

30. See *supra* note 7.

31. Case C-160/03, *Spain v. Eurojust*, [2005] ECR I-2077.

32. *Ibid.* paras 35–40.

33. *Ibid.* para 38.

34. *Ibid.* para 41.

regulations to Eurojust staff. This meant that would-be job applicants could, following the case law on the EC staff regulations, bring proceedings before the EU courts; the Member States have the power to intervene in such cases and even appeal relevant judgments of the Court of First Instance to the Court of Justice.³⁵

The Court's judgment did not expressly state whether Article 35 TEU must be considered to set out its Third Pillar jurisdiction exhaustively. In light of the later *Segi* judgment (see discussion below), in which the Court appears to confirm that Article 35 does set out an exhaustive list, the Court's jurisdiction can only be explained by examining the circumstances in which the Court's *First Pillar* jurisdiction applies to the Third Pillar (see further below).

Moreover, the Court does not clearly state in this judgment whether or not it agrees with the Spanish argument that all EU bodies taking decisions must be subject to judicial review, or even whether it agrees that the Union is "based on the rule of law". The Court also missed the opportunity to clarify whether Article 230 EC as such applied to the Third Pillar, subject to the conditions of Article 35 TEU, in parallel with the application of Article 234 EC as such to the Third Pillar, according to the later *Pupino* judgment.

The implication of this judgment is that would-be staff members of any other Third Pillar bodies which must apply the EU's staff regulations are also subject to the jurisdiction of the EU courts. It should logically follow by analogy that all *existing* or *previous* staff members of such bodies must also have access to the courts, for example to bring disputes concerning their working conditions, promotion, dismissal or pensions, because it is hard to see how a distinction could be made, consistent with the Court's reasoning (such as it is) between current, previous and potential staff members, in favour of the latter. In fact, a challenge to a Eurojust decision brought by a *former* staff member is indeed pending before the Civil Service Tribunal.³⁶ In addition to Eurojust, the other Third Pillar body applying the EC's staff regulations is the European Police College,³⁷ and the Commission has proposed that Europol will be subject to these regulations in future.³⁸

The broader potential implication of the judgment is that the application of other secondary EC law measures to the Third Pillar, for example the rules on

35. Ibid. paras 42 and 43. This must now be taken as a reference to the right of a Member State to appeal a ruling of the Civil Service Tribunal to the CFI: see Art. 9 of Annex I to the Court's Statute, annexed to the Decision establishing the Tribunal (O.J. 2004, L 333/7).

36. Case F-61/06, *Sapara v. Eurojust*.

37. See Art. 13 of the Decision (re-)establishing the College (O.J. 2005, L 256/63).

38. See Art. 38 of the proposed Decision (re-)establishing Europol (COM(2006)817, 20 Dec. 2006).

privileges and immunities, bring with them the Court's jurisdiction as well.³⁹ But does this line of argument beg the question, given that the EU Treaty in fact makes no reference to the application of the EC staff regulations or EC privileges and immunities within the context of the Third Pillar?⁴⁰ Even more broadly, if the Third Pillar is indeed subject to the "rule of law" principle, what might the further implications of this be?

The Court of Justice has subsequently developed the "rule of law" issue further in the *Segi* appeal, considered further below. First, however, it is useful to compare the ruling in the *Spain v. Eurojust* case with the Opinion of the Advocate General in the same case.⁴¹ After recapitulating the basic principle that all acts of EU bodies creating legal effects should be subject to judicial review, the Advocate General argued that "there is no obstacle preventing the Community system of law and the guarantees deriving from it from being extended to the European Union". In particular, the Court's role to ensure compliance with the law, in accordance with Article 220 EC, applies to the Third Pillar, as "[t]hat is the logical implication of a Union based on the rule of law, as referred to in Article 6 TEU. In a *Union governed by the rule of law*, it is essential for measures of Union institutions and bodies to be amenable to review by a Union Court, so long as they are intended to produce legal effects vis-à-vis third parties."⁴² But the Opinion recognized that the jurisdictional rules for the Third Pillar remained more limited than in the First Pillar, for "[a]lthough the principles of legality and effective judicial review, upheld in the Community context, also prevail in the context of a Union governed by the rule of law, it does not follow that the rules and arrangements for reviewing legality are identical"⁴³

First, as to the nature of the measures contested, the absence of a provision in the EU Treaty for a challenge to Eurojust acts "cannot constitute an absolute impediment to the admission of an action", following EC Treaty case law; so "it is appropriate to admit an action against a Union body to the extent to which it has a legislative function, even if it is used only on an exceptional basis". Moreover, the EC Treaty principle that "an action for annulment may be brought against all measures which produce legal effects, whatever their nature, form, or authorship....clearly applies in the context of the Union", so "the very idea of legality", as it must prevail in a Union governed by the rule

39. The specific issue of Court jurisdiction regarding the use of the EC budget is considered *infra* section 2.2.

40. This issue is considered further *infra* section 2.2.

41. *Spain v. Eurojust*, *supra* note 31.

42. See Opinion of A.G. Maduro in *Spain v. Eurojust*, *supra* note 31, para 17 (emphasis in the original).

43. *Ibid.* at para 19.

of law” must enable some applicants to seek annulment of “any” Third Pillar measures “which produce legal effects vis-à-vis third parties.”⁴⁴

Second, the standing of the applicant did not cause a problem in this case because the applicant was a Member State, and the lack of an “interest” requirement for Member States to challenge EC measures should be transposed to the Third Pillar, due to the parallel between the first and Third Pillar actions for annulment. The special nature of EC staff litigation should not prevent a Member State from bringing actions for annulment in that context.⁴⁵ To support this argument, the Advocate General referred to a judgment in which the Court accepted the admissibility of an annulment action brought by a Member State against a Commission decision addressed to another Member State pursuant to Article 86 EC.⁴⁶ But with respect, this judgment cannot be assumed to apply by analogy to staff proceedings, which are governed by a separate provision of the EC Treaty, which gives “jurisdiction to the Court in any dispute *between the Community and its servants within the limits and under the conditions* laid down” in the relevant secondary legislation.⁴⁷

In contrast to the judgment, the Advocate General’s Opinion far more clearly endorsed the application of the relevant basic principles of the Community legal order to the Third Pillar, and argued expressly for a wide interpretation of the Third Pillar rules on standing (as far as staff litigation was concerned) and on the potential defendants of Third Pillar actions (which, with respect, quite clearly *would*, in the interest of the rule of law, have disregarded the conditions for bringing an action for annulment in the Third Pillar, albeit consistently with the disregard of the conditions applicable in the First Pillar). While in this case, the Advocate General’s arguments apparently foundered on the lack of standing for Member States to bring staff cases within the Community legal order, they may have influenced the later *Segi* judgment, discussed below.

Next, in the *Pupino* judgment, the Court of Justice referred expressly (as noted above) to Article 46(b) TEU, which confers Third Pillar jurisdiction upon it, but without stating whether this provision could be considered exhaustive.⁴⁸ The Court also stated in passing that “the jurisdiction of the Court of Justice is less extensive under Title VI of the Treaty on European Union than it is under the EC Treaty” and that “there is no complete system of ac-

44. Ibid. at paras. 20–21.

45. Ibid. at paras. 22–23.

46. Case 41/83, *Italy v. Commission*, [1985] ECR 873.

47. Art. 236 EC.

48. See *supra* note 23 at para 19 of the judgment.

tions and procedures designed to ensure the legality of the acts of the institutions in the context of” the Third Pillar.⁴⁹

For its part, the Court of First Instance was first faced with questions concerning the extent of its Third Pillar jurisdiction in *Segi*,⁵⁰ where an alleged “domestic” terrorist group (i.e. based within the EU) brought a damages action to challenge its classification as “terrorist” by the Council, which had chosen the instrument of a Common Position adopted jointly using the EU’s second and Third Pillar powers to this end.⁵¹ Whereas groups or persons who are allegedly “international” terrorists (i.e. based outside the EU) are furthermore subject to Community legislation which freezes their assets, and which is therefore indisputably subject to the jurisdiction of the EU courts,⁵² “domestic” terrorists are only affected by the obligation placed by EU Common Positions upon Member States to step up cooperation within the scope of the Third Pillar between police forces and prosecutors. Nonetheless, *Segi* objected to being classified as a terrorist group.⁵³

In rejecting the claim for damages, the Court of First Instance stated that Article 46 TEU “exhaustively” lists the Court’s jurisdiction concerning the EU Treaty, by reference to Article 35 TEU.⁵⁴ It then noted that Article 35 TEU provides only for references, dispute settlement and annulment actions,⁵⁵ after stating that there is no provision for a “judicial remedy” concerning com-

49. *Ibid.* at para 35 of the judgment.

50. Orders of the CFI of 7 June 2004 in Cases T-333/02 (unreported) and T-338/02, *Segi and others*, [2004] ECR II-1647, para 35.

51. See the earlier Second Pillar claim for damages resulting from the Community measures linked to the allegedly illegal military action against the former Yugoslavia in respect of Kosovo (T-201/99, *Royal Olympic*, [2000] ECR II-4005). The CFI dismissed this claim with the general statement that Art. 46 TEU did not confer jurisdiction for the EU courts over actions of the EU, and that EC measures were insufficiently linked to the military action. An appeal was dismissed by an unpublished order of the ECJ (Case C-49/01, order of 15 Jan. 2002).

52. See the judgments in Cases T-306/01, *Yusuf* [2005] ECR II-3533 (on appeal as Case C-415/05 P, pending); T-315/01, *Kadi* [2005] ECR II-3649 (on appeal as Case C-403/05 P, pending); T-253/02, *Ayadi*, judgment of 12 July 2006, nyr (on appeal as Case C-403/06 P, pending); T-49/04, *Hassan*, judgment of 12 July 2006, nyr (on appeal as Case C-399/06 P, pending); T-228/02, *OMPI*, judgment of 12 Dec. 2006, nyr; and T-362/04, *Minin*, judgment of 31 Jan. 2007, nyr; the interim measures decisions in Cases T-306/01 R, *Aden* [2002] ECR II-2387 and T-47/03 R, *Sison* [2003] ECR II-2047; and the orders in Cases T-206/02, *KNK* [2005] ECR II-523, T-229/02, *PKK and KNK* [2005] ECR II-539 (reversed on appeal in Case C-229/05 P, judgment of 18 Jan. 2007, nyr) and T-299/04, *Selmani* [2005] ECR II-20*.

53. A complaint to the European Court of Human Rights against the (then) 15 Member States was dismissed as inadmissible on the grounds that *Segi* could not be considered to be a “victim” of any breach of the rights set out in the ECHR: Reports of Judgments and Decisions (2002–V).

54. *Segi* order, *supra* note 50, at para 35.

55. *Ibid.* at para 36.

pensation (damages liability) within the Third Pillar.⁵⁶ Furthermore, the CFI stated that Article 46(d) TEU (which, as noted above, gives the EU courts jurisdiction over human rights matters) does not grant any further jurisdiction over Third Pillar issues.⁵⁷ Moreover, the Court of First Instance accepted that “probably no effective judicial remedy is available to [the applicants], whether before the Community Courts or national courts”, as “it would not be of any use for the applicants to seek to establish the individual liability of each Member State for the national measures enacted pursuant to [the] Common Position” and “seeking to establish the individual liability of each Member State before the national courts on account of their involvement in the adoption of the common positions ... is likely to be of little effect”. Nor could the validity of the Common Position be challenged indirectly via the national courts, with a preliminary reference to the Court of Justice, presumably because – as pointed out above - Article 35(1) TEU does not apply to Common Positions. But the CFI concluded that “the absence of a judicial remedy cannot in itself give rise to Community jurisdiction in a legal system based on the principle of conferred powers, as follows from Article 5 EU”, referring to the *UPA* case in which the Court of Justice refused to widen the traditional definition of standing for individuals to bring annulment actions against EC measures.⁵⁸ A Council declaration on the Common Position, concerning the right to compensation, was also waved aside.⁵⁹ On the other hand, the CFI claimed that it did have jurisdiction to hear the case to the extent that it involved incursion into the competence of the Community; on this point, it rejected the claim on the merits.⁶⁰

Subsequently the Court of First Instance dismissed two similar annulment challenges to the Second Pillar aspects of Common Positions, on similar grounds. In the *Selmani* order, the Court of First Instance did not refer to Article 5 TEU, possible challenges before Member States’ courts, human rights issues or the Council declaration.⁶¹ In the *OMPI* judgment, the CFI referred again to Article 5 TEU and human rights issues, left open the issue of challenges before national courts (noting that further implementing measures can be and have been challenged, as this case concerned an alleged “international” terrorist group),⁶² and distinguished *UPA* to the extent that that judgment

56. *Ibid* at para 34.

57. *Ibid* at para 37. On human rights and JHA, see further Peers *op. cit. supra* note 3 at pp. 64–69.

58. *Segi*, order, *supra* note 50 at para 38, referring to Case C-50/00 P, *UPA*, [2002] ECR I-6677.

59. *Segi*, order, *supra* note 50 at para 39.

60. *Ibid* at paras 41–47.

61. *Selmani* (order, *supra* note 52), paras 52–58.

62. On this point, the CFI was perhaps influenced by the Opinion in the pending *Segi* appeal

stated that the “EC Treaty has established a complete system of legal remedies and procedures designed to ensure judicial review of the lawfulness of acts of the institutions”. Rather for the Second and Third Pillar, the EU Treaty has “established a limited system of judicial review, certain areas being outside the scope of that review and certain legal remedies not being available”.⁶³

The Court of Justice has now addressed more fully the control of legality of Third Pillar measures in its important judgment dismissing the appeal against the *Segi* order of the CFI.⁶⁴ First of all, the Court ruled that the CFI had not erred by refusing to consider *Segi*’s claim for damages within the context of the Third Pillar. In the view of the Court of Justice, the Court’s Third Pillar jurisdiction applies, pursuant to Article 46 TEU, “only ‘under the conditions provided for by Article 35 EU’”,⁶⁵ an apparent confirmation that the Court’s Third Pillar powers are exhaustively listed in that provision. The Court then listed the jurisdiction conferred by Article 35,⁶⁶ stating that “[i]n contrast, Article 35 EU confers no jurisdiction on the Court of Justice to entertain any action for damages whatsoever”.⁶⁷ Furthermore, applying the *Spain v. Eurojust* judgment by analogy, the Court held that Article 41 TEU does not make Articles 235 or 288(2) EC applicable to the Third Pillar.⁶⁸

Next, the Court addressed the argument concerning the lack of effective judicial protection. It began by admitting that, as regards the EU, the Treaties have “established a system of legal remedies in which”, referring to *Pupino*, there is “less extensive” jurisdiction for the Court than the EC Treaty provides for; but the Court did not repeat its earlier statement in *Pupino* that the EU Treaty lacks a complete system to ensure the legality of Third Pillar acts.⁶⁹ The Court then explicitly left it to the Member States to take up the question of reforming the system, in terms nearly identical to its *UPA* judgment, which solidified the limits on the standing to bring direct actions concerning EC measures:

to the ECJ, which had by then been released; see Opinion in Case C-355/04 P, *Segi*, *infra* note 64; discussed in text at note 79 *infra*.

63. See *OMPI v. Council* (judgment, *supra* note 52), paras 45–60.

64. Cases C-354/04 P, *Gestoras pro Amnistia v. Council*, and C-355/04 P, *Segi et al. v. Council*, judgments of 27 Feb. 2007, nyr.

65. *Segi* judgment at para 44 (emphasis added).

66. *Ibid.* at para 45. In fact, the Court here omitted to mention that the Court’s jurisdiction to rule on disputes over the interpretation or the application of acts adopted pursuant to Art. 34(2) TEU as conferred by Art. 35(7) TEU, also extends to disputes between Member States and the Commission regarding Conventions.

67. *Ibid.* at para 46.

68. *Ibid.* at para 47.

69. *Ibid.* at para 50.

“While a system of legal remedies, in particular a body of rules governing non-contractual liability, other than that established by the treaties can indeed be envisaged, it is for the Member States, should the case arise, to reform the system currently in force in accordance with Article 48 EU.”⁷⁰

However, this preceded, rather than concluded (as in *UPA*) a more detailed discussion of the possibilities open to the applicants. The Court stated that, “[a]s is clear from Article 6 EU, the Union is founded on the principle of the rule of law and it respects fundamental rights as general principles of Community law”, so, again paraphrasing *UPA*, “[i]t follows that the institutions are subject to review of their conformity of their acts with the treaties and the general principles of law, just like the Member States when they implement the law of the Union”.⁷¹ This is the first unambiguous statement by the Court that the Union is governed by the principle of the rule of law, including the corollary principle of judicial review, although it is not clear what the Court was referring to as regards review of the Member States’ implementation of EU law. Of course this statement by itself does not tell us *how* such review must be carried out.

To address this point, the Court then moved on, as discussed further below,⁷² to state that Third Pillar Common Positions were not meant to create legal effects upon third parties. This explains why only framework decisions and decisions may be subject to annulment actions, and (implicitly) why the Court’s jurisdiction over references for a preliminary ruling does not apply to common positions, since the latter jurisdiction applies to “all measures adopted by the Council and intended to produce legal effects in relation to third parties”. The Court then paraphrased Article 220 EC and stated that “the procedure enabling the Court to give preliminary rulings is designed to guarantee observance of the law in the interpretation and application of the Treaty,” so “it would run counter to that objective to interpret Article 35(1) EU narrowly”. So the right to refer preliminary rulings to the Court “must therefore exist in respect of all measures adopted by the Council, whatever their nature

70. Ibid; cf. para 45 of the *UPA* judgment (*supra* note 58). Logically the Court should also have mentioned the possible application of Art. 42 TEU, which would have the consequence of applying the jurisdictional regime applicable to Title IV EC (which concerns immigration, asylum and civil law: see Art. 68 EC) to Third Pillar matters.

71. Ibid. at para 51; cf. para 38 of the *UPA* judgment (*ibid*). The reference to review of the *Member States* is a new point in the *Segi* judgment as compared to the *UPA* judgment.

72. See *infra* section 3.2.

or form, which are intended to have legal effects in relation to third parties” (referring, *inter alia*, to the *ERTA* judgment).⁷³

This means that a common position which goes beyond the bounds of Article 34 TEU because of its content can be reviewed by the Court under the preliminary ruling procedure. It follows that:

“... a national court hearing a dispute which indirectly raises the issue of the validity or interpretation of a common position adopted on the basis of Article 34 EU, as [in this case], and which has serious doubt whether that common position is really intended to produce legal effects in relation to third parties, would be able, subject to the conditions fixed by Article 35 EU, to ask the Court to give a preliminary ruling. It would then fall to the Court to find, where appropriate, that the common position is intended to produce legal effects in relation to third parties, to accord it its true classification and to give a preliminary ruling.”⁷⁴

It may be that the Court hoped that such a reference might be forthcoming from the relevant parallel litigation in the Spanish courts, referred to in the Opinion in this case.⁷⁵

Next, the Court makes a parallel assertion of its jurisdiction to review such measures within annulment proceedings brought by the Commission or a Member State pursuant to Article 35(6) TEU.⁷⁶ This part of the judgment then ends with a sweeping final conclusion:

“Finally, it is to be borne in mind that it is for the Member States and, in particular, their courts and tribunals, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the lawfulness of any decision or other national measure relating to the drawing up of an act of the European Union or to its application to them and to seek compensation for any loss suffered.”⁷⁷

This statement again echoes the *UPA* judgment,⁷⁸ except that the latter judgment had also referred to Member States’ obligation to “establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection”, and explained the obligations concerning national proce-

73. *Segi* judgment, *supra* note 64, at para 53, referring to Case 22/70, *Commission v. Council (ERTA)*, [1971] ECR 263.

74. *Segi* judgment, *supra* note 64, at para 54.

75. Opinion of A.G. Mengozzi para 17. An appeal was pending before the Tribunal Supremo (Supreme Court), which as (presumably) the final court in Spain in this case would have the jurisdiction (and, under national law, the obligation) to refer questions to the Court of Justice.

76. *Segi* judgment, *supra* note 64, at para 55.

77. *Ibid.* at para 56.

78. See *supra* note 58 at para 42.

dural rules as a consequence of the principle of loyal cooperation. Also, the *Segi* judgment, unlike the *UPA* judgment, refers to challenges to measures concerning the *drawing up* of EU acts, and furthermore to the right to compensation.

The judgment in *Segi* can be compared with the Opinion of the Advocate General, who essentially argued that while the EU was subject to the principle of effective control of EU measures, such control effectively rested with the national courts, given the lack of jurisdiction of the EU courts over damages actions and the limited jurisdiction over preliminary rulings. He admitted that bringing proceedings through the national courts raised difficult issues relating to the choice of defendant (the Union or the Member States), the choice of jurisdiction, the possible immunity of the Union and the choice and content of the applicable law. In general, the judgment and the Opinion reached similar conclusions, except that the Court placed much greater stress on the mechanism of preliminary rulings to ensure the legality of Third Pillar measures, while the Opinion laid greater stress on national courts, and furthermore addressed in detail the issues that national courts would consequently face. Furthermore, the Court ruled that the appeal was inadmissible on procedural grounds to the extent that it argued that the Third Pillar measure encroached upon EC competence, but, as noted below,⁷⁹ it examined in detail the “internal” Third Pillar issue of whether it had been correct to adopt a common position as compared to another Third Pillar measure. The Opinion examined the former argument (rejecting it on the merits), but did not consider the latter.

The Court’s judgment in this case has obviously tried to strike a difficult balance between fidelity to the terms of the Treaties and its apparent desire to find a way to ensure effective and uniform control of the legality of EU acts. Inevitably there is a conflict between these two objectives in light of the wording of the EU Treaty, and it is not possible to satisfy both objectives fully at the same time. As compared to the EC Treaty, the Third Pillar provisions do not offer a choice for individuals between, on the one hand, a relatively effective annulment action (with a corollary jurisdiction under Art. 241 EC, and further buttressed by a possible action for damages liability against the EC institutions) and on the other hand, a relatively less satisfactory, and often more difficult,⁸⁰ prospect of bringing an indirect action through the national

79. See *infra* section 3.2.

80. But it must follow from *UPA* that challenges via this route should not be *impossible*. In the *Jégo-Quéré* appeal (Case C-263/02 P, [2004] ECR I-3425, para 35), the ECJ effectively concludes that EC measures should always be open to challenge through the national courts without having to contravene them first, even if those measures do not require the adoption of national implementing measures which would be open to challenge as such.

courts with a reference to the Court of Justice to challenge the validity of EC acts. Rather, in the Third Pillar there is *no* express jurisdiction for individuals to bring annulment actions nor a parallel right to bring damages claims, and the ability to bring proceedings via the national courts is obviously curtailed by the inability to obtain preliminary rulings in thirteen Member States, and the requirement to reach the courts of last instance in another two Member States, as pointed out at the beginning of this section.

To address this conflict, the *Segi* judgment does not take the obvious *Chernobyl* route of expanding the category of applicants,⁸¹ as the Court expressly rules out any EU Court jurisdiction over damages liability within the framework of the Third Pillar, and it implicitly appears to rule out jurisdiction over direct actions for annulment brought by individuals.⁸² Nor was it necessary to consider in this case expanding the categories of defendants, as the Court did in *Les Verts*,⁸³ and evaded doing in *Spain v. Eurojust* – as mentioned above. Rather, it takes the *ERTA* route of expanding the *categories of acts* which can be challenged *within the existing judicial framework*, coupled with the *UPA* route of devolving control over the legality of Third Pillar acts to the national courts. The problem with this approach is that while the *ERTA* judgment had the effect of further strengthening the relatively effective judicial framework of the Community, in the Third Pillar framework not much can be achieved by expanding the categories of acts which can be challenged if the would-be applicants who might wish to benefit from this still lack the standing to bring direct actions. Put another way, what would the *ERTA* judgment have accomplished if the Court had simultaneously reaffirmed provisions of the EC Treaty which denied the Commission any standing to sue the Council? True, such a judgment would have bolstered the position of Member States to sue the Council on such grounds by analogy, but in an institutional framework where the Member States have so much *political* power (by means of their *de jure* veto over EU acts, except for implementing measures), the Member States do not need any more *legal* powers.⁸⁴

81. See Case C-70/88, *European Parliament v. Council* (Chernobyl), [1990] ECR I-2041. Having said that, the Court's *Segi* judgment should not necessarily be understood as excluding the possibility of expanding (or "interpreting") its Third Pillar jurisdiction in order to rule on actions brought by the European Parliament to protect its prerogatives within the context of the Third Pillar, since the *Chernobyl* judgment was founded on the different principle of the protection of the Community's "institutional balance".

82. This must follow from the exhaustive nature of Art. 35 TEU (para 34 of the judgment, read in combination with paras 35 and 55).

83. Case 294/83, [1986] ECR 1339.

84. The same might even be said of the EC legal order, where Member States generally enjoyed a *de facto* First Pillar veto until the mid-1980s.

This parallel is not quite exact because, unlike individuals in the context of the Third Pillar, the Commission cannot bring proceedings against the Council in the national courts, whereas the *Segi* judgment places reliance on this route for individual challenges to Third Pillar measures. But of course, as noted several times already, on top of the complications that arise in any event from use of the national courts to challenge the validity of *Community* measures,⁸⁵ individuals' ability to challenge Third Pillar acts indirectly through that route is even more problematic. While an EU-wide designation of an individual or group as a "terrorist" or a "terrorist" organization could presumably be attacked in the national courts of any Member State, so that a group or individual which is designated as such can simply search for a Member State with jurisdiction to send preliminary rulings to the Court,⁸⁶ this adds a further complication for those affected by EU measures, who will not normally have the huge resources of multinational companies which often wish to challenge Community measures. At least, the Court's stress on the need to interpret national procedural rules to ensure the judicial review of Third Pillar acts must surely mean that standing rules should be interpreted flexibly, if necessary, to permit groups and individuals residing in other Member States to bring proceedings in Member States where there is the possibility of seeking a preliminary ruling from the Court.⁸⁷ This must be distinguished from the case of *Foglia v. Novello*, where the Court had particular concerns about an attempt to challenge the law of one *Member State* in the courts of another Member State; this is obviously a distinct issue from a challenge to the validity of *Union* (or indeed *Community*) law.⁸⁸

Moreover, a pattern has recently become established within the First Pillar of a concentration of challenges to EC legislation within the British courts, which are apparently sufficiently likely to be sympathetic to the substance of arguments challenging the validity of EC law, and subject to sufficiently flexible procedural rules, to attract many forum-shopping applicants.⁸⁹ Of course, in the absence of an opt-in to the Court's jurisdiction by the UK, such

85. The literature is voluminous; for a cogent critique see the Opinion in *UPA*, with further references, and (implicitly) the CFI judgment in *Jégo-Quéré* (Case T-177/01, [2002] ECR II-2365).

86. The same point could be made of NGOs who wish to bring a challenge to an EU measure, cf. *Advocaten voor de Wereld* (*supra* note 23).

87. Cf. Joined Cases C-87 to 89/90, *Verholen*, [1991] ECR I-3757.

88. Cases 104/79, [1980] ECR 745 and 244/80 [1981] ECR 3045.

89. See e.g.: Case C-74/99, *Imperial Tobacco*, [2000] ECR I-8599; Case C-491/01, *BAT*, [2002] ECR I-11453; Case C-210/03, *Swedish Match*, [2004] ECR I-11893; Joined Cases C-154 & 155/04, *Alliance for Natural Health and others*, [2005] ECR I-6451; Case C-453/02, *ABNA*, [2005] ECR I-10423; Case C-344/04, *IATA and others*, [2006] ECR I-403; and Case C-308/06, *Intertanko and others*, pending.

a possibility does not exist within the Third Pillar; there are signs, though, that Belgian courts might fill this gap.⁹⁰ Furthermore, there may be cases where an EU measure is applied in practice only to an individual in a particular Member State (or multiple Member States) which has (or have) not opted in to the Court's jurisdiction. For example, if the UK seeks to execute a European arrest warrant issued by another Member State, a person wishing to challenge the underlying validity of the Framework Decision will not generally have standing to bring proceedings in a Member State which has accepted the jurisdiction. If he or she is "lucky", the warrant might have been issued by a Member State which has opted in to the Court's jurisdiction, and so there might be a procedural possibility to challenge the warrant after its execution (or even before its execution, by means of a parallel challenge in the issuing Member State). But it is quite possible that the warrant will have been issued by one of the twelve other Member States which has not opted in to the Court's jurisdiction, so it is hard to see how a challenge to the validity of the Framework Decision in such a case could reach the Court of Justice. In some cases, such as a Framework Decision harmonizing substantive criminal law, the measure concerned may fall to be applied in each individual Member State, with no feasible prospect of shopping for another forum – leaving aside the practical difficulties of "shopping" while in detention!

The most striking aspect of the Court's ruling in *Segi* is the absence of any mention of the situation in Member States which have not opted in to the Court's preliminary jurisdiction, and in particular the consequences of this situation as regards the legality of Third Pillar measures. Since the courts in those Member States cannot send references to the Court, it must be presumed that those courts are *a fortiori* covered by the obligation to interpret and apply national law to allow for challenges to the lawfulness of EU measures, and to provide for compensation for any loss suffered. Given that those courts cannot seek any clarification of the relevant principles from the Court of Justice, it would have been helpful to indicate whether there are any common EU rules on the exercise of these responsibilities, and, if so, what those rules are. This would also have simplified the task of those courts which can send references. Must the national procedural rules, for instance, be governed by the principles of equivalence and effectiveness? Does this entail an obligation to create remedies, for example regarding interim relief and/or damages? It would obviously be remarkable if national courts had to create the very remedy (damage liability for the Union) within national law which the Court of Justice refused to create within the law of the Union. Are there any

90. See *Advocaten voor de Wereld* (*supra* note 23) and, as regards the validity of part of a directive closely linked to the Third Pillar, see Case C-305/05, *Ordre des barreaux francophones and germanophone and others*, judgment of 26 June 2007, nyr.

standard rules governing the issues which were canvassed in the Advocate General's Opinion (choice of defendant, choice of jurisdiction, immunity of the Union, and choice and content of law)? For example, must the right to seek compensation be governed by rules equivalent to the EC Treaty rules on the damages liability of the Community? And what does the Court mean by the responsibility for participation in *drafting* EU measures? It can only be hoped that the national courts which can refer questions to the Court take the opportunity to do so if these questions arise.

Those national courts also need to ask whether any of the principles of the EC legal order regarding review of EC measures via the national courts (such as the consequences of a ruling of invalidity, the Court's exclusive jurisdiction and the prospect of interim relief in national courts)⁹¹ apply to challenges to EU measures. It is striking that the Court of Justice did not expressly state whether national courts are able to rule against the validity of EU measures without a reference to the Court of Justice, or whether there should be a distinction in this regard between national courts which can send a reference to the Court of Justice, and those which cannot. Furthermore, can any conclusions be drawn from the Court's failure to mention the applicability of the principle of loyal cooperation to the national courts' review of the legality of Third Pillar measures, given that the *UPA* judgment explicitly stresses this principle,⁹² and that the *Segi* judgment elsewhere mentions the principle in the context of the legal effect of Common Positions?⁹³ Then again, the early case law setting the foundations of the national courts' role as regards the legality of Community measures did not mention this principle either.⁹⁴

Also, the Court should have made more clearly explicit that a Common Position which "should" have taken a different form is automatically invalid. This must follow from the requirement in Article 39 TEU for the Council to consult the EP before the adoption of every EU measure except for Common Positions;⁹⁵ so a "Common Position" which should have been adopted in the form of another Third Pillar measure must be invalid for breach of the proce-

91. See, for example, Case 66/80, *ICC* [1981] ECR 1191, Case 314/85, *Foto-Frost* [1987] ECR 3199, Joined Cases C-143/88 & C-92/89, *Zuckerfabrik*, [1991] ECR I-415 and Case C-465/93, *Atlanta*, [1995] I-3761. On the consequences of invalidity of a directive, see further Case C-421/06, *Fratelli Martini and Cargill*, pending.

92. *UPA* (judgment, *supra* note 58) at para 42. See also the appeal judgment in *Jégo-Quéré* (*supra* note 80), para 32 and *Atlanta*, *supra* note 91, para 46.

93. See *infra* section 3.2. The Opinion in the *Segi* judgment did draw a link between loyal cooperation and national courts' obligations on this point (paras. 106–107).

94. See *Foto-Frost* etc. (*supra* note 91), with the exception of *Atlanta*.

95. This raises the prospect that the European Parliament has standing to sue to annul Common Positions which should have taken a different form, on the grounds that the "institutional balance" has been affected: cf. *supra* note 81.

dural requirement to consult the EP.⁹⁶ Also, in some cases national legislatures may have greater powers over their government's consent to Third Pillar measures, and/or the application of those Third Pillar measures within the national legal order, when Framework Decisions or Decisions are adopted, rather than Common Positions, as evidenced by the lengthy delay in adoption of many Third Pillar measures due to national parliamentary scrutiny requirements

2.2. *Jurisdiction over Third Pillar matters under the EC Treaty*

First of all, there are a number of cases where Community law has an impact on national criminal or policing law, for example where national criminal law is applied to enforce Community law obligations or has the impact of limiting Community law rights, or where the EC has criminal law competence.⁹⁷ Obviously the Court's EC Treaty jurisdiction is applicable to such cases. That jurisdiction is also undeniably applicable to the EC's staff regulations, as regards staff of the EC institutions whose job concerns Third Pillar matters,⁹⁸ to infringement actions which address Third Pillar issues but which essentially concern free movement law,⁹⁹ or to claims that a *First* Pillar measure in fact falls within the scope of the Third Pillar.¹⁰⁰

Secondly, in principle, there may exist a category of "mixed jurisdiction" cases, where the Court's First and Third Pillar jurisdiction may be intertwined, raising the question as to which jurisdiction is applicable. This issue has not yet been considered by the Court of Justice, and so will not be considered further here.¹⁰¹

96. This assumes that, as in the First Pillar, a breach of the requirement to consult the European Parliament invalidates a Third Pillar measure, and that optional consultation of the European Parliament is similarly insufficient (see Peers, "Watchmen", *op. cit. supra* note 1, 384–385). In any event, the European Parliament has never been consulted in practice before the adoption of a Common Position.

97. For details, see Peers (*op. cit. supra* note 3), 389–402 and also 446–449 and 510–523.

98. This explains the jurisdiction of the CFI to rule on the integration of the staff of the Schengen Secretariat into the Council Secretariat: Case T-107/99 R, *Garcia de Retortillo v. Council* [1999] ECR II-1939 (interim measures; the main action was later withdrawn); Joined Cases T-164/99, *Leroy v. Council*, T-37/00, *Chevalier-Delanoue v. Council* and T-38/00, *Joaquim Matos v. Council* [2001] ECR II-1819; and Case T-166/99, *Andres de Dios v. Council* [2001] ECR II-1857.

99. Case C-503/03, *Commission v. Spain* [2006] ECR I-1097.

100. See Joined Cases C-317 & 318/04, and Case C-102/06 (*supra* note 7).

101. I have previously analysed this issue (which also currently arises as regards the distinct rules on the Court's immigration, asylum and civil law jurisdiction) in detail: see Peers, "Watchmen" (*op. cit. supra* note 1), 397–399.

This leaves us with three categories of cases which have been addressed in the case law. First of all, it appears clear that the EU Courts normally exercise their *First Pillar* jurisdiction when they consider whether Third Pillar measures should have been adopted pursuant to the First Pillar, rather than the EU Treaty. This can be explained because the jurisdiction of the EU Courts to rule in such cases is derived from Article 47 TEU, to which the Court's EC Treaty jurisdiction applies, according to Article 46(f) TEU.¹⁰² It follows that the EU Courts can receive annulment actions on this issue from any applicant listed in Article 230 EC, including the European Parliament and non-privileged applicants (subject to the usual standing rules).¹⁰³ The EU Courts also have jurisdiction to rule on the non-contractual liability of the EU institutions, if they have adopted a Third Pillar measure which should have been adopted as a First Pillar measure,¹⁰⁴ and it must also follow that all national courts and tribunals in all Member States can send preliminary rulings on this point to the Court of Justice.¹⁰⁵

The exception to this rule is when such proceedings are brought by the Commission or a Member State, whose standing to bring annulment actions against Third Pillar measures is governed by the *lex specialis* of Article 35(6) TEU.¹⁰⁶ This exception has no practical importance, since (for those applicants) Article 35(6) TEU is identical to Article 230 EC, on the assumption that the ancillary rules of the Court's jurisdiction over annulment actions (such as the capacity to grant interim relief) apply also to Third Pillar annulment actions.¹⁰⁷

Secondly, the EU Courts exercise their First Pillar jurisdiction pursuant to the EC Treaty rules which are expressly made applicable to the Third Pillar by Article 41 TEU. So the Court of First Instance confirmed (prior to the Treaty of Amsterdam) that because the precursor to Article 41 TEU provided (as does the present Art. 41) that the Council's rules of procedure apply to the Third Pillar, it followed that the rules on access to Council documents also apply, and that the EU courts therefore had jurisdiction pursuant to the EC Treaty to rule on disputes concerning access to Third Pillar documents.¹⁰⁸

102. See paras. 12–18 of the judgment in Case C-170/96 (*supra* note 22).

103. See the *OMPI* judgment and the *Selmani* order (*supra* note 52).

104. See the *Segi* order of the CFI (*supra* note 50) and the Opinion in the *Segi* judgment (*supra* note 64); the Court of Justice judgment on the *Segi* appeal did not address this issue.

105. The Court of Justice has referred to Art. 47 TEU in a reference from a national court: see Joined Cases C-64 & 65/96, *Uecker and Jacquet*, [1997] ECR I-3171, para 23.

106. See Case C-176/03, *Commission v. Council* (*supra* note 4).

107. On this point, see Peers, "Watchmen" (op. cit. *supra* note 1), 386–388.

108. Case T-174/95, *Svenska Journalistförbundet*, [1998] ECR II-2289, paras 81–87. The Court's EC Treaty jurisdiction now applies to disputes over access to Third Pillar documents pursuant to the reference to Art. 255 EC in Art. 41 TEU.

Similarly, the EU courts exercise their *EC Treaty* jurisdiction whenever Third Pillar funding is charged to the EC budget, as provided for in Article 41 TEU. This was first accepted by implication in a case challenging the Commission's decision to award the tender for the second-generation Schengen Information System, although this tender in fact concerned matters within both the first and Third Pillars.¹⁰⁹ The Court's jurisdiction was later confirmed expressly in *Greece v. Commission*, a case concerning the plans to construct combined embassies for several Member States, along with a representation of the Commission, in Nigeria, pursuant to the current Article 20 TEU (a Second Pillar provision concerning cooperation between national embassies and Commission representations in non-EU countries).¹¹⁰ This project was charged to the Community budget, by means of the pre-Amsterdam equivalent of Article 28 TEU (which is the Second Pillar equivalent of Art. 41 TEU), and the participating Member States were liable for a share of the project's costs, but Greece pulled out of the project and a dispute arose as to how much it owed as a consequence of its participation up to that point. Ultimately, the Commission applied the provisions of the EC's financial regulation which allows Member States' debts to the EC budget to be "offset" against payments from that budget, and Greece challenged this reduction.

The parties apparently presumed that the EU courts had jurisdiction over this dispute, but the Court of First Instance explicitly took the opportunity to explain the basis of this jurisdiction. It first noted, as usual, that the EU courts' powers over Second Pillar measures are "exhaustively" listed in Article 46 TEU, which does not give those courts any jurisdiction over Second Pillar measures.¹¹¹ "However", the Court went on, "it is not disputed that the Commission proceeded to recover the disputed amounts by means of an act adopted pursuant to the [EC's financial legislation] so that the act of offsetting is covered by Community law. Since such an act is open to challenge by way of an action for annulment under Article 230 EC, the Court of First Instance has jurisdiction to hear this application."¹¹² Later on in the judgment, the Court pointed out that the EC's financial legislation "applies only to sums falling under the Community budget", but that "[i]t is not disputed that the Commission was authorized, under Article 268 EC, which provides for both Community expenditure and certain expenditure occasioned for the institu-

109. Case T-447/04 R, *Cap Gemini*, [2005] ECR II-257. After this interim measures order, the case was withdrawn. In fact, the tender also concerned the Visa Information System project, which primarily falls within the scope of the First Pillar.

110. Case T-231/04, *Greece v. Commission*, judgment of 17 Jan. 2007, nyr. This case concerned the CFSP, but there is no reason to doubt its applicability by analogy to the Third Pillar, given the identical wording of Arts. 28(4) TEU and 41(4) TEU.

111. *Ibid.* at para 73.

112. *Ibid.* at para 74.

tions by the provisions of the Treaty on European Union relating to the common foreign and security policy, to assign to the Community budget the costs incurred in respect of the Abuja and Abuja II projects.”¹¹³

It should follow that, where Third Pillar funding is charged to the EC budget, annulment actions or actions to establish the EC’s non-contractual liability could also be brought against funding decisions in specific cases, or arguably even the general funding legislation, by the European Parliament or by non-privileged applicants who meet the standing requirements of Article 230 EC. Actions could also be brought regarding the spending of Third Pillar agencies which are funded from the EC budget.¹¹⁴ All of the financial provisions of the EC Treaty are applicable *mutatis mutandis*.¹¹⁵ The application of the EC budget rules justifies the Council practice of conferring upon the Commission the power to implement Third Pillar measures which charge funding to the EC budget.¹¹⁶

On the other hand, it might appear at first glance that the Court of Justice has ruled out the possible application of EC Treaty jurisdiction to the Third Pillar by means of Article 41 TEU. It will be recalled that in the *Spain v. Eurojust* judgment, the Court ruled that “Article 41 EU does not provide that Article 230 EC is to apply to the provisions on police and judicial cooperation in criminal matters in Title VI of the Treaty on European Union, the jurisdiction of the Court in such matters being defined in Article 35 EU, to which Article 46(b) EU refers”,¹¹⁷ while in *Segi*, the Court stated that “Article 41(1) EU does not include” Articles 235 or 288 EC among the list of EC Treaty Articles which are “applicable” to the Third Pillar.¹¹⁸ In fact, these two judgments are *prima facie* contradictory, as the *Spain v. Eurojust* judgment appears to state that no jurisdiction could arise *in principle* by virtue of Article 41, while the *Segi* judgment appears to assume that it could if the relevant EC Treaty articles are listed there.

There is, however, a way to reconcile these two judgments and the jurisprudence of the CFI on this issue, because in the *Spain v. Eurojust* judgment the Court was explicitly making the point that Article 41 TEU did not confer any more *Third Pillar* jurisdiction (“the jurisdiction of the Court *in such matters*”) on the Court. Certainly, it is true that Article 41, in light of the wording of Article 46, cannot confer any further *Third Pillar* jurisdiction on the Court;

113. *Ibid.* at para 111.

114. See Arts. 34–38 of the *Eurojust* Decision, as amended (O.J. 2002, L 63/1 and O.J. 2003, L 245/44), Arts. 15–18 of the European Police College Decision (*supra* note 37), and Arts. 41–43 of the proposed Europol Decision (*supra* note 38).

115. Arts. 246–248 and 268–280 EC.

116. See most recently O.J. 2007, L 7 and 13.

117. *Spain v. Eurojust* judgment at para 38 (*supra* note 31).

118. *Segi* judgment at para 47 (*supra* note 64).

rather it applies the EU courts' *First Pillar* jurisdiction to the Third Pillar, as regards certain institutional matters that do not touch upon the substance of Third Pillar measures. So, for instance, the EU Courts' jurisdiction over access to Council documents concerning Europol does not amount to jurisdiction over Europol's operational activity.

The third category of cases is where the EC Treaty jurisdiction of the Courts applies even in the absence of a reference to the relevant provisions of the EC Treaty in Article 41 TEU. Such a jurisdiction as regards staff cases appears to have been accepted by the Court of Justice in *Spain v. Eurojust*, even though there is no reference to Articles 236 or 283 EC in Article 41 TEU. In other words, while the lack of any reference to Article 230 EC in Article 41 TEU barred any jurisdiction for the EU courts, the absence of any reference to Articles 236 or 283 EC in Article 41 TEU did *not*.

In order to find an explanation for the ruling of the Court, we first need to examine which *other* EC Treaty provisions besides those listed in Article 41 TEU or (implicitly) Article 46 TEU apply to the Third Pillar, and in which circumstances. To examine the possible application of other EC Treaty Articles to the Third Pillar, the most obvious starting point is the *Pupino* judgment, which, as discussed further below, ruled that the EC Treaty principle of loyal cooperation applied to the Third Pillar, despite any express reference to it, on the basis that it would be "difficult for the Union to carry out its task effectively" without application of that principle. I suggest below that this principle could be applied to the other rules governing the legal effect of Community law, having regard also to the intention of the authors of the EU Treaty not to create a legal system identical to that of EC law.¹¹⁹

In applying this principle to the *institutional* rules of the EC Treaty, it is also necessary to take into account the EU Treaty requirement of consistency between the activities carried out in the different pillars (Art. 3 TEU), weighed against the distinction between the EC and EU Treaties as confirmed by Article 5 TEU, which states that the Community institutions "shall exercise their powers under the conditions and for the purposes provided for, on the one hand, by the provisions of the [Community Treaties] and, on the other hand, by the other provisions of this Treaty." Article 3 TEU clearly does not aim at *substantive* consistency only, since it obliges the establishment and maintenance of a "single institutional framework". The best way to reconcile these provisions, and the underlying tension between the similar objectives and tasks of the EC and EU and the intention to create different legal frameworks in the two treaties, is to accept that Article 3 TEU gives discretion to the Council to apply EC Treaty rules to the Third Pillar, even if not required

119. See *infra* section 3.2.

to do so, unless this is ruled out explicitly or by necessary implication by other provisions, thereby respecting Article 5 TEU. This justifies the Council's powers to extend the EC Treaty staff regulations, and the provisions on immunities, to Third Pillar agencies.¹²⁰ It should be recalled that unlike Article 46 TEU, Article 41 TEU does not specify that "only" the listed provisions are applicable to the EU Treaty.

Furthermore, Article 3 TEU would in exceptional cases even justify a derogation from, or substantial reinterpretation of, Third Pillar provisions which expressly rule out the application of EC Treaty institutional rules to the Third Pillar, where this is necessary in order to maintain substantive consistency and in order for the EU to carry out its Third Pillar tasks effectively. This justifies the Council's practice, in spite of the wording of Article 34(2)(c) TEU, which appears to confer exclusive powers to adopt measures implementing Third Pillar decisions upon the Council,¹²¹ nevertheless to confer power upon the Commission to adopt rules implementing the Schengen Information System's "SIRENE Manual" (and further implementing measures in future).¹²² This was necessary in order to ensure the uniform adoption of implementing measures which apply to both the First Pillar and the Third Pillar, avoiding the complications of having two entirely separate procedures to adopt these measures.

This approach to the issue would still entail that many of the institutional provisions of the EC Treaty not mentioned in Article 41 TEU would not be applicable to the Third Pillar, in cases where the EU Treaty effectively rules out the application of these provisions and there is no exceptional case for a derogation for the sake of consistency and effectiveness. For example, Article 302 EC, conferring power upon the Commission to maintain relations on behalf of the EC with the United Nations and other international bodies, in principle clearly cannot apply to the Third Pillar, as this would clearly contradict Article 37 TEU, which confers such power upon the Council Presidency instead. A detailed analysis of each relevant provision of the EC Treaty is beyond the scope of this article, but it cannot simply be assumed that any EC

120. On the staff regulations, see the *Spain v. Eurojust* case (*supra* note 31) and *supra* notes 38 and 114. On immunities, see Art. 3 of the Police College Decision (*supra* note 37) and Art. 50 of the proposed Europol Decision (*supra* note 38).

121. "[T]he Council, acting by a qualified majority, shall adopt measures necessary to implement those decisions at the level of the Union".

122. See the Third Pillar Decision conferring such powers on the Commission (O.J. 2004, L 64/45), adopted in parallel with Reg. 378/2004 (O.J. 2004, L 64/5), since implemented by the adoption of identical Commission Decisions (O.J. 2006, L 317). As for the future, see Art. 67 of the agreed text of the SIS II Decision (Council doc. 14914/06, 12 Dec. 2006), which is consistent with Art. 51 of the SIS II Regulation (Reg. 1987/2006, O.J. 2006, L 381/4).

Treaty provision is inapplicable simply because it is not listed in Article 41 TEU.¹²³

This finally brings us back to the question of the Court's jurisdiction over such measures. Logically, as the Court implicitly assumed in *Spain v. Eurojust*, the Court's First Pillar jurisdiction should necessarily apply wherever an EC Treaty provision applies to the Third Pillar. An exception might be made for the special case of the Commission's power to adopt substantive Third Pillar rules to implement the current and future Schengen Information System. Here, a logically consistent approach would entail application of all of the Court's Third Pillar jurisdiction *mutatis mutandis* to these Commission measures, considering in particular that Article 35 TEU does not expressly restrict the Court's jurisdiction to measures adopted by the Council.

Finally, the last remaining issue is the power of the Court to interpret Title I of the EU Treaty (aside from Arts. 6(2) and 7 TEU, where it has express jurisdiction), as well as Title VI of the EU Treaty itself, as distinct from acts adopted pursuant to it. Article 46 TEU grants the Court jurisdiction over "provisions of Title VI, under the conditions provided for by Article 35", but Article 35 does not expressly refer to jurisdiction to interpret Title VI of the EU Treaty.

In practice, the Court has interpreted Title VI of the EU Treaty, as well as Title I of that Treaty (leaving aside Arts. 6(2) and 7 TEU, over which it has express jurisdiction) on several occasions: Articles 1, 34 and 35 TEU in the *Pupino* judgment; Articles 35 and 41 TEU in *Spain v Eurojust*; Articles 6(1), 34, 35, 37 and 41 TEU in the *Segi* judgment; Articles 2, 6(1), 29, 31, 34 and 35 TEU in the *Advocaten voor de Wereld* judgment; and Article 2 in three Schengen double jeopardy cases, deriving detailed conclusions from the brief objective of the EU of "developing an area of freedom, security and justice" set out in Article 2.¹²⁴ The CFI has referred to Article 5 TEU.¹²⁵ Opinions of various Advocates General have referred to EU Treaty rules on even more occasions. It might have been thought that the restriction on the Court's ability to interpret Title I of the EU Treaty in particular was intended to prevent the Court from developing the reasoning that it adopted, for instance, in the *Pupino* judgment, in which (as discussed below) it derived assumptions about the legal effect of Third Pillar measures in part by interpreting Article 1 TEU.

123. E.g. see the Opinion in *Segi*, which simply assumes on this basis that Art. 307 EC is inapplicable to the Third Pillar.

124. See *supra* notes 23, 31 and 64 respectively. See also *supra* note 23 *Gozutok and Brugge* at para 36; *Miraglia* at para 34; and *Gasparini*, at para 36.

125. Order in *Segi* (*supra* note 50).

Is the Court's exercise of jurisdiction over Titles I and VI TEU acceptable? Certainly it would be illogical for the Court to be unable to interpret Article 35 TEU in order to examine whether it has jurisdiction over a case, and the power to consider the entire EU Treaty is in effect conferred by the grounds of review set out in Article 35(6) TEU (which implicitly applies to references on the validity of Third Pillar measures as well), which expressly refer to the possible annulment of an EU act for breaching the Treaty.¹²⁶ In other cases, the Court should only exercise such jurisdiction where, by analogy with the general rule of interpretation set out above, it is necessary in order to exercise effectively the jurisdiction which has been conferred upon the Court. For instance, it was necessary in *Pupino* to interpret Article 34 TEU in order to answer the question referred by the national court regarding the legal effect of Framework Decisions, and to interpret Article 1 TEU in order to deal with two Member States' objections to the application of the principle of loyal co-operation.

In any case, the Court should be able to interpret the "rule of law" provision of Article 6(1) TEU. Indeed, the Treaty drafters' attempt to refuse the EU courts any jurisdiction to interpret a treaty provision purporting to guarantee the "rule of law" is worthy of a *Monty Python* script.

3. Judicial protection in the national courts: The legal effect of Third Pillar measures

3.1. Framework Decisions: The *Pupino* judgment

The starting point for any discussion of the judicial protection which national courts must secure as regards Third Pillar measures in general, and Framework Decisions in particular, is the Court's remarkable judgment of June 2005 in *Pupino*.¹²⁷ This case, the first reference from a national court concerning a Framework Decision,¹²⁸ concerns the interpretation and the legal effect of provisions of the Framework Decision on crime victims,¹²⁹ which was the

126. The Court agreed with this argument explicitly in *Advocaten voor de Wereld*, paras 17 and 18 (*supra* note 23). See also paras. 33 and 34 of the Opinion in that case, and the *Segi* Opinion (*supra* note 64), para 66.

127. *Supra* note 23.

128. There have been two subsequent references, one concerning the interpretation of the same Framework Decision (*Dell'Orto*, pending, *supra* note 23) and one on the validity of the Framework Decision on the European Arrest Warrant (*Advocaten voor de Wereld*, *supra* note 23).

129. O.J. 2001, L 82/1.

second Framework Decision adopted by the Council.¹³⁰ Article 34(2)(b) TEU defines Framework Decisions identically to Directives, except that Framework Decisions “shall not entail direct effect”; an identical exclusion limits the legal effect of Third Pillar Decisions.

The particular Framework Decision at issue in *Pupino* requires each Member State to ensure that “where there is a need to protect victims – particularly those most vulnerable – from the effects of giving evidence in open court, victims may, by decision taken by the court, be entitled to testify in a manner which will enable this objective to be achieved, by any appropriate means compatible with its basic legal principles”.¹³¹ There is no definition of “vulnerable” victims.

Italian criminal procedure provides for certain cases where “special arrangements” can be made to hear victims, where the “witness cannot be heard in open court by reason of illness or serious impediment”, where a “witness is vulnerable to violence, threats, offers or promises of money or other benefits, to induce him or her not to testify or to give false testimony”, or concerning sexual offences or offences with a sexual background, if the person concerned is under 16.¹³² However, it was not clear whether these provisions were applicable to the case of Mrs Pupino, a nursery school teacher who was accused of (non-sexual) violence against several pre-school children in her care, and the national court took the view that, in principle, it could not accede to the public prosecutor’s request to gather evidence using “special arrangements”. The national court therefore asked the Court of Justice whether the Framework Decision should “be interpreted as precluding national legislation” such as the Italian rules in question.

The Court began its judgment by making several general points relating to its jurisdiction.¹³³ It then had to address difficult issues which, although they technically concerned the jurisdiction of the Court, in fact concerned the legal effect of Third Pillar measures. The French Government argued that the Italian court wanted to apply the Framework Decision in place of national legislation, whereas Article 34 TEU rules out the direct effect of Framework Decisions. As regards the “indirect effect” of Framework Decisions,¹³⁴ the

130. As of 10 Apr. 2007, twenty-one Framework Decisions had been adopted, the Council had agreed in principle on six more, and four more were under active discussion.

131. Art. 8(4) of the Framework Decision.

132. See *Pupino* (*supra* note 23) at para 10. For details of the latter arrangements, see para 11 of the judgment.

133. See further *supra* section 2.

134. I shall use the populist term “indirect effect” in this paper to refer to the principle of the interpretation of national law consistently with EC or EU law. As usual, the Court did not use this term in its *Pupino* judgment.

French Government argued that interpretation of national legislation in line with the Framework Decision was impossible, and in any event would aggravate the position of a defendant in criminal proceedings, which in both cases would exceed the possible application of the “indirect effect” principle.¹³⁵ Similarly, the Dutch Government argued that if the “indirect effect” principle did apply to the Third Pillar, the conditions for its application were not satisfied. The Italian government argued that the principle of indirect effect did not apply to the Third Pillar, as Framework Decisions and Directives are separate sources of law; the British and Swedish governments argued similarly that the principle could not apply in an intergovernmental framework.

However, the Court ruled decisively that the principle of “indirect effect” applies to the interpretation of national law falling within the scope of Third Pillar Framework Decisions. It first observed that “the wording of Article 34(2)(b) TEU is very closely inspired by that of the third paragraph of Article 249 EC”.¹³⁶ The binding character of Framework Decisions, since it was identical to Article 249 EC, “places on national authorities, and particularly national courts, an obligation to interpret national law in conformity” (para 34). This conclusion was not invalidated merely because the Court’s Third Pillar jurisdiction is “less extensive” than its First Pillar jurisdiction, or because “there is no complete system of actions and procedures designed to ensure the legality of the acts of the institutions in the context of” the Third Pillar (para 35). The Court held:

“Irrespective of the degree of integration envisaged by the Treaty of Amsterdam in the process of creating an ever closer union among the peoples of Europe within the meaning of the second paragraph of Article 1 EU, it is perfectly comprehensible that the authors of the Treaty on European Union should have considered it useful to make provision, in the context of Title VI of that treaty, for recourse to legal instruments with effects similar to those provided for by the EC Treaty, in order to contribute effectively to the pursuit of the Union’s objectives.” (para 36)

Moreover, the “importance” of the Court’s Third Pillar jurisdiction is confirmed by the ability of all Member States to submit observations by the Court as regards references for a preliminary ruling (para 37). This jurisdiction of the Court “would be deprived of most of its useful effect if individuals were not entitled to invoke framework decisions in order to obtain a conforming interpretation of national law before the courts of the Member States” (para 38).

135. On the indirect effect principle, see generally, Prechal, *Directives in EC Law*, 2nd ed. (OUP, 2005), ch. 8, with further references.

136. See *Pupino* (judgment, *supra* note 23) at para 33.

The Court then dealt with the Italian and British objection that the principle of indirect effect rested in part upon the principle of “loyal cooperation” of Member States as set out in Article 10 EC, and therefore had no parallel in the Third Pillar because of the absence of an express provision to that effect in Title VI TEU (para 39). It rejected that argument, in light of Article 1 TEU, which refers to the EU Treaty as a mechanism for developing an “ever closer union” with the task of organizing cooperation in a manner demonstrating consistency and solidarity (paras. 40–41). In the Court’s view,

“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...” (para 42)

In paragraph 43, the Court concluded decisively that the “indirect effect” principle applies to Third Pillar Framework Decisions, although this obligation “is limited by general principles of law, particularly those of legal certainty and non-retroactivity” (para 44), which prevent criminal liability from being imposed on the basis of a Framework Decision in the absence of a national implementing measure.¹³⁷ However, this limit does not apply where the position is aggravated due to a rule of criminal *procedure*, as distinct from substantive criminal law (para 46). Finally, the Court also accepts that, as with directives, there is a limit to the principle of “indirect effect” where it is impossible for national law to be interpreted consistently with a Framework Decision, although it left it to the national court to decide if a conforming interpretation was possible or not in this case (paras. 47–48).

The Court came to the unsurprising finding that in the circumstances of the case, pre-school children allegedly maltreated by a teacher had to be considered “vulnerable” victims (paras. 50–56). However, given the protection of human rights in the EU legal order, as set out in Article 6(2), any special arrangements applied would nonetheless have to ensure the protection of Mrs Pupino’s fundamental right to a fair trial, “as interpreted by the European Court of Human Rights” (paras. 57–61).

The Opinion of the Advocate General in this case examined the legal effect issues *beginning* with the issue of loyalty to the Union. The Opinion, like the judgment, concluded that this principle applied to the Third Pillar on the basis

137. *Ibid.* at para 45. The Court refers here to parallel case law limiting the legal effect of Directives on the same grounds.

of Article 1 TEU. However, the Opinion also mentioned the obligation in Article 10 EC that Member States must refrain from damaging measures. While the Opinion (like the judgment) endorsed the indirect effect of Framework Decisions on literal grounds, in doing so it applied (unlike the judgment) the Court's case law on the interpretation of international treaties. Although the Opinion accepted that the EU Treaty aimed at a "lesser degree of integration" than the EC Treaty, due to the different forms of decision-making and the limits on the Court's jurisdiction in the Third Pillar, the Advocate General nonetheless concluded that the Third Pillar is a comparable form of integration entailing a requirement to confer indirect effect upon Framework Decisions. She referred again to the creation of an "ever closer union" according to Article 1 TEU, as well as the development of Union "policies", which "indicates that, contrary to the view of the Swedish Government, the Treaty on European Union includes not only inter-governmental cooperation, but also joint exercise of sovereignty by the Union." Also, she referred to the obligation to "build upon the *acquis communautaire*" referred to in Article 3 TEU,¹³⁸ and she laid stress upon the historical development of the Third Pillar legal framework.¹³⁹

As for the counter-argument that the Third Pillar did not create a complete system of remedies to ensure its legality, the Advocate General responded that indirect effect did not create new rules, but presupposes that rules already exist. She concluded on this issue by arguing that even if the Framework Decision had to be classified as international law, it would have an impact on national courts because it was binding upon each Member State. Also, she referred to the UK Government's argument that indirect effect "cannot lay claim to the same primacy as Community law and may therefore – pursuant to national law – have to give way to other forms of interpretation", although it was not clear if she endorsed this view.¹⁴⁰

3.2. *Analysis of the Pupino judgment*

How significant is the Court's judgment in *Pupino*? Despite its apparently radical application of a key Community law principle to an area of law perceived to be intergovernmental, in several respects the Court's judgment is cautious. For one thing, although the Court's answer concerns indirect effect, the national court's question (as the French Government pointed out) concerned instead the compatibility of a national rule with the Framework

138. See *Pupino* (*supra* note 23) Opinion of the Advocate General, at para 32.

139. *Ibid.* at para 33.

140. *Ibid.* at para 37.

Decision – which would seem to call for a ruling on the *direct* effect and/or supremacy of Framework Decisions. This alchemy is disguised in the judgment because the Court takes care not to quote the national court's original question. The Court has, in effect, transposed a potential *Costa* into a mere *Von Colson*. It has been observed that the principle of indirect effect is “in general, a relatively mild incursion into the national legal system”.¹⁴¹ Even the Court's judgment on the substance of the Framework Decision is cautious, concluding only that a certain category of children must be considered to be “vulnerable” crime victims.¹⁴²

Furthermore, the Court did not set out many general conclusions about the legal order of the Third Pillar, but rather confined itself largely to addressing the very specific question of the legal effect of framework decisions. The reasoning begins with a literal, textual comparison of Articles 249 EC and Article 34(2)(b) TEU, goes on to reject a counter-argument based on the Court's limited Third Pillar jurisdiction, and then interprets the Treaty in light of the intention of the authors regarding the creation of framework decisions, *leaving aside* the question of “the degree of integration envisaged” by the creation of “an ever closer union” in accordance with Article 1 TEU. The only teleological point made is the effectiveness of the Court's jurisdiction, which is linked to an individual *entitlement* to invoke direct effect before national courts; the Court passed up the opportunity to describe this as an individual *right*. However, it should be noted that this line of reasoning appears to assume that the Community law principle of effectiveness (or a variation of it) applies to the Third Pillar.

It is hard to see how any of these points could be seen as radical. A standard black-letter interpretation of Article 34(2)(b) TEU suggests that since this provision is identical to the definition of directives in Article 249 EC except for the exclusion of direct effect (a principle which is course not mentioned in Art. 249, but instead was developed by the Court), then by *a contrario* reasoning, every other rule relating to the legal effect of directives is applicable to the legal effect of framework decisions. This could be confirmed by the principle of consistency as set out in Article 3 TEU, the unified general objectives of the Union, and the particular link between the Community law aspects of “freedom, security and justice” and the Third Pillar aspects of this area of law. This rule could even be regarded as a subset of a general rule of interpretation of the Third Pillar provisions of the Treaty in light of the First Pillar provisions “as far as possible” in light of the same

141. Prechal (op. cit. *supra* note 135), at p. 180.

142. Cf. the Opinion in *Pupino*, which concluded that *all* children were “vulnerable” victims of crime.

arguments, an interpretation which can be defended by the canons of interpretation of international law, without resorting to the Court's controversial approach to the legal effect of *Community* law.¹⁴³ This first line of the Court's analysis not only avoids any general statement about the Third Pillar, as noted above, but even avoids any general statement about the legal effect of Framework Decisions, addressing only the question of their indirect effect.

The interpretation of the Treaty by reference to the intentions of the authors gives primacy to the Member States as masters of the Treaties, and its application to the facts can easily be defended. Since the Treaty drafters consciously decided to define the legal effect of framework decisions by copying the definition of directives in the EC Treaty, with the sole specific exclusion of the direct effect of framework decisions, they can reasonably be presumed to have deliberately chosen to align the legal effect of the two instruments with the sole exception of direct effect, since they obviously turned their minds to the issue of divergences between the legal effect of the two instruments but chose only to draw a single distinction.

As for the argument about the absence of a complete system for controlling the legality of Third Pillar acts, it is hard to see how it is relevant to the question of the *legal effect* of Third Pillar acts, since the principle of a complete system of remedies was developed by the Court of Justice in the context of the separate question of challenges to the validity of EC acts,¹⁴⁴ long after the seminal judgments in *Van Gend* and *Costa*, which make no reference to such a principle.¹⁴⁵ So it makes sense for the Court of Justice to reject this argument out of hand. In contrast, the Advocate General's response to the argument is, with respect, confusing, although this matters little since the original argument is irrelevant.

However, the Court of Justice also refers to the rather stronger argument that the Court's jurisdiction is less extensive as regards the Third Pillar than the first. This could perhaps be understood as an *a contrario* reference to the reasoning in the *Van Gend* judgment, when the Court referred to the existence of the Court's jurisdiction over preliminary rulings as a secondary argument for concluding that EC law "has an authority which can be invoked by [Member States'] nationals before [national] courts and tribunals". The *Pupino* judgment in effect is a variation upon this theme, when it concludes that the effectiveness of the Court's Third Pillar jurisdiction over preliminary rulings would be nullified in the absence of indirect effect. The limits on the

143. For details of this suggested approach, see Peers, "Watchmen" (op. cit. *supra* note 1), 365–374.

144. See particularly *Les Verts* (*supra* note 83) and *UPA* (*supra* note 58).

145. Case 26/62, *Van Gend en Loos*, [1963] ECR 3 and Case 6/64, *Costa*, [1965] ECR 585.

Court's jurisdiction (i.e. national opt-outs) are explained away by concluding that the importance of the preliminary ruling jurisdiction is confirmed by the ability of all Member States to submit observations in Third Pillar references before the Court. This line of reasoning is also convincing as far as it goes, since it is hard to see what the point of the Court's jurisdiction would be in the absence of direct *or* indirect effect. Certainly the Court does not go so far as to derive from this point, as it did in *Van Gend*, the existence of a "new legal order of international law for the benefit of which the States have limited their sovereign rights." In fact, the Court does not derive any conclusion from this besides the principle of indirect effect. Nor, unlike *Van Gend*, does the Court make any reference to the preamble of the Treaty or the creation of its institutions. The Court also passed over the opportunity to approve or develop the points made by the Advocate General as regards the historical development of the Third Pillar, the creation of EU policies, the "joint exercise of sovereignty" by the Member States, and the implications of Article 3 TEU.

The more radical line of the Court's reasoning concerns the application of the principle of "loyal cooperation" to the Third Pillar, an issue which the Court appears to address only as an answer to the counter-argument put forth by the UK and Italy. In other words, the Court could, and probably (given its caution in the rest of the judgment) *would*, have ruled for the indirect effect of framework decisions without any need to examine the question of whether there is a principle of "loyal cooperation" governing the Third Pillar. So the UK and Italy only managed to give the Court the opportunity to invoke a further line of reasoning in favour of the indirect effect of Framework Decisions and which has fundamentally weakened the conception of the Third Pillar as an "intergovernmental" legal order, both as regards the legal effect of EU measures and more generally, as regards the existence of the basic rules underpinning that legal order. To invoke a football analogy, these Member States have not merely accidentally scored an own goal, but rather accidentally started playing for the other side.

In developing this line of reasoning, the Court *does* derive from the principle of "ever closer union" and the vague tasks referred to in Article 1 TEU a principle *not* expressly referred to in the Third Pillar provisions of the EU Treaty, which, by black-letter reasoning, therefore should not apply to the Third Pillar. Again, the Court refers to the effectiveness principle, this time as regards carrying out the Union's task, and concludes in effect that one aspect of Article 10 EC is applicable to the Third Pillar (the requirement to take measures to ensure fulfilment of obligations). It should be noted, however, that the Court makes no reference to the other aspects of Article 10 EC (the obligation to facilitate achievement of the EC's tasks and the requirement to abstain from any measure which would facilitate the attainment of the

objectives of the Treaty), although the obligation for Member States to take appropriate measures to fulfil their obligations to which the Court refers is expressly non-exhaustive (as indicated by the Court's use in para 42 of the words "in particular"). Furthermore, the Court's reliance upon the Union's tasks in the *Pupino* judgment can be compared to its reference to the Community's objectives in the *Van Gend* judgment.

The implication of the Court's reasoning here is not only that other aspects of the Court's principles concerning the legal effect of EC law derived from the principle of loyal cooperation and/or the principle of effectiveness could be transposed to the Third Pillar, but also that other EC law principles not expressly applicable to the Third Pillar could nevertheless be applicable to it by virtue of a link to the concept of developing an "ever closer union" and the Union's very general tasks as set out in Article 1 TEU. In short, the broad scope of this second line of reasoning in the *Pupino* judgment leaves most questions regarding the legal order of the Third Pillar wide open. It is not even clear on what basis the Third Pillar should be interpreted: by reference to the Treaty text and the intention of the authors? By reference to the effectiveness of the Court's jurisdiction? Or, by reference to the effectiveness of carrying out the EU's task, in the context of developing an "ever closer union"? The issue is obviously complicated because most of the general principles of EC law and the rules concerning the legal effect of EC law, and many of the rules governing the functioning of the EU's institutions and the jurisdiction of the Court of Justice (including the EC law obligations of national courts), have been developed by the Court in the absence of written rules – or sometimes even *in spite of* the written rules which do exist. Moreover, it would presumably be open to the Court to look at other provisions in the EU Treaty as grounds for arguments concerning the legal effect of EU law, such as the preamble and the objectives of the EU as set out in Article 2 TEU (paralleling the approach in *Van Gend*). In fact, the Court has already drawn detailed and far-reaching assumptions about the *substantive* law of the Third Pillar from the general provisions of Article 2.¹⁴⁶ For example, recognizing the principle of direct effect of Third Pillar measures would bolster the effectiveness of the EU's tasks and of the Court's jurisdiction, but (as regards framework decisions and decisions) it would manifestly breach the text of the EU Treaty. Recognizing the principle of supremacy of EU law within the Third Pillar would again bolster the effectiveness principle, and would not expressly violate the text of the EU Treaty, which is silent on this issue (as is the EC Treaty). But could it seriously be contended that the authors of the EU Treaty intended to provide for the supremacy of EU law in the Third Pillar?

146. See the references in *supra* note 124.

It might be tempting to rely upon the Court's recognition of the existence of the principle of loyal cooperation in the Third Pillar to argue that at least the EC law principles related to that rule should be applicable. But in the case law, the principle of loyal cooperation is closely intertwined with other fundamental rules relating to the legal effect of EC law. Separating these different rules is no easier than separating the distinct eggs in an omelette. So, for example, in *Factortame I*, the Court freely mixes the application of Article 10 EC with the principle of direct effect, ruling that it is for "national courts, in application of the principle of cooperation laid down in Article 5 of the EEC Treaty, to ensure the legal protection which persons derive from the *direct effect* of provisions of Community law".¹⁴⁷ The judgment subsequently refers to the effectiveness of EC law and the effectiveness of the preliminary rulings procedure, two points relied upon in the *Pupino* judgment,¹⁴⁸ but *Factortame* also refers earlier to the principle of the primacy of EC law.¹⁴⁹ In fact, the wording of the *Factortame* judgment suggests that it is interim relief, rather than the principle of supremacy as such, which flows from Article 10 EC. Along the same lines, the judgment in *Simmenthal* does not refer to Article 10 EC at all, instead relying mainly on primacy and direct effect, but it does make ancillary points about the effectiveness of EC law and the Court's jurisdiction.¹⁵⁰ The initial assertion of EC law supremacy in *Costa* relies largely on general statements by the Court about the nature of EC law, backed up by references to the objectives of the Treaty, the limited prospect for derogations, and the legal effect of regulations.¹⁵¹ As noted above, the first of these points could be applied by analogy to the Third Pillar.

The principle of indirect effect itself was initially developed primarily by reference to Article 10 EC.¹⁵² The principle of damages liability for breach of Community law, however, was developed primarily by reference to the creation of the EC as a new legal order, along with the obligation of national courts to protect EC law and the effectiveness of EC law rights; as a purely ancillary point, the Court concluded that "[a] further basis for the obligation of Member States to make good such loss and damage is to be found in

147. Case C-213/89, [1990] ECR I-2433, para 19.

148. *Pupino* (judgment, *supra* note 23) paras 21 and 22.

149. *Supra* note 147 at para 18.

150. Case 106/77, [1978] ECR 629.

151. See also *Van Gend* (*supra* note 145).

152. See para 26 of the judgment in Case 14/83, *Von Colson*, [1984] ECR 1891, referred to in the other key judgments on indirect effect (see e.g. Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, para 12; Case C-106/89, *Marleasing*, [1990] ECR I-4135, para 8; Joined Cases C-397-403/01, *Pfeiffer*, [2004] ECR I-8835, para 110).

Article [10] of the Treaty”.¹⁵³ But when the Court decisively ruled against the horizontal direct effect of directives, it referred to the principles of indirect effect (as derived from Art. 10 EC) and damages liability as alternative methods of ensuring the effectiveness of EC law.¹⁵⁴

As for other issues related to the effectiveness of EC law, the Court has linked the entire doctrine of effectiveness and equivalence of national rules to Article 10 EC,¹⁵⁵ in particular in the context of revoking prior administrative decisions when certain conditions are met.¹⁵⁶

To what extent do the Third Pillar provisions of the EU Treaty ensure effective judicial protection for individuals in the context of the legal effect of EU measures? The best way forward on this issue would be to strike a balance between the conflicting approaches based on the wording and the intention of the authors of the Treaty on the one hand, and the effectiveness and systemic considerations (based on the preamble, the task and objectives of the Union and the creation of EU institutions) on the other. In particular, the starting point must be that the intentions of the authors of the EU Treaty (even following the Treaty of Amsterdam) were surely that the full extent of the Community legal order would *not* apply to the Third Pillar of the EU. This must at least be true where the express wording of the EU Treaty rules out such an application (as regards the role of the political institutions, the jurisdiction of the Court of Justice, and the direct effect of framework decisions and decisions), but also as regards the most fundamental aspects of the relationship between national law and Community law.

This is confirmed by a literal interpretation, for if the Treaty authors had actually intended all aspects of the Community legal order to apply to the Third Pillar, then why did they draw up a separate EU Treaty at all? It would certainly have been possible to provide for an institutional and jurisdictional “ghetto” in the midst of the EC Treaty, as proved by Title IV of Part Three of that Treaty (concerning immigration, asylum and civil law). In fact, the “transfer” of parts of the Third Pillar to the First Pillar by the Treaty of Amsterdam, and the existence of *passerelle* clauses in Title VI TEU (former Art. K.9 TEU, and current Art. 42 TEU) which are made subject to national ratifi-

153. Joined Cases C-6 & 9/90, *Francovich*, [1991] ECR I-5357, particularly para 36.

154. Case C-91/92, *Faccini Dori*, [1994] ECR I-3325, particularly para 19. The judgment makes no reference to the supremacy of EC law.

155. See Case C-312/93, *Peterbroeck*, [1995] ECR I-4599, para 12.

156. See Case C-453/00, *Kühne and Heitz*, [2004] ECR I-837, para 27. In comparison, the Opinion in this case begins by applying the principles of primacy and direct effect, and only subsequently mentions Art. 10 EC, with reference to Case C-213/89, *Factortame and Others* [1990] ECR I-2433, para 20 and *Francovich* (*supra* note 153).

cation procedures,¹⁵⁷ rather than a provision which simply confers the power to amend the decision-making and jurisdiction rules pursuant to a less onerous procedure,¹⁵⁸ confirms that the authors of the EU Treaty, past and present, conceived that there were fundamental differences between the EC and EU legal orders.

This interpretation is confirmed by the wording of Article 1 TEU, which specifies that while the Union is “*founded upon*” the Communities, the Communities are “*supplemented by the ... forms of cooperation established by*” the EU Treaty, and by Article 5 TEU, which distinguishes clearly between the EC institutions “*exercising their powers under the conditions*” of the Community Treaties on the one hand, and the EU Treaty on the other. Such wording points unmistakably to the intention to create a distinct legal order.

It must follow that the principle of supremacy does not apply to the Third Pillar, and neither does the corollary principle of direct effect or the closely connected obligation to set aside national law (*a fortiori* national constitutional provisions) in order to apply Community law. If these principles applied to the Third Pillar, the essential distinctions between the First and Third Pillar would be lost, and the intentions of the Treaty authors would clearly be ignored. This is true as regards the direct effect of conventions as well, even though such a legal effect is not expressly excluded. To reverse the reasoning of *Van Duyn*,¹⁵⁹ it does not follow that the direct effect of conventions is applicable merely because direct effect is only excluded as regards the other measures listed in Article 34 TEU. Similarly, it cannot seriously be argued, to get around the exclusion of direct effect, that Third Pillar measures benefit from the subtly different concept of direct *applicability*.

It might be argued that this interpretation would limit the effectiveness of EU law. This objection is indisputably correct. But there is a trade-off between effectiveness and sovereignty. The clear indications are that the Member States accepted, at least for the time being, that a reduction in the effectiveness of EU law was a price worth paying for increased sovereignty, and the corresponding increased discretion of national governments and increased accountability to and increased powers of national parliaments and courts. Put simply, Member States wanted less integration in this area.

However, it does not follow that Member States wanted the Third Pillar to be entirely ineffective. In particular, as argued in the *Pupino* opinion, the substantial amendments made to the remaining Third Pillar by the Treaty

157. It is striking that these provisions permit a possible transfer to the First Pillar, not merely a possible change to the decision-making process *within* the Third Pillar.

158. Cf. Art. 67(2) EC, which was negotiated in parallel with Art. 42 TEU.

159. Case 41/74, [1974] ECR 1337.

of Amsterdam may be understood as a significant step in that direction. It is therefore appropriate to recognize the application of the *less* fundamental principles of Community law to the Third Pillar. Chief among these is the principle of indirect effect, which can, for the reasons already pointed out, be justified not only in light of the principles of effectiveness of EU law and the Court's jurisdiction, but also in light of the wording of the Treaty and the authors' intentions. Furthermore, the Third Pillar legal order should be understood to comprise the other secondary rules concerning the legal effect of Community measures, in particular the specific applications of the principle of effectiveness (except for the disapplication of national legislation), most particularly the principle of liability for damages. Although the principle of liability for damages can operate to protect directly effective rights,¹⁶⁰ it was initially developed in the context of protecting rights which were not directly effective,¹⁶¹ and has been used by the Court, along with indirect effect, as a form of compensation for the lack of (horizontal) direct effect.¹⁶² Similarly the more general requirement to ensure that national law giving effect to Community law rules is governed by the twin principles of effectiveness and equivalence is apt for application to the Third Pillar.¹⁶³ The application of the "loyal cooperation" principle to ensure the enforcement of Community law against individuals is even more apt for transposition to the Third Pillar, because one of the main objectives of the Third Pillar is to ensure that persons are prosecuted or investigated by Member States, or that one Member State's criminal law decisions are applicable in other Member States.¹⁶⁴

There is no reason that any of these principles should be subject to a different interpretation than that applied in the context of EC law. This is already clear as regards indirect effect, as the judgment in *Pupino* strongly implies, in light of the Court's reliance on the nearly identical definition of directives and framework decisions, its reference to interpretation in light of "the whole of national law",¹⁶⁵ and the reference to the principle of loyal cooperation in

160. See Joined Cases C-46 & 48/93, *Factortame III* and *Brasserie de Pecheur*, [1996] ECR I-1029.

161. See *Francovich*, *supra* note 153.

162. See *Faccini Dori*, *supra* note 154 and generally Prechal (op. cit. *supra* note 135), ch. 10.

163. The Opinion in *Advocaten voor de Wereld* (*supra* note 23), para 56, expressly suggests that the case law on the relationship between EC law and national procedural law applies to the Third Pillar. On these principles, see Prechal (*ibid*), ch. 9, and most recently the judgment of 13 March 2007 in Case C-435/05, *Unibet*, nyr.

164. See e.g. the important judgments in Case 68/88, *Commission v. Greece*, [1989] ECR 2965, Case C-265/95, *Commission v. France*, [1997] ECR I-6959 and Case C-94/00, *Roquette Frères*, [2002] ECR I-9011, all of which mention Art. 10 EC.

165. Para 47 of the judgment, implicitly referring to *Pfeiffer* (*supra* note 152).

all of the key judgments which concern the indirect effect principle.¹⁶⁶ It follows that national courts are obliged to interpret both prior and subsequent national law in light of a framework decision, as established in *Marleasing*.¹⁶⁷ The Commission's detailed arguments about the extent of Member States' obligations to legislate to give effect to framework decisions must also be correct.¹⁶⁸ Of course, it should be noted, that unlike the principle of the indirect effect of directives, which largely applies to relations between private parties, the indirect effect of framework decisions will, in the absence of direct effect and given the subject-matter of the Third Pillar, largely be relevant to the relations between individuals and state authorities. Having said that, there will be a few cases in which framework decisions govern the relations between individuals.¹⁶⁹

It might be objected that the Community law principles of liability for the errors of national judiciaries, and the obligation to reopen prior administrative decisions,¹⁷⁰ should not apply to the Third Pillar, because these obligations are linked closely to the obligation for final courts to refer any pending EC law questions to the Court of Justice, which does not generally apply to the Third Pillar.¹⁷¹ However, the application of these principles to the Third Pillar should nonetheless be reaffirmed, since it is clear from *Pupino* that all national courts have obligations to apply Third Pillar measures, whether they have the capability to refer questions to the Court of Justice or not. Surely the binding nature and legal effect of EU measures cannot differ depending on whether the Court has jurisdiction over preliminary rulings, or the extent of that jurisdiction.

Alternatively, a supporter of a more integrationist analysis might argue that it makes no sense to apply the secondary principles of Community law without also applying the principles of supremacy and direct effect. But there are prior examples of this in EC law, as regards the lack of horizontal direct effect

166. See *supra* note 152.

167. *Ibid.*

168. See, for instance, the report on the application of the Framework Decision on facilitation of illegal entry (COM(2006)770, 6 Dec. 2006, pp. 4–5) and Prechal (*op. cit. supra* note 135), ch. 5.

169. For example, the obligation in the Framework Decision on crime victims' rights for offenders to compensate crime victims, which is at issue in the pending *Dell'Orto* case (*supra* note 23).

170. *Kühne and Heitz* (*supra* note 156) and Case C-224/01, *Köbler*, [2003] ECR I-10239.

171. It is worth remarking in passing on the remarkable dynamics of the *Kühne and Heitz* judgment (*supra* note 156). Rather than relying on the national courts to enforce Community law against recalcitrant national administrations, as it has so many times in the past, in this case the ECJ enjoins national *administrations* to enforce Community law in spite of recalcitrant national *courts*.

of directives, which appears to rule out the prospect of setting aside national law (a key element of the supremacy principle),¹⁷² and the legal effect of the law of the World Trade Organization within the scope of EC law (supremacy without direct effect, but with *indirect* effect).¹⁷³

It is not necessary, in order to reach the conclusions I have suggested above, to determine whether the Third Pillar of the European Union constitutes a “new legal order” in international law, as several advocates general have done.¹⁷⁴ In fact, it may be tactically unwise for the Court to rule on this question either way: a positive ruling on this point could aggravate some national courts and some part of public and political opinion, while a negative ruling might result in national courts overlooking the legal effect of Third Pillar legislation, despite the ruling in *Pupino*. On the other hand, an *academic* opinion on this point is surely harmless! In my view, applying the analysis in *Van Gend*, the Union can indeed be considered a “new legal order”, in light of the preamble of the EU Treaty, the tasks and objectives of the Union and the roles of the institutions, including the Court. Even so, it does not follow that the Union shares all of the characteristics of the Community legal order, for all of the reasons set out above. It should be concluded that the Union and the Community are parallel and intertwined legal orders, sharing some essential characteristics but differing as regards the application of some important rules concerning the relationship between EC/EU and national law, because of the lesser degree of integration in the Third Pillar.

Finally, it may be useful to give some concrete examples of how these abstract principles might work. To date the Court has only had the opportunity to develop its case law beyond a single case in one substantive area of the Third Pillar, namely the cross-border double jeopardy principle.¹⁷⁵ All of the cases up to the present have concerned the substance of that principle, rather than procedural issues relating to its application. But it is certainly possible that, since the Court’s judgments in this area often require changes in national practice, there are persons who have been or will be wrongly detained, convicted and/or prosecuted in breach of the Court’s interpretation of the double jeopardy rules. While there is no obligation upon national courts to set aside any national legislation in breach of the Court’s interpretation of the double

172. See the Opinion of 11 Feb. 2007 in Case C-411/05, *Palacios de la Villa*, pending.

173. See: Case C-61/94, *Commission v. Germany*, [1996] ECR I-3989 (supremacy); Case C-149/96 *Portugal v. Council* [1999] ECR I-8395 and Joined Cases C-300 & 392/98, *Dior and others*, [2000] ECR I-11307 (no review of EC acts in light of WTO measures; lack of direct effect of WTO measures); and Case C-53/96, *Hermès*, [1998] ECR I-3603 (indirect effect).

174. See the Opinions in *Gasparini*, *supra* note 23, para 81 and *Advocaten voor de Wereld*, *supra* note 23, para 43.

175. See *supra* notes 20 and 23.

jeopardy rules, it still follows that such national legislation must be, as far as possible, interpreted in light of those rules as interpreted by the Court of Justice. Wrongful detention, prosecution and conviction connected to the double jeopardy rules should be compensated in accordance with the principles established as regards Community damages liability.¹⁷⁶ National procedural rules limiting challenges to detention or prosecution, or proceedings to set aside a conviction, where they are connected to the double jeopardy rules, must be subject to scrutiny in light of the principles of effectiveness and equivalence.¹⁷⁷

Similar arguments could be made as regards the provisions for remedies in the EU legislation on mutual recognition in criminal matters.¹⁷⁸ The legal effect of Third Pillar measures in national law would be particularly relevant if the Commission's proposed framework decision on the rights of suspects and defendants were adopted by the Council.¹⁷⁹

3.3. *Common Positions: The Segi judgment*

The Court of Justice has also ruled on the legal effect of Common Positions, in the recent *Segi* judgment.¹⁸⁰ In the framework of cases demanding compensation for being listed as "terrorists" in a Third Pillar Common Position,¹⁸¹ the Court ruled that Article 34 TEU provided for the adoption of acts "varying in nature and scope". In its view, "[a] common position requires the compliance of the Member States by virtue of the principle to cooperate in good faith, which means in particular that Member States are to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under European Union law [referring to *Pupino*]"'. Article 37 TEU "thus" requires the Member States to defend common positions at the international level, but "a common position is not supposed to produce of itself legal effects in relation to third parties". This "explains why" common positions cannot be the subject of actions for annulment or references for a preliminary ruling.¹⁸²

176. As regards wrongful detention, Art. 5(5) ECHR is also relevant. As regards wrongful conviction, see also Art. 3 of the Seventh Protocol to the ECHR.

177. Again, Art. 5 ECHR is relevant to proceedings relating to detention.

178. See Art. 11 of the Framework Decision on the European arrest warrant (O.J. 2002, L 190/1) and Art. 11 of the Framework Decision on freezing orders (O.J. 2003, L 196/45).

179. COM (2004) 328, 28 April 2004.

180. *Supra* note 64. See also para 40 of the *Advocaten voor de Wereld* judgment (*supra* note 23).

181. For further details of the judgment, see *supra* section 2.

182. See *Segi* judgment, *supra* note 64, at paras. 52 and 53.

The Court should be praised for identifying the key issue in this case, which was the comparison between common positions and other types of Third Pillar act, given the impact of designating a person or a group as a “terrorist” and the non-existent parliamentary and (particularly) judicial control over common positions as compared to other Third Pillar measures. Although Article 34 TEU does not expressly rule out the legal effect of common positions upon third parties, it is surely right to rule out such a legal effect as a matter of policy, as it is objectionable in principle that a Third Pillar measure having effects upon individuals could be immune from any prospect of judicial control by the Court of Justice, if only through the limited remedy of the prospect of preliminary ruling on its validity from the courts of barely half of the Member States.

The Court should furthermore have concluded that Third Pillar common positions are not binding *at all*, except where Article 37 TEU expressly provides for this,¹⁸³ by comparing Article 34(2)(a) TEU with the other provisions of Article 34(2) and also with Article 15 TEU, which clearly provides for a binding effect of Second Pillar common positions. But instead the Court clearly accepts that Common Positions are binding upon *Member States*, and arguably by implication that they are also binding upon EU institutions.

As a consequence of this ruling, it may be doubted whether the Third Pillar Common Positions labelling persons and groups as “terrorists”, and concerning the transfer of personal data to Interpol, were validly adopted. On the other hand, the common positions concerning coordination of Member States’ positions during international negotiations are clearly valid.¹⁸⁴

It is striking that despite the lack of legal effect of common positions on third parties, the principle of loyal cooperation nonetheless applies to such measures. This confirms that the principle of loyal cooperation is binding on the entire framework of Third Pillar cooperation, not just when the Council adopts framework decisions. It also confirms that the principle has a practical impact besides that of indirect effect of framework decisions, although the Court of Justice will rarely, if ever, have a chance to elaborate on the practical impact of that principle as far as common positions are concerned.¹⁸⁵

183. Art. 37 TEU states that “[w]ithin international organizations and at international conferences in which they take part, Member States shall defend the common positions adopted under the provisions of this Title”.

184. For details of the adopted Common Positions, see Peers (op. cit. *supra* note 6), 36–37.

185. It will be recalled (see *supra* section 2) that the Court has jurisdiction according to Art. 35(7) TEU over conflicts between Member States as regards the interpretation or application of (*inter alia*) Common Positions; but it has no other jurisdiction over them, except to rule that they should have been adopted in some other form.

Finally, it follows from *Pupino* and *Segi* that other Third Pillar measures (conventions and decisions) are also governed by the principle of loyal co-operation. The Court of Justice has not yet been called to rule on their legal effect, but logically, where relevant, it should be identical to the legal effect of framework decisions.

4. General principles of Community law

The general principles of Community law have had a significant impact on the development of the Community legal order, serving as important rules ensuring the judicial protection of individuals in the context of the validity and interpretation of Community acts.¹⁸⁶ But do these principles apply to the Third Pillar?

The Court has not expressly stated that all general principles of EC law apply to the Third Pillar. Starting with the best known of the general principles, the protection of human rights, as noted above, is expressly referred to in Article 6(2) TEU, which has been applied by the Court in its judgments in *Pupino*, *Segi* and *Advocaten voor de Wereld*.¹⁸⁷ In *Pupino*, the Court expressly stated that Third Pillar measures had to be interpreted in light of human rights principles, including the jurisprudence of the European Court of Human Rights. In *Advocaten voor de Wereld*, the Court confirmed that within the Third Pillar the human rights principles are also applicable when considering the validity of EU law¹⁸⁸ and the national application of EU law.¹⁸⁹ There can surely be little doubt that the principles apply as regards national derogations from EU law.¹⁹⁰

The *Pupino* judgment also stated that the obligation placed upon national courts to apply the principle of indirect effect “is limited by general principles of law, particularly those of legal certainty and non-retroactivity”.¹⁹¹ This

186. See generally Tridimas, *The General Principles of EU Law*, 2nd ed. (OUP, 2006).

187. Paras. 58–60 of the *Pupino* judgment (*supra* note 23) and para 51 of the *Segi* judgment (*supra* note 64). On the details of this general principle, see Tridimas (*ibid.*) ch. 7.

188. Para 45 of the *Advocaten voor de Wereld* judgment (*supra* note 23).

189. This also can be considered implicit in para 60 of the *Pupino* judgment (*supra* note 23).

190. Although most judgments on this point concern the application of the human rights principles to national derogations from internal market law (case law beginning with Case C-260/89, *ERT*, [1991] ECR I-2925), the Court has implicitly confirmed that the same rule applies to derogations from other EC law provisions (see Case C-540/03, *European Parliament v. Council*, [2006] ECR I-5769).

191. Para 44 of the judgment. On the details of these general principles, see Tridimas (*op. cit. supra* note 186), ch. 6.

statement could be understood to confirm that all the general principles of EC law apply to the Third Pillar, but it is not unambiguous to this effect. Of course, it certainly confirms that two important general principles apply to the Third Pillar. Another main element of the *Pupino* judgment is, of course, the application of the EC law principle of effectiveness.¹⁹²

Later on, the Court stated in *Van Esbroek* that the rule against double jeopardy was “a fundamental principle of Community law”, and in *Van Straaten* that its interpretation of the Schengen double jeopardy rules was justified by the “principles of legal certainty and of the protection of legitimate expectations”.¹⁹³ While these judgments do not expressly state that the rule against double jeopardy and the protection of legitimate expectations are *general* principles of law applicable to the Third Pillar, it is hard to interpret the judgments any other way.¹⁹⁴

In *Advocaten voor de Wereld*, in response to a question from the national court which explicitly asked if a provision of the Framework Decision on the European arrest warrant was compatible with Article 6(2) TEU, the Court ruled that the principle of respect for fundamental rights – and specifically the principle of equality and non-discrimination – applied to the third pillar.¹⁹⁵

As for the principles governing the exercise of Community powers, subsidiarity (as defined by Art. 5 EC) is expressly referred to in Article 2 TEU. One Advocate General has assumed that the principle of proportionality must also apply within the Third Pillar, as “a mechanism to facilitate subsidiarity”,¹⁹⁶ indeed, the principle is often referred to in the preambles of Third Pillar legislation.¹⁹⁷ The principle of conferred powers is virtually explicit in the word-

192. Paras 36, 38 and 42 of the judgment. On the details of this general principle, see Tridimas (op. cit. *supra* note 186), ch. 9. See also the Opinions in *Advocaten voor de Wereld* (*supra* note 23) and *Kretzinger* (*supra* note 23).

193. Para 40 of the *Van Esbroeck* judgment (*supra* note 21); para 59 of the *Van Straaten* judgment (*supra* note 23). On the details of the general principle of legitimate expectations, see Tridimas (op. cit. *supra* note 186), ch. 6.

194. In particular, the Court referred in *Van Esbroeck* to a First Pillar competition law judgment, and several opinions of A.G. Sharpston have argued that the rule against double jeopardy is a fully-fledged general principle of law (Opinions in: *Gasparini*, para 27; *Kraaijenbrink*, paras 60–63; and *Kretzinger*, paras 65 and 70, all *supra* note 23).

195. Paras. 55–60 (*supra* note 23). See also Opinions in *Spain v. Eurojust* (*supra* note 31), paras 32 and 33; *Segi* (*supra* note 64), para 115; and *Advocaten voor de Wereld*, paras 83–99.

196. Opinion in *Advocaten voor de Wereld*, (*supra* note 23), para 61. See Tridimas (op. cit. *supra* note 186), ch. 4.

197. For example, see the Opinion in *Advocaten voor de Wereld*, *ibid.*, para 62, and Tridimas, *ibid.* ch. 3.

ing of Articles 5 and 43(d) TEU,¹⁹⁸ and has been referred to in judgments of the Court of First Instance and the Opinion of an Advocate General.¹⁹⁹

If the principle of proportionality governs the review of EU measures, it must surely also be concluded that, for the sake of consistency, the principle also applies to the review of *national* measures falling within the scope of Third Pillar law.²⁰⁰ This has been assumed in the Opinions of Advocate General Sharpston.²⁰¹ Finally, while the principle of the right to a defence has not been mentioned to date in Third Pillar case law, it would be astounding, given the subject matter of the Third Pillar and its close link to human rights principles, if this principle did not apply to Third Pillar measures.²⁰²

In conclusion, the EU Treaty and the case law of the Court of Justice has confirmed that many general principles of Community law apply to the Third Pillar, and the case law of the CFI and the Opinions of various advocates general have endorsed the application of most or all of the others. Moreover, there is no indication from the case law (including CFI judgments or Opinions) that any of the general principles should be considered *inapplicable* to the Third Pillar. As I argued eight years ago,²⁰³ there is no reason to conclude from the text of the Treaties that any of the general principles is inapplicable. Application of all of the general principles would be consistent with the foundation of the EU upon the “rule of law” and the fact that Article 220 EC (concerning the role of the Court of Justice upholding the rule of law) also applies to the Third Pillar.²⁰⁴ For the sake of legal clarity and certainty, the Court should take an early opportunity to state clearly that all Community law general principles apply to the Third Pillar.

198. The latter provision is one of the conditions for authorizing “enhanced cooperation” in any of the three pillars: it provides that any proposed enhanced cooperation must remain “within the limits of the powers of the Union or of the Community”.

199. See respectively *Segi* and *OMPI*, discussed *supra* section 2, and the Opinion in *Segi*, para 104 (*supra* note 64).

200. See Tridimas (op. cit. *supra* note 186), ch. 5.

201. Opinions in *Kraaijenbrink*, para 60 and *Kretzinger*, paras 64, 65 and 70 (both *supra* note 23).

202. See Tridimas (op. cit. *supra* note 186), ch. 8.

203. Peers, “Watchmen” (op. cit. *supra* note 1), at 378.

204. See the discussion of the ECJ’s *Segi* judgment in *supra* section 4. On the link between the general principles and Art. 220 EC, see for instance the Opinion in *Palacios de la Villa* (*supra* note 172).

5. Conclusions

The case law of the Court of Justice on the system for judicial protection in the Third Pillar has established a number of important principles, but many key issues remain open. This paper has aimed, in light of this initial case law, to suggest an interpretation of the relevant Third Pillar provisions of the EU Treaty which ensures judicial protection as much as possible, consistent with, on the one hand, the Treaty's broad tasks and objectives and, on the other hand, with the intentions of the Treaty drafters to limit the extent of integration within the framework of the Third Pillar. Whichever approach the Court takes on these issues, it would be useful for it to clarify some key underlying issues, such as the role of national courts in controlling the legality of EU acts and the application of the general principles of EU law. It would also be useful for the Court to see how to resolve the tension between the establishment of a "single institutional framework" in Article 3 TEU and the distinctiveness of the EC and EU Treaties, as set out in Article 5 TEU.

From either a Eurosceptic or pro-integration perspective, the interpretation I have suggested above may smack of a rather "political" compromise, rather than a finely nuanced legal argument. But then, the same point could be made of the Court of Justice's case law on lack of horizontal direct effect of Directives, the lack of direct effect of WTO law, the case law on the effect of EC law on national procedural rules, the external competence of the Community, the division of powers between national courts and the Court of Justice as regards the interpretation and validity of Community law, or the principle of "institutional balance". The Court of Justice has developed and maintained its key position in the hierarchy of the Community legal order, and retained sufficient support for its doctrines from national courts, by constantly steering a careful path between judicial activism and political realism.

Nevertheless, despite the Court's best efforts to date, there are still some fundamental defects in the legal structure of the Third Pillar that the Court cannot repair by itself. The system for controlling the legality of EU acts and their effective and uniform interpretation within national legal systems appears to fall short of the basic minimum standards established by the Community legal order (which could in any event still be improved). Unfortunately it seems that "salvation" cannot fully be obtained outside the true "church" of Community law.