FIT FOR PURPOSE? A LEGAL ANALYSIS OF THE EUROPEAN UNION'S CONSTITUTIONAL ARRANGEMENTS IN THE FIELD OF CRIMINAL JUSTICE

Thesis submitted in accordance with the requirements of the University of Liverpool for the degree of Doctor in Philosophy

by

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ABSTRACT

This thesis will undertake a legal analysis of the European Union's constitutional arrangements in order to discover whether they can bear the weight of an emerging criminal justice regime.

It will analyse the powers of the European Union through the lens of the separation of powers in order to take a more holistic view of the Union's exercise of these powers than previous research has done. It will argue that the EU's competence over criminal law is not limited to the third pillar, but is spread amongst the pillars, particularly the first and third, and that as a result the communitarisation proposed by the Lisbon Treaty may not be the solution to all of the problems encountered in the third pillar system.

It will do this by analysing the powers of the Union to adopt legislation relevant to the criminal justice sphere, including an analysis of the democratic credentials of the European Parliament, in order to establish whether the system allows for the democratically legitimate adoption of criminal law.

It will then study the role of several European executive agencies from both the first and third pillar in order to discover the nature of the control mechanisms under both pillars. This will demonstrate that there is no single model under either the first or the third pillar, and that as such communitarisation of the third pillar is unlikely to have any impact on the supervision of agencies.

Finally it will examine the Union's system of judicial protection in order to demonstrate that where the ECJ has full jurisdiction it is able to adequately secure the rule of law and the protection of individual right regardless of the pillar under which it is operating. It will seek to demonstrate that the

major weakness of the pillared Union is therefore the lack of the jurisdiction of the Court. It will argue that this is the principle area in which the proposed communitarisation will make the most difference.

It will conclude that while the Lisbon reforms will make some impact on the weaknesses endemic in the constitutional architecture of the Union that have made it ill suited for a role in the criminal law sphere, that weaknesses remain, and that until they are comprehensively fixed, that Member States must tread carefully before entrusting further criminal law powers to the European Union.

CONTENTS

PREFACE

This thesis reflects the law and surrounding critical debate as it stood on the 1st of November 2009.

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TABLE OF CASES

EUROPEAN COURT OF JUSTICE DECISIONS

Case 152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] E.C.R, 723

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Case 302/87 *European Parliament v Council (Comitology)* [1988] E.C.R. 5615

Case 374/87 *Orkem v Commission* [1989] E.C.R. 3283

Case 68/88 *Commission v Greece* [1989] E.C.R. 2965

Case C-70/88 *European Parliament v Council (Chernobyl)* [1999] E.C.R. I-2041

C-322/88 *Grimaldi (Salvatore) v Fonds de Maladies Professionnelles* [1989] E.C.R. 4407

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Case C-6/90 and 9/90 *Francovich and Bonifaci v Italy* [1991] E.C.R. I-5357

Case C-41/90 *Höfner v Macrotron* [1991] E.C.R. I-1979

Case C-107/91 *ENU v Commission* [1993] E.C.R. I-599

Case C-155/91 *Commission v Council (the Waste Directive)* [1993] E.C.R. I-939

Case C-271/91 *Marshall v Southampton and South West Hampshire Area Health Authority II* [1993] E.C.R. I-4367

Case C-91/92 *Paola Faccini Dori v Recreb Srl* [1994] E.C.R. I-3325

C-404/92 P *X v Commission of the European Communities (Aids)* [1994] E.C.R. I-4737

Case C-46 and 48/93 *Brasserie du Pêcheur SA v Germany* [1996] E.C.R. I-1029

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C-192/94 *El Corte Inglés* v *Blázquez Rivero* [1996] E.C.R. I-1281

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Case C-246/94 *Cooperativa Agricola Zootecnica S. Antonio and others v Amministrazione delle Finanze dello Stato* [1996] E.C.R. I-4373

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Case C-185/95 P *Baustahlgewebe v Commission* [1998] E.C.R. I-8417

Case C-129/96 *Inter-Environement Wallonie v Region Wallone* [1997] E.C.R. I-7411

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Case C-386/96 *P Société Louis Dreyfus & Cie v Commission of the European Communities* [1998] E.C.R.I-2309

Case C-10/97 to 22/97 *Ministero delle Finanze v IN.CO.GE.'90 Srl et al* [1998] E.C.R. I-6907

Case C-120/97 *Upjohn Ltd v The Licensing Authority established by the Medicines Act 1968 and Others* [1999] E.C.R. I-223, para 34.

Case C-302/97 *Klaus Konle v Republic of Austria* [1999] E.C.R. I-3099

Case C-387/97 *Commission v Greece* [2000] ECR I-5047

Case C-424/97 *Salomone Haim v Kassenzahnärztliche Vereinigung Nordrhein* [2000] E.C.R. I-5123

Case C-377/98 *Kingdom of the Netherlands v European Parliament and Council (Biotechnological Innovation Directive)* [2001] E.C.R. I-7079

Joined Cases C-397 and 410/98 *Metallgesellschaft Ltd and Hoechst AG v Commissioners of the Inland Revenue* [2001] E.C.R. I-1727

Case C-443/98 *Unilever Italia SpA v Central Food SpA* [2000] E.C.R. I-7535

Case C-238/99 P *Limburgse Vinyl* [2002] E.C.R. I-8375

Case C-453/99 *Courage v Crehan* [2001] E.C.R. I-6297

Case C-11/00 *Commission v The European Central Bank* [2003] E.C.R. I-7147

Case C-50/00 *Union de Pequenos Agricultores v Council* [2002] E.C.R. I-6677

Case C-62/00 *Marks & Spencer v Commissioners or Customs and Excise* [2002] E.C.R. I-6325

Case C-94/00 *Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes* [2002] E.C.R. I-9011

Case C-253/00 *Muñoz y Cia SA v Frumar Ltd* [2002] E.C.R. I-7289

C-340/00 *P Cwick v Commission* [2001] E.C.R. I-10269

Case C-453/00 *Kühne and Heitz NV v Productschap voor Pluimvee en Eieren* [2004] E.C.R. I-837

Cases C–187 and 385/01 *Gözütok and Brügge* [2003] E.C.R. I–1345

Case C-189/01 *Jippes v Minister van Landbouw, Natuurbeheer en Visserij* [2001] E.C.R. I-5689

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Case C-278/01 *Commission v Spain* [2003] E.C.R. I-14141

Case C-491/01 *ex parte, British American Tobacco* [2002] E.C.R. I-11453

Case C-60/02 *Criminal Proceedings Against X* [2004] E.C.R. I-651

Case C-167/02 P *Willi Rothley and Others v European Parliament* [2004] E.C.R. I-3149

Case C-201/02 *R (On the Application of Wells) v Secretary of State for Transport Local Government and the Regions* [2004] E.C.R. I-723

Case C-263/02 P *Commission v Jégo-Quéré & Cie. SA* [2004] E.C.R. I-3423

Case C-304/02 *Commission v France* [2005] E.C.R. I-6263

Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and others* [2005] E.C.R. I-3565

Case C-51/03 *Georgescu* [2004] E.C.R. I-3203

Case C-105/03 *Criminal Proceedings Against Maria Pupino* [2005] E.C.R. I-5285

Case C-131/03 P *R.J. Reynolds Tobacco Holdings v Commission* [2006] E.C.R. I-7795

Case C-160/03 *Spain v Eurojust* [2005] E.C.R I-2077

Case C-176/03 *Commission v Council (Environmental Protection)* [2005] E.C.R. I-7879

C-131/03 P *Reynolds Tobacco and Others v Commission* [2006] ECR I-7795

Case C-540/03 *Parliament v Council (Family Reunification)* [2006] E.C.R. I-5769

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Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005] E.C.R. I-9981

Case C-212/04 *Konstantinos Adeneler et al. v Ellinikos Organismos Galaktos (ELOG)* [2006] E.C.R. I-6057

Case C-234/04 *Kapferer v Schlanck and Schick* [2006] E.C.R. I-2585

Case C-294-298/04 *Manfredi v Lloyd Adriatico Assicurazion SpA et al* [2006] E.C.R. I-4269

Case C-301/04 P *SGL Carbon AG v Commission of the European Communities* [2006] E.C.R. I-5977

Case C-355/04 P *Segi et al. v Council of the European Union* [2007] E.C.R. I-1657

Case C-521/04 P (R) *Hans-Martin Tillack v Commission of the European Communities* [2005] E.C.R. I-3103

Case C-77/05 *United Kingdom v Council (FRONTEX Regulation)* [2007] E.C.R. I-11459

Case C-91/05 *Commission v Council (Small Arms)* [2008] E.C. R. I-3651

Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] E.C.R. I-3633

Case C-432/05 *Unibet (London) Ltd and Unibet International Ltd v Justitiekanslern* [2007] E.CR. .I-2271

Case C-440/05 *Commission v Council (Ship Source Pollution)* [2007] E.C.R I-9097

Case C-66/08 *Criminal Proceedings against Szymon Koslowski* [2008] E.C.R. I-6041

Case C-127/08 *Metock v Minister for Justice, Equality and Law Reform* [2008] E.C.R. I-6341

Case C-195/08 PPU *Proceedings Brought by Rinau* [2008] E.C.R. I-5271

Case C-296/08 PPU *Santesteban Giocoechea* [2008] E.C.R. I-6307

Case C-388/08 PPU *Leymann and Pustovarov* judgment of 1st December 2008 (Full report pending)

EUROPEAN COURT OF JUSTICE ADVISORY OPINIONS

Opinion 1/91 "*Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area*" [1991] E.C.R. I-6079

Opinion 2/94 "*Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*" [1996] ECR I-1759

EUROPEAN COURT OF FIRST INSTANCE

Case T-7/89 *Hurcules Chemicals v Commission* [1991] E.C.R. II-1711

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Case T-17/00 *Willi Rothley and Others v European Parliament* [2002] E.C.R. II-596

T-377/00, T-379/00, T-380/00, T-260/01 and T-272/00 *Philip Morris International v Commission* [2004] E.C.R. II-1

Case T-177/01 *Jégo-Quéré & Cie. SA v Commission* [2002] E.C.R. II-2365

Case T-338/02 *Segi et al.* v. *Council of the European Union* [2004] E.C.R. II-1647

Case T-193/04 *Hans-Martin Tillack v Commission of the European Communities* [2006] E.C.R. II-3575

Case T-48/05 *Yves Franchet and Daniel Byk v Commission* [2008] E.C.R II-1585

UNITED KINGDOM

In re Piracy Jure Gentium [1934] AC 586

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Macarthy's ltd v Smith [1981] 1 QB 180

Garland v British Rail [1983] 2 AC 751

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Thoburn v Sunderland City Council [2003] QB 151

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Trybunal Konstytucyjny Decision on the constitutionality of the European Arrest Warrant national implementation, No. P 1/05

GERMANY

Re Wünsche Handelsgesellschaft [1987] 24(3) Common Market Law Review 225

Brunner v European Union Treaty [1994] 31(1) Common Market Law Review 57

Bundesverfassungsgericht decision on the German European Arrest Warrant Law, BvR 2236/04

Bundesverfassungsgericht decision on the Act Approving the Treaty of Lisbon, 2 BvE 2/08

EUROPEAN COURT OF HUMAN RIGHTS

App. No. 332/57 *Lawless v Ireland (No.3)* (1962) 1 EHRR 15.

App. No. 5100/71 *Engel v Netherlands* (1996) 1 EHRR 647

App. No. 6232/73 *Konig v Germany* (1978) 2 EHRR 170

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App. No. 45036/98 *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland* (2006) EHRR 1

App. No. 6422/02 *Segi et al. v. 15 States of the European Union*, Decision of 23 May 2002

App. No. 10249/03 *Scoppola v Italy* (No.2) Judgement of 17th September 2009

App. No. 13645/05 *Cooperative Producentenorganistatie Van De Nederlandse Kokkelvisserij U.A. v the Netherlands*, Decision of 20 January 2009

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EUROPEAN OMBUDSMAN DECISIONS

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The Protocol drawn up on the basis of Article 41(3) of the Europol Convention amending that Convention (the "Danish Protocol") OJ [2004] C 2, 6th January 2004

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First Regulation Implementing Articles 85 and 86 of the Treaty [1962] OJ 13, 6th February 1962.

Council Regulation (EC) No. 3295/94 of 22 December 1994 laying down measures concerning the entry into the Community and the export and re-export from the Community of goods infringing certain intellectual property rights [1994] OJ L 341 as amended by Council Regulation (EC) No. 241/1999 [1999] OJ L 27, 2nd February 1999
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Council Regulation (Euratom, EC) No 2185/96 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities [1996] OJ L 292, 11th November 1996
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Council Regulation No 2007/2004 establishing a European agency for the Management of Operations Cooperation at the External Borders of the Member States of the European Union [2004] OJ L 349, 25th November 2004 (As amended)
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Regulation 863/2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation 2007/2004 as regarding that mechanism and regulating the tasks and powers of guest officers [2007] OJ L 199/30, 31st July 2007
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Directive 68/151/EEC on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community [1968] OJ, English Special Edition L 41, 9th March 1968.('the First Companies Directive')
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Directive 78/660/EEC based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies [1978] OJ L 222, 25th July 1978. ('the Fourth Companies Directive')

Directive 80/777/EEC of 15 July 1980 on the approximation of the laws of the Member States relating to the exploitation and marketing of natural mineral waters

Directive 83/189/EEC laying down a procedure for the provision of information in the field of technical standards and regulations, [1983] OJ L 109/8, 28th March 1983

Directive 83/349/EEC based on Article 54(3)(g) of the Treaty on consolidated accounts [1983] OJ L 193, 13th June 1983. ('the Seventh Companies Directive')

FRAMEWORK DECISIONS

Council Framework Decision on the standing of victims in criminal proceedings (2001/220/JHA), [2001] OJ L 82, 15th March 2001
Articles 2, 3, 8

Council Framework Decision on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) [2002] OJ L 190, 13th June 2002.

Council Framework Decision on the Trafficking of Human Beings (2002/629/JHA) [2002] OJ L 203/1, 19th July 2002

Council Framework Decision on the protection of the environment through criminal law (2003/80/JHA) OJ [2003] L 029, 27th January 2003

Council Framework Decision laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking (2004/757/JHA) [2004] OJ L 335, 25th October 2004

Council framework decision on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters (2008/978/JHA) [2008] OJ L 305, 18th December 2008

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Commission decision establishing the European Anti-fraud Office (OLAF), [1999] OJ L 136
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Council Decision 1999/435/EC concerning the definition of the Schengen acquis for the purpose of determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the acquis [1999] OJ L 176, 10th July 1999.

Council Decision 2000/365/EC on the Request of the United Kingdom to Participate in some of the Provisions of the Schengen Acquis, [2000] OJ L 131, 1st June 2000

Council Decision 2005/358 designating the seat of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2005] OJ L 114, 4th May 2005

EU DECISIONS

Decision taken by common agreement between the representatives of the Governments of the Member States, meeting at Head of State and Government level, on the location of the seats and certain bodies and departments of the European Communities and of Europol OJ [1993] C 323/01, 30th November 1993
Council Decision supplementing the definition of the form of crime 'traffic in human beings' of the Convention OJ [1999] C 26, 3rd December 1998
Article 1(i)

Council Decision setting up Eurojust with a view to reinforcing the fight against serious crime (2002/187/JHA) [2002] OJ 63/1, 28th February 2002
Recitals (2)-(4)
Articles 2(1), 3(1)(a)-(c), 3(2)-(3) 4(1)(a)-(c), 4(2), 5(1)(b), 6, 6(a)(i)-(v), 6(b)-(d), 6(f)-(g), 9(1)-(4), 7(a)(i)-(v), 8(i)-(ii), 14(4), 15(1)-(4), 16(3), 17(2)-(4), 17(4)(a), 19, 19(3)-(4), 19(7)-(8), 20, 20(2), 21(2), 21(3)(b), 23(1)-(4), 32

Council Decision setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes (2002/494/JHA) [2002] OJ L167/1 26th June 2002

Council Decision establishing the European Police College (CEPOL) and Repealing Decision 2000/820/JHA (2005/681/JHA) OJ [2005] L 256/63, of 20 September 2005

Council Decision concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime (2007/845/JHA) [2007] OJ L332/103, 6th December 2007

Council Decision on a contact-point network against corruption (2008/852/JHA) [2008] OJ L301/38, 24th October 2008

Council Decision establishing the European Police Office (2009/371/JHA) OJ [2009] L 121, 6th April 2009
Recitals (2), (4)
Articles 2(1), 4, 4(3), 5, 5(1)(d), 5(2), 5(3)(b), 7, 8, 8(7), 9, 9(3)(d), 9(4), 10(2), 12, 12(1)(b), 12(e)-(g), 12(5), 14(1), 14(8), 21, 22(1)(b), 22(1)(a)-(c), 22(2), 22(3) 23(5) 23(6), 24, 28, 28(4), 35, 37, 42,42(3), 42(5)-(6), 42(8), 43(3)-(7), 48

Council Decision setting up Eurojust with a view to reinforcing the fight against serious crime (2002/187/JHA) [2002] OJ 63/1, 28th February 2002 as amended by Council Decision on strengthening Eurojust and amending the Eurojust Decision (2009/426/JHA) [2009] OJ 138/14, 16th December 2008.
Articles 2, 2(3), 4, 5a, 6(1) (vi) and (vii), 6(2), 7, 8, 9, 9(1), 9(3)(a)-(e), 9a, 9b, 9c, 9d, 9e, 9f, 10(2) 12, 15, 16, 16a, 16b, 17, 21, 23, 25a, 26, 26a, 27

COMMON POSITIONS

Common Position 2001/931/CFSP on the application of specific measures to combat terrorism [2001] OJ L 344
Articles 4, Annex

JOINT ACTIONS

Joint Action on making it a criminal offence to participate in a criminal offence to participate in a criminal organisation in the Member States of the European Union (98/733/JHA), [1998] O.J. L351/1, 21st December 1998

OTHER EUROPEAN MEASURES

Declaration (No. 10) on Article 35 (Formerly Article K.7) of the Treaty on European Union (Annexed to the Amsterdam Final Act)

Interinstitutional Agreement of 6 May 1999 between the European Parliament, the Council and the Commission on budgetary discipline and improvement of the budgetary procedure [1999] OJ C172/1, 6th May 1999

Council Decision concerning the terms and conditions for internal investigations in relation to the prevention of fraud, corruption and any illegal activity detrimental to the Communities' interests [1999] OJ L 149/36, 25th May 1999

Commission Decision of 2 June 1999 concerning the terms and conditions for internal investigations in relation to the prevention of fraud, corruption and any illegal activity detrimental to the Communities' interests [1999] OJ L 149/57, 2nd June 1999

European Parliament Rules of Procedure, 15th edition [2003] OJ L 61/1, 5th March 2003

Commission Notice on cooperation within the Network of Competition Authorities OJ [2004] C 101/43, 27th April 2004

Framework agreement on relations between the European Parliament and the Commission [2006] OJ 117/21, 18th May 2006

Rules of Procedure of the Court of Justice [2000] OJ L122/43
Articles 104a, 104b(a)

Convention applying the Schengen Agreement of 14th June 1985 between the governments of the Benelux economic union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders.
Title III Chapter 3

UK LEGISLATION

Accessories and Abettors Act 1861
Section 8

Perjury Act 1911
Section 1

Parliament Act 1911
Section 1(1)

European Communities Act 1972
Section 2

Criminal Law Act 1977
Sections 1 and 2

Serious Organised Crime and Police Act 2005
Section 1

Fraud Act 2006

OTHER DOMESTIC LEGISLATION

AUSTRALIA

Constitution of Australia
Section 51

FRANCE

Chapter 3 of Book 3 of the French Penal Code

GERMANY

Basic Law

Article 39

§263 Strafgesetzbuch

ITALY

Italian Penal Code
Article 2

Legislative Decree No. 61/02

SWITZERLAND

Federal Constitution of the Swiss Confederation
Article 5a

UNITED STATES OF AMERICA

Constitution of the United States of America
Articles 1(7), Tenth Amendment

INTERNATIONAL LAW

INTERNATIONAL CONVENTIONS

Agreement for the Prosecution and Punishment of Major War Criminals 1945

Genocide Convention 1948

Geneva Conventions I-IV 1949

European Convention on Human Rights and Fundamental Freedoms 1950
Articles 5, 6(2), 7, 8, 13, 34, 53

United Nations International Covenant on Civil and Political Rights 1966
Article 15(1)

Council of Europe Convention for the protection of individuals with regard to the automatic processing of personal data 1981

UN Convention Against Illicit Traffic in Narcotic and Psychotropic Substances 1988
Article 1(g)

Montevideo Convention on the rights and duties of States 1993
Article 1(d)

Rome Statute on the International Criminal Court 1998

UNITED NATIONS RESOLUTIONS

United Nations Security Council Resolution 1373 Threats to International Peace and Security caused by Terrorist Acts (2001)

Chapter 1

Introduction

The EU's constitutional architecture has been repeatedly analysed, as have the EU's criminal law powers. The weaknesses with the EU's criminal law powers have not been comprehensively analysed as a constitutional problem, and that is the aim of this thesis. It intends, through the lens of the separation of powers, to investigate the constitutional arrangements of the European Union to ensure that the constitutional architecture of the Union is capable of bearing the weight of an emergent system of criminal justice.

1.1 Functions of Government in the European Union

The government of the European Union is not a straight forward matter because it is neither a State in the traditionally understood sense of the word, nor merely an international organisation. To apply the usual phrase, it is a *sui generis* organisation and does not follow the usual rules. The term *"constitutional order of States"* has been coined to explain this unique constitutional make-up.[1] It establishes that, while the States of the Union retain their individual sovereignty and character, in certain fields they have voluntarily accepted a new role as part of a constitutional structure, a framework aimed at better achieving the goals which are in the common interests of all of the 27 Member States. In doing so, they cede some control over their national sovereignty as part of the process of achieving the wider goals of the Union.

[1] Dashwood, A. "States in the European Union" (1998) 23(3) European Law Review 201, 216.

The consequence of this is that the usual rules relating to the constitutional law of either States or international organisations cannot apply to the EU. The European Court of Justice (ECJ) has observed since very early in its existence that the European Treaties created a new kind of legal order.[2] A Community of limitless duration, with its own institutions, legal personality, legal capacity and powers stemming from a limited transfer of sovereignty gives the European Union a distinctive constitutional make-up, with the power to affect the domestic legal orders of its Member States.[3] This transfer of Sovereignty creates a non-State entity with directly applicable legislative powers and degree of discretion in the way that they are exercised.

The usual rules applying to the constitutional government of States cannot apply, because, put simply, the EU is not, in any way commonly understood, a State.[4] The method of legislating in the EU has evolved dramatically over its period of existence, moving gradually from intergovernmentalism with the power focused very much in the Council and the Member States, towards a more supranational method of decision-making with both the Council and the European Parliament, consisting of the elected representatives of the citizens, having an equal role in making most decisions. This method of decision-making has been described as the 'Community method'.[5] The particular construction of the European Union means that there are many interests to be accommodated in the decision-making structure. Rather than applying the separation of powers as a method of constraining the exercise of government power, the European

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[2] Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1962] E.C.R. 1.

[3] Case 6/64 *Flaminio Costa v ENEL* [1964] E.C.R. 585.

[4] See Mancini, F. "Europe: The Case for Statehood" (1998) 4(1) European Law Journal 29; Weiler, J. "Europe: the Case Against the Case for Statehood" (1998) 4(1) European Law Journal 43

Union employs a model aimed at separating various interests in the legislative process, referred to as the interinstitutional balance. [6]

The EU's constitutional structure does not consist of dividing government into three distinct branches, legislature, executive and judicial. Instead, the interests of the Member States are represented by the Council, the people of the Union are represented by the European Parliament, and the collective interests of the Union as a whole are represented by the Commission. The balance achieved by the Community method is therefore less a legal exercise in balancing powers and more a political calculation aimed at balancing interests. Rather than a defined legislature imposing its will upon the executive giving rise to the need to balance the power of government to correct abuse, one instead has three bodies each with a role in the adoption of legislation, meaning that the legislation necessarily establishes a compromise. The makeup of the European polity is aimed at securing the legislative policy to best serve the collective interests of the States without escaping their control any more than is strictly necessary to ensure progress. This may have been appropriate while the European Union was more akin to a simple international organisation; a forum in which international negotiations on coal and steel production could be conducted outside of the vagaries of the domestic political system. However, as competence has crept, or indeed been ceded, in areas with greater political sensitivity the political and legal mechanisms for controlling the exercise of those powers merit reconsideration.

The separation of powers has been dominant as a model of constitutional thought for over two hundred years. Montesquieu's original theory was

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[5] See Temple Lang, J. 'Checks and Balances in the European Union: the Institutional Structure and the Community Method' (2006) 12(1) European Public Law 127.

[6] Bradley, K. "Institutional Design in the Treaty of Nice" (2001) 38(5) Common Market Law Review 1095, 1096.

that liberty is lost where the powers of the executive, legislature and judiciary are not exercised by separate people or bodies of people. Where either or all three of these powers are in actual fact exercised by the same bodies there would be tyranny, noting that overlaps in these powers can give rise to oppression. Montesquieu wrote that;

> *"[There is no liberty] if the power of judging is not separate from legislative power and executive power. If it were joined to legislative power, the power over the life and liberty of the citizens would be arbitrary, for the judge would be the legislature. If it were joined to the executive power, the judge could have the force of an oppressor. All would be lost if the same man or the same body of principal men, either of nobles or the people, exercised these three powers".*[7]

Separating these powers provides a safeguard against tyranny and oppression because it means that law is defined and enacted, then enforced and interpreted separately. Montesquieu makes specific reference to the protection of the life and liberty of citizen, tacitly therefore accepting that the most important application of this process is to prevent those responsible for keeping the public peace being able to unilaterally create new laws which justify the control, by violent means, of otherwise lawful behaviour.

In practice, it is impossible to achieve pure separation of powers because there will always be some overlap. However, where one accepts a degree of overlap between these powers is inevitable, there are ways of turning this apparent weakness into an advantage. In formulating the Constitution

[7] Montesquieu, C. "The Spirit of the Law" (1748), (University of California Press, Berkley, 1979) Book 11, Chapter 6

of the United States, James Madison framed the potential advantages as follows;

"The great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others."[8]

In other words separating the functions of government in line with Montesquieu's theory leads to a kind of passive control on government power because each individual body is limited by the nature of its function. A legislature cannot, or should not adjudicate a case. However, if you equip each body with a constitutional power to oversee the other then, through wise constitutional choices, it is possible to create a constitutional system in which each institution can serve as a check or a balance on the other. For example, a chief executive can have a veto over the legislature, the legislature can have the power of impeachment over members of the executive, and the judiciary can review the legislation for its constitutional propriety.

Some elements of these ideas can be seen in practice in the context of the European Union. For example, the European Parliament does have a power of censure over the Commission[9], and the Court of Justice can judicially review, and strike down European legislation.[10] However, the institutions of government are not properly separated. Each of the principal institutions, except the Court of Justice, has a role in the legislative

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[8] Madison, J. "The Structure of Government must Furnish Proper Checks and Balances Between the Different Departments" (1788) 51 The Federalist Papers.

[9] Article 201 EC.

[10] Articles 230 and 234 EC.

process, and both the Council and the Commission exercise executive power depending on the circumstances.

This thesis will examine the way in which the EU exercises its constitutional functions in a criminal law context. It will do so by considering the legislative competences and executive powers bestowed on the political institutions by the EC and EU Treaties and the way in which the Court of Justice exercises its role as a constitutional court in the field of criminal law. Although the European Union is not a body constituted of a model of the separation of powers, this does not mean that one cannot use that theory as a method for assessing the way in which these powers are exercised by the Union. Each of these three functions of government are exercised at European level, and in the criminal law context. The ideas of Montesquieu and Madison are still relevant. The separation of powers was designed, in part at least, as a method for controlling the abuse of criminal law, and has, to a greater or lesser extent, been used to assess the success or otherwise of governments in this context for over two centuries. Merely stating that a given system is not built on the foundation of separation of powers does not prevent analysis according to this constitutional idea. Such an analysis can identify alternative control strategies which are as strong or stronger, and analysing the EU in accordance with this model will highlight the weaknesses in the legitimacy, oversight and accountability of the criminal legal process at the EU level, and will allow consideration of whether or not effective alternative mechanisms are in place.

1.2 Why is Criminal Law Special?

It is something of a truism to say that criminal law has always enjoyed a special place in the constitution of Statehood. There are many reasons for this. Among them is the idea that criminal law, and particularly its

enforcement, is key to the notion of national sovereignty. In *"Politics as a Vocation"* Max Weber observed that the right to use violence in the enforcement of law is the right of the State. In fact, this monopoly on the use of violence and control over citizens is almost the defining characteristic of the State.

> *"[Force] is certainly not the normal or the only means of the state...but force is a means specific to the state. Today the relation between the state and violence is an especially intimate one...Today we have to say that a state is a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory...Specifically, at the present time, the right to use physical force is ascribed to other institutions or to individuals only to the extent to which the state permits it. The state is considered the sole source of the 'right' to use violence...If the state is to exist, the dominated must obey the authority claimed by the powers that be."*[11]

This conceptual framework has been influential in social, political and legal thinking on State sovereignty for nearly a century.[12] International law generally regards effective control over the territory and people within it as being one of the key defining categories of Statehood.[13] The monopoly on the use of force seems therefore to have become one of the defining concepts of the sovereign State. Although the State is free to use force to enforce any aspect of its laws, the most obvious, and indeed visible manifestation of that principle is the enforcement of its criminal

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[11] Weber, M. "Politics as a Vocation" (1919) in Whyte, D. (ed.) *Crimes of the Powerful: A Reader* (Open University Press, 2009), 13.

[12] Knight, C. *"Bi-polar Sovereignty Restated"* (2009) 68(2) Cambridge Law Journal 361, 396.

[13] Article 1(d), Montevideo Convention on the Rights and Duties of States 1993.

law. In most modern democracies the most visible manifestation of executive government is the police. Within the police force reside the special legal powers necessary to enforce the criminal law of the State.

In its judgment reaffirming the constitutionality of the act adopting the Lisbon Treaty 2007, the *Bundesverfassungsgericht* (BVerfG) observed that the European Union should tread carefully in the potential encroachment on competences primarily reserved to the Member States on the basis of special constitutional sensitivity. Its reasoning seems to be heavily informed by Weber's ideas. In particular it notes that certain things have;

> *"...always been deemed especially sensitive for the ability of a constitutional state to democratically shape itself [including] decisions on substantive and formal criminal law [and] on the disposition of the police monopoly on the use of force towards the interior... As regards the preconditions of criminal liability as well as the concepts of a fair and appropriate trial, the administration of criminal law depends on cultural processes of previous understanding that are historically grown and also determined by language, and on the alternatives which emerge in the process of deliberation and which move the respective public opinion...The penalisation of social behaviour can, however, only to a limited extent be normatively derived from values and moral premises that are shared Europe-wide. Instead, the decision on punishable behaviour, on the rank of legal interests and the sense and the measure of the threat of punishment, is to a particular extent left to the democratic decision-making process. In this context, which is of importance as regards fundamental rights, a transfer of sovereign powers beyond intergovernmental cooperation may only under*

restrictive preconditions lead to harmonisation for certain cross-border circumstances; the Member States must, in principle, retain substantial space of action in this context"[14]

The BVerfG reiterates the importance of the definition and enforcement of crime and criminal procedure as being key to the idea of the nation State. They observe that the proper place for the adoption of such rules is within the political system of the nation State. This, according to the BVerfG is because what is and is not criminal is culturally sensitive. It is shaped by a nation's history, by its values. Holocaust denial is a crime in some Member States, and not others. The steps taken in national law to protect against terrorism or organized crime are defined by the national experience of States choosing to adopt such laws.[15] The Court goes on to observe that while there may be a role for the adoption of criminal law and sanctions at a European level, in general the shared cultural and historical experience is absent. Therefore, the retention, for the most part, of the competence to adopt criminal law in a domestic forum allows for a legislature, better attuned to the national context, to adopt appropriate criminal law.

However, that criminal law has a special place in the constitutional order of the State is not restricted to concepts such as sovereignty or identifying the appropriate political forum for the adoption of such laws. The law itself tends to attach special importance to criminal law. Historically it has always been regarded as the law of last resort, *lex ultima ratio*, in other words, administrative or civil penalties should always be explored before

[14] BVerfG, 2 BvE 2/08, para 252-253.

[15] On terrorism and the problems of finding an international definition see Di Filippo, M. "Terrorist crimes and international co-operation: critical remarks on the definition and inclusion of terrorism in the category of international crimes." (2008) 19(3) European Journal of International Law 533, 536. See also; Lamond, G. "What is a Crime?" (2007) 27(4) Oxford Journal of Legal Studies 609.

resort is made to criminalisation.[16] Criminal proceedings are generally treated as being of a different nature than civil ones. For example, Article 6 of the European Convention on Human Rights 1950 (ECHR) guarantees a fair, public hearing before an impartial court as one of the fundamental rights protected by the Convention. Article 6(2) ECHR imposes additional protections for the rights of the accused which apply specifically in a criminal trial.[17]

It will be recalled from above that in forming their theories of the separation of powers and checks and balances imposed in those contexts, both Montesquieu and Madison formulated their ideas with criminal law particularly in mind. Clearly it was recognised that the abuse of the criminal law process, either by the legislature, executive or judiciary was too great a risk to allow any one of those branches to exercise those powers independently of each other. If we accept that criminal law has a special place in terms of constitutional law, and in terms of national sovereignty, then we must ask ourselves first, why the European Union is acting in the field, and secondly how they have undertaken to legislate on criminal law in the EU.

1.3 EU Criminal law: Why and How?

International cooperation in criminal law is by no means new.[18] Piracy on the high seas has been recognised as a crime against the international community for centuries[19] and international criminal law as a phenomenon

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[16] Husak, D. "Criminal Law as a Last Resort" (2004) 24(2) Oxford Journal of Legal Studies 209.

[17] See also, Articles 48 to 50 of the Charter of Fundamental Rights of the European Union [2007] OJ C 303

[18] See generally Cassesse, A, *International Criminal Law* (2nd edition, OUP, 2008).

[19] *In re Piracy Jure Gentium* [1934] AC 586 in which the Privy Council traced the history of piracy as an international crime.

has gathered pace relentlessly since the conclusion of the Second World War.[20] International cooperation in the field of criminal law had not, however, been restricted to the definition of crimes against the international community. International institutional structures of various kinds have also been established, including organisations aimed at fostering police co-operation[21], and even courts for the prosecution of such international crimes.[22] But in addition to the international legal field, such cooperation has also evolved within the field of the European Union since Maastricht. The EU's intervention in this area has been even more extensive than the international developments, creating a new legal regime within Europe for the management of crime, including crimes defined by European law and European level criminal cooperation institutions such as Europol and Eurojust.

But why has the European Union gained competence in the field of criminal law? Why has it been felt necessary to endow the constitutional order of States with this most sensitive of the trappings of statehood? The primary motive for the expansion of the EU's competence to cover criminal law appears to have been much the same as the international community generally. Criminal behaviour emerged which was of common concern to the Member States.[23] This accords with the original, neo-functionalist vision of Jean Monnet, since, once the Community structure is established, gradually competence will grow as it becomes apparent that it is required. There is an added paradox in the nature of European criminal law however. Much of the criminality with which EU law is concerned is indirectly the result of the European Union. A simple example might be

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[20] Charter Annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals, 1945. Genocide Convention, 1948. The Geneva Conventions I-IV, 1949.

[21] Interpol, see www.interpol.int Last accessed 19th December 2009.

[22] International Criminal Court, Rome Statute 1998.

[23] Mitsilagas, V. *EU Criminal Law* (Hart Publishing 2009), 5.

that with the abolition of internal frontiers, it becomes much easier to smuggle contraband. Since the emergence of the European polity, cooperation has become easier, not just for the Member States but also for organised criminality. This is why so many of the early forays of the EU into the criminal law sphere were concerned with the combating of organised crime.[24] Moreover, gradually, specific concerns, such as the protection of the financial interests of the European Community have emerged to justify targeted action, including the creation of agencies at European level with the specific responsibility for the protection of such interests.[25] The involvement of the European Union in the criminal sphere has increased, almost exponentially since the attacks of the Eleventh of September 2001, and were further spurred by the terrorist atrocities committed on European soil in Madrid in 2004, and London in 2005.[26]

Having considered why the EU is involved in the field we must now turn to how. Constitutionally the EU is split into three pillars. The first is the European Community, constitutionally based on the Treaty Establishing the European Community 1957, and is the core of the EU. The competences of the EC are primarily geared around establishing the four freedoms, that is the movement of persons, goods, services and capital. The remaining pillars are based on the Treaty on European Union 1992. The second pillar, with which this thesis is, for the most part, not concerned, deals with the establishment of a common foreign and security

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[24] Mitsilegas, V. "Defining organised crime in the European Union: the limits of European criminal law in an area of "freedom, security and justice", (2001) 26(6) European Law Review 565. Joint Action on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union (98/733/JHA), [1998] O.J. L351/1, 21st December 1998 The Convention based on Article K3 of the Treaty on European Union on the establishment of a European Police Office.OJ [1995] C 316, 27th November 1995. A precondition for the assumption of jurisdiction by Europol was that an organised criminal structure be involved.

[25] OLAF, see Commission decision establishing the European Anti-fraud Office (OLAF), [1999] OJ L 136.

[26] Douglas-Scott, S, "The Rule of Law in the European Union: Putting the Security into the Area of Freedom Security and Justice" (2004) 29(2) European Law Review 2

policy and is based on Title V TEU. The third pillar is the traditional criminal law arm of the European Union. Originally known as Justice and Home Affairs, following the Amsterdam Treaty 1997, the pillar was partly Communitarized with visas, asylum and immigration and judicial cooperation in civil matters being transferred to the Community leaving a rump of Police and Judicial Cooperation in Criminal Matters (PJCCM) under Title VI as the remaining third pillar. This thesis will consider the role of both the first and the third pillar structures in the adoption and enforcement of criminal law, and will consider the role of the ECJ in applying and reviewing that law. By a detailed analysis of the Treaties as interpreted by the Court this thesis will conclude that there are significantly more similarities than differences between the pillars.

The scope of EU intervention in criminal law is now very broad,[27] and may, under the regime set out by the Lisbon Treaty 2007 become even broader.[28] It has a role in the definition of criminal offences. On the one hand it may, of its own motion, adopt legislation defining crimes at a European level[29] and has used its legislative competence in such a way as to make it an effective forum for the implementation of international obligations which are binding on all of the Member States, in particular, UN Security Council Resolutions on terrorism.[30] It also has a role in the

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[27] Mitsilegas, V. "The Third Wave of Third Pillar Law, Which Way Now for European Criminal Justice?", (2009) 34(4) European Law Review 523.

[28] Peers, S. "EU Criminal Law and the Treaty of Lisbon" (2008) 33(4) European Law Review 507.

[29] See, *inter alia*, Joint Action on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union" (98/733/JHA), [1998] O.J. L351/1, 21st December 1998; Council Framework Decision on the Trafficking of Human Beings (2002/629/JHA) [2002] OJ L 203/1, 19th July 2002; Council Framework Decision 2004/757/JHA laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking [2004] OJ L 335, 25th October 2004.

[30] Common Position 2001/931/CFSP on the application of specific measures to combat terrorism [2001] OJ L 344. United Nations Security Council Resolution 1373 Threats to International Peace and Security caused by Terrorist Acts (2001). Case C-355/04P *Segi et al.* v. *Council of the European Union* [2007] E.C.R. I-1657.

adoption of procedural measures, the most obvious of these is the framework decision on the standing of victims in criminal proceedings.[31] In addition to prescriptive rules relating to the nature or procedural rules regarding crime, the EU is also charged with securing adequate levels of cross border cooperation in the combating of crime. This can be judicial[32] or executive and may involve the creation of specific bodies or agencies for the purpose.[33]

This thesis will argue that the structural weakness in the Union's approach to the adoption, enforcement, and adjudication of criminal law are not limited by its pillared structures. Instead it will argue that they are endemic across the Union, and are constitutional in nature. It will, on that basis, aim to demonstrate that the solution which is clearly in vogue among the European political elites, to communitarize the third pillar will not work as a 'silver bullet' solution. It will seek to show that there are endemic constitutional weakness in the first pillar are which may make it unsuitable to support a criminal justice regime, even an embryonic one. As such, merely exposing the third pillar to those structures will not be enough to solve its inherent problems.

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[31] Council Framework Decision on the standing of victims in criminal proceedings (2001/220/JHA), [2001] OJ L 82, 15th March 2001.

[32] Council framework decision on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters (2008/978/JHA) [2008] OJ L 305, 18th December 2008; Council Framework Decision on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) [2002] OJ L 190, 13th June 2002.

[33] Europol, Eurojust and FRONTEX being obvious examples, see Chapters Three and Four for a detailed discussion.

1.4 Summary of the Thesis

This thesis will be broadly split into three sections. The first, comprising only Chapter Two, will consider the legitimacy of criminal legislation adopted by the Union. It will examine the legislative forms available to the Council under the third pillar, and the legislative procedures to be followed in their adoption. It will therefore consider the role of directly elected assemblies in the adoption of such legislation, both at the national, and supranational level and the gradual growth of a criminal law competence in the first pillar. Finally, it will also address the ECJs decision in the Case C-176/03 *Environmental Protection* ruling[34] and the case law which followed in order to establish the current scope of the Community's criminal competence and the democratic credentials of the legislative processes in those fields. It will conclude by outlining the Lisbon reforms in the legislative field and consider the extent to which they might be said to improve the situation.

The second section will deal with the way that the European Union exercises, or facilitates the exercise of, executive power in the criminal law sphere. This section will consist of Chapters Three and Four. Chapter Three will consider the executive agencies established under the third pillar, in particular the European Police Office, Europol and the European Judicial Co-operation Unit, Eurojust. The purpose of this chapter is to examine the way in which executive powers are delegated in the third pillar framework. It will consider the powers which have been granted to these two agencies, and, more crucially, the strategies in place for ensuring their accountability. It will achieve this by a detailed examination of the legislative structure put in place around these agencies by considering both the original legislation creating these bodies and the

[34] Case C-176/03 *Commission v Council (Environmental Protection)* [2005] E.C.R. I-7879.

recent amendments to their operational structures, identifying the methods of oversight in both cases.

Chapter Four, the second chapter in the executive section, will look at some specific examples of executive power in the Community pillar. It will consider the extent to which the enforcement of competition law under Articles 81 and 82 EC, action to prevent fraud, and executive control of immigration can be considered as a part of criminal law enforcement. In this way it will build on previous research discussing the extent to which competition enforcement proceedings are to be considered criminal. It will examine three bodies of the Community: the Commission's Directorate General for Competition, the Commission's anti-fraud unit OLAF, and the comparatively new European Borders Agency, FRONTEX. It will argue that the powers available to the Community executive are significantly more invasive than those available to the Union and therefore there is no intrinsic benefit to be gained from depillarization of the Union. As such, the developments in the Lisbon Treaty 2007 cannot be viewed as a silver-bullet solution to the accountability problems posed by the enforcement of European criminal law.

The third and final section will focus on the role of the European judiciary in criminal law. No EU court is capable of hearing a criminal trial *per se*, but this does not mean that the EU judiciary has no role in this regard. The ECJ, exercising its functions as a constitutional court has a significant degree of influence. Chapter Five will examine the constitutional 'toolkit' that the European Court has at its disposal for this purpose. It will take the form of an analysis of the current state of the relevant areas of European constitutional law. It will consider the foundations of direct effect, consistent interpretation and supremacy. It will also consider the role of

the Case C-6/90 *Francovich*[35] line of case law in securing compliance with the law. It will then examine the scope for judicial review and the preliminary ruling procedure and the ability of the various courts at European level to protect fundamental rights in European law. Framing the ECJ's constitutional armoury in this way allows the chapters which follow to draw on that analysis to consider the ECJs role in two specific fields of law. It will build a model of judicial protection which the following chapters will apply to the criminal context in order to establish whether the intricate judicial model that the Court of Justice has established is capable of bearing the strain of a criminal justice system.

Chapter Six will consider the Court's role in ensuring that European criminal law is properly applied. This includes an analysis of the possibility for criminal law to be directly effective or to demonstrate its supremacy over conflicting domestic rules. It also considers the limits of the duty of consistent interpretation in relation to criminal law. It considers whether European legislation can ever directly influence the outcome of a national criminal trial, either to the benefit or to the detriment of an individual. It comes to the conclusion that there is a single set of rules which apply regardless of the pillar under which the criminal law was adopted. It also argues that the rationale on which this set of rules is based has shifted, from an early functional, constitutional analysis to one based on the respect for fundamental rights. As such it will further support the arguments made in the previous chapters that the communitarisation envisaged by the Treaty of Lisbon is unlikely to have any significant impact on the way in which European criminal law actually operates in practice.

[35] Case C-6/90 and 9/90 *Francovich and Bonifaci v Italy* [1991] E.C.R. I-5357.

The final substantive chapter, Chapter Seven, will examine the way in which criminal law may be challenged before the European Court of Justice. It will consider the judicial review procedures in both the first and third pillars, in particular the ability of the individual to bring an action for review before the European Court of Justice. It will demonstrate that the third pillar prevents an individual from bringing such an action outright. It will then examine the standing of individuals under the more traditional Community pillar and demonstrate that the interpretation adopted by the ECJ of the various Treaty articles has the same effect and that individuals cannot in practice seek direct judicial review of European criminal law, irrelevant of the pillar under which it was adopted. It will then go on to consider the alternative to direct review, the preliminary reference system. Described as the jewel in the ECJ's constitutional crown[36] it has been the Court's most powerful vehicle in shaping the application of European law. It will examine the Treaty provisions under both the first[37] and third pillars[38] in order to establish the utility of this system in the field of criminal law. It will conclude that it is in this field where the Conmunitarization envisioned by the Lisbon Treaty will have the most effect. The third pillar reference system is highly restricted, and will be considerably liberalised by the Lisbon Treaty.

The investigation will however focus on the European Union as a constitutional order, rather than on the way in which this is dealt with by national systems. This focus has been adopted because an holistic constitutional analysis of the system is beneficial in highlighting the theoretical potential for the violation of individual rights within a system of criminal justice. While this thesis will consider some national

[36] Craig, P and De Burca, G. *"EU Law Text Cases and Materials"* (4th edition, OUP, 2008), 460.

[37] Article 234 EC.

[38] Article 35 TEU.

jurisprudence it will only do so where it is necessary to gain a fuller understanding of particular doctrines of European Constitutional law, in particular, Supremacy.

The thesis will conclude that in most respects the Communitarization of EU criminal law will have little or no positive impact on the adoption or the enforcement of criminal law. It will in fact suggest that many valuable lessons could, and possibly have, been learned by the Community pillar from the method of cooperation developed by the wider Union. In essence it will argue that there must be no complacency after the adoption of the Lisbon Treaty and that the reform of the constitutional rules surrounding European criminal law must be a priority for the next round of constitutional reform.

Chapter 2

Legislative Power in European Criminal Law

2.1 Introduction

When thinking of the EU it is unhelpful, at least in the context of legislating on criminal law, to think of the Union as two, or even three different legislatures; as the Union and the Community, or as the three 'pillars'. It is contended that the Union is in fact a single polity with a single legislature, that functions in numerous different ways depending on the context in which it is legislating. This seems like an obvious statement given that Article 3 TEU makes it clear that the Union is served by a single set of institutions. However, it is important in this debate, where the pillars of the Union seem to be regarded as separate legal entities, to reinforce the point that there are only procedural differences in how the pillars legislate and that the Union legislature is just that, the legislature for the Union, its different 'houses' having different roles in different contexts. This is neither controversial, nor particularly unusual in the case of domestic legislatures,[1] but the *sui generis* nature of the Union results in very specific problems caused by the major divergences in the roles of the legislative bodies depending on the context in which they act. This is particularly so in the field of criminal law.

Trying to identify the legal basis upon which EU criminal legislation can be based in accordance with the principle of attributed powers is becoming

[1] For example, it is very common for one house of a bicameral legislature to have different powers, and even to apply different procedures, in relation to money bills. See *inter alia* in the United Kingdom s.1(1), Parliament Act 1911, and in the United States of America Article 1, section 7, Constitution of the United States.

ever more complex. No longer is the power to legislate on criminal law restricted solely to intergovernmental cooperation and it is possible for the EU to create criminal legislation in both the first and third pillar. This chapter will consider the powers of the European polity to adopt criminal law under both pillars. It will, based on this analysis, consider the merits of depillarization of the Union, the processes for the adoption of legislation on criminal law within the European framework. In doing so, it will question the role of the democratic institutions in the adoption of such legislation and the legitimacy of the resulting legislation. It will argue that depillarization will make some difference to the *prima facie* legitimacy of the adoption of criminal law in the Union, but that it will not be transformative.

It will first study the legislative processes in the third pillar which is the more traditional criminal law arm of the EU. It will consider the objectives of the third pillar and the way in which the legislative powers therein have been used to meet those objectives. It will also look at the nature and form of the various legislative provisions available to the Council when acting under the third pillar. It will then go on to look at the scope of the criminal law legislative competence in the first pillar to create criminal law as clarified by the Court of Justice in Case C-176/03 *Commission v Council (Environmental Protection)*.[2] It will also look at the implications of the different legislative processes in the first pillar for the legitimacy of criminal law.

[2] Case C-176/03 *Commission v Council (Environmental Protection)* [2005] E.C.R. I-7879.

2.2 The Third Pillar Treaty Framework

The constitutional rules underpinning the third pillar of the European Union are found in Title VI TEU. This section will go on to analyse these rules in order to assess the aims and objectives of the third pillar, its competences, and the legislative provisions the legislature can adopt under those competences.

2.2.1 The Aims and Objectives of the Third Pillar

As with all aspects of Union law, it is first and foremost to be remembered that the Union is, in accordance with Article 2 TEU, a body based on the principle of attributed powers. The third pillar is no different in this respect, and the attributions in relation to the third pillar are made by Articles 29 to 32 TEU.

Article 29 TEU sets out the main overarching objective of Title VI TEU. It is that in aiming to complete the area of freedom, security and justice, the Union shall *'develop common action among the Member States'* in order to achieve cooperation in criminal matters and by combating *'racism and xenophobia'*. This objective is to be achieved by *'preventing and combating crime, organised or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud'*.

Some interesting points can be drawn from the above. It is notable that the Union shall achieve these goals not through Union action, but through developing common action between Member States. Clearly the emphasis in Title VI remains on intergovernmental cooperation rather than on supranationalism. A further point to consider is that the list of crimes is

not exhaustive, and thus apparently, there is no limit, beyond the political, to the offences which can be tackled by the EU within the framework of the third pillar.

The main methods of facilitating this are closer co-operation between the police, customs and *'other competent authorities'*, both directly and through Europol,[3] and closer judicial co-operation, both directly and through Eurojust.[4] Finally there is the possibility of the approximation of national rules of criminal law, and the substantive definition of crimes.

2.2.2 Competence to Legislate under Title VI TEU

The broad powers conferred upon the Union under Title VI TEU are further elaborated in Articles 30 and 31 TEU. Article 30 TEU establishes the powers available to the Union to establish police cooperation. This includes securing rules on the *'operational co-operation between competent authorities...in relation to the prevention, detection and investigation of criminal offences.'*[5] It also allows for the collection, use and sharing of various data,[6] the encouragement of cooperation in training including the exchange of liaison officers, the use of equipment and forensic research and the common evaluation of investigative techniques.[7] Article 30(2) TEU deals with the facilitation of co-operation through Europol. Article 32 TEU also grants the Council the power to set down rules regarding the extent to which competent authorities are entitled to operate on the soil of foreign Member States. It seems readily apparent that

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[3] Europol will be considered in more detail in Chapter 3, 3.2.

[4] Eurojust will be considered in more detail in Chapter 3, 3.3.

[5] Article 30(1)(a) TEU

[6] Article 30(1)(b) TEU

[7] Article 30(1)(c) and (d) TEU

the majority of these powers are aimed more at the facilitation of cooperation between executive bodies.

Article 31 TEU sets out the powers in relation to establishing judicial co-operation. This includes provisions for establishing judicial co-operation through Eurojust. For present purposes the more interesting provisions of Article 31 TEU allow for the facilitation of extradition between Member States,[8] ensuring compatibility in rules applicable in the Member States in order to facilitate judicial cooperation, preventing jurisdictional conflicts, and establishing minimum rules relating to the constituent elements of, and penalties for, criminal acts, in relation to organised crime, terrorism and drug trafficking.

In order to facilitate the kind of co-operation envisaged by Title VI TEU the Council is empowered by Article 34 TEU to pass legislation. There are four types, or forms, of legislative act which the Council under Article 34 TEU, is entitled to adopt. These are common positions,[9] framework decisions,[10] decisions[11] and conventions.[12] As we can see, the Union has a range of competences in relation to criminal cooperation, some substantive and some operational, which form the legal basis for the adoption of legislation. However, rather than limiting the type, or form, of legislation which can be used in relation to these competences, it seems that once a competence has been granted to the Union, the full range of legislative forms are available. This is clearly different from the method of attribution

[8] Article 31(1)(b) TEU. Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States [2002] OJ L 190, 13th June 2002 (the European Arrest Warrant) is the latest development with this aim in mind.

[9] Article 34(2)(a)TEU.

[10] Article 34(2)(b)TEU.

[11] Article 34(2)(c)TEU.

[12] Article 34(2)(d)TEU.

used in the first pillar in which the powers are attributed within the same Articles which place limits on the form of legislation to be adopted as well as its use. The difference can largely be explained by the nature of the third pillar. The third pillar remains principally intergovernmental, and unanimity is required in Council for any legislative action to be taken. While unanimity rules in the third pillar, the way in which powers attributed to the Union are used in legislative action remains, broadly at least, irrelevant because all the Member States have to concur on any action. The legislative form adopted can be chosen to suit the needs of the particular issue to be regulated. The various legislative types or forms contain their own limits, for example framework decisions can be used for approximation of Member State law, but decisions cannot.[13] If the limitations are inherent in the legislative *form* rather than the legal basis, then the degree of centralisation which the Member States are prepared to sign up to can be decided at the point at which legislative intervention is mooted, providing greater flexibility and encouraging unanimity.

2.2.3 Forms of Legislation in the Third Pillar

The specifics in relation to the form, effect and merits, or otherwise, of each of the legislative forms available for the adoption of legislation under the third pillar of the Union will be considered in detail below. There is a significant difference between the third and first pillars. The legislative procedure for the adoption of legislation is not defined by the legal basis, but by the legislative instrument to be adopted. In the case of common positions, these may be adopted unilaterally by the Council, acting unanimously. The European Parliament is not entitled to have any input

[13] See below, 2.2.2.

into this kind of act.[14] Framework decisions and decisions have to be adopted by the Council unanimously, following consultation of the European Parliament.[15] The final class of legislative act, the convention is much more akin to an international agreement. It is to be adopted by the Council, acting unanimously, following consultation of the European Parliament, and is then to be recommended to the individual Member States *'for adoption in accordance with their respective constitutional requirements'*.[16] The implications of the various legislative procedures will be considered below.

2.2.3.1 Framework Decisions

One form of legislation available to the Council acting in accordance with Title VI EU Article 34(2)(b) provides that:

> *"Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect."*

This is a form of words almost identical to that found referring to the directive in Article 249 EC[17] which provides:

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[14] Article 39(2)TEU only requires consultation of the European Parliament during the adoption of measures listed in Article 34 paragraphs (b), (c) and (d) TEU.

[15] Article 39 TEU. It is presumed that consultation in this context is governed by the same basic legal rules as consultation under the EC Treaty. See on this *inter alia* Case 138/79 *Roquette Frères v Council* [1980] E.C.R. 3333; Case C-65/93 *European Parliament v Council* [1995] E.C.R. I-643. It is difficult to envisage a circumstance in which this would be tested, given that Article 35 TEU does not grant the European Parliament the right to bring any case arising from Title VI before the Court.

[16] Article 34(2)(d) TEU.

[17] On the similarity between Article 34(2)(b) TEU and Article 249 EC see the comments of the ECJ in Case C-105/03 *Criminal Proceedings Against Maria Pupino* [2005] E.C.R. I-5285 para 33 *et seq*

"A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods."

So while it appears obvious that the Framework decision is similar in form to the Directive, the question must be asked as to whether it is similar in effect? As we saw above, direct effect of framework decisions in national law is ruled out expressly by the legal basis, but it was only a matter of time before the Court was asked to adjudicate on the legal effect of the framework decision. The moment came in the Case C-105/03 *Pupino*[18] when the court was asked whether the duty of consistent interpretation, an aspect of the Community legal order developed in Case 14/83 *Von Colson*[19] and Case C-106/89 *Marleasing,*[20] extended to third pillar legislation.

In Case C-105/03 *Pupino* the ECJ ruled that the duty of consistent interpretation did indeed extend to the third pillar and its reasoning was complex, though sound. They held that while, strictly speaking, no duty of loyal cooperation can be seen from the express provisions of either Title VI specifically or the TEU more generally,[21] that such a duty must logically exist in order to allow the Union to carry out its tasks effectively. That, twinned with the binding nature of framework decisions under

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[18] Case C-105/03 *Criminal Proceedings Against Maria Pupino* [2005] E.C.R. I-5285. See also Fletcher, M. "Extending "Indirect effect" to the third pillar: The significance of *Pupino*", (2005) 30(6) European Law Review 862; Spaventa, E. "Opening Pandora's Box: Some Reflections on the Constitutional Effects of the Decision in *Pupino*", (2007) 1(3) European Constitutional Law Review 5.

[19] Case 14/83 *Von Colson v Land Nordrhein-Westfahlen* [1984] E.C.R 1891.

[20] Case C-106/89 *Marleasing SA v La Commercial Internacional de Alimentcion SA* [1990] E.C.R. I-4135.

[21] *c.f.* Article 10 EC.

Article 34(2) TEU, and the need to ensure that the Court can give effective references, would seem to strongly indicate the existence of the duty of consistent interpretation in relation to the third pillar.[22]

Amongst the most contentious third pillar issues at the moment is the framework decision on the European Arrest Warrant[23] and the Court has been asked to rule on the validity of that legislation.[24] One of the grounds of review cited in the preliminary reference was a question as to the propriety of using the form of a framework decision for adopting a system such as the arrest warrant. In his Opinion Advocate-General Colomer has gone into some detail about the nature of framework decisions. He begins by observing that Article 34(2) TEU, in listing the various forms of legislation does not appear to place them in a hierarchy, and that as such the Council has a degree of discretion in the adoption of those acts and the choice of legislative form.[25] He goes on to note that the discretion is limited by the nature of the provisions in question. For the purposes of this section he notes that common positions and decisions are not appropriate for the approximation of laws.[26] The Treaty appears to exclude the uses of those provisions for the purpose. He then goes on to state that both conventions and framework decisions would be appropriate for the purpose of approximating laws, and that as such, the Council has absolute

[22] This argument is further developed in Chapter Six.

[23] Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States [2002] OJ L 190, 13th June 2002 (the European Arrest Warrant).

[24] Opinion of AG Ruiz-Jarabo Colomer in Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] E.C.R. I-3633.

[25] Opinion of AG Ruiz-Jarabo Colomer in Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] E.C.R. I-3633, para 52.

[26] Opinion of AG Ruiz-Jarabo Colomer in Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] E.C.R. I-3633, paras 54 and 55 respectively.

discretion as to which provision to adopt.[27] He also notes that where there is a genuine discretion between the types of legislative form which the legislature may adopt, the exercise of that discretion is not, in principle, subject to review.[28]Although some of the reasoning in the Opinion itself is open to criticism, his conclusion that framework decisions would not be appropriate for the creation of new norms of Union law is sound. The TEU itself states that framework decisions are to be used in the approximation of national laws. Thus their use for the creation of new norms of law would appear to be expressly excluded by the Treaty.

The Court of Justice has upheld this point and has made a number of observations in regard to the distinctive third pillar legislative measures. The Court clearly is of the opinion that Title VI establishes no hierarchy of legislative provisions and allows the Council to adopt whichever legislative form that they feel appropriate to achieve the intended goal.[29] They go on to affirm that there are limitations on the purposes for which certain legislative forms can be adopted, principally that the decision cannot be used for the approximation of national laws and that the common position may only be used for defining the Union's approach to a particular matter. Aside from those limitations the Council is open to pursue its objective via whatever means it deems appropriate. The convention and the framework decision are largely interchangeable, and the judgment on the European Arrest Warrant, given the difficulties involved in securing ratification of a

[27] Opinion of AG Ruiz-Jarabo Colomer in Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] E.C.R. I-3633, para 56

[28] Opinion of AG Ruiz-Jarabo Colomer in Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] E.C.R. I-3633, para 53.

[29] Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] E.C.R I-3633, paras 36-38.

convention in national legislatures, probably relegates the convention to legal history.[30]

In relation to the AG's reasoning however, there are some difficult problems. He seems to be at pains to indicate that the European Arrest Warrant is not aimed at harmonizing extradition.[31] Clearly this is an attempt to placate the national courts which had been annulling the national implementing legislation for the European Arrest Warrant on the grounds that it breached national constitutional rules prohibiting the extradition of nationals.[32] There are a number of reasons to discount this as an explanation. First, and possibly most convincing, is that the measure was adopted under Article 31(1)(b) TEU on the facilitation of extradition. On that basis, if the issue at hand is not extradition, then the Framework Decision on the European Arrest Warrant must simply be annulled on the ground of adoption on the incorrect legal basis.

Furthermore, '*Oppenheim on International Law*' defines extradition as *"...the delivery of an accused or convicted individual to the state where he is accused of or has been convicted of, a crime, by the state on whose territory he happens for the time to be."*[33] This seems to be a fair summary of what occurs under the operation of the EAW. Finally and most importantly, arguing that the Arrest Warrant is not intended to harmonize

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[30] Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] E.C.R I-3633, para 41.

[31] Opinion of AG Ruiz-Jarabo Colomer in Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] E.C.R. I-3633, para 46. It is also worth noting that this approach has been echoed by Advocate General Bot in Case C-66/08 *Criminal Proceedings against Szymon Koslowski* [2008] E.C.R. I-6041 at paragraph 87

[32] See Bundesverfassungsgericht Judgment of 18 July 2005 (BvR 2236/04) on the German European Arrest Warrant Law, and Trybunal Konstytucyjny Judgment of 27 April 2005 No. P 1/05 on the constitutionality of the European Arrest Warrant national implementation.

[33] Jennings, R; Watts, A. *Oppenheim's International Law*, (9th edition, Longman Publishing, 1996), 948.

the rules on extradition between the Member States leaves the question open as to what it was intending to do. The AG indicates that it was intending to harmonize the arrest and surrender procedures in Member States.[34] There are two difficulties with that. The first is that there is no substantive evidence that the EAW is in any way approximating the arrest laws of the Member States. The second is that there is no other lawful surrender procedure known to international law other than extradition. The simple fact is, that in bending over to prove that the framework decision is not extradition, the AG has in effect defeated it. If it is not approximation of extradition then it is a new norm of Union law and must thus be struck down as invalid, because, as we have seen framework decisions are not capable of creating new norms. If it is extradition, then it must be allowed to stand, and the Court of Justice must simply reaffirm the principle of supremacy of European law in relation to the third pillar. The ECJ did not address the point directly, restricting themselves to the question asked, and simply ruled that the framework decision could be used to introduce such a scheme.

2.2.3.2 Conventions

As was noted above, conventions share much in common with international agreements. They require ratification in accordance with the national constitutional procedures of Members States, and will only enter into force in relation to a given Member State following the completion of that process. This naturally leaves questions as to the appropriateness of this type of measure which needs to be assessed on a case by case basis. As has been seen above, the combination of Article 34(2)(d) and Article 39 TEU requires that these must be adopted unanimously by the Council

[34] Opinion of AG Ruiz-Jarabo Colomer in Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] E.C.R. I-3633, para 49.

following consultation of the Parliament, before submission to the States for ratification.

Article 34(2)(d) TEU makes no clear prohibition of direct effect, although whether these documents would be capable of direct effect would presumably be questionable. However, in an individual case, where a convention establishes a right which is sufficiently clear, precise and unconditional and in the absence of a prohibition within the convention itself,[35] it is uncertain whether or not the convention in question could be directly applicable. The absence of a specific prohibition leads the author to conclude that there must be at least the possibility that the ECJ would find a convention to be directly effective, or at the very least covered by the doctrine of consistent interpretation. Whether either of these legal doctrines would be extended to a convention prior to national ratification is doubtful. In the case of direct effect of directives under the first pillar, the measure in question has been fully adopted as a measure of EU law, in other words the legislative aspect of the directive is concluded. The implementation stage is much more akin to an exercise of executive function, the form and method, being left to the Member State. In terms of a convention, the ratification by Member States is clearly part of the legislative process. Until such time as the convention is ratified, then it is simply not a binding measure of Union law, and thus in all likelihood, not amenable to direct effect.[36]

There are comparatively few third pillar conventions currently in force in Union law. Until very recently with its repeal by a new Decision, perhaps

[35] The requirements for the direct effect of Community law under Case 26/62 *van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] E.C.R 1, para 12-13.

[36] See further Chapter 6.

the best known was the Europol Convention.[37] Probably the most important current convention is therefore the Convention on Mutual Assistance in Criminal Matters,[38] which lays down, among other things, the rules allowing for the operation of Joint Investigation Teams.[39] By illustration of the difficulties which can be experienced in the adoption of conventions, prior to the adoption of the Framework Decision on the European Arrest Warrant there were two attempts to adopt similar provisions by the use of conventions.[40] Neither of the previous conventions had been adopted by the time the constitutional reforms of the Treaty of Amsterdam came into force, having been only ratified by 12 of the then 15 Member States.[41]

The Amsterdam reforms extensively amended the third pillar and were responsible for the introduction of the framework decision and the decision. The introduction of these measures was a significant change. The common position was clearly never originally intended to be used to adopt binding legal rules.[42] The only provision available for the adoption of such rules was the convention. The requirement of national ratification clearly meant that the third pillar was predominantly intergovernmental. The introduction of the new legislative measures which allow for the

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[37] Convention based on Article K3 of the Treaty on European Union on the establishment of a European Police Office.OJ [1995] C 316, 27th November 1995, now Council Decision establishing the European Police Office (2009/371/JHA) OJ [2009] L 121, 6th April 2009. See Chapter 3.

[38] Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, OJ [2000] C 197/01, 13th July 2005.

[39] Article 13, Convention on Mutual Assistance in Criminal Matters 2005.

[40] Convention relating to extradition between the Member States of the European Union OJ [1996] C 313, 23rd June 1996; Convention on simplified extradition procedure between the Member States of the European Union OJ [1995] C 78, 30th March 1995.

[41] See Opinion of AG Ruiz-Jarabo Colomer in Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] E.C.R. I-3633, para 52

[42] On this point see Case C-355/04 *P Segi et al v Council of the European Union* [2007] E.C.R I-1657.

adoption of binding legal rules without reference to the national legal orders, seems to be indicative of the shift towards supranationalism, which, arguably, will be further encouraged by the Lisbon Treaty.

Another significant problem to be borne in mind with the use of conventions is that amending those conventions requires the adoption of a protocol to them, which follows the same onerous dual legislative procedure as the convention itself. This can result in the amendment of these documents taking an inordinately long time. For example, a number of protocols annexed to the Europol Convention, some dating from 2002, never actually came into force. This slow and cumbersome legislative process seems to have precipitated the introduction of the framework decision and the decision, and thus indirectly catalysed the move towards supranationalism.

2.2.3.3 Common Positions

Common positions are the final legislative form allowed for by Article 34 TEU. The common position is less a legislative act than an expression of unanimous opinion by the Council. AG Colomer puts it more succinctly as follows: *"it is useful in the sphere of the international relations of the Union and the Member States for the purpose of setting out their opinion on a particular subject".*[43] Presumably, once a common position had been adopted by the Council, the extent of the obligations it creates would be a legal obligation to support that common position in relation to the domestic and foreign policy of the respective Member States.[44] The other important

[43] Opinion of AG Ruiz-Jarabo Colomer in Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] E.C.R. I-3633, para 54.

[44] On the second pillar measure of the same name, see van Vooren, V. "A case-study of "Soft Law" in EU External Relations: The European Neighbourhood Policy." (2009) 34(5) European Law Review 696 at 710; Bono, R. "Some Reflections on the CFSP Legal Order" (2006) 43(2) Common Market Law Review 337.

preliminary point to note is that the common position is excluded from the scope of the ECJ's power to review EU legislation by Article 35 TEU.[45]

Recently the Court of Justice has had to discuss the limits of the common position in Case C-335/04 *Segi*.[46] In an attempt to comply with a UN Security Council resolution the Council of the European Union adopted Common Position 2001/931/CFSP on joint legal bases of Article 15 TEU of the Common Foreign and Security Policy (CFSP) and Article 34 TEU on Police and Judicial Co-operation in Criminal Matters. Article 4 of this Common Position required all Member States to grant one another *"the widest possible assistance in preventing and combating terrorist acts"*. Annexed to this position is a definitive list of individuals to whom Article 4 is to be applied. On the receipt of a request under Article 4 in relation to an individual listed in the Annexe the requested State is required to *"fully exploit...their existing powers in accordance with acts of the [EU] and other international agreements, arrangements and conventions"*. The Basque youth group Segi, along with several related individuals, were included in the Annexe as a constituent of the separatist group E.T.A. The Common Position has been updated several times and Segi has remained annexed to the decision. While the case was important for a number of issues which will be discussed later in the thesis, at this point, the Court's discussion on the limits of the legislative form of the common position is the most relevant.[47]

The common position, under Article 34(2)(a) TEU is intended to be used for *"defining the approach of the Union to a particular matter."*[48] The

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[45] For a detailed discussion of the Court's powers of review see further Chapter 7.

[46] Case C-355/04 *P Segi et al v Council of the European Union* [2007] E.C.R I-1657.

[47] See Davies, B. "*Segi* and the Future of Judicial Rights Protection in the Third Pillar of the EU" (2008) 14(3) European Public Law 311.

[48] Article 34(2)(a) TEU.

Court interpreted this narrowly stating that the common position *"is not supposed to produce of itself legal effects in relation to third parties".*[49] They went on to reason that the common position had been excluded from scope of the Court's review under Article 35 TEU for that very reason; applying a kind of circular logic, the Court was not empowered to review common positions because it was never a power it would have to exercise. In other words, because the Court cannot review a common position, the Council is not competent to adopt a common position which can have an impact on the rights or obligations of an individual.

While the Court has laid out a clear limit on the positive legal effect of the common position there are a number of possibilities which must also be considered. We have seen the Court export a number of judicial doctrines from the first pillar into the third, starting in *Pupino.* It is possible that a doctrine similar to that found in Case C- 322/88 *Grimaldi* will be found to apply in the third pillar.[50] In that case it was held that a duty of consistent interpretation could apply, even to a provision which is in itself not binding. So, while a common position is not actually binding and cannot in and of itself directly affect the rights and obligations of an individual, it is entirely possible that a common position setting out the approach of the Union to a given matter would be relevant to the interpretation of certain domestic measures.

2.2.3.4 Decisions

The decision is best identified with the measure of the same name in Community law. It is a legislative measure intended to provide for:

[49] Case C-355/04 *P Segi et al v Council of the European Union* [2007] E.C.R I-1657, para 52.

[50] C-322/88 *Grimaldi (Salvatore) v Fonds de Maladies Professionnelles* [1989] E.C.R. 4407.

"any other purpose consistent with the objectives of 'the third pillar, excluding any approximation of the laws and regulations of the Member States. These decisions shall be binding and shall not entail direct effect; the Council, acting by a qualified majority, shall adopt measures necessary to implement those decisions at the level of the Union".[51]

While the decision itself must be adopted unanimously, the Council has a degree of flexibility in adopting implementing legislation which may be done by qualified majority. Decisions are expressly precluded from being used to approximate laws, and are expressly incapable of having direct effect, and as such are only appropriate for the creation of new legal constructs within the Union. Examples of the use of decisions include the Eurojust Decision[52], and the decision establishing the European Police College (CEPOL).[53] It seems likely that this is the only type of action for which they could be used. Without the possibility of having any direct effect on national legal orders, and without the possibility of approximation of those orders, they appear on the face of it, to be appropriate only for the creation of new Union level norms, the establishment of new programmes or institutions.

Clearly then the European Parliament is relegated to a marginal role in the third pillar, and the role of national parliaments, while strong, is restricted to only one field. It is also worth considering the role of the Commission, and in particular the nature of the right of legislative initiative in the third

[51] Article 34(2)(c) TEU.

[52] Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime [2002] OJ 63/1, 28th February 2002, as amended by Decision 2009/426/JHA on strengthening Eurojust and amending the Eurojust Decision [2009] OJ 138/14, 16th December 2008.

[53] Council Decision 2005/681/JHA establishing the European Police College (CEPOL) and Repealing Decision 2000/820/JHA OJ [2005] L 256/63, of 20 September 2005.

pillar. Clearly from Article 34(2) TEU, the right of initiative is shared between the Commission and the Member States. This is important for several reasons, but most prominently, taken with the requirement for unanimity and the limited role of the Parliament, further underlines the intergovernmental nature of the third pillar.

2.3 The First Pillar and the Blurring of the Boundary

2.3.1 Criminal Law in the First Pillar

Having considered the powers of the Union in the adoption of legislation on criminal justice, it is now essential to turn our attention to what powers, if any, the Community has in this regard. While it may seem counterintuitive to assign criminal competences to the first pillar when there is an intergovernmental pillar expressly for the purpose, it is not. The Treaties certainly do not expressly reserve the right to adopt measures containing criminal sanctions to the Union.

It has been clear for some time that the Community has the power to adopt measures containing some form of sanction. The defining case on this issue is Case 68/88 *Commission v Greece*.[54] Article 10 EC makes it clear that Member States must take all appropriate action to ensure that Community law is enforced, and the Court in this case confirmed that this would include imposing sanctions where necessary *"to guarantee the application and effectiveness of Community law"*.[55] While Member States retained the discretion to choose the nature of the penalties, infringements of Community law should be punished:

[54] Case 68/88 *Commission v Greece* [1989] E.C.R. 2965

[55] Case 68/88 *Commission v Greece* [1989] E.C.R. 2965 at para 23

> *"under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective proportionate and dissuasive"*[56]

Thus from as early as the late 1980's it has been clear that where the domestic law of a Member State treats a transgression as criminal, it is under an obligation to treat analogous violations of Community law as criminal. It is submitted however, that while this is comparatively uncontroversial, there is some difference between applying this so-called principle of assimilation, in which Member States are still free to designate behaviour as criminal or otherwise within the domestic legal order, and the Community actually requiring the imposition of a criminal offence.

2.3.2 The Emerging EC Criminal Competence

While it has never been expressly stated in the Treaties that criminal law is the sole purview of the intergovernmental, third pillar under Title VI TEU, it has been largely, although by no means exclusively, presumed that criminal law was excluded from the competencies of the EC.[57] The creation of a separate, intergovernmental, arm of the European Union to deal with such issues seems to be strong prima facie evidence for this argument.

However, a closer reading of Articles 29 and 47 TEU seems to suggest that the situation is not necessarily as clear as it first appears. These

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[56] Case 68/88 *Commission v Greece* [1989] E.C.R. 2965 at para. 24

[57] See *inter alia* Wasmeier, M, Thwaits, N. "The Battle of the Pillars: Does the European Union have the Power to Approximate National Criminal Laws?" (2004) 29(5) European Law Review 613.

Articles seem to suggest that there is in fact a hierarchy between the Treaties. The wording of these Articles includes the phrases: *"without prejudice to the powers of the European Community"*[58] and *"nothing in this Treaty shall affect"* the European Community[59] which appears to imply that the powers of the third pillar in so far as they relate to the powers enjoyed by the Community are highly circumscribed. This could in fact be taken as implying that there had always been the possibility of some overlap between the first and third pillars, otherwise the Member States would not have felt the need to include these rules of priority in the Treaty at all. Over the last few years the Court has had several opportunities to clarify the relationship between the two pillars, and in particular, whether and to what extent the first pillar institutions enjoyed a competence to adopt criminal law.

In Case C-176/03 *Environmental Protection*[60] the Court of Justice went a significant way towards reshaping the criminal legislature at EU level. The case concerned an action for annulment taken by the Commission against Framework Decision 2003/80/JHA on the protection of the environment through criminal law.[61] They argued that being as environmental policy fell within the competency of the first pillar adopting criminal legislation on that matter fell outside the scope of Title VI TEU. In effect they were arguing that the power to impose criminal sanctions was not outside the remit of the competence of the Community under Article 175 EC. While in most cases of a choice between legal bases, providing the basis is appropriate it is irrelevant which basis is chosen, it is more constitutionally sensitive when the choice is between the EC and EU Treaties. As we saw

[58] Article 29 TEU.

[59] Article 47 TEU.

[60] Case C-176/03 *Commission v Council (Environmental Protection)* [2005] E.C.R I-7879.

[61] Council Framework Decision 2003/80/JHA on the protection of the environment through criminal law OJ [2003] L 029, 27th January 2003.

above, Article 47 TEU seems to make it plain that a hierarchy of Treaties exists and if a legislative measure can be based on the EC Treaty it may not therefore be based on the EU Treaty. By way of a preliminary note, it needs to be stated that this was clearly controversial territory. The Council was joined in its defence of the Commission's action for annulment by 11 of the then 15 Member States.[62]

The Court of Justice ruled in favour of the Commission and held that the power to enact measures containing criminal sanctions was indeed within the scope of the first pillar. They held that:

> *"As a general rule, neither criminal law rules nor the rules of criminal procedure fall within the Community's competence. However [that] does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective."*[63]

The Court was not entirely clear as to its reasons in this case. In terms of the conflict between the Treaties, the Court restated its well understood case law on the legal basis of EC legislation. While a full discussion of the nature of legal basis disputes, and the practice of the ECJ in their resolution is not necessary, it is necessary to restate the basic principles. It is long established that the choice of a legal base for legislation must be

[62] Denmark, Germany, Greece, Spain, France, Ireland, The Netherlands, Portugal, Finland Sweden and the United Kingdom.

[63] Case C-176/03 *Commission v Council (Environmental Protection)* [2005] E.C.R I-7879, paras 47-48.

identified according to *"objective factors which are amenable to judicial review".*[64] Where there are two possible bases, then if the procedural requirements in the two bases can be reconciled then the measure should be jointly based, where the differences cannot be reconciled then the measure should be based on the Article which best reflects the main purpose of the measure.[65] It applied this case law to the provisions of the framework decision on environmental protection and found that the substance of it should have been more properly based on Article 175 EC.[66]

This appears to suggest that Article 47 TEU allows the Court merely to apply Case C-155/41 *Waste Directive* and Case C-300/89 *Titanium Dioxide* to a cross pillar situation, and use the same reasoning on correct legal basis to determine it. It is difficult to argue any differently on the basis of the Court's ruling in this case. It has been suggested further that the result of this case is not dissimilar to the situation pertaining to Article 308 EC; where a legal basis exists elsewhere in the EC Treaty, the institutions are bound to rely on that basis rather than on Article 308 EC.[67] Following Case C-176/03 *Environmental Protection,* we must now read Article 47 TEU as suggesting that the provisions of Title VI EU can only be relied upon where no appropriate legal basis exists in the EC Treaty.[68]

What then does this case tell us about the nature of the criminal competence enjoyed by the EC? On this point, the Court is much less

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[64] Case C-155/91 *Commission v Council (the Waste Directive)* [1993] E.C.R. I-939, para 7.

[65] Case C-300/89 *Commission v Council (Titanium Dioxide)* [1991] E.C.R. I-2867.

[66] Case C-176/03 *Commission v Council (Environmental Protection)* [2005] E.C.R I-7879, para 46-48.

[67] Opinion 2/94 *"Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms"* [1996] ECR I-1759

[68] Tobler, C. "Annotation of Case C-176/03 *Commission v Council*" (2006) 43(3) Common Market Law Review 835, 843.

clear. Both Advocate General Colomer[69] and the Court seem to have leaned towards the position that when a criminal sanction is necessarily the most effective way of ensuring a rule is complied with the EC has competence to introduce such a sanction. This is by no means an uncontroversial position, because it has been observed that adopting criminal law sanctions ought in fact to be the legal last resort and that administrative sanctions are at least as effective.[70] However, the Court did not explicitly explore the issue of the scope of the criminal law competence of the Community, restricting its discussion to the case at issue, and only addressing the EC's competence over the environment. Despite this focus the Court did not expressly limit its findings to environmental protection, allowing for the possibility that there was a broader scope to this new competence.

That was certainly the Commission's interpretation of judgment in Case C-176/03 *Environmental Protection.* They published a response to the Court's judgment in which they assert that the arguments used by the ECJ in this context can be applied *'in their entirety to the other common policies and the four freedoms'.*[71]The Commission was criticized for its Communication, and in particular its assumption that the Court did not intend to limit the scope of the judgment strictly to environmental policy.[72] In addition to this the Commission attached an annex to the

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[69] Opinion of AG Colomer Case C-176/03 *Commission v Council (Environmental Protection)* [2005] E.C.R I-7879, para 74.

[70] See *inter-alia* Herlin-Karnell, E. "*Commission v Council*: some Reflections on Criminal Law in the First Pillar" (2007) 17(1) European Public Law 69,76.

[71] Communication from the Commission to the European Parliament and the Council on the implications of the Court's Judgment of 13th September 2005 (Case C-176/03 *Commission v Council*), COM (2005) 583 final, 24th November 2005, 3.

[72] See *inter alia* Herlin-Karnell, E. "*Commission v Council*: some Reflections on Criminal Law in the First Pillar" (2007) 17(1) European Public Law 69, 81; Dawes, A, Lynskey, O. "The Ever-longer Arm of EC law: the Extension of Criminal Competence into the Field of Community Law" (2008) 35(1) Common Market Law Review 137, 139.

Communication which contains all the legislative acts which they feel to have been either wrongly adopted, or wrongly proposed, on which they intend to take corrective action. Had the Commission been right in applying this judgment by analogy to the other common policies and freedoms, it is clear from that annex that the implications of the decision in Case 176/03 *Environmental Protection* would have been of great significance.

Time has however made fools of the Commission in this regard. In Case 440/05 *Ship Source Pollution*[73] the Court concluded that there was a substantive limit on the Community's criminal competence. Although the Community is competent to require that criminal sanctions should be applied, it is not competent to regulate the type and level of those sanctions which is left to the discretion of the Member States.[74] Peers is not convinced by this distinction, arguing that the principle of effectiveness, which the Court has relied on in establishing a criminal law competence in the first pillar at all, would apply equally well to a competence to introduce sanctions for such a violation.[75] Whether the Court adequately defended this distinction between requiring the adoption of a sanction, but not defining its type, it is appropriate to leave discretion in that regard to the Member States, to allow them to retain some cohesion within their criminal law.[76]

The Court did miss an opportunity in Case C-440/05 *Ship Source Pollution* however. They declined the opportunity to openly extend the competence

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[73] Case C-440/05 *Commission v Council (Ship Source Pollution)* [2007] E.C.R I-9097.

[74] Case C-440/05 *Commission v Council (Ship Source Pollution)* [2007] E.C.R. I-9097, 70.

[75] Peers, S. "The European Community's Criminal Law Competence: The Plot Thickens" (2008) 33(3) European Law Review 399, 407.

beyond environmental protection, leaving the position at best, uncertain. Advocate General Mazak encouraged the Court to clarify this contentious issue, in particular arguing that it makes no sense to restrict the Community's criminal competence to environmental protection.[77] In addition, the Court also failed to expressly endorse any specific interpretation of Article 47 TEU, in spite of encouragement by AG Mazak, merely reaffirming that a measure dealing with environmental protection ought not to be adopted under the third pillar.[78]

The Court appears to have definitively clarified the interpretation and role of Article 47 TEU in its ruling in Case C-91/05 *Small Arms*.[79] It adopted an automatic approach, somewhat akin to the relationship between Article 308 EC and the competencies of the rest of the first pillar, as noted above. In the words of the Court:

> *"...if it is established that the provisions of a measure adopted under Titles V or VI of the EU Treaty, on account of both their aim and their content, have as their main purpose the implementation of a policy conferred by the EC Treaty on the Community, and if they could properly have been adopted on the basis of the EC*

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[76] Although again Peers notes that cohesion can be difficult to find in some national criminal law, Peers, S. "The European Community's Criminal Law Competence: The Plot Thickens" (2008) 33(3) European Law Review 399, 408.

[77] Opinion of AG Mazak Case C-440/05 *Commission v Council (Ship Source Pollution)* [2007] E.C.R I-9097, para 79-99.

[78] Opinion of AG Mazak Case C-440/05 *Commission v Council (Ship Source Pollution)* [2007] E. C. R I-9097, para 53.

[79] Case C-91/05 *Commission v Council (Small Arms* also known as *ECOWAS)* [2008] E.C. R. I-3651; see also Hillion, C, Wessel, R. "Competence Distribution in EU External Relations after ECOWAS: Clarification or Continued Fuzziness" (2009) 46(2) Common Market Law Review 551. It should be noted that this decision was on the division of competence between the first and second pillar, but the interpretation placed on Article 47 TEU by the Court is likely to be equally applicable to the relationship between the first and third pillars.

Treaty, the Court must find that those provisions infringe Article 47 EU."[80]

Interestingly, the Court referred to both Case 176/03 *Environmental Protection* and Case C-440/05 *Ship Source* to underpin that finding. It would appear that it is settled law that where a measure could have been based on a provision of the EC Treaty, then it is invalidly adopted if based on a competence under Title VI TEU. Where a measure is enacted on the basis of a competence under the EC Treaty, then it can set out the requirement to impose criminal sanctions, but not the level or nature of the penalty, which is the responsibility of the Member States. Imposition of harmonised sanctions remains within the scope of the third pillar.

2.4 Democratic Legitimacy and the Adoption of European Criminal Legislation

In the American quest for a constitutional theory of criminal law, there is a clear division of opinion on the importance of the proper role for the constitution in policing criminal law. On the one hand, it is argued that the most important role of a constitution is to allow the review of the constitutionality of the substance of the law, while the American judiciary seem more concerned with the propriety of its adoption.[81] This apparent obsession of the US courts with the procedural adoption of law has been dismissed as *"process fetishism"*[82] or *"yielding the substance while*

[80] Case C-91/05 *Commission v Council (Small Arms)* [2008] E.C.R. I-3651, para 60.

[81] Dubber, M. "Towards a Constitutional Law of Crime and Punishment" (2004) 55(1) Hastings Law Journal 1, 14.

[82] Dubber, M. "Towards a Constitutional Law of Crime and Punishment" (2004) 55(1) Hastings Law Journal, 113.

contending for the shadow".[83] While it is conceded that there would be little or no sense in attacking one aspect of the constitutional process while neglecting the other, it must be stressed that the constitutional propriety of the process for adopting criminal law is at least as important. This is particularly so in the context of the European Union where, due to the lack of consistency in the division of competence between the pillars, there is such a diverse range of legislative processes available.

The basis of democracy is that decisions should be taken by the people, or as close to the people as is possible. This idea is underlined at Union level by the principle of subsidiarity,[84] and is common to the legal and cultural traditions of the Member States. Athenian democracy faded as the scope of the business of government grew, and so today, democracy is representative. People delegate their decision making powers to their local representative.[85] In this way, the people are linked to the legislation adopted on their behalf. The only people entitled to adopt laws which may have an effect on citizen's rights and obligations are those who have had that power delegated to them directly by the people whose rights and obligations would be affected.[86] It is not clear that the same can be said of adoption of criminal law by the European legislature.

However, the first step is to identify what exactly the Union legislature is. In terms of the third pillar, legislative power is mostly vested in the Council and this is in itself controversial. The European Union is not a body based on the constitutional principle of the separation of powers. It is

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[83] Dubber, M. "Towards a Constitutional Law of Crime and Punishment" (2004) 55(1) Hastings Law Journal,14.

[84] Article 5 EC.

[85] Strøm, K. "Delegation and Accountability in Parliamentary Democracies" (2000) 37 European Jounral of Political Research 261, 267.

based instead on the attribution of powers, and the inter-institutional balance, representing a separation of interests. The Parliament is intended to be representative of the citizens of the Union, the Council representative of the governments of the Member States, and the Commission representing the collective interests of the Member States, in other words, representing the interests of the Union itself.[87] Clearly this is problematic. In national constitutional arrangements, while the executive may, and in European systems often does, form a part of the legislature, there is a clear method of scrutiny of the executive's activities. National Parliamentary chambers debate and vote on a measure proposed by the government and are constitutionally empowered to reject it.[88] In the European system, where a measure is adopted under the Article 251 EC co-decision procedure, then the Council and the Parliament form two chambers of a bicameral legislature. While this is progress, giving the body which 'represents' the citizens a right of veto and power over the negotiation of legislation, the problem of the national executives forming an arm of the legislature still remains. The Council, as the representative body of the Member States remains the other body with control over the negation of the legislation to be adopted. A more significant problem is that under the third pillar, the legislature is, as we have seen, effectively the Council, representatives of the national executives, acting alone. As was identified above,[89] the convention was included as a legislative measure in the third pillar to guarantee that the national ratification

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[86] See Thatcher, M; Stone Sweet, A. "Theory and Practice of Delegation to Non-Majoritarian Institutions" (2002) 25(1) West European Politics 1

[87] Bradley, K. 'Institutional Design in the Treaty of Nice' (2001) 38(5) Common Market Law Review 1095.

[88] Although it is conceded that national parliamentary scrutiny may not always be perfect. In particular the UK's first-past-the-post system, which results in large government majorities, does somewhat undermine effective legislative scrutiny. See *inter alia* Kennon, A. "Pre-Legislative Scrutiny of Draft Bills" [2004] (Autumn) Public Law 477, Blackburn *et al. Griffith and Ryle on Parliament: Functions, Practice and Procedures* (2nd ed. Sweet and Maxwell, London, 2003)

[89] At 2.2.3.2.

procedures would apply to anything potentially injurious to national sovereignty. However, this had the dual function of ensuring that national Parliaments had a role in assessing Union action in the field of criminal law which would have a concrete impact on the citizens they represent at the level closest to the citizen.

The introduction of the framework decision in particular, but also the decision, which may be adopted without the subsequent necessity for ratification by national Parliaments, and with only bare consultation of the European Parliament represents a problematic development. Not only is the democratic body of the EU merely consulted in this process, but by adopting criminal measures at a European level, an assembly of representatives of the national executive governments in the Council are able to adopt criminal laws or other laws with a criminal character potentially without input from the European Parliament.[90] Under the first pillar, consultation of the European Parliament is merely the right of the Parliament to be heard in the process and although consultation is an essential procedural requirement, the outcome of the consultation does not bind the Council. Assuming this principle applies also to the legislative procedures in the third pillar, the Council is entitled to ignore any opinion resulting from the consultation of the European Parliament.[91] In doing so, those executives are in theory able to entirely escape the scrutiny of an elected legislature. While Union laws adopted under the third pillar are expressly prevented by the EU Treaty from being directly effective in national legal systems, since Case C-105/03 *Pupino*[92] they carry with them a duty of consistent interpretation. In effect as the Council is the only

[90] Neagu, N. "Entrapment Between Two Pillars: The European court of Justice Rulings in Criminal Law" (2009) 15(4) European Law Journal 531, at 541

[91] Case 138/79 *Roquette Fréres v Council (Isoglucose)* [1980] E.C.R. 3333.

[92] Case C-105/03 *Criminal Proceedings Against Maria Pupino* [2005] E.C.R. I-5285.

house of the European legislature which has a guaranteed role,[93] in the adoption of criminal legislation it may be adopted by decree of the collective of national executives.

It is possible, however, that the Treaty prohibition on the direct effect of these measures is intended to secure a greater role for the national legislature. It necessarily means that legislation cannot directly apply to the national legal system without having been implemented in accordance with national constitutional arrangements. However, the Courts finding in *Pupino*[94] that legislation may be effective in national legal systems without such implementation, albeit only through consistent interpretation, may undermine that position somewhat.

Douglas-Scott argues that the Union's exclusion of the European Parliament from the legislature effectively ends any democratic scrutiny of legislation adopted in the third pillar. She argues that in the name of efficiency, the *'deplorable'* lack of scrutiny results in *"...the rule of law (being) scarcely observed in this area."*[95] As we have seen, the solution which is most in vogue politically is the depillarization of the Union. The effect of this would be to largely "communitarize" the third pillar, i.e. criminal law would now be adopted according to the normal, Community legislative method. Legislation would be adopted under the ordinary legislative procedure, which would be the equivalent of the Article 251 EC co-decision procedure.[96] This would mean the inclusion of the European

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[93] Although the European Parliament has a right to be consulted about the legislation but assuming the application of Case 138/79 *Isoglucose* principle to the third pillar, the Parliament's opinion is non-binding on the Council.

[94] Case C-105/03 *Criminal Proceedings Against Maria Pupino* [2005] E.C.R. I-5285

[95] Douglas-Scott, S, "The Rule of Law in the European Union: Putting the Security into the Area of Freedom Security and Justice" (2004) 29(2) European Law Review 219, 221.

[96] Article 294 TFEU.

Parliament in the legislative process, but it is not clear that this would repair the weaknesses in the adoption of criminal legislation.

There certainly appears to be a tacit belief that allowing the European Parliament a full role in legislating in this area would be a panacea for democratic deficit.[97] There is, however, a large amount of discussion on the nature and appropriateness of the European Parliament as a representative body at all. Mather questions whether the peoples of Europe can ever be adequately represented at a European level, presiding *"over a people too varied both in terms of cultural background and political experience"* to allow for the Parliament to be an effective representative body.[98] She argues that this, twinned with low turnouts for European elections, significantly weakens the representative nature of the European Parliament.[99]

Even if the pillars were to be entirely removed, and the third pillar regime exposed to the scrutiny of the European Parliament, a question has to be raised about the appropriateness of the European Parliament as a democratic forum for the creation of criminal law. Within domestic constitutional orders, with the exception of times of national emergency, the appropriate forum for the creation of criminal law is the democratic legislature. Criminal law is passed in the open in the context of a national

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[97] Douglas-Scott, S, "The Rule of Law in the European Union: Putting the Security into the Area of Freedom Security and Justice" (2004) 29(2) European Law Review 219, Baker, E. Harding H. "From Past Imperfect to Future Perfect? A Longitudinal Study of the Third Pillar" (2009) 34(1) European Law Review 25, 45

[98] Mather, J, "The European Parliament: a Model for Representative Democracy" (2001) 24(1) West European Politics 181, 198.

[99] However, in terms of the diversity and size of the represented electorate, it is important to note that while the European Parliament represents 495 million citizens with 785 MEPs, the United States House of Representatives represents 303 million people with only 435 Congressmen, This is fewer representatives per million people in the face of significantly greater federal power. While this is not sufficient in and of itself to debunk the argument, it is a good reminder that the distance from the legislator is not necessarily the problem some may think.

debate with scrutiny by the legislature, normally the elected representatives of the people. The debate on the openness of the EU's legislature generally is well rehearsed[100] but it remains important to highlight the need to conclude criminal law in the open with the scrutiny of the legislature.

It has also been argued that the European Parliament does not play the traditional role associated with a parliament. It can, it is argued, be characterised not as a legislative parliament, but as a controlling parliament. Dann argues that this is because its legislative powers are restrained in such a way as to make it a chamber of oversight rather than a genuine legislative body.[101] He argues that there is a difference between a debating parliament and a working parliament. The former is a Westminster style parliament, in which the government sits and can be held directly to account by the opposition. In a working Parliament, of which the government is not a part, the committee system performs the more important role of detailed scrutiny of legislation. Dann argues that the European Parliament cannot be properly characterised as either because:

> "*The European Parliament can chase away a Commission, it can amend or prevent most legislation, it has powerful instruments to closely scrutinise the executive branch. But it does not have, especially in the central law making function and in contrast to the US Congress, the initiating and autonomous standing to positively make policies. It is therefore not a weak but rather a controlling actor, it is a policy-shaping not a policy-making legislature. This does not render it a debating parliament (not even in future*

[100] See De Leeuw, M. "Openness in the Legislative Process in the European Union" (2007) 32(3) European Law Review 295.

[101] Dann, P. "European Parliament and Executive Federalism: Approaching a Parliament in a Semi-Parliamentary Democracy" (2003) 9(5) European Law Journal 549, 570.

perspective) but more distinctly stresses its controlling role in the institutional setting of the EU."[102]

The problem with this assessment is that the European Parliament can, as of right, only amend or block a limited amount of legislation. While the Council is obliged to at least consult the Parliament in almost all cases, the Council is not bound by the opinions the Parliament presents.[103] If the European Parliament is a controlling chamber, it is not, as of yet, sufficiently empowered to properly exercise that function. Moreover, while Dann is technically correct that the Parliament can *"chase away"* a Commission, it is not a power which is much used in practice and will almost always constitute disproportionate over-reaction to dismiss an entire Commission.

There is an argument to be made that the European Parliament's limited legislative role, merely as a co-partner with the Council, does not make it necessarily the most appropriate forum to create legislation with a criminal character. However, to dismiss its legislative role entirely is inappropriate. If criminal legislation is adopted under the codecision procedure, where the European Parliament has a role in shaping the legislation, it is submitted that it is better to think of it as detailed above; a chamber of a bicameral Community legislature. It is worth restating that under the Community's legislative competence over criminal law identified by the Court of Justice thus far, environmental policy, legislation is adopted under the consultation procedure anyway. In other words, where criminal legislation can be adopted under the first pillar, the Parliament may not have a full and engaged legislative role in any event.

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[102] Dann, P. "European Parliament and Executive Federalism: Approaching a Parliament in a Semi-Parliamentary Democracy" (2003) 9(5) European Law Journal 549, 573.

[103] Case 138/79 *Roquette Fréres v Council (Isoglucose)* [1980] E.C.R. 3333.

2.5 Subsidiarity

A limit on the exercise of all European legislative activity is the principle of subsidiarity. Subsidiarity was introduced by the Maastricht Treaty as one of a series of new measures aimed at curbing the powers of the European Union. Along with proportionality and attributed powers, these concepts were supposed to collectively prevent the transfer of more powers than was intended to the EU, which would only exercise those powers that were clearly granted to it by the Member States. Any exercise of power by the EU would be done proportionately and the EU would only act where the same objective could not be achieved by the Member States acting alone and could be better achieved by coordinated EU action. This section will consider to what extent subsidiarity can be used as a block on EU action, and to what extent subsidiarity is binding on the Court as well as the legislature. It will also consider whether the Court's judicial activism undermines the notions of subsidiarity and attribution of powers, particularly when the Court is active in extending fundamental rights protection or is activist in other fields, such as Case C-144/08 *Mangold* on discrimination law.[104]

Attributed powers and subsidiarity are ideas which find their routes in federal legal systems and are concerned with delimiting the powers of government between central and local authorities. They are therefore primarily seen as protecting the rights of the latter against unnecessary encroachments by the former. It is interesting therefore to consider whether this principle, designed to protect the powers of one governmental organisation against erosion at the hands of another, can be used to protect

[104] Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005] E.C.R. I-9981.

the rights of individuals, as well as Member States, against encroaching EU action. These concepts were introduced into European law by the Treaty of Maastricht where concern was widely expressed by various Member States[105] of the emergence of an embryonic federal state.

Article 5 EC states that:

> *"The Community will act within the limits of the powers conferred on it by this treaty and the objectives assigned to it therein. In areas which do not fall within its exclusive competence the Community shall take action in accordance with the principle of subsidiarity only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore by reason of the scale or effects of the proposed action be better achieved by the Community."*[106]

The principle of subsidiarity is further qualified by the Protocol on the Application of the Principles of Subsidiarity and Proportionality added by the Treaty of Amsterdam 1998.[107] Article 2 of the Protocol states that:

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[105] Piris, J. "After Maastricht, are the Community institutions more efficacious, more democratic and more transparent?" (1994) 19(5) European Law Review 449; Harden I "The Constitution of the European Union" [1994] Public Law 609.

[106] Similar provisions exist in the Constitutional orders of various States with federal structures, see for instance, Article 39 of the Basic Law of the Federal Republic of Germany; Article 5a of the Federal Constitution of the Swiss Confederation; Section 51 Constitution of Australia; Tenth Amendment to the Constitution of the United States of America. See also, Emiliou, N. "Subsidiarity; an effective barrier against the "enterprises of ambition"?" (1992) 17(5) European Law Review 383.

[107] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts Protocol (No. 2) on the application of the principles of subsidiarity and proportionality [1997] OJ C 340, 10th November 1997. See DeBurca G. "Reappraising subsidiarity's significance after Amsterdam", Jean Monnet Working Paper 7/1999.

"...the application of the principles of subsidiarity and proportionality shall respect the general provisions and the objectives of the Treaty particularly as regards the maintaining in full of the acquis communitaire and the institutional balance."

Interestingly it also goes on to state that it *"shall not affect the principals developed by the Court of Justice regarding the relationship between national and Community law"* and it should take into account the TEU according to which the Union shall provide itself with the means necessary to attain its objectives and carry out its policies.[108]

Article 3 of the Protocol reiterates that subsidiarity does not call into question the powers conferred on the European Union by the Treaty. It also reiterates that the principle will only apply to secondary legislation in areas where the Union does not enjoy exclusive competence. It states that *"Subsidiarity is a dynamic concept and should be applied in the light of the objectives set out in the Treaty."* Clearly the intention was to create a flexible principle aimed at regulating Community action while still allowing its scope to shrink and grow organically as appropriate.

Article 4 of the Protocol requires that any proposed Community legislation should state the reasons on which it is based with a view a justifying its compliance with the principle of subsidiarity. The Commission must specifically state its reasons for its belief that a given action should be better achieved by the Community rather than by the Member States acting alone, which should be substantiated with quantitative, and where possible, qualitative indicators. Article 5 of the Protocol then goes on to reiterate that Community action should be justified under both aspects of the subsidiarity test; on the one hand that the action cannot sufficiently be

[108] Article 6(4) TEU (ex. Article F).

achieved by Member States acting independently of the supranational framework and can therefore be better achieved by European action. The Protocol then goes on the state three criteria which may be used to judge a given proposal's compliance with that principle. First, that the issue under consideration has transnational aspects which cannot be satisfactorily regulated by the Member States, secondly, actions by Member States alone or lack of Community action would conflict with requirements of the Treaty or significantly undermine Member States' collective interests and finally action at Community level would result in clear benefits due to the scale or effect of such action.[109]

Article 8 of the Protocol implies that if the Member States are successful in derailing European action on the grounds of subsidiarity, that they should be mindful of their obligations under Article 10 EC to cooperate faithfully to achieve the Community's objectives and take appropriate national measures to achieve the objectives which were not achieved supranationally.

The Protocol places a series of obligations on the Commission. These include an obligation to consult widely before making a proposal and to justify any proposal they make with regard to subsidiarity. This can include, where necessary, attaching explanatory memoranda to those proposals. They are also required to submit a report annually to the European Council, European Parliament and the Council of Ministers on the application of Article 5 EC.[110] The Protocol also places a specific obligation on the Council and the European Parliament to consider subsidiarity whilst fulfilling their duties as co-legislatures in the

[109] Articles 4 and 5, Protocol on Subsidiarity.

[110] Article 9, Protocol (No. 2) on Subsidiarity. This report should also be sent to the Committee of the Regions and ECOSOC for their information.

examination of the Commission's proposals. Not only does this concern their obligations while considering the Commission's proposals initially, but also any amendments put forward by the Council or Parliament must comply with this principle.[111] Article 13 of the Protocol states that *"compliance with the principle of subsidiarity will be reviewed in accordance with the rules laid down by the Treaty"*, which effectively secures non-compliance with subsidiarity as a potential ground for judicial review under Article 230 EC. While the Court therefore has jurisdiction to review the legality of adopted legislation on the grounds of subsidiarity,[112] the extent to which it will be prepared to exercise that power is yet to be seen. For example, the Court has stated that the substantive Articles of legislation do not require a reference to the principle of subsidiarity to respect this principle, it being sufficient that the Recitals in the Preamble to the measure make the institution's reasoning clear.[113]

The subsidiarity debate is clearly linked to the competence debate, and the Court has made it clear that in some cases the existence of a competence would be enough to demonstrate that the subsidiarity test has been met. For example, in Case C-84/94 *Working Time Directive*, the Court felt that once the Council had accepted there was a necessity to act to lay down minimum standards for health and safety the subsidiarity test was automatically met.[114] More recently however[115] the Court has resiled from its initially conservative approach to subsidiarity engaging in a more substantive way with the principle and questioning in a more substantive

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[111] Article 11, Protocol on Subsidiarity.

[112] Although this has not always been clear cut, see Toth, A. "Is Subsidiarity Justiciable?" (1994) 19(3) European Law Review 268.

[113] Case C-233/94 *Germany v European Parliament and Council* [1997] E.C.R. I-2405.

[114] Case C-84/94 *UK v Council (Working Time Directive)* [1996] E.C.R. I-5755, paras 47 and 55.

[115] See *inter alia* Case C-377/98 *Kingdom of the Netherlands v European Parliament and Council (Biotechnological Innovation Directive)* [2001] E.C.R. I-7079; Case C-491/01 *ex parte, British American Tobacco* [2002] E.C.R. I-11453.

way whether or not the Community action genuinely did comply with the requirements of subsidiarity. It must, however be noted that the issue has only really been considered in relation to relatively straightforward cases on free movement. The cases are comparatively straightforward because Member States acting alone cause the barriers to free movement, and therefore it is self evident that the action will be compliant with subsidiarity as it is necessary for the Community to undo the damage caused by Member States acting in isolation. The extent to which the Court will engage with subsidiarity remains to be seen, in particular whether or not the Court will actually be prepared to strike a measure down solely for failure to comply with the principle.

It should however be recalled at this point that subsidiarity is essentially a political question of whether it is appropriate to take action supranationally or nationally. The Court would necessarily be reticent to strike down any decision which is essentially political. That decision would after all have been made, if not by the entirety of the Council of Ministers, then at least by a qualified majority, and, if the measure was adopted by codecision, by a majority in the European Parliament. This signifies a significant political belief by two distinct legislative chambers that the legislation complies with the principle of subsidiarity, which would make it difficult for a Member State, or even a small group of Member States, to demonstrate conclusively that it did not comply. However, while subsidiarity is a political calculation, compliance with the principle is a legal requirement and the Court is entitled to consider the accuracy of the legal and factual findings of an institution[116] and the Court should be prepared to do so.

[116] See for example Case C-120/97 *Upjohn Ltd v The Licensing Authority established by the Medicines Act 1968 and Others* [1999] E.C.R. I-223, para 34.

Subsidiarity must be considered in the context of the other federal style restrictions on the exercise of collective powers, particularly the attribution of competences. Where competence is exclusively held by the Union subsidiarity is expressly excluded. Where competence is held complimentarily, there may be a theoretical need to demonstrate compliance with subsidiarity, although the reality suggests that the soft style law which can be adopted under such a competence rarely mandates action, preferring instead to facilitate it,[117] and would rarely produce any measure susceptible to such a challenge. Most likely, subsidiarity would arise in a field where competence is shared, and the Union can adopt harmonising measures, and where the possibility exists for a measure to be adopted without unanimity in the Council.

An interesting question is the extent to which national legislatures, that may feel their rights have been abused by a perceived failure of the Union to comply with subsidiarity, may have standing before the Court of Justice to protect their own interests, by analogy with the position of the European Parliament in the *Chernobyl* case.[118] If they were to enjoy such a right of standing it is conceivably possible that a national Parliament could seek to challenge a measure on the grounds of subsidiarity. If they did not enjoy such a direct right as a matter of European law, where a national legislature had a right of standing in the domestic constitutional system against its executive, then it may be possible to seek review of such legislation indirectly via a preliminary reference.

As was discussed in Chapter One it is easy to link the criminalisation of conduct to the cultural and social identity of each Member State. It is therefore arguable that subsidiarity is particularly relevant to the adoption

[117] See for example the action taken under Article 152 EC, the public health competence.

[118] Case C-70/88 *European Parliament v Council (Chernobyl)* [1990] E.C.R. I-2041.

of criminal sanctions. In the third pillar, the requirement for unanimity seems to limit the likelihood of subsidiarity being successfully invoked against a criminal law measure, but the possibility clearly exists under the first pillar for such an action. There will be significant changes to the monitoring of subsidiarity under Lisbon which will be discussed in the following section.

2.6 The Impact of the Lisbon Treaty

Clearly the depillarization of the Union, the favoured approach proposed by the failed Constitutional Treaty and the subsequently adopted Treaty of Lisbon, is the preferred method for combating the flaws with the old pillared Union structure. While this would go some way towards simplifying the legislative procedures, it by no means completely ends the confusion. While the Constitution would have entirely streamlined the legislative process, leaving the old third pillar to be covered entirely by the newly created 'ordinary legislative procedure', the Lisbon Treaty is not so far reaching.[119] While it does move the legislative competences of the old third pillar into the first, the two arms of the pillar, namely judicial and police co-operation in criminal matters are dealt with in different ways. Judicial co-operation, governed by Articles 82 to 86 of the amended Treaty on the Functioning of European Union (TFEU), will come under the auspice of the ordinary legislative procedure.[120] Matters deemed to be covered by judicial cooperation are many and varied. Article 82 TFEU makes it clear that judicial co-operation remains essentially based on the principle of mutual recognition and allows the Parliament and Council to adopt, in accordance with the ordinary legislative procedure, measures to

[119] See Dougan, M. "Treaty of Lisbon 2007: Winning Minds, not Hearts" (2008) 45(3) Common Market Law Review 617.

facilitate such recognition. These provisions will include measures to lay down *"rules and procedures"* for recognising all *"forms of judgment and judicial decision"*,[121] settlement of disputes,[122] and for support of the training of and co-operation between judges and competent judicial authorities.[123] Article 82(2) TFEU empowers the Council and the European Parliament under the ordinary procedure to adopt measures which regulate the admissibility of evidence, the rights of individuals in criminal procedures and the rights of victims of crime in relation to any *"criminal matters having a cross-border dimension"*.[124] Not only that, but once the Council has identified an issue by unanimous decision, and obtained the consent of the European Parliament, it is empowered to legislate on any *"specific aspect of criminal procedure"*.[125] Article 82(3) TFEU makes all measures adopted under Article 82(2) TFEU subject to the new so-called 'emergency brake' procedure. This procedure allows any Member State to refer any measure adopted under specified Articles to the European Council if they feel it would affect fundamental aspects of its criminal justice system. This referral will suspend the ordinary legislative procedure. If the European Council can reach consensus on the proposal within four months then it will be returned to the Council of Ministers and the legislative process will be resumed. If no agreement can be reached, then presumably, although this is not explicitly stated, the measure will fail. However, should at least nine Member States agree and wish to continue with the measure through enhanced cooperation, then those nine will notify the Council, Commission and European Parliament.

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[120] The ordinary legislative procedure is the equivalent of codecision and is defined by Article 294 TFEU.

[121] Article 82(1)(a) TFEU.

[122] Article 82(1)(b) TFEU.

[123] Articles 82(1)(c) and (d) TFEU respectively.

[124] Article 82(2)(a) to (c) TFEU respectively.

[125] Article 82(2)(d) TFEU.

Authorisation to continue with establishing enhanced co-operation will then be deemed to have been granted.

Article 83 TFEU allows the adoption of directives under the ordinary legislative procedure to establish rules relating to *"...the definition of criminal offences and sanctions in areas of particularly serious crime with a cross border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis."*[126] This is a departure from the old third pillar competences under which offences subject to legislative action had to have a cross-border element. The crimes are identified as terrorism, trafficking in human beings and sexual exploitation of women and children, illicit trafficking of drugs and arms, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. Acting unanimously with the consent of the Parliament, the Council may adopt a decision extending that list.[127] However, the Parliament will have a veto over such an extension.

Apparently as a response to the judgment in Case C-176/03 *Environmental Protection,*[128] Article 83(2) TFEU allows for the adoption, where *"essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures"*, of measures aimed at approximating the criminal laws of Member States. Where this is deemed necessary, the approximating measures will be adopted under the legislative procedure which was followed for the initially harmonizing measure. The entirety of Article 83 TFEU is subject to an emergency brake procedure.[129] This certainly clarifies the position on the Union's

[126] Article 83(1) TFEU.

[127] Article 83(1) (3) TFEU.

[128] Case C-176/03 *Commission v Council (Environmental Protection)* [2005] ECR I-7879.

[129] Article 83(3) TFEU

competence to adopt criminal sanctions outside the AFSJ *per se*. In terms of improving the democratic legitimacy of criminal law, in reality it achieves very little. In essences this is a victory for legal certainty, the court no longer has to address the issue on a case by case basis, but it still leaves the less than desirable situation in which the role of the Parliament in adopting criminal sanctions varies from one political context to another. If criminal sanctions are necessary, there ought to be the greatest possible democratic input into their adoption. Without that input, the legitimacy of any offences must be weakened.

Article 84 TFEU allows the legislature under the ordinary procedure to adopt any measure aimed at supporting or promoting the actions of Member States in crime prevention, excluding harmonization. Article 85 TFEU governs Eurojust, and Article 86 TFEU provides, for the first time, a legal basis for the establishment of a European Public Prosecutor's Office.[130] Police co-operation is governed by Articles 87 to 89 TFEU. Article 87(1) and (2) allow for the legislature to establish, in accordance with the ordinary legislative procedure, measures allowing for cooperation between *"police, customs and other specialised law enforcement services"*,[131] concerning *"collection, storage, processing, analysis and exchange"* of information, training and exchange of staff, and on common investigative techniques in relation to the detection of serious organised crimes. The above are not subject to an emergency brake.

Now we see the first divergence in the legislative process. Article 87(3) TFEU allows for a special legislative procedure, requiring unanimity in Council and consultation of the European Parliament, to adopt any measures concerning operational co-operation between the law

[130] See Chapter 3, 3.6.

[131] Article 87(1) TEFU.

enforcement services referred to in the Article. If other legislation may be subjected to an emergency brake, then measures adopted under Article 87(3) TFEU may be subjected to what could be referred to as an emergency acceleration procedure. In the absence of unanimity in Council, where at least nine Member States are in favour of adopting the legislation, that group of States may refer the issue to the European Council. Again, if a consensus is reached within four months then the legislation will continue. However, in the absence of consensus, if the group of nine or more States want to continue with the legislation then on notification of such an intention to the Council, Parliament and Commission, authorisation to continue with enhanced co-operation shall be deemed to have been granted.

Article 88 TFEU governs Europol. Rules governing the structure, operation, fields of action and tasks of Europol may be adopted in accordance with the ordinary legislative procedure. The tasks may include the use of data, or the coordination, organisation and implementation of investigative and operative actions carried out jointly by the Member State authorities or through joint investigation teams. Such regulation "*shall also lay down the procedures for scrutiny of Europol's activities by the European Parliament, together with national Parliaments.*"[132] In other words, regulations must be adopted to govern the procedures by which Europol may be made accountable to the European Parliament and the national Parliaments on the entry into force of the TFEU. This is a significant improvement in attempts to try and ensure the accountability of the executive body, Europol to elected representatives at both European and national level.[133] Article 88 TFEU is not subject to an emergency brake procedure. In accordance with Article 89 TFEU an identical special

[132] Author's emphasis.

[133] This will be explored further in Chapter 3.

legislative procedure allows for adoption of rules by which the competent Member State authorities will be allowed to operate in the territory of another Member State. This will not be subject to the emergency acceleration, or emergency brake procedure. The adoption of rules of procedure relating to executive operations appears to involve the European Parliament to a lesser degree than legislation on specific criminal offences which are governed by the ordinary legislative procedure. Although the extension of the ordinary legislative procedure is to be welcomed, the remaining limits on the role of the European Parliament continue to raise questions of legitimacy, particularly in relation to legislation on criminal law.

One of the problems which this chapter has highlighted is an overt dominance of the legislative process in the criminal field by the national executive. This has been partially addressed by the Lisbon reforms by giving Parliament a greater role in the adoption of legislation. However, Article 76 TFEU will reserve to the Member States a right of legislative initiative in the field of criminal cooperation, including in accordance with Article 83(2) TFEU. Specifically article 76 TFEU grants a shared right of initiative to the Commission and one quarter of the Member States. While a proposal is not the same as adopted legislation, a proposal goes a long way in framing the resulting debate, and allows national executives to propose measures at European level, a right which could, in theory, be exercised to avoid meaningful domestic scrutiny. Hopefully, however that possibility will be limited by a combination of the increased role of the European Parliament, and the mechanism to be discussed in the following paragraphs.

The operation of subsidiarity under the Lisbon Treaty will be policed by the national Parliaments.[134] This could be seen as acknowledging that subsidiarity is as much a political calculation as a legal rule. The mechanism for facilitating this oversight is complex. Each national Parliament shall be granted two votes.[135] Where a Parliament is bicameral, the votes are to be divided one between each chamber. Where a national Parliamentary chamber does not believe a proposed European legislative act complies with the principle of subsidiarity, they are entitled to issue a reasoned opinion to that effect. Where the total number of reasoned opinions equates to one third of the total votes the proposal in question will be reviewed by the Commission.[136] Interestingly, for our specific purposes however, the Protocol notes that where the measure in question relates to police or judicial co-operation in criminal matters, the threshold shall be a quarter, rather than a third.[137] This clearly acknowledges the special position which criminal law and procedure holds in relation to State sovereignty. The Commission may, following such a review amend, withdraw or maintain the decision giving its reasons.

Where a measure is subject to the ordinary legislative procedure and the votes of a national Parliament in this regard total a simple majority of available votes, the Commission, if it decides to maintain its proposal, must give a full reasoned opinion as to why the proposal complies with the principle of subsidiarity. That opinion, as well as the opinions of the national parliaments, must be submitted to the European Parliament for its

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[134] Protocol (No. 2) on the Application of the principles of Subsidiarity and Proportionality [2008] OJ C 115, 9th May 2008

[135] Article 7(1), Protocol (No. 2) on the Application of the principles of Subsidiarity and Proportionality [2008] OJ C 115, 9th May 2008

[136] Article 7(2), Protocol (No. 2) on the Application of the principles of Subsidiarity and Proportionality [2008] OJ C 115, 9th May 2008

[137] Article 7(2), Protocol (No. 2) on the Application of the principles of Subsidiarity and Proportionality [2008] OJ C 115, 9th May 2008

consideration.[138] In such circumstances, the legislature must, before concluding the first reading, consider whether or not the proposal complies with subsidiarity.[139] Where 55% of votes in the Council, or a simple majority of the Parliament decide that the proposal does not comply with subsidiarity then it will receive no further consideration.[140] This may become a particularly powerful weapon. National Parliaments are likely to be particularly sensitive in relation to the adoption of criminal law, and it may be that this provision will become important in the medium term.

As we can see, the Lisbon Treaty is not as successful at streamlining the old third pillar as the Constitutional Treaty would have been as the variable legislative procedures remain. The varied legislative procedures and the ad hoc basis on which emergency brake procedures and emergency acceleration procedures appear to have been scattered through the Lisbon Treaty is particularly unhelpful.

On the other hand certain reforms envisaged by the constitutional treaty will be carried through the Lisbon Machinery. One of the most significant for criminal law is the unification of the legislative instruments. The constitutional language was removed as part of the more widespread "deconstitutionalization" undertaken by the drafts of the Lisbon Treaty[141], so gone are laws and framework laws, but the substance remains the same.

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[138] Article 7(3), Protocol (No. 2) on the Application of the principles of Subsidiarity and Proportionality [2008] OJ C 115, 9th May 2008

[139] Article 7(3)(a), Protocol (No. 2) on the Application of the principles of Subsidiarity and Proportionality [2008] OJ C 115, 9th May 2008

[140] Article 7(3)(b), Protocol (No. 2) on the Application of the principles of Subsidiarity and Proportionality [2008] OJ C 115, 9th May 2008

[141] See Dougan, M. "Treaty of Lisbon 2007: Winning Minds, not Hearts" (2008) 45(3) Common Market Law Review 617, at 638

2.7 Conclusions

This chapter has identified that there is a serious concern as to the extent that national executives dominate the legislative process in the adoption of European Criminal Law. This is clearly true in the third pillar, but is also true, albeit to a lesser extent in the first. The Lisbon reforms will not be entirely successful in addressing these concerns. Certainly then, the Lisbon reforms will introduce a raft of structural changes. The pillars will be removed to be replaced with a single Union, but this does not, of course, mean that the same procedures will apply in every field, nor that every field will be treated the same by the institutions or the Member States. Clearly the wholesale relegation of the Parliament in the third pillar to a consultative role is not appropriate. Criminal law should be adopted in accordance with a system that allows at least an equal voice to the directly elected chamber. That said, there are legitimate concerns about the European Parliament's democratic credentials, and in many ways the ultimate expression of democratic involvement in European criminal law was the Convention, relegated to legal history already, but gone entirely under the Lisbon regime.

A combination of retaining a special legislative procedure in some fields, the question marks which remain over the democratic legitimacy of the European Parliament and perhaps most crucially the retention of a right of legislative initiative with the Member States undermines the notion of Communitarization. The reforms are undoubtedly a step in the right direction but this is clear evidence of the central proposition of this thesis; that the reforms inherent in the process of Communitarizing the third pillar are welcome, but are no 'silver bullet', partly because of the special nature of criminal law, but also because of structural weaknesses inherent in the first pillar system. As such the Lisbon reforms must be followed up with

further constitutional changes to ensure the democratic legitimacy of criminal law.

Chapter 3

Executive Agencies in the Third Pillar

3.1 Introduction

The previous chapter considered the legitimacy of the structures under both pillars for the adoption of criminal law and found them wanting. The following two chapters will consider the role of the European Union in the executive enforcement of criminal law. They will do so by examining the various conduits through which executive power is exercised in both the first and third. Chapter Three will consider the role of the European Police Office, Europol, and the European Judicial Cooperation Unit, Eurojust. Chapter Four will look at various first pillar bodies which exercise executive power in the field of criminal law. These chapters will demonstrate that the powers available to the first pillar are significantly more invasive than those enjoyed by the third, and that the methods for scrutinising and controlling the executive, are at best, the same, and at worse, significantly weaker under the first than the third pillar.

Chapter Three will start by setting out some of the theoretical structures for the delegation of discretionary power from a principal to an agent. It will consider the way in which these models have been developed to account for the *sui generis* constitutional order of the EU. It will then consider the two above examples, Europol and Eurojust, to demonstrate how well those theoretical models work in practice. It will be argued that the majority of the actual coercive power remains in the hands of national authorities and as such can be controlled by national courts. Within the European legal order, this is appropriate as those courts will all be bound

by the minimum standards of the European Convention on Human Rights in a way in which the European judiciary is not. It will be demonstrated that that while the administrative accountability at European level is relatively strong, the judicial and democratic accountability is significantly weaker and should be reviewed before any further centralisation is made. The following chapter will then consider, by reference to practical examples, whether Communitarisation of the third pillar would necessarily solve these immediate problems.

3.2 Delegation of Powers

There are three essential questions which one must ask in the examination of any agency. What powers do they have? How do they exercise them? And how are they supervised? In addition, however, asking the question of where these powers come from may help us to further understand the way in which these agencies operate, and may make the three key questions easier to answer. This chapter will look at the way in which some executive powers are pooled at the supranational level, but it will achieve this by applying certain ideas of delegation theory to the legal system surrounding the European Police Office, and the European Judicial Cooperation Unit.

Delegation theory in the above sense seeks to model the way in which powers, particularly discretionary powers, are transferred from the principal to the agent, and the pros and cons of such a transfer. This section will attempt to outline some of the ideas that will be used to assess the success or failure of the delegation of certain executive functions to the above mentioned agencies, and the way in which that has been achieved.

3.2.1 Models of Delegation for the EU

Models of delegation in a standard parliamentary democracy are well understood. It is possible to trace a chain of delegation from the people through their elected representatives, to the chief executive, then through to the ministers appointed, and through them to the civil servants who carry out the policies.[1] This holds true of the first stage of the European Union. It is possible to trace the same chain of delegation, up to a point. Taking the United Kingdom as an example, the citizens elect a Parliament, which in turn confers power on a prime minister, who appoints a foreign secretary who negotiates a Treaty. At this point the chain of delegation breaks down.[2] As Curtin points out, even if one follows that chain of delegation through the EU as a series of further actors, it becomes much more difficult to link the national parliaments with the final outcomes of their EU "agents".[3] Furthermore, it is impossible to model a more traditional chain of delegation directly onto the Union. While it is true that the European Parliament is directly elected[4] it would not be true to say that powers are delegated from the elected chamber to agencies created by secondary legislation. While this is certainly true for the first pillar[5], it is doubly true for the third. In most cases in the first pillar, the Parliament is a genuine co-legislator with the Council, but, as we have seen, in the third pillar the Parliament's role is limited to bare consultation, and as such any

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[1] See *inter alia* Strøm, K. "Delegation and Accountability in Parliamentary Democracies" (2000) 37(3) European Journal of Political Research 261, 267. For a more detailed assessment of the fundamentals of delegation see, Epstein, D, O'Halloran, S. *"Delegating Powers"* (Cambridge University Press, 1999).

[2] Curtin, D. "Delegation to EU Non-Majoritarian Agencies", in Gerdain, D *et al* (Eds.) *Regulation through agencies in the EU* (Edward Elgar Publishing, Cheltenham, 2005) 88, 91.

[3] Curtin, D. "Delegation to EU Non-majoritarian Agencies", in Gerdain, D *et al* (Eds.) *Regulation through agencies in the EU* (Edward Elgar Publishing, Cheltenham, 2005) 88, 91.

[4] Although as has been demonstrated previously some question marks remain over the legitimacy of the European Parliament, see Chapter 1.

[5] See on this Chapter 3

argument that the European Parliament forms any meaningful link in a hypothetical delegatory chain is difficult to sustain. Even in the first pillar, Curtin goes on to argue that when one goes on to look in any detail, then one is forced to conclude that there are a number of different chains of delegation partly because there are two institutions, the Council and the Commission performing executive functions, and as such two institutions with powers to delegate. It is submitted that this view is also true of the third pillar but for different reasons. Rather than there being two executives in the third pillar, the model of delegation is far more intimately linked with the form of legislation used, than with anything else. The Convention, requiring ratification by the Member States, seems to be a distinctly different way of transferring powers than the Decision which can be adopted without the direct approval of the Member State political systems, beyond their Ministerial representation in the Council. This Chapter will go on to apply this argument to the delegations made in the Europol Convention and the Eurojust Decision, but first is would seem appropriate to define more clearly what is meant by delegation, and what criteria will be used to judge the success or otherwise of these particular acts.

The following definition of delegation has been given by Thatcher and Stone Sweet;

> *"An authoritative decision, formalised as a matter of public law, that (a) transfers policy making authority away from established representative organs (those that are directly elected or managed directly by elected politicians), to (b) a non-majoritatiran institution, whether public or private."*[6]

[6] Thatcher, M, Stone Sweet, A. "Theory and Practice of Delegation to Non-Majoritarian Institutions" (2002) 25(1) West European Politics 1, 3.

Curtin has then argued that to properly fit the EU model it should instead be defined as;

> *"An authoritative decision, formalised as a matter of public law, that (a) transfers policy making authority away from established representative organs (those that are directly or indirectly elected or managed directly by elected politicians), to (b) a non-majoritatiran institution, whether public or private."*[7]

It is argued that this definition better suits the EU as the Council of Ministers can then be viewed as a principal in its own right.

Non-majoritarian institutions are in turn defined by Thatcher and Stone Sweet as;

> *"Governmental agencies that (a) possess and exercise some grant of specialised public authority, separate from that of other institutions, but (b) are neither directly elected by the people, nor directly managed by officials"*[8]

For the purpose of the present discussion the author will adopt Curtin's nomenclature of "non-majoritarian agency", so as to avoid confusion with the "institutions" of the Union.

At this point, it should be noted that some theorists have rejected attempts to characterise delegation to the EU as an example of this principal-agent

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[7] Curtin, D. "Delegation to EU Non-Majoritarian Agencies", in Gerdain, D *et al* (Eds.) *Regulation through agencies in the EU* (Edward Elgar Publishing, Cheltenham, 2005) 88, 91.

[8] Thatcher, M, Stone Sweet, A. "Theory and Practice of Delegation to Non-Majoritarian Institutions" (2002) 25(1) West European Politics 1, 2.

chain of delegation model. Majone, for example, rejects this approach in favour of what he refers to as the fiduciary model. Particularly with reference to the Community model, he suggests that Community institutions, particularly the Commission, should be thought of as exercising their powers as fiduciaries, as trustees of the Member State's political property rights.[9] While this argument is persuasive, particularly in terms of the Community, and will be revisited in the following chapter, the principal-agent model has more to recommend it, particularly when dealing with the third pillar, as the intermediate step of entrusting powers to the Commission is not seen in the third pillar.

While the reasons for delegating will be different with each delegation, Thatcher and Stone Sweet identify four main rationales for transferring public authority to a non-majoritarian agency.[10] First to "resolve commitment problems", by which it is meant that it is easier for a non-majoritarian agency, with a longer term mandate to work towards a long term goal, which may at times be unpopular or painful, than it is for a political entity such as a government party who may from time to time be tempted by the more popular short term fix. Second, to take advantage of particular expertise which may be more readily gathered by a fixed agency than by a government. Not every executive body will have amongst its members, for example, a food scientist, so it is logical to set up a food standards agency that can develop this particular body of specialist knowledge, and act in accordance with it. The third is to enhance efficiency; agents will generally be charged with a narrow portfolio of activities, allowing them to better respond directly to smaller nuances within that field. A fourth reason is to avoid taking unpopular decisions.

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[9] Majone, G. *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth* (OUP, 2005), 64 *et. seq.*

[10] Thatcher, M, Stone Sweet, A. "Theory and Practice of Delegation to Non-Majoritarian Institutions" (2002) 25(1) West European Politics 1, 4.

Sometimes these various categories will be reason enough in themselves for delegating powers, and at other times they will overlap. For example, all of these could be said to apply to the classic example of delegated function, the independent central bank. An independent bank may for example, from time to time have to raise interest rates to tackle inflationary pressures. A government may be reluctant to seek the best long term solution due to the short term pain of raised interest rates. However, the government will be able to take advantage of the economic knowledge of the bankers, and the bank, with a much narrower remit that the finance ministry generally, will be better placed to respond quickly and with expertise. Finally, the government cannot be blamed for the difficult decisions taken by an independent bank.

In order to feel the benefit of this type of transfer of power, a principal must also transfer a degree of discretion. If the principal devolves only the formal power to take decisions, but no discretion, then there is no gain, the principal still retains the choices, and has effectively "delegated" a paper exercise. The key to a successful delegation is knowing how much discretion to delegate.

3.2.2 Problems with Delegating

With any delegation there is a commensurate risk. Discretion is key to delegation, but if too much discretion is delegated, then the risk that the agent will reach a decision which is not in line with the policy objectives of the principal increases. This phenomenon is known as agency loss[11]. Of course there are occasions in which the whole purpose of the delegation was to allow a possibility that the agent will reach a different decision than

[11] Thatcher, M, Stone Sweet, A. "Theory and Practice of Delegation to Non-Majoritarian Institutions" (2002) 25(1) West European Politics 1, 4-5

the principal would have, but this is the point. The scope of discretion is the key in controlling the degree to which the agent is permitted legally to differ from the policy objectives of the principal.

Controlling agency loss whilst permitting a degree of discretion necessary to allow the agent to perform useful work is the greatest problem faced by principals when delegating. Thatcher and Stone Sweet talk in terms of a "gap" in which this agency loss can occur, and suggest that it is:

> *"Constituted by (a) the sum of delegated powers (policy discretion) granted by the principal to the agent, minus (b) the sum of control instruments available for use by the principals to shape (constrain or annul (reverse) policy outcomes that emerge as a result of the agent's performance of set tasks."*[12]

Curtin identifies four classically accepted methods for controlling agency loss. These are contract design, screening and selection mechanisms, monitoring and reporting requirements and institutional checks and balances.[13] These can be further categorised into two groups. The former two are controls intended to operate *ex ante* and the latter intended to operate *ex post*. Contract design is surely the most important of these. In almost every case, the other methods of control will be built into the contract, the contract in question being the "decision, formalised as a matter of public law"[14] which transfers power in the first place, in other words, the legal act which creates the agency. This chapter will now

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[12] Thatcher, M, Stone Sweet, A. "Theory and Practice of Delegation to Non-Majoritarian Institutions" (2002) 25(1) West European Politics 1, 5.

[13] Curtin, D. "Delegation to EU Non-Majoritarian Agencies", in Gerdain, D *et al* (Eds.) *Regulation through agencies in the EU* (Edward Elgar Publishing, Cheltenham, 2005) 88

[14] Curtin, D. "Delegation to EU Non-Majoritarian Agencies", in Gerdain, D *et al* (Eds.) *Regulation through agencies in the EU* (Edward Elgar Publishing, Cheltenham, 2005) 88, 91.

move on to consider in detail the powers delegated to the EU agencies, Europol and Eurojust, and then examine, in relation to each agency, the nature of the delegation, and whether sufficient steps have been taken to limit the space for agency loss.

3.3 Europol

Europol was established by Convention in accordance with Article 34(d) (ex. Article K3) TEU.[15] The Convention was promulgated in 1995 and following ratification by all Member States, it entered into force in 1998, with Europol itself becoming fully operational in 1999. The headquarters of Europol are located in The Hague.[16] The intention of this section is to throw greater light onto the competencies, tasks and responsibilities of Europol. For a body which seems to meet with a great deal of publicity and, it must be admitted has been relatively successful in its operation,[17] there is a surprising lack of discussion on its powers, objectives, tasks and

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[15] The Convention based on Article K3 of the Treaty on European Union on the establishment of a European Police Office.OJ [1995] C 316, 27th November 1995. For ease of referencing all references in this and following sections to this Convention shall be made to the consolidated version of the Convention published as a working document by Europol and available from <www.europol.europa.eu/index.asp?page=legal> (last accessed 28/4/08). This document incorporates changes introduced by Council Decision supplementing the definition of the form of crime 'traffic in human beings' of the Convention OJ [1999] C 26, 3rd December 1998; The Protocol drawn up on the basis of Article 43(1) of the Europol Convention amending that Convention (The Money Laundering Protocol) OJ [2000] C 358, 13th December 2000; The Protocol amending the Europol Convention and the Protocol on the Privileges and immunities of Europol, the members of its organs, the deputy directors and the employees of Europol (the "JIT Protocol") OJ [2002] C 312, 16th December 2002; and The Protocol drawn up on the basis of Article 41(3) of the Europol Convention amending that Convention (the "Danish Protocol") OJ [2004] C 2, 6th January 2004.

[16] Decision taken by common agreement between the representatives of the Governments of the Member States, meeting at Head of State and Government level, on the location of the seats and certain bodies and departments of the European Communities and of Europol OJ [1993] C 323/01, 30th November 1993, Article 1 (i), later made a matter of primary law by Protocol (No 8)EC on the location of the seats of the institutions and of certain bodies and departments of the European Communities and of Europol (1997) sole Article (j), added by the Treaty of Amsterdam.

[17] See e.g. the Financial Crime Forum, *"Europol's Fakes Success"* 16th January 2007 http://financialcrimeforum.com/2006/index.php?option=com_content&task=view&id=102&Itemid=109 retrieved on 12/5/2008.

method of operation. These are points of significant importance and need to be better understood in order to develop a clearer picture of the role and control of Europol and the European Union's ultimate policy objectives in relation to Title VI TEU.

3.3.1 Organisational Structure of Europol

Article 27 of the Europol Convention identifies the principal organs of Europol as the Management Board, the Director, the Financial Controller and the Financial Committee. In addition to these bodies, there is a Joint Supervisory Body[18] and each Member State is required to establish a National Supervisory Body.[19] The following discussion will focus on the political and administrative bodies, rather than the financial ones.

The day-to-day management of Europol is handled by the Director. The Director is appointed by the Council, acting unanimously for a once renewable four year term. In making that decision the Council must obtain the opinion of the Management Board.[20] The Director is responsible to the Management Board and should attend its meetings. He is responsible for the day-to-day administration of the Agency; the performance of the tasks allocated to Europol, personnel management, implementation of the decisions of the Management Board and budgetary matters.[21] He or she may be dismissed by the Council, by a two third majority vote and again, before making this decision, the Council must seek the opinion of the Management Board. The Director is to be assisted by a number of

[18] Article 24, Europol Convention.

[19] Article 23, Europol Convention.

[20] Article 29(1), Europol Convention.

[21] Article 29(3), Europol Convention.

deputies, the number fixed by the Council[22], who also serve four year terms, which may be renewed once. The Director is responsible for defining the duties of the deputies in more detail.[23]

The overall strategic management of the Agency is the responsibility of the Management Board, which is required to meet twice a year. The Convention lists 27 tasks[24] with which the Management Board is charged. These can essentially be summed up into five key areas. The Management Board has broad strategic responsibilities, such as setting the priorities of Europol in accordance with its mandate, technical responsibilities, such as drawing up rules relating to, for example, the Europol data system or the role of liaison officers, oversight powers, such as supervision of the Director's performance, and the ability to instruct the Director to open or close a data file, budgetary responsibilities, including a role in drawing up the budget and the adoption of financing plans, and a limited legislative role, as consultants to any amendments to the Convention. It is composed of one member from each Member State, and a member from the Commission, although the Commission does not have a vote. While there is a presumption that the Commission should be present, the Management Board may decide to meet in their absence. The final responsibility of the Management Board is to adopt two annual reports, one on Europol's activities in the previous year, and the second on Europol's future activities, particularly drawing attention to the budgetary and staffing implications of the future plans. These reports are communicated to the Council for their endorsement and to the Parliament for information.

[22] Currently three.

[23] Article 29(2), Europol Convention.

[24] Article 28(1), Europol Convention.

Europol operates indirectly through a series of national units and liaison officers. Each Member State nominates one Europol National Unit (national unit).[25] In the UK the National Unit is located in the Serious Organised Crime Agency (SOCA).[26] This unit then nominates at least one person to be seconded to Europol as that unit's liaison officer.[27] The national units are then solely responsible for the transmission and receipt of information to and from Europol and for the transmission of that information to the relevant competent national authorities.[28] There are limitations in the Convention which make it clear that there is no obligation on the national units to transmit information to Europol where to do so would in any way harm national security interests, compromise ongoing investigations or threaten the safety of any individual, or where such information would pertain to either specific intelligence activities or to particular organisations "in the field of State security".[29]

The liaison officers can in many ways be considered the national units' representative within Europol. They are responsible for representing the interests of the national units at Europol.[30] They are also the primary link between the national unit and Europol serving essentially as the conduits through which all gathered intelligence travels either into, or out of, The Hague.

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[25] Article 4(2), Europol Convention refers to the national unit as the only contact point but goes on to allow for certain circumstances in which other competent authorities will be allowed to have direct contact with Europol.

[26] Created by s.1, Serious Organised Crime and Police Act 2005, and subsumes the function of the former National Unit the National Criminal Intelligence Service.

[27] Article 5, Europol Convention provides that at least one officer must be seconded although it allows for more than that subject to the maximum set by unanimous decision of the Europol Management Board.

[28] Article 4(4), Europol Convention.

[29] Article 4(5), Europol Convention.

[30] Article 5(2), Europol Convention.

3.3.2 Powers of Europol

An important step in the consideration of any agency is analysis of the job it has been created to do. The first thing it is important to note is that Europol is expressly mentioned in the Treaty on European Union as the conduit of choice for the facilitation of police co-operation in the European Union.[31] Although the same is true of Eurojust, an issue to which we will return below, it is comparatively unusual to see an institution created by secondary legislation named in the Treaties as a primary means of achieving a Union, or Community, objective.

The principal objectives of Europol are set out in Article 2 of the Convention. These are to improve and facilitate the co-operation between Member States in tackling;

> *"serious international crime where there are factual reasons or reasonable grounds for believing that an organised criminal structure is involved and that two or more Member States are affected in such a way as to require a common approach by the Member States owing to the scale, significance and consequences of the offences concerned."*[32]

This is then further clarified. Article 2(1) goes on to define, for the purposes of the Convention, serious international crime as:

> *"crimes committed or likely to be committed in the course of terrorist activities against life, limb, personal freedom or property, unlawful drug trafficking, illegal money-laundering*

[31] Articles 29 and 30 TEU

[32] Article 2(1), Europol Convention.

activities, trafficking in nuclear and radioactive substances, illegal immigrant smuggling, trade in human beings, motor vehicle crimes and the forms of crimes listed in the Annexe (to the Convention) *or specific manifestations thereof."*

The Annex referred to in Article 2 significantly expands the list of crimes covered by the Convention.

Article 2(3) goes on to extend the competences of Europol beyond the specific enumerated offences themselves to *"related criminal offences"*, defined as:

> *"offences committed in order to procure the means of perpetrating acts...to facilitate or carry out acts...(and) to ensure the impunity of acts within Europol's sphere of competence."*[33]

On the face of it this is not an unreasonable list. A little further thought however reveals that a barrage of offences more properly dealt with under national criminal law are brought within the purview of Eurojust. For example, under the criminal law of England and Wales, the scope of offence could range, from conspiracy[34] or aiding, abetting, procuring or counselling an offence,[35] through to perjury.[36]

Article 3 of the Convention lists Europol's "Tasks". These are broken down in three categories. Article 3(1) deals with Europol's principal tasks.

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[33] Article 2(3), Europol Convention.

[34] Ss. 1 and 2, Criminal Law Act 1977.

[35] S. 8, Accessories and Abettors Act 1861, *Attorney-General's Reference (No. 1 of 1975)* [1975] QB 773.

[36] S.1, Perjury Act 1911. See also Mackarel, M. "Europol: What is it? What does it do? Why should we care?" (1996) 1(3) Scottish Law and Practice Quarterly 197.

The Article also sets out a series of supporting tasks, to be undertaken both directly by Europol and through the national units. These range from the establishment of Europol's "computerized information system"[37] through to the collection, analysis and distribution of information and intelligence,[38] related to those criminal activities listed in Article 2 and in the Annexe to the Convention, between the Member States.

Article 3(2) sets out Europol's additional tasks and again, some of these are surprisingly wide ranging and broadly defined. In particular Article 3(2)(2) charges Europol with providing *"strategic intelligence to assist and promote the efficient and effective use of the resources available at national level for operational activities."* There is no particular targeting of the intelligence they are to provide, nor any definition of efficient and effective.

Article 3(3) then sets out a series of additional tasks which Europol may undertake should its resources allow. These consist of advising Member States and conducting research into a variety of issues including training and investigation methods.[39]

What is immediately clear from Article 3 is that Europol is not a pan-European FBI. It is not an agency with any coercive policing powers and relies on Member State police forces for its information. The most important function of Europol is, in fact, the collation and analysis of intelligence. It is, in a sense, more of an intelligence agency than a police agency and to that extent at least the name 'Europol' may be a slight

[37] Article 3(1)(5), Europol Convention.

[38] Article 3(1)(1)-(4), Europol Convention.

[39] Articles 3a and 3b allow Europol to be involved in operations conducted by Joint Investigation Teams.

misnomer. The information it gathers is received in its role as a police agency for the storage and distribution of intelligence on cross-border crime amongst the agencies of Europe. On that point we turn to the way in which Europol gathers its information.

In order to perform the task of effectively gathering and analysing information for use across the Member States, Europol is entitled to compile and maintain an electronic information system. Twenty-three of the Europol Convention's forty-six Articles are dedicated to this information system, the data which may be stored in it, and the controls relating to that data.

Europol is entitled to hold a certain amount of personal data which is necessary for the performance of their tasks, with the exception of data relating to related offences.[40] The data stored must relate to persons who, in accordance with national law, are either suspected of having committed a criminal offence within the competence of Europol, or, where there are serious grounds for doing so, a person who it is believed *will* commit such an offence.[41] Where such data is stored it may "***only include the following details***":[42] past and present names and aliases, date and place of birth, nationality, sex and *"where necessary, other characteristics likely to assist in identification, including any specific objective physical characteristics not subject to change."*[43] The latter provision is perhaps excessively broad. First, there is no indication as to circumstances in which storing such data is likely to be necessary. Secondly, while the provision does

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[40] Article 8(1), Europol Convention, which provides that *"the information system may be used to store... only the data necessary for the performance of Europol's tasks, with the exception of data concerning related criminal offences."*

[41] Article 8(1)(1)-(2), Europol Convention.

[42] Article 8(2), Europol Convention. Author's emphasis.

[43] Article 8(2) (1)-(5), Europol Convention.

provide explicitly for only physical characteristics not subject to change, presumably tattoos, scars and birthmarks, it certainly is not meant to mean that is the only type of detail which may be stored under that Article. It has even been argued that potentially any characteristic is likely to assist in identification, and there is certainly nothing on the face of the Article to say that this could not include a person's political views, group memberships or sexuality.[44] In addition Europol may also collate information relating to criminal offences, alleged or actual, and the time of their commission, means used in the commission of crime, departments handling the case in question, suspected membership of criminal organisations, and convictions where they relate to offences for which Europol is competent[45]. This data may also be recorded, where such a thing is possible, where the commission of the crime is yet to be tied to an individual suspect. Additional information which is held by either Europol or the national units concerning the groups of persons on whom Europol may store information may be communicated to any national unit or to Europol should either of those bodies request it. Any communication with Europol by a national unit is subject to national law, even when Europol has requested the information.[46]

Next we must consider who is entitled to access this information, and under what circumstances. Article 9 of the Convention states:

> *"National units, liaison officers and the Director, Deputy Directors or duly empowered Europol officials shall have the right to input data directly into the information system and retrieve them*

[44] See inter alia Mackarel, M. "Europol: What is it? What does it do? Why should we care?" (1996) 1(3) Scottish Law and Practice Quarterly 197.

[45] Article 8, Europol Convention.

[46] Article 8(4), Europol Convention.

therefrom. Data may be retrieved where this is necessary for the performance of Europol's tasks in a particular case; retrieval shall be effected in accordance with the laws, regulations, administrative provisions and procedures of the retrieving unit."[47]

Article 9(3) goes on to clarify that;

"Responsibility for the permissibility of retrieval from, input into and modifications within the information system shall lie with the retrieving, inputting or modifying unit...the communication of information between national units and the competent authorities in the Member States shall be governed by national law"

Member States may also designate other competent authorities who will be able to make a query of the information system, but the result of such a query will only be confirmation that the requested data is available. Further requests must then be directed to the national unit, thus preserving the essentially exclusive, national nature of the relationship between the competent authorities of a Member State and Europol. Only the unit who inputted that data, be it a national unit or Europol itself, shall have the authority to delete or modify data in the information system.

In order to complete its intelligence brief, Europol may use the data stored in the information system for analysis.[48] Where it is relevant to either a criminal offence for which Europol has competence, or a related criminal offence, personal data concerning either the suspect or potential suspect as referred to in Article 8(1), potential witnesses, victims or possible victims, contacts and associates and other persons who may be able to provide

[47] Article 9(1), Europol Convention.

[48] Article 10, Europol Convention.

information may be stored in a separate file for the purpose of analysis.[49] There are a series of complex rules governing who may and may not form part of the project team working on these files. For our purposes the most important thing to note is that for any analysis to take place on data stored in the information system at Europol itself, the agency must make an order opening that file, and the order contains a number of details on the file, including the purpose of the file, the nature of the data stored and the conditions in which that data may be revealed to third parties.[50] Whenever such an order is made, the Director must inform both the Management Board and the Joint Supervisory Body for Europol (hereafter JSB(Epol)). On receipt of this notification the JSB(Epol) may communicate any comments they have to the Management Board,[51] who may then, at any time, may instruct the Director to either amend the order opening the file, or close the file entirely.[52] The data files, when opened, may only be kept for three years, but the Director may order that it be kept open for a new period of three years.[53]

3.3.3 Control of Europol

It bears repeating at this point that Europol is not a coercive, operational police force in the way we understand the term. It is an intelligence agency. Its officers have no powers of arrest, nor any right to undertake coercive actions against suspects. Europol creates a European pool of information on criminal activities which it is responsible for collating, analyzing and redistributing amongst the various national police forces of

[49] Article 10(1), Europol Convention.

[50] Article 10(1), Europol Convention.

[51] Article 10(2), Europol Convention.

[52] Article 10(3), Europol Convention.

[53] Article 10(4), Europol Convention.

Europe in order to improve the efficiency of cross-border investigations. Such an agency is without question necessary in the era of the single market. Without frontiers crime is able to move with great ease between countries.[54] On the other hand, it is essential that such an agency be adequately controlled. It must be made accountable for its actions as it operates to ensure that cross-border crime is tackled more effectively, which means it potentially has an impact upon individual liberties. Although this may be protected through judicial controls, this section will focus on the way Europol's discretion is monitored and controlled to limit agency loss. Judicial control over Europol's activities is subject to an opt-in arrangement under the Protocol to the Europol Convention, which limits the jurisdiction of the ECJ.

3.3.3.1 Sources of Control over Europol's activities

In terms of Europol's use of information, it is again important to reiterate here that Europol works in a very particular way. The central agency has no executive power at all in relation to individual suspects. Its role is to collate and redistribute information via its satellite national units. The decision on how to use that information in the operational field is the responsibility of the national unit, and subject to control by national law. However, that notwithstanding, the Convention does put in place a number of additional safeguards.

Each Member State is required to designate a national supervisory body. The national supervisory body is tasked with monitoring, independently, in accordance with respective national laws, the transmission of any

[54] See, *inter alia* European Commission *"Completing the Internal Market. White Paper from the Commission to the European Council"* (Milan, 28-29 June 1985). COM (85) 310 final, 14 June 1985, Mitsilagas, V. "EU Criminal Law", (2009, Hart Publishing, Oxford and Portland) at 6-7

personal data by the national units to Europol.[55] All individuals have the right to request that the national supervisory body ensure that any transmission of data regarding them to Europol, or any consultation of that data by the Member State, was lawful. Those rights are also subject to national law.[56]

From the national supervisory body, the Member States are required to appoint a delegation of not more than two persons to the JSB(Epol). Each delegation will have one vote. The Joint Supervisory Body is responsible for ensuring that no rights are breached by Europol itself. Where the JSB(Epol) notes any violation of the Convention in terms of data storage it shall at first instance, refer the matter to the Director. Should they then be dissatisfied with the Director's response they can raise the matter with the Management Board. The JSB(Epol) is also charged with producing a report *"at regular intervals"* which must be communicated to the Parliament and the Council.[57] The Management Board shall first have the opportunity to give an opinion on the report and this opinion will be annexed to it.[58] The JSB(Epol) is also responsible for the final disposal of appeals in two particular categories of case. The first is where an individual has made a direct request to Europol to access any data the agency holds in relation to them and the second is where an individual has requested that data held on them be deleted or corrected.[59]

In terms of Parliamentary accountability, Europol's annual report is, as we have seen, submitted to the European Parliament for their information.

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[55] Article 23(1), Europol Convention.

[56] Article 23, Europol Convention.

[57] Article 24(6), Europol Convention.

[58] Article 24, Europol Convention.

[59] Article 24, Europol Convention.

The report of the JSB(Epol) is also submitted to the Parliament. There is a requirement that Parliament be consulted in the case of any amendments to the Convention, or in the event of the adoption of any of the myriad tertiary measures which may be adopted under the Convention.[60] The Presidency of the Council may also appear before Parliament to answer questions relating to Europol, although it is not clear that there is an obligation for them to do so. Furthermore, while Europol is still governed by the Convention, any amendment of it must be approved in accordance with national constitutional processes, usually Parliamentary, so national Parliaments retain a role in scrutinizing the growth of Europol's power.[61]

On the face of it there is a gap in the judicial regime. The ECJ is of course limited in any event by Article 35 TEU, each Member State being allowed to opt in or out of the ECJ's scrutiny over the third pillar as it sees fit. Furthermore, the Protocol to the Europol Convention relating to the Court of Justice functions in the same way as Article 35 TEU allowing a voluntary opt in to the court's jurisdiction, and even though the majority of States have accepted the Court's jurisdiction, there has never been a case brought before the court under this arrangement.

The conventional wisdom in relation to the supervision of Europol appears to be that it is inadequate. Peers makes three substantive criticisms. The

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[60] Article 34, Europol Convention. These tertiary measures are technical in nature, including, for example, rules of procedure.

[61] Any doubt that national Parliaments take this responsibility seriously should be dispelled by the experience of the European Arrest Warrant, Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States OJ [2002] L 190, 13th June 2002.on which the Council had agreed a series of Conventions prior to resorting to the Framework Decision, none of which were successfully adopted. See Council Act adopted on the basis of Article K.3 of the Treaty on European Union, drawing up the Convention relating to extradition between the Member States of the European Union OJ [1996] C313, 27th September 1996; Council Act adopted on the basis of Article K.3 of the Treaty on European Union, drawing up the Convention on simplified extradition procedure between the Member States of the European Union OJ [1995] C78, 10th March 1995.

first is that there is insufficient Parliamentary scrutiny, both nationally and supranationally, of Europol, the second is that the reporting regime is inadequate, as the reports are all generated internally and therefore necessarily reflect the agency's position, and that the judicial regime is weak.[62]

On the other hand, Fijnaut is not so scathing, stating unambiguously that *"Europol is perhaps the most controlled police agency in Europe."*[63] Fijnaut takes a more practical approach to the supervision of the actual work of Europol reminding us that Europol's only substantive task is analysis and distribution of data, and as such the important controls are the data protection systems set up at national level. He is, at least in part, not alone in this assertion. Brown reminds us that any decision to act on information provided by Europol is taken by a national authority and will be subject to national law, including the oversight of the domestic courts.[64]

While it is conceded that there are some Union level weaknesses in judicial supervision, it is to be reiterated that these weaknesses are not fatal, and the following section will demonstrate why.

3.3.4 Bridging the Gap - Control of Agency Loss

The Europol Convention seems to embody a reasonably successful mix of *ex post* and *ex ante* controls, but the degree to which the controls are

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[62] Peers, S. *Justice and Home Affairs* (2nd edition OUP, 2006), 539. See also Brown. A. "Democratic and Legal Deficits of Europol" (1998) 148 New Law Journal 404, Peers, S. "Governance and the Third Pillar: The Accountability of Europol" in Curtin, D,Wessels, R. (Eds). *Good Governance and the European Union* (Instersentia, Antwerp, 2005), 253.

[63] Fijnaut, C. "Police Co-operation and the Area of Freedom, Security and Justice", in Walker, N. (Ed.) *Europe's Area of Freedom Security and Justice* (OUP, 2004), 239, 255.

[64] See Brown, A. "Democratic and Legal Deficits of Europol" (1998) 148 New Law Journal 404.

successful may depend, to some degree at least, on how the delegation is characterised.

There is a strong argument that the foundation of Europol is in fact an act of direct delegation from the Member States, in effect a national act dressed up in Union clothing. There are two principal supports for this argument. First, the use of the Convention as the legislative form is significant. The Convention required ratification by the Member States before it entered into force. By its nature, substantive amendments to the Convention may only take the form of protocols, which require further national ratification. While the Council is able to make certain technical changes, the most important of which is to alter the definitions or types of crime over which Europol will be competent,[65] the Council is not able to extend Europol's powers without recourse to a protocol requiring ratification by the Member States. It is conceded that at the time of Europol's foundation, the Convention was the only legal act available, so it may not have represented a conscious choice on behalf of the Member States, but in many ways that only serves to reinforce the argument.

Secondly, further evidence for this proposition can be seen from the contract design. All of the supervisory arrangements are made subject, in one way or another, to national law. Even the JSB(Epol), the only effective supranational body, conducts its investigations in accordance with the national law of the inputting State. Europol has no significant free standing powers, other than to distribute information, which it receives from Member States. It must also be recalled that Europol was founded in an era when the third pillar was still decisively an intergovernmental

[65] See Peers, S. "Governance and the Third Pillar: The Accountability of Europol" in Curtin, D, Wessels, R (Eds.) *Good Governance and the European Union* (Instersentia, Antwerp, 2005), 253.

structure. There was a marked reluctance to make any aspect of its operation, or supervision subject to Union law.

It is also worth noting that a significant number of Europol's tasks are framed broadly so as to provide them with as much discretion and flexibility as possible. It is accepted that a degree of flexibility is necessary for a body such as Europol, police work is ever changing and needs to be responsive. But the degree of discretion afforded to Europol may be too broad. Effective contract design can significantly curb the need for more stringent *ex post* controls further down the line. It is submitted that the sheer scale of the apparent discretion enjoyed by Europol may be a flaw in the initial contract design as represented by the Europol Convention.

Screening and selection processes also have a national flavour to them. The Director will be appointed by the Council acting unanimously, with no role at all for the Commission. The only consultation they are bound to make is of the Management Board, a body appointed on an individual basis by the Member States. The national supervisory bodies from which the membership of the JSB(Epol) is drawn is exclusively a matter of national law. The members of the JSB(Epol) are drawn from the national supervisory body in accordance with national law. Not only do the *ex ante* controls seem to suggest that Europol is a construct of traditional international law, but a significant portion of the *ex post* controls do as well. The checks and balances are all governed by national law, or by the Convention itself. Those which are governed by the Convention make Europol accountable for its activities to the Council.[66] It is conceded at this point that this argument depends to some degree on how one characterises the Council. If the Council is in effect an intergovernmental meeting

[66] For example, the Council has the final say in the adoption of Europol's budget under Article 35, Europol Convention.

room, then Europol is almost certainly a measure much more closely related to international law because Europol is then accountable directly to the Member States through this forum. Even if it is not, and the Council is a genuine free standing body of supranational governance, even in the context of the third pillar, then we may not be looking at something like international law, but we are still looking at something unique. Europol would then be a body which had its powers delegated to it by one polity, the Member States, and, to control agency loss, was subjected to controls from an entirely different source, the European Union.

Arguments have been advanced that Europol requires a greater degree of Parliamentary scrutiny or a greater degree of European level judicial scrutiny in order to properly control its functions.[67] This is not however entirely persuasive. Parliaments at both the national and European level have a role in ensuring the accountability of Europol. On the national level, they have a role in controlling the delegation of further powers and control the definition of crimes falling within the scope of Europol's coordination remit in national legislation. On the supranational level, the European Parliament has the ability to question the Council and can expect to see the annual reports both from Europol itself and from the JSB(Epol).

It is difficult to entirely agree that the solution to ensuring the effective accountability of Europol is to extend the jurisdiction of the Court of Justice. The aim of greater ECJ involvement at a supranational level would be to try and ensure that individual rights and data protections standards are protected and observed by Europol in the conduct of its activities. This is of course a laudable aim. However, it may be irrelevant to include the ECJ as an aspect of this form of accountability. Any decision

taken on the basis of information received by Europol is exclusively a matter of national law, and this is even more true if the national delegation logic is to be believed. The operation of Europol is not the same as the first pillar enforcement of competition law.[68] Not only is the review of the use of data subject to national law, as is made explicit by the Convention, but of course any decision taken to act on this information, for example to arrest a named suspect, is clearly one of national law. National police forces are certainly not co-opted into Europol when acting on information received from the agency, and this is clear, if not explicitly from the text of the Convention, then certainly from the spirit of it.

Furthermore, Article 33 TEU seems to suggest that this is true. Article 33 TEU states unequivocally that nothing in Title VI TEU shall affect the Member State's responsibilities in the field of maintenance of law and order and the safeguarding of internal security. This provision is often dismissed as an unnecessary piece of political window dressing, but even window dressing has its uses. It is argued that without the ECJ there is no minimum standard of rights protection in the use of data provided by Europol, there is no common denominator, or uniform source of control. There is no guarantee that data will be used in Estonia in the same way as it is in France. Mitsilegas quotes David Cameron as observing that mutual recognition in criminal law obliges us not only to trust the authorities in a given Member State but to trust the authorities in all Member States, not only now, but many years into the future, and this is a fair criticism of use of data through Europol as well.[69] We are not necessarily being asked to

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[67] See Brown, A. "Democratic and Legal Deficits of Europol" (1998) 148 New Law Journal 404, Peers, S. "Governance and the Third Pillar: The Accountability of Europol" in Curtin, D, Wessels, R (Eds.) *Good Governance and the European Union* (Instersentia, Antwerp, 2005)

[68] See on this, Chapter 4.2

[69] Mitselegas, V. "The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU" (2006) 43(5) Common Market Law Review 1277, 1289.

trust that information used by the French national unit is legitimately used, but that information from every national unit now and into the future is legitimately input into the database and used lawfully. However, the idea that there is no common standard is simply not true. While all of the supervisory structures under the Europol Convention are based on national law, they fall within the remit of the national courts. This means that there is standard of rights protections provided by the ECHR through the national obligation to comply with that convention, and ultimately that standard will be policed by the Strasbourg Court. Bringing the entire regime within the ECJ's jurisdiction would almost certainly cause the Strasbourg Court to adhere to its *Bosphorus* ruling[70] and step back. In this ruling the Court of Human Rights held that they would not review the individual acts taken by an international body provided that the constitutional structure of that body was able to provide an "equivalent" level of protection, and concluded that the ECJ was able to do so.[71] The clamour to bring in the ECJ is misplaced in that context because the ECtHR already has the jurisdiction to rule on potential rights violations which fall under the Europol umbrella. Most rights lawyers working in the field of EU fundamental rights law see the application of the ECHR regime in full to the Union's legal architecture as both necessary and desirable to ensure comprehensive protection of individual rights across European law. We seem to have already reached that in relation to information used and controlled by Europol because accountability is effectively achieved through the national legal system.

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[70] App. No 45036/98 . *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland* (2006) E.H.R.R. 1

[71] For a full discussion of *Bosphorus*, see chapter 4.4

3.4 The Europol Decision

From the 1st January 2010, Europol as constituted under the Convention will cease to exist and be succeeded by a new Europol, constituted under the Europol Decision.[72] For the most part, the Decision makes limited changes. The main motivation seems to be to allow amendments to the operation of Europol to be made more easily in the name of allowing a police agency to adapt in the face of emerging challenges.[73]

While the changes made by the new Decision are limited, there are some which require more investigation. The first is a fairly substantial extension to Europol's jurisdiction. Article 4 of the Decision states;

> *"Europol's competence shall cover organised crime, terrorism and other forms of serious crime...affecting two or more Member States in such a way as to require a common approach by the Member States owing to the scale, significance and consequences of the offences."*[74]

Under the Convention, the presence of *"an organised criminal structure"* was a prerequisite to Europol's jurisdiction.[75] Under the Decision, organised crime appears to be only one of the broad categories of crime which the new Europol may play some role in preventing. We saw above that one of the major weaknesses of the Convention was the comparatively broad definitions which allowed for a significant amount of discretion on

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[72] Article 1(2), Council Decision establishing the European Police Office (2009/371/JHA) OJ [2009] L 121, 6th April 2009. This section will, for the sake of clarity, refer to Europol as constituted under the Decision as 'new Europol'.

[73] Recitals (2) and (4), Europol Decision.

[74] Article 4, Europol Decision.

[75] Article 2(1), Europol Convention.

Europol's part, and apparently these weaknesses are not remedied by the new Decision. The actual criminal acts over which the new Europol will have jurisdiction appear to be the same, including the list of "related offences" which were discussed above.[76]

The tasks of the new Europol, laid out primarily in Article 5 of the Europol Decision, remain largely the same. There are a few specific changes worth noting however. The new Europol will have the power to request that Member States establish Joint Investigation Teams.[77] It will also be expected to advise and promote the effective use of Union level resources for operational activities and the support of such activities for the prevention of cross-border crime. Presumably this will, in the main, involve issues within the competence of FRONTEX.[78]

Possibly the most interesting change is the insertion of Article 5(2) of the Decision;

> *"[The tasks of the new Europol] shall include providing support to the Member States in their tasks of gathering and analysing information from the Internet in order to assist in the identification of criminal activities facilitated by or committed using the Internet."*

This seems again subject to a great deal of discretionary interpretation. "Gathering and analysing information from the internet" is far too broad. Moreover, the phrase "facilitated by" is not defined in any way. The

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[76] Article 4(3), Europol Decision.

[77] Article 5(1)(d), Europol Decision.

[78] Article 5(3)(b), Europol Decision. For more on FRONTEX see Chapter 4.4

language of Article 5(2) leaves significant discretion to Europol in interpreting the scope of its mandate in relation to online criminal activity.

Some of the changes are extremely subtle, and while they may not seem seismic in themselves, there is a change of attitude in the Decision which may come to have significance. It is worth comparing Article 3b of the Convention to Article 7 of the Decision, both of which deal with Europol's power to request that Member States initiate criminal investigations. The first point is that in responding to the requests made by Europol, under the Convention:

> *"Member States **should** deal with any request from Europol...and **should** give such requests due consideration"*[79]

And under the Decision this has become:

> *"Member States **shall** deal with any request from Europol...and **shall** give such requests due consideration."*[80]

It is conceded that in the light of some of the other changes this seems to be a minor textual change, but the apparently conscious choice to move from "should", implying a degree of discretion, to "shall", implying a simple obligation, is at least worth noting. This twinned with the ECJ confirming in Case C-105/03 *Pupino*[81] that the duty of loyal co-operation applies in

[79] Author's emphasis.

[80] Author's emphasis.

[81] Case C-105/03 *Pupino* [2005] E.C.R I-5285.

the third pillar, strongly implies a Case 68/88 *Commission v Greece*[82] style duty to comply with such a request.[83]

Another, more substantive change is the requirement under Article 8 of the Decision that the Member States must designate an official as the head of the Europol National Unit. Article 8(7) reproduces the requirement under Article 4(7) of the Convention that the heads of the national units should meet on a regular basis, but extends a specific mandate to effectively evaluate the actual operational effectiveness of Europol. The insertion of a specific legislative requirement to designate a specific head of the national unit seems to indicate that there may have been some difficulty in this respect under the previous regime.

The number of liaison officers sent now appears to be fully at the discretion of the Member States, with the provision in Article 5 of the old Convention, providing for the maximum number to be established by a decision of the Management Board, not being reproduced in Article 9 of the Decision.

An interesting provision has been inserted in relation to the national liaison officers. Article 9(3)(d) states that national liaison officers shall:

> *"assist in the exchange of information from their national units with the liaison officers of other Member States under their responsibilities in accordance with national law. Such bilateral exchanges may also cover crimes outwith the competence of Europol, as far as allowed by national law."*

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[82] Case 68/88 *Commission v Greece* [1989] E.C.R. 2965

[83] This will be uncontroversial when the Treaty of Lisbon enters into force.

This seems to imply that national liaison officers are able to use the structures of Europol to transfer information bilaterally regardless of whether or not the information is relevant to crimes over which Europol has competence. Article 9(4) of the Decision does extend some of the safeguards which apply centrally to Europol to the liaison officers, but these are only minimal technical data security requirements rather than legally substantive data protection requirements.[84] Presumably therefore, such a transfer of information, if it is beyond the competence of Europol, would also be beyond the remit of its data protection safeguards and subject solely to the protections provided by national law.

Some of the more significant changes are found in Chapter II of the new Decision on information processing systems. There are a number of cosmetic changes which can be put down to an increased familiarity with computerised data storage systems in the 14 years since the adoption of the Convention. In addition though, the Europol Management Board is empowered by Article 10(2), to adopt a Decision setting up *"a new system for processing personal data"*. The procedural requirements for the taking of such a Decision are minimal. The Decision must be adopted acting on a proposal from the Director, having considered the possibilities allowed for by the existing Europol processing systems, and following consultation of the JSB(Epol).[85] The only involvement of the Union's political institutions is that such a Decision shall be submitted to the Council for approval. There is no vote threshold set out in the provision itself, either for the Management Board, or the Council, which strongly implies that a bare majority of voting members of either body will suffice. The paucity of either institutional or judicial involvement in this is untenable when one

[84] Article 9(4), Europol Decision provides that Article 35 shall apply to the national liaison officers *mutatis mutandis*.

[85] Presumably this duty is subject to a similar "essential procedural requirement rule" as was found in Case 138/79 *Roquette Frères v Council* [1980] E.C.R. 3333

considers the potential ramifications of such a Decision, which has the potential to alter the control and storage of personal data.

Other worrying changes are introduced by Article 12 of the Decision, which replaces Article 8 of the old Convention, on the contents of the Europol Information System. While the criteria for including the detail of persons who are suspected of having committed an offence remain the same, the conditions for the inclusion of persons who may commit an offence have been significantly liberalised. The old Article 8(1)(2) read as follows:

> *"[Data entered into the information system shall relate to] persons who there are **serious grounds** under national law for believing will commit criminal offences for which Europol is competent"*[86]

Article 12(1)(b) of the new Decision reads as follows:

> *"[Data input into the information system shall relate to] persons regarding whom there are **factual indications or reasonable grounds** under the national law of the Member State concerned that they will commit criminal offences in respect of which Europol is competent"*[87]

Leaving aside the perennial problem that the conditions for establishing the grounds for such suspicions will vary from State to State, what cannot be ignored is that "factual indications or reasonable grounds" is a much lower threshold than "serious grounds".

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[86] Author's emphasis.

[87] Author's emphasis.

Beyond that, the actual categories of data which may be stored have been significantly expanded. Article 12(e) allows for the place of residence, profession and whereabouts of a suspect to be stored, 12(f) for social security numbers, driving licenses, identification documents and passport data and 12(g) extends "specific objective physical characteristics not subject to change"[88] to expressly include fingerprint and DNA data.

In another significant change, the circumstances in which information must be immediately deleted have been changed. The Convention required deletion where proceedings against the suspect were dropped or the individual was acquitted.[89] The Decision requires that proceedings are "definitively dropped" or that the person be "definitively acquitted". It is difficult to be sure of the precise impact of that requirement, but presumably it is designed to allow the information stored to be retained in the event of any ambiguity.[90] There does not appear to be a specific reference in the decision to the disposal of information once proceedings are brought against a suspect, and as such, it is submitted that once proceedings are brought, or a suspect is convicted of the offence that there would then be a reversion to the basic rules relating to the use or retention of data. In particular that Europol may only hold data for "*as long as is necessary for the performance of its tasks*" and in any event not longer than three years, subject to the various reviews and extensions allowed for by the decision.[91]

The Convention also contains a number of specific references to Europol's relationships with partner institutions. Although in general these are not of

[88] Form of words originally found in Article 8(2)(5), Europol Convention.

[89] Article 21, Europol Convention

[90] Article 12(5), Europol Decision.

[91] Article 20, Europol Decision

relevance, there are some specific points which are worth noting. The Convention makes specific references to OLAF, and FRONTEX, which would seemingly undermine any contention that these two agencies are not criminal in nature by acknowledging the relationship between their respective activities.[92] Chapter IV of the Decision deals with the scope of Europol's relations with "partner institutions". Article 22 lays out the conditions under which it may work with other *"Union or Community institutions, bodies, offices and agencies"*. It allows Europol to establish relationships which are *"relevant to the performance of its tasks."* It lists several bodies specifically, including Eurojust, FRONTEX and OLAF,[93] but the list is not exhaustive. Article 22 requires that Europol should establish agreements with any entities with whom it wishes to maintain a relationship and these arrangements can include provisions on data sharing. These agreements must be approved by the Management Board and, where the agreement concerns data exchange, the JSB(Epol).[94]

Article 23 allows Europol to establish relationships with third states and bodies *"in so far as it is necessary for the performance of its tasks."* There is no exhaustive list of bodies with whom Europol may establish a relationship. Interpol is mentioned specifically, and then any *"international organisation and their subordinate bodies"* and *"other bodies governed by public law which are set up by...two or more states."*[95] Under Article 23(2) of the Decision, Europol has the power to establish relationships with third bodies, but it may not do so entirely on its own initiative. Under Article 26(1)(a) the Council, acting by qualified majority vote, following consultation with the Parliament, must approve a list,

[92] Articles 22(1)(b) and 14(8) and 22(1)(c), Europol Decision. See further Chapter 3

[93] Article 22 (1) (a), (c) and (b), Europol Decision.

[94] Article 22(2), Europol Decision.

[95] Article 23 (1), Europol Decision.

prepared by the Management Board, of states and third bodies with whom Europol may maintain a relationship.

These provisions seem to be effectively undermined however, by provisions in both Article 22[96] and Article 23[97] which allow Europol to transmit data to bodies with whom it does not have an agreement. Under Article 23(5), it may even transmit information to bodies not on the list drawn up by the Council, albeit not, in that specific circumstance, personal data. In all cases of transmission of information without such an agreement, Europol must comply with the minimum requirements laid down in Article 24 of the Decision. Article 24 essentially only requires the consent of the Member State from which the data originated, which may be given in advance *"in general terms"*, or, if the data was not submitted to it by a Member State, that Europol *"satisfy itself"* that transmission of that data will not obstruct a Member State or threaten the security, public order or general welfare of a State. These are almost entirely benign criteria, and the operation of them, in concert with the provisions which allow for the transmission of data outside of an agreement with the bodies in question, seem to partially undermine the existence of a system of agreements.

Chapter V of the Decision deals with data protection and security. Article 28 provides for the creation of a new Data Protection Officer, who is principally responsible for ensuring the lawfulness of the processing of personal data. The Officer should prepare an annual report for submission to the Management Board and the JSB(Epol). The Officer should be guaranteed access to all Europol premises. There is a three stage process which the Officer is required to follow where there are failings in the data

[96] Article 22(3) Europol Decision.

[97] Article 23(5) and (6), Europol Decision.

protection regime.[98] In the first instance such concerns should be raised with the Director, who is then required to correct those failings within a given time frame. In the event of failure to comply, that is then elevated to the Management Board, and if the situation remains unsolved, the Officer may refer it to the JSB(Epol).

Among all of the disconcerting negative changes there are some positives. The role of the European Parliament is strengthened in several ways. The Council, who now act by qualified majority rather than unanimity, must consult the European Parliament in the adoption of implementing rules for the use of data in analysis work files. Again that Decision should be adopted by the Council on the basis of a Decision on the Management Board who must, following the new Decision also consult the JSB(Epol).[99]

Article 48 of the Europol Decision also improves the European Parliament's supervisory function over Europol, creating a significantly clarified obligation on behalf of the Presidency of the Council, the Chairperson of the Management Board and the Director of Europol to attend the European Parliament at its request, to *"discuss matters relating to Europol"*.[100] Obviously this does not allow the European Parliament any direct disciplinary control over any of the actors that may be summoned in this way, but it does give Parliament the right to ask the questions in the first place. This increases the level of scrutiny of Europol's operations and encourages accountability of the Management Board and the Director in particular to the directly elected European Parliament. It also has the potential to raise the profile of the scope of Europol's activities

[98] Article 28(4) Europol Decision.

[99] Article 14(1) 3rd Paragraph, Europol Decision.

[100] Article 48, Europol Decision.

in this forum and provoke discussion over the use of operational discretion by Europol by a directly accountable European body and, as such, is an important improvement in the accountability of Europol.

The changes to Europol's budgetary arrangements are arguably the most significant new mechanism for ensuring European Parliamentary oversight. Article 42 of the Europol Decision makes the funding of the new Europol a component of the Commission's section of the general budget of the European Union. While this change does mean that the financial offices under the old Convention have been abolished, it means that Europol's accounts and budgetary estimates are subject to several layers of scrutiny. In the first instance, the Director draws up an estimated budget, and submits it to the Management Board.[101] The Management Board then adopts the budget, and forwards it, together with its draft work programme for the associated fiscal year to the Commission. The Commission has 30 days to raise objections with the Management Board[102] and will then *"forward the estimates to the budgetary authority*[103] *together with the preliminary draft general budget"*[104], for approval along with it.[105] Moreover, there is a positive obligation on the Management Board to notify the budgetary authority *"as soon as possible"* of any plans which *"may have significant financial implications for the funding of its budget"*. It particularly notes that projects relating to real property should be reported, but does not limit the obligation to them. Either branch of the budgetary authority then has an option to issue an opinion on the project.

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[101] Article 42(3), Europol Decision.

[102] Article 42(5), Europol Decision.

[103] Defined, as per the usual custom, by Article 41(1) as the Council and the European Parliament.

[104] Article 42(6), Europol Decision.

[105] Article 42(8), Europol Decision.

Furthermore, Article 43 of the Europol Decision lays down a new series of controls over the implementation of Europol's budget. The requirements include, by various deadlines set in the Decision itself, obligations to transmit a statement of accounts to the Commission,[106] who must in turn submit those accounts to the Court of Auditors for their observations.[107] On the receipt of the observations from the Court of Auditors, the Director, who is required to reply within a fixed period to those observations, shall compile the final accounts. Interestingly, the Decision clearly stipulates that the Director shall compile those accounts *"on his own responsibility"*, presumably this is to make clear that he is to be considered personally accountable for them.[108] On receiving the final accounts the Management Board should issue an opinion[109] prior to their being forwarded, along with that opinion, to the European Parliament, Council, Commission and the Court of Auditors.[110] Those accounts should then be published.[111] All of the aforementioned makes Europol's budgetary activities subject to genuine political scrutiny by the European institutions and makes Europol's budget subject to public scrutiny and can only be a welcome innovation.

The other important point to note is the change to the Management Board. The tasks of the Board have been significantly streamlined with 26 specific tasks under the Convention being replaced with 9 under the Europol Decision. But the *prima facie* reduction in tasks is slightly misleading, given the broad nature of some of the tasks entrusted to the Management

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[106] Article 43(3), Europol Decision.

[107] Article 43(4), Europol Decision.

[108] Article 43(4), Europol Decision.

[109] Article 43(5), Europol Decision.

[110] Article 43(6), Europol Decision.

[111] Article 43(7), Europol Decision.

Board under the new Decision. Of more interest is that the Commission representative to the Management Board now seems to be entitled to vote. While in the main, this is unlikely to cause any problem, or make any significant difference to the operation of Europol because the representative of the Commission will be one of 28, there is a symbolic value in that change which makes it worth noting.[112] Europol seems further embedded into the institutional architecture of the European Union, and the methods of accountability consequently seem to have been increased. Including a Commission vote in its operational activities is perhaps indicative of this process.

To conclude, that changes seem to be a mixed bag. Every positive change, the creation of the Data Protection Officer, the strengthening of the role of the European Parliament, seems to be counterbalanced by a less welcome change, such as the extension of the types of data, and the new powers on behalf of the Management Board to alter the data storage systems with barely any input from the political institutions. While the scope of the discretion awarded to Europol seems to have been increased in the operation of its activities in relation to sharing personal data, the oversight and supervision of these activities seems to have been increased. Particularly in the case of the budget, which is now clearly bound into the Commission's normal budgetary procedures, and the oversight of the European Parliament, the other European institutions appear to have a greater role in the control of Europol's discretion, potentially making it subject to much clearer scrutiny at European level, representing an advance on the previous Europol Convention.

[112] Article 37, Europol Decision.

3.5 Eurojust

Europol is only one part of the third pillar agency framework, and to develop a more comprehensive understanding of that framework we must now turn our attention to Eurojust.

Created amidst much fanfare following Tampere[113], Eurojust is designed to secure an equal and appropriate level of co-operation in the prosecution of suspects alleged to be involved in cross-border crimes. Its founding document is the Council Decision setting up Eurojust with a view to reinforcing the fight against serious crime (hereafter the Eurojust Decision).[114]

3.5.1 Structure of Eurojust

The distinction between police action and judicial action, particularly in the field of, for example, early phases of a criminal investigation or prosecution decisions, is not rigid, and varies significantly between Member States. One of the many underlying rationales behind Eurojust was to pool, in one permanent structure at EU level, the relevant competence and expertise to optimise judicial co-operation between the Member States.[115] With this in mind, Eurojust is composed of one national member from each Member State, each national member being *"a prosecutor, judge or police officer of equivalent competence"*.[116] The powers and status of the national members are generally matters for their

[113] Paragraph 46, Presidency Conclusions from the Tampere European Council 15th-16th October 1999.

[114] Council Decision setting up Eurojust with a view to reinforcing the fight against serious crime 2002/187/JHA OJ [2002] L 63/1, 6th March 2002. (Eurojust Decision)

[115] Eurojust Decision Preamble Recitals (2)-(4).

[116] Article 2(1), Eurojust Decision.

Member States of origin,[117] with the minor exception that they must be entitled to access national criminal records or *"any other register of his [sic] Member State in the same way (as) a prosecutor, judge or police office of equivalent competence."*[118] This seems to indicate that, while the Member State is free to appoint from whichever of the above classes of person it chooses, they have a duty to appoint from the most appropriate of those categories in their domestic legal orders to assist Eurojust in the conduct of its tasks. As with Europol, the national member shall serve as the contact point between Eurojust and the competent authorities in the Member States, with all information exchanges, including requests for action, being transmitted through the national members.[119] Collectively those national members form the College. The College must elect a President from amongst its membership for a once renewable three year term.

Article 4 of the Eurojust Decision sets out the jurisdiction of Eurojust. It shall be competent over all of the crimes listed in Article 2 of the Europol Convention.[120] In addition they are competent over the following broad umbrellas of criminal activity; *"computer crime, fraud, corruption and any criminal offence affecting the European Community's financial interests, the laundering of proceeds of crime, environmental crime and participation in a criminal organisation"*,[121] the latter being defined within the meaning of the Joint Action on Organised Crime.[122] They are also competent over *"other offences committed together with"* the above

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[117] Article 9(1) and (3), Eurojust Decision.

[118] Article 9(4), Eurojust Decision.

[119] Article 9(2), Eurojust Decision.

[120] Article 4(1)(a), Eurojust Decision.

[121] Article 4(1)(b), Eurojust Decision.

[122] Council Joint Action 98/733/JHA making it an offence to participate in a criminal organisation in the Member States of the European Union, OJ [1998] L 351/1. 29th December 1998.

crimes.[123] Furthermore, Article 4(2) seems to extend the substantive competence of Eurojust, subject to a procedural limitation. At the request of a competent authority in a Member State, Eurojust may assist, in accordance with its objectives, in the investigation of offences other than those listed above.[124]

If we look to the phrase *"in accordance with its objectives"* for a substantive limit on these competences, we are unlikely to find any assistance. Article 3 expresses the objectives of Eurojust in the broadest possible terms. They are, to stimulate and improve co-ordination[125] and co-operation[126] between the competent authorities of Member States, and to otherwise support the competent authorities of Member States *"in order to render their investigations and prosecutions more effective"*[127] where two or more Member States are involved in investigation or prosecuting serious crime, particularly where such crime is organised. While it is not made explicit, it is to be assumed that organised bears the same meaning as in Article 4 of the Eurojust Decision. No meaning at all is attributed to *"serious"* in this context, and will presumably remain obscure until such time as the Court of Justice has an opportunity to clarify it. Moreover, where a co-operation agreement has been established between Eurojust and the competent authorities of a third state, Eurojust may also support that investigation, even if it only concerns one Member State.[128] Eurojust is also entitled to support the investigation of offences concerning only one Member State and the Community itself, at the request of either the

[123] Article 4(1)(c), Eurojust Decision.

[124] Article 4(2), Eurojust Decision.

[125] Article 3(1)(a), Eurojust Decision.

[126] Article 3(1)(b), Eurojust Decision.

[127] Article 3(1)(c), Eurojust Decision.

[128] Article 3(2), Eurojust Decision.

competent authorities of the Member State in question, or the Commission.[129]

Once Eurojust has been shown to be competent over an offence, in order to achieve its somewhat nebulous objectives, it is charged with a number of tasks. This is further complicated by Eurojust being able to operate in effectively two different forms. On the one hand it may act through its national members, and on the other hand it may act as a College. These two forms are able to carry out significantly different tasks.

The tasks which Eurojust may undertake when acting though its national members are set out in Article 6 of the Eurojust Decision. A national member may request of a second State that the competent authorities: undertake investigations or prosecution of specific acts or accept that another Member State may be in a better position to conduct such an investigation or prosecution.[130] Clearly these are fairly significant powers, the ability to request a State to either begin or end an act which is generally considered to be part of the core of national sovereignty; conducting a criminal investigation. However, it does not appear that Member States are compelled to comply with a request made under Article 6, or even to give reasons for failing to do so. National members may also ask Member States to consider co-ordinating with the competent authorities of other concerned Member States or to setup a Joint Investigation Team.[131] Finally they may request that the competent authorities share any information that they have which is *"necessary for Eurojust to carry out its tasks."*[132] On the other hand, Eurojust *"shall"*, acting through its national

[129] Article 3(3), Eurojust Decision. This potentially raises a question of which Commission officials may make such a request.

[130] Article 6(a)(i) and (ii), Eurojust Decision.

[131] Article 6(a) (iii) and (iv), Eurojust Decision.

[132] Article 6(a)(v), Eurojust Decision.

members, assist the competent authorities of the Member States, at their request; inform one another of investigations and prosecutions which have been conducted, and assist national authorities in ensuring the best possible co-operation and co-ordination of their resources in order to secure the most desirable outcomes from investigations or prosecutions.[133] Again, the national members may, where the above conditions have been met, and with the approval of the College, assist with investigations and prosecutions concerning only one Member State.[134] The final task of the national member is to forward requests for judicial assistance from the competent authorities of one Member State to another.[135]

Article 9 of the Eurojust Decision makes it plain that national members are subject to national law as regards their status.[136] It also goes on to state that Member States must define in detail the nature and extent of the judicial powers it grants its own national member within its own territory. One of the reasons that Article 6 seems to be largely consent based is that it is not necessarily anticipated that the national members would need to be able to compel another Member State to begin an action. In many Member States, the national member would be empowered in the national legal system to begin an investigation as of right. This however is problematic in itself. Van den Wyngaert flags up the problem of the "super-members", with some members having much more extensive powers than others.[137] The end result of this will probably be that the College acts more

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[133] Article 6 (b)-(d), Eurojust Decision.

[134] Article 6(f), Eurojust Decision.

[135] Article 6(g), Eurojust Decision.

[136] Article, 9(1), Eurojust Decision.

[137] Van den Wyngaert, C. "Eurojust and the European Public Prosecutor in the *Corpus Juris* Model: Water and Fire?" in Walker, N. (Ed.) Europe's *Area of Freedom Security and Justice* (OUP, 2004), 201, 211.

frequently in relation to Member States who second national members to Eurojust who have more limited powers.

When acting through its individual members, the powers of Eurojust appear to be largely based on reaching consensus between the competent Member State authorities. There is a distinct difference in tone when talking about the powers of the College. Article 7(a) of the Eurojust Decision entitles the College to make the same requests of the competent authorities of the Member States as the individual members can under Article 6(a); to begin an investigation or prosecution,[138] to suspend or end one in favour of another State,[139] to co-ordinate their investigations with another State,[140] to set up a Joint Investigation Team[141] or to forward necessary information to Eurojust.[142] However the Decision seems to imply a stronger underlying presumption of compliance with the request than underlies the tasks of the national members under Article 6. First, unlike Article 6, there is a requirement for the College to present the competent authorities with reasons for making the request. Secondly, Article 8 of the Decision requires Member States to give reasons for failure to comply with a request from Eurojust, but only where that request is made under Article 7, in other words, by the College. However, the requirement under Article 8 is not limitless, and Member States will not be required to give reasons for refusing to comply with a request made under Article 7(a)(i),(ii) or (v), where giving such reasons would harm their

[138] Article 7(a)(i), Eurojust Decision.

[139] Article 7(a)(ii), Eurojust Decision.

[140] Article 7(a)(iii), Eurojust Decision.

[141] Article 7(a)(iv), Eurojust Decision.

[142] Article 7(a)(v), Eurojust Decision.

national security interests or jeopardise the success of investigations already underway[143] or expose an individual to the risk of harm.[144]

Having established this difference between the powers of Eurojust acting through its national members or through the College, or at least the presumptions associated with those acts, the next question must be, when does Eurojust act through its members and when does it act as a College? It appears, from Article 5 of the Decision that the presumption is that Eurojust will act through its national members. Article 5(1)(b) however, lists the circumstance in which it will act as a College. These circumstances occur when a national member has requested it because they are *"concerned"* by a particular case with which they are dealing, when a case deals with *"investigations or prosecutions which have repercussions at Union level of which might affect Member States other than those directly concerned"* or where the case raises questions *"relating to the achievement of"* one of Eurojust's objectives.[145]

Again, the question of referral of cases to the College appears to throw up a number of difficult questions relating to the nature of the Eurojust Decision as a contract which one would have hoped had been designed to limit agency loss. The Article gives no indication as to what *"concern"* might mean, effectively meaning that there is no realistic yardstick against which one can judge the appropriateness of the referral of a case by a national member to the College, and the presumptions associated with such an elevation. Nor is there a definition of *"repercussions at Union level"*. It is conceivable that almost any case with a cross-border element could have repercussions at Union level. Article 5 is rendered even more broad by the

[143] Article 8(i), Eurojust Decision.

[144] Article 8(ii), Eurojust Decision.

[145] Article 5(1)(b), Eurojust Decision.

line *"might affect Member States other than those directly concerned"*. Again, any crime over which Eurojust has competence could potentially effect third States. Finally, under Article 5(1)(b)(iii), general questions remain relating to the attainment of Eurojust objectives. As we have previously seen, the objectives of Eurojust are so broad that any case arising could potentially raise questions relating to their achievement. It seems that this combination of the above effectively mean that Eurojust can act as a College in whichever circumstances it chooses. On the one hand, this may be an advantage. The added presumption of compliance means that Eurojust will be acting more efficiently if it is acting as a College, but, on the other, we are looking at an agency with the power to request that a Member State begin criminal proceedings against an individual, and there is a legal presumption of compliance. In those circumstances, one would have hoped that in allowing a new supranational agency a role in the exercise of the key sovereign right to begin prosecutorial proceedings, that Member States would have been more definitive in the construction of the contract. We will go on to see below that Member States have built in some safeguards as to the specific way in which Eurojust operates, and particularly the way in which it handles data, but at this point it is necessary to reiterate how poor the contract design has been, and how important an opportunity the Member States have missed to limit agency loss. The prevailing wisdom at the moment is that any creation of a European Public Prosecutor would be from Eurojust, and indeed this has been embodied in the two last rounds of Treaty reform.[146]

The Joint Supervisory Body provided for by the Eurojust Decision (JSB(Ej))[147] is a body of some fluidity. Each Member State must nominate

[146] Article III-274 , Constitutional Treaty, Article 86, TFEU (Treaty of Lisbon)

[147] As distinct from the Joint Supervisory Body under the Europol Decision (JSB(Ep)), see above point 2.2.

a judge, or where a national or constitutional system so requires, persons holding a national office of sufficient independence to be included with judges,[148] to be included on a list of persons who may sit on the JSB(Ej). Those nominations must last for at least 18 months, and the procedure for appointment and removal is governed entirely by national law. [149] At any time, three of the judges will be permanent members of the JSB(Ej), and the others may be called on to act as *ad hoc* judges as necessary.[150] A judge will become a permanent member one year before that member's appointing State become the President of the Council and will remain a permanent member for 18 months, taking the Chair of the Joint Supervisory Body for the six months of the judge's State's Presidency.[151]

In the execution of its tasks, Eurojust is, like Europol, entitled, where necessary, to process personal data. Unlike Europol, however, the purpose of the collection and processing of this data is not to maintain a permanent database. It is intended that Eurojust will only collect information as far as is necessary for the completion of its tasks, rather than its primary function being the management and control of information. However, the rules governing the storage of the data collected and the use of that data by Eurojust are complex. Eurojust is entitled to deal with personal data in two different ways. It may establish and maintain an index of ongoing investigations.[152] It may then also create temporary work files which can, in certain circumstances, contain more extensive data than the index.

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[148] For the sake of brevity, the following section will follow the Decision and refer to both types of appointee as "judges".

[149] Article 23(1), paragraph 3, Eurojust Decision.

[150] Article 23(2), Eurojust Decision.

[151] Article 23(3), Eurojust Decision.

[152] Article 14(4), Eurojust Decision.

The data which can be held by Eurojust is relatively extensive. Provided that a person is under investigation or subject to prosecution for an offence falling within Eurojust's jurisdiction, Article 15(1) of the Decision allows the agency to hold a fairly detailed range of personal information. This includes all names and aliases past and present, date and place of birth, nationality, sex, place of residence, whereabouts and occupation, social security numbers, driving licences, identity cards and passports, bank accounts and accounts with other financial institutions, details of the offence or alleged offence, including information which suggests that the case could be internationally extended and details relating to alleged membership of a criminal organisation.[153] They may also hold details of any legal persons related to individuals subject to a criminal investigation, where such information is relevant.[154] Article 15(2) also entitles Eurojust to hold a much more limited array of information concerning witnesses or victims of the crime in question.[155] All of the above may be entered on the index.

The caveats included in Articles 15(3) and (4) however, are worrying. Article 15(3) states that:

"In exceptional cases, Eurojust may also, for a limited period of time, process other personal data relating to the circumstances of an offence where they are immediately relevant to and included in ongoing investigations which Eurojust is helping to coordinate".

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[153] Again this remains undefined but is presumably to be understood as having the meaning contained in Council Joint Action 98/733/JHA making it an offence to participate in a criminal organisation in the Member States of the European Union, OJ [1998] L 351/1. 29th December 1998.

[154] Article 15(1), Eurojust Decision.

[155] Artricle 15(2), Eurojust Decision. The respective statuses "suspect", "witness" and "victim" in the context of Article 15 are to be derived from national law.

Again, this provision is extremely widely drafted, so as to allow Europol almost boundless discretion in the nature of the data they may hold and process. There is no definition of exceptional circumstances, nor of *"other personal data"*. This provision merely serves to further underline the weakness of the contract design in the new Decision which continues the disappointing trend of devolving an excess of discretion on Europol.

Article 15(4) is even more troubling because it allows information concerning racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership and data concerning health or sex life to be processed by Eurojust where necessary for the national investigation concerned and its effective coordination through Eurojust. It should be clarified that this data may only be processed in a temporary work file, and may not appear on the index. On the other hand however, unlike Article 15(3) there appears to be no *"exceptional circumstance"* requirement, nor does Article 15(4) state clearly that such information may only be held for a limited period of time. Where any of the data listed in Article 15(4) is to be stored in relation to a suspect the decision may be taken by a national member. Where it is to be entered in relation to a witness, then under Article 15(3) the decision must be taken by at least two national members. In the case of Article 15(4) the decision to enter that kind of data in relation to a witness or victim must be taken by the College. In addition to the questions raised above, there are a series of problems, again relating to weak definitions in Article 15(3). First, the scope of exceptional circumstances is left undefined. Secondly, it is not clear what *"other personal data"* may be stored, or what constitutes a limited period of time for its legitimate storage. Finally, information of *'immediate relevance'* remains undefined, leaving the legal provisions opaque and much discretion as to the retention of extensive types of sensitive data is left with the national members, or the College of Eurojust.

There appears to be limited oversight of the operation of these provisions by external bodies, leaving the control of data exclusively within the purview of Eurojust, relying upon internal controls to ensure the responsible operation of these provisions.

In relation to the second question there may be an answer as Article 21 sets out the time limits for storing personal data. Article 21(2) states that data may be held until either *"the date on which prosecution in barred under the statute of limitations of all the Member States concerned by the investigation and prosecutions"*[156] or *"the date on which the judicial decision of the last of the Member States concerned by the investigation or prosecution became final"* or when Eurojust and the Member States concerned mutually conclude that it is no longer necessary for Eurojust to co-ordinate the investigations or prosecutions. This is apparently irrespective of which State the information was provided by; in other words information provided by a given Member State (A) may be retained long after the possibility of action in State A has passed if the prosecutorial rules of a second Member State allow for a longer limitation period. *"Appropriate automated processing"* must be put in place to constantly monitor compliance with the above deadlines, but, irrespective of these processes, a periodic review must take place on the need to retain that information. Worryingly however, this review is only required triennially. While the above seems reasonable, there is yet another derogation. Article 21(3)(b) states that when one of the deadlines passes, Eurojust may, in order to allow it to achieve its objectives, decide to continue with the storage of that information until the next review, which may be up to three years away. The Article goes on to state that where information has been retained by way of derogation, that triennial reviews must be conducted. This clearly allows Eurojust to store information indefinitely

[156] Article 21(2), Eurojust Decision.

where the storage of that information can be justified as necessary for the completion of the objectives, but once again leaves the control of this discretion exclusively in the hands of the College without any form of external review of the necessity of retention of such data which may still be of a sensitive nature.

3.5.2 Controls on Eurojust

Although Eurojust's powers are extensive and they have considerable discretion under the Eurojust Decision as to their use, there are some controls on their activities. In the use of personal data, Eurojust are required to ensure that they maintain a system of data protection at least equivalent to that required by the Council of Europe Convention on Data Protection.[157] In terms of more concrete institutional safeguards, Article 17 of the Eurojust Decision creates a dedicated Data Protection Officer. The Officer is a member of Eurojust's staff under the direct authority of the College. However, Article 17 does make it clear that in carrying out the Officer's duties under that Article, the Officer should take instruction from no one and as such is independent of Eurojust's internal operations. The Officer is to be informed immediately in the event that any use is made of Articles 15(3) or (4) to retain highly sensitive personal data in exceptional circumstances. He or she is also entitled to access any extant temporary work file, and is to be notified of the opening of every new file.[158] The Officer, who is to be afforded unrestricted access to all of Eurojust's premises and materials,[159] has three principal tasks; ensuring that personal data is compiled and processed lawfully and in accordance with the

[157] Article 14(2), Eurojust Decision. Council of Europe Convention for the protection of individuals with regard to the automatic processing of personal data 1981. The Data Protection Convention provides a minimum standard of data protection for the holding and processing of personal data.

[158] Article 16(3), Eurojust Decision.

[159] Article 17(3), Eurojust Decision.

Eurojust Decision, ensuring that a written record is kept of any receipt or transmission of information, particularly as regards personal information and ensuring that, at their request, persons about whom data is stored by Eurojust are made aware of their rights.[160] If the Officer is dissatisfied with the processing of any data he or she must immediately refer the matter to the College.[161] If the College does not resolve the issue within a reasonable time then the Officer may refer the matter to the next stage of safeguards; the Joint Supervisory Body. While it is not intended to single out the current, or indeed any other past or future Data Protection Officer for any, specific criticism the fact that the Officer is a member of Eurojust's staff is of some concern. While Article 17 requires that the Officer be independent in the conduct of his or her tasks, this may not be a sufficient guarantee of independence, and the possibility of making the first control mechanism independent may be worthy of consideration.

The Data Protection Officer is responsible in his or her own right for supervising the use of data by Eurojust but individuals also have certain rights in relation to information on themselves held by Eurojust, including the right to access that data,[162] or to have personal information which is incorrect, incomplete or held in violation of the Decision blocked, deleted or amended.[163] In relation to the right to access data held about themselves, Eurojust is entitled to refuse where such access would jeopardise either one of Eurojust's activities, any national investigation in which Eurojust is participating or the *"rights and freedoms of a third party"*.[164] In the event that access is denied, or that no information is held

[160] Article 17(2), Eurojust Decision.

[161] Article 17(4)(a), Eurojust Decision.

[162] Article 19, Eurojust Decision.

[163] Article 20, Eurojust Decision.

[164] Article 19(4), Eurojust Decision.

on an individual, then Eurojust is entitled to reply in such a way that refrains from revealing whether the applicant is known to them.[165] The presumption is that the right to request access to personal data should be exercised in accordance with the national law of the Member State from which an individual made the request. However, where the Eurojust can ascertain the competent authority responsible for transmitting the information to them, they must notify that authority, who are entitled to require that the right of access be exercised in accordance with their national law.[166] In relation to the latter right, Eurojust must reply stating whether it has taken the action requested.[167] In the event that the applicant is dissatisfied with the outcome of either procedure, they may appeal that decision to the Joint Supervisory Body.[168]

The Joint Supervisory Body will hear appeals from individuals,[169] as well as conducting investigations at the request of the Data Protection Officer. When the JSB(Ej) convenes to hear such proceedings, it shall be composed of the three permanent members[170] and the *ad hoc* judges from any or all Member States who have transmitted information which is being considered in the case at issue.[171] The decisions of the JSB(Ej) are considered final and binding in their entirety on Eurojust. In addition to meeting for the disposal of appeals, the body will meet at least twice annually, and must meet when so requested by at least two Member

[165] Article 19(7), Eurojust Decision.

[166] Article 19(3), Eurojust Decision.

[167] Article 20(2), Eurojust Decision.

[168] Articles 19(8) and 20(2), Eurojust Decision.

[169] Article 23(7), Eurojust Decision.

[170] Who will then remain a part of that hearing even if there term of office expires within the duration of the proceedings.

[171] Article 23(4), Eurojust Decision.

States.[172] It must also submit an annual report to the Council.[173] This body is composed of members external to the Eurojust operations and structure and as such provides a measure of independence when hearing appeals. It also recognises the national interest in the protection of data being processed by Eurojust and the judicial nature of the body gives it authority to hear appeals. Its rather fluid nature means that it may be difficult to develop expertise, but this reflects the rotating nature of the Presidency of the Council and investigations will always contain permanent members.

While the role of the judiciary will be examined in much greater detail elsewhere,[174] it is necessary to briefly touch on it at this stage. The jurisdiction of the Court of Justice is limited in the same way as it is over every third pillar body; by the provisions of Article 35 TEU. The Court is able to give a ruling on the interpretation or validity of the Decision itself, but only if a case can reach it. In terms of its ability to rule on the acts of Eurojust, it has had an opportunity to do so but has declined because the Court recognised that Eurojust was not on the list of bodies it had the power to review.[175] The limited jurisdiction of the Court is of serious concern because of the nature of the operations of Eurojust which extend beyond management of data to coordination of police operations. There is no oversight by the Court meaning that all potential breaches of the Eurojust Decision must be dealt with through the internal mechanisms identified. However, the actual operation of police investigations will remain subject to compliance with national law, enforced through national legal systems. It remains the case though that Eurojust has been delegated a

[172] Article 23(1) Paragraph 2, Eurojust Decision.

[173] Article 23(12), Eurojust Decision.

[174] See Chapter 5

[175] Case C-160/03 *Spain v Eurojust* [2005] E.C.R I-2077.

role in the national prosecutorial process and the management of this delegation will be considered further in the next section.

3.5.3 Gap or Chasm? Agency Loss and Eurojust

We have identified that the Member States have, by Decision, delegated a small proportion of their sovereign powers to Eurojust. They have delegated powers to coordinate cross-border investigations, to share information between their competent authorities and, to some extent, even to choose whether or not to prosecute persons within their jurisdiction, to a non-majoritarian agency. What steps have the Member States taken to limit the possibility of agency loss in these cases? In the first instance it must be stated that the contract design is poor. The level of discretion which is afforded to Eurojust is simply much too high and the ambiguity in the drafting of the Decision is extremely unhelpful, especially in relation to data retention.

Screening and selection processes for the members of Eurojust are more expressly national decisions. Each Member State appoints national member individually and these go on the form the College. However, even here there is a problem because while the President of the College of Eurojust is probably less important in terms of his or her institutional role at least, more of a *primus inter pares* than a President in the truest sense, they still hold a significant role in the administration of Eurojust, and in the setting of its agenda. Disconcertingly the Council has absolutely no role in the selection of the President, it is an internal matter for the College. The scope for agency loss in this appointment would seem significant. The Chairperson of any body can significantly shape events, and for the Council to have allowed the selection of the President to fall entirely out of their control is short-sighted.

It appears that the *ex ante* controls are not particularly successful in minimising the gap which Thatcher and Stone Sweet identified as allowing for agency loss.[176] Next we must consider the *ex post* controls to see if we can identify any more success. In terms of reporting strategies, the President must once a year report to Council on the activities and management of Eurojust, and the Presidency of the Council must *"forward a report"* to the European Parliament.[177] There is then at least a reporting requirement, but it certainly is not rigorous enough to offset the weaknesses in the *ex ante* control structure.

The checks on the operation of Eurojust in its operations are also relatively limited in both their nature and potential effect. There has to be some concern over the Data Protection Officer's ability to truly act independently of Eurojust while being a member of its staff. While this is not to say that it is impossible to achieve this, justice must not only be done, but must be seen to be done. There is at least a risk that the Data Protection Officer's status as a member of staff could be seen to undermine their position. Again we are not being asked to trust a named Data Protection Officer to carry out their task independently, but instead we are being asked to trust each and every future holder of that office. Presumably it is on this basis that the JSB(Ej) was introduced as an additional safeguard to the Data Protection Officer as a genuinely independent arbiter. This is a more successful initiative, but there remains a significant problem in the level of judicial oversight of Eurojust's activities. In relation to Eurojust, the European Court of Justice has no role

[176] Thatcher, M, Stone Sweet, A. "Theory and Practice of Delegation to Non-Majoritarian Institutions" (2002) 25(1) West European Politics 1, 4-5

[177] Article 32, Eurojust Decision.

in overseeing Eurojust as it has no jurisdiction to review its activities.[178] While there is an argument to be made in relation to Europol that the results of agency action is scrutinised domestically,[179] no such argument can be made for Eurojust. It is conceded that while acting through its national members there may be recourse to national courts because they remain subject to national law as regards their status at least, and if they are exercising powers granted to them by national law, the exercise of these powers must remain subject to review in national courts. However the Decision stipulates that when acting, a national member should endeavour to make it clear whether they are acting in their national capacity, this at least makes the possibility very real that there may be circumstances when they are not acting in their national capacity. In these circumstances, as with Eurojust acting as a College, there is no judicial recourse, the Court of Justice is simply excluded, and as we have seen, has declined to take jurisdiction. There can be no argument that Eurojust is not a Union construct, the Decision did not require ratification nationally and was adopted by the Council. As such, in relation to Eurojust, the legal deficit in accountability to both judicial and elected forums is much more acute than that of Europol and must be a cause of significant concern given the scope of its activities and its potential impact on individual rights, both in pursuing prosecutions and holding personal data. It is difficult to conclude that the delegation of powers to Eurojust has been successfully matched by robust control mechanisms, and the scope for agency loss, if not the actual occurrence of this phenomena, must be judged to be very high. The opportunity to correct this has since occurred on the amendment of the Eurojust Decision and the changes made will be considered further in the next section.

[178] Case C-160/03 *Spain v Eurojust* [2005] E.C.R I-2077

[179] See above, section 3.3.2.

3.5 Amending the Eurojust Decision

On the 16th December 2008, the Council adopted Decision 2009/426/JHA on strengthening Eurojust and amending the Eurojust Decision.[180] It, like the Europol Decision, makes a series of changes aimed at improving Eurojust, particularly by improving its internal, and external, structures and its capacity to fulfil its tasks.

Although the tasks in Article 5 remain as they were under the old Decision, Article 4 has been amended in order to bring the competence of Eurojust exactly into line with that of Europol, and as such now reads;

> *"The general competence of Eurojust shall cover...the types of crimes and offences over which Europol is at all times competent to act [and] other offences committed together with [them]"*

The new Article 5a requires the establishment of *"an On-Call Coordination"* (OCC). This is essentially designed to ensure that at least one of the national members, their deputy or assistant[181] from each Member State be available at all times, in case of an urgent request for a decision relating to Eurojust's competence. OCC will be administered by a single contact point within Eurojust.

Article 6 is amended so as to empower national members to ask their national authorities to *"take special investigative measures [or] take any*

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[180] [2009] OJ L 138/14, 16th December 2008. All references in the following section to the Eurojust Decision (2002/187/JHA (2002) OJ L 63) will be to Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime [2002] OJ 63/1, 28th February 2002, as amended by Decision 2009/426/JHA on strengthening Eurojust and amending the Eurojust Decision [2009] OJ 138/14, 16th December 2008.

[181] Article 2, Eurojust Decision as amended requires at least one deputy and assistant national member be appointed to assist the national member.

other measure justified for the investigation or prosecution".[182] A requirement has also been inserted that where the national authorities receive a request from their Eurojust national member they should respond *"without undue delay".*[183]

Article 7 is amended so as to include a mechanism for the College to deal with conflict between national members over the most appropriate national jurisdictions. There is also a new provision inserted that allows for national authorities to effectively report national authorities from other Member States for persistent refusals to execute measures requiring mutual recognition. In the event of either of these provisions being activated, the College is required, where the issue cannot be resolved by discussions between the national authorities concerned, to issue a non-binding opinion on the matter which must be forwarded to the Member States concerned. Should Member States not wish to comply with those opinions then a new provision has been inserted in Article 8 which requires them to give reasons, unless the reasons would fall under the usual exceptions of endangering national security, the safety of individuals or an ongoing national investigation. This is clearly aimed at reducing the potential for conflict between the Member States about the effective operation of Eurojust at a national level.

The most significant changes come in relation to Article 9 on national members, which is replaced by a new Article 9. In addition Articles 9a to 9f are inserted. These provisions are clearly the result of extremely complex negotiation. There are a number of substantive changes introduced in these Articles specifically relating to empowering the national members to do their job. National members will now have a

[182] Article 6(1)(vi) and (vii), Eurojust Decision as amended.

[183] Article 6(2), Eurojust Decision as amended.

minimum four year term of office.[184] The new Article 9(3) is a little opaque, providing:

> *"In order to meet Eurojust's objectives, the national member shall have at least equivalent access to, or at least be able to obtain the information contained in, the following types of registers of his Member State as would be available to him in his role as a prosecutor judge or police officer, whichever is applicable, at national level."*

The provision then goes on to list criminal records, registers of arrested persons, investigation registers, DNA registers, and other necessary registers.[185] This provision seems to mean that in principle the national member should have access to all of those databases, but should at the very least not be disadvantaged in relation to accessing them, or having information retrieved from them, by virtue of his or her position at Eurojust. It is important to restate here that the national members retain the powers they have in national systems by virtue of their position as a police officer, prosecutor or judge at national level. This is reemphasised by the new Article 9a.

Article 9a(2) is again slightly opaque, and states that Member States shall grant their national members at least the powers set out in Article 9b, and subject to Article 9e, the powers set out in Articles 9c and 9d, but then again seems to undermine any compulsion by reiterating that the Member States shall define the nature and extent of the powers. Article 9b seems to set the minimum desired threshold. It requires that national members are required in their capacity as national authorities, to be able to transmit,

[184] Article 9(1), Eurojust Decision as amended.

[185] Article 9(3)(a) to (e), Eurojust Decision, as amended.

receive, facilitate, follow up and provide supplementary information in relation to judicial cooperation requests within Eurojust's field of competence.[186] They should also however be empowered, by their national status, to request that their competent national authorities take remedial action to ensure full compliance with a request for judicial cooperation where such a request has been partially or inadequately complied with.[187]

Articles 9c and 9d set out a number of powers which national members should be entitled to exercise, but are made subject to Article 9e, which states that where national members are barred by *"Constitutional rules"* or *"fundamental aspects of the criminal justice system regarding the division of powers between the police, prosecutors and judges"*.[188] Article 9e also notes that, where a national member is so prohibited from enjoying the ideal powers set out in Articles 9c and 9d, they should be empowered, at the very least, to make a request for such action to be taken, and where such a request is made, national law should require that the competent authorities deal with it as promptly as possible.[189]

Under Article 9c the national member should, as a competent national authority themselves, be able, in agreement with other competent national authorities, to issue and complete requests for judicial cooperation *"including instruments giving effect to the principle of mutual recognition"* and to execute such requests in their seconding state.[190] They should also be able to order investigative measures deemed necessary by a

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[186] Article 9b(1), Eurojust Decision, as amended.

[187] Article 9b(2), Eurojust Decision, as amended.

[188] Article 9e(1) (a) and (b) respectively, Eurojust Decision, as amended.

[189] Article 9e(1) and (2), Eurojust Decision, as amended.

[190] Article 9c (a) and (b), Eurojust Decision, as amended.

coordination meeting. This meeting will have been staged by Eurojust *"to provide competent national authorities concerned"* in a case in which Eurojust is involved any necessary information, and will include representatives from the competent national authorities concerned.[191] They should also be empowered to authorise controlled deliveries[192] into their Member States.[193]

Where the national member cannot contact the competent national authority, and urgent action is required they should be able, in their national capacity, to authorise and coordinate controlled deliveries, or execute requests or decisions on judicial cooperation. The national authorities should be contacted as soon as possible and informed of the exercise of those powers. Despite the extensive revision of the scope of the national member's roles, Article 10 on the powers of the College is virtually unchanged.

One of the criticisms raised above, that of so-called 'super members'[194], purports to be solved by the amendments. The new Article 2(3) now requires that *"the national member shall have a position which grants him the powers referred to in this Decision"*. All national member should now therefore have the same basic level of powers as every other, reducing the differences between the operation of Eurojust between different Member

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[191] Article 9c(c), Eurojust Decision, as amended.

[192] The definition of these deliveries given by Article 1(g), UN Convention Against Illicit Traffic in Narcotic and Psychotropic Substances 1988 is: *"the technique of allowing illicit or suspect consignments of narcotic drugs, psychotropic substances...or substances substituted for them, to pass out of, through or into the territory of one or more countries, with the knowledge and under the supervision of their competent authorities, with a view to identifying persons involved in the commission of offences"*.

[193] Article 9c(d), Eurojust Decision, as amended.

[194] Van den Wyngaert, C. "Eurojust and the European Public Prosecutor in the *Corpus Juris* Model: Water and Fire?" in Walker, N. (Ed.) *Europe's Area of Freedom Security and Justice* (OUP, 2004), 201, 211

States. These powers are designed to establish a minimum standard, but are undermined by the perfectly legitimate inclusion of Article 9e, and the constant back-reference to the fact that the powers must be conferred in accordance with the national members' role in the national system. This is appropriate. In an area as sensitive as being able to issue orders to begin investigations or to take decisions on the execution of measures of judicial cooperation, presumably including the European Arrest or Evidence Warrants, then it should be entirely for the Member States to define which national officials should exercise those powers. The criticism that Eurojust cannot perform the same role in relation to the various Member States is entirely legitimate, but that fact is entirely justified by the nature of its role. This provision is seemingly walking that fine line between ensuring the effectiveness of Eurojust, while preserving the sovereignty of the Member States to define the powers of their own officers. It is a complex balancing act which the decision probably manages as well as is practically possible.

Article 12 has been replaced to establish a new Eurojust national coordination system. This system seeks to link the national correspondents for Eurojust, the correspondents for the European Judicial Network, the civil co-operation equivalent of Eurojust, and the designated contact points created under a wealth of secondary legislation[195] into a single coherent network. These contact points are supposed to ensure that the appropriate

[195] See Council Decision 2002/494/JHA setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes [2002] OJ L167/1, 26th June 2002; Council Decision 2007/845/JHA concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime [2007] OJ L332/103, 6th December 2007; Council Decision 2008/852/JHA on a contact-point network against corruption [2008] OJ L301/38, 24th October 2008.

information is funnelled to the national members in order to assist Eurojust in the completion of its objectives.[196]

Article 15, has been amended by the new Decision to significantly broaden the scope for the processing of personal data by Eurojust. Whereas previously personal information could only be stored on those *"subject to a criminal investigation"* the threshold has now been lowered to those who *"are suspected of having committed or having taken part in"* an offence for which Eurojust has competence. In addition to this the actual information which may be processed has been broadened significantly to include telephone numbers, e-mail addresses, vehicle registration data finger prints, photographs and, again, DNA. Article 16 is replaced and supplemented by Articles 16a and 16b to create a new case management system, which is aimed at systematising the temporary work files and index system. Its principal function seems to be to facilitate ease of access and ease of cross referencing of the personal data held in accordance with Article 15.[197]

As with the new Europol Decision, similar provisions are inserted into the Eurojust Decision regulating its relationships with other Union bodies, including OLAF and FRONTEX,[198] and with third States and bodies.[199] Transmission of any data stored by Eurojust to a third state or body can only be carried out with the express consent of the Member States who

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[196] See also the new Article 25a, Eurojust Decision, as amended, on cooperation with the European Judicial Network and other networks of the European Union involved in cooperation in criminal matters, and Communication from the Commission to the Council and the European Parliament on the role of Eurojust and the European Judicial Network in the fight against organised crime and terrorism in the European Union COM(2007) 644 final, 23rd October 2007.

[197] Article 16(2), Eurojust Decision, as amended.

[198] Article 26, Eurojust Decision, as amended.

[199] Article 26a, Eurojust Decision, as amended.

supplied the information, providing protection for individuals against the transmission of data outside the Eurojust system.[200]

In addition to the more major changes outlined above, there have been minor changes in several areas. These include the method for adopting the rules of procedure for the College.[201] Article 23 has been amended to alter the criteria for permanent membership of the JSB(Ej). The permanent members are now elected by the ad hoc members from amongst their number, and when elected they will serve for three years, with an election for one member being held each year. The JSB(Ej) will be chaired by the permanent member in the final year of their mandate which potentially increases the knowledge base and stability of this body. Other apparently superficial amendments include that to the role of the Data Protection Officer, who used *"to take instructions from no-one"*, and is now merely required to *"act independently"*,[202] and some limited technical changes to time limits for data storage.[203]

The amendments to the Eurojust Decision seem not to have addressed any of the concerns raised in relation to the contract design for the operation of Eurojust. The provisions are still drafted so as to provide Eurojust with the maximum possible discretion, and this is to be discouraged. The standard upon which data may be held on citizens has been lowered under the amended Article 15, seemingly increasing the ability of Eurojust to hold such data. There have been no significant changes to the oversight of Eurojust's operations from either internal or external bodies despite evident limitations in the effectiveness of the current structure. This European

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[200] Article 27, Eurojust Decision, as amended.

[201] Article 10(2), Eurojust Decision, as amended.

[202] Article 17, Eurojust Decision, as amended.

[203] Article 21, Eurojust Decision, as amended.

agency has significant capability to impact on the day-to-day life of its citizens with only limited accountability strategies in place to control it.

3.6 The Future of Eurojust and the European Public Prosecutor

Successive rounds of constitutional reforms have allowed for the possibility that a European Public Prosecutor (EPP) may be established from within the framework of Eurojust.[204] This debate has been ongoing since the negotiations for the Nice Treaty, and the Commission, through its anti-fraud office, OLAF, published a Green Paper on the issue in 2001.[205] The proposal contained in this Green Paper focussed very heavily on the EPP as a solution to the specific problem of fraud against the Community's financial interests, although the Commission considered pitching the net wider, but chose to stick to the financial offences.[206] However, the EPP proposal has not been taken up as yet. It has received significant support from some Member States, but little or no support from others, hence the inclusion of an option to pursue this course of action, rather than a mandate to do so under Article 86 TFEU.

Article 86 of the TFEU would allow for the establishment of the EPP from within the structure of Eurojust. It is subject to a special legislative procedure initially requiring unanimity in the Council. Where unanimity cannot be reached, if the proposal in question is supported by at least nine Member States then it may be referred to the European Council for

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[204] Article III-274 , Constitutional Treaty, Article 86, TFEU (Treaty of Lisbon).

[205] Green Paper on the protection of the financial interest of the Community and the Establishment of a European Public Prosecutor, COM (2001) 715 final, 11th December 2001. On the background to this proposal and the *Corpus Juris* see Delmas-Marty, M. "Combating Fraud - Necessity, Legitimacy and Feasibility of the *Corpus Juris*" (2000) 37(2) Common Market Law Review 247.

[206] Green Paper on the protection of the financial interest of the Community and the Establishment of a European Public Prosecutor, COM (2001) 715 final , 11th December 2001, paragraphs 3.1 and 5.2.3.

discussion. Where consensus is reached it would be referred back to the Council for adoption, on the other hand however, if no consensus can be reached any States who wish to adopt it will be entitled to proceed under the enhanced co-operation procedures under the Treaty. This is a significantly problematic provision. Any enhanced co-operation measure in that context would have to be extremely carefully drafted. The most significant problem is that it would effectively split Eurojust in two. The legal basis expressly provides that the EPP would be established from within Eurojust, presumably the ultimate intention being that Eurojust would effectively become a European prosecution service. However, the creation of the prosecutor would have to be very carefully managed in order to prevent the effectiveness of Eurojust being undermined for those States who were not party to the EPP agreement. It is seriously to be hoped that every effort is made to avoid turning to that provision and that if no consensus can be reached all other options be explored before allowing for that procedure to be activated.

The jurisdictional issues alone would be highly problematic, but following this course of action would also raise significant procedural issues within the EU. If the crime was cross-border there must at least be the possibility that some elements of the crime would be committed within the jurisdiction of the EPP and some without. This leads to the possibility that the crime would be prosecuted differently depending on whether the EPP or national prosecutors had jurisdiction, which is a far from desirable state of affairs. In addition, if adopted in its current form, the EPP would only have jurisdiction over crimes with financial implications for the Community and other cross-border crimes would be left unaffected. The role of the EPP would be limited and the practical division of jurisdiction over prosecutions would be difficult to define and controversial, especially

if the EPP had control over defining which types of criminal activity fell within its remit.

Van den Wyngaert observes that setting up yet another institution in this field would merely add to the proliferation of bodies, leading to *"turf wars"* and the wasting of energy in *"coordinating the coordinators"*.[207] She is also critical of the proposal to establish the EPP from within Eurojust, noting that the two bodies are fundamentally different, one being a coordinating body, and one having actual powers to prosecute individuals of their own motion. She instead proposes phasing in the EPP in three stages. Phase one would be the introduction of a prosecutor with responsibility for internal fraud only. In other words a body with jurisdiction to bring prosecutions against European Civil Servants, and other public servants of the Union for fraud, money laundering, corruption and related offences. Phase two would be to reform Eurojust so as to require national members to have the power to prosecute, of their own motion, crimes committed against the interests of the EU in their seconding States. The third phase would then to be transform Eurojust into a fully fledged European Prosecution Service with transnational jurisdiction.[208] This solution could be appealing because of its increased efficiency and scope to deal with the full extent of cross-border crime, but only if the body were to be established for the European Union as a whole. The existence of the EPP for some States and not others is a troubling possibility.

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[207] Van den Wyngaert, C. "Eurojust and the European Public Prosecutor in the *Corpus Juris* Model: Water and Fire?" in Walker, N, *(Ed.) Europe's Area of Freedom Security and Justice* (OUP, 2004) 201, 227.

[208] Van den Wyngaert, C. "Eurojust and the European Public Prosecutor in the *Corpus Juris* Model: Water and Fire?" in Walker, N. *(Ed.) Europe's Area of Freedom Security and Justice* (OUP, 2004), 201, 228.

If the view is taken that the EU needs the power to prosecute, then as Peers notes, *"the Commission has not properly considered the effectiveness of more limited measures to achieve the same objective".*[209] Instead, there is an easier, cheaper and less invasive alternative of giving the College of Eurojust the power to mandate the opening of an investigation by national prosecutors. National prosecutors would have an obligation under Article 10 EC and Case 68/88 *Commission v Greece*[210] to give it the same priority as an equivalent national case. The usual safeguards could be included, for example a prosecution would not be continued if it would risk jeopardising existing national investigations. Of course this would require a redesign of Eurojust to account for the criticisms raised above, not to mention a single catalogue of offence over which Eurojust would be able to mandate such an investigation.

Peers raises the possibility of strengthening OLAF, the Community anti-fraud body, in order to provide yet another alternative, particularly as the current proposals for the EPP focus on the combating of financial crimes. I will consider this argument in more detail in the next chapter,[211] but for now suffice as to say, that it would be a preferable alternative to establishing a fully fledged EU level prosecutor, but could not happen without significant redesign of OLAF, in particular the securing of fundamental rights protections and independence of the body from the Commission.

The creation of another centralised European body is of concern for another, potentially more serious reason. Every new European body is a new body beyond the automatic reach of the protection afforded by the

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[209] Peers, S. *EU Justice and Home Affairs Law* (OUP 2007), 491.

[210] Case 68/88 *Commission v Greece* [1989] E.C.R. 2965

[211] Chapter 4.3

European Court of Human Rights. If a solution could be found that allowed an instruction from a European body to trigger an investigation domestically this would be much more satisfactory as the prosecution would be conducted by a national authority entirely within the remit of the ECHR. While the model currently proposed would see the EPP conduct prosecutions in the Member State courts, the harmonization of evidential rules and criminal law which would be required would legally make much of the prosecution a matter of European law, meaning that potentially, the Convention would apply to some aspects of the proceedings and not others. Without EU accession to the ECHR, centralisation of enforcement powers, particularly under the third pillar has gone about as far as is possible without posing a very serious risk of being in breach of the Convention.

The most important point is, however, that the necessity of the Prosecutor has not been definitively proven, by the Commission, or by anyone else. It is far from certain that the same effect could not be achieved through minimal harmonization, and coordination, through Eurojust, of the national prosecutors. According to the Commission's 2003 follow up report to the 2001 Green Paper, several Member States objected on the grounds of subsidiarity and proportionality, and it is very difficult not to agree, in particular, with the latter point as the same result could be achieved through greater coordination of national prosecutors.[212] Even if it can be demonstrated that the Member States acting as one could better address this problem than each State acting alone, the solution of a supranational office with direct access to the Member State legal systems with the power to prosecute individuals within those systems is disproportionate to the aim pursued to centralise this degree of invasive power.

3.7 Conclusions

At the outset, it was stated that this chapter would seek to ascertain the way in which power had been transferred to European agencies by the Member States within the structure of the third pillar, and judge the success or failure of those transfers. The examination of the the third pillar executive agencies demonstrates that there seems to be no unitary model for delegation. In fact the two models presented by Europol and Eurojust are quite different. At least a strong argument can be made that Europol, as it was constituted, was not in fact 'European' at all. Why does this matter? As with all things legal, the important question is one of control. Europol, a construct which relies much more strongly on national underpinnings is far better supervised and controlled than Eurojust which is a construct purely of European law, because of the role of national structures in its oversight.

The role of national Parliaments in scrutinising the original legislation for the adoption of the Europol Convention was, to the present author at least, key in lending some form of legitimacy, a clear demonstration of democratic accountability. The adoption of the Europol Decision indicates that this form of oversight has now lost currency. While this is not a call for direct democratic control over operational policing, democratic control over granting powers to police agencies is absolutely essential, and any move away from national Parliamentary scrutiny categorically must include a move towards a full co-legislative role for the European Parliament. While this has been done to an extent, with the adoption of

[212] Follow up report on Green Paper on the criminal law protection of the financial interests of the Community and the Establishment of a European Prosecutor, COM (2003) 128 final, 19th March 2003, 6.

the new budgetary arrangements, the decision of the Council to adopt the new Europol Decision, and indeed the new Eurojust Decision, on the eve of the presumed entry into force of the Lisbon Treaty is at best liable to raise questions of cynicism.[213]

The scope for agency loss and individual rights violations is much greater with Eurojust because of its more European nature and the lack of external oversight of its activities. It is disappointing that the Council has not taken more care in the initial contract design to prevent both of these possibilities and it is very much to be hoped, being as the Commission is committed to the idea, that before any significant steps are taken towards establishing the European Public Prosecutor that Eurojust is significantly reformed.

This Chapter has identified that internal administrative controls are not enough. There also has to be strong judicial control and democratic accountability. While the majority of the coercive actions are conducted by national authorities at national level the role of national courts is sufficient for securing the judicial accountability of the use of executive power. However, any move to extend the role of the European agencies themselves, must be twinned with an increase in European level judicial control.

[213] Mitsilegas, V. "The Third Wave of Third Pillar Law: Which Way Now for EU Criminal Justice?" (2009) 34(4) European Law Review 523, 549.

Chapter 4

Criminal Law Enforcement and the Community Pillar

4.1 Introduction

This chapter will build on the analysis in Chapter 3 by analysing the criminal law powers of the executive in the first pillar. It will consider three specific examples of executive power: the powers enjoyed by the Commission to enforce competition law, the role of OLAF, the Commission's independent anti-fraud unit and the role of FRONTEX, the new European borders agency. These three bodies have been selected for examination for both substantive and structural reasons. Substantively, they all exercise a role in the criminal law sphere. OLAF investigate fraud, FRONTEX has a role in securing the borders of the Union against unlawful incursions by unlawful migrants, or by smugglers of contraband. The enforcement of competition rules has taken on a criminal character and this chapter will attempt to demonstrate how. It will also address the weaknesses in the enforcement structure which flow from this development.

Structurally these bodies are all different. Competition enforcement is the direct work of the Commission. DG Competition is responsible for the enforcement of the law, and there is no pretence at independence from the political executive in the exercise of that function. OLAF is a General Services Directorate General, in other words structurally a part of the Commission, which may also form the target of an investigation. However, the various legislative provisions which establish OLAF are

aimed at creating a functional independence. In other words, OLAF can be seen as representing the Commission, acting at arm's length of itself. FRONTEX is different again, being much more similar to the non-majoritarian agencies we have already discussed in the third pillar. By examining the structure and powers of these bodies, this chapter will demonstrate that they are significantly more powerful, in a coercive, executive sense at least than the agencies we considered in Chapter Three. Moreover, the powers enjoyed by them are significantly more invasive, and as such are potentially much more injurious to the fundamental rights of individuals.

One would expect, given the above, and given that Communitarization of the third pillar is so widely perceived as a solution to the problems of the third pillar, that the accountability strategies would not only be better than those in the third pillar, but exponentially so. However, this chapter will demonstrate that they are at best, the same, and in some cases significantly less well developed. It will therefore add further weight to the central argument of the thesis that merely exposing the criminal law regime to the mechanisms already established under the first pillar will not necessarily be enough to solve all of the problem in the third pillar system. Specific thought must be given to whether the accountability strategies in the first pillar are strong enough to bear the weight of criminal law, and if not, then their reform must be a priority in the very near future.

4.2 Competition Enforcement by the European Community

The single market, based on the free movement of goods, persons, services and capital, remains, arguably, the primary function of the European Union, regulated through the competences in the first, EC pillar of the Union. In the context, free means unhindered movement of factors

of production, but in the context of a market, it has a additional and particular meaning. Free competition is one of the cornerstones of the market as an idea, and in order to ensure an effective, functioning and, above all, free market, distortions of competition must be removed. In the European Union, that responsibility falls to the Commission and, since the introduction of Regulation 1/2003,[1] the National Competition Authorities (NCAs) which, together with the Commission form the European Competition Network (ECN). This part of the chapter will consider the criminal nature of such enforcement activities and the way in which the Commission exercises their responsibility.

That a supranational body has a role in competition enforcement is not only defensible, but, in the light of the aims of the European project, it is probably necessary. When the underlying goal is to create a single free and open market, then competition rules are an essential component of that goal. Once the market to be regulated becomes international in scope then national authorities are no longer best placed to supervise the operation of the market. As the supranational body charged explicitly with the maintenance of the internal market,[2] the Commission is best placed to monitor its operation, and as such, distortions in it. While there is certainly scope to question the way in which the Commission exercises the powers delegated to it to prevent distortions in competition, there is a strong case for that delegation.

The Commission is essentially empowered to regulate two types of anti-competitive practice by private undertakings, anti-competitive agreements

[1] Council Regulation No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1, 4th January 2003.

[2] Article 211 EC.

and the abuse of dominant market positions. Article 81 EC[3] prohibits agreements between undertakings which would lead to the distortion of cross-border trade in the economic sector in which they operate. In particular it prohibits agreements which, among other things, fix prices or other trading conditions, limit production, technical development or investment, share sources of supply or create competitive disadvantages by agreeing to treat competing undertakings differently.[4] Article 81 EC stipulates that any such agreement would be considered automatically void,[5] except insofar as the authorities declare the Article would be inapplicable to it because it results in beneficial economic side-effects.[6] Under the previous regime, Regulation 17/62[7] the power to issue such a declaration was reserved to the Commission, but under the decentralized regime introduced by Regulation 1/2003 that power is now enjoyed equally by the Commission and the NCAs.

Article 82 EC on the other hand prohibits the abuse of a dominant market position. It does not prohibit the existence of monopolistic undertakings, or of oligopolistic undertakings, it merely prohibits those undertakings from using those dominant positions to undermine the fair operation of the market. Article 82 EC is not exhaustive, but gives an illustrative list of what may be considered abusive. Such practices include directly or indirectly fixing prices, creating other unfair trading conditions or limiting production or innovation.

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[3] The Commission also has a role in managing the role of the State in the market but these powers, contained in Articles 86-89 EC, are beyond the scope of this thesis.

[4] Article 81(1) EC.

[5] Article 81(2) EC.

[6] Article 81(3) EC.

[7] Council Regulation First Regulation Implementing Articles 85 and 86 of the Treaty [1962] OJ 13, 6th February 1962.

With a massive enlargement looming, to create a Union of 25 Member States in May 2004, Regulation 1/2003 entered into force and decentralised the remainder of the enforcement of Community competition law. This created a new system of enforcement allowing both NCAs and the Commission to take enforcement action under the EC Treaty. Enlargement and the reduction of the Commission's workload was an express reason given in the 1999 White Paper on Modernisation[8], and decentralisation allows for the Commission to focus its efforts on the most egregious breaches. The Commission also has the power to step in and assume jurisdiction from NCAs at any point.[9] The work of NCAs is interesting in and of itself, but this thesis examines the supranational criminal justice regime of the EU, and as such this chapter will focus on the powers and regulation of the Union authorities.

There is extensive case law on the interpretation and application of Articles 81 and 82 EC, and a thorough examination of it is beyond the scope of this thesis.[10] For our purposes it is sufficient to note that both Articles have been interpreted broadly, leaving a considerable degree of discretion to the implementing authorities. The broadly universal application of the competition rules has been underlined by the ECJ. The Treaty itself is not particularly helpful, stating only that the provisions apply to "undertakings". The Court has however adopted a broad interpretation, stating that 'undertaking' *"encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed."*[11] That universality is further reinforced by the

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[8] Commission White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty [1999] OJ C 132/1, 12th May 1999.

[9] Article 11(7), Regulation 1/2003.

[10] For further discussion of the case law see Iversen, B. *et al Regulating Competition in the EU* (Djeof Publishing, Denmark, 2008).

[11] Case C-41/90 *Höfner v Macrotron* [1991] E.C.R. I-1979, para 21.

broad material application of the competition provisions, with the ECJ underlining that the provisions can be applied in principle to any sector of the economy.[12]

The broad, indeed some have argued universal, nature of Articles 81 and 82 EC, twinned with the scale of the sanctions which the Commission is capable of deploying has led to the question of whether competition enforcement should be viewed as criminal law. In enforcement proceedings, the Commission not only has the right to initiate an investigation of an undertaking, but also to decide their guilt and impose sanctions if the undertaking is found in breach.[13] The more general question of when a legal rule becomes criminal rather than administrative is a vexed one. It is not merely a question of labels. If a transgression is labelled criminal rather than administrative, any proceedings relating to the alleged transgression will automatically carry a number of additional safeguards.

The distinction between criminal and administrative proceedings has long been an area of controversy, one which has significant implications for the defendants in proceedings. Clearly, the Commission and the Community judiciary is committed to the idea that the enforcement of competition law is merely an administrative function. It is not difficult to understand this attitude on the part of the Commission; any acknowledgement on their part of a criminal characteristic to competition enforcement would more than likely result in their having to surrender their role in assessing guilt, and in assessing the level of fine appropriate to the breach. What is more disturbing is the intransigence of the ECJ on this issue. It is submitted that this is an example of form winning over substance. Ostensibly, the ECJ is

[12] Case C-209-213/84 *Ministère Public v Asjes* [1986] E.C.R. 1425.

[13] This will be explored further *below*.

arguing that the mere fact that the exercise of these functions is the responsibility solely of the executive means that it must be an administrative issue.[14] This is a problematic example of circular logic. This reluctance to categorise a given proceeding as criminal could become a much more significant cause for concern when the waters are muddied further by the introduction of a genuine criminal competence into the field of Community law by the TFEU. If competition law enforcement is subsequently recognised as a criminal proceeding, it is not clear that the competition law basis alone would be the appropriate basis for adoption of subsequent legislation.

In determining the scope of the additional protections in Article 6 ECHR, the European Court of Human Rights (ECtHR) has explicitly stated that the label which the competent legislature applies to the transgression, while relevant, will not be considered definitive.[15] They have also held that the nature of the transgression in question, and the severity of the penalty will be of greater relevance to determining whether it is a criminal transgression or not.[16] For example, the ECtHR has held that the imposition of an "administrative fine" for transgressions of import and export laws can amount to a criminal charge.[17] In *Stenuit*[18] the European Commission on Human Rights, one of the forerunning bodies to the current formation of the ECtHR, held that the application of French competition law possessed a criminal aspect. This was due to the deterrent

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[14] See Drabek, L. "A Fair Hearing before EC Institutions" (2003) 9(4) European Review of Private Law 529, 533; and Andreangeli, A. *EU Competition Enforcement and Human Rights* (Edward Elgar Publishing, Cheltenham, 2009).

[15] App. No. 5100/71 *Engel v Netherlands* (1996) 1 EHRR 647, para 81.

[16] App. No. 5100/71 *Engel v Netherlands* (1996) 1 EHRR 647, para 82. See also Benjamin, V. "The Application of EC Competition Law and the European Convention on Human Rights" [2006] European Competition Law Review 693, 695.

[17] App. No. 18996/91 *Garyfallou AEBE v Greece* (1999) 28 EHRR 244. See also App. No. 15523/89 *Schmautzer v Austria* (1996) 21 EHRR 511.

[18] App. No. 11598/85 *Stenuit v France* (1992) 14 EHRR 509.

nature of the penalties provided for, and the universality of the application of the prohibitions in question. Andreangeli persuasively argues that this must necessarily mean that the ECHR must apply to the enforcement of Articles 81 and 82 EC which provide for:

> *"the detection and sanction of violations of norms of general application adopted in the general interest."*[19]

She goes on to observe that the penalties in *Stenuit* amounted to 5% of the undertaking's revenue, whereas under Community law the penalty can be as much as 10% of the undertaking's worldwide turnover, a value she describes as both a deterrent but also as punitive.[20] In the light of the above, it would seem difficult to sustain an argument that an allegation of an infringement under Articles 81 or 82 EC does not constitute a criminal charge within the meaning of Article 6 ECHR. Moreover there is a current of opinion amongst many of the Advocate Generals to the ECJ, albeit largely overlooked by the Community Courts, that it should so be treated.[21]

One significant fact which marks competition enforcement out as a criminal procedure is the power of the Commission to conduct a hearing, the result of which can be a very substantial fine, the record now standing at more than one billion Euros.[22] Extending Andreangeli's logic then, this

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[19] Andreangeli, A. *EU Competition Enforcement and Human Rights* (Edward Elgar Publishing, Cheltenham, 2009), 26.

[20] Andreangeli, A. *EU Competition Enforcement and Human Rights* (Edward Elgar Publishing, Cheltenham, 2009), 25-26, see also Riley, A. *"The ECHR Implications of the Investigation Provisions of the Draft Competition Regulation"*, (2002) 51(1) International and Comparative Law Quarterly 55, at 66 *et seq.*

[21] See Opinion of AG Leger Case C-185/95 P *Baustahlgewebe v Commission* [1998] E.C.R. I-8417; Opinion of AG Vesterdorf Case T-7/89 *Hurcules Chemicals v Commission* [1991] E.C.R. II-1711; Opinion of AG Kokott Case C-105/04 P *Netherlandse Feteratieve Vereigning voor de Goothandel op Elektrotechnisch Gebied v Commission* [2006] E.C.R. I-8725.

[22] Commission Press Release "Antitrust: Commission fines car glass producers €1.3 billion for market sharing cartel." IP/08/1685, 12th November 2008.

suggests that the Commission's competition enforcement regime has the characteristics of criminal law enforcement and as such falls within the scope of Article 6 ECHR as it defined by the ECtHR.

While there seems to be a strong groundswell of academic opinion that competition enforcement procedures ought to be considered criminal, it is worth noting that there has been strong support for the ECJs reasoning from other quarters. Advocate General Geelhoed in Case C-301/04 P *Commission v SGL Carbon*[23] aggressively defended the ECJ case law in the field, making a clear distinction between competition proceedings and "'Classical' criminal procedures".

This thesis will proceed on the assumption that the enforcement of competition law is, at least in part, criminal in nature, it is, however, contended that whether it is or not, competition enforcement is relevant to the overall contention of this chapter that the vesting of coercive executive powers in the Community, whether administrative or criminal, is not necessarily a solution to the deficiencies in the European Criminal Law regime.

4.2.1 Structure of Competition Law Enforcement by the Commission

As we have seen above, the enforcement of competition law is expressly the responsibility of the Commission, specifically the Directorate General for Competition, in co-operation with NCAs. The actual exercise of the Commission's powers is the responsibility of Commission civil servants. The political responsibility, along with the power to set both political and practical priorities belong to the Competition Commissioner. The accountability of individual Commissioners is a familiar topic, and will be

[23] Case C-301/04 P Commission v SGL Carbon [2006] ECR I-5915

discussed in more detail below, but for the present purposes it is important to note only that the Commissioner is responsible politically to the President of the Commission. The organisation of DG Competition, and the allocation of responsibility within it, is entirely in the gift of the Commissioner and the Director General.

The structure of European competition enforcement has been complicated by the introduction of Regulation 1/2003, and the decentralisation of the enforcement powers. Article 11(6) of Regulation 1/2003 clearly establishes a hierarchical relationship between the Commission and the NCAs whereby NCAs are relieved of their competence to apply European competition rules in domestic law when the Commission initiates proceedings. The Commission Notice on cooperation within the network of competition authorities seeks further to clarify that division of competence.[24] The main aim is that each complaint should be investigated and where possible concluded by the authority *"best placed"* to deal with it.[25] There is an initial rebuttable presumption that the authority which first receives the complaint will deal with it, and the reallocation of a complaint would only be envisaged where one or more authorities are better placed to conduct the investigation.[26]

Where reallocation is found to be necessary it should be conducted as quickly as possible with an assumption that the complaint be reallocated to one single authority if possible.[27] The Notice sets out three criteria for

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[24] Commission Notice on cooperation within the Network of Competition Authorities OJ [2004] C 101/43, 27th April 2004.

[25] Commission Notice on cooperation within the Network of Competition Authorities OJ [2004] C 101/43, 27th April 2004, para 6.

[26] Commission Notice on cooperation within the Network of Competition Authorities OJ [2004] C 101/43, 27th April 2004, para 6.

[27] Commission Notice on cooperation within the Network of Competition Authorities OJ [2004] C 101/43, 27th April 2004, para 7.

judging which NCA is best placed and they are territorial. The criteria are defined as cumulative and are that:

> *"1. the agreement or practice has substantial direct actual or foreseeable effects on competition within its territory, is implemented within or originates from its territory;*
>
> *2. the authority is able to effectively bring to an end the entire infringement, i.e. it can adopt a cease-and-desist order the effect of which will be sufficient to bring an end to the infringement and it can, where appropriate, sanction the infringement adequately;*
>
> *3. it can gather, possibly with the assistance of other authorities, the evidence required to prove the infringement."*[28]

The Notice allows for parallel action between two or three authorities where all of them would be considered well placed to address the complaint,[29] but specifically requires that where multiple authorities are investigating one complaint, they should seek to coordinate their action as far as is possible by designating one of their number the *"lead authority"*.[30]

The Commission is well placed to address a complaint where the complaint suggests that the breach affects more than three Member States, or where the breach is linked to other Community measures which the

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[28] Commission Notice on cooperation within the Network of Competition Authorities OJ [2004] C 101/43, 27th April 2004, para 8.

[29] Commission Notice on cooperation within the Network of Competition Authorities OJ [2004] C 101/43, 27th April 2004, para 12.

[30] Commission Notice on cooperation within the Network of Competition Authorities OJ [2004] C 101/43, 27th April 2004, para 13.

Commission is charged with enforcing, or where a Commission decision may be necessary to further shape competition law.[31] In general then, direct Commission action is reserved for the most egregious breaches with significant cross-border effects.

4.2.2 Powers

If the proceedings before the Commission amount to a criminal charge, then the investigations prior to those proceedings must necessarily amount to a criminal investigation. As such, this section will consider the nature of the investigative powers at the Commission's disposal. That said, an exhaustive examination of the powers available to DG Competition is beyond the scope of this thesis.[32] An examination of a cross section of those powers will demonstrate the invasive nature of the investigative powers at the Commission's disposal, and is necessary for the subsequent analysis, to be conducted *below,* as to the adequacy of the supervisory structures. In particular this section will consider the power to request information, and the so-called "dawn raid" powers, which allow the Commission to inspect both business and private premises without prior notice.

In issuing requests for information, the Commission may act in one of two ways, either by a simple request, or by decision.[33] If it acts by decision it may impose a penalty for failure to comply.[34] That the choice of act is entirely discretionary is interesting. Under the previous regime governed by Regulation 17/62 this was a two stage process with a requirement that

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[31] Commission Notice on cooperation within the Network of Competition Authorities OJ [2004] C 101/43, 27th April 2004, paras 14 and 15.

[32] See further Iversen, B. *et al Regulating Competition in the EU* (Djeof Publishing, Denmark, 2008).

[33] Article 18(1), Regulation 1/2003.

[34] Article 18(3), Regulation 1/2003.

the more heavy handed decision bearing possible penalties only be issued where the Commission had attempted, and failed, to gain access by request. The discretion as to which method to choose implies a strengthening of the Commission's discretion to judge the seriousness of the situation, and the likelihood of non-compliance by the undertaking in question.

The question of the extent to which one can be compelled to reveal information to an executive agency under the remit of the Community is of interest, particularly if there is the potential in the future for a dedicated agency to conduct prosecutions or criminal investigations at the European level, such as a potential future European Public Prosecutor.[35] The ECJ had the opportunity to clarify the extent to which an undertaking could be required to incriminate him or herself in response to request for information from the Commission in Case 374/87 *Orkem*.[36] It seems clear from the Court's ruling that there is no absolute rule in Community law against self incrimination, although they do make a number of interesting observations. The Court acknowledged the widespread existence of a right against self incrimination in Member State law, but suggested that right was only generally available to natural persons charged with a criminal offence and subject to a criminal investigation.[37] Of course it must be noted at this point that the Court is thereby impliedly rejecting the proposition that competition enforcement is a criminal proceeding. Not only that, but the Court briefly considered the application of the ECHR in this context and dismissed the suggestion that a right not to incriminate oneself in competition proceedings could be derived either from the text of

[35] See Chapter Two, 2.6.

[36] Case 374/87 *Orkem v Commission* [1989] E.C.R. 3283

[37] Case 374/87 *Orkem v Commission* [1989] E.C.R. 3283, para 29.

Article 6, or from the case law of the ECHR.[38] The ECJ did however acknowledge a limited right against self incrimination. While an undertaking cannot refuse to hand over documents or provide answers which may be used to establish the case against them, they are entitled to refuse to answer a question or provide an answer which would constitute an admission of guilt.[39] The decision in Case 374/87 *Orkem* related to the regime under Regulation 17/62, but has been codified by Recital 23 of Regulation 1/2003. Although for a time the ECJ did appear to be moving towards a less restrictive approach to applying this protection,[40] they have more recently reverted to their stance in Case 374/87 *Orkem.*[41]

The most potent tool at the Commission's disposal is the power to conduct snap inspections at the premises of a suspected undertaking. The Commission adopts a decision which empowers its officials to *"enter any premises, land and means of transport of undertakings and associations of undertakings".*[42] The Commission must consult the NCA of the Member State concerned before adopting such a decision. Where such a decision has been adopted, undertakings are required to comply. The decision must specify the purpose, subject matter and date of the inspection, along with the penalties for failure to comply. It shall also make it clear that the undertaking shall be able to seek review of that decision before the ECJ.[43] The Commission officials may be accompanied, at the request of either the Commission or the NCA, by national officials who will take an active role

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[38] Case 374/87 *Orkem v Commission* [1989] E.C.R. 3283, para 30.

[39] Case 374/87 *Orkem v Commission* [1989] E.C.R. 3283, para 34.

[40] See *inter alia* Case C-238/99 P *Limburgse Vinyl* [2002] E.C.R. I-8375.

[41] Case C-301/04 P *SGL Carbon AG v Commission of the European Communities* [2006] E.C.R. I-5977. See Berghe, P, Dawes, A. "Little pig, little pig, let me come in: an evaluation of the European Commission's powers of inspection in competition cases" [2009] European Competition Law Review 407, 419.

[42] Article 20(2)(a), Regulation 1/2003.

[43] Article 20(4), Regulation 1/2003.

in the inspection.[44] The NCA officials will enjoy the same powers as Commission officials. Having entered the specified premises, the officials are empowered to study or copy the books or any other records related to the business, regardless of the form in which they are stored.[45] They are further empowered to seal any premises, books or records for the period of time and to the extent necessary to allow them to conduct the inspection properly.[46] The officials are then entitled to ask questions of staff of the undertaking or association of undertakings being inspected in order to gather information relating to the books and records inspected, and to record those interviews.[47] Article 4 of Regulation 773/2004 relating to the conduct of proceedings by the Commission,[48] further clarifies the powers of the Commission officials when conducting such interviews. The interviews may be recorded in any form, and a copy of those recordings must be made available to the undertaking being inspected following the inspection. Where the individual interviewed by Commission officials was not authorised to speak on behalf of the undertaking being investigated, the Commission shall set a time period for the undertaking to issue clarifications or corrections, which must be added to the recording of the interview. When beginning an inspection the Commission officials must produce written authorisation which specifies the purpose of the inspection and sets out the penalties which may be levied if information given to the inspectors is incomplete, false or misleading. Those penalties are set out by Article 23(1) of Regulation 1/2003, and may not exceed 1% of the total turnover of the undertaking in question in the previous business year. Article 23(1)(5) makes it expressly clear that the decision to impose

[44] Article 20(5), Regulation 1/2003.

[45] Article 20(2)(b) and (c), Regulation 1/2003.

[46] Article 20(2) (d), Regulation 1/2003.

[47] Article 20(2)(e), Regulation 1/2003.

[48] Commission Regulation No 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty [2004] OJ L 123/18, 7th April 2004.

the fine *"shall not be of a criminal law nature"*. Clearly, therefore, the intention is that these fines be viewed as administrative. It is possible to impose fines which are of an administrative nature and beyond the scope of criminal law, however, as we have seen, it is not certain that merely applying the label *"not of criminal nature"* is entirely sufficient to prevent the classification of a penalty as criminal in nature by the ECtHR for the purposes of Article 6 ECHR.[49]

Where an inspection is resisted, then the Member State must provide the Commission with all available assistance, including the assistance of the police or an equivalent, to allow the inspection to take place.[50] Where such assistance would require authorisation from a judicial body, that authorisation must be sought, and may be sought in advance as a precautionary measure.[51] Where a national court is required to grant such authorisation, they are entitled to review the authenticity of the original Commission decision, to examine whether the *"coercive measures envisaged"* are not arbitrary or excessive. To determine this, they may ask the Commission to explain its reasons for suspecting an infringement of Articles 81 or 82 EC, and may enquire as to the seriousness of the suspected infringement, and as to the suspect role of the undertaking or associations of undertakings in question. However, the national court may not call into question the necessity of the inspection, nor may it insist on seeing the information in the Commission's files. The legality of the initial decision authorising the inspection may only be reviewed by the Court of Justice.[52]

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[49] Benjamin, V. "The Application of EC Competition Law and the European Convention on Human Rights." [2006] European Competition Law Review 693, 695.

[50] Article 20(6), Regulation 1/2003.

[51] Article 20(7), Regulation 1/2003.

[52] Standing would not be an issue as the decision would be individually addressed to the undertaking concerned, see Article 230 EC.

Not only this, but the Commission may, where it has a *"reasonable suspicion"* that relevant books or records are held at different premises, including private homes, and where the inspection is relevant to establishing a serious breach of Articles 81 and 82 EC, inspect those additional premises.[53] When conducting those inspections the officials of the Commission will enjoy the powers set out in Article 20 *mutatis mutandis.*[54] The Commission must issue a decision authorising such an inspection, which cannot be executed without the subsequent authorisation of a national judicial authority. Article 21(3) reproduces the conditions found in relation to a judicial authorisation sought under Article 20 of Regulation 1/2003.

There are some serious definitional weaknesses with the criteria for authorising an inspection under Regulation 1/2003. The Regulation does not define *"reasonable suspicion"* although the questions which the national court may consider are limited by the Regulation as follows:

> *"The national judicial authority shall ensure that the Commission decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard in particular to the seriousness of the suspected infringement, to the importance of the evidence sought, to the involvement of the undertaking concerned and to the reasonable likelihood that business books and records relating to the subject matter of the inspection are kept in the premises for which the authorisation is requested. The national judicial authority may ask the Commission, directly or through the Member State competition authority, for detailed explanations on*

[53] Article 21, Regulation 1/2003.

[54] Article 20(5) and (6), Regulation 1/2003 will also apply *mutatis mutandis.*

those elements which are necessary to allow its control of the proportionality of the coercive measures envisaged.

However, the national judicial authority may not call into question the necessity for the inspection nor demand that it be provided with information in the Commission's file. The lawfulness of the Commission decision shall be subject to review only by the Court of Justice."[55]

The question of whether the Commission's suspicions are reasonable seems then to rest with the Court of Justice. National courts are allowed only to consider the proposed actions to guard against excess or arbitrariness, being expressly precluded from considering their necessity, which would logically seem to include whether the Commission's suspicions are indeed reasonable. However, what seems to be clear is that elements of the inspection regime are governed by national courts, and others by the ECJ. This leads to the less than entirely satisfactory situation that two sets of rights protections operate in parallel, one national and one supranational.

What must be clear by this stage is that we are dealing with serious powers to conduct invasive inspections of private premises and demand information. Regulation 1/2003 itself described the powers as *"coercive"*, a sentiment which has been echoed by the ECJ.[56] The significance of these powers is not limited to the sanctions imposed if any transgression is discovered. Undertakings suffer merely as a result of an inspection. When news of a Commission inspection reaches the markets, the value of that

[55] Article 21(3), Regulation 1/2003.

[56] Articles 20 and 21, Regulation 1/2003. See Case C-94/00 *Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes* [2002] E.C.R. I-9011, para 40.

undertaking typically falls by an average of 2%.[57] However, unless the undertaking in questions resists and judicial authorisation is sought in national law, Community law does not stipulate a requirement as to the levels of suspicion necessary to trigger an inspection. A *prima facie* reading Regulation 1/2003 seems to imply that merely being involved in the sector of the economy in which the Commission can demonstrate concern over uncompetitive practices will suffice to justify an inspection. It is far from clear what inferences may be drawn by the Commission from an undertaking failing to cooperate,[58] and the discretion of the Commission to announce their inspection by a decision, which could include financial penalties for failure to comply, means that resisting an inspection could prove an extremely dangerous strategy, regardless of the actual guilt of the undertaking concerned.

The actions of Commission officials in relation to Articles 19 and 20 of Regulation 1/2003 would seem to be at least within the scope of Article 8 of the ECHR, the right to maintain private and family life and private correspondence. The ECJ has been confronted on a number of occasions with the question as to whether snap inspections constitute a violation of Article 8, and the ECJ has repeatedly said no. In Joined Cases C-46/87 and 227/88 *Hoechst*[59] the Court stuck to the same type of reasoning that appeared to have served them well in Case 374/87 *Orkem,*[60] holding that the rights under the ECHR applied only to natural persons, not commercial

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[57] Motta, M. "On Cartel Deterrence and Fines in the European Union." [2008] European Competition Law Review 209, 213.

[58] Although, based on the fact that the ECHR does not necessarily preclude drawing such inferences from a failure to permit an inspection, the ability of the Commission to draw negative inferences would appear to be possible; see *inter alia* App No. 18731/91 *Murray* v *United Kingdom* (1996) 22 EHRR 29; App. No. 35718/97 *Condron* v *United Kingdom* (2001) 31 EHRR 1 and Redmayne, M. "Rethinking the Privilege against Self-incrimination" (2007) 27(2) Oxford Journal of Legal Studies 209, 214.

[59] Joined Cases C-46/87 and 227/88 *Hoechst v Commission* [1989] E.C.R. 1989.

[60] Case 374/87 *Orkem v Commission* [1989] E.C.R. 3283, para 29.

enterprises. The ECtHR has since ruled in *Niemitz*[61] that Article 8 ECHR can apply to business activities and premises, but the Community courts appeared initially to hold to their former position.[62] Since then, Advocate General Mischo in Case C-94/00 *Roquette Frères*[63] suggested that while Article 8 ECHR may in principle be engaged, the way in which the rules were applied would meet with the criteria for derogation from Article 8 found in Article 8(2) ECHR based on pressing social need.[64] The Court of Justice addressed the point in its ruling holding that while the ECtHR had clarified that Article 8 applied in the context of business premises, the protection was likely to be far less extensive, thus attempting to marry *Hoechst* with the case law of the ECtHR.[65]

What is yet to be seen however, is the extent to which the ECJ would modify its stance in relation to inspections in private premises conducted in accordance with Article 21 of Regulation 1/2003. Not only this, but as authorisation from a national court is required by Article 21 before such an inspection can be conducted, there is a question as to the nature of the decision made by the national court. It has been established that in certain circumstances, national courts may be co-opted into the Community judicial architecture when applying Community law.[66] However, Article

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[61] *App. No. 13710/88 Niemietz v Germany (1993) 16 EHRR 97*; see also App. No. 10828/84 *Funke v France* (1993) 16 EHRR 297.

[62] See for example the CFI in Joined Cases T-305-307, 318, 325, 328-329 and 335/94 *Limburgse Vinyl Maatschappij v Commission* [1999] E.C.R. II-931.

[63] Case C-94/00 *Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes* [2002] E.C.R. I-9011.

[64] Case C-94/00 *Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes* [2002] E.C.R. I-9011, paras 27-29.

[65] Opinion of AG Mischo Case C-94/00 *Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes* [2002] E.C.R. I-9011, para 38.

[66] On the position of national courts in the Community architecture see Report of the Court of Justice on Certain Aspects of the Application of the Treaty on European Union (Luxembourg, May 1995), available at http://europa.eu.int/en/agenda/igc-home/eu-doc/justice/cj_rep.html, last accessed 20th December 2009.

21 seems to imply that the assessment of the legality of the inspection is a matter of national law. If this is the case, then the national court itself would be free to apply the ECHR in accordance with their national procedures. Even if the national courts are Community judicial bodies for the purpose of authorizing an inspection under Article 21 of Regulation 1/2003, there will be significantly increased pressure on the ECJ to reconsider the implications of Article 8 ECHR, particularly where the inspection in question is of a private dwelling.[67]

4.2.3 Accountability

We have seen above that in many ways the powers enjoyed by the Commission when enforcing the law on competition in the first pillar are significantly more invasive than those powers exercised under the third, explored in Chapter Three. We now have to consider the ways in which the exercise of these powers are supervised and monitored in the first pillar. Particularly in the field of competition law enforcement, possibly more so than the others to be discussed, we are dealing with a classical expression of the interinstitutional balance. It must be remembered that there is no attempt whatsoever to disestablish the enforcement of competition law from the Commission itself, and as such we are dealing with essentially the same system of interinstitutional checks and balances established to deal with the majority of other exercises of power under the first pillar. However, as well trodden as the issue of the interinstitutional balance may be, the specific context makes it worthy of further consideration, particularly, the efficacy of the traditional interinstitutional balance as a check on the exercise of coercive executive powers, be they

[67] See: Benjamin, V. "The Application of EC Competition Law and the European Convention on Human Rights" [2006] European Competition Law Review 693, 698.

criminal, quasi-criminal or administrative by the Commission as an executive body.

We saw in the previous chapter that the legislative process itself can function as a control against agency loss.[68] The contracts both primarily, in the form of the Treaty, and secondarily, in the form of Regulation 1/2003, devolve a significant degree of discretion onto the Commission to adopt implementing rules. One obvious example is the power the Commission enjoys under Article 86(3) EC to adopt legislation acting alone. In this case, the legislation in question directly concerns the relationship between the Member States and undertakings rather than the Commission unilaterally adopting legislation covering their own relationship with suspected undertakings, but the principle is still disconcerting in the context, giving considerable discretion to the Commission alone. Of more interest is Article 33 of Regulation 1/2003 which gives the Commission the right to adopt measures for the implementation of the Regulation, including measures which regulate the conduct of the hearings.

The delegation of such wide discretion to unilaterally adopt measures in a field in which enforcement proceedings may be characterised as criminal is at best troubling. It does something to belie the notion that readoption of all third pillar measures under the first pillar would automatically improve the democratic credentials of those measures because the level of discretion accorded to the Commission in this respect is much greater than that accorded to the bodies exercising similar functions under the third pillar, Europol and Eurojust.[69] However, the most important point to note

[68] Chapter Two, 2.1.2. See Thatcher, M, Stone Sweet, A. "Theory and Practice of Delegation to Non-Majoritarian Institutions" (2002) 25(1) West European Politics 1.

[69] See Chapter Three, 3.2 and 3.4.

in this regard is the legal basis used in regulating competition. Article 83 EC provides for the adoption of regulations or directives by the Council following consultation of the Parliament. This is of course the same legislative procedure as provided for in the third pillar by Articles 34 and 39 TEU. It would appear that democratic supervision of the Commission's activities in regard to competition enforcement is therefore highly limited both *ex post* and *ex ante* the delegation of powers. The regime looks at least as questionable as that which governs Europol and Eurojust, and it must be recalled that the powers of the Commission are significantly more extensive and invasive. Neither are third pillar agencies entitled to adopt secondary legislation governing their own actions with no meaningful input from the democratic bodies of the Union, nor do they have an unqualified right to propose legislation to enhance or amend their powers.

This wide range of discretionary powers which are delegated to the Commission must be a cause for concern. If one can demonstrate that competition enforcement is a criminal procedure, then there must be a debate about the constitutional powers of the Commission to propose and adopt the laws which govern the way in which the Commission may conduct its own investigations. Moreover it must throw serious doubt onto the nature of depillarization as a solution to the problems of criminal law at Union level if this process results in an increase in the scope of the discretion accorded to executive agencies with powers over criminal investigations in the EU.

Beyond its role as a legislator, as in most systems of government, the European Parliament has a responsibility to call the executive to account. The power of the European Parliament to call the Commission to account

has been well documented,[70] but in the context is worth revisiting. The Parliament has three principal powers in relation to the Commission; a role in its appointment,[71] a right to receive answers to questions,[72] and the power to adopt a censure motion.[73]

As we saw in Chapter Three, selection and appointment of officials of any agent can act as an effective *ex ante* control to prevent agency loss,[74] and the Commission is no different in this respect. The Commission is after all an agent of the Member States in the completion of the European project, and as such the usual model of delegation, and the methods to control any delegation, apply.[75] Since the Maastricht Treaty, Article 214(2) EC gives the Parliament a veto over the Council's nominee for the Presidency of the Commission, and over the entire list of nominees to the Commission, but not specifically over each individual Commissioner. This power has become significant in recent years, with the Parliament successfully forcing individual Commission nominees to stand down through threatening to veto the entire Commission.[76] This, at least in theory, demonstrates that the Parliament could, were they concerned with the likely job performance of a nominated Commissioner for DG Competition, make the same threat again.

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[70] See *inter alia* Dashwood, A. "Community Legislative Procedures in the Era of the Treaty on European Union" (1994) 19(3) European Law Review 343; Arnull, A, Wincott, D *Accountability and Legitimacy in the European Union* (OUP, 2003).

[71] Article 214(2) EC.

[72] Article 197 EC.

[73] Article 201 EC.

[74] Chapter Three, 3.1.1.

[75] For an alternative assessment of the delegation model in the Commission see Majone, G. *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth* (OUP, 2005).

[76] *"EU row candidate stands down"*, BBC News 30th October 2004, available at: http://news.bbc.co.uk/1/hi/world/europe/3967463.stm last accessed 21st January 2009.

The day-to-day scrutiny of the Commission by the European Parliament is conducted by written questions to the Commission or by requests that Commissioners attend Parliamentary sessions, to which the Commission are obliged to reply.[77] This, along with the Commission's obligation to submit an annual report to the Parliament,[78] should keep the Parliament effectively informed of the Commission's activities, but should the Parliament not be satisfied by the information they receive, then they may be forced to resort to the significant power of censure.

The motion of censure is theoretically the Parliament's most potent weapon in holding the Commission to account, but it is almost always going to represent a disproportionate response to difficulties associated with delegation of power to the Commission. It must be recalled that it has never actually been used, and the only time its use was seriously threatened was when there was evidence of systematic and widespread corruption at the highest levels of the Commission.[79] The likelihood that Parliament would ever be prepared to deploy this weapon as a result of isolated dips in standards for securing the rights of the accused or abuses of powers by competition authorities, is non-existent. It would be inappropriate for the European Parliament to pursue this course of action as the power is clearly intended as a political weapon of last resort.

Until recently, the motion of censure of the entire Commission was the European Parliament's most powerful means of calling the Commission to account. However, since the Santer crisis the Parliament also has the power

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[77] Article 197 EC.

[78] Article 200 EC.

[79] See, *inter alia*, Craig, P. "The Fall and Renewal of the Commission; Accountability, Contract and Administrative Organisation" (2000) 6(2) European Law Journal 98, ; Dinan, D. "Governance and Institutions 1999: Resignation, Reform and Renewal" (2000) 38(1) Journal of Common Market Studies 25; Editorial Comment (1999) 36(2) Common Market Law Review 270.

to seek the resignation of an individual Commissioner. This power is currently set out in Paragraph 3 of the Framework Agreement on Relations between the European Parliament and the Commission.[80] Should the Parliament express its lack of confidence in an individual Commissioner, the President of the Commission is required to *"seriously consider"* requesting that Commissioner's resignation. It is possible therefore that where there are serious failings in the way in which competition enforcement powers are exercised, that the Parliament could express a loss of confidence in the Competition Commissioner. However, this is not an impeachment in any real sense as the President may refuse to ask for that Commissioner's resignation, instead giving Parliament reasons for that decision. Of course Parliament would retain the option to censure the entire Commission should they be dissatisfied with the President's reasons, but the likelihood of such action remains implausible, although, given that Parliament's concerns over the Santer Commission were aimed primarily at one Commissioner,[81] not impossible.

We saw in Chapter Two that there are a series of questions over the legitimacy and effectiveness of the European Parliament as a legislative body.[82] This must be borne in mind in this discussion as well. It is, as we saw in Chapter Three, possible to argue that pooling certain executive powers in Community institutions can be acceptable so long as that delegation is properly executed, and appropriately controlled.[83] The example of competition enforcement however, seems to demonstrate that the limited oversight of the European Parliament means accountability is certainly not guaranteed, and that the delegation chain, which seems to be

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[80] Framework agreement on relations between the European Parliament and the Commission [2006] OJ 117/21, 18th May 2006.

[81] Edith Cresson, at the time Research Commissioner.

[82] Chapter Two, 2.4.

[83] Chapter Three, 3.1.

relatively successful in relation to Europol in particular, has not, historically at least, been applied in the first pillar. Communitarisation does not necessarily equate to an increased role for the European Parliament, and can in fact lead to a decreased role for the national legislatures.

The extent of the powers enjoyed by the Commission in their enforcement of competition law goes beyond anything enjoyed by the agencies established under the third pillar. Logically, for appropriate oversight of the delegation of executive power, one would expect a set of controls and safeguards which are commensurate with them. Moreover, given the general assumption in the Lisbon Treaty 2007 that communitarisation of the third pillar is a solution to all of the problems we see there, we may even be entitled to expect a higher level of administrative, political and substantive safeguards in the first pillar. Unfortunately, in terms of the political and administrative controls at least, those expectations do not seem to be met. The biggest weakness is the degree of discretion delegated to the agent, in this case the Commission, in terms of making and implementing the rules in this field. Moreover, the Commission is entirely free to establish the disciplinary regime which governs its officials, and the chain of accountability. As far as competition enforcement is concerned, the supervisory regime does not match the powers, and the independence, in particular the wide discretion, of the Commission, and its agents, to carry out their responsibilities are at very best a cause for concern, particularly when the Court of Justice is reluctant to accept the powers for what they clearly are; a manifestation of the criminal law.

4.3 OLAF and Fraud Prevention

4.3.1 Introduction

Fraud against the EU budget is one of the most persistent criticisms levelled against the European Union. Headlines that the Court of Auditors have *"refused"* or *"failed"* to sign off the EU accounts have become an annual event in headlines of publications and organisations seen both as for and against the European project.[84] The Delors Commission, having been subject to a stream of criticism relating to alleged fraud against the Common Agricultural Policy, made the first moves towards establishing a method for stamping out fraud. In a move typical of the *modus operandi* of the Delors Commission, the solution involved further empowering the Commission to investigate and combat fraud by establishing the first Commission body charged with the fight against fraud, known as UCLAF. [85] UCLAF will now be regarded as, on most counts, a failure. The events surrounding the fall of the Santer Commission threw greater light on the powers and role of UCLAF. Two fairly damning reports, one by the Court of Auditors,[86] and one by the Committee of Independent Experts, colloquially known as the Three Wise Men, exposed the inherent

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[84] *"EU accounts failed for 13th year in a row"* BBC News 13th November 2007. Available at: http://news.bbc.co.uk/1/hi/world/europe/7092102.stm; *"Minister Slates EU for 12th Failure to Balance its Books"* The Independent 20th November 2006. Available at: http://www.independent.co.uk/news/business/news/minister-slates-eu-for-12th-failure-to-balance-its-books-425089.html; *"Auditors Refuse to Sign off EU Accounts"* The Guardian, 15th November 2005. Available at: http://www.guardian.co.uk/world/2005/nov/15/eu.politics; *"Why aren't we Shocked by a Corrupt EU?"* Daily Telegraph, 14th Novmber 2007. Available at: http://www.telegraph.co.uk/opinion/main.jhtml?xml=/opinion/2007/11/14/do1402.xml, all websites last accessed 25th September 2008.

[85] Quirke, B. "A Critical Appraisal of the Role of UCLAF" (2007) 14(4) Journal of Financial Crime 460, 460.

[86] Court of Auditors Special Report No. 8/98 on the Commission's Services Specifically Involved in the Fight against Fraud, Notably the Unite de Coordination de la Lutte Anti-Fraude (UCLAF) together with the Commission's Replies [1998] OJ C 230/1, 22nd July 1998.

weaknesses in its ability to tackle such fraud.[87] Both reports, concluded that, to a greater or lesser degree, UCLAF was incapable of adequately fulfilling its role. The criticisms focused around two problems. First, UCLAF was effectively toothless because it had no self standing coercive powers of investigation. Secondly, it lacked independence of the Commission. In the cleanup after the resignation of the Santer Commission, the Commission took steps to address these problems. Following a brief interregnum in which the duties of UCLAF were transferred to the Task Force for Coordination of Fraud Prevention, the Commission established the European Anti-Fraud Office, OLAF,[88] by the Decision of 28 April 1999[89] (the OLAF decision).

Again we find reluctance on behalf of the Union to characterise OLAF's activities as anything other than merely an administrative action. Regulation 1073/1999 governs the conduct of OLAF's investigations.[90] Article 2 of Regulation 1073/1999 makes it clear that the investigations referred to in that regulation are administrative in nature. However, it must be recalled that the label is not conclusive.[91] It is conceded that OLAF has no power to impose a sanction, and that as such an investigation by OLAF cannot be considered a criminal trial within the meaning of Article 6 ECHR, but it can be considered a criminal investigation. After all, the purpose of an OLAF investigation is to uncover fraud or corruption. The ECtHR, as we saw above has repeatedly

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[87] Report of the Committee of Independent Experts on Allegations of Fraud, Mismanagement and Nepotism in the European Commission, 15 March 1999. Available at: http://www.europarl.europa.eu/experts/report1_en.htm, last accessed 20th December 2009.

[88] OLAF is a French Acronym for Office Européen de Lutte Anti-Fraude.

[89] Commission Decision establishing the European Anti-fraud Office (OLAF), [1999] OJ L 136/20, 28th April 1999.

[90] Commission Regulation No 1073/1999 concerning investigations of the European Anti-Fraud Office (OLAF) [1999] OJ L136/1, 25th May 1999.

[91] App. No. 5100/71 *Engel v Netherlands* (1996) 1 EHRR 647, para 81.

stated that a criminal charge is not a matter of categorisation, but more a question of the nature of the transgression at issue or the severity of the penalty or both. The nature of the transgression clearly indicates that OLAF is conducting criminal investigations, even if this does not necessarily terminate in a prosecution. Domestically, not every investigation mounted by the police results in a prosecution, even when charges are brought, and no one seriously suggests that those investigations are not criminal in nature. The bottom line is in many cases fraud is dealt with by national law as a criminal offence[92], and thus the investigation of fraud is likely to be the investigation of a crime. As such, Article 8 ECHR, which protects the right to private and home life, Article 5 ECHR which contains protection on the conduct of arrest procedures, and Article 10 ECHR on the right to freedom of speech may potentially be engaged by OLAF's investigations.

4.3.2 Structure

OLAF is a General Services Directorate General of the Commission. In other words, it is simply an administrative division of the Commission, a Directorate General in exactly the same way as DG Competition. However, following the negative assessment of its predecessor by the Three Wise Men, OLAF has been granted a greater degree of structural independence than UCLAF.[93] Unlike other Directorates-General OLAF is not the direct responsibility of any individual Commissioner.

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[92] For example, in the UK it is regulated by the Fraud Act 2006, in Germany by §263 Strafgesetzbuch (Criminal Code), and in France by Chapter 3 of Book 3 of the French Penal Code.

[93] Report of the Committee of Independent Experts on Allegations of Fraud, Mismanagement and Nepotism in the European Commission, 15 March 1999. Available at: http://www.europarl.europa.eu/experts/report1_en.htm, last accessed 20th December 2009.

The bare bones of OLAFs internal structures are laid down by the OLAF Decision, but the roles of its officers and bodies in relation to the conduct and supervision of checks and inspections are more fully defined by Regulation 1073/1999. Article 3 of the OLAF Decision attempts to address one of the criticisms raised by the reports clarifying that, while OLAF does indeed remain an administrative arm of the Commission, it is to exercise its investigative function *"in complete independence."* It specifically makes clear that *"in exercising (OLAF's) powers, the Director of the Office shall neither seek nor take instructions from the Commission, any government or any other institution or body."*

Article 5 of the OLAF Decision provides for the appointment of the Director of OLAF, who is appointed for a once renewable five year term by the Commission. The Commission must first draw up, with the consent of the supervisory committee, a shortlist of candidates. The Commission will then consult the Parliament and the Council on that list before appointing the candidate. This is an important point to note. It makes it abundantly clear that the Commission views the Director of OLAF as a Commission employee, and thus reserves the right to make the final judgment on the candidate to the Commission.[94]

Article 12 of Regulation 1073/1999 sets out some additional responsibilities of the Director, who shall report regularly to the Parliament, the Council, the Commission and the Court of Auditors on the outcome and progress of investigations. When reporting to the institutions the Director is required to ensure that the confidentiality and *"legitimate rights"* of persons concerned in the investigations are protected. The institutions to which those reports are made, are also

expressly required to ensure that those rights are protected. The Director is also empowered to bring an action before the ECJ should the Commission take action which in his or her opinion impinges on the Director's independence.[95] The Director is also required to keep the supervisory Committee *"regularly"* informed as to OLAF's activities and investigations, in particular as to the results of investigations and actions taken based on those results. He or she is also explicitly required to inform the Committee where an investigation has been ongoing for more than nine months, giving the Committee the reasons for that and an anticipated timescale for its conclusion.[96]

Article 4 of the OLAF Decision provides for a "supervisory committee" who will be responsible for overseeing the exercise of OLAF's investigative function. Its role is spelled out more expressly in Article 11 of Regulation 1073/1999, but its remit is not clearly set out by the Regulation which provides that:

> *"The supervisory committee shall reinforce the Office's independence by regular monitoring of the implementation of the investigative function. At the request of the Director, or on its own initiative, the committee shall deliver opinions to the Director concerning the activities of the Office, without however interfering with the conduct of investigations in progress."*[97]

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[94] This of course presumes that the judgment in Case 138/79 *Roquette Fréres v Council (Isoglucose)* [1980] E.C.R. 3333, applies in this context, and that the Commission's consultations of the Council and Parliament in this context are non-binding procedural necessities.

[95] Article 12(3), Regulation 1073/1999.

[96] Article 11(7), Regulation 1073/1999.

[97] Article 11(1), Regulation 1073/1999.

The committee is composed of five members, who are independent of the Commission and *"possess the qualifications required for appointment in their respective countries to a senior post relating to the Office's area of activity*", and must be jointly approved by the Parliament, Council and Commission.[98] They will be appointed for a 3 year once renewable term,[99] and elect a chairman from within their number.[100] The supervisory committee should hold at least ten meetings per year[101] and should report on its activities at least once annually.[102] It will be informed by the Director wherever the outcome of an investigation requires information to be forwarded to the judicial authorities of a Member State.

4.3.3 Powers

Article 2 of the OLAF Decision lays out the responsibilities and tasks of OLAF. It clarifies that OLAF is not exercising any powers of its own, but is in fact exercising the Commission's powers to monitor and combat fraud, corruption and *"other illegal activity adversely affecting the Community's financial interests."*[103] Specifically, Article 2 of the OLAF Decision delegates the Commissions powers to conduct investigations into allegations of fraud onto OLAF.

The powers ultimately devolved on OLAF to conduct inspections to protect the Community's financial interests are the result of a complex interaction of four distinct legal acts. All powers to protect the financial

[98] Article 11(2), Regulation 1073/1999.

[99] Article 11(3), Regulation 1073/1999.

[100] Article 11(6), Regulation 1073/1999.

[101] Article 11(6), Regulation 1073/1999.

[102] Article 11(8), Regulation 1073/1999.

[103] For the sake of brevity, this section will refer to 'fraud'.

interests of the Community are based on Article 280 EC, and on that basis, Regulation 2988/95 was adopted, setting out generic provisions on the protection of the Community's financial interests.[104] Those powers are bolstered by inspections which will be exercised by the Commission under the conditions laid out in Regulation 2185/96,[105] which provides the formal legal basis for all inspections conducted by the Commission. The OLAF Decision represents an internal administrative decision of the Commission, setting up a functionally independent office to exercise the powers conferred on the Commission by Regulations 2988/95 and 2185/96. Regulation 1073/1999 sets out the procedural rules which govern OLAF's exercise of those powers, and further elaborates on the role of certain specified officers and bodies of OLAF in the supervision of those powers.[106]

Article 3 of Regulation 1073/1999 confers on OLAF the power to conduct inspections into third parties who are suspected of having defrauded the Community budget. Article 1(2) of Regulation 2988/95 clarifies the position by defining what will constitute an 'irregularity' over which OLAF will have investigative jurisdiction. It states that an irregularity would be an act or omission by an economic operator which is contrary to Community law and would result in harm to the budget, either by causing a loss of revenue or prompting an unjustifiable expenditure. Article 5 of Regulation 2185/96 makes it clear that OLAF will only have jurisdiction to conduct inspections over persons to which Regulation 2988/95 applies.

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[104] Council Regulation (EC, Euratom) No 2988/95 on the Protection of the European Communities' financial interests [1995] OJ L 312/1, 23rd December 1995.

[105] Council Regulation (Euratom, EC) No 2185/96 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities [1996] OJ L 292, 11th November 1996.

[106] It must be noted at this point that there are also a vast number of sectoral regulations which govern the specifics of the inspections which may be conducted in various sectors of EU competence, but these are beyond the scope of this thesis.

Article 4 of Regulation 2185/96 states that OLAF must notify the Member State concerned when they intend to make an inspection on their territory, particularly notifying them in good time of the object, purpose and legal basis of the inspection. What is interesting is the tone of Article 4. It states that the principal purpose of the notification is *'so that (the Member State) can provide all the requisite help.'* Rather than informing the Member State as a matter of courtesy or procedure, it is informing that State in timely fashion in order that they be ready to assist the inspectors. It is submitted that the reasons for this is that it is a duty of the Member States under Article 280 EC to combat fraud, and under Article 10 EC to cooperate faithfully with one another, and with the Union. In fact Article 8 of Regulation 2988/95 would seem to indicate that in the first instance it is for Member States to carry out the checks and inspections *'to ensure the regularity and reality of transactions involving the Communities' financial interests.'* The Commission should not therefore step in unless no action is being taken. Where criminal proceedings are being taken against an operator on the basis of the same facts, the administrative procedures must be suspended.[107] In addition, before OLAF initiates an inspection, under Article 3 of Regulation 2185/96, it is incumbent on OLAF to ensure that:

> *"...similar checks and inspections are not being carried out at the same time in respect of the same facts with regard to the economic operators concerned on the basis of (Community law). In addition, it shall take into account the inspections in progress or already carried out in respect of the same facts with regard to the economic operators concerned, by the Member State on the basis of its legislation."*[108]

[107] Article 6, Regulation 2988/95.

[108] Article 3, Regulation 2185/96.

The notion behind the phraseology of Article 4 of Regulation 2185/96 is presumably that the Commission are only stepping in either as a result of the failure of a Member State to investigate the incident themselves, or when a Member State has requested the involvement of OLAF.[109] The Member State can request that the inspections be carried out jointly between OLAF and their national authorities.

OLAF's inspectors must produce a written document of authorization *'stating their identity and position'* and a document which outlines the reason behind and the subject of the check or inspection. They will be expected, subject to the requirements of the relevant Community legislation, to comply with the national laws of the Member States concerned.[110]

Inspectors should have the power under national law to inspect and, where necessary, reproduce any relevant data or documentation. The items which may be included in these inspections are listed in Article 7 of Regulation 2185/96 and include documents, such as invoices, receipts and bank statements, electronic data, and budgetary and accounting documents. They can check on the quality of goods produced or work undertaken, they can inspect progress and quality of Community financed works and investments and they can take and check samples of goods produced. Once the inspection is completed it is down to the Member State authorities to take necessary measures to safeguard any evidence gathered.[111]

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[109] Under Article 2, Regulation 2185/96.

[110] Article 6, Regulation 1073/1999.

[111] Article 7(2), Regulation 2185/96.

Should the economic actor resist an inspection, the Member State on whose territory the inspection is being conducted shall give all assistance necessary, in accordance with national law, in order to allow OLAF to complete their work.[112] The requirement under Case 68/88 *Commission v Greece*[113] will apply in this context, compelling national authorities to take all action which they would take in an equivalent national situation, given the requirement under Article 10 EC to cooperate faithfully with the Union.

Article 4 of Regulation 1073/99 grants OLAF the formal jurisdiction to conduct investigations *"within the institutions, bodies, offices and agencies"* of the Union. The smooth operation of internal investigations by OLAF into the activities of the European Parliament, the Council and the Commission, was facilitated by the adoption of the Interinstitutional Agreement of the 6th of May 1999.[114] In this agreement the three institutions undertook to adopt a decision based on the standard form annexed to the Agreement, to ensure the smooth and harmonious conduct of internal investigations. This led to Article 10 and Annexe XI being added to the European Parliament's Rules of Procedure[115] and the adoption of decisions of both the Council[116] and Commission.[117]

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[112] Article 9, Regulation 2185/96.

[113] Case 68/88 *Commission v Greece* [1989] E.C.R. 2965.

[114] Interinstitutional Agreement of 6 May 1999 between the European Parliament, the Council and the Commission on budgetary discipline and improvement of the budgetary procedure [1999] OJ C172/1, 6th May 1999.

[115] Adopted on the basis of Article 199 EC. For the latest version see European Parliament Rules of Procedure, 15th edition [2003] OJ L 61/1, 5th March 2003.

[116] Council Decision concerning the terms and conditions for internal investigations in relation to the prevention of fraud, corruption and any illegal activity detrimental to the Communities' interests [1999] OJ L 149/36, 25th May 1999.

[117] Commission Decision of 2 June 1999 concerning the terms and conditions for internal investigations in relation to the prevention of fraud, corruption and any illegal activity detrimental to the Communities' interests [1999] OJ L 149/57, 2nd June 1999.

However, the limits of OLAF's internal jurisdiction has been challenged before the ECJ on several occasions, the most noteworthy of which were challenges by a group of MEPs against OLAF's jurisdiction over Parliament, and by the European Central Bank. After Parliament implemented the interinstitutional agreement, it was challenged before the Court of First Instance by a total of 71 MEPs, led by Willi Rothley MEP, alleging infringement of the legislative procedure and breach of the principles relating to the immunity and independence of the MEPs in Case T-17/00 *William Rothley and Others v European Parliament.*[118] The MEP's argued that, in being subjected to a regime of inspections by Commission officials, the independence of the MEPs and the interinstitutional balance would be significantly prejudiced. These are interesting points, but the Court did not address them, instead ruling out the case on the basis that the MEPs had no standing to challenge it.[119] However, even if they had succeeded in establishing standing under Article 230 EC, the Court would have dismissed the action in any event. Fraud is a crime, and the immunity of members of a legislature should never be so extensive as to prevent the proper application of the criminal law, and Protocol 36 to the EC Treaty, on which the applicants sought to rely in argument, expressly rules out such immunity.[120] Article 4 of the Parliament's decision implementing the interinstitutional agreement makes it very clear that *'rules governing Member's Parliamentary immunity and the right to refuse to testify remains unchanged'.*[121] In other words, MEPs

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[118] Case T-17/00 *Willi Rothley and Others v European Parliament* [2002] E.C.R. II-596. The judgment of the CFI was appealed and upheld by the ECJ, see Case C-167/02 P *Willi Rothley and Others v European Parliament* [2004] E.C.R. I-3149.

[119] Case T-17/00 *Willi Rothley and Others v European Parliament* [2002] E.C.R. II-596, para 77. The applicants failed to demonstrate individual concern under Article 230 EC. The problems of gaining standing before the Community judiciary under Article 230 EC will be discussed in Chapter Five.

[120] Article 10, Protocol of the Privileges and Immunities of the European Communities. Protocol 36 to the Treaty Establishing the European Communities.

[121] Case T-17/00 *Willi Rothley and Others v European Parliament* [2002] E.C.R. II-596, para 19.

will be immune from prosecution unless, under Article 10 of the Protocol on Privileges and Immunities of the European Communities, they are caught in the act of committing a criminal offence, in particular defrauding the budget, or the European Parliament otherwise elects to waive the immunity of the Member concerned.

More contentious was Case C-11/00 *Commission v European Central Bank*[122] where the Commission sought to annul a decision of the ECB establishing an anti-fraud regime on the grounds that such a decision was unlawful under Regulation 1073/1999. The ECB claimed that Regulation 1073/1999 was not applicable for one of two reasons. First, Regulation 1073/1999 did not apply to the ECB and secondly, if the Court held it did apply to the ECB, it would be unlawfully adopted as the legislative procedure would not have been properly followed. The ECJ dismissed the notion that the ECB is not covered by Regulation 1703/1999. The wording of Article 8 EC makes it absolutely plain that the ECB is established by the Treaty. It is no different in that regard to any other body of the Union. The Recital 7 of the preamble to Regulation 1073/1999, and Article 1(3) make it clear that the fight against fraud should be undertaken by *'all the institutions, bodies, offices and agencies established by or on the basis of the EC Treaty'*.[123]

The ECB further suggested that when Article 280 EC refers to the *'financial interests of the Community'* it is solely referring to mismanagement of the budget. If that is accepted, then OLAF would only have jurisdiction over European bodies financed by that budget, and as

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[122] Case C-11/00 *The Commission of the European Communities v The European Central Bank* [2003] E.C.R. I-7147. See Odudu, O. "Case C-11/00 *Commission v ECB*" (2004) 41(4) Common Market Law Review 1073.

[123] Emphasis added. Case C-11/00 *The Commission of the European Communities v The European Central Bank* [2003] E.C.R. I-7147, paras 62-67.

such a Regulation which is broad enough in scope to encompass the ECB must be disproportionate as the ECB is not so financed. The ECJ also dismissed this argument, stating that Article 280 EC clearly means to encompass all financial operators within the EU and has a wider meaning than merely the Community budget.[124]

The ECB also argued that, by allowing OLAF inspectors the right to investigate them, their independence was undermined. The Court held that in securing independence for the ECB the Community was trying to ensure that its decisions regarding monetary policy would not be influenced by any outside forces. This is why they are explicitly excluded from taking or seeking instruction from any Community body or Member State, and the Member States and Community bodies are prohibited from seeking to influence them.[125] The Court held that OLAF's remit would be to investigate specific suspicious circumstances, not to exercise any control over the ECB in the execution of its tasks. Furthermore, Regulation 1073/1999 itself takes great pains to clarify that OLAF will be fully independent from the Commission in an operational sense when it is conducting investigations.[126] The Court seems therefore to be keen to ensure that the Commission's anti-fraud remit is taken seriously, and that the scope of Regulation 1073/1999 is not artificially limited.

The legislative structures establishing and regulating OLAF's activities are exceedingly complex and have evolved over time to try and ensure the effectiveness of OLAF in operations both within the Community institutions, and within the Member States. This complexity is also a

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[124] Case C-11/00 *The Commission of the European Communities v The European Central Bank* [2003] E.C.R. I-7147, para 90. See *inter alia* Article 268 EC.

[125] Article 108 EC.

[126] Case C-11/00 *The Commission of the European Communities v The European Central Bank* [2003] E.C.R. I-7174, para 100.

reflection of the particular position OLAF holds within the constitutional architecture of the Community: it is a body with the power to investigate the activities of the institutions, but is itself part of one of those institutions, the Commission. Ensuring independence and effective oversight of OLAF's activities in this constitutional context is a serious concern, but it is clear that OLAF's role is regarded as important and key to the fight against fraud against the Communities. The next section will therefore examine the consequences of any investigation when they are carried out, before considering the accountability mechanisms for the scrutiny of OLAF's activities.

4.3.4 Consequences of Investigation

This section will discuss the likely consequences of an OLAF investigation for those persons under investigation, and the differences between the consequences for an internal inspection within the Community institutions compared to the likely consequences for a third party economic operator. Whether the investigation conducted by OLAF is internal or external, if they find a violation they have no powers to prosecute themselves.

OLAF's role in conducting an internal investigation is essentially disciplinary. OLAF must forward the report *"to the institution, body, office or agency concerned"*[127] and it shall be for the competent official of that body to take such action as they deem necessary. This presumably includes the possibility of forwarding that report to such national prosecutors as may be appropriate. In these circumstances it is possible to dismiss OLAF's investigatory role as an administrative one, part of an internal disciplinary procedure. OLAF conducts its investigation and reports its findings to the target's line manager for further action.

[127] Article 9(4), Regulation 1073/1999.

Where the investigation is external, conducted into the activities of a third party economic actor, the report shall be submitted to the competent national authority for their action.[128] The nature of OLAFs powers present more of a problem where reports go, not to an internal disciplinary panel, but directly to national prosecutors. While the national authorities do indeed retain discretion as to whether or not to prosecute, it is unlikely that this discretion is total. Article 10 EC creates a duty of loyal cooperation between the Member States and the Union. This duty must entail a presumption of action on the part of the Member State authorities when a file is received by OLAF. Not only this, but the rule in Case 68/88 *Commission v Greece*[129] creates a positive obligation for Member State authorities to treat the file in exactly the same way as they would an analogous national case. The CFI in Case T-48/05 *Yves Franchet and Daniel Byk v Commission,* where there was confusion over whether an investigation was internal or external, indicated that the transmission of a file to a national prosecutor is more than a merely administrative act. The CFI awarded €56,000 against the Commission and OLAF for wrongful acts in the transmission of a file to the national authorities. This seems to indicate that the CFI feel that the mere act of transmitting the file has serious repercussions for those involved, accepting that transmission of the file is likely to result in criminal proceedings.[130] Given the potentially serious nature of the consequences of an investigation by OLAF, it is necessary to examine the methods of accountability employed to ensure oversight of its activities. While it is freely admitted, as will be seen below, that there is no absolute duty on Member State Authorities to prosecute, for the CFI to award such substantial damages against the

[128] Article 9(3), Regulation 1073/1999.

[129] Case 68/88 *Commission v Greece* [1989] E.C.R 2965.

[130] Case T-48/05 *Yves Franchet and Daniel Byk v Commission* [2008] E.C.R II-1585, para 123.

Commission merely for transmitting the file, which Member State authorities are theoretically at least free to ignore, heavily implies that the CFI believes that there is at least a serious risk of legal consequences flowing from the transmission of the file.

4.3.5 Accountability

We have to look again at the administrative and political accountability of OLAF. First in terms of legal basis, we are almost looking at an inverse of the situation observed in relation to the enforcement of competition law by the Commission. The legal act which established OLAF is an internal administrative decision of the Commission, but the rules governing the inspections OLAF can conduct are contained in a series of Regulations, particularly Regulation 1073/1999. In the case of Regulation 1073/1999, it was adopted on the basis of Article 280 EC in conformity with the Article 251 EC codecision procedure. The other instruments, governing the specifics of OLAF's inspectoral powers were adopted under Article 308 (ex Article 235) EC, but these were adopted prior to the inclusion of a legal basis in Article 280(4) (ex 209a) EC by the Treaty of Amsterdam to counter fraud and other activities affecting the Communities' budget. It appears that measures aimed at regulating investigations by OLAF will be adopted with the full involvement of the European Parliament, and in consultation with the Court of Auditors. All measures relating to the governance of OLAF are however internal administrative measures which can be unilaterally adopted and amended by the Commission. There are subtle differences between the regime governing OLAF, and DG Competition. The most obvious is that the Competition Commissioner is a Member of the College of Commissioners, and the Director of OLAF is not. This allows the Director of OLAF a necessary degree of independence from the Commission's internal structures, considering it

may conduct an internal investigation of the Commission. Moreover, the Director has a legal power to bring actions before the ECJ in defence of his or her independence.[131]

The exercise of the powers of inspection are, as we have seen, monitored by a supervisory body set up specifically for the purpose. However, as we have also seen, the powers of this body appear to be limited. It has the right to issue opinions to the Director of OLAF, and to expect an explanation from OLAF should an investigation take an exceptionally long time. It is also required to report once annually. As Article 11(1) of Regulation 1073/1999 makes plain, its primary purpose is to *"reinforce the Office's independence"*, rather than being responsible for policing the ways in which the OLAF officials actually exercise their powers.

However, rights protections in the first pillar can be guaranteed in different ways. OLAF investigations, having been designated as administrative,[132] fall within the jurisdiction of the European Ombudsman. In addition, any decision taken by OLAF to commence an investigation would naturally be addressed to the target and thus may be subject to judicial review directly before the ECJ as this individual or entity would have standing under Article 230 EC as the person directly and individually concerned with the investigation. However, it is worth noting at this point, the potential application of the CFI ruling in Case T-377/00 *Philip Morris International v Commission*[133] where the CFI held that the decision to begin civil proceedings in the American Courts against the applicant undertakings was not a reviewable act as it did not, in and of itself produce legal effects,

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[131] Article 12(3), Regulation 1073/1999.

[132] Article 2, Regulation 1073/1999.

[133] Joined cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/00 *Philip Morris International v Commission* [2004] E.C.R. II-1, and the subsequent appeal in one of the joined cases, C-131/03 P *Reynolds Tobacco and Others v Commission* [2006] ECR I-7795

those effects being produced instead being produced by the judgement of the court in question. Although potentially the same logic could be applied to this situation, any investigation conducted by OLAF is more than likely to have legal effects in and of itself. As noted above, whether or not one accepts that characteristic of Fraud as a criminal offence, any investigation which involves allowing officials to enter premises or examine records, and is required by Regulation 1073/1999, will at least engage ones Article 8 rights. It is not possible to dismiss these investigations in the same way as the American judicial proceeding itself in the *Philip Morris* case is not a foregone conclusion, and can act as its own check and balance. This is not so in a circumstance where an executive investigation is ordered.

Particularly when OLAF elect to forward their findings to a competent national authority for appropriate action, the decision is necessarily going to be of direct and individual concern to the persons concerned.

The nature of the European Union necessarily complicates delegatory models. In transferring powers to the supranational Union as an agent with legislative discretion the Member States suffer a degree of agency loss. This, as we saw in the previous chapter, can be mitigated against by retaining control of the legislative process in the Council of Ministers by retaining a requirement of unanimity and/or limiting the role of the European Parliament. By including a legal basis in Article 280 EC which uses the Article 251 EC codecision procedure, the Council has caused further agency loss. On the other hand, this is a positive. It was again observed in the previous chapter that there is a significant problem with allowing the national executives through their role in Council to unilaterally create executive agencies with only bare consultation of any directly elected body. This was true in the case of Europol and Eurojust whose executive powers extend only to the collection and analysis of data.

Inclusion of the European Parliament in the process of creating a body with the power to take coercive action against individuals which can lead to criminal sanctions is not only desirable, but essential and this is equally true of OLAF.

The OLAF decision, an internal Commission decision, contains the legal basis for a number of the important checks on OLAFs powers, and they therefore remain subject to unilateral repeal by the Commission. These checks include guarantees of OLAF's operational independence,[134] and the establishment of the supervisory board.[135] The Director of OLAF is responsible for the day-to-day management of OLAF but, as we have seen, he or she is regarded as a Commission employee. In all other aspects OLAF is an office of the Commission but one with the power to conduct investigations into the commission of crime. It is conceded that in the actual execution of those powers it is required by law to be independent and that independence is subject to judicial review, but in terms of independent political or administrative accountability the only concrete requirement is a single annual report.

This appears to represent further evidence that the administrative and political accountability of the Community executive is very highly circumscribed and is essentially reserved to the internal staff regulations of the Commission. With OLAF, as with competition enforcement, one is forced to concede that there are significant problems with the way in which the Community manages its criminal law enforcement regime. The methods and practices of OLAF in relation to its external inspections were brought to public attention by a dispute between OLAF and the national Belgian authorities on the one hand, and a journalist on the other which

[134] Article 3, OLAF Decision.

[135] Article 4, OLAF Decision.

culminated in a ruling of the ECtHR in the case of *Tillack v Belgium.*[136] The complainant, Mr Tillack, a journalist, wrote two stories, the first exposing alleged fraud at Eurostat, and the second discussing the investigations conducted into that fraud by OLAF. These reports were based on two confidential documents which had come into Mr Tillack's possession. OLAF launched an investigation into how these documents had come into the possession of the complainant. Having failed to identify the leak, OLAF took the decision to forward the file to the Belgian authorities alleging bribery on Mr Tillack's part in order to obtain these documents. The Belgian authorities then raided the complainant's home and arrested him. No action was brought against Mr Tillack as a result of these investigations. Instead, Mr Tillack brought three actions of his own. The first was to submit a complaint against OLAF before the European Ombudsman, the second was an action for damages against the Commission on the basis that OLAF had caused Mr Tillack to be arrested unlawfully, before the Court of Justice, and the final action was against the Belgian authorities before the ECtHR alleging a breach of Article 10, the right to freedom of expression.

In the first action, the European Ombudsman concluded that the allegations of bribery made by OLAF against Mr Tillack were baseless.

> *"By proceeding to make allegations of bribery without a factual basis that is both sufficient and available for public scrutiny, OLAF*

[136] Application no. 20477/05 *Tillack v Belgium* ECtHR. The full judgment is, at present, only available in French. This section is based on the press release issued by the ECtHR on 27th November 2007. The judgment and the English summary are available at: http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionSimilar=40780863&skin=hudoc-en&action=similar&portal=hbkm&Item=1&similar=frenchjudgement Last accessed 21st December 2009.

has gone beyond what is proportional to the purpose pursued by its action. This constitutes an instance of maladministration."[137]

Following this conclusion Mr Tillack brought an action for damages before the CFI alleging that OLAF had caused his arrest by issuing the decision to transmit its file alleging bribery to the Belgian authorities. In their ruling in Case T-193/04 *Tillack v Commission*[138] the CFI held that while OLAF may have committed an act of maladministration, OLAF's actions had not in themselves, brought about a change in Mr Tillack's position. While they conceded that the duty of loyal co-operation under Article 10 EC does entail a duty for the Member State's competent authorities to carefully consider any file transmitted to them by OLAF and take any action they deem appropriate, this does not entail a compulsion to act on them. In other words, the Belgian authorities retained a discretion to dismiss OLAF's allegations against Mr Tillack and were not bound to act on them. Therefore, while OLAF were wrong to allege as they did, they were not the cause of Mr Tillack's arrest and as such were not liable for any damages.[139] This decision was upheld by the ECJ.[140] The ECtHR however did find that the Belgian authorities had violated Article 10 ECHR by acting on OLAF's complaint and arresting Mr Tillack.

Once again, in relation to OLAF, it seems there is a disappointing lack of correlation between the nature of the powers, and the extent of the oversight. But in the specific context, this may be explicable. Consider

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[137] *Decision of the European Ombudsman on complaint 140/2004/(BB)PB against the European Anti-Fraud Office, para 4.1.*

[138] Case T-193/04 *Hans-Martin Tillack v Commission of the European Communities* [2006] E.C.R. II-3575.

[139] Case T-193/04 *Hans-Martin Tillack v Commission of the European Communities* [2006] E.C.R. II-3575, para 72.

[140] Case C-521/04 P (R) *Hans-Martin Tillack v Commission of the European Communities* [2005] E.C.R. I-3103.

for a moment OLAF's role as an internal disciplinary body where it is possible to conclude that the powers are proportionate to the aim because OLAF is operating as a de facto part of the disciplinary structure of the institutions. The problem though, is that OLAF may also play a role in the administration of criminal law and there is no difference in the accountability mechanisms. Political and administrative accountability of both the internal and the external regime is the same, and in this context one size most definitely does not fit all. In other words, the same agency, exercising more or less the same powers, can be seen in very different lights. However, oversight by the ECtHR, although impossible for internal investigations because the EU is not currently a signatory to the ECHR, is possible for the conduct of external investigations, once the file has been passed to the authorities of a Member State. As the case of Mr Tillack demonstrates, the ECtHR can adjudicate on human rights breaches by national authorities in dealing with the results of OLAF investigations. Presumably this would also be the case if national officers are involved in an inspection conducted in conjunction with OLAF. However, this does not ensure that the rights of those subject to investigations will be protected by OLAF themselves, as both the case of Mr Tillack, and Case T-48/05 *Yves Franchet and Daniel Byk v Commission*[141] demonstrate.

OLAF's location within the Commission is also a problem. There are two reasons for this. One is that the MEPs in Case T-17/00 *Rothley* raised the question of institutional balance which must, at the very least, be of relevance. It is questionable whether merely ring-fencing OLAF administratively from the central Commission is sufficient to prevent the perception that OLAF gives the Commission considerable investigative power over the other institutions. In terms of the separation of powers, this gives a division of the executive a great deal of power over the legislature,

[141] Case T-48/05 *Yves Franchet and Daniel Byk v Commission* [2008] E.C.R II-1585,

and while there should be a degree of check and balance, it is not clear that this is effectively secured in the conduct of OLAF's investigations. The other problem is that OLAF is also supposedly responsible for investigating the Commission. Can it do that effectively while it is still a part of the Commission? In a sense, whether it can or not, is irrelevant. The doubt will always remain, and this is unnecessary when, as we shall see, there is a readily available solution. The next section will consider one of the more recent innovations of the Community pillar, FRONTEX, and the alternative structure set up for its management and oversight.

4.4 FRONTEX and Immigration Control

4.4.1 Introduction and Nature of FRONTEX

In a flurry of activity immediately prior to the enlargement of 2004, the Community rushed to establish an agency with responsibility for the coordinating the protection of the external frontiers of the Union by passing Regulation 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member states of the European Union (hereafter the FRONTEX Regulation). [142] Regulation 2007/2004 has since been significantly amended by Regulation 863/2007 establishing a mechanism for the creation of Rapid Border Intervention Teams (the RaBITs Regulation).[143]

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[142] The initial proposal, Proposal for a Council Regulation establishing a European agency for the Management of Operational Cooperation at the External Borders COM (2003) 687 final/2 was adopted by the Commission on the 11th of November 2003, and the final Council Regulation No 2007/2004 establishing a European agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2004] OJ L 349, 25th November 2004 was adopted by the Council on the 25th of October 2004. The agency went from proposal to existence in less than twelve months. The Agency took up its responsibilities on the 1st of May 2005 (Article 34, Regulation 2007/2004).

[143]Regulation 863/2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation 2007/2004 as regarding that mechanism and regulating

FRONTEX was constituted to assist in the fight against unlawful immigration and contraband smuggling. It was constituted to do this in two ways through both the hands off co-ordination and support of multilateral action by the Member States, and by the direct deployment of teams of agents onto the ground. Clearly there is a criminal activity prevention element to its mandate, and, as the following section will demonstrate, the agency has significant and invasive powers to secure that mandate.

FRONTEX, based in Warsaw,[144] is a comparatively new agency, and its operational arm, the RaBITs even more so. But in spite of its youth FRONTEX makes for an extremely interesting case study for a number of reasons. The first is that it was adopted under Title IV, Part III EC, which incorporates judicial cooperation in civil matters and cooperation over asylum and immigration, previously an aspect of the old third pillar prior to the Amsterdam Treaty and an example of a previous round of Communitarization. Secondly, it represents yet another model of executive law enforcement in the Community pillar, in this instance a specially constituted non-majoritarian agency.[145]

The FRONTEX regulation was adopted on the basis of Articles 62(2)(a) EC allowing for the adoption of measures for conducting checks on people crossing borders and Article 66 EC allowing for the adoption of measures facilitating cooperation between administrative departments whose work is relevant to Title IV EC. The UK and Ireland were not included in the

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the tasks and powers of guest officers [2007] OJ L 199/30, 31st July 2007. Hereinafter all reference to Regulation 2007/2004 will be to that Regulation as amended by Regulation 863/2007.

[144] Council Decision 2005/358 designating the seat of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2005] OJ L 114, 4th May 2005.

[145] See Chapter Three, 3.2.1.

adoption of the FRONTEX regulation due to the Council's enforcement of the opt-out from Title IV EC which both the UK and Ireland negotiated from Amsterdam, in spite of the UK having requested permission to take part. The Council refused permission, arguing that measures relating to the crossing of external frontiers formed a part of the Schengen *acquis* establishing common external borders and an area of free movement within the Union,[146] which the UK has not been granted permission by the Council to take part in.[147] The UK then sought annulment of the FRONTEX regulation on the grounds that they had been wrongfully excluded from it. In Case C-77/05 *United Kingdom v Council (FRONTEX regulation)*[148] the Court upheld the regulation, endorsing the exclusion of the UK from its scope. This ruling made plain that Member States opting out of the Treaty in certain respects could not elect to participate in legislative developments with wider implications for aspects of the legal framework that that State is not party to, and that opt-outs were to be interpreted strictly.[149] For our purposes however, it is merely important to note that the FRONTEX regulation does not apply uniformly to all Member States, with the UK and Ireland being formally excluded.

4.4.2 Structure

The day-to-day management of FRONTEX is the responsibility of its Executive Director, and the political and strategic management is the

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[146] Council Decision 1999/435/EC concerning the definition of the Schengen acquis for the purpose of determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the acquis [1999] OJ L 176, 10th July 1999.

[147] Council Decision 2000/365/EC on the Request of the United Kingdom to Participate in some of the Provisions of the Schengen Acquis, [2000] OJ L 131, 1st June 2000.

[148] Case C-77/05 *United Kingdom v Council (FRONTEX Regulation)* [2007] E.C.R. I-11459.

[149] See Rijpma, J. "Annotation of Case C-77/05*United Kingdom v Council* and Case C-137/05, *United Kingdom v Council*" (2008) 45(4) Common Market Law Review 835, 851.

responsibility of the FRONTEX Management Board (Hereafter FMB). The powers of the FMB are set out by Article 20 of the FRONTEX Regulation. They appoint the Director from a shortlist drawn up by the Commission.[150] They are responsible for adopting an annual general report on FRONTEX for submission to the Parliament, the Council, the ECOSOC and the Court of Auditors. Following receipt of the opinion of the Commission, they will adopt FRONTEX's programme of works for the following year. The FMB is also responsible for *"establishing procedures for taking decisions related to the operational tasks of the Agency by the Executive Director"*.[151] It also has a role in approving the budget of the organisation[152] and is the disciplinary authority over the Director.

The FMB is composed of one representative of each Member State on whom the FRONTEX regulation is binding, and two representatives of the Commission.[153] They will be appointed on the basis of *"high level relevant experience and expertise in the field of operational cooperation on border management"*.[154] The FMB will elect a chairperson from amongst its members. Representatives of non-Member States associated with the implementation of the Schengen acquis may also have representatives on the FMB, but the degree of participation that those representatives will be entitled to is determined by the association agreement between that State and the Union.[155]

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[150] Article 20(2)(a), FRONTEX Regulation.

[151] Article 20(2)(d), FRONTEX Regulation

[152] Articles 20(e), and 29, FRONTEX Regulation.

[153] Article 21, FRONTEX Regulation.

[154] Article 21(2), FRONTEX Regulation.

[155] Article 22(3), FRONTEX Regulation.

The Executive Director is responsible for the day-to-day management of FRONTEX and in doing so is specifically barred from seeking or taking instruction from national governments or any other bodies.[156] The Director shall implement the decisions and work programmes adopted by the FRONTEX Management Board and ensure the functioning of the agency in accordance with the provisions of the FRONTEX regulation.[157] The Director is also responsible for taking all actions necessary, including *"the adoption of...administrative instructions and...notices"*, to ensure that FRONTEX operates in compliance with the regulation.[158] The Director is also ultimately responsible for enforcing the staff regulations within FRONTEX.[159] He or she is also empowered to delegate powers to other members of agency staff subject to such rules as adopted by the FMB.[160] It might seem counter-intuitive to set up a screening and control mechanism and then allow for the delegation of those functions to a third member of agency staff. In reality however, such delegation will be necessary in practice, and is indirectly controlled by the Member States through the FMB. A degree of discretion is necessary, and in any event the screening and selection procedure should ensure the appointment of an executive Director who can be trusted to exercise that discretion to appoint an appropriate third member to delegate powers to.

4.4.3 Powers

This section will consider the tasks, responsibilities and powers of FRONTEX, and their role in the criminal justice system, aiming to

[156] Article 25(1), FRONTEX Regulation.

[157] Article 25(3)(a), FRONTEX Regulation.

[158] Article 25(3)(b), FRONTEX Regulation.

[159] Articles 25(3)(d) and 17 (2), FRONTEX Regulation.

[160] Article 25(f), FRONTEX Regulation.

provide a general overview of the agency and its competencies. It will particularly consider the executive powers that FRONTEX enjoys in deploying RaBITs and the powers that those teams have once deployed.

Article 1(2) of the FRONTEX regulation makes it plain that for the most part, the responsibility for protecting the external borders of the Union rests with the Member States, but that FRONTEX is established in order to assist in the coordination of joint operations aimed at the safeguarding of the Union's external frontiers. External frontiers are defined by Article 1a(1) as the *"land and sea borders of the Member States along with their airports and seaports."* Article 2 lists the tasks of FRONTEX. It is charged with coordinating operational cooperation between Member States, taking a role in training national border guard, particularly by establishing common training standards, carrying out risk analyses, monitoring and following up on research relevant to protecting borders, assist Member States where increased operational assistance is required, provide the Member States with necessary support in coordinating joint return operations, and crucially, to deploy RaBITs.

In terms of operational powers, the picture has been significantly altered since the adoption of Regulation 863/2007. Having decided that the power to coordinate operations may, in certain circumstances be insufficient, the adoption of Regulation 863/2007 empowers FRONTEX to coordinate the provision of *"operational assistance for a limited period to a requesting Member State facing a situation of urgent and exceptional pressure,"* through the deployment of a RaBIT to assist the Member State. The regulation repeatedly refers to *"large numbers of third country nationals trying to enter the Union illegally".*[161] While it does not explicitly limit the deployment of a RaBIT to such a situation it is clearly the principal

[161] Article 1, Regulation 863/2007.

circumstance intended to trigger a deployment. The RaBITs are not constituted of permanent staff of FRONTEX, but are instead composed of border guards temporarily seconded from other Member States.[162] The Management Board of FRONTEX, after consulting with the Director adopts a decision stating the profiles and numbers of officers which should be made available to the FRONTEX. When FRONTEX so requests, these guards will be deployed to the requesting State, although the seconding State may refuse to allow the redeployment where they are *"faced with an exceptional situation substantially affecting the discharge of national tasks."*

Article 8d of the FRONTEX regulation sets out in detail the steps to be followed when deploying a RaBIT. The first step is that a request is submitted by a participating Member State to FRONTEX for the consideration of the Executive Director, who must immediately inform the Management Board. The Director must make a decision on whether or not to deploy a RaBIT within a maximum of five days from the receipt of the request. The Director may dispatch experts to assess the situation on the ground in the requesting State. If the Director decides to deploy a RaBIT, before the team is deployed an operational plan must be adopted in accordance with Article 8e of the FRONTEX regulation. The operational plan must include details of the situation requiring the deployment and the aims of the RaBIT, the foreseeable duration of the deployment, the geographical area for which the teams will be responsible, the description of the tasks required of the teams and the permissibility or otherwise of firearms and ammunition which non-national border guards may carry. The plan must also include the name and rank of the Officer of the requesting State to whom the RaBITs will be responsible. Article 8g of the FRONTEX Regulation provides that the Director must nominate a

[162] Article 4, Regulation 863/2007 and Article 8b, Regulation 2007/2004.

coordinating officer from the permanent staff of the agency to oversee the deployment. Article 5 of Regulation 863/2007 makes it clear that while the decision to deploy a RaBIT is taken by FRONTEX, all the instructions given to those teams are from the host Member State. The coordinating officer appointed by the Agency may make his or her opinion on those instructions known to the host State, and the State must take those opinions into account, but the instructions remain the prerogative of the Member State.

Article 6 of Regulation 863/2007 sets out the powers which the RaBITs will enjoy during active operations on the ground in the requesting Member State, and the sources of control over their activities. They shall have the power to conduct all necessary inspections in order to fulfil the operational plan on the basis of which they have been deployed. It states that RaBITs may only undertake executive tasks under instructions from, and *"as a general rule"* in the presence of, a border guard from the host State. One of the most troubling clauses of Regulation 863/2007 is that members of the team are entitled, unless the host State explicitly objects, to carry service weaponry and ammunition in accordance with the law in their home State.[163] Article 6(6) authorises the RaBITs to use force, including service weapons, only with the consent of the home State and in the presence of border guards of that State. By way of derogation from Article 6(6), members of a RaBIT are entitled to use force in self defence in accordance with the national law of the host State. Any decision to refuse entry to the host State must be taken by the border guards of that State. These provisions accommodate differences in the regulation of border operations in the various Member States, but seem to favour the deployment of weapons in all RaBIT's operations.

[163] Article 6(5), Regulation 863/2007.

Although Regulation 863/2007 actually gives the power to a European agency to coordinate the deployment of armed guards on the territory of another State, and the State from whom these guards are to be drawn may only object under well defined circumstances, any deployment of armed units would be strictly under the conditions imposed by the host Member State, and would be subject to the control of the national officials on the ground. While they are allowed to carry such weapons in accordance with the rules of their home state, they are only permitted to do so with the express consent of the host State and only use them in accordance with the law of that State.

One of the responsibilities of FRONTEX is to coordinate or deploy a RaBIT to assist in combating unlawful incursion of immigrants beyond the external frontiers of the Union. As we have seen they have a role in combating the unlawful trafficking of persons or of contraband. Both of these acts are prohibited by criminal laws, and are in themselves representative of an increased trend towards the control of migration through criminalisation.[164] Article 29 TEU considers trafficking in persons and contraband to currently be a part of the EU's criminal architecture, and it would remain so classified under the Treaty of Lisbon, post communitarisation of the third pillar.[165] In addition, the Commission has already argued that the criminal law regulation of trafficking may already be within the competence of the Title IV EC.[166] It would be difficult for the Commission to argue on the one hand that the trafficking of people as a

[164] See, for example, Bosworth, M. "Governing through migration control: security and citizenship in Britain" (2008) 48(6) British Journal of Criminology 703.

[165] Article 83(1) TFEU. See Peers, S. "EU Criminal Law and the Treaty of Lisbon" (2008) 33(4) European Law Review 507.

[166] Communication from the Commission to the European Parliament and the Council on the implications of the Court's Judgment of 13th September 2005 (Case C-176/03 *Commission v Council*), COM (2005) 583 final, 24th November 2005. See Peers, S. "EU Criminal Law and the Treaty of Lisbon" (2008) 33(4) European Law Review 507, n.38.

category of criminal offence falls within the jurisdiction, not only of the Union, but the Community, while FRONTEX's role in the prevention of such acts is merely administrative. FRONTEX plays a role in the criminal justice system, not just because of the nature of their role, but because the Commission has already, frequently, tacitly admitted such.

On the 30th of October 2009, the Brussels European Council made calls for a further enhancement of FRONTEX. These enhancements are to include powers and detailed guidelines for immigration operations at sea, and increased scope for cooperation between FRONTEX and countries of origin and transit of illegal migrants.[167] The Commission was invited by the European Council to bring forward proposals to facilitate those changes.

4.4.4 Accountability of the FRONTEX and RaBITs

As is evident from the above discussion, there are two levels of body which must be made accountable for its actions: the overarching European body FRONTEX, and the operational units which may be formed, RaBITs teams. This section will consider the various levels of political accountability over FRONTEX, in particular the legislative process, macro accountability of the agency itself, and the democratic and administrative scrutiny of its operation. This section will consider the systems in place to secure the accountability of deployed RaBITs.

First it should be noted that as FRONTEX is a body constituted under Title IV EC, it is particularly pertinent to this discussion. It is a body established under the legal regime created by the last process of

[167] Brussels Council Conclusions, 30th October 2009, Council document 15265/09, CONCL3, para 40.

Communitarization of part of the third pillar by the Treaty of Amsterdam. Both the FRONTEX and RaBITs regulations are based on Article 62(2) EC, and adopted in accordance with the legal bases contained in Article 67 EC. This regime is complex, and results in the FRONTEX regulation being adopted in accordance with one process, that in Article 65(1) EC, and the RaBITs regulation by another, that in Article 65(4) EC. The FRONTEX regulation required unanimity in Council, following consultation with the Parliament. Article 65(4) EC provides that, by derogation from the general rule, where the Council has adopted the underlying rules by unanimity following consultation, any subsequent rules shall be adopted in accordance with the Article 251 EC codecision procedure. FRONTEX itself was created with the minimal of Parliamentary input through the consultation procedure, but the introduction of the RaBITs was done through codecision. More than that however, the FRONTEX regulation was substantially amended by the RABITs regulation. The constitutional architecture of Title IV in this context clearly intends for the basic framework to be adopted according to one system and amended by another which, in itself is interesting. It could be seen as representing a kind of secondary delegation. The Member States retain control of the initial transfer of a competence to the Community by requiring unanimity, but then allowing for the issue which they have devolved to succumb more completely to the supranational Community codecision legislative procedure.

As with the new Europol, FRONTEX is financed by a subsidy from the Community budget[168] entered under the Commission section. This gives the Parliament, as one arm of the Budgetary Authority an element of control over this agency. It should be noted of course that the horse trading

[168] Along with a contribution from States associated with the implementation of the Schengen acquis; Article 29(1)(3), FRONTEX Regulation.

involved with negotiating the Community budget, and its scale as a whole, is likely to result in Europol and FRONTEX receiving less attention than they may otherwise merit, but placing these agencies within the general, democratised budgetary process of the Union is absolutely appropriate in further legitimising them.

In terms of administrative accountability, there is an effective selection and screening mechanism in place for the selection of the senior agency official for FRONTEX. This ensures that the body is accountable to the institutions through the appointment of the Executive Director, and to the Member States through the FMB. Interestingly, there appears to be no explicit requirement that Members of the FMB should be independent, or refrain from taking instruction from national governments. This, taken with the phrasing of Article 21 of the FRONTEX Regulation which expressly refers to representatives of the Member States, could be taken to infer that the FRONTEX Management Board, in addition to its administrative responsibilities, assists in making the agency politically accountable to the Member States. FRONTEX seems therefore to be structured so as to guarantee the independence of the management and executive acts of the agency itself, through a Director whose independence is guaranteed, while retaining a degree of national and supranational control thorough the Management Board. Subject to the fact that representatives of the Member States and Commission have the power to approve the work plans and budgets drawn up by the Director, and have the power to adopt internal rules for the management of FRONTEX, the Director is independent in the actual operation of the Agency.

The multilayered approach for supervising FRONTEX, an agency with full operational independence along with partial budgetary independence, is an appropriate model, and ironically it seems largely to be based on the

successful models adopted under the third pillar. It seems that the non-majoritarian agency model itself makes the accountability structures in place for FRONTEX more successful than the accountability strategies in place for the Commission organs for competition law enforcement and fraud prevention discussed above. Moreover, the accountability of FRONTEX is further bolstered because, as a body constituted under the EC Treaty the Court of Justice would have jurisdiction over it, although being as it is established under Title IV EC that jurisdiction is not unlimited.[169]

In terms of the accountability of the RaBIT teams deployed on the ground, Article 6 and 7 of Regulation 863/2007 make it very clear that when operating in a Member State, members of a RaBIT are governed by *"Community law and the national law of the host Member State"* and should be treated in exactly the same way as national officials *"with regard to any criminal offences that may be committed against or by them"*. As was discussed above, while actually in the field the RaBIT will be under the operational control of officials of the host Member State, subject to the obligation to take into account the opinion of the RaBIT team's coordinating office. This again is entirely appropriate for two reasons. First, the executive authority of the host Member State must retain control of coercive actions taken in the defence of its national borders. Secondly, the purpose of the RaBIT is to support and supplement, not replace or overrule, the border teams of each Member State. It would not be appropriate to have the EU dictating the standards by which national border guards should abide. Moreover, making RaBITs subject to a different legal system than the national authorities would result in an arbitrary system in the field. Depending on whether an individual met a

[169] Under Article 68 EC preliminary references under Title IV EC may be made only by the court from which there is no further appeal in the national system.

RaBIT member or a national official, they would be subject to a different set of rules.

It is, however, worth noting that the FRONTEX regulation, and in particular the RaBITs amendments, are something of a watershed. This regulation actually sees the deployment onto the soil of Member States of teams, who may well be armed, to assist in the operation protection of the borders of a Member State. It is perfectly true to state that the RaBITs team will, as a general rule, be under the direct command of an agent of the host state,[170] but the operational plan covering their deployment is negotiated by the FRONTEX Executive Director and the requested Member State.[171] At the point it requests a RaBIT, the Member State is no longer in sole control of regulating its own external borders. It is also worth reiterating that where FRONTEX has an opinion on the instructions given, the coordination officer may communicate those opinions to the host Member State, and there is then an obligation on the host Member State to take those views into account. These teams are therefore deployed on national soil, with the ability to engage in law enforcement operations. They are coordinated and deployed by an agency of the Union, albeit subject to the direct command of the host State.

In spite of these operational powers, the organisation of FRONTEX itself is clearly more akin to the non-majoritarian agencies found in the third pillar than to the other Community institutions we have discussed in this chapter, and could be seen as evidence of Unionisation of one of the Community's criminal law agencies. In other words, the structural peculiarities of the agencies in the third pillar, an independent executive director and a management board expressly composed of Member States

[170] Article 5 Regulation 863/2007, and 8e(1)(f) FRONTEX Regulation

[171] Article 8e (1) FRONTEX Regulation

representatives, have been transposed onto this first pillar, Title IV agency. This may be because of the recognition that these border control activities are part of a criminal law enforcement process and this distinction will be less important once the Lisbon Treaty comes into force. However, it is submitted that, while the legislative and judicial control of criminal law may well be Communitarised by the Lisbon Treaty, it will be interesting to see whether this Unionisation approach towards the control of executive agencies is continued in future generations of agency creation in this field.

The creation of FRONTEX is interesting for other reasons. It demonstrates a number of political and legal tensions within the European architecture. On the one hand it further reinforces the idea of 'Fortress Europe'.[172] With the enlargement looming, the Commission and the Council became nervous of the capacity of the accession States on the Eastern edge of the new Europe to adequately protect their borders, and the solution, it would appear, was to further centralise the control of those frontiers. The motive above all was to secure the borders.[173] And, as noted above, it happened quickly. Political palatability seems often to be the real bar, rather than legal concerns, to the extension and development of European competence over criminal law enforcement issues of particular sensitivity to national sovereignty such as national border control.

Also of interest is the UK's decision to attempt to opt in, but perhaps not as interesting as the Council's decision to refuse them, and the ECJ's decision to uphold that refusal. It sends a strong message to Member

[172] See Peers, S. "Building Fortress Europe: the Development of EU Migration Law" (1998) 35(6) Common Market Law Review 1235.

[173] Although, an alternative logic has been proposed in the context of securitization theory; that FRONTEX is more about risk management than securitization, see Neal, A. "Securitization and Risk at the EU Border: The Origins of FRONTEX", (2009) 47(2) Journal of Common Market Studies 333, 351.

States, like the UK, Ireland and even Denmark, that existing on the sidelines of European integration may not be the best option. Having one's cake and eating it is becoming more difficult. As noted in the previous chapter, the potential creation of a European Public Prosecutor through enhanced co-operation will be an interesting case study of this phenomenon, highlighting some of the particular difficulties of variable geometry between States.

The supervisory regime of FRONTEX seems to echo that of Europol, and in some ways this is unsurprising given that it is in fact an autonomous agency based on the same kind of model. This ensures that the body is accountable to the institutions through the appointment of the Executive Director, and to the Member States through the FMB. The multilayered, non-majoritarian approach for the supervision of an agency with full operational and budgetary independence is an appropriate model, and ironically it seems largely to be based on the successful models adopted under the third pillar. Moreover FRONTEX seems to be the most successful of the three bodies discussed in this chapter since, as a body constituted under the first pillar the Court of Justice, has jurisdiction over its activities. In addition, once a RaBITs team is deployed, its activities will be controlled by national law which will set the standards for the operation and, in case of infringement, will be subject to the jurisdiction of national courts. This will also bring the operation of the RaBITs teams within the scope of the ECHR particularly Article 5 ECHR on the protection of individual liberty and security of the person so, for example, a RaBITs team will not be able to hold an individual without due process of national law.

However, the example of FRONTEX demonstrates another important point. As a body constituted under Title IV EC, the FRONTEX regulation

was adopted following the procedure under Article 67 EC, which allows only for the consultation of the Parliament. Again it is worth noting that this is the only extant example of depillarization, which took place a decade ago, and still operates under the same legislative rules as the pillar from whence it came. In other words where there does appear to be an appetite for change, it seems severely limited in terms of ensuring oversight of the establishment of non-majoritarian agencies by the democratically representative body.

4.5 Conclusions

This chapter has clearly demonstrated a lack of consistency over the executive enforcement of criminal law in the first pillar. There is no single model for the creation of a first pillar agency with a criminal remit. There is no single model for the kinds of power that they enjoy, nor is there any model for the supervision of those agencies. There is one clearly identifiable general trend however; the powers enjoyed by the first pillar bodies are more invasive than those enjoyed by the third. One would hope that this more significant suite of powers would be bolstered by a more robust supervisory regime than the agencies of the third pillar are subjected to. Sadly that hope is not borne out by the analysis in this chapter.

The first pillar agencies examined in this chapter are all charged with a role in a process which can lead to the adoption of a criminal sanction, or at least a sanction which, while officially administrative, may in fact be criminal in character. While only DG Competition can adopt a sanction directly, national law enforcement agencies generally do not have the power to adopt a criminal sanction directly, but this does not make the investigation any less part of a criminal process. Until that is recognized, then rights generally regarded as central to the criminal process, in

particular the protection against self-incrimination, and the right to legal representation may not be properly respected in the case of competition law enforcement. This is also true of the investigations by OLAF where national rights guarantees will only have a role once a file has been passed to national authorities, a problem highlighted by the *Tillack* case.

Similar problems arise in the political sphere. While the Commission is directly responsible for two of these bodies, it is difficult to argue that either DG Competition or OLAF are routinely subjected to the kind of democratic scrutiny necessary to properly legitimate a body with a role in such a process. The only, comparative, success story, FRONTEX, is constituted very differently, and seems to be an example of the Community learning from the successes of the Union. It will be interesting to see whether this non-majoritarian criminal agency is the beginning of trend which will continue under the post-Lisbon regime. Both competition enforcement, and fraud investigation and prevention should be separated from the Commission as a political entity. They should be reconstituted as non-majoritarian agencies in order to ensure that they conduct their investigations independently, in accordance with political priorities which it is legitimate for a centralised executive to set, while avoiding the potential allegations of abuse of power which are bound to be advanced whilst they remain part of the Commission. This is particularly important in terms of OLAF who also have the responsibility for investigating fraud within the Commission.

In terms of the broader questions of this thesis however, the analysis of these first pillar bodies lends further weight to the argument. The Communitarization of the third pillar is not going to be a 'silver bullet' solution. The structures under the first pillar are arguably cause for greater concern than the structures under the third, and in fact the one reasonably

successful first pillar structure is constructed much more like a third pillar body. At best therefore, it seems that the Communitarization of the third pillar will make no difference to the administrative and political accountability of the Union executive.

Chapter 5

Judicial Protection in the European Union

5.1 Introduction

The final three chapters of this thesis will examine the role of the European Union judiciary in the application of European criminal rules. The European Court of Justice has over its history been instrumental in developing a European legal order. Chapter Five will open this section by making a broad analysis of the development of the suite of powers at the European Court's disposal to secure that order. It will particularly consider two broad categories of rules; those relating to the enforcement of the law, and those relating to challenging it.

Given that these rules were developed in the context of first pillar litigation, the majority of the analysis in this chapter will focus on the first pillar. It will investigate the way in which the court has interpreted the Treaty broadly to create these powers and argue that its primary motivation has been ensuring, to a greater or lesser extent, that the rule of law is preserved by the Union, and latterly, that fundamental rights are protected. This analysis will attempt to demonstrate that in order to ensure the rule of law, including the protection of human rights, the Court has aimed to build a constitutional system of rules which provides, as far as possible within the obvious constraints of the system, a complete set of legal rules and remedies. It has also attempted to ensure that people should be able to rely on their rights before any Court within the Union, and to receive an appropriate remedy where the rights that they should have been entitled to under European law have not been secured.

This analysis will focus in particular on the relationship between supremacy, direct effect and consistent interpretation, arguing that all three are linked, and in fact the latter are manifestations of the former. It will then consider the Court's interpretation of the rules allowing direct access to challenge the validity of European law, and to a lesser extent the interpretation of the preliminary reference arrangements, and will examine the role of fundamental rights in this system. On the one hand it will investigate the Union's internal human rights standards through the Court's development of the general principles, and increased engagement with the Charter, and on the other externally, through the European Convention on Human Rights, and the powers of review which the European Court of Human Rights holds in reserve. It will argue that through the development of these judicial structures the ECJ has created a system which is adequate for protecting the kinds of rights most usually relevant to the type of law adopted within the European sphere.

Chapters Six and Seven will then contextually apply this analysis to the supranational criminal law spheres identified in the preceding chapters in an attempt to ascertain whether or not the Court is performing, or indeed is able to perform, to the level required to fully legitimise the emerging European criminal justice system. In other words, these chapters will consider whether the system is capable of securing the protection of the rule of law in the face of the additional requirements placed upon it by a system of criminal law, building on the analysis of the ECJ's constitutional "toolkit" in this chapter. Chapter Six will consider the way in which European Law can be applied by national courts. Chapter Seven will consider the powers of the Court to protect the rights of the individual against the European Union.

5.2 Role of the Court of Justice in European Law

The role of the Court in creating a Union based on the rule of law cannot be understated, but it has a restricted number of tools with which to achieve this, and it is beginning to reach its limits. Article 6 TEU notes that the Union is founded on, among other things, the rule of law. This phrase has a tremendous weight, but defining the rule of law is difficult. No single comprehensive definition has ever been agreed, and finding such a definition is well beyond the scope of this thesis.[1] However, the rule of law as a concept has a particular political resonance although it can be used to mean many different things. Furthermore, it has been persuasively argued that any definition taken from a national, or even purely international context, cannot simply be transposed onto the *sui generis* EU system.[2] The main reason for this is that any national definition will be heavily contextualised by the particular historical, cultural and legal context in which they arose. Lord Bingham, however, has neatly summarized the core of the principle as follows:

> *"That all persons and authorities of the State whether public or private should be bound by and entitled to the benefits of laws publically and prospectively promulgated and publicly administered in the Courts."*[3]

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[1] See Dicey, AV. *Introduction to the Study of the Law of the Constitution* (1885); Raz, J. *The Authority of Law* (OUP, 1979).

[2] Arnull, A. "The Rule of Law in the European Union." in Arnull, A, Wincott, D. *eds Accountability and Legitimacy in the European Union* (OUP, 2002), 241.

[3] Bingham, T. "The Rule of Law", Sir David Williams Lecture, King's College London (2006).

Jacobs concurs on the key point that any exercise of power by a public authority *"is subject to review by the Courts to ensure that that exercise was authorised by law"*[4]

Dworkin would refer to this as the formal conception, or *"the rulebook conception"*, which essentially requires that government only ever act in compliance with the law, and that it has nothing to say, on its face at least, about the content of those laws. On the other hand, there is a broader substantive conception of the rule of law, which does concern itself with the content of the law. This essentially argues that certain moral and political rights exist as a part of the natural legal aether and that these should be enforced at the request of the citizens via the judiciary.[5] Craig argues that there are circumstances in which those two concepts of the rule of law overlap. Those are where democratic legislatures have chosen to formally codify those rights.[6] Arguably, with the ECHR and the European Charter of Fundamental Rights of the European Union,[7] the Member States of the Union have chosen to go down that road, which should mean that, whichever conceptual framework of the rule of law one prefers, the European Union should, as part of that, be protecting fundamental rights. The idea that the EU is founded on the protection of fundamental rights is also supported by Article 6 TEU.

What seems to be clear from the various definitions is that the law itself assumes a greater significance than the political institutions which promulgate and enforce that law, and that any action taken must be allowed by law. The role of the judiciary in the legal system is the interpretation of

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[4] Jacobs, F. "The Sovereignty of Law the European Way" The Hamlyn Lectures (CUP, 2006), 7.

[5] Dworkin, R. *A Matter of Principle* (Harvard University Press, 1985), 11-12.

[6] Craig, P. "Formal and Substantive Conceptions of the Rule of Law: An analytical framework" [1997] Public Law 478.

[7] Charter of Fundamental Rights of the European Union [2000] OJ C 364/01, 18th December 2000.

the law, and the monitoring of its application. In many ways this places the judiciary at the centre of principle of the rule of law. Most modern definitions therefore accept that an independent judiciary is an essential component of this idea, in order to ensure than the concept is properly observed.

In attempting to assess whether or not the Court can effectively protect rights in the emerging criminal context, one must initially consider what in fact is the Court's role more generally. Article 220 EC states that *"The Court of Justice and the Court of First Instance...shall ensure that in the interpretation and application of this Treaty the law is observed"*, although to what extent this short sentence is in fact helpful is questionable. Before launching into a more detailed examination of the effectiveness or otherwise of the Court's regime for judicial protection in the criminal context, it is important to examine in some detail the general framework for protecting rights and enforcing the law. This section will go on to consider in more detail the Court's substantive powers, both found in the Treaties and those which the Court has developed to a greater or lesser extent itself through the creative interpretation of the Treaty and of the general principles. In very general terms the role of the ECJ could be said to be the same as the role of any other court in that it is primarily charged with ensuring the maintenance of the rule of the law. As we saw in Article 220 EC, the Court is charged with ensuring that the law is observed. That provision is framed very broadly and gives the Court, subject to the Articles which follow, a degree of discretion to create a European idea of the rule of law.

Arnull argues that, on paper, the structure created by the Treaties to ensure the correct observation of the rule of law was always incomplete. For example, it was silent on the effects of European law being invoked in the

national courts, or the effect of conflicts between European and national laws, or the consequences of national breaches of European law which caused a loss to a third party.[8] The Court was therefore left to fill the gaps in this emerging legal system, and in doing so it created a series of principles which will be considered below which could be seen as resulting in a European rule of law.

5.2.1 The Enforcement of European Law

In the absence of any express rules in the Treaty on the way in which conflicts between European and national law were to be resolved, or the extent to which European legal rules were to be enforced before the national courts, much of the work in solving these problems has fallen to the Court.[9] Through its, occasionally extremely creative, interpretation of the Treaties the ECJ has created a fully realised, new legal order which is neither national nor international in nature.[10] Arguably the most significant jurisprudence of the Court relates to the way in which Union law interacts with national law and the degree to which rights created by Union law can be enforced before national courts.

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[8] Arnull, A. "The Rule of Law in the European Union" in Arnull, A, Wincott, D. *eds Accountability and Legitimacy in the European Union* (OUP, 2002), 242.

[9] See *inter alia*, Arnull, A. "The European Union and its Court of Justice", (2nd edition, OUP 2006); Dougan, M. *National Remedies before the European Court of Justice* (Hart Publishing, Oxford, 2004).

[10] On the origins and source of concepts within the emerging Community legal order see: Wyatt, D. "New Legal Order or Old" (1982) 7(1) European Law Review 147. On the unique nature of the Community legal order see Dashwood, A. "States in the European Union" (1998) 21(2) European Law Review 201.

5.2.1.1 The Enforcement Actions, Failure to Act and Damages

The EC Treaty contains a number of provisions which allow the Member State, the institutions and, in some highly specific cases, individuals, to enforce Community law directly before the Court of Justice.

Where the Commission believes that a Member State has failed to act in accordance with its obligations under the Treaty, and has submitted to that Member State an opinion and given it an opportunity to respond, Article 226 EC allows the Commission to bring an action before the Court of Justice. In a similar vein, Article 227 states that where a Member State feels that another Member State has failed to comply with its obligations, they should first bring the matter to the attention of the Commission, but where this fails to produce a resolution the complainant State may bring the respondent before the ECJ.

Where the Member State in question is found to have failed to comply with its obligations, they are required to comply with the judgment of the Court under Article 228 EC.[11] Should the Commission believe that a Member State has failed to comply with the Court's judgment, then it may, having given the State warning and an opportunity to respond, submit to that Member State a reasoned opinion, stating precisely the nature of that State's non-compliance.[12] This requirement would be removed by the Lisbon Treaty 2007, with the Commission being required only to give the Member State in question an opportunity to present its reasoning on the issue. If the Member State fails, in the Commission's opinion, to comply following its reasoned opinion, the Commission may refer that failure to the Court, stating the proposed level of fine, which may be either a lump

[11] Article 228(1) EC.

[12] Article 228(2) EC.

sum, a periodic payment, or both,[13] which it believes to be appropriate.[14] Should the Court concur that the Member State has failed to comply with its original judgment then it may impose a fine of its choosing.[15]

These are dramatic powers and are clearly intended as powers of last resort. Both Articles 226 and 227 EC contain a mandatory non-judicial phase, and only following an inability to resolve the dispute will action be taken before the Court. Article 228 EC similarly allows for a non-judicial phase, but following the decision in Case C-304/02 *Commission v France*, recourse to this Article can potentially have serious financial consequences for Member States.[16]

There is also the possibility that, should any political institution of the Community fail to act in accordance with the Treaty, then any Member State or political institution may, having first brought that objection to the attention of the institution in question, bring the matter before the Court.[17] These are the most obvious formal tools for the direct enforcement of Community law. The Treaties make express provision in certain circumstances for compliance with the Treaty to be monitored and enforced before the ECJ. On the other hand, there exist numerous grey areas. Principally these involve the relationships between Union and national law, and the effect of European law in national courts. The Court

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[13] Case C-304/02 *Commission v France* [2005] E.C.R. I-6263.

[14] Article 228(2) EC.

[15] See *inter alia* Case C-387/97 *Commission v Greece* [2000] ECR I-5047; Case C-278/01 *Commission v Spain* [2003] E.C.R. I-14141; Case C-304/02 *Commission v France* [2005] E.C.R. I-6263. See also, Borszak, L. "Punishing Member States or Influencing Their Behaviour or Iudex (non) Calculat" (2001) 13(2) Journal of Environmental Law 235.

[16] Case C-304/02 *Commission v France* [2005] E.C.R. I-6263.

[17] Article 232 EC. The third paragraph of Article 232 EC entitles legal or natural persons to bring such an action under the same conditions, although the circumstances in which this would be possible would be so limited as to make it almost irrelevant. See Cases 10 and 18/68 *Societa "Eridania" Zuccherifici Nazionali v Commission* [1969] E.C.R. 459; Case C-107/91 *ENU v Commission* [1993] E.C.R. I-599.

has gone to some length to establish a regime by which European law is, in its opinion at least, enforced uniformly and effectively throughout the Member States. The tools which it has developed to achieve this goal, effectively relegating the specified tools in the Treaty, to measures of last resort, will be discussed *below*.

The possibility exists for one Member State to bring another before the Court in the third pillar under Article 35 TEU, but no action exists under the third pillar for the Commission to bring an action on the basis that a Member State has failed to comply with their obligations, apparently reinforcing the intergovernmental nature of the pillar.

5.2.1.2 Supremacy

The idea of the supremacy of Community law is one of the most far reaching, and arguably, least well defined, concepts in the European law. The principle seems to stem in part from the duty of loyal co-operation in Article 10 EC, and is implied by the existence of the direct applicability of regulations in Article 249 EC.[18] The ECJ, in Case 6/64 *Costa v ENEL,*[19] made it clear that the Member States have created a new type of legal system which is binding on them and their nationals and, because that creation involved a transfer of sovereign powers, it necessarily entails a commensurate limitation in the sovereign powers of the Member States. In Case 106/77 *Simmenthal*[20] the Court went a step further, stating that supremacy meant that where there was a conflict between national law and directly applicable European law, then the national law must be set aside,

[18] Case 6/64 *Costa v ENEL* [1964] E.C.R. 585.

[19] Case 6/64 *Costa v ENEL* [1964] E.C.R. 585.

[20] Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] E.C.R. 629.

irrespective of whether these measures had been adopted after the Community measure in question. In the words of the Court:

> *"[The] relationship between [Union law] on the one hand and [national law] on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but...also preclude the valid adoption of new national measures to the extent to which they would be incompatible with Community provisions."*[21]

This was clarified in Cases C-10/99-22/97 *IN.CO.GE.Srl* to mean that the rule of national law in conflict with the rule of European law was not vitiated by operation of supremacy but suspended, and only within the scope of application of European law.[22]

There are further limits on supremacy which are imposed on the doctrine by Community law itself. For example, Case C-453/00 *Kühne and Heitz*[23] found that supremacy could be limited by the application of other general principles. In this instance the principle of *res judicata* could overrule the application of supremacy in its strictest sense. These principles must be applied by any national court or tribunal dealing with European law,

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[21] Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] E.C.R. 629, para. 17.

[22] Case C-10/97 to 22/97 *Ministero delle Finanze v IN.CO.GE.'90 Srl et al* [1998] E.C.R. I-6907, although it has been argued that this is clear from the original French language version of the judgment and any confusion was in fact caused by the poor translation into English; Arnull, A. *The European Union and its Court of Justice* (2nd edition, OUP, 2006), 183.

[23] Case C-453/00 *Kühne and Heitz NV v Productschap voor Pluimvee en Eieren* [2004] E.C.R. I-837. See Caranta, R. "Case C-453/00 *Kühne and Heitz NV v Productschap voor Pluimvee en Eieren*" (2005) 42(1) Common Market Law Review 179. See also, Case C-234/04 *Kapferer v Schlanck and Schick* [2006] E.C.R. I-2585.

whether or not they would otherwise have the power as a matter of national law to declare domestic legislation to be unconstitutional.[24]

The significance of such cases as *Kühne and Heitz* is not entirely the substantive legal point made[25] but the broader point that, in the view of the ECJ, it is European law which sets the limit of this European legal doctrine. This can be further demonstrated from the constitutional battles fought between the ECJ and the Bundesverfassunsgericht, the German Constitutional Court. In Case 11/70 *Internationale Handelsgesselschaft* the ECJ made it absolutely clear to the Bundesverfassunsgericht that responsibility for the protection of fundamental rights in the European legal sphere rested with the European Court and that European law was therefore supreme over any review conducted by the Bundesverfassunsgericht in accordance with provisions of the German Constitution.[26]

The statement by the ECJ that European law was supreme over National Constitutions has never been entirely accepted by the German courts, nor for that matter by the House of Lords (now the Supreme Court[27]), leading to a significant divergence of views between the European and national judiciaries relating to the precise operation of the doctrine. In essence the consensus view of national Supreme Courts still appears to be that Community law is supreme until such time as national law decides that it is

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[24] Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] E.C.R. 629, para 22. A further manifestation of supremacy to which we shall return below is that Community law must not only be applied but applied effectively. This includes the duty to apply national remedies in such a way as to ensure effective protection of rights derived from European law, even where a bar to such applications would exist as a matter of national law; see Case C-213/89 *R v Secretary of State for Transport, ex. P. Factortame Ltd. And others* [1990] E.C.R. I-2433; see further *below* at 4.2.1.6.

[25] That *res judicata* can in certain circumstances alleviate the pure functioning of supremacy

[26] Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorrastelle für Getreide und Futtermittel* [1970] E.C.R. 1125.

[27] Following the Constitutional Reform Act 2005.

not. In the case of the United Kingdom, the House of Lords were battling with the problem of accommodating the supremacy of European law within the constitutional doctrine of Parliamentary sovereignty. According to this doctrine, any subsequent legislation which contradicted European law would, in theory, have resulted in the implied repeal of Section 2 of the European Communities Act 1972. In *Factortame (no. 2)*,[28] their Lordships created the neat legal fiction of the implied supremacy clause to the effect that all legislation is impliedly adopted with the intention of being compliant with Community law. However, this leaves the possibility that the British Parliament could adopt legislation which deliberately fails to comply with Community law. In the event of this occurring it appears that UK courts would be bound, as a matter of domestic law, to apply the domestic law rather than the European provision with which it conflicts.[29]

The *Solange*[30] litigation before the Bundesverfassunsgericht gives further evidence of a domestic legal system placing limits on supremacy. As a result of this litigation, the German Constitutional Court has made clear that the final say on the degree to which European law is supreme in the German national legal system rests with them. In *Solange No.2*[31], what can best be described as an uneasy truce was declared with the German Constitutional court ruling that, while the ECJ maintained a standard of rights protection broadly equivalent to that of the German system, the Bundesverfassunsgericht would refrain from reviewing individual provisions of European legislation, but that the German courts retained a

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[28] *R v Secretary of State for Transport, ex parte Factortame (No.2)* [1990] 3 W.L.R. 818. See Craig, P. "Supremacy of the United Kingdom Parliament after *Factortame*" (1991) 11 Yearbook of European Law 221.

[29] *Garland v British Rail* [1983] 2 AC 751, 771 per Lord Diplcok. See also, *Macarthy's ltd v Smith* [1981] 1 QB 180, *Thoburn v Sunderland City Council* [2003] QB 151

[30] *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorrastelle für Getreide und Futtermittel* (No.2 BVL 52/71)

[31] Wünsche Handelsgesellschaft, Re. (2 BvR 197/83)

reserve jurisdiction to review European secondary law should such a conflict arise in future.[32]

While *Kühne and Heitz* and the line of case law which follows seems to strongly suggest that while the Court of Justice considers the concept of supremacy to be a matter of European law, including its limits, at least some Member States believe that supremacy is, in the words of Douglas-Scott, *"a product of their own domestic legal orders rather than a feature of the unique* sui generis *nature of Community law".*[33] To an extent however, the precise nature of supremacy is unimportant for the time being; there is a truce, however uneasy it may be, between the two schools of thought. Both national courts and the ECJ accept that, in the present legal circumstances, Community law will be applied in preference to conflicting rules of national law,[34] but the way in which those rules are applied has become a matter of some debate.

5.2.1.3 Direct Effect of European Law

Possibly more than any other 'judge-made' doctrine, the notion of the direct effect of European law has demanded a huge amount of critical attention. Along with supremacy it is regarded as the principal tool for

[32] *Re Wünsche Handelsgesellschaft* [1987] 24(3) Common Market Law Review 225. See also *Brunner v European Union Treaty* [1994] 31(1) Common Market Law Review 57. A series of cases relating to the Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States [2002] OJ L 190, 13th June 2002 (the European Arrest Warrant) have revealed a similar patchwork of conditional acceptance of the doctrine of supremacy in relation to the third pillar in a number of Member States, see Case C-66/08 *Kozlowski* [2008] E.C.R. I-2601. This will be discussed in greater detail in following chapters. See also Chapter 7, 7.3.1.1 on the discussion of Case 314/85 *Firma Foto-Frost v Hauptzollamt Lubek-Ost* [1987] E.C.R. 4199 as a partial manifestation of the supremacy of European law.

[33] Douglas-Scott, S. *Constitutional Law of the European Union* (Longman, Bristol, 2002), 264.

[34] Arnull, A. *The European Union and its Court of Justice* (2nd edition, OUP, 2006), 265-266. The extent to which Union law, and in particular Title VI TEU, is supreme over national law will be discussed in detail in Chapter 6.

giving effect to European law, in the case of direct effect particularly Community law, within the national legal system.[35] To briefly restate, direct effect is that doctrine which allows, in certain circumstances, rules of Community law to be relied upon directly before national courts. In the landmark Case 26/62 *Van Gend en Loos,*[36] the Court confirmed for the first time that the Treaty did indeed envisage circumstances in which national courts would be required to interpret and thus apply provisions of European law directly. The Court has been variously and extensively praised[37] and criticised[38] for its ruling in *Van Gend,* but the significance of this decision cannot be overlooked, and direct effect has effectively become an everyday notion, readily and universally accepted,[39] a startling judicial achievement. In order for a Treaty provision to enjoy direct effect it must be clear, precise and unconditional and must not require any further implementing action.[40] The early case law on direct effect all centred around enforcing rights derived from Community law against the Member State. In Case 127/73 *SABAM*[41] the Court affirmed that the EC Treaty could be relied upon directly in disputes between two private parties. *SABAM* concerned the application of Articles 81 and 82 EC on competition law (ex Articles 85 and 86 EC respectively), the 'horizontal' effect of which

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[35] Dougan, M. "When Worlds Collide! Competing Visions of the Relationship Between Direct Effect and Supremacy" (2007) 44(4) Common Market Law Review 931, 932.

[36] Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1962] E.C.R. 1.

[37] Arnull, A. *The European Union and its Court of Justice* (2nd edition, OUP, 2006), 168.

[38] See Hartley, T. "The European Court, Judicial Objectivity, and the Constitution of the European Union" (1996) 112(1) Law Quarterly Review 95.

[39] Pescatore, P. "The Doctrine of "Direct Effect": An Infant Disease of Community Law" (1983) 8(2) European Law Review 155, 177; Prechal, S. "Does Direct Effect Still Matter" (2000) 37(5) Common Market Law Review 1047.

[40] Opinion of Advocate General Mayras in Case 2/74 *Reyners v Belgium* [1974] E.C.R. 631. As originally set out in Case 26/62 *Van Gend en Loos,* para 13 there was a further requirement that the provision create a negative right, although this fell swiftly by the wayside, see Arnull, A. *The European Union and its Court of Justice* (2nd edition, OUP, 2006), 170.

[41] Case 127/73 *BRT v SABAM* [1974] E.C.R. 51.

is perhaps unsurprising as the Articles in questions were aimed at regulating the relationship between private parties.[42]

The direct effect of secondary legislation is, however, slightly more complicated. Regulations are clearly directly applicable in Member State legal systems in accordance with Article 249 EC, and the fact that they are seems to underpin much of the Court's jurisprudence both on supremacy and direct effect. It appears that regulations may be enforced horizontally between private parties. In Case C-523/00 *Muñoz*[43] the Court held that where a regulation was of general application, for example, in the instant case it was designed to keep inferior products from entering the market, it should be understood as offering protection to consumers from defective goods, and other producers from unfair practices. It was therefore inappropriate for enforcement of such regulations to be reserved to the Member States, and an individual could rely on such a regulation in national courts against a third party.

Directives on the other hand are more difficult.[44] That directives are capable of having direct effect[45] vertically[46] against *"emanations of the State"*[47] is established by a long series of case law. If a directive is sufficiently precise and unconditional, and the Member State has failed to correctly implement that directive by the end of the time period allowed for

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[42] Arnull, A. *The European Union and its Court of Justice* (2nd edition, OUP, 2006), 173. On potential problems with the direct effect of Articles 81 and 82 EC in a quasi-criminal context see *infra* Chapter Six.

[43] Case C-253/00 *Muñoz y Cia SA v Frumar Ltd* [2002] E.C.R. I-7289.

[44] For a more comprehensive assessment of the role of directives in EC law and their legal effect see Prechal, S. *Directives in EC law* (2nd edition, OUP, 2005).

[45] Case 41/74 *van Duyn v Home Office* [1974] E.C.R. 1337.

[46] Case 152/84 *Marshall v Southampton and South West Hampshire Area Health Authority* [1986] E.C.R. 723

[47] Which has been defined broadly, see Case C-188/89 *Foster v British Gas* [1990] E.C.R. I-3313.

implementation then it may be relied upon by an individual in proceedings against a State emanation in national courts. A provision is to be considered precise where it sets out an obligation in unequivocal terms, and unconditional when the obligation in question is not qualified by any condition nor subject to the Member State or the Community taking any further measures to implement it.[48]

Directives are not however capable of having horizontal direct effect.[49] There appears to be a number of possible conceptual reasons for denying individuals the right to rely directly on improperly implemented directives against one another in private proceedings. The rationale which appears to have been given most credence by the Court of Justice is that vertical direct effect is a form of estoppel; to deny vertical direct effect would be to allow Member States to rely on their own failure to implement, or properly implement, a directive, and thus to excuse their failure to comply with their obligations under the Treaty.[50] This relies on an understanding of direct effect as a method of enforcing those obligations.[51] Moreover, this argument is somewhat undermined by the broad definition accorded to the State by the ECJ in Case C-188/89 *Foster*.[52] The Court has also advanced another reason for denying horizontal direct effect to directives. In Case C-91/92 *Faccini Dori* the ECJ observed that regulations are, as we have seen, directly applicable by virtue of the Treaty and to extend horizontal effect to

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[48] Case C-246/94 *Cooperativa Agricola Zootecnica S. Antonio and others v Amministrazione delle Finanze dello Stato* [1996] E.C.R. I-4373, paras 17-19.

[49] Case 152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] E.C.R, 723; Case C-91/92 *Paola Faccini Dori v Recreb Srl* [1994] E.C.R. I-3325.

[50] Case 148/78 *Criminal proceedings against Tullio Ratti* [1979] E.C.R. 1629, para. 22.

[51] Craig, P. "Once upon a Time in the West; Direct Effect and the Federalization of EEC Law" (1992) 12(4) Oxford Journal of Legal Studies 397. This argument, that direct effect is a de facto method of enforcing obligations from European law against Member States applies more widely than purely in relation to directives..

[52] Tridimas, T. "Horizontal Effect of Directives: a Missed Opportunity" (1994) 19(6) European Law Review 621, 631.

directives would be to equate them with regulations thus recognising *"a power in the Community to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations."*[53] However, whatever the primary reason for excluding horizontal direct effect from directives, this distinction has, formally at least, survived in the Court's case law.

Informal inroads have, however been made into this principle. Cases C-194/94 *CIA Securities*[54] and Case C-443/98 *Unilever Italia* are particularly difficult cases to marry with the ECJs general approach to the nature of direct effect.[55] These cases have been frequently analysed, often to little avail, indeed to the extent that attempting to fully explain the Court's reasoning has been dismissed as *"a task fit only for masochists."*[56] In both of these cases, private parties brought actions against other private parties alleging that they were conducting their business in accordance with domestic rules which had been adopted unlawfully because of the impact of Directive 83/189.[57] In each case the ECJ set aside the wrongly adopted national measures, which may not in itself seem controversial. The problem is that the action was brought between private parties, and while the is no doubt that the wrong being corrected was a wrong by the Member States in question, this does not disguise the fact that the outcome was a change in the relative positions of two private litigants. The extent to which

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[53] Case C-91/92 *Paola Faccini Dori v Recreb Srl* [1994] E.C.R. I-3325, para 24, although again this argument has been rejected by commentators, particularly when taken with the extensive duty of consistent interpretation, see . See also, Tridimas, T. "Horizontal Effect of Directives: a Missed Opportunity" (1994) 19(6) European Law Review 621, 631.

[54] Case C-194/94 *CIA Security International SA v Signalson SA and Securitel SPRL* [1996] E.C.R. I-2201.

[55] Case C-443/98 *Unilever Italia SpA v Central Food SpA* [2000] E.C.R. I-7535.

[56] Dougan, M."When Worlds Collide! Competing Visions of the Relationship Between Direct Effect and Supremacy" (2007) 44(4) Common Market Law Review 931, 963.

[57] Directive 83/189/EEC laying down a procedure for the provision of information in the field of technical standards and regulations, [1983] OJ L 109/8, 28th March 1983.

this undermines the prohibition on horizontal effects depends to a significant degree on how one conceptualises not only direct effect, but also supremacy, and the relationship between those principles.[58]

Two main conceptual frameworks for the relationship between direct effect and supremacy have been advanced. These have been neatly characterised as the "primacy" and "trigger" models.[59] The essence of the primacy model is that supremacy exists as a free standing principle of European law which can in and of itself have an "exclusionary" impact on national law, setting aside non-compliant rules of national law. Direct effect is then a freestanding doctrine which can act in a "substitutionary" fashion. In other words when a piece of European legislation meets the threshold criteria for direct effect, that legislation is "substituted" into the Member State legal system. The difference between the operation of the two doctrines is therefore that supremacy operates negatively, to set aside national law, leaving a vacuum which the rest of national law should continue to operate, and direct effect operates positively, inserting new legal rules into the national system.[60] On the other hand, the trigger model sees supremacy as a remedy to Member State breaches which is triggered by the direct effect threshold criteria. Once European law has been made justiciable by national courts by meeting the direct effect threshold criteria, the supremacy "remedy" both imposes new substantive individual rights on a

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[58] Dougan, M. "The Disguised Vertical Direct Effect of Directives" (2000) 59(3) Cambridge Law Journal 586; Dougan, M. "When Worlds Collide! Competing Visions of the Relationship Between Direct Effect and Supremacy" (2007) 44(4) Common Market Law Review 931.

[59] Dougan, M "When Worlds Collide! Competing Visions of the Relationship Between Direct Effect and Supremacy" (2007) 44(4) Common Market Law Review 931.

[60] Dougan, M "When Worlds Collide! Competing Visions of the Relationship Between Direct Effect and Supremacy" (2007) 44(4) Common Market Law Review 931, 933. This model has much critical support, see Tridimas, T "Black, White and Shades of Grey, horizontal direct effects revisited" (2001) 21 Yearbook of European Law 327; Leanaerts, K, Corthaut, T. "Of Birds and Hedges; The Role of Primacy in invoking norms of EU law" (2006) 31(3) European Law Review 287, de Witte, B. "Direct Effect, Supremacy and the nature of the legal order", in Craig, P, de Burca, G. *eds The Evolution of EU Law* (OUP, 1999), 177-213.

legal system, and excludes inconsistent national rules which are incompatible with broader "public rights".[61]

Dougan argues that the creation of a seamless model for the direct enforcement of Community law which encompasses all of the constitutional devices created by the Treaties and the ECJ is impossible. Any conceptual model cannot simultaneously be descriptively complete, legally compelling, and intellectually coherent all at the same time, for one very simple reason. The Court has failed to be descriptively, legally and intellectually coherent in the development of its case law.[62] This is true, and the best that can be expected is to create a model which attempts to encompass as much as possible. There will always be anomalous decisions in any legal model. In some ways, the best way to judge the success of a model may be to judge how little it needs to dismiss as anomalous as much as how much it successfully explains.

It is submitted that the 'trigger' model explanation that exclusion is as much a manifestation of direct effect, albeit a kind of negative direct effect, is more conceptually appealing. However, even in a model which views the direct effect thresholds as a trigger for supremacy it is not obvious that supremacy is reduced to the status of a mere remedy. It is possible to construct a model of supremacy which works with both direct effect, and as will be seen below, consistent interpretation to create a more complete model for the enforcement of Union law. Although it is conceded that this model is not perfect, it is submitted that Dougan is correct in the assertion that no model will ever be entirely so.

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[61] Dougan, M. "When Worlds Collide! Competing Visions of the Relationship Between Direct Effect and Supremacy" (2007) 44(4) Common Market Law Review 931, 934.

[62] Dougan, M. "When Worlds Collide! Competing Visions of the Relationship Between Direct Effect and Supremacy" (2007) 44(4) Common Market Law Review 931, 963.

5.2.1.4 Consistent Interpretation

Consistent interpretation is, again, not as straightforward a doctrine as it first appears. Attempting to conceptualise the doctrine requiring national courts to interpret provisions of national law in conformity with European law into a seamless judicial scheme is difficult, although it is submitted, not impossible. The doctrine was first identified in Case 14/83 *Von Colson,*[63] but was more fully realised in Case C-106/89 *Marleasing.*[64] The Court maintained their line that directives could not be enforced directly in a dispute between private parties. However, in such disputes, there was a duty on national courts to interpret national law in such a way as to give effect to a directive which either has not been, or has been incorrectly, implemented. *Marleasing* also confirmed that the obligation was not entirely without limit, stating that national law should only be interpreted in conformity *"in so far as it is possible".*[65] That the doctrine does not require a *contra legem* interpretation has been clarified more recently.[66] Consistent interpretation has been viewed as a mitigating influence against the ECJ's intransigence on horizontal direct effect, hence the label, "indirect effect".[67] On the other hand, it has been argued that the duty of consistent interpretation is not in fact a relative of direct effect, but is more akin to the duties which have arisen under Article 10 EC.[68]

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[63] Case 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] E.C.R. 1891.

[64] Case C-106/89 *Marleasing SA v La Comercial Internacionale di Alimentacion SA* [1990] E.C.R. I-4153.

[65] Case C-106/89 *Marleasing SA v La Comercial Internacionale di Alimentacion SA* [1990] E.C.R. I-4153, para 8.

[66] Case C-105/03 *Criminal Proceedings Against Maria Pupino* [2005] E.C.R. I-5285, para 47.

[67] Drake, S. "Twenty Years After *Von Colson*: the impact of "indirect effect" on the protection of the individual's Community rights" (2005) 30(3) European Law Review 329.

[68] Dougan, M. "When Worlds Collide! Competing Visions of the Relationship Between Direct Effect and Supremacy" (2007) 44(4) Common Market Law Review 931, 947. For an altogether more critical assessment of the case law on consistent interpretation see Betlem, G. "The Doctrine of Consistent Interpretation: Managing Legal Uncertainty" (2002) 22(3) Oxford Journal of Legal Studies 397.

As identified in the previous section, most commentators have now accepted, to a greater or lesser extent, that a relationship exists between supremacy and direct effect. It is also possible however to create a conceptual model of supremacy which encompasses the doctrine of consistent interpretation. It has been said that it is difficult to do this because of the *contra legem* exception. However, it is submitted that once one accepts that there is a duty to change the interpretation of national law to conform with European law there is a *de facto* hierarchy which places European law above the national. Logically, this superiority can only be a manifestation of supremacy. The reason that this manifestation of supremacy does not simply sweep away the offending national legislation is that the principle of supremacy exists in both strong and weak forms. Supremacy in its weak form is capable of distorting national law, to the extent required by *Marleasing*, but only in its strong form is it capable of imposing novel rights or obligations on, or excluding the operation of rules of, national law. Therefore, whether by substitution or exclusion, direct effect is a manifestation of strong supremacy and the threshold criteria for direct effect signifies the demarcation point between supremacy in its two forms.

Consistent interpretation as a manifestation of the principle of supremacy can be further demonstrated as its limits are entirely defined by Community law. That the national court is not required to adopt a *contra legem* interpretation is clearly, according to *Marleasing,* a matter of Community law. Other general principle, such as legal certainty and non-retroactivity, apply so as to limit the application of the full extent of consistent interpretation, and, as we saw above, the same limits are applied to the concept of supremacy following *Kühne and Heitz.*

5.2.1.5 Damages

Of course there are always going to be cases in which it is either too late, or impossible to seek the enforcement of rights before a national court. In those circumstances the ECJ has developed an additional safety net. In Case C-6/90 *Francovich*[69] the Court established the principle that Member States would be liable in certain circumstances to pay compensation for their failure to comply with their European obligations. The Court held that *"it is a principle of Community law that Member States are obliged to pay compensation for harm caused to individuals by breaches of Community law for which they can be held responsible."*[70] This seemed to be a major point of departure from previous rulings of the Court which had previously held consistently that European law, in the absence of measures specifically intended to do so, would not require Member States to make any remedies which would not otherwise have been available in national law,[71] although national remedies should be applied so as not to render the exercise of Community rights impossible.[72] *Francovich*, however, seemed to create a new right to compensation, which obliged Member States to compensate individuals who suffered a loss because of a failure to comply with Community law. Dougan argues persuasively that *Francovich* does not in fact create a new remedy, but merely continues the Court's programme of requiring Member States to apply their national rules in such a way as to ensure the effective protection of Community rights.[73]

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[69] Case C-6/90 and 9/90 *Francovich and Bonifaci v Italy* [1991] E.C.R. I-5357.

[70] Case C-6/90 and 9/90 *Francovich and Bonifaci v Italy* [1991] E.C.R. I-5357.

[71] Case 158/80 *Rewe-Handelsgesellschaft Nord mbH v Hauptzollamt Kiel* [1981] ECR 1805.

[72] See Case 309/85 *Barra v Belgium* [1988] E.C.R. 355; Case C-62/00 *Marks & Spencer v Commissioners for Customs and Excise* [2002] E.C.R. I-6325: Case C-213/89 *R v Secretary of State for Transport, ex parte Factortame Ltd. and Others* [1990] E.C.R. I-2433; Case C-271/91 *Marshall v Southampton and South West Hampshire Area Health Authority II* [1993] E.C.R. I-4367.

[73] Dougan, M. "The *Francovich* Right to Reparation: Re-shaping the Contours of Community Remedial Competence" (2006) 6(1) European Public Law 103.

In Case C46/93 *Brasserie du Pechêur*[74] the Court seemed again to change direction. Instead of relying solely on effectiveness and Article 10 EC, as in *Francovich*, they instead sought to make *Francovich* reparations a necessary corollary of Article 288 EC on the non-contractual liability of the Community, seeking apparently to ground the doctrine in the general principles and national law traditions, attempting to deflect accusations of excessive judicial activism.[75] The Court also clarified the circumstances in which a Member State would find itself liable for a breach of Community law, establishing a tripartite test. The European rule breached must be intended to confer rights, the breach must be sufficiently serious and it must be possible to demonstrate a direct causal link between the breach and the damage suffered.[76]

In *Brasserie du Pêcheur*, the Court gave further guidance as to the interpretation of the test. A breach is to be considered sufficiently serious where a Member State *'manifestly and gravely disregarded the limits on its discretion'*.[77] It then went on to list a number of factors which could be considered in establishing whether the Member State had gravely disregarded its discretion. In the words of the Court:

> *"The factors which the competent court may take into consideration include the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error*

[74] Case C-46 and 48/93 *Brasserie du Pêcheur SA v Germany* [1996] E.C.R. I-1029.

[75] Case C-46 and 48/93 *Brasserie du Pêcheur SA v Germany* [1996] E.C.R. I-1029, paras 28-29.

[76] Case C-46 and 48/93 *Brasserie du Pêcheur SA v Germany* [1996] E.C.R. I-1029, para 51.

[77] Case C-46 and 48/93 *Brasserie du Pêcheur SA v Germany* [1996] E.C.R. I-1029, para 55.

of law was excusable or inexcusable, the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law... On any view, a breach of Community law will clearly be sufficiently serious if it has persisted despite a judgment finding the infringement in question to be established, or a preliminary ruling or settled case-law of the Court on the matter from which it is clear that the conduct in question constituted an infringement."[78]

It has become clear since *Francovich* that the Member State may be liable in damages for the acts of any level[79] or branch of government.[80] Following Case C-224/01 *Köbler*[81] the ECJ acknowledged the possibility of damages for actions of the national judiciary which fell within the scope of the *Brasserie* test and were particularly egregious. This case expressly dealt with a court of last instance, and it is submitted that it is unlikely that the ECJ would make the State liable in Community damages for a breach which was caused by a court from which there was a national remedy. It should also be noted however, that by not imposing damages on the breach committed by the Court in *Köbler* the ECJ has set the threshold so high that its practical influence is likely to be questionable.[82]

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[78] Case C-46 and 48/93 *Brasserie du Pêcheur SA v Germany* [1996] E.C.R. I-1029, paras 56 and 57.

[79] Case C-302/97 *Klaus Konle v Republic of Austria* [1999] E.C.R. I-3099.

[80] Legislative (Case C-46/93 and 48/93 *Brasserie du Pêcheur SA v Germany* [1996] E.C.R. I-1029), executive, including autonomous public bodies (Case C-424/97 *Salomone Haim v Kassenzahnärztliche Vereinigung Nordrhein* [2000] E.C.R. I-5123).

[81] Case C-224/01 *Köbler v Austria* [2003] E.C.R. I-10239.

[82] See also Anagnostaras, G. "Erroneous Judgments and the Prospect of Damages:The scope of the Principle of Governmental liability for Judicial Breaches" (2006) 31(5) European Law Review 735.

There are some questions over the precise nature of the *Francovich* reparations. Some commentators[83] have suggested that far from being a genuine remedy, the right to compensation it is actually a *de facto* punishment. In other words, the aim of the Court's case law is to punish Member States for failing to comply with European obligations and the fact that the "fine" goes not to the Community budget but to an individual is in some ways incidental, a point illustrated by the decision in Case C-201/02 *Wells.*[84] It is difficult to see what genuine compensatable damage the claimant in *Wells* suffered, and it is far more likely that the real reason behind the ruling was to punish the Member State for failing to comply with its obligations.

It is also possible to seek compensation from a private party for a breach through the horizontal direct effect of European law. In Case C-453/99 *Courage v Crehan*[85] the Court found that national law should not place any bar on seeking compensation from a private party who has acted in breach of Article 81 EC. While this does not create a new *Francovich* liability for private parties, it certainly brings such a thing a step closer. Nor is this particularly problematic; if law can be binding horizontally then breach of it should at least have the potential to allow for compensation to be paid horizontally.[86]

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[83] Dougan, M. *National Remedies before the European Court of Justice* (Hart Publishing, 2004), 2; Nebbia, P. "Damages Action for Infringement of EC Competition Law: Competition or Detterence?" (2008) 33(1) European Law Review 23, 29; Steiner, J. "From Direct Effect to *Francovich*: Shifting Means of Enforcing Community Law" (1993) 28(1) European Law Review 3; Prechal, S. "Member State Liability and Direct Effect: What's the difference after all?" (2006) 17(2) European Business Law Review 299.

[84] Case C-201/02 *R (On the Application of Wells) v Secretary of State for Transport Local Government and the Regions* [2004] E.C.R. I-723.

[85] Case C-453/99 *Courage v Crehan* [2001] E.C.R. I-6297, subsequently confirmed by Case C-294-298/04 *Manfredi v Lloyd Adriatico Assicurazion SpA et al* [2006] E.C.R. I-4269.

[86] Komninos, P. "New prospects for the Private enforcement of EC Competition Law: *Courage v Crehan* and the Community Right to Damages" (2002) 39(3) Common Market Law Review 447; Drake, S. "Scope of *Courage* and the Principal of 'Individual Liability' for Damages: Further

This case law has of course primarily evolved in the Court's rulings on the Community pillar. The chapters which follow will discuss the way in which these rules may apply to the third pillar.

5.3 Role of the Court in Challenging European Law

We have dealt with the ways in which the Court has developed a system of law enforcement, for European law in national courts but that is only one side of the coin. Within the European legal system, it is also possible to challenge the validity of legislation adopted by the European institutions. The grounds upon which judicial review of adopted legislation may be sought, and the standing to seek such an action are issues which have attracted considerable controversy and the Court's case law is still evolving. This section will examine the actions that can be brought, who can bring them, and the grounds upon which annulment of European legislation may be sought.

5.3.1 The Action for Annulment

There are two main routes for seeking judicial review of European legislation; either by seeking review of that legislation directly before the ECJ, or by bringing an action before a national court and seeking a preliminary reference under Article 234 EC. The disparity between the first and third pillars in this regard represents one of the most serious weaknesses in the pillar structure of the Union. We shall see below that neither of these paths to judicial protection is perfect, but we shall also see that while both paths are available in relation to first pillar measures, only

Development of the Principle of Effective Judicial Protection by the Court of Justice" (2006) 31(6) European Law Review 841.

the latter is available in relation to third pillar measures, and even then in a severely curtailed form.

5.3.1.1 Direct Actions

Article 230 EC gives the ECJ jurisdiction to hear direct actions seeking judicial review of the legal acts of the European Union. It empowers the Court to review the legality of any act of the Council, Commission or European Central Bank,[87] any act adopted jointly by the Council and the Parliament and any act of the Parliament intended to create legal effects for third parties.[88] This clearly extends the Court's jurisdiction to any legislation adopted under the first pillar, including measures adopted under Title IV EC on visas, asylum and immigration, an aspect of the old third pillar before Communitarization of these competences by the Treaty of Amsterdam.

5.3.1.2 Standing: Who can Challenge the Validity of European Law?

Three broad types of applicant have standing under Article 230 EC to petition the Court for judicial review. These are usually described as privileged, semi-privileged and non-privileged applicants. Privileged applicants under Article 230 EC are the Member States, the European Parliament, the Council and the Commission.[89] These applicants have an absolute right to bring an action before the Court to seek review of a Community act on the grounds of *"lack or competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule*

[87] Other than recommendations or opinions.

[88] Article 230(1) EC. For historical interest see, Case C-294/83 *Parti Ecologist "Les Verts" v Parliament* [1986] E.C.R. 1339.

[89] Article 230(2) EC.

of law relating to its application or misuse of powers."[90] The semi-privileged applicants (SPAs), listed in Article 230 EC as the Court of Auditors and the European Central Bank, can bring actions before the Court *"under the same conditions"* as the privileged applicants, for the purposes of protecting their own interests.[91]

The Court has, in the past, extended the right of standing to an institution in order to protect its own interests without an express basis in the Treaty. Prior to the Treaty of Nice the European Parliament had no standing rights under the Treaty. Although the Parliament failed at the first attempt to convince the Court to allow them standing,[92] they had more success in the second attempt. In Case C-70/88 *Chernobyl* [93] the Court accepted that the Parliament should have the right to protect its own interest before the Court.

For non-privileged applicants, Article 230 EC is far more restrictive, requiring that, unless the applicant is an addressee of the measure, that the measure must be of direct and individual concern to them. A measure will be of direct concern if the applicant can demonstrate that the measure amounted to *"a complete set of rules which are sufficient in themselves and require no implementing provisions."*[94] In other words, the right to seek review of EU law seems to be predicated on the EU rule itself being at fault, and in any circumstance in which any discretion is left to Member States, the action should be brought against the implementation by the Member State, rather than the European rule being implemented. We will

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[90] Article 230(2) EC.

[91] Article 230(3) EC.

[92] Case 302/87 *European Parliament v Council (Comitology)* [1988] E.C.R. 5615.

[93] Case C-70/88 *European Parliament v Council (Chernobyl)* [1999] E.C.R. I-2041.

[94] Case C-294/83 *Parti Ecologist "Les Verts" v Parliament* [1986] E.C.R. 1339.

see below that this logic seems to underpin most of the Court's case law on individual standing, but in relation to direct concern at least it appears to have been mitigated somewhat.

In Case 11/82 *Piraiki-Pitraiki*[95] the ECJ found that, even if some discretion was left to Member States in implementation, that would not necessarily prevent the measure in question being of direct concern to an applicant. If discretion is illusionary, or, as in the case of *Piraiki-Patraiki,* the factual situation makes clear that there was never a realistic question of the implementing party exercising the discretion allowed to them, that measure may still be of direct concern. This is clearly important to the implementation of directives, which, in the words of Article 249 EC *"leave to the national authorities the choice of form and methods"*. A directive may be susceptible to a challenge in theory so long as direct and individual concern can be demonstrated, but whether an applicant is directly concerned by a directive, in spite of the implementation requirement, must be decided on a case-by-case basis. Since, in the majority of cases, directives are so detailed that their implementation generally does not entail a significant degree of discretion,[96] a potentially high number of directives would be susceptible to review. The Court of First Instance reiterated this approach in Case T-172/98 *Salamander,*[97] where they noted that it would be necessary to assess the direct concern of an individual in relation to a directive on a case-by-case basis.[98]

On the other hand, however, the ECJ has interpreted Article 230 EC so as to place a significant obstacle in front of anyone outside the privileged or

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[95] Case 11/82 *Piraiki-Patraiki v Commission* [1985] E.C.R. 207.

[96] Case C-10/95 P *Asocarne v Council* [1995] E.C.R. I-4149, para 29.

[97] Case T-172/98 *Salamander AG v Parliament and Council* [2000] E.C.R. II-2487.

[98] Case T-172/98 *Salamander AG v Parliament and Council* [2000] E.C.R. II-2487, paras 27-32.

semi-privileged applicants seeking judicial review directly before it. Demonstrating that a measure is of "individual concern" to an applicant has often proved so difficult as to make it close to impossible.

The classical statement of the Court's interpretation of the notion of individual concern is laid down in Case 25/62 *Plaumann:*

> *"Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed."*[99]

In other words, an applicant to whom the measure was not addressed must be a member of a closed class of persons who can demonstrate that their factual circumstances cause them to be affected by a measure in such a way as to make them a *de facto* addressee affected. In *Plaumann* the Court began to sketch out the full ramifications of that finding. Being an undertaking involved in an economic sector affected by a measure will not be enough. This will be so wherever anyone can, theoretically or otherwise, take part in that sector. The Court has artificially restricted what can be considered a closed class, to the extent that even being able to tell the name and precise numbers of the individuals affected will not, in and of itself, suffice. Even being a part of a closed class of persons will not necessarily be enough.

[99] Case 25/62 *Plaumann v Commission* [1963] E.C.R. 95, para 107.

In Case 11/82 *Piraiki-Patraiki*[100] the ECJ held that, in addition to being a member of a closed class, the applicant must demonstrate that the institution or institutions adopting the measure in question were somehow obligated to take the interests of that class into account. In *Piraiki-Patraiki* for example, merely being importers of cotton would not suffice, although being importers of cotton with specific binding contracts to be performed during a fixed period, which would be rendered impossible by a subsequent Commission decision, would suffice. The Court held the Commission were not only capable of learning of these contracts, but should have known and taken them into account. This gives an indication as to the extremely stringent requirements. Likewise in Case C-358/89 *Cordoniu*[101] the Court found that the undertaking in question was individually affected because they had been using a trademark which had been registered in 1924, and had been using it informally since before then, and would be prevented from continuing to do so by the contested measure.

The case law of the Court on individual standing has been subjected to almost continuous assault from academics for being too restrictive.[102] However, the criticism is not solely academic. Probably the best known attack on the case law came in the form of a conceptually compelling Opinion from Advocate General Jacobs in Case C-50/00 *UPA.*[103] The argument primarily rests on the point that the EC Treaty does not create a

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[100] Case 11/82 *Piraiki-Patraiki v Commission* [1985] E.C.R. 207.

[101] Case C-358/89 *Cordoniu v Council* [1994] E.C.R. I-1835.

[102] Ward, A. *Individual Rights and Private Party Judicial Review in the EU*" (OUP, 2007); Albors Llorens, A. "The standing of private parties: Has the ECJ missed the boat?" (2003) 62(1) Cambridge Law Journal 72: Arnull, A. "Private Applicants since *Cordoniu*" (2001) 38 (1) Common Market Law Review 7; Usher, J. "Direct and individual Concern: an Effective Remedy or a Conventional Solution?" (2003) 28(5) European Law Review 575.

[103] Opinion of AG Jacobs Case C-50/00 *Union de Pequenos Agricultores v Council* [2002] E.C.R. I-6677.

complete system of remedies. The Court has consistently rejected the prospect of reducing the stringency of the individual concern test on the grounds that the proper route to bring a question of validity before the Court in the majority of cases is to bring a challenge nationally and rely on the national court to submit a request for a preliminary reference under Article 234 EC.[104] The Advocate General dismissed this argument on several grounds.

First, that the applicant before a national court does not have the right to demand a reference, and, with some limited exceptions which will discussed *below*, the decision to make a reference is in the gift of the national court. Although it is conceded that not all national legal orders allow for the possibility of the review of legislation, this is not an answer to the criticism that it is difficult to access the rights which are granted by the Treaty. Once the Treaty grants a right, in this particular example, to seek review of legislation, either directly or indirectly that right should be genuinely protected by the judicial body responsible for it. This is particularly true when the effect of the Courts caselaw is that it becomes indirectly discriminatory against nationals of States whose legal orders either do not require implementing measures, or do not allow for challenge of those measures, that would most obviously be true of primary legislation in the United Kingdom. If a rule is to be applied, it must be applied fairly, and evenly across the Union.

Another, arguably more serious, objection is that not all measures require national implementing measures, and in some cases such measures are automatically deemed to be illegal. The Advocate General also pre-empted the Court's response to this particular objection, stating that requiring

[104] Arnull, A. (2nd edition, OUP, 2006), 82. The ECJ reiterated this point in Case C-50/00 *Union de Pequenos Agricultores v Council* [2002] E.C.R. I-6677, para 40.

courts to interpret national procedural rules broadly so as to allow a challenge wherever possible would require the Court of Justice to become unnecessarily involved in the interpretation and application of national procedural rules and would still not create an absolute right to seek a remedy. He proposed that the Court should repeal the *Plaumann* formula and instead accept that an applicant is *"individually concerned by a Community measure where that measure has, or is liable to have, a substantial adverse effect on his position."* The Advocate General presents a number of advantages to this streamlined formula; that it would shift the focus of judicial review procedures before the Court from questions of procedure and standing to questions of substance and it would grant a right of standing to a greater number of people, closing the legal vaccuum created by the *Plaumann* test. Moreover, he argued, the broadening of the standing criteria would be in line with the tendency of the Court to increase, rather than restrict, judicial protection. He also states that there is nothing in Article 230(4) EC to preclude a more relaxed test, any more than there is anything which expressly endorses the *Plaumann* formula. Moreover, he rejects out of hand the idea that legislative, administrative or judicial efficiency can ever justify shielding potentially unlawful measures from judicial review. It is submitted that this final reason is the most persuasive of all. Once a system has accepted the principle of judicial review, it must surely be impossible to justify restricting access to that process on the grounds of efficiency

It appears that the Court of First instance was persuaded by the suggestions made by AG Jacobs in *UPA*, and in Case T-117/01 *Jégo-Quéré*,[105] they set out a different liberalised set of standing rules. The Court of First instance argued that an applicant should be regarded as individually concerned where a measure *"affects his legal position, in a manner which is both*

[105] Case T-177/01 *Jégo-Quéré & Cie. SA v Commission* [2002] E.C.R. II-2365.

definite and immediate, by restricting his rights or imposing obligations on him."[106] The CFI's judgment issued after AG Jacobs' Opinion, but before the ECJ issued judgement in *UPA,* can best be described as a very thinly veiled rebuke of the ECJ. It has been argued however, that the tone of the CFI was potentially responsible, at least in part, for the ECJ's judgment in *UPA.*[107] In its judgment on *UPA,* the ECJ rejected the Opinion of AG Jacobs in its ruling, emphatically restating the case law under *Plaumann.* The Court claimed that any change to the standing rules would require a Treaty amendment, stating that it is for the Member States to make such a change rather than the Court.[108] This is largely unconvincing, primarily on the grounds that the *Plaumann* test is not found in the Treaty and is a matter of judicial interpretation. They then proceeded, as was inevitable, to reverse *Jégo-Quéré* on appeal.[109] The rules of standing for non-privileged applicants therefore remain restrictive and artificially limit the ability of individuals to apply for judicial review of the validity of legislation. We will see below that the Lisbon Treaty will go some way towards eliminating the problems in relation to direct standing before the national courts. In particular Article 263 TFEU will remove the burden of proving individual concern for a measure which requires no implementing measures, requiring only that the individual demonstrate that a regulatory measure is of direct concern.[110]

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[106] Case T-177/01 *Jégo-Quéré & Cie. SA v Commission* [2002] E.C.R. II-2365, para 51.

[107] Arnull, A. *The European Union and its Court of Justice* (2nd edition, OUP, 2006), 85.

[108] Case C- 50/00 *Union de Pequenos Agricultores v Council* [2002] E.C.R. I-6677, para 45.

[109] Case C-263/02 P *Commission v Jégo-Quéré & Cie. SA* [2004] E.C.R. I-3423.

[110] See below at Chapter 7.2.3

5.3.2 The Preliminary Reference Procedure

Article 234 EC creates what is possibly the cornerstone of the EU judicial system, the preliminary reference procedure. Whether its value was anticipated or not is unclear but the relationship between national courts and the ECJ has necessarily been shaped by not only the substantive rulings given, but the manner in which the ECJ has exercised its jurisdiction in these matters. Article 234 EC allows national courts to send questions of EC law to the European court[111] for a preliminary ruling in order to ensure the correct interpretation of the Treaty[112] or of legislation adopted in accordance with the Treaty.[113] It also allows national courts to raise questions of the validity of secondary legislation[114] and to raise questions of the interpretation of the statutes establishing bodies and agencies of the Union.[115] Article 234 EC states that any *"court or tribunal"* of a Member State is entitled to submit a reference to the European courts at their discretion. Where such a question is raised before a national court against whose decision there is no appeal, that Court is obliged to refer the matter to the Court.

The Court has had to examine what constitutes a court or tribunal with the ability to refer cases through the preliminary reference procedure. The Court has traditionally interpreted this question broadly. The Court has made clear that whether or not a national body is a court or tribunal for the purpose of Article 234 EC is a question for Community law. They stated

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[111] Following the Treaty of Nice, Article 225(3) EC allows the Court of First Instance to hear preliminary references in the limited circumstances as set out in the Statute of the Court of Justice. For details see Arnull, A. *The European Union and its Court of Justice* (2nd edition, OUP, 2006).

[112] Article 234(a) EC.

[113] Article 234(b) EC.

[114] Article 234 (b) EC.

[115] Article 234(c) EC.

that the answer was not straightforward but was in fact governed by a number of factors. These factors include whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether the procedure is *inter partes,* whether it applies rules of law and whether it is independent.[116]

Article 234 EC does not however paint a complete picture of the preliminary ruling arrangements. In total there are three preliminary reference procedures, and the additional procedures are of particular relevance to this thesis. They can be found under Article 35 TEU for measures adopted under the third pillar and Article 68 EC, for measures adopted under Title IV. [117] The Article 234 procedure has been extensively covered elsewhere[118], and a more exhaustive examination of them is not necessary here. Of more interest are the exceptions to that rule present within the Community system.

While much criticism is levelled at the third pillars patchwork of judicial protection, it must also be noted that the first pillar is by no means consistent. Article 68 EC sets out the arrangements for judicial protection under Title IV Part III EC. In particular it restricts the possibility of requesting a preliminary reference to the court of last instance.[119] This is

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[116] Case C-54/69 *Dorsch Consult Ingenieurgesellshaft v Bundesbaugesellschaft Berlin* [1997] E.C.R. I-4961, para 23.

[117] Under Article 68(1) EC, preliminary references may only be made by the court of last instance in the Member State, which has restricted the number of references on Title IV matters. While there is a unique system for preliminary references, the rules for judicial review under Article 230 EC apply, and cases on the legitimacy of Title IV legislation have been heard before the Court. See Drywood, E. "Giving with One Hand, Taking With the Other: Fundamental Rights, Children and the Family Reunification Decision" (2007) 32(3) European Law Review 396.

[118] Arnull, A. "References to the European Court" (1990) 15(5) European Law Review 375, Allott, P. "Preliminary Rulings-Another Infant Disease" (2000) 25(5) European Law Review 538, Komarek, J. "In the Court(s) we Trust? On the Need for Hierarchy and Differentiation in the Preliminary rulings Procedure" (2007) 32(4) European Law Review 467

[119] The court has expressly rejected attempts by courts not of last instance to request references, see Case C-51/03 *Georgescu* [2004] E.C.R. I-3203.

important because, when one considers the likely content of Title IV measures the number of cases which would, in practice, reach a court of last instance is likely to be limited. These cases will deal with families and recent immigrants, many of whom are unlikely to have sufficient resources to reach the last instance courts.[120] Even where such cases do reach the courts of last instance and are referenced, there could be significant negative repercussions. It must be noted that at the time of writing it can take as long as two years for a preliminary reference request to be answered by the ECJ.[121] Assuming that it can take an equal amount of time for a case to progress through the various layers of the national judiciary, this can lead to extraordinary delay in concluding the legal proceedings. For example, in certain cases relating to cross-border disputes over children and custody under Regulation 2201/2003,[122] the legal positions of the parties may be altered as a result of the changing age of the child.[123] Where the possibility exists for a significant delay the case may be manifestly altered by the length of time it takes to progress through the various layers of judiciary necessary to definitively conclude it. Article 6 of the ECHR requires, among other things, that hearings, be they civil or criminal, be conducted *"within a reasonable time"*. While the ECtHR has held that delays in national systems can be in breach of the Convention[124], it has thus far not been as forthcoming with time delays in the European

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[120] See *iner alia* Arnull, A. *The European Union and its Court of Justice* (2nd edition, OUP, 2006),132; Editorial Comment "Preliminary Rulings and the Area of Freedom, Security and Justice" (2007) 44(1) Common Market Law Review 1.

[121] Barnard, C. "The PPU: Is it worth the Candle? An early assessment" (2009) 34(2) European Law Review 281, 281; see also Tridimas, T. "Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure" (2003) 40(1) Common Market Law Review 9.

[122] Regulation No 2201/2003 concerning jurisdiction and recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility [2003] OJ L 338/1, 27th November 2003.

[123] See Lamont, R. "Annotation of Case C-523/07 *A*" (2010) 47(1) Common Market Law Review *forthcoming.*

[124] App. No. 6232/73 *Konig v Germany* (1978) 2 EHRR 170, para 99.

system. In particular in *Pafitis v Greece* the ECtHR held that they were not competent to review the delays in judicial proceedings which were not attributable to the judicial authorities of a State party[125]. It is worth noting that the delays in ECJ references have increased markedly since then, however, and the ECtHR may not be quite so standoffish where criminal proceedings are concerned.

Cognisant of the above critique, the Union have introduced two accelerated procedures by which preliminary references can be heard. The accelerated procedure was introduced in 2000[126] and in 2008 a process known as the urgent preliminary ruling procedure (PPU)[127] was introduced aimed at further ameliorating the particular problems posed by references arising from Title IV EC or Title VI TEU.[128] Thus far relatively few cases have been brought under each of these procedures,[129] and given that the PPU has specifically been adopted for Titles IV EC and VI TEU, it is highly likely that all accelerated references of relevance to those Titles will be made under the PPU rather than the accelerated reference procedure. While it is early to judge the success or failure of these new procedures, in terms of cases if not in terms of time, thus far reactions to both procedures have

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[125] App. No. 20323/92 *Pafitis and Others v Greece* (1999) 27 EHRR 566 paras 93-95

[126] Amendments to the Rules of Procedure of the Court of Justice [2000] OJ L122/43, introducing Article 104a to the Rules of Procedure of the European Court of Justice, http://curia.europa.eu/en/instit/txtdocfr/txtsenvigueur/txt5.pdf Last accessed 27th April 2009.

[127] The acronym standing for the French *procédure préjudicielle d'urgence.*

[128] Decision 2008/79/EC, Euratom [2008] OJ L 24/42 Article 1, Paragraph 23(a), Article 104b to the Rules of Procedure of the European Court of Justice, http://curia.europa.eu/en/instit/txtdocfr/txtsenvigueur/txt5.pdf Last accessed 27th April 2009.

[129] Under the former see, Case C-189/01 *Jippes v Minister van Landbouw, Natuurbeheer en Visserij* [2001] E.C.R. I-5689; Case C-66/08 *Criminal Proceedings against Kozlowski* [2008] E.C.R. I-6041; Case C-127/08 *Metock v Minister for Justice, Equality and Law Reform*[2008] E.C.R. I-6341, See Currie, S. "Accelerated justice or a step too far? Residence Rights of non-EU family members and the Courts rulings in *Metock*", (2009) 34(2) European Law Review 310. Under the latter see, Case C-195/08 PPU *Proceedings Brought by Rinau* [2008] E.C.R. I-5271; Case C-296/08 PPU *Santesteban Giocoechea* [2008] E.C.R. I-6307; Case C-388/08 PPU *Leymann and Pustovarov* judgment of 1st December 2008.

been mixed. In particular, neither procedures require a full Advocate General's opinion to be published, and in fact Article 104(b)(5) of the Courts Rules of Procedure requires only that the Advocate General be *"heard"*.[130] This oral submission has become known as the *"prise de position"* and is not published. This has been highlighted as one of the greatest weaknesses in the system.[131] Its effectiveness or otherwise remains to be seen, but undoubtedly it is a step in the right direction, recognising the weaknesses of the current system for addressing cases where time is of importance. Article 67(2), EC contains a passarelle style clause which allows the Council, acting unanimously following consultation of the European Parliament, to bring Title IV EC in line with the rest of the EC Treaty. This would allow, for example, preliminary references to be dealt with under the standard process found in Article 234 EC, which would be welcomed, but has yet to be meaningfully explored.[132]

The pick-and-mix nature of the jurisdiction of the supranational judiciary under Title VI TEU, together with the national opt-outs under Title IV EC are likely to lead to a degree of fragmentation in Union law. National courts will necessarily find it more difficult to apply European rules consistently without recourse to the ECJ for clarification on their interpretation or validity.[133] This system of judicial protection under the AFSJ has been heavily criticised, being dismissed by one commentator as nearly absent.[134] The Court has itself pointed out that unless referencing

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[130] Currie, S. "Accelerated justice or a step too far? Residence Rights of non-EU family members and the Courts rulings in *Metock*" (2009) 34(2) European Law Review 310.

[131] Barnard, C. "The PPU: Is it worth the Candle? An early assessment" (2009) 34(2) European Law Review 281, 292-293. See also Currie, S. "Accelerated justice or a step too far? Residence Rights of non-EU family members and the Courts rulings in *Metock*" (2009) 34(2) European Law Review 310, 318-319.

[132] See, Peers, S. "Who's Watching the Watchmen? The judicial system of the Area of Freedom, Security and Justice" (1998) 18 Yearbook of European Law 337.

[133] Douglas-Scott, S. *Constitutional Law of the European Union* (Longman, 2002), 490.

[134] Douglas-Scott, S. *Constitutional Law of the European Union* (Longman, 2002), 471.

procedures in the AFSJ are streamlined they will be *"less effective"* in ensuring the protection of fundamental rights.[135]

5.4 Fundamental Rights in the European Union

Fundamental rights protection in the European Union has been allowed to become a regrettable patchwork of various norms from various sources. This section will examine the evolution of the law and the resulting weaknesses in protection.

5.4.1 Fundamental Rights as European Union Law

Fundamental rights first arose in the Union's judicial architecture as a defence mechanism. Ironically it was not for the purpose of defending individuals from the actions of the State or the Union, but for the purpose of protecting the Union from its Member States. It is widely accepted[136] that the ECJ's ruling in Case 11/70 *Internationale Handelsgesselschaft*[137] was as much about pre-empting a revolution by the judiciaries of the Member States, in particular, again, the Bundesverfassungsgericht. Although Spaventa has argued that the Court of Justice would have been inclined to go in this direction without the pressure they were under, and that the decision merely represented the most likely natural evolution of European law,[138] the particular decision in Case 11/70 *Internationale*

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[135] See Proceedings of the Court of Justice and the Court of First Instance of the European Communities, Number 15/95; Arnull, A. *The European Union and its Court of Justice* (2nd edition, OUP, 2006), 132.

[136] Douglas-Scott, S. *Constitutional Law of the European Union* (Longman, 2002), 438 *et seq.*

[137] Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorrastelle für Getreide und Futtermittel* [1970] E.C.R. 1125.

[138] Spaventa, E. "Federalisation Versus Centralisation: Tensions in Fundamental Rights Discourse in the EU", in Dougan, M, Currie, S. (*eds*), *50 Years of the European Treaties, Looking Back and Thinking Forward*, (Hart Publishing, 2009), 343, 344-345.

Handelsgesselschaft does appear to be a response to the position the German Constitutional Court had adopted on fundamental rights protection and EC law. The precise context of the ensuing battle between the ECJ and the German judiciary was discussed *above* in the context of supremacy so there is no need to reiterate it here, only to observe that the remarkable discovery of fundamental rights as a part of the general principles was made by an ECJ apparently very much under fire.

In their judgment in Case 4/73 *Nold*,[139] the ECJ expounded further on the sources which inspired the general principles of law which gave them a fundamental rights jurisdiction. On the one hand, they found that fundamental rights were part of the common constitutional traditions of the Member States. On the other, and arguably even more significantly, they found that they were able to draw on *"international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories."*[140] Clearly, this was aimed, if not exclusively, then primarily, at the European Convention on Fundamental Rights.[141] Today, the idea of the Union being based on fundamental rights can now be found in the formulation of Article 6 TEU. In particular, Article 6(2) TEU which states that;

> *"The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms...and as they result from the constitutional*

[139] Case 4/73 *Nold v Commission* [1974] E.C.R. 491.

[140] Case 4/73 *Nold v Commission* [1974] E.C.R. 491, para 13.

[141] Although it must be noted at this point that they were not referring to the ECHR exclusively. For example the Court has held that the United Nations Convention on the Rights of the Child can also be relevant. See Case C-540/03 *Parliament v Council* [2006] E.C.R. I-5769; Drywood, E. "Giving with one hand, taking with the other: fundamental rights, children and the family reunification decision." (2007) 32(3) European Law Review 396.

traditions common to the Member States, as general principles of Community Law"

The Court has been criticised for being somewhat conservative in the exercise of its new jurisdiction.[142] It is worth repeating at this point that neither in *Internationale Handelsgesselschaft* nor *Nold*, did the ECJ go on to find a fundamental rights breach. It was in fact nearly three decades after finding that fundamental rights protection came within the ECJ's sphere of influence that the Court actually identified a breach.[143]

The Court has been willing to acknowledge the role of fundamental rights in the general principles of law, and has even gradually moved towards enforcing those rights. There is, however, a perception that it has not moved quickly enough in that process. One possible solution which is frequently discussed is the accession of the European Union to the ECHR. Although the Court of Justice rejected that under the current Treaty regime on the grounds of lack of competence, in Opinion 2/94, this idea has never gone away. [144] The political will clearly exists to see the accession as the abandoned Constitutional Treaty,[145] and the Lisbon Treaty,[146] both include an express competence allowing such accession to take place. The decision in Opinion 2/94 has been criticised as conservative,[147] and to a degree self serving.[148] It is conceded that the Court has in the past accepted the

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[142] Douglas-Scott, S. "A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis." (2006) 43(3) Common Market Law Review 629, 633.

[143] Case C-404/92 P X v Commission of the European Communities (Aids) [1994] E.C.R. I-4737, see also Case C-185/95 *Baustahlgewebe v Commission* [1998] E.C.R. I-8417.

[144] See above, 4.3.2.

[145] Article I-9, Constitutional Treaty.

[146] Article 188 TFEU.

[147] Douglas-Scott, S. *Constitutional Law of the European Union* (Longman, 2002), Chapter 13.

[148] Weiler, J, Fries, S. "A Human Rights For the European Community and Union: The Question of Competences", Harvard Jean Monnet Working Paper 4/94, p.6.

principle that the Community could make itself subject to the jurisdiction of an external Court established by an international convention.[149] It is however submitted, that the accession to the ECHR, and thus the acceptance of the jurisdiction of the Strasbourg Court, would be significantly more likely to subject the Court itself to outside scrutiny, and would indirectly increase pressure on the institutions to use their powers more responsibly due to the distinct possibility of negative review.

5.4.1.1 The Charter of Fundamental Rights

The political institutions of the Union have played a role in furthering human rights protection in the European Union with the "solemn proclamation" of the Charter of Fundamental Rights. The Charter was drafted following a *"novel, experimental, relatively deliberative and open forum for constitutional debate"*,[150] which was triggered by the European Council summit in Cologne in 1999. The conclusions of the Cologne Council required a document be drawn up which contained a catalogue of rights which drew on;

> *"...the fundamental rights and freedoms as well as basic procedural rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and derived from the constitutional traditions common to the Member States, as general principles of Community law"*[151]

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[149] Opinion 1/91 *"Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area"* [1991] E.C.R. I-6079.

[150] De Burca, G. "The Drafting of the EU Charter of Fundamental Rights" (2001) 26(2) European Law Review 126, 138.

[151] Annexe IV to the Cologne European Council Presidency Conclusions, 3-4th June 1999.

To that extent, the Charter was clearly meant to represent a restatement of the status quo, rather than any radical departure or novel innovation. It is also apparently clear that the intention was not to usurp to role of the ECHR as primary human rights document in the European continent.[152] It is also important to note that much of the momentum which may have been gathered by the Charter was nullified by a seismic shift in the debate. The debates on the legal nature of the Charter, and the extent to which it was to be considered binding law were effectively stalled by the Convention on the future of Europe and the decision to include that Charter as part II of the Constitutional Treaty, rendering the questions on its legal status irrelevant.[153] It would have become primary, constitutional law and the question would have shifted, as indeed it did, to the more narrow question of its proper scope and application.[154]

The Charter contains a number of substantive rights and an exhaustive examination of them is beyond the scope of this thesis.[155] More interesting is the scope of the Charter as a part of the ECJ's toolkit for establishing a comprehensive regime for the protection of rights. The Charter has always been ambiguous and the horizontal provisions in particular have caused much debate about the precise nature of the Charter and its operative scope. Article 51 of the Charter states that it is:

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[152] Article 52(3) of the Charter states that any rights with an analogous counterpart in the ECHR should be interpreted in accordance with the Convention and the jurisprudence of the ECtHR.

[153] See Douglas-Scott, S. "The Charter of Fundamental Rights as a Constitutional Document" [2004] 1 European Human Rights Law Review 37.

[154] See *inter alia* Carruthers, C. "Beware of Lawyers Bearing Gifts: a Critical Evaluation of the proposal on Fundamental Rights in the EU Constitutional Treaty" [2004] 4 European Human Rights Law Review 424, 428 *et seq*; Leanaerts, K, Gerard, D. "The Structure of Union According to the Constitution for Europe; the Emperor is getting dressed" (2004) 29(3) European Law Review 289, 317-318; Eeckhout, P., "The EU Charter of Fundamental Rights and the Federal Question" (2002) 39(5) Common Market Law Review 945.

[155] For a comprehensive summary see Arnull, A *et al*, *Wyatt and Dashwood's European Law* (5th edition, Sweet and Maxwell, 2006), Chapter 9.

> *"...addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers."*

This clearly intends to create a narrow scope of application, particularly in relation to the Member States. 'Implementing' seems to imply that it would be binding on the Member States when they are taking some positive action, either legislating to introduce European law into their national systems or taking action to enforce or comply with EU law. In terms of the institutions of the Union, it seems clear that when legislating, they start from the basis that their legislation should be compliant with the Charter, and most legislation now includes a statement in its Preamble to that effect. What is less clear is the extent to which that is always actually the case, and what the consequences would be.

The ECJ was slow to get to grips with the Charter. It has been argued that the Court had adopted a soft touch on many issues because of the presumed ratification of the Constitution, and only in the wake of the Treaty's failure did the Court move to "cherry pick" aspects of the Treaty of which they approved.[156] It is only comparatively recently, indeed since the fallout from the Constitution, that the Court has actually chosen to engage with the Charter. In Case C-540/03 *Family Reunification,*[157] and again in Case C-131/03 *Reynolds Tobacco*[158] the Court held that the

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[156] See Chalmers, D. "The Court of Justice and the Third Pillar" (2005) 30(6) European Law Review 773; Arnull, A., "Family Reunification and Fundamental Rights" (2006) 31(5) European Law Review 611; Drywood, E. "Giving with one hand, taking with the other: fundamental rights, children and the family reunification decision." (2007) 32(3) European Law Review 396.

[157] Case C-540/03 *European Parliament v Council* [2006] ECR I-5769.

[158] Case C-131/03 P *R.J. Reynolds Tobacco Holdings v Commission* [2006] E.C.R. I-7795.

Charter was best understood as being an interpretive aid in discerning the fundamental rights which were encompassed by the general principles of Union law. In other words, given that the sources identified by the Cologne Council[159] which were aimed at informing the Charter were the same as the sources identified by the ECJ as those which informed the general principles, and that it was agreed by all of the institutions and the Member States as a minimum floor for rights protection in the Union,[160] that it is appropriate to use the Charter as a guide in the interpretation of those general principles. Until progress can be made in securing a fully binding set of rules for the Union, preferably by the accession of the Union to the ECHR, following ratification of the Lisbon Treaty, then using the Charter in this way is both appropriate and forward thinking. It marks a positive step from almost every standpoint. It seems to be evidence of a successful dialogue between the Member States and the Court on this issue. The Court has made it clear that fundamental rights must be a part of the Union's legal system, and in response to this, the Member States have, albeit over a significant period of time, presented the Court with a tool which the Court accepts. The way in which this document is utilised by the supranational judiciary will of course be shaped by the legal future of the EU, particularly if accession makes the Convention formally binding on them, but until then, Case C-540/03 *Family Reunification* represents the next phase in this, apparently successful dialogue.

Under the Constitutional Treaty, the Charter would have been brought into the Treaty framework in a very direct way, being included as a distinct section of the Constitution. As a part of the broader policy of removing the constitutional trappings from the reform package which would be

[159] Annexe IV, Conclusions of the Presidency, Cologne European Council 3-4th June 1999.

[160] Article 53 of the Charter makes clear that it is no way intended to restrict the application of Fundamental rights.

presented by Lisbon, the direct inclusion of the Charter was dropped. In its place is a new Article 6(1) TEU which states that the Union recognises the rights and freedoms enshrined in that Charter, and endows the charter with the same legal status as the treaties. It also makes clear that the Charter should be interpreted in accordance with the horizontal provisions discussed above. Clearly the Charter is intended to become unambiguously a part of the constitutional structure of the Union, but the way in which the ECJ decides to deal with this new Constitutionalized bill of rights remains to be seen.[161]

5.4.2 The European Union and the Court of Human Rights

It is not conceptually difficult to set forth a reasoned argument that the Court of Human Rights should be fully capable of reviewing the Union's fundamental rights record, even in the current legal environment. Each of the Member States of the Union is a signatory to the ECHR, and is thus bound by its obligations under that Convention.[162] The fact that they have pooled their sovereignty in an international organisation should have no bearing on the jurisdiction of the ECtHR over those sovereign powers. Moreover, the ECtHR itself has repeatedly stated that Member States cannot be exempted from their oversight on the grounds that they have transferred elements of their powers to an international organisation.

The possibility of a Member State being made liable for acts of the Community which were in breach of the Convention was raised by the now-defunct European Commission on Human Rights in *M and Co v*

[161] Dougan, M. "Treaty of Lisbon 2007: Winning Minds, not Hearts" (2008) 45(3) Common Market Law Review 617 at 662

[162] It is conceded that this was not always the case from the inception of the Union, but, following the accession of France to the ECHR in 1974, it is the current state of affairs and has been for some time. It would now be required as an aspect of the accession criteria.

Germany.[163] However, the case in which it was made clear that the Member State may be liable in these circumstances is *Matthews v United Kingdom.*[164] In *Matthews* the ECtHR held that, where the European System allowed for no judicial recourse, Member States would remain "responsible" for securing Convention rights for those within their jurisdiction, irrespective of the source of the legislation in question, holding the UK responsible for a breach of the Convention caused by European law.[165] Self evidently this is the correct outcome. The EU is not at this stage a federal state, but a constitutional order of sovereign states,[166] all of whom are signatories to the Convention. The mere fact that they have decided to exercise their sovereignty collectively should not excuse them from their responsibilities under that Convention.

However, in the more recent *Bosphorous* ruling,[167] the ECtHR has stepped back from its position in *Matthews* adopting a holding pattern which strongly echoes the position of the German courts in *Solange II.* The Court held that where sovereign power had been transferred to an international organisation which could produce independent legal obligations;

> *"In the [ECtHR's] view, State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms for controlling their observance, in a manner which can be considered at least equivalent to that for which the*

[163] Application No. 13258/87 *M v Germany* Dec. 9.2.90, D.R. 64

[164] Application No. 24833/94 *Matthews v United Kingdom* (1998) 28 EHRR 361.

[165] Application No. 24833/94 *Matthews v United Kingdom* (1998) 28 EHRR 361, para 35.

[166] Dashwood, A. "Limits of European Community Powers" (1996) 21(2) European Law Review 113, Dashwood, A. "States in the European Union" (1998) 23(3) European Law Review 201.

[167] Application No. 45036/98 *Bosphorus v Ireland* (2006) 42 EHRR 1.

Convention provides...If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation. However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international co-operation would be outweighed by the Convention's role as a 'constitutional instrument of European public order' in the field of human rights."[168]

Again, it is submitted that a truce of kinds has been reached between two European courts, in this case the ECJ and the ECtHR. However, in many ways this is the more troubling. The ECtHR in this case has expressly stated that the Convention's role as constitutional instrument, as a rights protection document, can be subordinated to the interests of international co-operation.[169]

Attempts have been made to seek review of EU actions before the ECtHR since the adoption of the *Bosphorus* test. Both *Segi v EU* and *Cooperative Producentenorganistatie* [170] were declared inadmissible, in the case of the former on a barely convincing technicality, and in the case of the second, following a cursory examination of the complaint in question. It is

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[168] Application No. 45036/98 *Bosphorus v Ireland* (2006) 42 EHRR 1, paras 5-6.

[169] Douglas-Scott, S. "A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis." (2006) 43(3) Common Market Law Review 629, 639; Costello, C. "The *Bosphorous* Ruling of the Court of Human Rights: Fundamental Rights and Blurred Boundaries" (2006) 6(1) European Human Rights Law Review 87.

[170] Application No. 6422/02 *Segi et al. v. 15 States of the European Union*, Decision of 23 May 2002; Application no. 13645/05 *Cooperative Producentenorganistatie Van De Nederlandse Kokkelvisserij U.A. v the Netherlands.* Decision of 20 January 2009.

accepted that this is the purpose of preliminary hearings, but the complaint, particularly in *Segi,* merited much more than a *prima facie* assessment.[171] In some ways, this apparently consciously hands-off approach is the more dangerous aspect of the ECtHR approach than the actual substance of the *Bosphorus* test *per se.* Although it may have arisen from a misunderstanding of the jurisdictional issues relevant to the case, this can hardly excuse the failing. Fundamental rights protection is a key element in the EU's ability to legislate appropriately on criminal law and address the effects of such legislation. The following chapters will examine how this balance established in *Bosphorous* works in the Union's legal order for criminal law.

5.5 Conclusions

This chapter concluded that the ECJ has striven to build a system which seeks to ensure that every individual can benefit from the rights to which European law is supposed to entitle them without undue interference from either the Union's institutions or the Member States. This system is also intended to provide a complete set of remedies for the individual who falls within the scope of European law. The Court has demonstrated through the creation of this intricate system of supremacy, direct effect and consistent interpretation that it is able to ensure the observance of the rule of European law, consistently and appropriately, both in the narrow sense that citizens should be able to access their rights before the courts empowered to enforce them, and in the broader sense that the Courts should be able to protect citizens from the overreach of the law makers.

[171] Davies, B. *"Segi* and the Future of Judicial Rights Protection in the Third Pillar of the EU" (2008) 14(3) European Public Law 311, 391.

The above discussion also identified that the European Court of Human Rights would be prepared to step in where necessary to prevent any failure of the European judicial system to protect those rights. Since *Matthews*, however, the ECHR has not been minded to intervene, and as such, this system may therefore be more threat than reality. Although it is accepted that the ECHR and the ECtHR's system for its enforcement is by no means perfect, it is currently a basic standard of rights protection, signed up to and accepted by all of the Members of the Union, and it seems that the EU does not, at present live up to its standards in all of the fields of its operation. With accession apparently looming under the provisions of the Lisbon Treaty, this chapter, and the wider thesis, proceeds on the basis that that accession would be beneficial. This is so in spite of the Charter, which the Court has yet to fully commit to as a legal instrument, although this is likely to change further after Lisbon, and the changes to the Charters legal status.

This chapter aimed to recast the analysis of the Court's creation of these structures as being aimed at preserving the rule of law within its field of influence. The following chapters will seek to apply that system to the criminal context.

The chapters which follow will seek to analyse the way in which this system interacts with European criminal law. In particular Chapter 6 will seek to analyse the way in which the Court of Justice has modified its rules on the enforcement of European law in national courts to cope with added pressures of criminal law. Chapter 7 will then go on to ask whether the systems that the ECJ has put in place for judicial review of Union action are suitable for criminal law.

Chapter 6

Applying European Criminal Law in National Courts

6.1 Introduction

We saw in Chapter Five that there are numerous ways in which European law may be applied by national courts. It can be extremely difficult to tell where direct effect ends and supremacy begins, and when one also considers the role of consistent interpretation, the picture becomes even less clear. This chapter will deal with the interplay between supremacy, direct effect and consistent interpretation in the criminal context to try and identify a series of common rules for the application of European law in national criminal proceedings.

This chapter will argue that the case law of the ECJ can be interpreted as creating a single set of rules in relation to the effects of European criminal law in national courts. It will argue that European law, adopted under either the first or the third pillar, can never be applied, either directly or through consistent interpretation, so as to aggravate or determine the liability of an individual. It will seek to demonstrate that the legal reasoning underlying that rule has shifted from a rationale based purely on direct effect, to one based on fundamental rights; in particular the prohibition on the retroactive effect of criminal law. The fundamental rights rationale can however justify the direct application of European law so as to alleviate potential criminal liability, or cause a lesser sanction to be applied to an individual. This is also likely to be true of legislation adopted under the third pillar, in spite of an express prohibition in the EU Treaty excluding the direct effect of third pillar legislation.

The overall effect of this is that the way in which European criminal law applies in domestic courts, in particular the way in which European law affects domestic criminal law, is the same regardless of the pillar under which it has been adopted. Communitarization of criminal law competence is therefore not likely to have any serious impact on the way in which the ECJ manages the enforcement of European rules on criminal law. Moreover, by switching from the more narrow direct effect rationale evident from its earlier case law, to a fundamental rights rationale in its more recent rulings, the Court has given itself the tools to import the general rules of the Community legal order into the third pillar, further demonstrating the protective function of the judicially developed legal structures.

6.2 Community Measures in National courts

6.2.1 Directives: Direct Effect and Consistent Interpretation in the Criminal Context

The ECJ has been asked on several occasions to give a preliminary ruling on the extent to which European law may cause a defendant to be criminalised. In Case 14/86 *Salò*[1] and Case 80/86 *Kolpinghuis*[2] the ECJ was asked whether or not the provisions of an unimplemented directive could be relied upon directly by the State against an individual in order to secure their criminal conviction. The answer was unequivocally no.

Case 14/86 *Pretore di Salò*[3] concerned a prosecution in Italy against the constructors of a number of dams which had caused the water levels in the

[1] Case 14/86 *Pretore di Salò v Persons Unknown* [1987] E.C.R. 2545.

[2] Case 80/86 *Criminal Proceedings Against Kolpinghuis Nijmegen BV* [1987] E.C.R. 3969.

[3] Case 14/86 *Pretore di Salò v Persons Unknown* [1987] E.C.R. 2545.

river Chiese to change rapidly and significantly to the extent that the river was no longer capable of supporting fish.[4] While the Italian criminal law did not prohibit causing water to become incapable of sustaining fish, the prosecutors felt that Directive 78/659 contained such a prohibition.[5] The ECJ interpreted the questions referred as asking whether or not the directive could;

> *"...of itself and independently of the internal law of a Member State, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive."*[6]

The effect of this was to ask whether a provision of criminal law could enjoy direct effect against an individual. The Court recalled the decision in Case 152/84 *Marshall*[7] and stated that a directive not implemented in national legal systems could not directly impose obligations on individuals, either in relation to one another, or to the State.

Pretore di Salò dealt with the question of whether or not Community law could have direct effect in a criminal proceeding. In deciding that it could not, the Court relied solely on a convincing analysis, based on their direct effect case law. Later in the same year the Court had the opportunity to assess the extent to which European law could influence national criminal law, this time via the doctrine of consistent interpretation. Case 80/86

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[4] Case 14/86 *Pretore di Salò v Persons Unknown* [1987] E.C.R. 2545, 3, see also Arnull, A. "The Scope of Article 177" (1988) 13(1) European Law Review 40.

[5] Directive 78/659/EEC of 18 July 1978 on the quality of fresh waters needing protection of improvement in order to support fish life, since repealed.

[6] Case 14/86 *Pretore di Salò v Persons Unknown* [1987] E.C.R. 2545, 18.

[7] Case 152/84 *Marshall v South West Hampshire Area Health Authority* [1986] E.C.R. 723. See Chapter Five, 5.2.1.4

Kolpinghuis[8] concerned a Dutch company attempting to sell bottled water, labeled as mineral water, but which was in fact merely carbonated tap water. The Dutch criminal law stipulated that it was an offence to sell any product intended for human consumption which was of 'defective composition', this phrase not being further defined. The Dutch prosecutor sought to use Directive 80/777[9] on the marketing of bottled waters to influence the interpretation of Dutch criminal law, in accordance with the principle set out in Case 14/83 *Von Colson*,[10] and thus bring the conduct in question within the scope of the Dutch criminal law.

The Court reiterated the ruling in *Salò* that a directive cannot determine or aggravate the criminal liability of an individual.[11] While the Court restated that this decision was a logical and legal extension of the rules it has laid out clearly in both *Marshall*[12] and *Salò*[13] the ECJ went further in their reasoning. They referred to the non-retroactivity of criminal law as one of the general principles of Community law, and held that consistently interpreting national law with unimplemented, or badly implemented, EU law in such a way as to aggravate or determine an individual's criminal liability would be injurious to that principle.[14]

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[8] Case 80/86 *Criminal Proceedings Against Kolpinghuis Nijmegen BV* [1987] E.C.R. 3969.

[9] Council Directive 80/777/EEC of 15 July 1980 on the approximation of the laws of the Member States relating to the exploitation and marketing of natural mineral waters.

[10] Case 80/86 *Criminal Proceedings Against Kolpinghuis Nijmegen BV* [1987] E.C.R. 3969, 12; Case 14/83 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* [1984] E.C.R. 1891; Case C-106/89 *Marleasing SA v La Comercial Internacionale de Alimentacion SA* [1990] E.C.R. I-4135.

[11] Case 80/86 *Criminal Proceedings Against Kolpinghuis Nijmegen BV* [1987] E.C.R. 3969, 14; see also Case C-168/95 *Criminal Proceedings Against Luciano Arcaro* [1996] E.C.R. I-4705.

[12] Case 80/86 *Criminal Proceedings Against Kolpinghuis Nijmegen BV* [1987] E.C.R. 3969, 9; Case 152/84 *Marshall v South West Hampshire Area Health Authority* [1986] E.C.R. 723.

[13] Case 80/86 *Criminal Proceedings Against Kolpinghuis Nijmegen BV* [1987] E.C.R. 3969, 13, Case 14/86 *Pretore di Salò v Persons Unknown* [1987] E.C.R. 2545, 20. See also Chapter 7.

[14] Case 80/86 *Criminal Proceedings Against Kolpinghuis Nijmegen BV* [1987] E.C.R. 3969, 13.

It can be tempting, from a surface reading, to dismiss these cases as an obvious interpretation of the concept of direct effect in the context of criminal liability and indeed for a time, it was.[15] It was fairly clear from the ECJ ruling in Case 41/74 *Van Duyn*[16] and *Marshall*, that directives could only be considered binding against the state once they were properly implemented. As such, the conclusions in *Salò* and *Kolpinghuis* should have been eminently foreseeable. However, the decision to expand the decision in *Kolpinghuis* to consider fundamental rights guarantees is not entirely obvious, and will be considered further *below*.

6.2.2 Regulations

In *X*[17] the Court of Justice was faced with an attempt to interpret national legislation in light of the provisions of a regulation in such a way as to criminalize an individual. Regulation 3295/94,[18] among other things, requires that counterfeit goods should be prevented from entering, leaving or even passing through Member States. Article 11 of that Regulation requires that Member States adopt dissuasive and effective sanctions to apply in the case of its infringement. In the case in question a consignment of counterfeit watches in transit through Austria were confiscated by customs authorities. The Austrian Criminal Code however only penalized the import and sale of such goods. The Austrian Court asked the Court of Justice whether or not the provisions of the Austrian Criminal Code should be interpreted in conformity with the regulation in order to give effect to the prohibitions envisaged by it. The Court reiterated the decision in

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[15] Arnull A, "Legal order of the Communities" (1988) 13(1) European Law Review 42, 42.

[16] Case 41/74 *Van Duyn v Home Office* [1974] E.C.R. 1337.

[17] Case C-60/02 *Criminal Proceedings Against X* [2004] E.C.R. I-651.

[18] Council Regulation (EC) No. 3295/94 of 22 December 1994 laying down measures concerning the entry into the Community and the export and re-export from the Community of goods infringing

Kolpinghuis and found that it was not possible to aggravate or determine criminal liability on the basis of consistent interpretation, even where the measure in question was a regulation,[19] which the Treaty makes clear is directly applicable.[20] This seems to have been based on the discretion left to the Member States in the adoption of the penalties required by Article 11 of that Regulation.[21]

Given, however, that there remains a presumption that regulations require no implementation,[22] if the European legislature were to adopt, under one of its emerging competences,[23] a hypothetical regulation which defines not only the conduct prohibited but the nature of the penalty to be imposed as criminal, such legislation would, by virtue of Article 249 EC be directly applicable in the national legal system. This appears, following the above analysis, to be the only circumstance in which an individual's liability would be determined directly by European law.

It is unlikely that such legislation would arise at present however, as Case C-440/05 *Ship-Source Pollution*[24]seems to make it plain that while the Community can adopt measures requiring criminal sanctions, they cannot adopt legislation which specifies the level or type of such sanctions. However, following the ratification of the Lisbon Treaty, it will be possible to adopt legislation which defines the crime, and the level and

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certain intellectual property rights [1994] OJ L 341 as amended by Council Regulation (EC) No. 241/1999 [1999] OJ L 27, 2nd February 1999.

[19] Case C-60/02 *Criminal Proceedings Against X* [2004] E.C.R. I-651, paras 61-62.

[20] Article 249 EC.

[21] Case C-60/02 *Criminal Proceedings Against X* [2004] E.C.R. I-651, para 63; see also Case 72/85 *Commission v Netherlands* [1986] E.C.R 1219 where the court found Member States could be in breach of Community law for failing to implement regulations where such implementation is clearly required.

[22] See, *inter alia* Case 34/73 *Fratelli Variola v Italian Finance Ministry* [1973] E.C.R. 981.

[23] Case C-176/03 *Commission v Council (Environmental Protection)* [2005] E.C.R I-7879.

type of sanction to be imposed,[25] which would be directly applicable in the national legal system.

6.2.3 Exclusionary Effects of Community Legislation

In Case 148/78 *Ratti*[26] the ECJ was asked to rule on the extent to which European law could exclude the application of national criminal law. In this case, two directives[27] had been promulgated which changed national rules on the labelling of certain varnishes and solvents. The defendant, a director of an Italian firm, had complied with the provisions of the directive in question rather than with the provisions of the Italian criminal law. The deadline for implementation had passed for one directive but not for the other, and the Italian government had made no effort to implement either.

The Court held that where the implementation date for a directive had passed, if a national court is requested to disapply national law which contravened it, it could not refuse to do so.[28] From the facts of *Ratti*, it was clear that this was true, even where the proceedings in question were criminal, and where the request came from the defendant in those proceedings. The Court's justification was that to do otherwise would be to allow a Member State to rely on its own failure to comply with its obligations under Community law to secure the criminal conviction of one of its citizens. This decision gave rise to the categorization of direct effect

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[24] Case C-440/05 *Commission v Council (Ship Source Pollution)* [2007] E.C.R I-9097.

[25] Article 83 TFEU.

[26] Case 148/78 *Pubblico Ministero v Tullio Ratti* [1979] E.C.R. 1629.

[27] Directives No. 73/173/EEC on the classification packaging and labelling of dangerous preparations (solvents) and No. 77/728 on the classification packaging and labelling of paints, varnishes, printing inks, adhesives and other similar products.

[28] Case 148/78 *Pubblico Ministero v Tullio Ratti* [1979] E.C.R. 1629, para 24.

as a form of estoppel. More than that however, it demonstrated that European law is supreme even over national criminal law. Where European law, had it been properly implemented, would have altered national criminal law, so that the affected criminal law should be disapplied at the request of the defendant. It has been argued that this represents a defence in the national criminal context,[29] but it would be more properly understood as decriminalizing the conduct.

More recently, in a similar vein, the Court of Justice was asked whether provisions of the Italian criminal law should be set aside in accordance with Union law in a case concerning the Italian Prime Minister Silvio Berlusconi.[30] The Court issued its judgment in May 2005 when Berlusconi was still the serving Prime Minister of Italy, and as such the ruling was always going to be politically as well as legally significant. The facts of the Berlusconi case are complex,[31] but the defendants were charged with having produced false corporate documents prior to 2002. In 2002 the Berlusconi government introduced new legislation which significantly reduced the penalties associated with such a transgression.[32] The Italian Courts made a reference to the ECJ seeking clarification on the compatibility of the new Italian law with a number of European company

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[29] Baker, E. "Taking Criminal Law Seriously" [1998] Criminal Law Review 361.

[30] Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and others* [2005] E.C.R. I-3565.

[31] Biondi, A, Matsroianni, R. "Annotation of joined cases C-387/02, C-391/02 and C-403/02, *Berlusconi and others*, Judgment of the Court (Grand Chamber) of 3 May 2005" (2006) 43(2) Common Market Law Review 553, 553 *et seq.*

[32] Legislative Decree No. 61/02. This reduced the sentence from a maximum of five years imprisonment plus an unlimited fine, to a two year sentence, which would be automatically considered a suspended sentence under Italian law. It also introduced a requirement that an action be brought by creditors or members of the company, whereas previously, the offences could be prosecuted by the state. It also more than halved the original limitation period. Biondi, A, Matsroianni, R. "Annotation of joined cases C-387/02, C-391/02 and C-403/02, *Berlusconi and others*, Judgment of the Court (Grand Chamber) of 3 May 2005" (2006) 43(2) Common Market Law Review 553.

law directives.[33] In particular, Articles 2 and 6 of the first companies directive requires that companies makes certain particulars and documents available, including balance sheets and profit and loss accounts, and that Member States must provide for appropriate penalties for failure to do so.[34] The Italian court referred a series of questions. First, whether producing a false balance sheet constituted failure to produce a balance sheet within the meaning of the directive. Secondly, if it did, then were the new Italian penalties to be considered "adequate" for the purposes of Article 6 of that Directive.

In answering the first question, the ECJ made reference to the general scheme of the companies directives and ruled that publishing fraudulent accounts did indeed constitute failure to publish accounts within the meaning of the first companies directive. However, both the Italian government and the private parties involved[35], argued that the reference was inadmissible as any finding by the Court would be prejudicial to the principle of the retroactive application of the more lenient penalties. This is understood to be a corollary of the principle of the non-retroactivity of criminal law, protected by the United Nations International Covenant on Civil and Political Rights, and the EU Charter,[36] and is expressly protected by, among others, the Italian Criminal Code.[37]

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[33] First Council Directive 68/151/EEC on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community [1968] OJ, English Special Edition L 41, 9th March 1968 ('the First Companies Directive'); Fourth Council Directive 78/660/EEC based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies [1978] OJ L 222, 25th July 1978 ('the Fourth Companies Directive'); Seventh Council Directive 83/349/EEC based on Article 54(3)(g) of the Treaty on consolidated accounts [1983] OJ L 193, 13th June 1983. ('the Seventh Companies Directive').

[34] Article 2(1)(f) and Article 6, First Companies Directive.

[35] Who, it should be noted, in at least one of the cases concerned, could be considered as one and the same.

[36] Article 15(1), United Nations International Covenant on Civil and Political Rights, "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a

The Court was swayed by this argument stating that the principle that the most lenient penalty should be applied retroactively formed part of the common constitutional traditions of the Member States, and as such was part of the general principles of European law. The ECJ did not, however, find it necessary to undertake any kind of review of the penalties provided for under the Italian regime. They reiterated the general theme running through their jurisprudence on this issue; that a directive may not of itself aggravate or determine the criminal liability of an individual.[38] They held that, even were the Court to make an assessment that the new rules adopted in legislative decree were not "adequate" within the meaning of the directive, that in setting those regulations aside, the Court would be allowing the directive, in and of itself, to determine the liability of an individual. To do so would be manifestly in breach of the newly discovered general principle of retroactivity of the more lenient penalty.

This ruling, in particular the reliance on the retroactivity of the more lenient penalty, has been criticized. Biondi and Matsroianni are particularly critical of the ECJ's failure to cite any national constitutions to support their assertion that this principle forms part of the common constitutional traditions of the Member States, citing only the Italian criminal code, which they argue is dubious as authority for that principle

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criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby." Article 49(1), EU Charter on Fundamental Rights the wording of which is substantially identical.

[37] Article 2, Italian Criminal Code; Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and others* [2005] E.C.R. I-3565, para 66.

[38] Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and others* [2005] E.C.R. I-3565, para 74.

in any event.[39] They observe that the ECHR does not expressly protect this principle, and that the case law of the ECtHR is unclear on the point.[40] They also observe that the Court refuses, as was its want, to make explicit reference to Article 49(1) of the Charter of Fundamental Rights. Biondi and Matsroianni are correct in this assessment, and that if the principle of retroactivity of the most lenient penalty is protected by the Convention at all, it is only incidentally. Berrand observes that Article 7 ECHR does not reproduce Article 15 of the International Covenant in its entirety and does not expressly require such retroactivity, and when this issue was raised before the European Commission of Human Rights, it was in fact rejected.[41]

This argument appears to have been rejected by the Court of Human Rights in *Scoppola.*[42] The ECtHR reassessed the state of European and International criminal law, taking a digest of approaches from, for example, the French Courts, the Rome Statute of International Criminal Court, the International Criminal tribunal for the Former Yugoslavia, and perhaps most importantly, the ECJ.[43] Relying to a great extent on the ruling of the ECJ in *Berlusconi* the Court affirmed that the retroactivity of the most lenient penalty in a criminal case was indeed a principle protected by Article 7 of the Convention.[44] Even had the ECtHR not ruled that the

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[39] Biondi, A, Matsroianni, R. "Annotation of joined cases C-387/02, C-391/02 and C-403/02, *Berlusconi and others*, Judgment of the Court (Grand Chamber) of 3 May 2005" (2006) 43(2) Common Market Law Review 553, 566.

[40] Biondi, A, Matsroianni, R. "Annotation of joined cases C-387/02, C-391/02 and C-403/02, *Berlusconi and others*, Judgment of the Court (Grand Chamber) of 3 May 2005" (2006) 43(2) Common Market Law Review 553, 566. See *G. v France* (1996) 21 EHRR 288.

[41] Beddard, R. "The Rights of the Criminal under Article 7 ECHR" (1996) Human Rights Supplement European Law Review 3, 7-8; See Application 7900/77 *X v Federal Republic of Germany* (1979) 13 DR 70.

[42] Application no. 10249/03 *Scoppola v Italy* (No.2) Judgement of 17th September 2009

[43] Application no. 10249/03 *Scoppola v Italy* (No.2) Judgement of 17th September 2009 paras 37-41

[44] Application no. 10249/03 *Scoppola v Italy* (No.2) Judgement of 17th September 2009 para 105-108

principle was protected by Article 7 ECHR, the Convention itself is a floor rather than a ceiling, and expressly states that its signatories remain free to guarantee higher levels of protection as they see fit.[45] That the ECHR does not expressly protect a right is surely no reason for the ECJ to reject it, particularly when the drafters of the EU Charter have made a positive decision to include it. Moreover the ECJ must be applauded where it does seek to provide a greater level of rights protection than the Convention, which at the time of *Berlusconi* it clearly did, just as it is legitimately criticised for any perceived failures to meet that standard.

While Biondi and Matsroianni are correct that the Court does not reference the Charter in its ruling[46], this is by no means a fatal criticism of the decision. It must be recalled that the Charter was drafted by the Member States, and then proclaimed by the institutions of the Union. Therefore, as was argued in Chapter Four, it is entirely reasonable to read the Charter as a reflection of the Member States' understanding of the fundamental values that they hold common. As such, in much the same way as a resolution of the United Nations General Assembly can be seem as representing the current state of customary international law,[47] there is no reason why the Charter cannot be seen as a representation of the common principles the Member States feel are applicable to the Union. As such,

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[45] Article 53, ECHR, see also, Opinion of AG Colomer in C-340/00 *P Cwick v Commission* [2001] E.C.R. I-10269, para 29; Douglas-Scott, S. "A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis." (2006) 43(3) Common Market Law Review 629, 648.

[46] Biondi, A, Matsroianni, R. "Annotation of joined cases C-387/02, C-391/02 and C-403/02, *Berlusconi and others*, Judgment of the Court (Grand Chamber) of 3 May 2005" (2006) 43(2) Common Market Law Review 553, 566

[47] Customary international law being based on the practices of States, and the understanding of those States as to their obligations under international law, a resolution representing the opinion of the majority of States is persuasive authority as to the current state of that fluid body of law. See the International Court of Justice ruling in *Nicaragua v United States of America* [1986] ICJ Rep 14, Akehurst, M. "*Nicaragua v. United States of America*" (1987) 27 Indian Journal of International Law 357, although for a contrary viewpoint see Oberg, M. "The legal effects of resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ" (2005)16(5) European Journal of International Law 879, 898 *et seq.*

while the ECJ was reticent to make reference to the Charter directly, which it should be recalled is of uncertain legal status, it may feel free to draw on the Charter to inform its understanding of the general principles, albeit implicitly.

In practice, the ECJ simply did not refer to the Charter prior to its ruling in Case C-540/03 *Family Reunification Directive.*[48] Following that decision the ECJ has been more ready to refer to the Charter as an important source of rights. This does not necessarily mean that the Charter was not of importance to the ECJ's deliberations, merely that because of its uncertain status, it was not expressly referred to. As suggested in Chapter Four, the Court were conscious of the need to avoid being seen to pre-empt the political outcome of the Constitutional Treaty which would have given them the unambiguous right to adjudicate on the Charter, subject, of course to a definitive interpretation of the horizontal provisions. Since that ruling the Court has been more prepared to refer to the Charter, and should such a case as *Berlusconi*, or indeed any other case of this nature, arise for the Court's consideration one would expect them to refer to the Charter more readily.

It seems clear from the foregoing that directives, at least in so far as substantive criminal law or its interpretation is concerned, can never be relied upon directly before a national court to 'aggravate' the liability of an individual, or to "determine" liability where that determination would be to that individual's detriment. This seems to be based on two distinct rationales. On the one hand, the more classical direct effect rationale, as exemplified in *Salò* and *Ratti*; that to allow a State to benefit from direct effect in such a way would be to reward, or at best excuse their failures to

properly comply with their obligations under the Treaty. On the other, the Court has also developed a rights focused approach, based on the general principles of European law, in particular the principles recognized by Article 7 ECHR and Article 49(1) of the Charter of Fundamental Rights as demonstrated by *Berlusconi* and *Kolpinghuis*.

In any event, it seems clear that Community norms can never have substitutionary effects where the result of such a substitution would be to aggravate liability, but it appears that they may still operate so as to exclude national law where such an exclusion would be of benefit to the individual.

6.3 Union Measures

There are certain specific rules under the third pillar with regard to the direct effect of measures adopted under the TEU. The starting point is that third pillar legislation does not enjoy direct effect. Article 34 TEU sets out the types of measures which may be adopted by the Union legislature in the third pillar, and Article 34(2)(b) and (c) states unequivocally that framework decisions and decisions *"shall not entail direct effect"*. This allows for the theoretical possibility at least that common positions and conventions may enjoy direct effect.

6.3.1 Residual Possibility of Direct Effect for Union Law

The ECJ has made it clear that there will be no circumstances in which a common position would contain the kind of rights capable of having such

[48] Case C-540/03 *European Parliament v Council* [2006] E.C.R. I-5769; see Drywood, E. "Giving with one hand, taking with the other: fundamental rights, children and the family reunification decision." (2007) 32(3) European Law Review 396; Chapter Five, 5.4.1.

effect. In Case C-355/04 P *Segi*[49] the Court considered, among other things, the nature of the common position. They found that a provision which was immune to judicial review could not contain provisions likely to affect the rights and obligations of a third party.[50] Where a common position was adopted containing such provisions, should it reach the Court, they would reclassify it as a decision. The practical effect of that ruling is that the legislature should not adopt a common position which contains a clear, precise and unconditional right which would be capable of direct effect, and as such the lack of an express prohibition on direct effect appears to be irrelevant.

The convention is slightly more interesting. It is to be recalled at this point that the convention is similar in most respects to an international treaty, it is "established" by the Council, following consultation with the Parliament, and then commended to the Member States *"for adoption in accordance with their respective constitutional requirements"*.[51] This type of measure enters into force in the ratifying States once half of the Member States have ratified the convention.[52] What separates them from the traditional international law convention, however, is that they are concluded within the constitutional framework of the European Union. In the absence of an express rejection of direct effect in the Treaty, or in the convention itself, there is no reason why, where a convention contains clear, precise and unconditional rights, it should not enjoy direct effect. The interesting question then is at what point in the legislative process a convention could have direct effect. Presumably it would only enjoy

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[49] Case C-355/04 P *Segi et al.* v. *Council of the European Union* [2007] E.C.R. I-1657; see also Chapter Seven, 7.2.1.2, on the effect of *Segi* on the third pillar preliminary reference system.

[50] Case C-355/04 P *Segi et al.* v *Council of the European Union* [2007] E.C.R. I-1657, para 52; see Davies, B. "*Segi* and the future of judicial rights protection in the third pillar of the EU" (2008)14(3) European Public Law 309, 312-313.

[51] Article 34(2)(d) and Article 39 TEU. See Chapter Two, 2.2.2.2.

binding effect on the legal system once it enters into force, much like a time limit for the implementation of a directive. Moreover, such a provision could only be directly effective in Member States where the convention has been ratified as the treaty is explicit that the convention is only in force for those States who have ratified it. This is particularly likely since the ECJ has always been clear that the deadline for implementation must have passed for a directive to have direct effect[53] and even more likely now the Court has held this is also necessary before requiring consistent interpretation of national legislation.[54]

However, while a convention probably will not enjoy direct effect in the positive sense prior to ratification, it is highly likely that certain other obligations will result from a convention which was still to be ratified. While the TEU does not contain an express equivalent of the Article 10 EC duty of loyal co-operation, the Court in Case C-105/03 *Pupino*[55] found that an analogous duty existed when acting under the third pillar.[56] In Case C-129/96 *Inter-Environement Wallonie*[57] the Court highlighted a particular element of the duty in relation to legislation awaiting full implementation. The Belgian Conseil d'État sent a reference to the ECJ about the limits of direct effect, asking whether a Member State was free to adopt legislation which ran contrary to a directive up until the implementation date. The Court held that;

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[52] Article 34(2) TEU.

[53] Case C-129/96 *Inter-Environement Wallonie v Region Wallone* [1997] E.C.R. I-7411.

[54] Case C-212/04 *Konstantinos Adeneler et al. V Ellinikos Organismos Galaktos (ELOG)* [2006] E.C.R. I-6057.

[55] Case C-105/03 *Criminal Proceedings Against Maria Pupino* [2005] E.C.R I-5285.

[56] See further *below.*

[57] Case C-129/96 *Inter-Environement Wallonie v Region Wallonie* [1997] E.C.R. I-7411.

> *"Although the Member States are not obliged to adopt those measures before the end of the period prescribed for transposition, it follows from the second paragraph of Article 5 in conjunction with the third paragraph of Article 189 of the Treaty and from the directive itself that during that period they must refrain from taking any measures liable seriously to compromise the result prescribed."*[58]

In other words a combination of the duty of loyal co-operation under Article 10 EC (ex Article 5), and the third paragraph of Article 249 EC (ex Article 189), means that national governments are prohibited from adopting any measure seriously liable to frustrate the purpose of the directive. It is submitted that, having discovered the analogous duty of loyal co-operation in *Pupino*, exporting this element of the duty from the first to the third pillar is entirely foreseeable.[59] This duty is certainly likely to apply to framework decisions. It is also possible that it would apply to the adoption of a convention. Once the Council has adopted a text to be recommended to the Member States, it is probable that a duty not to frustrate the objective of that text would arise.

6.3.2 Consistent Interpretation in the Third Pillar

While the practical usefulness of direct effect is limited in the third pillar, consistent interpretation is a different matter. In *Pupino* the Court was asked to clarify whether national courts are obliged to interpret domestic legislation in accordance with framework decisions. The case arose from criminal proceedings taken against Signora Pupino, a nursery school

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[58] Case C-129/96 *Inter-Environement Wallonie v Region Wallonie* [1997] E.C.R I-7411, para 45.

[59] It should be noted that as a manifestation of loyal cooperation, rather than of direct effect, this doctrine is equally likely to apply to framework decisions during the period between adoption and implementation.

teacher in Italy who was accused of seriously mistreating her pupils. A European framework decision allowed for evidence to be taken from young witnesses at an earlier stage in proceedings than would usually be allowed under Italian criminal procedure. The circumstances in which Italian law would allow such premature collection were limited to a set list of offences, which did not include those offences with which Signora Pupino was charged. However, the Italian courts made a reference to the ECJ on the compatibility of the domestic legislation with the provisions of Framework Decision 2001/220 on the standing of victims in criminal proceedings.[60]

Article 2 of the Framework Decision requires that victims should be treated with dignity, and that *"particularly vulnerable"* victims should *"benefit from special treatment best suited to their circumstances"*. Article 3 requires that the Member States shall ensure that the victim's right to be heard and give evidence is protected during a criminal process. Article 8 also requires that specific procedures be laid down to protect vulnerable witnesses from having to testify in open court where it is deemed appropriate by the court hearing the case.

The ECJ interpreted the question from the Italian Court as being;

> *"...whether, on a proper interpretation of Articles 2, 3 and 8(4) of the Framework Decision, a national court must be able to authorise young children, who, as in this case, claim to have been victims of maltreatment, to give their testimony in accordance with*

[60] Council Framework Decision on the standing of victims in criminal proceedings (2001/220/JHA)[2001] OJ L87/1, 22nd March 2001.

arrangements ensuring them an appropriate level of protection, outside the public trial and before it is held."[61]

Before addressing the question itself however, the Court had to deal with a number of preliminary objections. For the purpose of this discussion, the most relevant the objection raised by the Italian, Swedish and British governments, that the TEU does not impose a duty of consistent interpretation on national courts in respect of framework decisions.[62] In support of that argument, it was suggested to the Court that the TEU contained no equivalent to Article 10 EC, and that as such, the obligation to consistently interpret national law, which was based partly on that duty, could not exist. The Court was emphatic in rejecting that suggestion.[63] They argued in fact that Article 1 TEU, in stating that the Union should be tasked with organising relations between the Member States *"in a manner demonstrating consistency and solidarity"*,[64] necessarily implied that Member States are bound by an analogous duty of loyal co-operation when acting in the fields covered by Title VI TEU.[65] Having found this duty, the Court then clarified that the more specific duty to interpret domestic legislation in accordance with European law did indeed apply in the third pillar.[66] In extending the duty of consistent interpretation to framework decisions the Court stresses that it is subject to the limits found under the first pillar. In particular it is subject to the general principles[67] that there should be no requirement to give national legislation a meaning which is

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[61] Case C-105/03 *Criminal Proceedings Against Maria Pupino* [2005] E.C.R I-5285, para 50,

[62] Case C-105/03 *Criminal Proceedings Against Maria Pupino* [2005] E.C.R. I-5285, paras 25 and 26.

[63] Case C-105/03 *Criminal Proceedings Against Maria Pupino* [2005] E.C.R. I-5285, para 40.

[64] Article 1(3) TEU.

[65] Case C-105/03 *Criminal Proceedings Against Maria Pupino* [2005] E.C.R. I-5285, paras 41 and 42.

[66] Case C-105/03 *Criminal Proceedings Against Maria Pupino* [2005] E.C.R. I-528,5 para 43.

[67] Case C-105/03 *Criminal Proceedings Against Maria Pupino* [2005] E.C.R. I-5285, para 44.

contra legem[68] and that an individual's liability cannot be determined or aggravated solely on the basis of a breach of the substantive provisions of a framework decision.[69] The Court then clarified that in its opinion the provisions of national law in question were procedural in nature and as such could be interpreted so as to conform with the framework decision, even where this could have an impact on the outcome of the proceedings.[70]

The decision in *Pupino* therefore adds another layer to the general rules on consistent interpretation. While an individual's liability may not be determined or aggravated by direct reliance on the substantive criminal law provisions of an unimplemented or incorrectly implemented measure of European law, interpreting national criminal procedure in the light of European law is permissible, even where that may, in effect, aggravate an individual's liability. This is permissible, in terms of Article 7 ECHR, because this right only protects against the retroactive creation of the offence itself, and the rules of criminal procedure are not relevant to its application.[71] However, this situation may fall within the scope of Article 6 ECHR which contains guarantees relating to the conduct of trials. The ECJ deals neatly with this issue by stating that it is for national courts to ensure that the procedural rules, whether they result from domestic or European law, are applied in such a way as to make the proceedings fair within the meaning of the Convention.[72]

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[68] Case C-105/03 *Criminal Proceedings Against Maria Pupino* [2005] E.C.R. I-5285, para 47.

[69] Case C-105/03 *Criminal Proceedings Against Maria Pupino* [2005] E.C.R. I-5285, para 45.

[70] Case C-105/03 *Criminal Proceedings Against Maria Pupino* [2005] E.C.R. I-5285, para 46.

[71] App. No. 332/57 *Lawless v Ireland (No.3)* (1962) 1 EHRR 15.

[72] Case C-105/03 *Criminal Proceedings Against Maria Pupino* [2005] E.C.R. I-5285, para 60.

This was unquestionably a landmark ruling.[73] The Court stopped short of extending a duty of consistent interpretation to all legislation adopted under the third pillar, expressly limiting its decision to framework decisions,[74] but there appears to be no principled reason why such a doctrine could not apply to other measures adopted under the third pillar. While the ECJ limited the discussion in *Pupino* to framework decisions, their underlying reasoning was much more broad:

> *"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...'*

There can be no principled reason not to extend this duty of loyal cooperation to any of the other third pillar measures in particular decisions[75] and conventions. In *Segi*[76] the ECJ grouped framework decisions, decisions and conventions together as measures which were capable of having *"legal effect in relation to third parties"*.[77] If those provisions are capable of having such effect, then it seems likely that they

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[73] It was met, in many quarters, with considerable surprise, see *inter alia* Spencer, J "Child Witnesses and the EU" (2005) 64(3) Cambridge Law Journal 569.

[74] Case C-105/03 *Criminal Proceedings Against Maria Pupino* [2005] E.C.R. I-5285, para 43.

[75] Spaventa, E. "Opening Pandora's Box; Some Reflections on the Constitutional Significance of the Decision in *Pupino*" (2007) 3(1) European Constitutional Law Review 5, 11; Peers, S. *EU Justice and Home Affairs Law* (2nd Edition, OUP, 2006), 33.

[76] Case C-355/04 P *Segi et al.* v. *Council of the European Union* [2007] E.C.R. I-1657.

[77] Case C-355/04 P *Segi et al.* v. *Council of the European Union* [2007] E.C.R. I-1657, paras 52-54.

would carry with them a duty to interpret national law in conformity with them. This doctrine could also apply *mutatis mutandis* to the common position. Even where a provision of European law is non-binding in and of itself, it can carry with it a duty of consistent interpretation. In Case 322/88 *Grimaldi* the ECJ found that a recommendation, which in itself was not binding under the first pillar legal order, could be relevant in the interpretation of national law. This is the case particularly where such measures were adopted to implement such recommendations, although the Court did not limit the interpretive duty to such measures.[78] It seems likely therefore, that the common position, while not in and of itself binding, could carry a similar obligation of interpretation as so called "soft-law" adopted under the first pillar.[79]

However, Peers argues that the judgment in *Pupino* is in fact a cautious one. Rather than setting out sweeping broad principles for the legal order of the third pillar, the Court restricted itself to answering the questions asked in the narrowest possible terms to achieve the result it wanted.[80] Moreover, he notes that they have managed this by carefully avoiding actually quoting the question referred to them by the national court, which had regard to the compatibility of national law with the third pillar measure. Had they restrained themselves to answering the question asked, Peers contends, they would have been unable to achieve this result, instead having to address the more contentious question of the supremacy of third pillar measures.[81] He notes that by expressly deciding to exclude

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[78]Case 322/88 *Grimaldi (Salvatore) v Fonds de Maladies Professionnelles* [1989] E.C.R. 4407, para 18.

[79] Davies, B. "*Segi* and the future of judicial rights protection in the third pillar of the EU" (2008)14(3) European Public Law 309, 313.

[80] Peers, S. "Salvation Outside the Church: judicial protection in the third Pillar after the *Pupino* and *Segi* judgments" (2007) 44(4) Common Market Law Review 883, 914.

[81] Peers, S. "Salvation Outside the Church: judicial protection in the third Pillar after the *Pupino* and *Segi* judgments" (2007) 44(4) Common Market Law Review 883, 914.

direct effect in Article 34 TEU and nothing else, it can be inferred that consistent interpretation was always meant to apply.[82] However, Mistilegas contends that consistent interpretation or "indirect effect" is inextricably linked to the doctrine of direct effect, which he contends is expressly discounted by the third pillar's own legal framework,[83] an argument supported by Borgers. He advances a similar argument, criticising the ECJ for failing to even address the fact that Article 34(2)(b) expressly excludes direct effect.[84]

Whether one concurs with Peers or with Mitselegas and Borgers depends, of course, on whether one sees direct effect and consistent interpretation as linked, or mutually co-dependent. It is perfectly possible to accept either viewpoint, but it is submitted that rather than focussing on criticising *Pupino* for ignoring the link between direct effect and consistent interpretation, the more appropriate response is to accept *Pupino* at face value as authority for the fact that direct effect and consistent interpretation are not so intrinsically linked as to depend on one another. Moreover, as was argued in the Chapter Four, while they are both linked, it is more accurate to see them both as manifestations of the wider principle of supremacy, albeit in its stronger and weaker forms respectively. On that construction of the relationship between these doctrines, the fact that the Treaty rules out the application of one, does not lead to the conclusion that it must rule out the other, particularly where the doctrine which is excluded is the stronger form of the principle of supremacy.

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[82] Peers, S. "Salvation Outside the Church: judicial protection in the third Pillar after the *Pupino* and *Segi* judgments" (2007) 44(4) Common Market Law Review 883, 915.

[83] Mitselegas, V. *EU Criminal Law* (Hart Publishing, 2009), 28.

[84] Borgers, M. "Implementing Framework Decisions" (2007) 44(5) Common Market Law Review 1361, 1367.

6.3.3 Supremacy in the Third Pillar

It was argued in Chapter Four that exclusionary effects should be understood as a manifestation of supremacy, albeit in its weaker form. The role of supremacy in the first pillar was discussed at length in the previous chapter but the extent to which supremacy applies to the third pillar remains less clear. Lenaerts and Corthart argue that supremacy must apply in the third pillar, primarily because the ECJ's reasoning in Case 6/64 *Costa v ENEL*[85] applies equally to the EU order as it does to the EC. In short, the EU has been established for an indefinite period, is served by its own set of institutions and has, in a functional sense, legal personality. It also has its own substantive competence, allowing it to adopt legislation on issues which are aspects of national sovereignty, implying that sovereignty has been transferred to it by the Member States.[86] Nicol however argues that the unique nature of the Community legal order was not its unlimited duration, or its unique competences, but the access to the domestic legal order which is was granted by Article 249 EC in the context of regulations. This kind of measure being absent from the third pillar demonstrates that it should not be assumed that the principle of supremacy should apply to the third pillar, rather it should be assumed that it does not.[87] Peers suggests that there is an interpretive argument for continuing to exclude the principle of supremacy from the third pillar. He relies on Article 1 and Article 5 TEU using such language as *"founded upon"* and *"supplementing"* to suggest that the authors of the Treaties clearly intended to create two distinct legal orders, and that applying such

[85] Case 6/64 *Costa v ENEL* [1964] E.C.R 585.

[86] Leanarts, K, Corthaurt, T. "Of Birds and Hedges: the Role of Primacy in Invoking Norms of EU Law" (2006) 31(3) European Law Review 287, 289-290.

[87] Nicol, D. "Democracy, supremacy and the "intergovernmental" Pillars of the European Union" [2009] Public Law 218.

principles as direct effect and supremacy, created in the first pillar, to the third pillar legal order would be to wholly undermine that intention.[88]

It is possible however to construct a different interpretative model. If the Union is founded on the notion of the Community, then its legal order should be similarly be founded on the same legal order as the Community subject to such express exceptions as are found in the new Treaty. In other words, the fundamental principles of the legal order upon which the Community is founded, should logically apply to the Union. Moreover, were Articles 2 and 5 TEU supposed to be read as constituting a manifestly separate legal order, and thus exclude the application of all of the tools that the ECJ has developed in order to give effect to the EC legal order, then why was it felt necessary to expressly exclude direct effect, and not other such phenomena? The absence of an express exclusion of supremacy, given that there is such a provision dealing with direct effect in the TEU, could be interpreted to imply that supremacy applies to the Union pillars, and indeed probably should be so interpreted. This is not to make a political case for the inclusion of Supremacy within the third pillar, but merely to identify that some elements of the principle can already be seen there. The following section will go on to clarify this position.

We saw in the Chapter Four that the doctrine of consistent interpretation should be seen as an example of supremacy in its weaker form. This was based on the logic that interpreting one rule of law so as to make it conform with another necessarily implies a hierarchy in which the latter is superior to the former. In the context of European Union law, that hierarchy must be a part of the doctrine of supremacy. If that is the case, then it is argued that *Pupino* provides further evidence to reinforce the idea

[88] Peers, S. "Salvation Outside the Church: judicial protection in the third Pillar after the *Pupino* and *Segi* judgments" (2007) 44(4) Common Market Law Review 883, 920.

that supremacy does apply to the third pillar, albeit only in its weaker form through the doctrine of consistent interpretation. It could also mean that the absence of direct effect from the decision and framework decision is merely illustrative of a different kind of supremacy; that of the Treaty over secondary Union law. In other words, supremacy in all its forms, be it the weaker requirements to consistently interpret national law with European law obligations, or to exclude national law where it is inconsistent, or in its stronger substitutionary form, applies throughout the Union legal order unless the Treaty expressly excludes it. Being as the Treaties are without question the highest form of European law, they will always reign supreme over subordinate measures, hence Article 34(2)(b) EC, in excluding direct effect just forms another aspect of the operation of the European law principle of supremacy.

In those circumstances, where a weak form of supremacy clearly exists in the third pillar, it is possible to envisage the operation of that supremacy so as to exclude incompatible national legislation under the conditions in *Ratti*.[89] Where the exclusion of the provisions of national law would be to the benefit of the defendant, then the national law must comply with the interpretation in European law. The ECJ ruled in *Pupino* that the prohibition on aggravating or determining liability of individuals applies to framework decisions. They also expressly stated that this principle was founded on the ideas of non-retroactivity and legal certainty.[90] That the ECJ would not extend such a principle beyond the framework decision to the other third pillar measures is difficult to imagine. This, taken as a whole, would strongly suggest that where national law was inconsistent

[89] Dougan, M "When Worlds Collide! Competing Visions of the Relationship Between Direct Effect and Supremacy" (2007) 44(4) Common Market Law Review 931, 937.

[90] Case C-105/03 *Criminal Proceedings Against Maria Pupino* [2005] E.C.R. I-5285, paras 44-45.

with a framework decision, a decision or a convention,[91] and setting aside the law would be of benefit to the individual, then the principle of supremacy is likely to operate, even in the third pillar context, so as to set aside that national law.

6.4 A Coherent Model?

It is possible then, to summarize the application of the above cases as follows. *Salò*[92] suggests that substantive European rules which require or allow further implementation may never be applied directly in national courts to the detriment of the individual in criminal proceedings. Moreover, *Kolpinghuis*[93] and *Pupino*[94] state that domestic rules cannot be interpreted in accordance with substantive EU rules in such a way as to aggravate or determine the liability of an individual. *Pupino* also tells us that procedural rules may be interpreted in accordance with EU rules even where that may have an impact on liability, though it is for national courts to ensure compliance with Article 6 ECHR. *Ratti*[95] allows national criminal rules to be set aside where they are incompatible with European law in such a way as to benefit the defendant. However *Berlusconi*[96] makes plain that European law will not set aside domestic law where that would be to the detriment of the individual subject to it, particularly where to do so would violate the principle of non-retroactivity. It seems then fairly clear that the rule is that European criminal law will only operate in

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[91] A common position is no longer likely to contain the kind of provisions which would be relevant in these circumstances, see C-355/04 P *Segi et al.* v. *Council of the European Union* [2007] E.C.R. I-1657.

[92] Case 14/86 *Pretore di Salò v Persons Unknown* [1987] E.C.R. 2545.

[93] Case 80/86 *Criminal Proceedings Against Kolpinghuis Nijmegen BV* [1987] E.C.R. 3969.

[94] Case C-105/03 *Criminal Proceedings Against Maria Pupino* [2005] E.C.R. I-5285.

[95] Case 148/78 *Pubblico Ministero v Tullio Ratti* [1979] E.C.R 1629.

[96] Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and others* [2005] E.C.R. I-3565.

national law so as to alleviate, rather than aggravate, individual liability. However, a more detailed analysis of the interplay of these cases allows us to create further nuances for the principles of direct effect and supremacy in this field of law.

If we consider the above discussion in relation to the current substitution-exclusion debate over the nature of direct effect, a slightly more complex picture begins to emerge. At the moment, it seems clear that no substantive criminal law is capable of being directly effective, if directly effective is understood as meaning having substitutionary effect. *Ratti* however makes it clear that EU law can operate to exclude domestic criminal law, which, it was argued in Chapter Five, is more properly understood as an operation of the principle of supremacy in one of its weaker forms.[97] *Berlusconi* however suggests that even those exclusionary effects are subordinated to the general principles of law, in particular fundamental rights. In *Ratti* and *Salò* the ECJ was able to rely on its traditional direct effect rhetoric, merely restating the well established truism that unimplemented directives can only be considered binding on Member States and do not have horizontal, or inverse vertical effects. However, *Kolpinghuis* and the cases which follow demonstrate that the ECJ made a choice to realign their caselaw on individual liability on a fundamental rights footing, rather than a purely constitutionalist one.

6.4.1 Development of a Fundamental Rights Approach

It is interesting that the ECJ has chosen to approach the question of the enforcement of European criminal law through fundamental rights. It would have been possible for the Court to have maintained the approach

adopted in *Salò* and *Ratti*; simply stand by the direct effect reasoning and maintain a constitutional prohibition on allowing Member States to rely on their own failure to implement European directives through an estoppel justification. As has since been seen, the Court has apparently been express that consistent interpretation cannot affect individual liability against the State irrespective of the criminal context.[98] However, the Court made a choice in the *Kolpinghuis* case to introduce a rights rhetoric, indicating a clear willingness to engage with fundamental rights norms to a greater extent than is perhaps generally assumed.

The way in which the ECJ has dealt with the relationship between European law and national criminal law adds significantly to the evidence that fundamental rights law forms a standard to which it will subordinate the rest of European law, even the core, foundational principles of supremacy and direct effect. The Court of Justice has been able to set out these principles which most people would regard as perfectly adequate to protect fundamental rights from the application of European law, in spite of the pillared Union which has come in for such significant criticism. This is not to imply that the third pillar is perfect, and the major weaknesses in the pillared judicial protection system will be discussed in the following chapter, but for the purposes of enforcing criminal law against individual defendants, the ECJ has done an admirable job in upholding the rights of individuals, despite the relatively poor constitutional system in which it has to operate.[99] Whether or not one

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[97] See *supra* 5.2.1.3, see also, Hinarejos, A. "On the Legal Effects of Framework Decisions and Decisions: Directly Applicable, Directly Effective, Self Executing, .Supreme?" (2008) 14(5) European Law Journal 620, 632.

[98] Case C-168/95 *Criminal Proceedings Against Luciano Arcaro* [1996] E.C.R. I-4705; Arnull, A. *The European Union and its Court of Justice* (2nd Edition, OUP, 2006), 219.

[99] Baker, E. and Harding, C. "From Past Imperfect to Future Perfect? A Longditudinal Study of the Third Pillar" (2009) 34(1) European Law Review 25, 49 describe the ECJ as having a respectable track record in that regard.

accepts the argument that in previous years the Court of Justice has been somehow bounced, or blackmailed into protecting fundamental rights norms,[100] it is certainly true now that whenever it decides a case with a fundamental rights element, it will be conscious of the *Bosphorous* and *Solange*[101] compromises created by the ECtHR and the German Constitutional Court. However, protecting fundamental rights does not necessarily require openly engaging with the concept of rights discourse in this context. The Court could, as suggested above have easily, and defensibly, achieved the same result, by having rigidly stuck to a constitutionalist mantra based on supremacy, direct effect and consistent interpretation. Instead it opted to consider the implications of fundamental rights. The Court has reached the same ends but done so by the broader means, and for this it must be applauded. Moreover, as can be aptly demonstrated by *Berlusconi*, in moving to this rights based approach to this issue, the Court has not only met the standards of the ECHR in relation to Article 7, but, at the time it even exceeded them within its jurisdiction.

6.5 Conclusions

It seems possible to construct a single set of rules for the application of European law in national criminal proceedings. A rule of European law, be it Union or Community, should never be applied directly to aggravate or determine the criminal liability of an individual where the Member State retained a discretion as to the mode of its implementation. Where conflicts

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[100] See *inter alia* Douglas-Scott, S. "A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis." (2006) 43(3) Common Market Law Review 629; although c.f. Spaventa, E. "Federalisation Versus Centralisation: Tensions in Fundamental Rights Discourse in the EU" in Dougan, M, Currie, S. (*eds*), *50 Years of the European Treaties, Looking Back and Thinking Forward* (Hart Publishing, 2009), 343, 344-345.

[101] See Chapter Four, 4.4.1.

between national criminal law and European rules arise, national criminal law may be disapplied where that dissapplication would benefit of the defendant. Whether for reasons of compliance with the constitutional rules set out by the ECJ, or for human rights reasons, or both, the Court has developed an apparently consistent rule, which is applied across the whole of the EU, regardless of the pillars. This takes on particular significance when considered in the broader context of this thesis as a whole.

Chapter Two demonstrated that while depillarization was desirable to give the Parliament a greater role in the legislative process, it could not necessarily be seen as a 'silver bullet' to the problems of the old third pillar. Chapters Three and Four argued that depillarization is likely to make little or no difference to the executive activities of the Union in relation to criminal law and that if anything, the first pillar has been improved by following the lead of the third. What this Chapter has demonstrated is that where the constitutional structure of the Union allows the Court to close the loopholes, it is capable of doing so. Not only that, but that in addition to merely closing a legal loophole, it has demonstrated through the progression in its case law from *Salo* to *Berlusconi* that it is capable of expressly doing so for the right reasons. Indeed the Court has proved for all to see that it can actually lead the European debate over fundamental rights and its ruling in *Berlusconi* appears to have established a pan-European rights standard which has been expressly adopted by the ECtHR. The next chapter will examine whether the ECJ's interpretation of the provisions allowing for challenges to be made to European law are as successful in terms of the protections afforded to the individual as its system for the enforcement of the law.

Chapter 7

Judicial Protection for Individuals in EU Criminal Law

7.1 Introduction

As we saw in Chapter Five, the oversight of the legal system by an independent judicial body appears to be generally accepted as one of the fundamental tenets of the modern understanding of the elusive concept of the rule of law.[1] Certainly the notion of effective judicial protection seems to be at the core of the operation of the European Union, even if understanding of that principle sometimes differs. This Chapter will therefore consider the role of the European Court of Justice in protecting the individual against abuses of their rights through European law. It will consider the powers of the Court to review criminal legislation, and examine the added difficulties posed by the Court's direct and individual concern test under Article 230 EC for standing in judicial review cases in that context. It will also consider the constitutional rules governing the standing of individuals in the third pillar, and find them clearly wanting.

It will then consider the nature of the preliminary reference procedure as an alternative to the direct actions for review, and its use in the criminal context. It will be questioned whether the preliminary reference system is inappropriate, in particular whether the current legal structures effectively require people to await criminal charge before being able to seek a reference from a domestic court to challenge the legality of European

[1] See *supra*, Chapter Five, 5.1.

criminal law. It will also consider the significant weaknesses with the preliminary reference system in the third pillar.

Finally this chapter will also address the role of seeking damages, either against the Union or the Member States, for violation of Community law in the criminal sphere. It will ask whether the principle in Case C-6/90 *Francovich*[2] can apply in the third pillar, and whether it would be an effective mechanism for compensating individuals when the more proactive protections which should apply before and during the process of criminal prosecution have failed to do their work. An examination of these issues will demonstrate the ECJ's capability to protect fundamental rights in the criminal law field, through the judicial structures already in place in the European Judicial architecture.

7.2 Judicial Review of Criminal Law

This section will investigate the possibility of individual standing to seek the review of criminal law directly before the European courts. It will consider the situation in both the first and third pillar, and then aim to compare the two and identify the consequences of the regrettably limited opportunities under both systems.

7.2.1. Standing under the First Pillar

We saw in Chapter Four that Article 230 EC allows, in certain circumstances, for individuals to challenge the validity of legislation adopted by the European legislature. This is also, on the surface at least, a

[2] Case C-6/90 and 9/90 *Francovich and Bonifaci v Italy* [1991] E.C.R. I-5357.

reason to support the Communitarization of Title VI TEU.[3] As we saw however, the situation is complicated by the standing rules.

The Court's narrow interpretation of the standing rules under Article 230 EC has the effect of severely limiting the realistic scope of individual standing before the Court. The Court's interpretation of individual concern has been subjected to a sustained barrage of criticism.[4] The nature of the criticism was discussed in Chapter Four, but to reiterate briefly, the result is that in practice very few individuals are ever able to challenge measures directly before the Court of Justice. The adoption of the excessively strict Case 25/62 *Plaumann*[5] formulation for the interpretation of direct and individual concern has meant the development of the extraordinarily restrictive closed class test. In order to demonstrate individual standing one has to prove that the legislation in question affected the individual because of specific factual circumstances which would distinguish them individually to the point of them being *de facto* addressees of the measure in question.[6] Moreover, Case 11/82 *Piraiki-Patraiki*[7] requires that in addition to demonstrating membership of a closed class, it is essential to demonstrate that the Community institution should have taken the applicant's unique position into account before legislating.

It is submitted that for all practical purposes it is highly unlikely that any individual would be able to demonstrate membership of the kind of closed class which would meet the *Plaumann* criteria in the criminal law context,

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[3] See *inter alia* Usher, J. "Direct and Individual Concern – an effective remedy or a conventional solution" (2003) 28(5) European Law Review 575, 588; Albors Llorens, A. "The standing of private parties: Has the ECJ missed the boat?" (2003) 62(1) Cambridge Law Journal 72.

[4] See Opinion of AG Jacobs in Case C-50/00 *P Union de Pequeños Agricultores v Council* [2002] E.C.R. I-6677.

[5] Case 25/62 *Plaumann v Commission* [1963] E.C.R. 95.

[6] See also Case 26/86 *Deutz and Geldermann v Council* [1987] E.C.R. 941, para 9.

[7] Case 11/82 *Piraiki-Patraiki v Commission* [1985] E.C.R. 207.

and even less likely that an individual would be able to demonstrate that they were in a position so unique as to require specific consultation before some activity were made criminal. It is conceivable that, for instance, were a particular waste disposal method to be criminalized and only one commercial undertaking in the whole of Europe were still employing that method, they may be able to demonstrate individual concern, but even this is unlikely. The ECJ has in the past held that manufacturers or importers of a certain good would not be considered a closed class.[8] Moreover, and possibly most importantly, in Case C-209/94 *Buralux* the ECJ upheld a CFI decision that, where a measure was formulated in the abstract, being able to identify the number of undertakings, or even their names, was not sufficient to constitute a closed class.[9] Criminal law is always formulated in the abstract. It is after all of general application. This makes it extremely difficult to envisage anyone demonstrating membership of a closed class in relation to Community criminal law. Until the rule has actually been breached, when a person will be directly and individually concerned with the consequences, the criteria in *Plaumann* cannot be met, but encouraging breaches of the law to achieve this status is obviously inappropriate. However, as the ECJ approaches this as an issue of fact, it may be that someone will be able to demonstrate at some future time, to the satisfaction of the Court, that before the Community sought to criminalise an act the members of a particular class should have been consulted in the adoption of the legislation and thus should have standing.

Even if one accepts the theoretical possibility of an applicant being able to demonstrate individual concern, the issue does not end there. The issue of direct concern may pose a very real bar to judicial review of any

[8] Case 25/62 *Plaumann v Commission* [1963] E.C.R. 95; Case 11/82 *Piraiki-Patraiki v Commission* [1985] E.C.R. 207.

[9] Case C-209/94 P *Buralux SA v Council* [1996] E.C.R. I-615, para 24.

Community criminal law. Direct concern merely requires that a measure directly affect the position of the individual purporting to challenge it; in the words of the Court that the measure in question constitutes a *"complete set of rules".*[10] A European provision must require no further implementation or, where it does require implementation, it must leave either no or minimal discretion to the Member State, or that where discretion is left there can be no real doubt as to how that discretion is to be exercised.[11] The ECJ has restated the test as follows;

> *"The Court's case-law shows that, for a person to be directly concerned by a Community measure, the latter must directly affect the legal situation of the individual and leave no discretion to the addressees of that measure who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from Community rules without the application of other intermediate rules...The same applies where the possibility for addressees not to give effect to the Community measure is purely theoretical and their intention to act in conformity with it is not in doubt"*[12]

The CFI in Case T-172/98 *Salamander*[13] interpreted this as effectively ruling out the possibility of a directive ever being of direct concern to an individual as they always require implementation into the national legal system. They appear not to completely deny the possibility of a directive ever being of individual concern but go on to effectively rule it out for all

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[10] Case C-294/83 *Les Verts v Parliament* [1986] E.C.R. 1339.

[11] Case 11/82 *Piraiki-Patraiki v Commission* [1985] E.C.R 207.

[12] Case C-386/96 *P Société Louis Dreyfus & Cie v Commission of the European Communities* [1998] E.C.R.I-2309, Paras 43-44.

[13] Cases T-172, 175 and 177/98 *Salamander v Parliament and Council* [2000] E.C.R. II-2487. See also Dougan, M. *National Remedies Before the Court of Justice* (Hart Publishing, 2004), at 314.

practical purposes. [14] Their logic seems to rely on the ECJ findings in the direct effect case law that directives cannot be relied upon directly against an individual. As such, they argue, they are highly unlikely to be of direct concern to any individual.[15]

Any criminal law adopted by the Community has to leave a degree of discretion to the Member States. It should be recalled from Case C-440/05 *Ship-Source Pollution*[16] that, while the Community does have the power to adopt legislation criminalising certain practices it does not have the authority to adopt specific sanctions.[17] This would mean that it would be unlikely that legislation would be adopted which would satisfy the direct concern requirements. The very fact that the nature and level of the penalty is reserved either to the Member States acting individually, or to the institutions acting through the third pillar of the EU almost certainly means that the Court would be unlikely to find that any criminal legislation under the Community pillar could constitute a *"complete set of rules"*.

That said, it may be possible that the requirement to criminalise an act is discrete from the requirement to impose a sanction. The requirement to criminalise could be legally complete, leaving no discretion to a Member State whatsoever, but even then there is likely to be a bar to demonstrating direct concern. The reasoning in *Salamander* relied principally on the argument that directives could not affect an individual's interest without implementation by the Member States, and as such, unless a very

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[14] Cases T-172, 175 and 177/98 *Salamander v Parliament and Council* [2000] E.C.R. II-2487, 53.

[15] Cases T-172, 175 and 177/98 *Salamander v Parliament and Council* [2000] E.C.R. II-2487, 54. The CFI cite Cases 152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] E.C.R.723; Case 80/86 *Criminal Proceedings Against Kolpinghuis Nijmegen BV* [1987] E.C.R. 3969, Case C-91/92 *Paola Faccini Dori v Recreb Srl* [1994] E.C.R. I-3325 and C-192/94 *El Corte Inglés* v *Blázquez Rivero* [1996] E.C.R. I-1281.

[16] See Chapter Two, 2.3.

[17] Case C-440/05 *Commission v Council* [2007] E.C.R. I-9097, paras 70-71.

particular set of circumstances prevailed it was unlikely to be of direct concern. It will be recalled that the rule derived from Case C-60/02 *Criminal Proceedings Against X*[18] is that European criminal law may not aggravate or determine an individual's liability directly without implementation. Following the *Salamander* logic, this seems to preclude the possibility of European criminal law ever being of direct concern. The Court was very clear that even where, as a matter of European law, the legislative act in question would not normally require implementation, in that case a regulation, European law would not, independently of Member State action, affect an individual's criminal liability to his or her detriment. Following the reasoning in *Salamander* this seems to preclude the possibility of European criminal law ever being of direct concern because there is always a requirement for implementation of criminal law sanctions in the first pillar. The final possibility however is that the rule in Case 11/82 *Piraiki-Pitraiki*[19] could apply to a regulation in such circumstances, as the discretion allowed is likely to be minimal, allowing the possibility that a given provision could be of direct concern, although given the Court's insistence that European criminal law could not, in and of itself, negatively affect the liability of an individual, it is likely to be difficult to demonstrate such concern.

The practical result of this is that the only route an individual would have to bring a substantive challenge against a first pillar criminal measure would be through a preliminary reference, which the Court has always relied upon as justification for its limited construction of the standing rules. This is not without problems in the specific criminal context and such flaws will be discussed further *below*.

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[18] Case C-60/02 *Criminal Proceedings Against X* [2004] E.C.R. I-651. See Chapter Six, 6.2.2.

[19] Case 11/82 *Piraiki-Patraiki v Commission* [1985] E.C.R. 207. See Chapter Five, 5.3.1.2.

7.2.2 Judicial Review of Third Pillar Law

While access to the Court can be seen as circumscribed under the regime described in Chapter 5, there are different procedures in place under the Title VI EU and Title IV EC. In relation to criminal law, Article 35 TEU sets out the jurisdiction of the Court of Justice under the third pillar. It outlines the preliminary reference procedures which will be discussed further *below*, but makes no reference to the possibility of individual action before the Court of Justice. Article 35(6) TEU sets out specifically which measures adopted under Title VI TEU the Court will have jurisdiction to review for their legality. It will be able to review the legality of framework decisions or decisions in actions brought by the Member States or the Commission on the grounds of:

> *"...lack of competence, infringement of an essential procedural requirement, infringement of this Treaty (TEU), or any rule of law relating to its application or misuse of powers."*[20]

This seems to exclude both the common position and the convention from any review of legality. However, the Court has signalled that it intends to take a purposive approach to the interpretation of this provision, at least in relation to common positions.[21]

The common position is, from a *prima facie* reading of the Treaty, completely excluded. And while the ECJ is able to give rulings on the validity and interpretation of framework decisions and decisions, it is only

[20] Article 35(6) TEU.

[21] Davies B, "Segi and the Future of Judicial Rights Protection in the Third Pillar of the EU" (2008) 14(3) European Public Law 311; Peers, S. "Salvation from Outside the Church: Judicial Protection in the Third Pillar after *Pupino* and *Segi*" (2007) 44(4) Common Market Law Review 883.

able to rule on the interpretation of conventions, not their validity.[22] Moreover, the categories of applicants able to seek review, and the circumstances in which they may seek review are limited. Article 35(6) TEU grants the ECJ jurisdiction to rule on the validity and interpretation of framework decisions or decisions in actions brought by a Member State or by the Commission. Article 35(7) TEU grants the Court the power to rule on the interpretation of a Convention in an action brought either by a Member State or the Commission. It also grants the Court the jurisdiction to settle a dispute between Member States where the Council has first had an opportunity to settle that dispute and failed. There are two clear omissions. The European Parliament has no right of action under the third pillar, to protect its own interests or otherwise. However, the most glaring omission is any right of standing for an individual. Some of the problems this may lead to can be underlined by the Court of Justice ruling in Case C-355/04 P *Segi*.[23]

The *Segi* case concerned an application by a group of individual members of Segi, a left wing youth group associated with Basque terrorist group ETA, who were a proscribed terrorist group in Spain and France. In September 2001 the United National Security Council adopted Resolution 1373 (2001), which stipulated that UN Member States should provide each other with the greatest possible level of support and assistance in investigating or prosecuting suspected terrorists or combating the financing of terrorists.

In December 2001 the Member States of the European Union decided that in order to best implement Resolution 1373, action by the Union acting under Title VI EU was necessary. As such they adopted Common Position

[22] Article 35(1) TEU.

[23] Case C-355/04 P *Segi and Others v Council* [2007] E.C.R. I-1657.

2001/931/CFSP on the application of specific measures to combat terrorism. Article 4 provided:

> *"Member States shall, through police and judicial cooperation in criminal matters within the framework of Title VI of the [EU] Treaty, afford each other the widest possible assistance in preventing and combating terrorist acts. To that end they shall, with respect to enquiries and proceedings conducted by their authorities in respect of any of the persons, groups and entities listed in the Annex, fully exploit, upon request, their existing powers in accordance with acts of the European Union and other international agreements, arrangements and conventions which are binding upon Member States."*

Segi were included in the Annex to that Common Position as a constituent of ETA.[24] They had previously attempted to bring a case before the ECtHR, arguing that being listed in the Annex violated their human rights, in particular Article 6 ECHR as they has not been given a fair opportunity to state their case. However, following a preliminary assessment the ECtHR declared their case inadmissible as they had not been *"victims"* within the meaning of Article 1 ECHR.[25]

Segi then brought their action before the Court of First Instance alleging that the Council had breached the general principles of European Union law and sought damages to compensate them for the harm they allegedly suffered as a result of their inclusion in the Annex. The CFI rejected the claim as they lacked jurisdiction to award damages in relation to the third

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[24] The Common Position was updated on 2 May and 17 June 2002 by Common Positions 2002/340/CFSP and 2002/462/CFSP, respectively, and Segi remained in the Annexe.

[25] Application No. 6422/02 *Segi et al.* v. *15 States of the European Union*, decision of 23 May 2002.

pillar.[26] In an extraordinary concession they ruled that EU law provided Segi with *"no effective remedy"*.[27]

The claimants then appealed to the ECJ who agreed in most particulars and rejected the appeal. The ECJ rejected the CFI's proposition that the EU system did not provide an effective remedy in the circumstances. In doing so however, they took a somewhat creative approach to the interpretation of both Article 35 TEU and to the common position as a legal act. They ruled that the Treaty had never intended that common positions should be used to produce legal effects for third parties.[28] They reasoned backwards to this conclusion from an assessment of their jurisdiction under Article 35 TEU. They held that framework decisions and decisions were amenable to review by the Court and as such must be able to contain provisions designed to affect the legal positions of third parties. However, the very fact that common positions were excluded from the scope of the Court's jurisdiction meant that they could not contain measures aimed to affect the position of third parties. Any measure which was labeled a common position would instead be reclassified as appropriate by the ECJ who would then conduct a substantive review, thus allowing, in the circumstances a genuine remedy.[29]

While the ECJ is capable of making some leaps of faith in its interpretation of the Treaty to close some of the fairly obvious lacuna, it is not capable of closing them all. It was compelled to conclude that no individual action for damages existed in the third pillar and it was consequently compelled to reject the appeal. As Spain allows preliminary references to be made to the

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[26] See further *below*.

[27] Case T-338/02 *Segi et al.* v. *Council of the European Union* [2004] E.C.R. II-1647, para 38.

[28] Case C-355/04 P *Segi and Others v Council* [2007] E.C.R. I-1657, para 54.

[29] Case C-355/04 P *Segi and Others v Council* [2007] E.C.R. I-1657, para 55.

ECJ from the Spanish courts so the possibility exists that Segi may resubmit their complaint through the Spanish system and eventually return to the Court of Justice via an appropriate jurisdictional route. However, the Court will not be able to provide any remedy other than the potential annulment of the misclassified common position, damages would still not be available.

The Court also has the jurisdiction to rule on any dispute between Member States regarding the interpretation or the application of acts adopted under the third pillar. However, any such dispute must first be raised in the Council of Ministers, who must then attempt to resolve the dispute. If no resolution can be reached after six months, then the matter may be raised before the Court.[30] The Court may also rule on disputes between the Member States and the Commission.[31] What is interesting about Article 35 TEU is that it makes no reference to individual application and that there appears to be no enforcement action, in other words the Commission cannot take action against a Member State for failure to comply with its Union obligations, further reinforcing the notion that the Council, not the Commission is the main locus of authority under the third pillar.

7.2.3 Effect of Standing Limitations

The examination of the standing rules under the first pillar demonstrates that individual standing is another problem that communitarization of the third pillar is unlikely to solve. We will see *below* that, even though the preliminary referencing system may mitigate against this problem to a degree, the failure to extend an individual right of standing may be even

[30] Article 35(7) TEU.

[31] Article 35(6) and (7) TEU.

more injurious in the criminal law context than it is in other fields of European law.

Moreover, the reforms envisioned under the Lisbon Treaty are unlikely to actually solve these problems. Article 263(4) TFEU will read as follows:

> *"Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures."*[32]

As was outlined *above*, direct concern is likely to pose a significant difficulty in the field of criminal law and this remodelled system for judicial review retains the concept in all fields. Moreover, individual concern is only removed in relation to acts which apply directly, and being as the practice has previously been to criminalise conduct through directives and framework decisions, which always require national implementation, then this is likely to leave the situation substantively identical despite the reforms. The possibility does however remain that the ECJ would use the new provisions as an excuse to revisit their interpretation of direct and individual concerns on the grounds that the authors of the Treaty have shown an inclination to liberalise the conditions allowing for access to the Court, although it must be conceded that this approach is at best unlikely.[33]

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[32] Article 263(4) TFEU [2008] C OJ 115, 9th May 2008.

[33] See also Dougan, M. "The Treaty of Lisbon 2007: Winning Minds, Not Hearts" (2008) 45(3) Common Market Law Review 617, 677.

Individual standing will be changed by the Lisbon reforms, with the requirement of individual concern being removed for a measure of general application which do not require implementation.[34] This is to be welcomed because it will allow individuals to bring actions for review where previously they had no forum through which to do so in the old third pillar. It is also to be recalled that under the Lisbon arrangements this review system will, for the first time, apply in its entirety to the old Title VI TEU. An individual seeking to challenge a directive will still have to either demonstrate individual concern or seek to challenge the implementing measure before a national court.

7.3 The Role of the Preliminary Reference Procedure

This section will consider the extent to which the preliminary reference procedure can actually mitigate against the weaknesses of the standing rules in direct judicial review actions. It will consider the models for preliminary referencing in both pillars and seek to compare the two.

7.3.1 First Pillar References

Regulation through criminal law carries with it problems distinct from regulation through other types of law. In most matters over which the Union has jurisdiction, the measure in question may arise in an administrative, or civil tribunal. In criminal law there is almost no possibility of this, and consequently the first occasion upon which an individual will be able to mount any challenge against EU law is when he or she stands accused before a criminal trial. For example, a corporation may be engaged in a particular kind of waste disposal which is currently

[34] Article 263 TFEU.

legal. The EU subsequently adopts a measure criminalizing that practice. The undertaking cannot challenge it directly, and their domestic legislature implements such legislation in a form immune to domestic challenge.[35] This means that the undertaking has two options, to either comply with the legislation in question, or to continue the practice, invite prosecution and seek a preliminary reference to the ECJ under Article 234 EC for review of legality of the legislation. The national court is not obliged to grant unless it reaches the national court of last instance which makes this attempt a costly, lengthy procedure. While it is accepted that this is essentially part of the argument advanced by AG Jacobs in Case C-50/00 *UPA,*[36] this makes it no less valid, and the addition of the criminal context, which receives additional protection from the ECHR, means that this issue needs careful consideration, particularly since the individual or corporation in question must seek prosecution by breaching the law before they can request a preliminary reference. It should however be noted at this stage that this will be partly rectified by the Lisbon Treaty[37], which as we saw above would eliminate the requirement to demonstrate individual concern where a measure does not require implementation, and in those circumstances, even in the UK, it is likely that the individual would be able to find a right of standing before a national court.

It is not argued that it is imperative that any individual should have an abstract right to challenge any legislation of which they disapprove, and even more so with criminal law. However, if it is alleged, as the Court of Justice frequently does, that the Treaty creates a *"complete system of remedies"* then it should be a system in which people have a genuine right

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[35] For instance, an Act of Parliament in English and Welsh Law cannot be reviewed for legality by the English courts.

[36] Opinion of Advocate General Jacobs Case C-50/00 P *Union de Pequeños Agricultores v Council* [2002] E.C.R. I-6677, para 102.

[37] Article 263 TFEU

to avail themselves of remedies if they feel that they have been particularly wronged. Criminal legislation has, more than most other type of law, the real prospect of interfering with the way in which an individual lives their day-to-day life or conducts ones affairs. It also has significant implications for the operation of corporations and their financial viability. *De facto* compulsion of an individual, legal or natural, to invite a criminal charge as a prerequisite to accessing a right simply cannot be an acceptable approach to administering a system which prides itself upon its provision of effective judicial protection.

Such an approach would be inconsistent with the ECJ's case law in other fields. In their decision in Case C-432/05 *Unibet*[38] the Court was asked whether it was necessary to establish a free standing right of review over national law to enable domestic courts to test the compliance of domestic law with the EC Treaty. The case concerned the freedom to provide services, in this case two companies based in Malta and the UK advertised online gambling services in Swedish newspapers. In Sweden however, it was both an administrative infringement and a criminal offence to advertise gambling service organized abroad to Swedish nationals without the grant of a specific exemption. As such the Swedish authorities began actions in both administrative and criminal law against the newspapers carrying the adverts. Unibet and Unibet International, in spite of having no action brought against them, brought an action in the domestic Swedish courts arguing that the rule in question restricted their right to provide services, and as such was incompatible with Article 49 EC. There was no freestanding provision under Swedish law allowing for individuals to test the compatibility of a rule of national law with a higher legal norm, instead requiring a substantive issue to be raised before the courts, and the

[38] Case C-432/05 *Unibet (London) Ltd and Unibet International Ltd v Justitiekanslern* [2007] E.CR. .I-2271.

conformity of the domestic law with EU law being raised as a preliminary issue. The case made its way through the Swedish judicial system to the Swedish Supreme Court, the Högsta domstolen, who made a preliminary reference under Article 234 EC. The Swedish court asked whether European law required the creation of a freestanding right to challenge domestic law as being incompatible with EU law.

The Court held that Community law did not necessarily require a free standing right of that type so long as:

> *"other effective legal remedies, which are no less favourable than those governing similar domestic actions make it possible for such a question of compatibility to be determined as a preliminary issue, which is a task that falls to the national court."*[39]

However, the Högsta domstolen had submitted an observation to the ECJ questioning whether an individual must simply ignore the legislation in question, await either administrative or criminal action, and seek a reference as a preliminary issue in that case.[40] The Court expressly dismissed this possibility, arguing that if a claimant:

> *"was forced to be subject to administrative or criminal proceedings and to any penalties that may result as the sole form of legal remedy for disputing the compatibility of the national provision at*

[39] Case C-432/05 *Unibet (London) Ltd and Unibet International Ltd v Justitiekanslern* [2007] E.C.R. I-2271, para 65.

[40] Case C-432/05 *Unibet (London) Ltd and Unibet International Ltd v Justitiekanslern* [2007] E.C.R. I-2271, para 62.

issue with Community law, that would not be sufficient to secure for it such effective judicial protection."[41]

This has significant repercussions for criminal law. This case was specifically concerned with the problem of testing of national law for its compatibility with European law, rather than challenging the legality of European law itself. However, the express nature of the ECJ's rejection of the possibility of seeking a preliminary reference through this route seems to imply it is equally likely to apply to the latter situation. While the Court will not require a new remedy to be created at national level, it has made clear that it will not be satisfied by a situation which requires an individual face prosecution before they can assert their rights.[42]

Either the ECJ will have to require some form of procedural right be created domestically to facilitate a right to seek review of the legality of European criminal legislation and the domestic implementing legislation, independently of any criminal prosecution, or the ECJ is going to be forced to relax its interpretation of Article 230 EC on individual rights of standing. Most likely, it will remind national courts of their duty under Article 10 EC to interpret domestic procedural rules broadly enough[43] to facilitate a right to seek the review of legislation, thus avoid having to create a *de jure* new right. This is regrettable as the most sensible solution would be to relax the standing restrictions in line with the test suggest by AG Jacobs in Case C-50/00 *UPA*. Even were the Court not prepared to extend the interpretation of the standing rules generally, it is submitted that

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[41] Case C-432/05 *Unibet (London) Ltd and Unibet International Ltd v Justitiekanslern* [2007] E.C.R. I-2271, para 64.

[42] Arnull, A. "Annotation of Case C-432/05 *Unibet (London) Ltd and Unibet International Ltd v Justitiekanslern* (2007) 44(6) Common Market Law Review 1763, 1780. See also Joined Cases C-397 and 410/98 *Metallgesellschaft Ltd and Hoechst AG v Commissioners of the Inland Revenue* [2001] E.C.R. I-1727.

[43] See Chapter Six, 6.4.1.

it would be possible for them to do so for the criminal context in isolation. It is clear from a plain text reading of Article 6 ECHR that an individual's rights require a greater degree of protection in the field of criminal law. It would therefore be entirely defensible for the Court to state that the interpretation of Article 230 EC in *Plaumann* and the jurisprudence which followed was never developed with a Community criminal law competence in mind, and thus to relax the requirements for the criminal field along the lines suggested by AG Jacobs in *UPA*.

7.3.2 Third Pillar References

Under the first pillar the Court has referred to the preliminary reference procedure as a justification for restricting direct access to the Court by individual applicants. This logic cannot apply in the third pillar. While there is a preliminary reference procedure under the third pillar, it applies in a severely abrogated form. Article 35(2) TEU states that;

> *"By a declaration made at the time of signature of the Treaty of Amsterdam, or at any time thereafter, any Member State shall be able to accept the jurisdiction of the Court of Justice to give preliminary rulings as specified in paragraph one."*

This system of declaration of willingness to recognise the Court's jurisdiction makes the preliminary reference procedure under the third pillar optional for the Member States.

Once the Member State has accepted that jurisdiction they are entitled to adopt numerous procedural permutations. The national court of last

instance may be entitled, or required,[44] to make a reference,[45] or any court in the national system may make a reference.[46] A complete, consolidated breakdown of the current state of the system is provided by the Court of Justice. It suggests that of the twenty Member States from whom information is available,[47] seventeen have accepted the jurisdiction of the Court.[48] Of those seventeen, all except Spain have allowed all courts to make a reference, with Spain restricting that jurisdiction to courts against whose decision there is no judicial remedy.[49] Spain has declared that the court of final instance shall be required to refer cases raising a question of European law, along with nine others.[50] Seven Member States who have made a declaration have therefore retained the option to refer.[51] In all then, this list demonstrates that there are at least five possible procedural permutations, ranging from completely denying national courts the right to make a reference, all the way through to a system identical to Article 230 EC, where any court may make a reference, and courts of last instance shall, with a majority, although not overwhelming, of States for whom information was available, opting for the latter.[52]

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[44] Although where a court is required to refer, it is to be required by operation of national, rather than European law. See Declaration (No. 10) on Article 35 (Formerly Article K.7) of the Treaty on European Union (Annexed to the Amsterdam Final Act).

[45] Article 35(3)(a) TEU.

[46] Article 35(3)(b) TEU.

[47] Information is not available from Bulgaria, Cyprus, Estonia, Malta, Poland, Romania and Slovakia. The fact that the ECJ is not able to correctly ascertain the position of all the Member States must be slightly worrying. See; http://curia.europa.eu/jcms/upload/docs/application/pdf/200809/art35_2008-09-25_17-37-4_434.pdf (Last accessed 24th June 2009.)

[48] The United Kingdom, Denmark and Ireland have not opted in to the referencing system.

[49] In a demonstration of the flexibility of the system, Hungary, having initially restricted the option to reference to courts of last instance, have since changed their mind, and extended the right to all courts.

[50] Germany, Austria, Belgium, France, Italy, Luxembourg, The Netherlands, The Czech Republic and Slovenia.

[51] Finland, Greece, Hungary, Latvia, Lithuania, Portugal and Sweden.

[52] The States who have voluntarily opted for a system which mirrors Article 234 EC are Germany, Austria, Belgium, France, Italy, Luxembourg, The Netherlands, the Czech Republic and Slovenia.

In the light of this complex and discretionary system, it is possible to argue that rulings made by the ECJ are not binding on Member States which have not accepted its jurisdiction. It is likely at least that those States which have not accepted that the ECJ's jurisdiction would attempt such an argument at some point were the issue ever to arise. Albors-Llorens argues that, as the Member States are opting in to the ECJ's jurisdiction, where a Member State has not made a declaration, then any ECJ ruling made under Article 35 TEU is not binding on that State.[53] Textually, this is an appealing argument, and would presumably be supported by non-declaring States. However, the idea that the ECJ could clarify the correct interpretation of third pillar secondary legislation and a non-declaring Member State would be free to willfully apply that legislation differently seems far-fetched. It is to be recalled however, that Article 35(4) TEU notes that whether or not a Member State has made a declaration under Article 35(2) TEU that State will still be entitled to submit its observations in any case arising under Article 35 TEU. That provision is likely to undermine the idea that ECJ rulings would not bind on non-declaring Member States. If Member States are entitled to submit observations in any case, there should be at least a presumption that those ruling are binding on them.

Moreover, as the ECJ has emphasized in Case C-105/03 *Pupino*[54] that the duty of loyal co-operation applies in the third pillar. This implies that such a duty would apply throughout the third pillar, not just between the States accepting the Court's jurisdiction over preliminary rulings, otherwise the

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See Monar, J. "Justice and Home Affairs in the Treaty of Amsterdam: Reform at the Price of Fragmentation" (1998) 23(4) European Law Review 320, 330.

[53] Albors-Llorens, A. "Changes in the Jurisdiction of the European Court of Justice Under the Treaty of Amsterdam" (1998) 35 Common Market Law Review 1273, 1281.

[54] Case C-105/03 *Criminal Proceedings Against Maria Pupino* [2005] E.C.R. I-5285.

Court would have expressed this point in its judgment. Part of the justification for the existence of a duty of consistent interpretation in *Pupino* was that framework decisions are in fact binding, and they are binding on all States, not merely those who have accepted the Court's jurisdiction. This duty would necessarily imply a presumption that national courts should seek to interpret the legislation in conformity with the rulings of the ECJ even if they are not themselves entitled to seek such rulings. Finally, the courts in the Republic of Ireland certainly feel themselves bound by *Pupino* and have applied it nationally as best they can in the absence of a right to refer questions to the ECJ.[55]

There remains the possibility of one Member State bringing an action against another, albeit under truncated conditions, under Article 35(7) TEU. This implies that even were one, or indeed a group, of rogue States to wilfully fail to comply with a preliminary ruling given in the judgment on a preliminary reference from another State then there is still the possibility of a Member State appearing before the ECJ in an inter-State dispute and being compelled to comply with the Court's judgment. However, with no provisions analogous to Articles 227 and 228 EC, the consequences of a State's continued failure to comply will be solely political rather than financial as there is no possibility of a fine, and without an enforcement provision by the Commission analogous to Article 226 EC, this is, in all probability a theoretical possibility as the issue is highly unlikely to arise directly before the ECJ.

There will be a series of broad, sweeping changes to this regime under the Lisbon architecture, and it is this field that the Communitarization will be seen as having the greatest impact on the third pillar, and indeed in the

[55] Fahey, E. *"How to be a Third Pillar Guardian of Fundamental Rights? The Irish Supreme Court and the European Arrest Warrant"* (2008) 34(1) European Law Review 563

field of EU criminal law more generally. First, the general preliminary referencing rules will be extended to cover the whole of European law. There will no longer be specific procedural requirements in relation to what was Title IV EC or Title VI EU. Certain restrictions will remain over the old third pillar system. Anything adopted prior to the entry into force of Lisbon will be governed by the judicial provisions of Title VI TEU. Title VII of the Protocol on Transitional Provisions deals with the transitional measures to be applied to measures adopted on the basis of the TEU. Article 10 of that Protocol to the TFEU provides that;

> *"As a transitional measure, and with respect to acts of the Union in the field of police cooperation and judicial cooperation in criminal matters which have been adopted before the entry into force of the Treaty of Lisbon, the powers of the institutions shall be the following at the date of entry into force of that Treaty: the powers of the Commission under Article 258* (ex 226 EC) *of the Treaty on the Functioning of the European Union shall not be applicable and the powers of the Court of Justice of the European Union under Title VI of the Treaty on European Union, in the version in force before the entry into force of the Treaty of Lisbon, shall remain the same, including where they have been accepted under Article 35(2) of the said Treaty on European Union."*[56]

This provision will remain in force for five years after the Treaty of Lisbon enters into force.[57] Where a provision is amended, the new powers of the Commission and the Court will take effect in relation to that amended

[56] Article 10(1), Protocol (No. 36) on Transitional Measures [2008] OJ C 115, 9th May 2008.

[57] Article 10(3), Protocol (No. 36) on Transitional Measures [2008] OJ C 115, 9th May 2008.

legislation only in relation to the States in which the amended legislation is to apply.[58]

7.3.3 *Case 314/85 Firma Foto-Frost and the Third Pillar*

The Court of Justice retains a clear monopoly on the review of EC law. The basis of this monopoly is the decision in Case 314/85 *Firma Foto-Frost.*[59] In that case the ECJ was asked whether or not national courts had the power to declare EC law invalid. The ECJ was definitive in its reply:

> *"[National] courts may consider the validity of a Community act and, if they consider that the grounds put forward before them by the parties in support of invalidity are unfounded, they may reject them, concluding that the measure is completely valid...On the other hand those courts do not have the power to declare acts of the Community institutions invalid."*[60]

The Court then went on to better define its reasons for reserving this power to itself. The main reason was:

> *"To ensure that Community law is applied uniformly by national courts. That requirement of uniformity is particularly imperative when the validity of a Community act is in question. Divergences between [national courts] would be liable to place in jeopardy the very unity of the Community legal order."*[61]

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[58] Article 10(2), Protocol (No. 36) on Transitional Measures [2008] OJ C 115, 9th May 2008.

[59] Case 314/85 *Firma Foto-Frost v Hauptzollamt Lubek-Ost* [1987] E.C.R. 4199.

[60] Case 314/85 *Firma Foto-Frost v Hauptzollamt Lubek-Ost* [1987] E.C.R. 4199, paras 14-15.

[61] Case 314/85 *Firma Foto-Frost v Hauptzollamt Lubek-Ost* [1987] E.C.R. 4199, para 15.

The Court then restated its view that the EC Treaty created a complete system of legal remedies[62] and vested those remedies in the ECJ. As Article 230 EC extended to the Court the exclusive power to annul the acts of the Communities, that exclusivity must logically extend to Community legislation.[63] The Court also advanced a procedural argument for creation of this monopoly, noting that the ECJ's rules of procedure allow both the institutions and Member States to submit observations directly to them which meant that they were best placed to decide on the validity or otherwise of Community law because this facility would not be available to national courts.

While the Court does not explicitly refer to it, it is submitted that the supremacy of the Community legal order must have played a part in the Court's reasoning. *Firma Foto-Frost* clearly bolsters the doctrine of supremacy, by reaffirming the hierarchical relationship between the ECJ and national courts in matters of Community law.[64] Komarek summarizes it thus:

> *"The strong (and unrealistic) strive for uniformity serves as a justification for the Court of Justice's involvement in cases of minor importance for EU legal order as a whole, where an ordinary supreme court in a mature system of law would never intervene.*

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[62] Case 314/85 *Firma Foto-Frost v Hauptzollamt Lubek-Ost* [1987] E.C.R. 4199, para 16. See also Case 294/83 *Partie Ecologiste "Les Verts" v European Parliament* [1986] E.C.R. 1339.

[63] Case 314/85 *Firma Foto-Frost v Hauptzollamt Lubek-Ost* [1987] E.C.R. 4199, para 17.

[64] See *inter alia* Leanaerts, K, Corthaut, T. "Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law" (2006) 31(3) European Law Review 287, 289 *et seq*; Bebr, G. "The Reinforcement of the Constitutional Review of Community Acts under Article 177 EEC Treaty (Cases 314/85 and 133 to 136/85)" (1988) 25(4) Common Market Law Review 667, 678.

This intervention does not aim at uniformity, but supremacy of Union law."[65]

The Court was probably not motivated only by a desire for control over the Community legal order, nor solely by a motivation to bolster supremacy. In fact, in terms of the first pillar the ruling in *Firma Foto-Frost* is entirely defensible, and probably desirable on the grounds of uniformity of EC law.[66] In the Community pillar there is a practically complete set of legal remedies, despite the weaknesses in the rules on individual standing before the ECJ, supported by a universal and functional preliminary reference system. However, the third pillar is a different issue.

In attempting to address the concerns over the third pillar system, the Opinion of Advocate General Mengozzi in Case C-335/04 P *Segi* makes a series of fairly radical proposals for addressing the review of European legislation in the third pillar. AG Mengozzi considered the state of Union law as a whole and, finding that the ECJ is not properly empowered to ensure adequate judicial protection in the third pillar, argued that this power must instead be vested in national courts.[67] In particular he argued that a compensatory remedy should be administered by national courts,[68] and that in certain circumstances those courts should be able, of their own motion, to declare third pillar measures to be invalid.

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[65] Komarek, J. "In Court(s) we Trust? On the Need for Hierarchy and Differentiation in the Preliminary Ruling Procedure" (2007) 32(4) European Law Review 467, 472.

[66] See Arnull, A. *The European Union and its Court of Justice* (2nd edition, OUP, 2006) 126. Usher, J. "Direct and Individual Concern – an Effective Remedy or a Conventional Solution" (2003) 28(5) European Law Review 575, 588. The ruling has been criticised, see Hartley, T. "The European Court, Judicial Objectivity and the Constitution of the European Union (1996) 112(Jan) Law Quarterly Review 95, 100.

[67] Opinion of AG Mengozzi Case C-335/04 P *Segi v Council* [2007] E.C.R. I-1657, para 99.

[68] See further *below*.

In reaching these conclusions the AG takes a series of steps which may seem disjointed, but lead to a somewhat more elegant whole. He argues that the possibility to challenge a provision of law before a court is *'inherent in the rule of law'*.[69] He further notes that the provisions outlining the role of the judiciary in the Treaty only apply to the supranational Courts.[70] Since Articles 6(1) and (2) TEU guarantee respect for the rule of law and fundamental rights, he argues that this must mean that these principles should be judicially protected.[71] As such, he suggests that Member States could not possibly have intended to craft a system which would exclude the possibility of judicial review altogether, therefore *"no provision of the EU Treaty can be invoked...to claim that the authors of the Treaty intended to exclude such review from the field of [PJCCM]"*.[72] He argues that national courts must enjoy power to review the legality of measures adopted under the third pillar, grounded in the principles enshrined by Articles 6(1) and (2) TEU, but that these powers are *"limited by respect for the powers conferred on the Court of Justice."*[73] Referring to *Pupino*, AG Mengozzi notes that the principle of loyal co-operation exists in the third pillar, and that as a result of that, it must logically follow that the responsibility for the creation of a complete system of judicial protection falls equally to the Union and to the Member States.[74] He then considers the opt-in system of references in the third pillar and argues that, were the Court to accept this system at face value, then EU law would create *"a situation of intolerable inequality between persons affected by one and the same act...who would or would not enjoy*

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[69] Opinion of AG Mengozzi Case C-335/04 P *Segi v Council* [2007] E.C.R. I-1657, para 101 quoting the Opinion of AG Darmon in Case 222/84 *Johnston* [1986] E.C.R. 1651.

[70] Opinion of AG Mengozzi Case C-335/04 P *Segi v Council* [2007] E.C.R. I-1657, para 104.

[71] Opinion of AG Mengozzi Case C-335/04 *Segi v Council* [2007] E.C.R. I-1657, para 102.

[72] Opinion of AG Mengozzi Case C-335/04 P *Segi v Council* [2007] E.C.R. I-1657, para 103.

[73] Opinion of AG Mengozzi Case C-335/04 *Segi v Council* [2007] E.C.R. I-1657, para 105.

[74] Opinion of AG Mengozzi Case C-335/04 *Segi v Council* [2007] E.C.R. I-1657, paras 106-107.

judicial protection against that act, depending on the options chosen by the individual State." [75] He concludes that, in order to give effect to the principles of effective judicial protection, equality before the law and even non-discrimination on the grounds of nationality, that *"it must be possible for a decision as to the validity or invalidity of [third pillar legislation] to be taken by the national court itself in the absence of the possibility of a reference for a preliminary ruling."*[76] However, such a ruling would have effect only within the national jurisdiction of the court concerned.[77]

AG Mengozzi considered the role of the judgment in *Foto-Frost* and dismissed its application in the third pillar. In particular he focused on the two principal justifications offered by the ECJ for its decision; the uniformity of law, and the completeness of the European system of remedies. He argues that unlike Articles 230, 234 and 241 EC, Article 35 TEU cannot truly be said to create a complete and independent set of remedies.[78] Moreover he observes that the "*á-la-carte*" nature of the jurisdiction of the Court of Justice must in and of itself undermine the idea of the uniformity of Union law. Even were a *Foto-Frost* rule to be adopted in the third pillar, because a number of States have failed to opt-in to the reference system, then a serious risk, if not a serious likelihood, of divergent interpretations arises.[79]

It would be difficult to accept at face value everything AG Mengozzi contends in his Opinion in *Segi*. In particular, the suggestion that no Article of the TEU can be identified as intending to limit judicial scrutiny

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[75] Opinion of AG Mengozzi Case C-335/04 *Segi v Council* [2007] E.C.R. I-1657, para 114.

[76] Opinion of AG Mengozzi Case C-335/04 P *Segi v Council* [2007] E.C.R. I-1657, para 114.

[77] Opinion of AG Mengozzi Case C-335/04 P *Segi v Council* [2007] E.C.R. I-1657, para 120.

[78] Opinion of AG Mengozzi C-335/04 P *Segi v Council* [2007] E.C.R. I-1657, para 123.

[79] Opinion of AG Mengozzi Case C-335/04 P *Segi v Council* [2007] E.C.R. I-1657, para 127-130.

is questionable. It could of course be argued that Article 35 TEU was intended to do expressly that by limiting the ECJ's jurisdiction in both a procedural and substantive way. That said, however, his essential point is persuasive. The current system for the protection of individual rights under the third pillar effectively relies on the political whim of national governments in accepting the ECJ's jurisdiction over preliminary references. Despite the adoption of several judicial doctrines developed in the first pillar by the third pillar for the effectiveness of EU law, a *Foto-Frost* rule in the third pillar should be ruled out on the basis of effective judicial protection. The ECJ alone is incapable of ensuring that individual rights are protected across the European legal sphere under the current structures of the third pillar.

However, the Court rejected the opportunity to rule out the application of the principle in *Foto-Frost* in this context. In *Segi* it shied away from this more contentious conclusion, opting instead to address only the narrower point, discussed *above*, considering the nature of judicial review in the third pillar. It is difficult to understand why the Court did not take the opportunity with which it was presented to attempt at least to solve this manifest flaw in the legal order and the jurisdiction of the Court of Justice. It could, of course be argued that any such ruling would have to be considered beyond the scope of the inquiry as the associations in question were based in Spain, who have accepted the jurisdiction of the Court. Had the question arrived at the Court via a preliminary reference rather than the ill-founded attempt at direct action, they would have had the opportunity to rule on the wider question of the Court's jurisdiction and the application of the first pillar *Foto-Frost* principle.

However, the very nature of the problem means that such an issue will never directly reach the ECJ, as there is no possibility of individual access

to the ECJ under the third pillar and courts in States such as the UK and Ireland are not capable of making a preliminary reference.[80] Whilst the Court's judgment in *Segi* does not expressly consider the preliminary reference system, it certainly did drive the ECJ to consider one of the major weaknesses in the legal system, and it is to be greatly lamented that they failed to address the wider problems. This represents a golden opportunity squandered, and one which it is conceivable that the ECJ may come to regret should this issue come before the ECtHR in different circumstances.[81] The fact that they may have been anticipating the entry into force of the failed Constitution and thus resisted the urge to solve a problem which had already all but been solved, is not sufficient reason.[82] In fact it is possible to suggest that the Constitution should have catalysed a bolder response. The political institutions and the Member States had agreed that those reforms were necessary and so if the ECJ had sought to close the gap in the interim, then whether or not this would have been contrary to the results in the various failed referenda, the political will existed to close loopholes in the judicial protection regime, and the ECJ could have taken its lead from the institutions.

The most compelling argument raised by the Advocate General in *Segi* for the rejection of a *Foto-Frost* style rule in the third pillar is that under the present system it is unlikely to fulfil its primary stated aim; the uniformity of law. As we saw above, Article 35 TEU goes out of its way to create a non-uniform constitutional system. The imposition of a *Foto-Frost* style rule will result in fragmented interpretation as various courts are forced to

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[80] Davies, B. "*Segi* and the Future of Judicial Rights Protection in the Third Pillar" (2008) 14(3) European Public Law 311; Peers, S. "Salvation outside the church: Judicial Protection in the Third Pillar after the *Segi* and *Pupino* judgments"(2007) 44(4) Common Market Law Review 883, 901; Nettesheim, M. "UN Sacntions Against Individuals – A Challenge to the Nature of EU Governance" (2007) 44(3) Common Market Law Review 567, 577-578.

[81] See *below*, 6.3.2.

interpret European legislation without the guidance of the ECJ. Clearly, since enforcing the rule would lead to a lack of uniformity, the ECJ should accept the lack of uniformity in the form best able to protect fundamental rights.

There will be a reasonable objection that allowing the constitutionally most appropriate Member State courts to disapply Union law independently of the ECJ would be injurious to the primacy of Union law, assuming of course that Union law is supreme.[83] This could be easily dispensed with. The ECJ, in setting out the circumstances in which jurisdictionally isolated national courts were able to strike down legislation, should simply rule that the decision should be properly regarded as effectively interim until such time as the issue, by any other means, arises before the Court of Justice. Interim in this circumstance is not meant to mean interim in terms of the instant case, but in terms of the relationship between the legal systems. Judicial efficacy and the principle of *res judicata* would require that all cases decided in accordance with the ruling of the national court remain decided. The national court should only take this decision in accordance with EU law, not national law, thus only endangering the monopoly of the ECJ, rather than supremacy itself. Once the ECJ has had an opportunity to rule, and where its ruling runs contrary to the national decision, then the legislation struck down should be reinstated, and applied in accordance with the ECJ ruling from that time forward, subject, as noted above, only to the principle of *res judicata.* It is conceded that such an approach is in no way the perfect solution, nor even particularly desirable. However, the European constitutional system in place does not lend itself to perfect solutions, only functional ones. Should a Member State government whose courts are not entitled to make a reference not like

[82] See Chalmers, D. "The Court of Justice and the Third Pillar" (2005) 30(6) European Law Review 773.

the national court's decision, they are of course free to allow future references by opting into the ECJ's jurisdiction over preliminary references.

While the most obvious solution is to allow national courts to set aside measures which, as a matter of European law are unlawful, on an interim basis another possibility has been advanced, namely the creation of regional European courts, to whom there would be direct access, with the possibility of direct appeal to the centralized ECJ.[84] Clearly this would represent a novel solution, it is likely to be costly, and politically untenable. If the acceptance of the central ECJ's jurisdiction is untenable, then the establishment of satellite courts within the national jurisdictions is likely to be even less politically acceptable.

7.4 Damages

In some circumstances the provision of a legal right can be enough on its own, but it is generally recognised that in order to make a right genuinely effected it should be backed up by an effective remedy. Article 47 of the Charter of Fundamental rights provides that;

> *"Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article."*

In addition Article 13 ECHR provides that;

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[83] See Chapter Six.

[84] Comella, V. "The European Model of Constitutional Review of Legislation: Towards Decentralisation" (2004) 2(3) International Journal of Constitutional Law 461, 482.

"Everyone whose rights and freedoms (under the ECHR) are violated shall have an effective remedy"

This provision is specific to violations of fundamental rights under the ECHR, but in this context we are discussing the likely possibility of the violation of either Articles 5 or 6 of the ECHR. Moreover, Article 47 of the Charter is a much broader guarantee. The following section will consider the availability of such a remedy, in particular of compensatory damages with the European regime for the breach of such rights.

7.4.1 Actions for Damages Against the European Union

Article 288 EC clearly provides for an action for damages, both contractual and non-contractual, against the European institutions when acting in the scope of the Community Treaty. It provides:

"In the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damages caused by its institutions or by its servants in the performance of their duties."

Although questions have been raised over the adequacy and effectiveness of Article 288 EC, there is at least a mechanism by which individuals can be compensated for losses caused by the Community.[85] For example, the CFI have awarded significant damages against OLAF.[86]

[85] See *inter alia* Eilmansburger, T. "The Relationship Between Rights and Remedies in EC Law: In Search of the Missing Link" (2004) 41(5) Common Market Law Review 1199

[86] Joined Cases T-391/03 and T-70/04 *Franchet and Byk v Commission* [2007] E.C.R. I-3741.

However, as we saw above in the *Segi* case there is no specific analogous right for damages against the Union, a conclusion with which both the CFI and the ECJ were bound to concur from Title VI of the EU Treaty. However, again AG Mengozzi proposed a way of rectifying the problem. He again observed that while the EU Treaty did not convey a jurisdiction to award damages to the ECJ, it was silent about the nature of the national court's role in this regard. [87] As we saw he argued that there had to be a complete system of remedies and where this was not available before the European courts, it must be available before the domestic courts. The onus is then on national courts to interpret their rules of standing in such a way as to allow the claim of damages for violations of rights perpetrated by the Union acting in accordance with Title VI TEU.[88]

AG Mengozzi's main argument was that while the EU Treaty does not allow for an action in damages before the supranational Court, it was in fact silent on damages actions under the TEU altogether. The AG therefore reasoned that, based on the principle of attributed powers, where an essential procedural power, the ability to award a remedy for the breach of fundamental rights, has not been conferred on the supranational courts, it must rest with the national courts.[89] He points out that an action for compensation for a breach of ECHR rights must exist somewhere, as it is;

> *"rooted...in the principles of the rule of law and respect for fundamental rights on which the Union is based (Article 6(1) and (2) TEU), including the right to effective judicial protection".*[90]

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[87] Opinion of AG Mengozzi Case C-335/04 P *Segi v Council* [2007] E.C.R. I-1657, para 62.

[88] Opinion of AG Mengozzi Case C-335/04 P *Segi v Council* [2007] E.C.R. I-1657, para 98.

[89] Opinion of AG Mengozzi Case C-335/04 *Segi v Council* [2007] E.C.R. I-1657, para 104.

[90] Opinion of AG Mengozzi Case C-335/04 P *Segi v Council* [2007] E.C.R. I-1657, para 105.

He also notes that finding no possibility for recovering such a remedy anywhere in Union law has grave ramifications for the relationship between the EU and the ECHR because the fundamental rights guaranteed by European law cannot be compensated on breach.[91]

His solution is therefore that Member States should establish a system of rules to ensure that damages are available to individuals if European Union law breaches their fundamental rights, and national courts should interpret them in such a way as to ensure adequate protection.[92] Individuals would be able therefore to seek the award of damages from the Community institutions directly before national courts.[93] This is a novel solution, which, in the absence of a defined right of damages for breach of fundamental rights before the ECJ, must be considered in order to avoid falling foul of the ECtHR's *Bosphorous*[94] test. Unfortunately however, as with much of the AG's argument in *Segi,* the ECJ was silent on the issue, merely electing to concur with the CFI that it had no jurisdiction to grant damages under Title VI TEU. While it is undoubtedly correct that the Treaty does not provide for a direct action for damages before the ECJ, it is submitted that the AG's argument that the award of such damages should be possible before national courts is conceptually appealing.

7.4.2 Francovich Liability under the Third Pillar

Criminal law is of course different in nature to the administrative or civil legislation which the EU system was originally designed to deal with, the following section will consider the extent to which the system of damages

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[91] Opinion of AG Mengozzi Case C-335/04 P *Segi v Council* [2007] E.C.R. I-1657, para 86. See *below,* 6.5.

[92] Opinion of AG Mengozzi Case C-335/04 P *Segi v Council* [2007] E.C.R. I-1657, para 107.

[93] Opinion of AG Mengozzi Case C-335/04 P *Segi v Council* [2007] E.C.R. I-1657, para 141 *et seq.*

[94] Application No. 45036/98 *Bosphorus v Ireland* (2006) 42 EHRR 1.

established by the ECJ ruling in Case C-6/90 *Francovich*[95] can ever apply in the context of European criminal law.

The starting point, as with any assessment of the applicability of *Francovich* has to be the test laid down in Case C-46/93 *Brasserie du Pêcheur*[96] for its application. The tripartite *Brasserie* test, can be summarized as:

> *"the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties."*[97]

The first issue is whether it will ever be possible to demonstrate that a provision of criminal law was intended to confer a right on an individual. In principle, the answer must be yes. Consider for example, a situation analogous to that arising in *Criminal Proceedings against X*.[98] A regulation is intended to prevent the purchase, sale or transport of counterfeit goods in the Union. That regulation is not properly implemented by a Member State and, as a result of the ECJ diligently respecting the principle of non-retroactivity, the goods cannot be seized and nor can the counterfeiters be punished. Had that regulation been properly implemented then a criminal offence would have been created aimed at protecting the right of the legitimate manufacturer of the goods in question to compete in a market not distorted by counterfeit goods. There

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[95] Case C-6 and 9/90 *Francovich and Bonifaci v Italy* [1991] E.C.R. I-5357.

[96] Case C-46 and 48/93 *Brasserie du Pêcheur SA v Germany* [1996] E.C.R. I-1029.

[97] Case C-46 and 48/93 *Brasserie du Pêcheur SA v Germany* [1996] E.C.R. I-1029, para 51.

[98] Case C-60/02 *Criminal Proceedings Against X* [2004] E.C.R. I-651.

is moreover, a causal connection between the failure to implement the rule and the loss suffered, and the breach would be considered serious.

The situation in *Criminal Proceedings against X* was one where the Union adopted a market rule, which the Austrian State then chose to implement, albeit badly, as a part of their criminal code. Would the situation be different if the Union adopted a rule which was criminal on its face under the EC Treaty? This depends upon what one believes to underlie the *Francovich* principle in the first place. There are two perspectives on this issue: on the one hand the ECJ's reasoning can be taken at face value and the sole intention is to seek to create a system by which individuals will be compensated for their losses following the failure of a Member State to properly comply with its Community obligations.[99] On the other hand, it has been argued that *Francovich* and the related jurisprudence is actually about punishing the Member States for failing to adequately comply with European obligations and the fact that the revenue raised can be offset to compensate individuals for losses that they may have suffered is a happy coincidence. In other words, the system is aimed at creating half a billion private enforcers of EU law. The truth probably lies somewhere in between.[100]

This debate probably however, hinges on whether one accepts criminal law is intended to confer an identifiable right, or whether it is in fact intended to protect the public good. Murder is a crime. However, there is a conceptual difference between the notion that the criminal law of murder is intended to prevent one individual from ending the life of another individual, and saying that it is intended to guarantee that we all have a right not to have our life ended. Is criminal law intended to protect our

[99] Dougan, M. *National Remedies Before the Court of Justice* (Hart Publishing, 2004).

[100] Dougan, M. *National Remedies Before the Court of Justice* (Hart Publishing, 2004)

individual rights to go about our business free of crime, and, if so, does each new criminal prohibition mean that we have all gained a new right to go about our business free of interference from the behaviour involved in that particular crime? While this discussion is beyond the scope of this thesis, this distinction is linked to the conception of the response, if there is a failure by a body to ensure that criminal prohibitions are enforced.

Dougan argues that damages awarded to an individual on behalf of the public good would be difficult to rationalize:

> *"From a legal perspective, it might be difficult in such cases to demonstrate any intention by the Community legislature to confer subjective rights upon the individual, as opposed to the recognition of mere rights to standing. From a policy perspective, it would seem hard to justify enriching an individual whose capacity to bring legal proceedings derives from the effective protection of the public (rather than any strictly private) interest. And Francovich damages would surely be difficult to swallow in cases involving general damage to the environment, as regards which the claimant suffers no greater loss than any other citizen."*[101]

It should be borne in mind that the test for the application of the *Francovich* reparations is a three part, factual assessment of the situation of a given case. If a given piece of legislation is intended to confer a right, and it or the obligations surrounding it have been breached in a sufficiently serious manner by the Member State, and an individual has suffered a loss consequent on the breach of that right, then it does not matter what broad category of law we are dealing with. There is no reason of principle why *Francovich* should not apply to criminal law, merely reasons of fact. The

[101] Dougan, M. *National Remedies Before the Court of Justice* (Hart Publishing, 2004), 45.

mere fact that there may be an overwhelming public interest in preventing certain conduct does not automatically deprive a given victim of their private rights.[102]

However, there is also the important question of whether the principle of reparation for breaches of rights by EC law under *Francovich* can be extended to EU law under the third pillar. If so, then there is yet another issue to which Communitarisation of European criminal law will likely make very little difference.

The ECJ has already sidestepped the first, apparently legitimate, bar to the application of a *Francovich* principle in the third pillar. In its original ruling the Court relied on the principle enshrined in Article 10 (ex 5) EC to underpin its findings. They extended the principle slightly ruling that;

> *"Further foundation for the obligation on the part of Member States to pay compensation is to be found in Article 5 EEC, under which the Member States are required to take all appropriate measures, whether general or particular to ensure fulfillment of their obligations under Community law. Among these is an obligation to nullify the unlawful consequences of a breach of Community law..."*[103]

This aspect of the judgment clearly refers to obligations under Community law, but there can be no greater meaning attributed to this as the ruling predates the Union. The ECJ has already found that the duty of loyal co-

[102] For example, a number of acts which constitute crimes under the law of England and Wales also constitute torts, the crime of assault is supplemented by the civil action for trespass against the person, and the crime of fraud is supplemented by the tort of deceit. See *inter alia* Lamond, G. "What is a Crime?" (2007) 27(4) Oxford Journal of Legal Studies 609.

[103] Case C-6 and 9/90 *Francovich and Bonifaci v Italy* [1991] E.C.R. I-5357, para 36.

operation and its specific manifestation of it, consistent interpretation, apply to the third pillar in *Pupino.* There is no clear reason why another specific manifestation of the duty of loyal cooperation, the principle in *Francovich,* cannot apply in the third pillar context as well.[104]

One possible justification for refusing to extend *Francovich* to the third pillar would be the absence of the additional justification laid out by the Court in *Brasserie.*[105] Article 288 (ex 215) EC provides for the non-contractual liability of the Community, which the Court suggests is merely meant to represent the general principle common to the legal traditions of the Member States that *"an unlawful act or omission give rise to an obligation to make good damage caused"* and that this applies equally to public authorities who fail to carry out their duties.[106] The extent to which this justification for liability in the Community pillar would affect the adoption of a similar form of *Francovich* liability in the third pillar depends on the relative importance of the general principle over the Treaty Article said to represent it. We know from the ruling in *Segi* that there is no analogous right to damages against the Union under the third pillar regime over which the ECJ has direct jurisdiction. However, *Pupino* demonstrates that the general principles of EC law seem to apply in the third pillar.[107] If the general principle itself outweighs the importance of the absence of an equivalent to Article 288 EC, then there is no reason whatsoever why a *Francovich* style liability should not exist in the third pillar; until such time as the Court expressly rules it out, it should be assumed that such liability exists.

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[104] See also Peers, S. "Salvation outside the church: Judicial Protection in the Third Pillar after the *Segi* and *Pupino* judgments"(2007) 44(4) Common Market Law Review 883, 921.

[105] Case C-46 and 48/93 *Brasserie du Pêcheur SA v Germany* [1996] E.C.R. I-1029.

[106] Case C-46 and 48/93 *Brasserie du Pêcheur SA v Germany* [1996] E.C.R. I-1029, para 29. See Craig, P. "Once More Unto the Breach: The Community, The State and Damages Liability" (1997) 113(Jan) Law Quarterly Review 67.

[107] See *supra* Chapter Six.

Although *Francovich* almost certainly could apply in the third pillar as a general rule, it must always be recalled that the assessment of the availability of any remedy is made on a case-by-case basis. For example, while common positions may be theoretically capable of attracting *Francovich* liability, following the ECJ ruling in *Segi* they are rarely, if ever going to intend to confer a right; they are legally prohibited from containing any provision which would affect the position of a third party and would not be capable of falling under the *Francovich* principle.

There are of course other procedural issues which are regulated by the third pillar which could potentially give rise to liability in damages. Take for instance the principle of *ne bis in idem*, that no one should be tried for the same crime more than once. This is particularly important in a single "area of freedom, security and justice," where crimes and their consequences are increasingly cross-border in nature and may gives rise to liability in more than one State. This principle applies in the EU through the framework of the third pillar which now includes the Agreement to Implement the Schengen Convention, in particular Article 54.[108] This principle, it should also be recalled, is to be found in Article 50 of the EU Charter and thus is likely to be considered one of the general principles of law.[109] It is possible, that if one Member State were to wilfully disregard this principle and continue with a prosecution in spite of the fact that such proceedings had been concluded in another Member State, that there would be *Francovich* liability. The principle is clearly intended to create a right, and there would be no doubt as to the gravity of the breach or the causal

[108] Convention applying the Schengen Agreement of 14th June 1985 between the governments of the Benelux economic union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders. Title III, Chapter 3.

[109] See Chapter Five, 5.4.1.2.

link between the breach and the damage caused.[110] If the general rule can apply, as it probably can, then it is for the court to decide on a case by case basis whether the legislation in question was intended to confer a right. If so, then everything else is a factual question for the national court to determine in accordance with the detailed guidance set out in *Brasserie.*

7.5 Effective Protection of Fundamental rights and *Bosphorous*

While the ECJ made some efforts to close the loopholes in the judicial protection regime in the third pillar, that the CFI in *Segi* were capable of making the extraordinary statement that the applicants probably had *"no effective remedy"* in European law must be a significant cause for concern.[111] Advocate General Mengozzi, in his Opinion in the *Segi* appeal, set out the potentially seismic consequences for the European legal order were that observation to prove to be correct:

> *"In particular, from the point of view of observance of the obligations undertaken by the Member States when they signed the ECHR, it is entirely improbable that the European Court of Human Rights would extend to the third pillar of the Union the presumption of equivalence in the protection of the fundamental rights that it has established between the ECHR and Community law, or the 'first pillar' of the Union, and which leads that Court to carry out only a 'marginal' review of the compatibility of acts adopted by the Community institutions with the ECHR. On the other hand, it is highly likely that, in the course of a full examination of the*

[110] See Cases C–187 and 385/01 *Gözütok and Brügge* [2003] E.C.R. I–1345.

[111] Case T-338/02 *Segi et al. v. Council of the European Union* [2004] E.C.R. II-1647, para 38.

compatibility of acts adopted by the institutions under Title VI of the EU Treaty with the ECHR, the European Court of Human Rights will in future rule that the Member States of the Union have infringed the provisions of that Convention, or at least Articles 6(1) and/or 13."[112]

He also reiterated that no comfort can be taken from the fact that the ECHR dismissed the *Segi* case as inadmissible, because they did so *"not on the merits of the case but on admissibility, based on a denial that, in the light of the specific nature of the actual case, the appellants are 'victims' within the meaning of Article 34 of the ECHR, which is a purely procedural provision of the ECHR".*[113] He moreover suggests that not only would the *Bosphorous* scales be tipped but national courts would no longer accept the balance established by the ECJ and the *Solange II* balance would also be upset. National courts would feel compelled to ensure that rights were being properly secured by the Union, and the fragmentation which this would lead to would be both undesirable, and injurious to the notion of the equality before the law of all Union citizens.[114]

The significant restrictions on individual standing before the Court under Article 230 EC and the lack of any standing at all under Title VI EU are very problematic. It must be recalled at this point that the *Bosphorous* compromise related not only to the substantive rights, but also to *"the mechanisms for controlling their observance".*[115] The ECJ has frequently maintained that this problem is mitigated against by the preliminary

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[112] Opinion of AG Mengozzi Case C-335/04 P *Segi v Council* [2007] E.C.R. I-1657, para 86.

[113] Opinion of AG Mengozzi Case C-335/04 P *Segi v Council* [2007] E.C.R. I-1657, para 87.

[114] Opinion of AG Mengozzi Case C-335/04 *Segi v Council* [2007] E.C.R. I-1657, para 90.

[115] Application No. 45036/98 *Bosphorus v Ireland* (2006) 42 EHRR 1, para 5.

reference system, and in the first pillar, this is probably true. Clearly, however, the third pillar preliminary reference system cannot mitigate against the absence of individual standing before the ECJ. If a Member State decides not to allow references, and the ECJ is not prepared to expressly rule out a *Foto-Frost* rule in the third pillar then individuals in non-declaring Member States will simply have no access to a court competent to annul unlawful European legislation. If a concrete violation of fundamental rights could be demonstrated by an EU measure in a non-declaring state and no court to which the individual has access were to have the authority to rectify it then there is a very real probability that this situation would fall foul of the *Bosphorous* test because the "mechanisms for the observance" of rights within the EU is not convention compliant. The ECtHR is highly likely in those circumstances to rule that the Member State's failure to avail itself of its option under Article 35(2) TEU would be a breach of the ECHR.

The ECJ's oversight of the legality of European legislation is the single biggest weakness in the third pillar system, and the only weakness which would be comprehensively solved by the Communitarisation of the third pillar. The Court cannot fix this problem, it can only paper over the cracks in the Treaties. Any solution which the Court can unilaterally implement would entail its own problems. The refusal to extend the *Foto-Frost* principle would lead to a differential legal system within the Union, even if the ECJ were to include those caveats suggested above.

7.6 Conclusions

This chapter has demonstrated that this field, the ability of persons to challenge European law, or to seek compensation for the violations of their rights, that the third pillar system is most fundamentally flawed.

Access to a Court to seek judicial review either directly or indirectly is a requirement of the rule of law, and without the ability to bring a complaint before a court with the power to redress it, the rule of law is compromised. Under the third pillar there is no direct access to the Court, and the system of preliminary references is so severely abrogated as to significantly undermine its utility as a credible alternative to direct applications to the ECJ. This chapter has also demonstrated that there is no reason in principle that a *Francovich* style right to damages should not exist in relation to the third pillar provided that the conditions set out in *Brasserie* are met. The questions of whether judicial doctrines developed under the first pillar can apply to the third should be reframed as whether there is any reason that they cannot apply.

Chapters Five, Six and Seven, taken as a whole, demonstrate that the ECJ seems to be genuinely concerned with the maintenance of the rule of law, and has gradually become more concerned with the protection of fundamental rights. It also demonstrates that, unless absolutely prohibited from doing so by the Treaties, the ECJ has shown itself capable of broad interpretation of the rules in the name of rights protection. The ECJ has built a system which creates a complete set of rules, and where allowed to apply it by the fundamental constitutional architecture of the Union it is broadly successful, albeit with some notable weakness, particularly the rules relating to direct and individual concern under Article 230 EC.

This is also the field in which the Lisbon reforms will make the most difference. The Court's jurisdiction will be extended, subject to the protocol on transitional measures, to cover the entirety of the European Union's criminal law competences. The loophole in the preliminary reference system will be closed and the limitations on judicial actions will also be ended. It is also worth reiterating that the direct and individual

concern test will be modified so as to relieve the individual of some of the burdens necessary to seek direct review before the Court, although this matters less with the full extension of the preliminary reference system.

While the depillarization will improve the situation in the legislative field, and make no difference to the executive field, it will result in a substantial improvement in the judicial field. That improvement is a jurisdictional exercise however and it is only that it further empowers persons, real or legal, to access the Court in fields where they were not able to under the old third pillar. In every other field the Court has been able to close the gaps by itself, it was only where the constitutional system had prevented access to the Court where problems emerged. Fortunately this most glaring loophole would be closed by the Lisbon reforms.

Chapter 8

Conclusions

The thesis started from the premise that Criminal law is somehow different from other forms of law, both from a point of view of national sovereignty, and from the point of view of the impact that it can have on an individual.[1] With this in mind the thesis sought to analyse the constitutional structures of the European Union to establish whether or not they were suitable to manage the additional requirements imposed by involvement in the criminal justice sphere.

In order to do this the thesis took as a logical starting point the ideas of thinkers like Montesquieu and Madison, still influential in theories of constitution building, that the abuses possible in the exercise of criminal law powers can be best controlled by separating the functions of the state into the three branches and giving each the tools to guard against the encroachments of the other.[2]

On that basis the thesis then sought to assess the criminal law functions of the European Union through the lens of the separation of powers. In other words, rather than simply repeating an analysis of the pillared structure of the Union, the thesis sought to examine the ways in which criminal law could be adopted, enforced and adjudicated across the first and third pillars. This allowed a clearer picture to be developed of where the criminal law powers in the union were actually focused, how they were exercised, and how they were policed. It also allowed for a more holistic understanding of the weaknesses in the structures; in particular it enabled the flaws in the arrangements for the protection of rights to show through.

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[1] Chapter 1, 1.2

[2] Chapter 1, 1.1

This has taken on particular importance given the vogue for the Communitarization of the third pillar as a solution to the EU's ills in relation to criminal law.

The Third Pillar

The result of this analysis was not straightforward. The legislative structures in the third pillar are not desirable. The role of the European Parliament under Title VI EU is far too limited to allow it to effectively scrutinise the operation of the Council and Commission in enacting criminal law.[3] This leads to a position where the national executives are able to bypass not only the European Parliament, but national legislatures, in the introduction of criminal legislation, much of which is substantive, and has the real potential to impact on the lives and liberties of the individual citizen. Paradoxically, previous rounds of reform, particularly Amsterdam and Nice, which were in part aimed at improving the democratic credentials of the first pillar, have hurt the democratic credentials of the third. The introduction of the decision and framework decision, which have had the effect of reducing the convention to a legislative footnote, has reduced the role of national legislatures in the third pillar structure to a theoretical possibility rather than the practical check that it used to represent.[4]

That said some elements of the executive structure of the third pillar do seem to work. As we have seen, certain elements of the supervision of the executive agencies established under the third pillar have had to be left in the national field, in particular the supervision of the transmission of data to and from the non-majoritarian agencies Europol and Eurojust, and the use by national agencies of that data. This has had the result of ensuring

[3] Chapter 2, 2.2

[4] Chapter 2, 2.2.3

that any actual impact that Europol or Eurojust has on an individual is subject to the review of national legal systems, further bolstered by the direct application of the ECHR by national courts.[5]

Not only that, but the ECJ, despite being constitutionally hamstrung in a series of significant ways has been able to do an adequate job of ensuring the protection of individual rights through the imposition of a number of the doctrines it developed under the first pillar in the third.[6] That said, the thesis did not dismiss the significance of some of the restrictions on the Court found under the machinery of Title VI EU. In particular it was argued that the restriction on the rights of the individual to access the court, and the opt-in preliminary ruling system are dangerous aberrations which need to be addressed.[7]

Criminal law in the Community Pillar

However, the Community legal order, touted as the solution to the problems of the third pillar was no more flattered by this analysis than its counterpart. It has become clear that the definition of criminal offences fall within the remit of the first pillar. However, the precise scope of that competence remains unclear. This is significant because under the first pillar, even more than the third, the degree of oversight by the Parliament is much more dependent on the policy area and the legal basis under which legislation is adopted than under the third where it is uniformly weak. This is, of course undesirable, and the reluctance of the ECJ to more comprehensively clarify this position is to be lamented. Legal certainty as to the nature and scope of the competence to adopt criminal law is necessary in any legal system, but particularly so in a legal system where

[5] Chapter 3

[6] Chapters 5-7

[7] Chapter 7, 7.2

the available scrutiny and oversight varies so dramatically from one policy area to another.[8]

There are also problems with the executive structures in the first pillar. First, there is a marked reluctance, in fact a positive refusal, on the part of the first pillar institutions to admit what seems to be fairly clear; that its agencies have a role in the criminal justice sphere. This is true on both a macro level, the political and administrative supervision of these agencies, and on a micro level, the rights of the individual subjects of the investigations of these bodies. This means that the targets of these agencies are not necessarily entitled to the protections that perhaps they should be, including for example, a privilege against self incrimination. This is not helped by a weak approach from the ECJ to this issue. In particular the roles of DG Competition and OLAF in the criminal justice system are causes for concern.[9]

On the other hand, FRONTEX, the only first pillar agency structured on the non-majoritarian model favoured under the third pillar, seems to be much more successful, both on the macro and micro level. This seems to indicate that the best elements in the first pillar executive system have learned from the experiences of the Union rather than the other way around. That is an interesting point on which to reflect as we stand on the eve of the communitarization of the Union pillars.[10]

The Court's jurisdiction is unquestionably broader under the first pillar, but it does not necessarily solve all of the problems. The way in which the ECJ has interpreted direct and individual concern, for instance is a

[8] Chapter 2, 2.3

[9] Chapter 4, 4.2 and 4.3

[10] Chapter 4, 4.4

particular problem.[11] The nature of European law almost certainly means that neither element of that test can be satisfied by criminal legislation. That said, the Court has demonstrated under the first pillar that it is able to adjust its approach to an issue in the light of legitimate human rights concerns; in particularly its approach to the direct aggravation of individual liability is demonstrative of this.[12] There was no clear need for the Court to adopt a human rights approach in that context, and yet they made a clear and voluntary choice to accept this. This to be applauded, and along with their 'discovery' of fundamental rights amongst the general principles of law, and an increased willingness to engage with the Charter, illustrates a Court which is in general at least serious about the protection of rights, even if it is occasionally overly cautious in this regard.[13] This makes its intransigence on other issues, in particular issues of individual standing, even more perplexing. Broadly, however, it is submitted that the ECJ has demonstrated that it is sensitive to the specific rights concerns that come with criminal law and is able to deal with those concerns in a sensitive and appropriate manner.

Conclusions and the Lisbon Reforms

So what broader lessons can be drawn from this analysis? In principle it demonstrates that the third pillar has passed its prime. The structure of the third pillar panders to national interests, but in particular to the interests of national executives. It allows co-operation which is desirable but the system in place at EU level should not be open to abuse. It should not be possible to adopt measures in the EU simply to avoid scrutiny of the judiciary, both nationally and internationally, and to its credit the Court of

[11] Chapter 5, 5.3.1, Chapter 7, 7.2.1

[12] Chapter 6

[13] Chapter 5.4

Justice has sought to limit these possibilities.[14] The current system is clearly a mess. Criminal law competence is spread across the pillars based not on any obvious policy distinctions, nor even any clear logical footing, but more on political palatability.[15] Moreover the approach to the supervision of agencies with a role in the criminal justice system can at best be described as patchy, and is clearly context dependent rather than according to any particular strategy for the supervision of such agencies, which is obviously a cause for concern.[16] The result of all of this is a deeply regrettable patchwork of human rights protection. The thesis has also demonstrated that the Court is the apparent key-stone in this system. Where the court has workable jurisdiction it has been able to close some of the more obvious loopholes, and more importantly it appears to have done so for broadly the right reasons. That said, the Court is only able to play the hand it is dealt. It is conceded that it has, with some exceptions, used its tools well, but there are severe weaknesses in the constitutional structure, such as the national opt-outs, which the Court cannot work round via interpretation.[17] It is also not possible to dismiss the nature of the Constitutional flaws in the European System by reference to national law. The aim of this thesis was to highlight the flaws inherent in the European Constitutional architecture, and that some national courts are, for example, capable of striking down legislation because of their own constitutional architecture does not in and of itself excuse the weaknesses in the broader Union system. Particularly where the vagaries of national Constitutional law would, when left to their own devices, leave some better protected than others against acts of a European Union supposedly founded on the rules of law and its equal application.

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[14] Chapter 7, 7.3.3

[15] Chapter 2

[16] Chapters 3 and 4

[17] Chapters 5-7

Therefore a decision has to be made. Either the criminal cooperation activities of the Union need to be scaled back, or accountability and oversight need to be improved at every stage of the process. This author prefers the second option. Clearly a case can be made for significant criminal co-operation work at the European level, but it is plain that much greater supervision is required to improve both the democratic legitimacy of this legal activity, and to ensure that the rights of the individual are adequately respected by that activity.

The Lisbon Treaty would appear to suggest that the communitarization of the third pillar is the solution to these problems. This thesis has questioned that assumption on several levels. In terms of the Union legislature, the involvement of the Parliament will be massively increased. The ordinary legislative procedure extends the Parliament's competence as a co-legislature across almost all EU competences, but there are still some over which it does not have such a role, including police co-operation. An improvement in the role of the Parliament has to be welcomed of course, and in structural terms at least does improve the democratic legitimacy of the European Union's criminal law activities. That said, even if the increased role of the elected chamber increases democratic legitimacy it does not necessarily guarantee a higher standard of rights protection. Moreover, there are legitimate fundamental criticisms of the Parliament as a representative, legislative chamber, which go to the heart of whether giving the Parliament an enhanced role is a solution at all.[18] All of that being said however, on balance the Lisbon legislative reforms are broadly welcome.

In terms of the executive agencies in the Union, Lisbon will extend the review powers of the ECJ to cover the acts of those agencies, and

[18] Chapter 2, 2.4

obviously this is to be welcomed. In terms of Europol and Eurojust however, even under the new decisions, much of the meaningful scrutiny of the actions of these agencies will be at the point of interaction with individuals, in other words under domestic law. Will their constitutional position in the first pillar make any significant difference? Beyond the enhanced role of the Parliament in designing the initial contracts there is unlikely to be any significant change. The Parliament will still be mostly excluded from Europol, as police co-operation will still be subject to a special legislative procedure, relegating Parliament to a consultative role.[19] In any event there will be no improvement inherent in the constitutional changes. The agencies constituted under, and with their roots in, the first pillar system, are less well supervised, and less well controlled than their third pillar cousins, in spite of having much more invasive powers. The first pillar already seems to have learned significant, and welcome, lessons from the third, and it is unlikely that that process will be reversed.

The biggest changes will be in the judicial architecture, with the jurisdiction of the Court being extended throughout the Union. The end of the third pillar opt-out is clearly a necessary step. The harmonization of the legislative forms allows the Court to exercise its review powers over all legislation, closing another important loophole. The unification of the pillars also means that the Court will be able to extend the doctrines it has developed under the old first pillar regime to the full gamut of EU criminal law. Possibly the most interesting changes for the medium to long term are the inclusion of a legal basis for the accession to the ECHR and the changes in the legal status of the Charter.[20]

[19] Chapter 2, 2.6

[20] Chapters 6 and 7

While the impact of depillarization may be positive, and this thesis has sought to demonstrate where this will be the case, this thesis has also demonstrated a number of ways in which the first pillar is not well equipped to deal with criminal law, and while the first pillar is no doubt "better" in many respects that the third, those flaws will not necessarily be fixed by Lisbon, and the systemic flaws in the first pillar will not be fixed merely by extending additional competences to it.

Further Research

Many of the observations made by this thesis are about to be empirically tested by the introduction of the Lisbon Treaty, and in itself this creates many opportunities for further research. There is in particular work to be done on the enhanced co-operation provisions and the impact of their possible use in the context of the European Public Prosecutor for the coherency of the EU criminal justice system. While this thesis focussed on the nature of the European Constitutional order there is also clearly work to be done on the way this impacts in practice on the national legal systems, and the way in which the bodies identified in part II of the thesis work in practice. There is also research to be done on the nature of the European Parliament and its role as the locus for democratic accountability in EU criminal law, both as to whether or not the Parliament is structurally able to fulfil this role at all, and whether or not Lisbon has made a difference to this. Research will also be necessary into the impact of the ECHR on EU law generally, but in particular into the impact of the full applications of Articles 5 and 6 of the ECHR to the EU Criminal Law system. Further work will also be necessary to determine the full implications of the effect of the new legal status of the charter in European law.

Final Observations

The growth in the criminal law competences of the Union make it more and more important that the Union's constitutional structures are capable of properly protecting individual rights. In particular, the ability of the judiciary to guarantee those rights must be proportionate to the ability of the legislature and the executive to infringe upon individual liberty. When the dust settles following the Lisbon Treaty, the debate will inevitably move to what it failed to achieve, and it is to be hoped that a systematic analysis of the criminal law competence of the Union is front and centre in that discussion. Reform of the European criminal justice system is an ongoing process, and there will still be significant work to be done following its communitarisation. This is partly because of the special characteristics of criminal law but also because the constitutional architecture of the first pillar, to which the Union's criminal competences are about to be fully exposed, was not designed with criminal law in mind. It must, above all, be remembered that this is not an abstract question of constitutional theory. The power of a body, national or supranational, to infringe on our rights and liberties is amongst the gravest manifestations of the law. Without the necessary guarantees to ensure that those powers will be used responsibly, the Member States must act with the greatest possible caution in pooling this most important of sovereign rights.

BIBLIOGRAPHY

BOOKS AND EDITED COLLECTIONS

ANDREANGELI, A. *EU Competition Enforcement and Human Rights* (Edward Elgar Publishing, Cheltenham, 2009)

ARNULL, A, WINCOTT, D *Accountability and Legitimacy in the European Union* (OUP, 2003)

ARNULL, A *et al, Wyatt and Dashwood's European Law* (5th edition, Sweet and Maxwell, 2006)

ARNULL, A. *The European Union and its Court of Justice*, (2nd edition, OUP 2006)

BLACKBURN, R, KENNON, A, WHEELER-BOOTH, M. *Griffith and Ryle on Parliament: Functions, Practice and Procedures* (2nd edition, Sweet and Maxwell, London, 2003)

CASSESSE, A, *International Criminal Law* (2nd edition, OUP, 2008)

CHALMERS, D. "The Court of Justice and the Third Pillar" (2005) 30(6) European Law Review 773

CRAIG, P, DE BURCA, G. (Eds) *The Evolution of EU Law* (OUP, 1999)

CRAIG, P and DE BURCA, G. *EU Law Text Cases and Materials* (4th edition, OUP, 2008)

CURTIN, D, WESSELS, R. (Eds). *Good Governance and the European Union* (Instersentia, Antwerp, 2005)

DICEY, AV. *Introduction to the Study of the Law of the Constitution* (1885)

DOUGAN, M. *National Remedies before the European Court of Justice* (Hart Publishing, Oxford, 2004)

DOUGAN, M, CURRIE, S. (*eds*), *50 Years of the European Treaties, Looking Back and Thinking Forward*, (Hart Publishing, 2009)

DOUGLAS-SCOTT, S. *Constitutional Law of the European Union* (Longman, Bristol, 2002)

DWORKIN, R. *A Matter of Principle* (Harvard University Press, 1985)

EPSTEIN, D, O'HALLORAN, S. *Delegating Powers* (Cambridge University Press, 1999)

GERDAIN, D *et al* (Eds.) *Regulation through agencies in the EU* (Edward Elgar Publishing, Cheltenham, 2005)

IVERSEN, B. *et al Regulating Competition in the EU* (Djeof Publishing, Denmark, 2008)

JENNINGS, R, WATTS, A. *Oppenheim's International Law*, (9th edition, Longman Publishing, 1996)

MAJONE, G. *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth* (OUP, 2005)

MITSILEGAS, V. *EU Criminal Law* (Hart Publishing 2009)

MONTESQUIEU, C. *The Spirit of the Law* (University of California Press, Berkley, 1977)

PEERS, S. *Justice and Home Affairs* (2nd edition OUP, 2006)

PRECHAL, S. *Directives in EC law* (2nd edition, OUP, 2005)

RAZ, J. *The Authority of Law* (OUP, 1979)

WALKER, N. (Ed.) *Europe's Area of Freedom Security and Justice* (OUP, 2004)

WARD, A. *Individual Rights and Private Party Judicial Review in the EU*" (OUP, 2007)

WHYTE, D. (Ed.) *Crimes of the Powerful: A Reader* (Open University Press, 2009)

ARTICLES AND CONTRIBUTIONS TO EDITED COLLECTIONS

AKEHURST, M. "*Nicaragua v. United States of America*" (1987) 27 Indian Journal of International Law 357

ALBORS-LLORENS, A. "Changes in the Jurisdiction of the European Court of Justice Under the Treaty of Amsterdam" (1998) 35 Common Market Law Review 1273

ALBORS LLORENS, A. "The standing of private parties: Has the ECJ missed the boat?" (2003) 62(1) Cambridge Law Journal 72

ALLOTT, P. "Preliminary Rulings-Another Infant Disease" (2000) 25(5) European Law Review 538

ANAGNOSTARAS, G. "Erroneous Judgments and the Prospect of Damages: The scope of the Principle of Governmental liability for Judicial Breaches" (2006) 31(5) European Law Review 735

ARNULL, A. "Legal order of the Communities" (1988) 13(1) European Law Review 42

ARNULL, A. "References to the European Court" (1990) 15(5) European Law Review 375

ARNULL, A. "Private Applicants since *Cordoniu*" (2001) 38 (1) Common Market Law Review 7

ARNULL, A. "The Rule of Law in the European Union." in Arnull, A, Wincott, D. *eds Accountability and Legitimacy in the European Union* (OUP, 2002), 241

ARNULL, A., "Family Reunification and Fundamental Rights" (2006) 31(5) European Law Review 611

ARNULL, A. "Annotation of Case C-432/05 *Unibet (London) Ltd and Unibet International Ltd v Justitiekanslern* (2007) 44(6) Common Market Law Review 1763

BAKER, E. "Taking Criminal Law Seriously" [1998] Criminal Law Review 361

BAKER, E. HARDING H. "From Past Imperfect to Future Perfect? A Longitudinal Study of the Third Pillar" (2009) 34(1) European Law Review 25

BARNARD, C. "The PPU: Is it worth the Candle? An early assessment" (2009) 34(2) European Law Review 281

BEBR, G. "The Reinforcement of the Constitutional Review of Community Acts under Article 177 EEC Treaty (Cases 314/85 and 133 to 136/85)" (1988) 25(4) Common Market Law Review 667

BEDDARD, R. "The Rights of the Criminal under Article 7 ECHR" (1996) Human Rights Supplement European Law Review 3

BENJAMIN, V. "The Application of EC Competition Law and the European Convention on Human Rights" [2006] European Competition Law Review 693

BERGHE, P, DAWES, A. "Little pig, little pig, let me come in: an evaluation of the European Commission's powers of inspection in competition cases" [2009] European Competition Law Review 407

BETLEM, G. "The Doctrine of Consistent Interpretation: Managing Legal Uncertainty" (2002) 22(3) Oxford Journal of Legal Studies 397

BINGHAM, T. "The Rule of Law", Sir David Williams Lecture, King's College London (2006)

BIONDI, A, MATSROIANNI, R. "Annotation of joined cases C-387/02, C-391/02 and C-403/02, *Berlusconi and others*, Judgment of the Court (Grand Chamber) of 3 May 2005" (2006) 43(2) Common Market Law Review 553

BRADLEY, K. "Institutional Design in the Treaty of Nice" (2001) 38(5) Common Market Law Review 1095

BONO, R. "Some Reflections on the CFSP Legal Order" (2006) 43(2) Common Market Law Review 337

BORSZAK, L. "Punishing Member States or Influencing Their Behaviour or Iudex (non) Calculat" (2001) 13(2) Journal of Environmental Law 235

BORGERS, M. "Implementing Framework Decisions" (2007) 44(5) Common Market Law Review 1361

BOSWORTH, M. "Governing through migration control: security and citizenship in Britain" (2008) 48(6) British Journal of Criminology 703

BROWN. A. "Democratic and Legal Deficits of Europol" (1998) 148 New Law Journal 404

CARANTA, R. "Case C-453/00 *Kühne and Heitz NV v Productschap voor Pluimvee en Eieren"* (2005) 42(1) Common Market Law Review 179

CARRUTHERS, C. "Beware of Lawyers Bearing Gifts: a Critical Evaluation of the proposal on Fundamental Rights in the EU Constitutional Treaty" [2004] 4 European Human Rights Law Review 424

COMELLA, V. "The European Model of Constitutional Review of Legislation: Towards Decentralisation"(2004) 2(3) International Journal of Constitutional Law 461

COSTELLO, C. "The *Bosphorous* Ruling of the Court of Human Rights: Fundamental Rights and Blurred Boundaries" (2006) 6(1) European Human Rights Law Review 87

CRAIG, P. "Supremacy of the United Kingdom Parliament after *Factortame*" (1991) 11 Yearbook of European Law 221

CRAIG, P. "Once upon a Time in the West; Direct Effect and the Federalization of EEC Law" (1992) 12(4) Oxford Journal of Legal Studies 397

CRAIG, P. "Once More Unto the Breach: The Community, The State and Damages Liability" (1997) 113(Jan) Law Quarterly Review 67

CRAIG, P. "Formal and Substantive Conceptions of the Rule of Law: An analytical framework" [1997] Public Law 478

CRAIG, P. "The Fall and Renewal of the Commission; Accountability, Contract and Administrative Organisation" (2000) 6(2) European Law Journal 98

CURRIE, S. "Accelerated justice or a step too far? Residence Rights of non-EU family members and the Courts rulings in *Metock*", (2009) 34(2) European Law Review 310

CURTIN, D. "Delegation to EU Non-Majoritarian Agencies", in Gerdain, D *et al* (Eds.) *Regulation through agencies in the EU* (Edward Elgar Publishing, Cheltenham, 2005) 88

DANN, P. "European Parliament and Executive Federalism: Approaching a Parliament in a Semi- Parliamentary Democracy" (2003) 9(5) European Law Journal 549

DASHWOOD, A. "Community Legislative Procedures in the Era of the Treaty on European Union" (1994) 19(3) European Law Review 343

DASHWOOD, A. "Limits of European Community Powers" (1996) 21(2) European Law Review 113

DASHWOOD, A. "States in the European Union" (1998) 23(3) European Law Review 201

DAVIES B, "Segi and the Future of Judicial Rights Protection in the Third Pillar of the EU" (2008) 14(3) European Public Law 311

DAWES, A, LYNSKEY, O. "The Ever-longer Arm of EC law: the Extension of Criminal Competence into the Field of Community Law" (2008) 35(1) Common Market Law Review 137

DE BURCA, G. "The Drafting of the EU Charter of Fundamental Rights" (2001) 26(2) European Law Review 126

DE LEEUW, M. "Openness in the Legislative Process in the European Union" (2007) 32(3) European Law Review 295

DELMAS-MARTY, M. "Combating Fraud - Necessity, Legitimacy and Feasibility of the *Corpus Juris*" (2000) 37(2) Common Market Law Review 247

DE WITTE, B. "Direct Effect, Supremacy and the nature of the legal order", in Craig, P, de Burca, G. *eds The Evolution of EU Law* (OUP, 1999), 177

DINAN, D. "Governance and Institutions 1999: Resignation, Reform and Renewal" (2000) 38(1) Journal of Common Market Studies 25

DI FILIPPO, M. "Terrorist crimes and international co-operation: critical remarks on the definition and inclusion of terrorism in the category of international crimes." (2008) 19(3) European Journal of International Law 533

DOUGAN, M. "The Disguised Vertical Direct Effect of Directives" (2000) 59(3) Cambridge Law Journal 586

DOUGAN, M. "The *Francovich* Right to Reparation: Re-shaping the Contours of Community Remedial Competence" (2006) 6(1) European Public Law 103

DOUGAN, M. "When Worlds Collide! Competing Visions of the Relationship Between Direct Effect and Supremacy" (2007) 44(4) Common Market Law Review 931

DOUGAN, M. "Treaty of Lisbon 2007: Winning Minds, not Hearts" (2008) 45(3) Common Market Law Review 617

DOUGLAS-SCOTT, S. "The Charter of Fundamental Rights as a Constitutional Document" [2004] 1 European Human Rights Law Review 37

DOUGLAS-SCOTT, S, "The Rule of Law in the European Union: Putting the Security into the Area of Freedom Security and Justice" (2004) 29(2) European Law Review 219

DOUGLAS-SCOTT, S. "A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis." (2006) 43(3) Common Market Law Review 629

DRABEK, L. "A Fair Hearing before EC Institutions" (2003) 9(4) European Review of Private Law 529

DRAKE, S. "Twenty Years After *Von Colson*: the impact of "indirect effect" on the protection of the individual's Community rights" (2005) 30(3) European Law Review 329

DRAKE, S. "Scope of *Courage* and the Principal of 'Individual Liability' for Damages: Further Development of the Principle of Effective Judicial Protection by the Court of Justice" (2006) 31(6) European Law Review 841

DRYWOOD, E. "Giving with One Hand, Taking With the Other: Fundamental Rights, Children and the Family Reunification Decision" (2007) 32(3) European Law Review 396

DUBBER, M. "Towards a Constitutional Law of Crime and Punishment" (2004) 55(1) Hastings Law Journal 1

EDITORIAL COMMENT (1999) 36(2) Common Market Law Review 270

EDITORIAL COMMENT "Preliminary Rulings and the Area of Freedom, Security and Justice" (2007) 44(1) Common Market Law Review 1.

EECKHOUT, P., "The EU Charter of Fundamental Rights and the Federal Question" (2002) 39(5) Common Market Law Review 945

EILMANSBERGER, T. "The Relationship Between Rights and Remedies in EC Law: In Search of the Missing Link" (2004) 41(5) Common Market Law Review 1199

EMILIOU, N. "Subsidiarity; an effective barrier against the "enterprises of ambition"?" (1992) 17(5) European Law Review 383

FAHEY, E. "How to be a Third Pillar Guardian of Fundamental Rights? The Irish Supreme Court and the European Arrest Warrant" (2008) 34(1) European Law Review 563

FIJINAUT, C. "Police Co-operation and the Area of Freedom, Security and Justice", in Walker, N. (Ed.) *Europe's Area of Freedom Security and Justice* (OUP, 2004), 239

FLETCHER, M. "Extending "Indirect effect" to the third pillar: The significance of *Pupino*", (2005) 30(6) European Law Review 862

HARDEN I "The Constitution of the European Union" [1994] Public Law 609

HARTLEY, T. "The European Court, Judicial Objectivity, and the Constitution of the European Union" (1996) 112(1) Law Quarterly Review 95

HERLIN-KARNELL, E. "*Commission v Council*: some Reflections on Criminal Law in the First Pillar" (2007) 17(1) European Public Law 69

HILLION, C, WESSEL, R. "Competence Distribution in EU External Relations after ECOWAS: Clarification or Continued Fuzziness" (2009) 46(2) Common Market Law Review 551

HINAREJOS, A. "On the Legal Effects of Framework Decisions and Decisions: Directly Applicable, Directly Effective, Self Executing, Supreme?" (2008) 14(5) European Law Journal 620

HUSAK, D. "Criminal Law as a Last Resort" (2004) 24(2) Oxford Journal of Legal Studies 209

JACOBS, F. "The Sovereignty of Law the European Way" The Hamlyn Lectures (CUP, 2006)

KNIGHT, C. *"Bi-polar Sovereignty Restated"* (2009) 68(2) Cambridge Law Journal 361

KENNON, A. "Pre-Legislative Scrutiny of Draft Bills" [2004] (Autumn) Public Law 477

KOMAREK, J. "In Court(s) we Trust? On the Need for Hierarchy and Differentiation in the Preliminary Ruling Procedure" (2007) 32(4) European Law Review 467

KOMNINOS, P. "New prospects for the Private enforcement of EC Competition Law: *Courage v Crehan* and the Community Right to Damages" (2002) 39(3) Common Market Law Review 447

LAMOND, G. "What is a Crime?" (2007) 27(4) Oxford Journal of Legal Studies 609

LAMONT, R. "Annotation of Case C-523/07 *A*" (2010) 47(1) Common Market Law Review *forthcoming*

LEANAERTS, K, GERARD, D. "The Structure of Union According to the Constitution for Europe; the Emperor is getting dressed" (2004) 29(3) European Law Review 289

LEANAERTS, K, CORTHAUT, T. "Of Birds and Hedges; The Role of Primacy in invoking norms of EU law" (2006) 31(3) European Law Review 287

MANCINI, F. "Europe: The Case for Statehood" (1998) 4(1) European Law Journal 29

MADISON, J. "The Structure of Government must Furnish Proper Checks and Balances Between the Different Departments" (1788) 51 The Federalist Papers

MACKAREL, M. "Europol: What is it? What does it do? Why should we care?" (1996) 1(3) Scottish Law and Practice Quarterly 197

MATHER, J, "The European Parliament: a Model for Representative Democracy" (2001) 24(1) West European Politics 181

MITSILEGAS, V. "Defining organised crime in the European Union: the limits of European criminal law in an area of "freedom, security and justice", (2001) 26(6) European Law Review 565

MITSELEGAS, V. "The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU" (2006) 43(5) Common Market Law Review 1277

MITSILEGAS, V. "The Third Wave of Third Pillar Law, Which Way Now for European Criminal Justice?", (2009) 34(4) European Law Review 523

MONAR, J. "Justice and Home Affairs in the Treaty of Amsterdam: Reform at the Price of Fragmentation" (1998) 23(4) European Law Review 320

MOTTA, M. "On Cartel Deterrence and Fines in the European Union." [2008] European Competition Law Review 209

NEAGU, N. "Entrapment Between Two Pillars: The European court of Justice Rulings in Criminal Law" (2009) 15(4) European Law Journal 531

NEAL, A. "Securitization and Risk at the EU Border: The Origins of FRONTEX", (2009) 47(2) Journal of Common Market Studies 333

NEBBIA, P. "Damages Action for Infringement of EC Competition Law: Competition or Detterence?" (2008) 33(1) European Law Review 23

NETTESHEIM, M. "UN Sacntions Against Individuals – A Challenge to the Nature of EU Governance" (2007) 44(3) Common Market Law Review 567

NICOL, D. "Democracy, supremacy and the "intergovernmental" Pillars of the European Union" [2009] Public Law 218

OBERG, M. "The legal effects of resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ" (2005)16(5) European Journal of International Law 879

ODUDU, O. "Case C-11/00 *Commission v ECB*" (2004) 41(4) Common Market Law Review 1073

PEERS, S. "Who's Watching the Watchmen? The judicial system of the Area of Freedom, Security and Justice" (1998) 18 Yearbook of European Law 337

PEERS, S. "Building Fortress Europe: the Development of EU Migration Law" (1998) 35(6) Common Market Law Review 1235

PEERS, S. "Governance and the Third Pillar: The Accountability of Europol" in Curtin, D,Wessels, R. (Eds). *Good Governance and the European Union* (Instersentia, Antwerp, 2005), 253

PEERS, S. "Salvation from Outside the Church: Judicial Protection in the Third Pillar after *Pupino* and *Segi*" (2007) 44(4) Common Market Law Review 883

PEERS, S. "The European Community's Criminal Law Competence: The Plot Thickens" (2008) 33(3) European Law Review 399

PEERS, S. "EU Criminal Law and the Treaty of Lisbon" (2008) 33(4) European Law Review 507

PESCATORE, P. "The Doctrine of "Direct Effect": An Infant Disease of Community Law" (1983) 8(2) European Law Review 155

PIRIS, J. "After Maastricht, are the Community institutions more efficacious, more democratic and more transparent?" (1994) 19(5) European Law Review 449

PRECHAL, S. "Does Direct Effect Still Matter" (2000) 37(5) Common Market Law Review 1047

PRECHAL, S. "Member State Liability and Direct Effect: What's the difference after all?" (2006) 17(2) European Business Law Review 299

QUIRKE, B. "A Critical Appraisal of the Role of UCLAF" (2007) 14(4) Journal of Financial Crime 460

REDMAYNE, M. "Rethinking the Privilege against Self-incrimination" (2007) 27(2) Oxford Journal of Legal Studies 209

RIJPMA, J. "Annotation of Case C-77/05 *United Kingdom v Council* and Case C-137/05, *United Kingdom v Council*" (2008) 45(4) Common Market Law Review 835

RILEY, A. "*The ECHR Implications of the Investigation Provisions of the Draft Competition Regulation*", (2002) 51(1) International and Comparative Law Quarterly 55

SPAVENTA, E. "Remembrance of Principles Lost: on Fundamental Rights, the Third Pillar and the Scope of Union Law" (2006) 25 Yearbook of European Law 153

SPAVENTA, E. "Opening Pandora's Box: Some Reflections on the Constitutional Effects of the Decision in *Pupino*", (2007) 1(3) European Constitutional Law Review 5

SPAVENTA, E. "Federalisation Versus Centralisation: Tensions in Fundamental Rights Discourse in the EU", in Dougan, M, Currie, S. (*eds*), *50 Years of the European Treaties, Looking Back and Thinking Forward*, (Hart Publishing, 2009), 343

SPENCER, J "Child Witnesses and the EU" (2005) 64(3) Cambridge Law Journal 569

STEINER, J. "From Direct Effect to *Francovich*: Shifting Means of Enforcing Community Law" (1993) 28(1) European Law Review 3

STRØM, K. "Delegation and Accountability in Parliamentary Democracies" (2000) 37 European Jounral of Political Research 261

TEMPLE LANG, J. 'Checks and Balances in the European Union: the Institutional Structure and the Community Method' (2006) 12(1) European Public Law 127

THATCHER, M, STONE SWEET, A. "Theory and Practice of Delegation to Non-Majoritarian Institutions" (2002) 25(1) West European Politics 1

TOBLER, C. "Annotation of Case C-176/03 *Commission v Council*" (2006) 43(3) Common Market Law Review 835

TOTH, A. "Is Subsidiarity Justiciable?" (1994) 19(3) European Law Review 268

TRIDIMAS, T. "Horizontal Effect of Directives: a Missed Opportunity" (1994) 19(6) European Law Review 621

TRIDIMAS, T "Black, White and Shades of Grey, horizontal direct effects revisited" (2001) 21 Yearbook of European Law 327

TRIDIMAS, T. "Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure" (2003) 40(1) Common Market Law Review 9

USHER, J. "Direct and individual Concern: an Effective Remedy or a Conventional Solution?" (2003) 28(5) European Law Review 575

VAN DEN WYNGAERT, C. "Eurojust and the European Public Prosecutor in the *Corpus Juris* Model: Water and Fire?" in Walker, N. (Ed.) *Europe's Area of Freedom Security and Justice* (OUP, 2004), 201

VAN VOOREN, V. "A case-study of "Soft Law" in EU External Relations: The European Neighbourhood Policy." (2009) 34(5) European Law Review 696

WASMEIER, M, THWAITS, N. "The Battle of the Pillars: Does the European Union have the Power to Approximate National Criminal Laws?" (2004) 29(5) European Law Review 613

WEBER, M. "Politics as a Vocation" in Whyte, D. (ed.) *Crimes of the Powerful: A Reader* (Open University Press, 2009), 13

WEILER, J. "Europe: the Case Against the Case for Statehood" (1998) 4(1) European Law Journal 43

WYATT, D. "New Legal Order or Old" (1982) 7(1) European Law Review 147

JEAN MONNET WORKING PAPERS

DE BURCA G. "Reappraising subsidiarity's significance after Amsterdam", Jean Monnet Working Paper 7/1999.

WEILER, J, FRIES, S. "A Human Rights For the European Community and Union: The Question of Competences", Harvard Jean Monnet Working Paper 4/94

REPORTS

Report of the Committee of Independent Experts on Allegations of Fraud, Mismanagement and Nepotism in the European Commission, 15 March 1999. Available at: http://www.europarl.europa.eu/experts/report1_en.htm

EUROPEAN UNION MATERIALS

EUROPEAN COMMISSON

Completing the Internal Market. White Paper from the Commission to the European Council (Milan, 28-29 June 1985). COM (85) 310 final

White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty [1999] OJ C 132/1, 12th May 1999

Green Paper on the protection of the financial interest of the Community and the Establishment of a European Public Prosecutor, COM (2001) 715 final, 11th December 2001

Follow up report on Green Paper on the criminal law protection of the financial interests of the Community and the Establishment of a European Prosecutor, COM (2003) 128 final, 19th March 2003

Proposal for a Council Regulation establishing a European agency for the Management of Operational Cooperation at the External Borders COM (2003) 687 final/2

Communication from the Commission to the European Parliament and the Council on the implications of the Court's Judgment of 13th September 2005 (Case C-176/03 *Commission v Council*), COM (2005) 583 final, 24th November 2005

Communication from the Commission to the Council and the European Parliament on the role of Eurojust and the European Judicial Network in the fight against organised crime and terrorism in the European Union COM(2007) 644 final, 23rd October 2007

Commission Press Release "Antitrust: Commission fines car glass producers €1.3 billion for market sharing cartel." IP/08/1685, 12th November 2008

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

Report of the Court of Justice on Certain Aspects of the Application of the Treaty on European Union (Luxembourg, May 1995)

EUROPEAN COUNCIL

Brussels Council Conclusions, 30th October 2009, Council document 15265/09, CONCL3

Cologne European Council Presidency Conclusions, 3-4th June 1999
Annexe 4

EUROPEAN COURT OF AUDITORS

Special Report No. 8/98 on the Commission's Services Specifically Involved in the Fight against Fraud, Notably the Unite de Coordination de la Lutte Anti-Fraude (UCLAF) together with the Commission's Replies [1998] OJ C 230/1, 22nd July 1998

NEWSPAPER ARTICLES

"EU row candidate stands down", BBC News 30th October 2004, available at: http://news.bbc.co.uk/1/hi/world/europe/3967463.stm

"Auditors Refuse to Sign of EU Accounts" The Guardian, 15th November 2005. Available at:
http://www.guardian.co.uk/world/2005/nov/15/eu.politics

"Minister Slates EU for 12th Failure to Balance its Books" The Independent 20th November 2006. Available at;
http://www.independent.co.uk/news/business/news/minister-slates-eu-for-12th-failure-to-balance-its-books-425089.html

"EU accounts failed for 13th year in a row" BBC News 13th November 2007. Available at:
http://news.bbc.co.uk/1/hi/world/europe/7092102.stm

"Why aren't we Shocked by a Corrupt EU?" Daily Telegraph, 14th Novmber 2007. Available at:
http://www.telegraph.co.uk/opinion/main.jhtml?xml=/opinion/2007/11/14/do1402.xml

WEBSITES

Financial Crime Forum, *"Europol's Fakes Success"* 16th January 2007
http://financialcrimeforum.com/2006/index.php?option=com_content&task=view&id=102&Itemid=109