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Research Papers in Law
Cahiers juridiques
No 2 / 2008

www.coleurope.eu

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Vassilis Hatzopoulos*

1. Introduction

Unintended as it was, the European Court of Justice (ECJ, the Court, the Court of the EU) has played an extremely important role in the construction of the Area of Freedom Security and Justice (AFSJ). The AFSJ was set up by the Treaty of Amsterdam in 1997 and only entered into force in May 1999. The fact that this is a new field of EU competence, poses afresh all the fundamental questions – both political and legal – triggered by European integration, namely in terms of: a) distribution of powers between the Union and its Member States, b) attribution of competences between the various EU Institutions, c) direct effect and supremacy of EU rules, d) scope of competence of the ECJ, and e) extent of the protection given to fundamental rights. The above questions have prompted judicial solutions which take into account both the extremely sensible fields of law upon which the AFSJ is anchored, and the EU's highly inconvenient three-pillar institutional framework.¹ This structure is on the verge of being abandoned, provided the Treaty of Lisbon enters into force.

The ECJ is the body whose institutional role is to benefit most from this upcoming 'depillarisation', possibly more than that of the European Parliament.² However spectacular this formal boost of the Court's competence, the changes in real terms are not going to be that dramatic. This apparent contradiction is explained, to a large extent, by the fact that the Court has in many ways 'provoked', or even 'anticipated', the depillarisation of its own jurisdictional role, already under the existing three-pillar structure.

Simply put, under the new – post Treaty of Lisbon – regime, the Court will have full jurisdiction over all AFSJ matters, as those are going to be fully integrated in what is now the first pillar. Some limitations will continue to apply, however, while a special AFSJ procedure will be institutionalised. Indeed, if we look into the new Treaty we may identify general modifications to the Court's structure and jurisdiction affecting the AFSJ (section 2), modifications in the field of the AFSJ stemming from the abolition of the pillar structure (section 3) and, finally, some rules specifically applicable to the AFSJ (section 4).

2. General modifications to the Court's jurisdiction, affecting the AFSJ

The Lisbon Treaty, compared to previous EC/EU Treaties, innovates as to its own structure. It consists of three parts, all having equal legal value: a) the very brief Treaty of European Union (TEU) introduces the basic structure and principles of the

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¹ For a systematic account of the Court's case law in this field see V Hatzopoulos 'With or Without You ... Judging Politically in the AFSJ' 33 *ELRev* (2008) 44-65; see also H. Labayle 'Architecte ou spectatrice? La Cour de Justice de l'Union dans l'Espace de liberté, sécurité et justice', 42 *RTDEur* (2006) 1.

² For a general assessment of the jurisdictional role of the Court after the entry into force of the Lisbon Treaty see F. de Witte 'The European Judiciary after Lisbon' 15 *Maastricht Journal of European and Comparative Law* (2008) 43-54.

EU, b) the more extensive and technical Treaty on the Functioning of the European Union (TFEU) describes in detail the various policies and functions of the EU and c) the long series of protocols further detail several issues. The Court's jurisdiction is dealt with in all three parts of the new Treaty.

2.1. The Court's tripartite constitution

The most visible modification introduced by the Lisbon Treaty concerns the very structure of the Court, now renamed 'Court of Justice of the European Union' (CJEU).³ Changes in this respect are twofold.

First, the division between the Court of First Instance (CFI) – renamed 'General Court' and the (higher) 'Court of Justice' – is being reinforced. True to its new name, the General Court, is to become the main jurisdictional body of the EU, hearing at first instance all actions, but preliminary rulings and infringement proceedings against Member States (Article 256(1) TFEU). Hence, annulment proceedings between the Institutions, which have been quite common in the field of AFSJ,⁴ would no longer be heard by the Court, but on appeal. Compared to individual actions (which already are in the jurisdiction of the CFI), annulment proceedings between the Institutions are more likely to bear on important institutional questions. Therefore, the more detailed and rigorously reasoned judgments of the General Court – occasionally reviewed by the Court of Justice – would be likely to increase visibility and to better the understanding of the issues raised by the AFSJ. All the above, however, is put into a provisory halt by Article 51 of Protocol n. 3 'on the Statute of the CJEU' which creates a very important derogation to the general rule of Article 256(1) TFEU. In the Statute it is made clear that annulment actions and actions for failure to act brought by the Member States or by the Institutions against the Parliament, the Council and the Commission, remain under the exclusive jurisdiction of the CJEU. Therefore, until such time as the European Parliament and the Council modify Article 51 of the Court's Statute,⁵ the above apparent change in the Court's jurisdiction is only forthcoming and hypothetical. The General Court, nonetheless, will be hearing annulment (and failure to act) proceedings against the newly recognised defendants: the European Council and the Agencies and Bodies of the EU.⁶

Second, Article 257 TFEU provides that Specialised Courts may be attached to the General Court, according to the ordinary legislative procedure. This may prove highly relevant for the AFSJ, for at least four reasons. Firstly, individuals are being recognised a standing for annulment and failure to act proceedings, both for asylum and immigration issues (current Title IV EC) and for police and judicial cooperation issues (current Title VI EU).⁷ Moreover, admissibility conditions of such standing are being extended.⁸ Secondly, the preliminary competence of the Court is being

³ See Art 19 EU, Arts 251-281 TFEU and protocol n 3.

⁴ See e.g. Case C-170/96 *Commission v Council, air transit visas* [1998] ECR I-2763; Case C-160/03 *Spain v Eurojust* [2005] ECR I-981; Case C-257/01 *Commission v Council, visa policy* [2005] ECR I-345; Case C-176/03 *Commission v Council, sanctions for the environment*, [2005] ECR I-7879; Joined Cases C-317 & 318/04 *European Parliament v Council, PNR* [2006] ECR I-4721; Case C-540/03 *EP v Council, Family reunification* [2006] ECR I-5769; Case C-77/05, *Commission v Council, sanctions for the environment*, judgment of 23 October 2007, nyr; Case C-133/06 *Parliament v Council, asylum procedures directive*, judgment of May 6, 2008, nyr.

⁵ Such a modification may be adopted according to the ordinary legislative procedure, following a proposal by the Court or the Commission and in consultation with the other body; see Art 281 TFEU.

⁶ See below 2.2.1.

⁷ See below 3.2.

⁸ See below 2.2.2.

generalised and extended to all jurisdictions of all Member States.⁹ Therefore, an important increase of AFSJ cases reaching the docket of the CJEU is to be expected.¹⁰ Thirdly, an urgency procedure is provided specifically for AFSJ cases, where a person in custody is involved.¹¹ Fourthly, it has been forcefully put forward that judging in the field of AFSJ, especially in cases involving criminal law, requires special expertise, which the judges of the General Court and the Court of Justice may be lacking.¹² These four factors together may, if overload does in fact materialise, eventually lead to the creation of a specialised AFSJ Court.

2.2. Expanded admissibility in annulment proceedings

2.2.1. Passive legitimation: new Institutions subject to the Court's control

Article 263 TFEU, provides that the Court 'shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties'. Similarly, Article 265 TFEU provides for failure to act proceedings against such bodies. Both provisions use a wide formulation which includes all acts and, presumably also, all kinds of bodies, no matter their legal status. The only limitation introduced by the new provision is that of the intent of the author of the act. Therefore, jurisdictional immunity is no longer afforded to players actively participating in shaping and/or implementing EU policies. Two categories of new litigants are especially relevant for the AFSJ.

Firstly, the European Council: this body started up as an informal and purely intergovernmental forum for the exchange of political views as far back as 1969. It got formally institutionalised by the 1992 Treaty of Maastricht as the only new Institution pertaining to the EU – as opposed to the pre-existing EC Institutions. Since its institutionalisation, the European Council has fully dominated cooperation in the second pillar (common foreign and security policy). It has also played an extremely important role in the third pillar (immigration etc / justice and home affairs) even after its partial 'communautarisation' by the 1997 Amsterdam Treaty. This boost of the European Council's role in the field of the AFSJ is not only symptomatic of the general trend towards intergovernmentalism¹³ and the hyper-activity of the European leaders (the European Council was meant to meet twice – or more – every year, but in fact it has been meeting an average of 6-8 times). It is also, and to a large extent, due to the fact that the Treaty provisions on the AFSJ only provide powers for the EC (Title IV EC) and the EU (Title VI EU), but not the ends to which such powers should be used. This gap has been filled up by the European Council's meeting in special sessions, most importantly in Tampere (1999) and the Hague (2004).¹⁴ Therefore, the European Council has been playing a 'semi-constituant' role in the field of AFSJ. The role of the most supranational body has been further strengthened by the fact

⁹ See below 3.1.

¹⁰ For a thorough discussion of the additional charge of the Court arising from AFSJ cases see House of Lords (EU Committee), 10th Report 2007-08, *The Treaty of Lisbon: an Impact Assessment*, vol. 1, 127 et seq.

¹¹ See below 4.2.

¹² See House of Lords 10th Report, above fn 10, 129 et seq.

¹³ See recently S Blavoukos, D Bourantonis and G Pagoulatos, 'A President for the European Union: A New Actor in Town?', 45/2 *JCMS* (2007) 231-252, 237.

¹⁴ This point is clearly being made by Ph De Bruycker, 'L'émergence d'une politique européenne d'immigration', in « The emergence of a European immigration policy – L'émergence d'une politique européenne d'immigration », Ph De Bruycker, Academic Network for Legal Studies on Immigration and Asylum Law in Europe, Réseau académique Odysseus, Bruylant 2003, 1-95.

that until the end of 2004 the Council of Ministers has been deciding alone (or merely in consultation with the Parliament under the EC Treaty), based on unanimity. Only in December 2004 did the Council switch to the co-decision procedure and this only in respect of the less contentious matters of visas, asylum and illegal (as opposed to legal) immigration.¹⁵ Under the Lisbon Treaty co-decision and qualified majority in the Council will become the standard decision making procedure, while the Treaty itself will contain some general aims to be achieved in the AFSJ. The projected President of the European Council, however, is expected to strengthen the role of this Institution.¹⁶

Secondly, the AFSJ is one of the fields in which new EU Agencies develop and flourish.¹⁷ Europol, Eurojust, CEPOL (College of European Police), EBA (European Border Agency), FRA (Fundamental Rights Agency) are only some of the Agencies involved in the management of the AFSJ.¹⁸ These Agencies do not, in principle, issue binding acts. Therefore, their action is only subject to some kind of 'principal – agent' supervision by the Institution to which they are attached (i.e. the Commission or Council)¹⁹, as well as to indirect control by the European Parliament and the Ombudsman. It is not, however, subject to judicial review. Moreover, the 'acts' they issue do not fall within the typology of those currently provided for in Articles 230 EC (first pillar) or 35(7) EU (third pillar), which the ECJ does have competence to review. This has led the Court to hold that, unless otherwise provided in their founding acts, no annulment proceedings lie against the acts of such Agencies.²⁰ This finding, grounded on a narrow reading of the 'rule of law' principle, creates an uncomfortable situation, since the Agencies play an ever increasing role in the administration and every day running of the AFSJ. Moreover, the Court's findings in *Spain v. Eurojust* seems indirectly infirmed by the more recent judgments in *Gestoras* and *Segi*,²¹ where the Court opted for a much wider application of the 'rule of law' principle.

¹⁵ See Council Decision 2004/927/EC of the Council of 22 December 2004 [2004] OJ L 396/45. For the scope of this decision see Case C-133/06 *Parliament v Council*, asylum procedures directive, nyr, delivered on May 6, 2008.

¹⁶ See Blavoukos e.a. above fn 13.

¹⁷ In general for Agencies see E. Chiti, 'The Emergence of a Community Administration: the Case of European Agencies' (2000) *CMLRev* 309-343, E. Vos, 'Reforming the European Commission: What Role to Play for EU Agencies?' (2000) *CMLRev* 1113-1134, X. Yataganas, 'Delegation of Regulatory Authority in the EU, The Relevance of the American Model of Independent Agencies' (03/01) Jean Monnet Paper, G. Majone, 'Delegation of regulatory powers in a mixed polity' (2002) *ELJ* 319-339, P. Craig, 'The constitutionalisation of Community administration' (2003) *ELRev* 840-864, M. Flinders, 'Distributed public governance in the EU' (2004) *JEPP* 520-544, D. Geradin & N. Petit, 'The development of Agencies at EU and national levels: Conceptual analysis and proposals for reform' (2004) 23 *YEL*, 137-197; see also the Commission communication COM (2002) 718 final.

¹⁸ For the acts instituting these agencies see the Europol Convention of 26 July 1995 [1995] OJ C 316/; Decision 2002/187/JHA [2002] L 63/1; Decision 2005/685/JHA [2005] OJ L 256/63; Regulation (EC) 2007/2004 [2004] OJ L 349/1; Regulation (EC) 168/2007 [2007] OJ L 53/1, respectively.

¹⁹ With few exceptions, supervision is essentially indirect and operates mainly through a) the nomination/revocation of members and/or of the board of managers and/or of the Director of the Agencies, b) control over their financial resources and their use, c) a yearly report submitted to the supervising Institution and (more often than not) to the European Parliament.

²⁰ Case C-160/03 *Spain v Eurojust*, [2005] ECR I-2077. The question arose as to whether the terms and conditions (concerning the linguistic qualifications of the participants) for the selection of personnel for Eurojust could be challenged by a Member State (i.e. a privileged applicant). The Court answered in the negative. It maintained that the rule of law is sufficiently protected by both the individual right of participants to challenge the terms of the selection procedure before the CFI, and the right of Member States to intervene in the proceedings.

²¹ For which see the analysis below 2.2.2.

Next to the Agencies, there are also several other 'bodies' or 'offices' involved in the design and management of the AFSJ. The High Level Group on Asylum and Migration (created in 1998) is hierarchically the most important, but one should not forget the SCIFA (Strategic Committee on Immigration, Frontiers and Asylum) and the SCIFA +, the CIREFI (Centre d'Information de Réflexion et d'Echange sur les Frontières et l'Immigration), the EURASIL, the European Migration Network, the Immigration Liaison Officers Network, to state just a few. These bodies play essentially consultative and/or preparatory role and therefore their 'acts' are unlikely to 'produce legal effects vis-à-vis third parties', in the sense of Article 263 TFEU. It may not be altogether excluded, however, that a 'strategic plan' adopted by the High Level Group affects individual rights through some 'return policy', nor that some of the other body's activities impairs the status of some 'third party'.

Last but not least, the broad way in which Article 263 TFEU is drafted, seems to be encompassing also Funds. It should be remembered that an important series of Funds is already active in the AFSJ: the European Refugee Fund, the External Borders Fund, the Return Fund, the Integration Fund.²² Their acts could be challenged in the future, essentially by the privileged plaintiffs (i.e. the Member States, the Council and the European Parliament), probably as a way to controlling their functioning.

2.2.2. Active legitimation: individual plaintiffs admitted more extensively

Article 263 TFEU introduces yet another considerable extension of the Court's competence for annulment proceedings. The standing of individual plaintiffs is formally extended to cover not only acts 'addressed to that person or which [are] of direct and individual concern to them' but also against 'a regulatory act which is of direct concern to [them]' provided it does not entail any implementing measures. This replaces the current much more restrictive formula (Article 230 EC), whereby individual plaintiffs may only oppose *decisions* addressed to them or *regulations and decisions* addressed to other persons, provided they are of direct *and individual* concern to the plaintiffs. The fact that annulment proceedings may be brought not only against formal *decisions* but against any act affecting individual rights, irrespective of its formal qualification, is no novelty and corresponds to longstanding case law of the Court.²³

Of more interest is the fact that *individual concern* is being dropped as a prerequisite for the admissibility of individual annulment proceedings against regulatory acts.²⁴ In this respect the Court's case law has ebbed and flowed.²⁵ It is, however, in the recent terrorist cases, borderlining between the AFSJ and the CFSP (Common Foreign and Security Policy) that the Court has uncovered the lengths to which it is ready to go in order to ensure that acts affecting individual rights do not evade judicial control. In *Gestoras pro Amnestia* and *Segi*,²⁶ the President of the CFI had declared inadmissible an action in damages against the EC Institutions for having placed

²² Décision 573/2007/EC, OJ [2007] L 144/1, Decision 574/2007/EC, OJ [2007] L 144/22, Decision 575/2007/EC, OJ [2007] L 144/45, Decision 435/2007/EC, OJ [2007] L 168/18, respectively.

²³ See Case 22/70 *Commission v Council, ERTA* [1971] ECR 263 and, more recently, Case C-57/95 *France v Commission, Pension Funds Communication* [1997] ECR I-1627.

²⁴ New problems are expected to arise out of this provision of the Lisbon Treaty, as no definition is given in the Treaty of what constitutes 'a regulatory act'.

²⁵ The last episode in the Court's jurisprudence is the remarkable judgment in Case C-50/00 P *Union de Pequenos Agricultores* [2002] ECR I-6677.

²⁶ Case C-354/04 P *Gestoras pro Amnestia* and Case C-355/04 P, *Segi*, both delivered on February 27, 2007; for these two cases see E. Meisse in (4/2007) *Europe comm.* 110, p. 24-25.

some individuals and organizations on the list of presumed terrorists. The Court, confirming on this point the CFI, started by recognising that the system of judicial protection foreseen by the Treaty for the third pillar is incomplete compared to that of the first pillar and that no action in damages lies outside the latter.²⁷ It went on, however, to hold that by virtue of Article 6 EU the Union is based on the rule of law and the respect of fundamental rights.

'It follows that the institutions are subject to review of the 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'.²⁸

In consequence, the Court found that all acts (under all pillars) which have the effect of directly affecting individual rights may be brought before the ECJ by way of a preliminary question, even if this is not expressly provided for in the relevant Treaty provision. They may also be challenged by the privileged applicants (EC Institutions and Member States) in accordance with Article 35(6) EU.²⁹ And since individual plaintiffs are not eligible to bring annulment actions against acts of the second or third pillar,

'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'.³⁰

Therefore, based on the rule of law approach, the Court partly reviewed the procedural arrangements of the Treaty,³¹ in order to ensure that any act producing legal effects is subject to a) judicial review and b) its own preliminary jurisdiction. In this way the Court, at a time when the content of the Lisbon (then named Reform) Treaty was being actively negotiated under the auspices of the German Presidency, sent a clear message highlighting the gaps of legal protection existing in the current institutional constellation and pushed for extending individual plaintiffs' rights.³² This has also led to the introduction, in the Lisbon Treaty, of Article 275 TFEU, whereby by derogation to the general rule that CFSP measures are immune to the Court's jurisdiction, the Court will have competence to review 'the legality of European decisions providing for restrictive measures against natural or legal persons adopted by the Council'.³³

2.3. Enhanced infringement proceedings

Compliance with EU law is also addressed by the Lisbon Treaty. In particular, Commission infringement proceedings against Member States are facilitated in two ways, aiming at putting pressure onto recalcitrant States through the accelerated imposition of fines.

²⁷ *Gestoras pro Amnestia*, para. 50.

²⁸ *Ibid*, para. 51; and more recently Case C-303/05 *Advocaten voor de Wereld*, judgment of May 3, 2007, para 45.

²⁹ *Ibid*, para. 55.

³⁰ *Ibid*, para. 56. In this respect this judgment operates a clear reversal of the Orders of the CFI, where it was maintained that individuals have no remedy against a common position, either under EU or under national law. The same restrictive solution has also been adopted by the French Conseil d'Etat, in its judgment in case *Dispans c/ Ministre de l'Intérieur*, 11-12-06, AJDA 2007, p. 421; for this French case see D. Simon in (4/2007) *Europe*, comm. 108, p. 23.

³¹ Concerning generally the role of the rule of law in the AFSJ see also C Dauvergne 'Sovereignty, Migration and the Rule of Law in Global Times' 67 *MLR* (2004) 588-615.

³² See on this aspect of the ECJ's case law, Hatzopoulos above fn 1, 47-50.

³³ Further on that see below 4.3.

Therefore, recidivist States, who insist on not complying with a (first) judgment of the Court, may be brought before the Court for a second time without a fresh reasoned opinion being served to them (compare Article 260(2) TFEU with Article 228(2) EC). More importantly, where a Member State is pursued by the Commission for the non transposition of a Directive (i.e. a straight forward and easily ascertainable infringement), then the latter may require the imposition of fines, already in the first proceedings brought before the Court.³⁴

3. Specific AFSJ modifications to the Court's jurisdiction linked to the 'depillarisation'

3.1. Generalisation of preliminary rulings

The single most important consequence, in terms of the Court's jurisdiction, stemming from the abolition of the three-pillar structure, is the generalisation of the Court's preliminary jurisdiction. As things stand today there is a double limitation in the way the Article 234 EC procedure applies in the field of the AFSJ. In the first pillar (Article 68(1) EC), preliminary questions are only open to jurisdictions 'against whose decisions there is no judicial remedy', not to all jurisdictions.³⁵ Worse still, in the third pillar, Article 35 EU, provides for a twofold limitation. First, Member States are not subject to the preliminary jurisdiction of the Court unless they have made a declaration to that effect. To date, sixteen Member States have made such a declaration.³⁶ Second, Article 35 EU –contrary to Article 234 EC or even 68 EC – only provides for the interpretation by the Court, of secondary legislation and not of the Treaty provisions themselves.

These differences, however, have been considerably 'played down' by the Court. The judgment of the Court in *Pupino*³⁷ was delivered in preliminary proceedings initiated by an Italian jurisdiction, under Article 35 EU, in relation to a framework decision in the field of criminal law. Before answering the substantive issues raised by the referring jurisdiction, the ECJ had to reject some admissibility claims put forward by some of the intervening Member States. In doing so, the Court made it clear that the preliminary procedure provided for by Article 35 EU is governed by the same interpretative rules (concerning the qualification of the referring body as a 'court', the clarity and necessity of the question referred to the Court etc), as that of Article 234

³⁴ This new possibility is criticised by part of the doctrine (see e.g. S. Peers in the House of Lords Report, quoted above fn 10,); our guess is that this possibility will be useful as a means to exert pressure to Member States, but will be used by the Commission only in the most flagrant violations.

³⁵ For a very critical account of this Treaty provision see C. Cheneviere, 'L'article 68 CE – Rapide survol d'un renvoi préjudiciel mal compris' (2004) CDE 567-589. See also the Commission communication COM (2006) 346 final, of June 28th 2006, where it proposes that Article 234 EC should also become plainly applicable in the field of Asylum, Immigration and Visas.

³⁶ According to Art. 35 EU Member States are free to make a declaration as to whether they accept the Court's preliminary jurisdiction and, in the case that they do, whether all - or only higher - jurisdictions should have access to the Court. It is remarkable that out of sixteen Member States who have submitted declarations, only two have limited the access of their tribunals to the ECJ. The remaining fourteen include countries such as: Austria, the Benelux countries, the Czech Republic, Finland, France, Germany, Greece, and Italy. It is also worth noting that there is no official document enumerating Member States which have submitted a declaration and that the number of declarations informally brought to the attention of the present author differs from the one the British House of Lords refers to in its Report, quoted above, fn 10, 125, where it is stated that fourteen Member States have made declarations.

³⁷ Case C-105/03 *Pupino*, judgment of May 31, 2005.

EC.³⁸ The same tendency was also pursued in the more recent judgment of the Court in *Gestoras pro Amnestia*, with the effect of furthering the parallelism between the first and the third pillars.³⁹

The second difference identified above, concerning the Court's (lack of) jurisdiction to interpret the Treaty provisions of the third pillar, has been addressed by the Court in the recent judgment in *Advocaten voor de Wereld*.⁴⁰ In a judgment delivered by the Grand Chamber, with the intervention of no less than ten Member States (the conclusions of which were, for once, followed by the Court) the Court upheld the validity of the Council's framework decision which established the European arrest warrant.⁴¹ A Belgian NGO contested before the Belgian courts the legality of the law which transposed into national law the aforementioned framework decision. One of the intervening states in the proceedings before the Court deemed the preliminary question inadmissible in that it (indirectly) required the Court 'to examine Article 34(2)(b) EU, which is a provision of primary law not reviewable by the Court'.⁴² The Court remained unconvinced by this argument, as well as by the stark difference of wording of the above-mentioned Treaty provisions. It held that:

'Under Article 35(1) EU, the Court has jurisdiction [...] to give preliminary rulings on the interpretation and validity of, *inter alia*, framework decisions, which necessarily implies that it can, even if there is no express power to that effect, be called upon to interpret provisions of primary law [...] where [...] the Court is being asked to examine whether a framework decision has been properly adopted on the basis of that latter provision.'⁴³

Therefore, the Court has reshaped its preliminary competence in the third pillar in parallel with that of the first. Not only has it extended its jurisdiction to all acts of secondary legislation (see *Gestoras pro Amnestia* in relation to common positions),⁴⁴ but it has also interpreted the Treaty provisions themselves, of a Treaty deemed 'intergovernmental' (see *Advocaten voor de Wereld*).

Article 267 TFEU now provides for a single preliminary procedure covering all issues of the current first and third pillar. This is compulsory for all Member States and for all jurisdictions and does not require any prior declaration or other formality. Further, both primary and secondary law may be subject to the Court's interpretation. A special fast-track procedure is provided for in the last paragraph of Article 267, for cases stemming from the AFSJ, where 'a person in custody' is involved.⁴⁵ As a consequence of the above 'generalisation' of the Court's preliminary jurisdiction, the special competence of the Court (provided for in Article 68(3)) to give interpretative judgments on the request of the Council, the Commission or any Member State is being dropped.

3.2. Regular plaintiffs admitted to introduce annulment proceedings

³⁸ According to Art. 35 EU Member States are free to make a declaration as to whether they accept the Court's preliminary jurisdiction and, in the case that they do, whether all - or only higher - jurisdictions should have direct access to the Court. It is remarkable that out of sixteen Member States who have submitted declarations, only two have limited the access of their tribunals to the ECJ. The remaining fourteen include countries such as: Austria, the Benelux countries, the Czech Republic, Finland, France, Germany, Greece, and Italy.

³⁹ See above fn 26.

⁴⁰ Above fn 28.

⁴¹ Framework decision 2002/584/JHA of 13 June 2002 [2002] OJ L 190/1.

⁴² *Advocaten voor de Wereld* para 17.

⁴³ *Ibid* para 18.

⁴⁴ Above fn 26.

⁴⁵ For which see below 4.2.

A second important change in the Court's jurisdiction, already mentioned, relates to annulment proceedings. It has already been explained that passive legitimation has been extended to cover the European Council and the Agencies, bodies etc. It has also been said that individual plaintiffs are more largely admitted to introduce annulment proceedings, as an individual concern is no more required where a regulatory act requiring no transposition is at stake. These are important changes for both the matters currently falling under the first and under the third pillar. However, for third pillar issues 'depillarisation' makes the change all the more important.

This is so because, as it now stands, Article 35(6) EU provides only for annulment proceedings to be brought by a Member State or the Commission. In other words, only privileged plaintiffs – and then again not all – can initiate annulment proceedings. The fact that no annulment proceedings lie for individuals has been highlighted – and indeed stigmatised – by the Court itself in its judgment in *Gestoras pro Amnistia* and *Segi*.⁴⁶ It is true that in these judgments the Court did find a way to secure the 'rule of law' principle. This, nonetheless, was both *indirect* and *imperfect*. *Indirect*, because it was through the intermediation of Member States that the Court sought to guarantee that individuals have rights of action. Indeed, the Court held that Article 6 EU obliges Member States, when implementing EU law, 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'. *Imperfect* because, while opening up their dockets to European AFSJ cases, the national jurisdictions are supposed – according to the Court – to have access to the preliminary assistance of the Court. This, however, ignores the fact that only sixteen Member States have made declarations under Article 35(2) and that plaintiffs in national proceedings can never force their way to Luxembourg.

The abolition of the pillars by the Lisbon Treaty will, for the first time, make it possible for individual plaintiffs – and privileged plaintiffs other than the Member States and the Commission – to bring annulment proceedings in the field of criminal justice and judicial and police cooperation. Indeed, the indirect and imperfect way devised by the Court to comply with the 'rule of law' principle (above) should only be seen as an 'interim' solution, on the way to some more acceptable institutional setting. Already under the current indirect fertilisation of the EU by the grand ECHR principles and the oblique control the ECtHR exerts over the functioning of the EU,⁴⁷ it is unclear whether the Court's judgments in *Segi* and *Gestoras pro Amnistia* would satisfy Article 6 ECHR. After the full accession of the EU to ECHR, provided for in the Lisbon Treaty, the opening up of 'third pillar' annulment proceedings to individual plaintiffs seems a one way road.

3.3. Infringement proceedings against Member States

Further to the extension of individual rights vis-à-vis the Institutions, the 'depillarisation' also strengthens the role of the Commission, not only as an initiator of EU legislation, but also as a watchdog for the proper application of such legislation. Under the current intergovernmental setting of the third pillar, the Commission may not bring infringement proceedings against Member States. Only other Member States can do so, provided however, that 'such dispute cannot be settled by the Council within six months of its being referred to the Council by one of its members' (Article 35(7) EU). Existing solidarity between non-compliant peers, combined to the

⁴⁶ See eg *Gestoras pro Amnistia*, para. 50.

⁴⁷ See ECtHR judgment in *Bosphorus International*, application n. 45036/98, judgement delivered on 30 June 2005. See annotation by Douglas-Scott in *CMLRev* (2006), 243-254. See also, by the same author 'A Tale of Two Courts; Luxembourg, Strasbourg and the Growing European Human Rights Acquis' *CMLRev* (2006) 629-665.

six month political interlude, have led to the de facto idleness of judicial enforcement in the third pillar.

This is going to change under the Lisbon Treaty since the Commission will recover its traditional enforcement role. In this respect the new, enhanced, powers of the Commission concerning infringement proceedings,⁴⁸ will be of utmost importance. By the same token, compliance in the field the AFSJ will be de-politicised, since negotiations in the Council will bear only on prospective legislation and will not be diluted by compliance issues. Indeed, the position of Member States in the field of AFSJ – in particular what is today the third pillar – will be fundamentally altered: from a situation where each Member State can negotiate around its veto and may, in impunity, indefinitely resist the application of EU rules it dislikes, States will now have to decide with qualified majority and be subject to strict compliance scrutiny by the Commission. This swift departure from intergovernmentalism may be a partial explanation for the ‘emergency brake’ procedures provided for by Articles 82(2), 83(3) (judicial cooperation in criminal matters), 86 (European Public Prosecutor) and 87 (police cooperation). The precise mechanisms of the ‘emergency brakes’ differ from area to area, but the basic idea is that any Member State which considers that a proposed legislative text affects fundamental aspects of its judicial system can refer the matter to the European Council and have the ordinary legislative procedure suspended. Such suspension may go on until such time as divergences are settled at the political level, or at least nine Member States decide to proceed with enhanced cooperation.

3.4. Action in damages against the EU

A further consequence of the depillarisation is that, henceforth, individual plaintiffs will have the right to claim damages for EU action in the field of police and judicial cooperation. The non-existence of such a claim under the current setting has been stigmatised by the Court in the *Gestoras* and *Segi* cases.⁴⁹

This newly acquired jurisdiction of the Court, however, is expected to be of limited importance for, at least, two reasons. First, future cases similar to *Gestoras* and *Segi* may not be successfully pleaded in the framework of a claim for damages. According to the Court’s longstanding case law a claim in damages is inadmissible where an annulment action could have the very same practical effects for the claimant. In other words, damage suffered because of an act imposing some kind of fine, freezing of funds or other pecuniary sanction, can only be remedied by the annulment of such act, but not through an action for damages.⁵⁰ Second, damages claims in a field where the EU decision making is characterised by the exercise of important discretion and by restricted disclosure of relevant information and documents, will be very difficult to substantiate.

The ‘passive legitimation’ of Agencies, bodies etc,⁵¹ however, some of which may also develop operational activities (EUROPOL, EBA), may be a source of important damages claims.

4. Rules specifically applicable in the AFSJ

Despite the ‘depillarisation’ pursued by the Lisbon Treaty and the fusion of the first with the third pillar, some specific rules concerning the Court’s jurisdiction are to be found in the new Treaty.

⁴⁸ See above 2.3.

⁴⁹ See above fn 26 and the corresponding text.

⁵⁰ Case 25/62 *Plaumann* [1963] ECR 201: a different solution would indirectly side-step the two-month time-limitation for introducing annulment proceedings.

⁵¹ For which see above 2.2.1.

4.1. Public order derogation

Article 276 TFEU provides that

‘in exercising its powers [...] relating to the AFSJ the CJEU 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.’

This provision is directly issued from Article 35(5) EU as it now stands. It also finds its equivalent in the first pillar in current Article 68(2) EC. It is true that the latter (EC) provision seems to be limiting solely to the preliminary competence of the ECJ, while the former (EU) provision clearly introduces a general reserve to the Court’s jurisdiction.

It remains that none of these provisions have ever been applied up till now, so only speculations may be made concerning the way in which they may be construed and applied in the future. Four ideas may, nevertheless, be put forward in this respect. First, the general ‘mainstreaming’ of the AFSJ into the general EU structure is likely to lead to an extremely restrictive interpretation of this sovereignty reserve. Second, from the Court’s case law already in *Commission v Council, air transit visas* it would seem that, in an unspoken way, the ultimate judge of the *comptens competenz* is the Court itself, and therefore any reserve thereto is subject to its own control.⁵² Third, and in relation to the previous point, Article 276 TFEU reserve should be read in the light of the Court’s terrorist case law and the rule of law principle:⁵³ if individual plaintiffs are not offered minimal procedural guarantees under the national legal system, then the EU legal order should step in – on the face of the express exclusion described above – in order to offer some judicial control, at least indirectly, in the form of a preliminary ruling. Such a requirement seems all the more compelling in view of the EU’s accession to the ECHR. Fourth, Member States wishing to stop some EU measure affecting their internal public order, are more likely to have recourse to the emergency brake clauses provided for in the Lisbon Treaty,⁵⁴ at the adoption level, rather than wait until such measures reach the Court.

4.2. Urgency procedure

The generalisation of the Court’s jurisdiction to cover all matters pertaining to the AFSJ will certainly lead to some (considerable?) increase of the Court’s workload. In particular, the extension of preliminary references to all jurisdictions of all Member States⁵⁵ is likely to lead to greater delays in delivering preliminary rulings. Despite the successful efforts of the Court to limit the time necessary for delivering its judgments, the mean duration of a preliminary procedure before the Court was of 19,3 months in 2007.⁵⁶ Part of this delay is due to inelastic procedural requirements, linked to translation, to the time left to the Commission and the Member States in order to present their observations etc.

In order to accommodate these procedural requirements with the need to avoid lengthy detention periods,⁵⁷ the President of the ECJ has proposed to the Council a

⁵² For this and further cases see below 4.2.

⁵³ See above 2.2.2 and 3.2.

⁵⁴ See above 3.3.

⁵⁵ See above 3.1.

⁵⁶ See the Court’s Annual Report (2007) available at http://curia.europa.eu/en/instit/presentationfr/index_cje.htm.

⁵⁷ In this respect the ongoing negotiations for the adoption of the ‘return’ directive are highly topical, on which a political agreement in the Council has only been reached after three years of negotiations, on May 5, 2008.

modification of the Court's own statute, in order to introduce a fast-track 'interim' preliminary procedure specifically reserved to AFSJ issues.⁵⁸ From the two solutions put forward by the President of the Court, the Council opted for the one most respectful of Member States' rights (to the detriment of expediency and the rights of detainees). Council Decision 2008/79/EC⁵⁹ modified the Court's statute in order to shorten the duration of the written procedure.⁶⁰ Therefore, only the Member State concerned and the Commission (and the Parliament and Council if one of their acts are at stake) are allowed to present written observations, while intervening parties may only present oral observations. The five-member chamber specially competent for this procedure shall deliver its judgment shortly after hearing the Advocate General, while the exchange of documents shall be based essentially on the use of electronic means. This procedure is already operational,⁶¹ therefore, the last paragraph of Article 267 TFEU has no added value other than to offer a (not needed) constitutional grounding for it.

4.3. CFSP acts

The Court's judgments in the 'terrorist' cases⁶² have shown how closely intertwined the acts pertaining to the AFSJ (first and third pillars) and those stemming from the CFSP (second pillar) may be. In this respect a new provision introduced into the Lisbon Treaty does merit a word of comment.

Article 275 TFEU specifically provides that the Court has no 'jurisdiction with respect to the provisions relating to the CFSP nor with respect to acts adopted on the basis of these provisions'. This general rule, however, is subject to two exceptions enumerated in the second paragraph of this same provision. Both exceptions are highly relevant for the AFSJ.

First, it is foreseen that the Court monitors the borderlines between CFSP and the other EU competences (see Article 40 TEU). This confirms and consolidates previous ECJ jurisprudence. At a time when the Court had no competence at all in the third pillar (i.e. before the entry into force of the Amsterdam Treaty, on May 1999), held that it had jurisdiction to rule on the legality of a (third pillar) common action of the Council.⁶³ Such jurisdiction was necessary in order to protect that first pillar competences were not violated. The same solution, was later followed concerning the relationships between the second and third pillars. The recent cases concerning the imposition of 'smart sanctions' (in the form of the 'freezing' of assets) on persons, organizations etc allegedly connected to terrorism, offer a vocal illustration of the Court's perception of the extent of its own jurisdiction. In this respect, the Court of First Instance (CFI) has delivered three series of important judgments⁶⁴ and, on appeal,⁶⁵ the Court another three.⁶⁶ The factual background of

⁵⁸ Document 13272/06 of September 28th, 2006. For a brief discussion of this document see the Editorial Comments in 44 CMLRev (2007) 1-7.

⁵⁹ Decision of the Council 2008/79/EC of 20 December 2007, amending the Protocol on the Statute of the Court of Justice, OJ [2008] L 24/42.

⁶⁰ See E. Bernard 'La nouvelle procédure préjudicielle d'urgence applicable aux renvois relatifs à l'Espace de liberté, sécurité et de justice' (5/2008) *Europe*, 5-8.

⁶¹ See also the information and instructions provided by the Court's webpage <http://curia.europa.eu/en/instit/txtdocfr/txtsenvigreur/noteppu.pdf>

⁶² See among others the cases quoted above in fn 26 and 28.

⁶³ Case C-170/96 *Commission v Council, air transit visas* [1998] ECR I-2763.

⁶⁴ Cases of the same date T-306/01 *Yusuf* and T-315/01 *Kadi*, judgments of September 21, 2005, for which see D. Simon & F. Mariatte, 'Le tribunal de première instance des Communautés : Professeur de droit international ? A propos des arrêts *Yusuf* et *Kadi*' (2005) *Europe* chron. 12, p. 6 and the case note by Ch Tomuschat in 43 CMLRev (2006) 537-551; and T-253/02 *Ayadi* and T-49/04 *Hassan*, judgments of July 12, 2006, for which see D.

all five cases decided by the CFI is very similar.⁶⁷ In order to implement several UN Security Council resolutions the Council of the EC has adopted several common positions based on the second (and occasionally) third pillar. On the basis of these common positions, and for their implementation, several first pillar regulations and decisions have been adopted. In all cases, the plaintiffs asked for the annulment of the totality of the above acts. The CFI started by explaining that common positions of either the second or third pillar are, in principle, outside its control. It went on, however, to state that

'the Court of First Instance has jurisdiction to hear an action for annulment directed against a Common Position adopted on the basis of Articles 15 EU and 34 EU only strictly to the extent that, in support of such an action, the applicant alleges an infringement of the Community's competences'.⁶⁸

This approach was taken further and expanded in the two extremely important judgments of the Court, in appeal proceedings against an Order of the President of the CFI.⁶⁹ In *Gestoras pro Amnestia* and *Segi*.⁷⁰

The above judgments of the Court also explain the second reserve to the general rule of Article 275 TFEU, whereby the Court does have jurisdiction to hear annulment proceedings against CFSP 'decisions providing for restrictive measures against natural or legal persons'.

5. Conclusion

It would be exaggerated to say that the Lisbon Treaty fundamentally innovates concerning the Court's jurisdiction. The single most important novelty of the new Treaty, the abolition of the pillar structure, does, nonetheless, have important consequences for the Court's role, especially in the AFSJ. Henceforth, the Court has full competence a) to deliver preliminary rulings (all jurisdictions of all Member States concerning all sources of EU law, both primary and secondary), b) to hear annulment proceedings introduced by individual plaintiffs against all acts of all the EU

Simon & F. Mariatte 'Le 'droit' à la protection diplomatique : droit fondamental en droit communautaire ?' (2006) *Europe chron.* 11 p. 4; See also case T-228/02 *Mojahedines*, judgment of December 12, 2006, for which see the case note by Ch Eckes in 44 *CMLRev* (2007) 117-129; all the above cases are currently under appeal before the ECJ. For a general assessment of the relevant case law see W Vlcek 'Acts to Combat the Financing of Terrorism: Common Foreign and Security Policy at the ECJ' 11 *European Foreign Affairs Review* (2006) 491-507; also M Nettesheim 'UN Sanctions against individuals – A challenge to the architecture of EU Governance' 44 *CMLRev* (2007) 567-600; also P Stangos & G Gryllos 'Le droit communautaire à l'épreuve des réalités du droit international: leçons tirées de la jurisprudence communautaire récente relevant de la lutte contre le terrorisme international' 3-4 *CDE* (2006) 429-481.

⁶⁵ For all five cases, appeals are currently pending before the ECJ; the three appeal judgments already delivered by the ECJ concern previous orders by the President of the CFI.

⁶⁶ Case C-229/05 *Ocalan* judgment of January 18, 2007; Case C-354/04 P *Gestoras pro Amnestia* and Case C-355/04 P, *Segi*, both delivered on February 27, 2007; for these two cases see E. Meisse in (4/2007) *Europe comm.* 110, p. 24-25.

⁶⁷ On similar facts and concerning the imposition of smart sanctions the CFI has actually delivered some more judgments and orders, of lesser importance, which are not discussed here; see for instance: Case (order) T-338/02 *Segi e.a.* [2004] ECR II-1647; Case (Order) T-299/04 *Selmani*, judgment of November 18, 2005; Case T-362/04 *Minin*, judgment of January 31, 2007.

⁶⁸ *Mojahedines* para 56. On these judgments see A Miron 'La jurisprudence du TPI à propos de l'inscription sur les listes terroristes' 511 *RMUE* (2007) 526-531.

⁶⁹ Above n. 67. For these judgments see A Berramande 'Les limites de la protection juridictionnelle dans le cadre du titre IV du traité sur l'UE' 2 *RDUE* (2007) 433-446.

⁷⁰ See above fn 26.

Institutions and of other bodies, Agencies etc c) to judge on infringement proceedings against Member States and d) to hear claims for damages. By the same token, the hotly debated issue of EU competence to adopt criminal measures is emptied of any substance.⁷¹ All these are new competences in the field of the AFSJ. Most of these developments, however, have been anticipated or at least, put into the agenda, by the Court already under the current institutional setting.

Most interestingly, the judgments that the Court delivered in the field of AFSJ during these years have had a clear spill-over effect: they have paved the way for a more general strengthening of the Court's role in all other areas: the right of individual plaintiffs to initiate proceedings against acts of the European Council and of Agencies, bodies etc, and this without (always) having to prove individual concern, are requirements stemming from the strong 'rule of law' approach put forward by the Court in the AFSJ.

In its judgments in *Pupino*, the terrorist cases and the other cases discussed above, the Court recognises supra-constitutional status to some basic principles, strictly connected to the respect of individual rights. Such rights are not, according to the Court, modifiable at the free will of the Member States, but remain beyond their grasp. Such principles are inherent to the construction of any legal order having as its subjects (also) individuals and not only States. However, the accession of the EU to the ECHR requires these principles to be spelled out and to have a clearer scope. This is the essential input of the Lisbon Treaty in relation to the AFSJ.

⁷¹ Dealt with by the judgments of the Court in Cases C-176/03 and C-77/05, above fn 4; see in this respect H Labayle 'L'ouverture de la jarre de Pandore, Réflexions sur la compétence de la Communauté en matière pénale' 3-4 *CDE* (2006) 379-428; and on a more critical tone, A Dawes & O Lynskey 'The Ever-longer of EC law: The Extension of Community Competence into the Field of Criminal Law 45 *CMLRev* (2008) 131-158.



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