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Yüksek Lisans Tezi

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DANIŞMAN: MUSTAFA TAYYAR KARAYİĞİT

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ONAY SAYFASI

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Prof. Dr. Muzaffer DARTAN
Müdür

ABSTRACT

The primary aim of the thesis was to examine the realisation of the Area of freedom, security and justice in the European Union introduced by the Treaty of Amsterdam and to evaluate the modifications introduced by the Lisbon Treaty to the whole structure of the AFSJ. The institutional structure, the decision making process, the nature and legal effects of the legal instruments, the developments in each of the areas and finally the situation with judicial protection of individuals in the AFSJ have been examined. The research of the area revealed that the establishment of the AFSJ was not completed successfully as was intended and promised by the Treaty of Amsterdam. The evaluation detected the shortcomings in the present system of the AFSJ. The gaps in the present system of the AFSJ are: the existence of AFSJ policies within different pillars of the EU leads to complexity and to the lack of transparency; the nature and legal effects of the third pillar legal instruments in the AFSJ leads to inefficiency; non-involvement of the European Parliament in the decision making causes illegitimacy of the third pillar measures; the limited preliminary ruling jurisdiction of the European Court of Justice over Title IV and the third pillar measures of the AFSJ and no jurisdiction to review third pillar agencies acts; the individuals are not given locus standi to challenge third pillar measures directly. The Lisbon Treaty unifies the legal, operational and judicial structure of the AFSJ. It creates a homogenous structure of legal instruments in the AFSJ, extends co-decision procedure to all legal acts, broadens the jurisdiction of the ECJ, and incorporates the Charter of fundamental rights into the EU. It will promote a more efficient, transparent, legitimate area with judicial scrutiny of measures and their accountability with fundamental rights.

ÖZET

Bu tez Amsterdam antlaşması ile ortaya sunulan Avrupa özgürlük, güvenlik ve adalet bölgesi(AÖGAB) gerçekleşmesini araştırma ve Lisbon antlaşmasıyla AÖGAB'ın tüm yapısına sunulan değişiklikleri değerlendirme amacı taşımaktadır.

Burada AÖGAB'in kurumsal yapısı, karar verme yöntemi, hukuki enstrümanların temel yapısı ve hukuki efekti, her bir bölgedeki gelişmeler ve sonda bireysellerin hukuki korunması durumu incelenmiş. Bölge araştırması AÖGAB'in Amsterdam antlaşmasında hedefe alındığı ve söz verildiği gibi başarılı kurulmadığını tespıt etmiş. Değerlendirme AÖGAB'in mevcut sisteminde noksanlar tespit etmiş. AÖGAB'in mevcut sistem boşlukları şunlardır: AÖGAB'in siyaset alanlarının Avrupa Birliğinin farklı sütununda bulunması karışıklığa ve şeffaflık eksikliğine yol açıyor; üçüncü sütün hukuki enstrümanların temel yapısı ve hukuki etkisi verimsizliğe yol açıyor; Avrupa Parlamentosunun karar verme mekanizmasında bulunmaması üçüncü sütun hukuki enstrümanların gayri meşruluğuna yol açıyor; Avrupa Adalet divanının AÖGAB'in IV' üncü başlık ve üçüncü sütun önlemleri üzere sınırlı ön duruşma yetkisi ve üçüncü sütun organları fiilleri üzere ön duruşma yetkisizliği; bireysellere üçüncü sütun önlemleri direk olarak itiraz etme hakı verilmemiş.

Lizbon Antlaşması AÖGAB'in hukuki, işletme ve yargılama sistemini birleştiriyor. Antlaşma AÖGAB'inde hukuki enstrümanların homojen bir yapısını oluşturuyor, ortak karar verme prosedürünü tüm hukuki fiillere uyguluyor, Avrupa Adalet Divanının yetkisini genişletiyor ve Temel haklar tüzüğünü AB'ye sunuyor. Bu temel haklar sorumluluğu taşıyan ve hukuki incelenen önlemleri ile daha verimli, şefaf, hukuki meşru bir bölgenin oluşmasına yardımcı olacaktır.

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INTRODUCTION

This thesis analyses the concept of the area of freedom, security and justice in the European Union (hereinafter AFSJ). The Treaty of Amsterdam started the process of constructing and developing of the AFSJ and introduced it into the EU framework. The AFSJ incorporates visas, migration law, asylum, police and judicial cooperation in criminal and civil matters. The AFSJ is the continuation and further development of the original concept of cooperation in Justice and Home Affairs (hereinafter JHA) as introduced to the law of European Union by the Treaty of Maastricht. This Treaty created the three-pillar structure of the EU, in which the European Community and its law forms the first pillar, Common Foreign and Security Policy constitutes the second pillar and JHA are regulated and organised in the third pillar.

The Treaty of Amsterdam introduced a new objective in Article 2 TEU, which is to maintain and to develop the Union as an "Area of freedom, security and justice." The creation of an AFSJ is closely tied to completion of the common market and its four freedoms. Article 2 TEU states that "in the area the free movement of persons is assured in conjunction with appropriate measures with respect to the external border controls, asylum, immigration and the prevention and combating of crime". Article 29 TEU confers on the Union the responsibility to provide citizens "with a high level of safety within this area by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia". Article 61 EC prescribes the adoption of measures in visas, asylum and immigration and other policies related to free movement of persons for the establishment of the AFSJ.

The main argument of the thesis is that the current system of the AFSJ falls short of the objectives set in the Amsterdam Treaty. The existence of the AFSJ system within two pillar structure impedes the achievement of the real area. It is argued in the thesis that there are considerable gaps in the legal, operational and judicial structure of the AFSJ what create obstacles for its successful realisation. Moreover balance in the AFSJ has been struck down in favour of the area of security.

A new framework of the AFSJ under Lisbon Treaty makes reforms on the structure of the AFSJ and leads to a more successful realisation of the whole area intended in the Amsterdam.

The study evaluates the AFSJ in two sections. The first part will assess the AFSJ in the aftermath of Amsterdam Treaty. The second section will provide a concise overview and evaluation of the most relevant innovations in the AFSJ introduced by the Treaty of Lisbon.

The Treaty establishing the Constitution for Europe which failed due to referenda in France and Netherlands revisited the foundations and prospects of the EU's AFSJ.[1] However I will not consider the possible impact of the European Constitution on the realisation of the AFSJ if it was ratified successfully by all the Member States and what the failure of the Constitutional Treaty meant for the AFSJ. This question is out of the scope of my paper.

First of all, the chapter 1.1 of the thesis provides an overview of the notion of an AFSJ and gives the description of the objective of an AFSJ. The chapter 1.2 of the thesis briefly sums up the constitutional foundations of the AFSJ under the Amsterdam Treaty framework as regards both the role of the EU institutions, legislation making procedure and the function of the legal instruments. The innovations the treaty introduced and related to the AFSJ are discussed. The communitarisation of the part of JHA pillar has great implications for the area. The EC adopted a host of legal instruments in the area of asylum, visas, immigration and civil law, after co-decision procedure under Article 251 EC applied to Title IV matters. The study reveals the factors that served as the main catalysts of the communitarisation process. Two types of legal instruments are used to manage policies within the AFSJ after Amsterdam, first pillar legal instruments and third pillar legal instruments. The analysis goes on by

[1] Treaty Establishing the Constitution for Europe as signed in Rome on 29 October 2004 in the Official Journal C 310 of 16 December 2004, 47, page 1. See Art. I-3.2 (The Union's Objectives) which stipulates, "The Union shall offer its citizens an area of freedom, security and justice without internal frontiers".

evaluating the nature, the legal effect, the functioning, and the role of these legal instruments in the establishment of the intended area in chapter 1.3. The particular focus is made on third pillar legal instruments which are still adopted on judicial cooperation in criminal maters.

The research finds out that the presence of instruments of intergovernmental cooperation in the AFSJ impedes the achievement of objectives set out initially by the Treaty of Amsterdam, since they lack transparency, legitimacy due to decision-making process and are inefficient because of their legal nature.

The Treaty of Lisbon makes modifications to the system of legal instruments. This modification affects the policies falling within the AFSJ to a great extent. The study examines the nature, legal effect and the scope of new legal instruments and their implication for the AFSJ in chapter 1.4 of the thesis. Moreover modified role of EU institutions, decision-making procedure in the domain of the AFSJ under the Lisbon Treaty is evaluated. Most of the deficiencies existing in the current system of legal instruments that impede the achievement of the AFSJ have been remedied in the Lisbon Treaty framework.

The analysis of the AFSJ will divide it into three interrelated areas: the area of freedom, the area of security and the area of justice. The successful operation of one of them depends on the other two areas. Only in case all three areas are achieved the realisation of the AFSJ is possible. The paper provides the description of the pivotal legal instruments adopted in each of these areas.

It is argued that September 11 events have functioned as a major policy-catalyst in the development of the security area. After this event did the European Council met at an extraordinary meeting and proposed an Action plan to adopt EU counter terrorist strategy. Security challenges also disregarded the freedom and justice areas to some extent. The Union adopted strict third pillar anti-terrorist measures with no possibility for individuals to challenge them directly and with little ECJ control over them. Moreover several agencies with no EU parliamentary control and ECJ scrutiny over their actions were established after tragic events. The role of the new common border

management agency the so-called Frontex in the European security area is also disscused.

The study makes an overview of the area of justice in chapter 4 of the thesis, which is provided through judicial cooperation in civil matters and criminal matters. The pivotal legal instruments are discussed with the focus on the European Arrest Warrant.

Finally, the study describes the situation with judicial protection of individuals in the AFSJ in chapter 5. The chapter aims to describe the characteristic of the system of judicial protection of individuals within the AFSJ and to assess whether or not that system provides effective judicial protection for individuals. The scope of the chapter is limited to the right to effective judicial remedy in the AFSJ. Other human rights and the way that the European Court of Justice (hereinafter the ECJ) has applied and interpreted them will not be discussed. Chapter 5 will focus on two judicial remedies enjoyed by individuals when challenging EC and EU measures of the AFSJ, the so-called action for annulment and preliminary ruling procedure via national courts. First these two judicial remedies against Title IV measures of the first pillar is discussed, than follows an evaluation of judicial remedies against third pillar measures of the AFSJ. The study answers the question of whether individuals in the AFSJ can reach the ECJ and enforce their rights if they are breached by measures adopted for the establishment of the AFSJ.

The ECJ's powers under Title VI TEU and Title IV EC differ, and its powers in both areas are different from those normally applicable in the Community Pillar. The limited jurisdiction of the ECJ in the preliminary ruling procedure in Title IV measures affects the overall level of judicial protection in the AFSJ. Moreover the case law of the ECJ related to annulment actions against Community measures is reviewed. The strict rules concerning "locus standi" create obstacles for individuals to bring direct actions against Title IV measures of the AFSJ. The case law of the ECJ in the third pillar shows that the court is not satisfied with the level of judicial protection provided for individuals against third pillar measures. Anyway the Court tries to provide a remedy when its jurisdiction is limited under the Treaty. Whether it is really a pressing need for

reform in the system of judicial protection that was promised in the Lisbon Treaty is among the questions of this section to be analysed.

In chapter 5.4 the implications of the Lisbon reform on the system of judicial protection of individuals in the area is analysed. It promises a number of innovations to the system of judicial protection in the AFSJ. A new framework of the AFSJ under Lisbon Treaty leads to the area in which judicial protection of individuals will be on the same level as in other parts of EU law.

1. THE NOTION OF THE AREA OF FREEDOM, SECURITY AND JUSTICE AND ITS LEGAL INSTRUMENTS

The area of freedom, security and justice is an area in the EU aiming to provide the free movement of persons in a safe and secure area with no judicial obstacles. The AFSJ consists of three separate areas which are interrelated and affect each other. Currently these three areas are achieved through the adoption of first pillar and the third pillar legal instruments. The chapter gives the notion and the description of the legal instruments of the AFSJ.

1.1. THE NOTION AND OBJECTIVES OF THE AFSJ

The Establishment of an AFSJ is a major project to be implemented by the European Union. The AFSJ is a measure launched by the European Union to promote greater liberty and justice in a more secure European area. The AFSJ was officially introduced with the drafting of the Treaty of Amsterdam in 1997. The AFSJ became one of the fundamental objectives of that treaty. Article 2 TEU states that "The Union shall set objective in order to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime".

For the gradual establishment of the AFSJ the European Council in Tampere adopted a multi-annual programme, the so-called "Tampere programme" defining the orientations, specific objectives and a timetable for implementing these objectives for the period 1999-2004.[2] On 5 November 2004, the Brussels European Council agreed a

[2] See European Council, Presidency Conclusions of the Tampere European Council of 15-16 October, SN 200/99,Brussels,1999.Retrievable at:http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/00200-r1.en9.htm.

new five-year Action Plan the so-called "The Hague programme" fixing priorities in EU policy in the AFSJ.[3]

The AFSJ is comprised of: an area of freedom, where citizens can move without restriction. Its establishment involves the abolition of controls at internal borders and the adoption of measures for third-country nationals.

The area of security aimed at preventing and combating the threats that hang over the Union and its citizens. The Union task is to combat all types of serious crime, such as organised crime, terrorism, drug trafficking, trafficking in human beings, fraud against the European Community's financial interests, cybercrime and money laundering.

The area of justice, which comprises two areas: First, judicial cooperation in civil matters. The second one is judicial cooperation in criminal matters. The former intends to ensure that national legal systems do not pose obstacles to citizens in their professional activity or in their family life. The aim is to give people residing in Europe better access to legal aid in cross-border disputes by removing obstacles resulting from different national judicial systems. The latter aims to prevent criminals from fleeing prosecution by crossing national borders. The Union is working to ensure that criminals find no refuge in the Union territory.

These three areas are closely interconnected that results in a single AFSJ. Providing freedom without an equivalent level of security is impossible. Indeed, it would be unacceptable to enable terrorists to take advantage of provisions on free movement of persons to move from one Member State to another more easily. Similarly, the areas of security and justice overlap considerably. Enhanced judicial cooperation in criminal matters contributes to the creation of the area of security by strengthening the European law enforcement system.

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[3] The Hague Programme: Ten priorities for the next five years - The Partnership for European renewal in the field of Freedom, Security and Justice (Communication from the Commission), COM(2005)184 final.

The AFSJ is the continuation and further development of the original concept of cooperation in Justice and Home Affairs as introduced to the law of European Union by the Treaty of Maastricht. The policies and legislation of the European Union falling within the AFSJ, such as questions relating to justice, internal security and civil liberties, were first brought systematically within the ambit of the Justice and Home Affairs pillar of the Union by the Treaty of Maastricht. This pillar was characterised by intergovernmental legal structure and differed substantially from the "Community" pillar as regards decision-making and institutional structures laid down by the Treaty of Rome in 1957, notably in the limited role it accorded to the central institutions of the Union and the types of legal instruments. The pillar structure therefore represented something of a compromise between the advocates and opponents within national governments of the extension of supranational governance into areas of such acute national sensitivity as domestic security. The organizational structure of the third pillar represented a convergence of the previously existing working groups and structures at European level such as; Ad Hoc Group on immigration, the Trevi group, the Working group on judicial cooperation, the Customs mutual assistance group, the Group of co-ordinators on free movement of persons.

1.2 THE AREA OF FREEDOM, SECURITY AND JUSTICE UNDER THE AMSTERDAM TREATY FRAMEWORK

With the entry into force of the Treaty of Amsterdam, civil law matters, asylum and immigration became Community matters, while police and judicial cooperation in criminal matters remained within the third pillar. The Treaty of Amsterdam brings certain areas within the Community legal order, namely policy on visas, asylum, immigration and other policies connected with the free movement of persons. The Treaty stipulates the measures to be taken by the Council with a view to the progressive establishment of an AFSJ within five years of its entry into force.[4] The Treaty of Amsterdam lays down that, for a transitional period of five years following its entry into

[4] See Article 61 EC.

force, the Council shall in general act unanimously on a proposal from the Commission or on the initiative of a Member State and after consulting the European Parliament. However after this period, the Council shall act merely on proposals from the Commission which shall henceforth acquire sole right of initiative. On the other hand, the Commission must also examine any request by a Member State that submits a proposal to the Council. With regard to the decision-making procedure, it is laid down that the Council, acting unanimously after consulting the European Parliament, may take a decision with a view to making all or part of the areas covered by this title subject to the co-decision procedure provided by Article 251 EC. As regards the procedures and requirements for the issue of visas by the Member States and rules on uniform visas, the Treaty therefore provides for the co-decision procedure to apply after the transitional period to the decision-making process.

The Treaty of Amsterdam creates a distinction between the free movement of persons and the establishment of an AFSJ. Policies in the area of visas, asylum, immigration and judicial cooperation in civil matters have been made Community matters. This has made it possible to use Community instruments such as regulations or directives instead of conventions which are subject to ratification, require rather cumbersome procedures prior to their entry into force and decisions, recommendations and opinions. The two countries United Kingdom and Ireland are not taking part in measures under Title IV and are not bound by them. Therefore they do not take part in votes in areas falling within the AFSJ. However they have opt-out and opt-in rights as regards measures adopted on the basis of Title IV. In case they wish to take part in the adoption and implementation of a proposed measure, they will have to inform the President of the Council within a period of three months starting from the submission to the Council of the proposal or initiative and they will also be entitled to agree to the measure at any time after its adoption by the Council. Denmark has also a special position provided by the Protocol on the position of Denmark according to which the country does not taking part in the measures under Title IV save those determining the non-member countries whose nationals must have a visa when crossing the external borders of the Member States and measures introducing uniform format for visas.

A number of observers pointed out the substantial progress the Amsterdam Treaty had led to by introduction of new Title IV. Brinkhorst called new provisions, compared with the ex-ante practice, as "certainly a net gain" and Brok characterised a new Title IV as a "decisive progress".[5] Patijn concluded that the Amsterdam IGC had succeeded in transferring asylum, visa and immigration policies to the first pillar "against all odds" and Hoyer regarded it as "the main improvement of the Treaty".[6] The Amsterdam Title IV results have been viewed as mixed or moderately positive by Monar and Müller-Graf. [7]

The Intergovernmental third pillar has been decisively reorganised - areas have been changed, new legal instruments have been introduced, the role of the Community bodies is defined and enhanced cooperation is clarified. The Treaty of Amsterdam did not communitarise however the police and judicial cooperation in criminal matters while it did so for visas, asylum, immigration and other polices related to free movement of persons. Part of JHA measures which are to be adopted for the establishment of the AFSJ remained within the intergovernmental method of cooperation. Police and judicial cooperation in criminal matters are grouped under Title VI of the Treaty on European Union in the third pillar of the EU.

Art 29 TEU lays down that "the Union is to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia". The article goes on

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[5] Brinkhorst, Laurens Jan, "Pillar III, Making Sense of the Amsterdam Treaty", *European Policy Centre*, Brussels 1997,page 49; Brok, Elmar, "The European Parliament, Making Sense of the Amsterdam Treaty", *European Policy Centre*, Brussels 1997a, page 377.

[6] Patijn, Michiel, Ludlow, Peter, "The Dutch Presidency', Making Sense of the Amsterdam Treaty", *European Policy Centre*, Brussels 1997, page 38 ; Hoyer, Werner, "The German Government, *Making Sense of the Amsterdam Treaty"*, *European Policy Centre*, Brussels 1997,page 71.

[7] Monar, Jörg, "Justice and Home Affairs", *Journal of Common Market Studies*, Vol. 36, Annual Review 1998,page 138.

to highlight that this objective shall be achieved through enhanced cooperation between national security agencies and judicial authorities by "preventing and combating crime, organized or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking ,corruption and fraud". To that end, acting unanimously on an initiative of any Member State, the Council may adopt common positions, framework decisions, decisions and may establish conventions.

Therefore in the third pillar the co-decision procedure under Article 251 EC does not apply and legal instruments are adopted unanimously by the Council on the initiative of any Member State or of the Commission. Moreover the European Parliament is not sufficiently included in decision-making process due to the non-applicability of Art 251 EC; it is just consulted about the measures adopted in the areas covered by Title VI according to Article 39 EU. The Member States have virtually sole responsibility for cooperation in the fields covered by Title VI. The new Treaty does not affect the responsibilities of the Member States for maintaining law and order and safeguarding internal security. To coordinate their action, they inform and consult one another and establish collaboration between their respective government departments. They uphold common positions adopted under this heading in the international organizations and conferences that they take part in. Peers called cooperation in the areas under Title VI which is based on "intergovernmentalism", the "black-market integration".[8]

As a result the measures which are to be adopted for the gradual establishment of AFSJ fall within different pillars of the EU. Visas, asylum, immigration are within the Community pillar, the judicial cooperation in criminal matters is within the remit of the third pillar. Due to the two pillar structure, there is a lack of transparency and efficacy and a high degree of inefficiency in the AFSJ. The duality of pillars in the AFSJ equally creates uncertainty as to the precise legal effects of each of the legal instruments

[8] S.Peers,*EU Justice and Home Affairs Law*,London,Longman 2000, page 81.

being used under each pillar as well as in terms of their material scope. It is worth pointing out that as will be examined in the section such type of pillar division would have negative effects on decision-making.

1.3 THE SYSTEM OF LEGAL INSTRUMENTS

A developing AFSJ in the European Union includes policies which are currently placed in two different locations within the wider EU legal framework: the EC first pillar, which contains Title IV of the EC Treaties, "Visas, Asylum, Immigration and other policies related to free movement of persons", and the EU third pillar, which resides in Title VI of the Treaty on European Union (TEU), "Provisions on Police and Judicial Cooperation in Criminal Matters". The package of legal instruments used to develop the AFSJ in the European Union therefore consists of the legal instruments of the first pillar and intergovernmental third pillar instruments.

1.3.1 Instruments of the Community pillar (first pillar)

The Treaty provision dealing with legal instruments of Community pillar is Article 249 EC which states that: In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions. The nature of the legislative acts provided by Article 249 is assessed.

1. A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. Adopted by the Council in conjunction with the European Parliament or by the Commission alone, a regulation is a general measure that is binding in all its parts. Regulations are addressed to everyone. A regulation is directly applicable, which means that it creates law which takes immediate effect in all the Member States in the same way as a national instrument, without any further action on the part of the national authorities.

2. 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. Adopted by the Council in conjunction with the European Parliament or by the Commission alone, a directive is addressed to the Member States. Its main purpose is to align national legislation. A directive is binding on the Member States as to the result to be achieved but leaves them the choice of the form and method they adopt to realise the Community objectives within the framework of their internal legal order. If a directive has not been transposed into national legislation by a Member State, if it has been transposed incompletely or if there is a delay in transposing it, citizens can directly invoke the rights arising out of it before the national courts.

3. A decision shall be binding in its entirety upon those to whom it is addressed. Adopted either by the Council, by the Council in conjunction with the European Parliament or by the Commission, a decision is the instrument by which the Community institutions give a ruling on a particular matter. By means of a decision, the institutions can require a Member State or a citizen of the Union to take or refrain from taking a particular action, or confer rights or impose obligations on a Member State or a citizen. A decision is an individual measure, and the persons to whom it is addressed must be specified individually, which distinguishes a decision from a regulation binding in its entirety.

4. Recommendations and opinions shall have no binding force. A recommendation allows the institutions to make their views known and to suggest a line of action without imposing any legal obligation on those to whom it is addressed (the Member States, other institutions, or in certain cases the citizens of the Union). An opinion is an instrument that allows the institutions to make a statement in a non-binding fashion, in other words without imposing any legal obligation on those to whom it is addressed. The aim is to set out an institution's point of view on a question.

1.3.2 Instruments of the Intergovernmental Third Pillar

The separate range of legal instruments for third pillar matters is listed in Article 34 EU. Article 34 EU dealing with legal instruments of the third pillar states that in the

areas of police and judicial cooperation in criminal matters Member States shall inform and consult one another within the Council with a view to coordinating their action. To that end, they shall establish collaboration between the relevant departments of their administrations. The Council shall take measures and promote cooperation, using the appropriate form and procedures as set out in this title, contributing to the pursuit of the objectives of the Union. To that end, acting unanimously on the initiative of any Member State or of the Commission, the Council may adopt common positions, framework decisions and decisions, and may establish conventions. According to the Treaty police and judicial cooperation in criminal matters is characterised by the intergovernmental nature.

1. The common positions adopted unanimously by the Council of the European Union determine the Union's approach to particular questions of foreign and security policy or police and judicial cooperation in criminal matters and give guidance for the pursuit of national policies in these fields. Common positions shall not entail direct effect.

2. Framework decisions are adopted unanimously by the Council of the European Union for the purpose of approximation of the laws and regulations of the Member States. 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.

3. Decisions are adopted unanimously by the Council of the European Union for any other purpose consistent with the objectives of police and judicial cooperation in criminal matters 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.

4. The convention is a traditional instrument of international law. It is an agreement in written form between states that is intended to establish a relationship in a particular matter governed by international law. Only states that are parties to a

convention are bound by it. However, a very large number of states voluntarily may adhere to the treaty and accept their provisions as law, even without becoming parties to them. A convention has to be ratified by the national parliaments of all the Member States in order to have effect.

In addition to the legal instruments examined above, the current Treaty envisages totally 15 different legal instruments, including the second pillar instruments.[9] There are also legal instruments which although not contained in the Treaty, form part of EU law, as determined by the ECJ in the *ERTA* case.[10]

The absence of a genuine hierarchy of legal acts as to ranking of different types of legal acts in accordance with the democratic legitimacy of their respective authors and adoption procedures is a remarkable feature of the present Union's set of legal instruments. It is a fact that the definitions of the Community legal instruments do not reveal any information as to the author of the act. Any of the legislative procedures provided for by the Treaties in fact may result in the adoption of any of the acts envisaged therein, depending only on the specific legal basis giving the EU/EC the power to act in a certain field.

According to the EC Treaty, each of the different Community instruments can be used to lay down the basic policy choices in a given competence area or can contain mere technical implementation measures. Briefly, the choice for a regulation, a directive, or a decision does not reveal, as such, the legislative or executive nature of the

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[9] As counted by Working Group IX on Simplification (n 6) 3. See also European Convention (Secretariat), 'The legal instruments: present system' (Note) CONV 50/02, 15 May 2002.

[10] Case 22/70 *Commission v Council* [1971] ECR 263. In that case, the Court considered the proceedings of the Council to be a legally binding instrument subject to judicial review. The Court also considered other non-Treaty acts to be part of Community law and to have a legally binding force: a Commission communication in Case C-325/91 *France v Commission* [1993] ECR I-3283 para. 23 and in Case C-57/95 *France v Commission* [1997] ECR I-1627 para 23; a Code of Conduct enacted by the Commission in Case C-303/90 *France v Commission* [1991] ECR I-5315 para. 25; or a Resolution of the Council in Case 32/79 *Commission v UK* [1980] ECR 2403 para. 11. Whether a non-Treaty act has a legally binding force is a matter of substantive analysis of the act in question. In this respect, see Case C-57/95 *France v Commission,* paragraph 9.

act adopted under that label.[11] The designation of "regulation", "directive", or "decision" therefore does not inform us on the rank of the measure in the overall legal system. Lenaerts and Desomer pointed out that there is no connections established in the EC Treaty between legal instruments and specific decision-making procedures, that is, there are no uniform legislative and implementing procedures, nor there are instruments of a clearly legislative or executive nature.[12] Capeta also points out the absence of a hierarchy between EU institutions and pre-established hierarchy between legal acts.[13] Most commentators are of the opinion that there are too many different EU legal instruments and distinction between them is not clear due to their high number. Bogdandy on the other hand mentions that "[e]ven though the structure of the legal instruments is complex and only partially determined by the Treaties, they do not reflect the chaotic structure".[14]

However, the examination of intergovernmental pillar instruments and their impact on the AFSJ of the European Union revealed the following shortcomings. Third pillar legal instruments are characterised with lack of efficiency and ineffectiveness, complexity and problems of legitimacy.

The ineffectiveness of Union law in the third pillar coupled with inefficiency in the decision-making process leading to the production of such law is the most prominent reason for the gap between ambition and results of the Union's policy in this field. Unanimity required in the Council for virtually all acts in this area has caused not only extraordinary delays in the Council's work, despite the importance of the

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[11] The nature of the act can not be deduced from the choice of legal instrument by the institutions. This additional information is to be found in the legal basis of the act (a provision of the Treaties or an act of secondary EC law), in the case law of the Court of Justice, in the title, or the text of the act.

[12] K.Lenaerts and M.Desomer, "Towards a Hierarchy of Legal Acts in the European Union? Simplification of Legal Instruments and Procedures", *European Law Journal*, Vol. 11, No. 6, November 2005, page 745.

[13] Tamara Capeta, "Legal instruments in the reform Treaty-Simplified"? *Croatian Yearbook of European Law and Policy*, Vol 3, 2007, page 162.

[14] Dr.Armin von Bogdandy , "Legal Instruments in European Union Law and their Reform: A Systematic Approach on an Empirical Basis", *Yearbook of European Law* 23, 2004,page 92.

instruments to be adopted, but also a minimization of the real legal content of many of the instruments finally adopted. Instruments are carefully drafted in such a way that no member state really has to change anything in its own legislation. This is particularly striking especially in the Joint Action on participation in a criminal organization and in the Framework Decision on the fight of corruption in the private sector.[15] Reaching consensus on important legislative initiatives has been impossible with the unanimity rule especially after 2004 and 2007 enlargements, which led to lengthy discussions on the draft of such legislative acts as Framework Decisions on procedural rights in criminal proceedings,[16] on data protection in the Third Pillar[17] or on combating racism and xenophobia.[18] The weaknesses of the particular legal instruments at the disposal of the Union in this area result in deficits of effectiveness, only after lengthy discussions in the Council the adoption of an act could be achieved. Ratification by all the EU Member States of the international law instrument of convention with guaranteed uniform legal value and meaning in every member state provided by Article 34 TEU is also extremely cumbersome. Even today, many of the conventions adopted under the Third Pillar since 1993 have still not entered into force. Once entered in force, it is virtually impossible to amend such conventions speedily enough to respond to changing political challenges, which would be necessary especially in the case of Europol. That is why the Commission proposed in 2006 to replace the Europol Convention by a decision,[19] and it is another problem that the Council has virtually stopped using the instrument of conventions since 2000.

Yet framework decisions and decisions as alternative legal instruments provided by Article 34 TEU cannot have direct effect. The functioning of Framework Decisions

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[15] Joint Action 98/733/JHA; Framework Decision 2003/568/JHA.

[16] COM (2004)328 final.

[17] COM (2005) 475 final.

[18] COM (2001)664 final.

[19] COM (2006)817 final.

and Decisions thus depends entirely on the good will of each Member State to transpose them faithfully in national law, where the Commission has no tools such as the infringement procedure of Article 226 EC for controlling their correct implementation. An example is the weakness of the European Arrest Warrant Framework (hereinafter EAW) requiring uniform application throughout the Union.[20] The implementation phase of the legislative act which has been evaluated by the European Commission has shown the lack of confidence about intentions and respective judicial and legal systems of the Member States.[21] The deadline for the implementation of the act by Member States was stipulated by the Framework decision to be the December 31st 2003. But only by November 1st 2004 all EU Member States except Italy implemented the Framework Decision. The main reason given by the national governments to justify the failure to implement the Decision was the need to amend their constitutions. France for example enacted a new constitutional law on the EAW on 25 March 2003.

The EAW Decision is certainly the most ambitious instrument ever adopted under the third pillar designed to replace the classical extradition procedure by a rapid and purely judicial mechanism of surrender and to abolish the traditional double incrimination requirement. However its effectiveness depends on a correct and ideally uniform transposition into national law, which cannot be effectively monitored by the Commission, in absence of an infringement procedure under the third pillar. Additionally the functioning of the EAW had temporarily been hampered by suspended implementation following the decisions of the constitutional courts in some Member states, where courts challenged the constitutional legality of the act. Nevertheless the problems have been overcome meanwhile.[22]

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[20] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, Official Journal L 190, 18.07.2002.

[21] See report from the European Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States ,COM (2005) 63, 2005/267 (SEC),Brussels,23.02.2005.

[22] Poland – Decision of 27.4.2005, P 1/05 The Polish Constitutional Tribunal ruled that "Article 607t § 1 of the Criminal Procedure Code, insofar as it permits the surrendering of a Polish citizen to another Member State of the

Similarly, since third pillar decisions have no direct effect, the Union must rely on the recognition in the law and practice of every member state of the legal personalities of Eurojust and of Europol. The envisaged conversion of the Europol Convention into an Article 34 TEU decision entails yet further risks of legal lacuna, as regards Europol's data processing activities. Such activities affect fundamental rights of individuals and must therefore be provided for by law. Because of lack of direct effect, only the national legislators can create such a legal basis, and for that purpose they must all hence faithfully transpose a future Europol decision for Europol to operate legally vis-à-vis individuals in all Member States for which no one however can be entirely sure that it will effective.[23] Member States with the right of initiative in the area of police and judicial co-operation in criminal matters have tabled initiatives by responding to a particular concern of domestic politics instead of the general European interest often just before taking up the Presidency.[24]

The complexity is the result, first and foremost of the pillar structure of the European Treaties themselves and Union's system of primary law in the area of police and judicial co-operation in criminal matters and of the variable geometry also result from the special regimes granted to the United Kingdom, Ireland and Denmark. As regards the first point, the triple pillar structure often forces the Union to split up its action related to a single subject-matter artificially between several legal instruments adopted pursuant to the different procedures that apply to the different pillars.[25]

European Union on the basis of the European Arrest Warrant, does not conform to Article 55(1) of the Constitution".Available at http://www.trybunal.gov.pl/eng/summaries/documents/P_1_05_GB. pdf; Germany – Decision of 18.7.2005, 2 BvR 2236/04 Bundesverfassungsgericht states "The European Arrest Warrant Act infringes the guarantee of recourse to a court (Art. 19.4 of the Basic Law) because there is no possibility of challenging the judicial decisions that grants extradition".Available at http://www.bverfg.de/entscheidungen/rs20050718_2bvr223604.html.

[23] See the provisions on transposition and applicability in Arts.59-62 of the Commission's proposal for a Decision replacing the Europol Convention. COM/2006/0817 final - CNS 2006/0310.

[24] C. Ladenburger, "Police and Criminal Law in the Treaty of Lisbon; A New Dimension for the Community Method", *European Constitutional Law Review*, volume 4, 2008, page 23.

[25] For instance, a double legal basis is necessary for the establishment of the important Schengen Information System II (SIS II). Similarly, the Union's policy on drug abuse is split up between the first pillar for issues related to health (and notably the prevention of drug abuse) and the third pillar for judicial and police co-operation to combat drug crimes.

Whether there is a need for drawing line between the different pillars was subject to lengthy discussions. The best known example is the controversy about the competencies of the Community versus the Union for harmonising criminal sanctions, which has led to two rulings of the Court of Justice.[26] Another important point of complexity, namely the current special status of the United Kingdom, Ireland and Denmark as organized in the respective Protocols, as well as that of non-member countries Norway and Iceland regarding the Schengen *acquis*. Treaty of Lisbon however did not give an end to these "opt-outs".

A twofold legitimacy problem exists in the Union's action in the field of police and judicial co-operation in criminal matters. First, democratic and in particular parliamentary control is insufficient or ineffective. There is no co-decision with the European Parliament in this area and the mere consultation of that Parliament often only takes place after a compromise has been reached in the Council with great difficulties. In practice, the control exercised by national parliaments cannot, adequately compensate this deficit as well. The main basis for parliamentary legitimacy for framework decisions and decisions pursuant to Article 34 EU is the national parliaments' oversight over the conduct of ministers in the Council, which however varies greatly from the constitutional systems of one member state to the other and in practice often turns out to be illusory. Framework decisions which have no direct effect must be transposed by a national law formally enshrining all national constitutional guarantees and providing the legal basis for impacts on fundamental rights. The proceedings before the German Constitutional Court however on the EAW provide a good example for how in practice national parliamentarians often perceive their role in a process of transposing a scheme "already decided in Brussels".[27] National parliaments

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[26] *See* C-176/03 *Commission* v. *Council*, [2005] *ECR* I-7879, the communication of the Commission final interpreting that judgment, COM (2005)583 and the judgment of 23 Oct. 2007 in Case C-440/05, *Commission* v. *Council* (n.y.r.).

[27] See on this judgment Christian Tomuschat, "Inconsistencies–The German Federal Constitutional Court on the European Arrest Warrant", *European Constitutional law review,* volume 2, 2006, page 209.

are often unable to exercise a real influence on the content of the conventions ratified as they are presented with a take-it-or-leave-it-situation.[28]

Second problem is that, the judicial accountability of measures under the EU third pillar is insufficient, which will be discussed in the separate Chapter 6.3 however.

Furthermore, the AFSJ is criticised for having adverse effects because of the need to adopt parallel legislative acts in different pillars with its cross-pillar implications.[29] Such a system is characterised as a democratic deficit in the European Union, the lack of transparency and legal certainty in the functioning of the European Union, a high degree of inefficiency owing to the duality in the legal dimension and a serious lack of democratic and judicial accountability.

1.4 THE SYSTEM OF LEGAL INSTRUMENTS INTRODUCED BY THE LISBON (REFORM) TREATY

The Lisbon Treaty introduces a massive and "fundamental change" to both the structure of AFSJ and on the whole European legal order as well. It is to abolish the pillar structure and moves third pillar matters (police and judicial cooperation in criminal matters) to the EC Treaty (to be renamed as the Treaty on the functioning of the European Union). The Reform Treaty would "communitarise" most of the policies falling within the current EU Third Pillar and offer a unique framework common for all these fields under Chapter IV "Area of Freedom, Security and Justice". Chapter IV will therefore comprise five sections and will bring the currently dispersed JHA policies under one heading. However the special position of United Kingdom, Ireland and

[28] Ladenburger,op.cit.supra note 24, page 25.

[29] Final report of Working Group X "Freedom, Security and Justice," CONV 426/02 (Dec. 12, 2002).

Denmark having rights of opt-out and opt-in in Title IV EC to these Member States was extended to all AFSJ matters.[30]

Decision-making in AFSJ policies falling within the previous third pillar since then will no longer be intergovernmental and all policies under the area will be subjected to the Community co-decision method with the involvement of European Parliament. Judicial cooperation in criminal matters and police cooperation will come within the scope of the Union's overall legal and judicial framework. The co-decision procedure and qualified majority voting will be the rule in decision-making regarding all AFSJ subjects.

The EU third pillar legal instruments such as framework decisions, conventions and common positions disappear and will no longer be available as instruments for the European policy in the field of police and judicial co-operation in criminal matters. Conventions between the Member States will be abandoned as official EU legal instruments. Not only "Third pillar" conventions referred to in Article 34(2) (d) TEU disappear, but also article 293 EC providing for inter-state conventions has been repealed. Inter-state conventions have proved to be ineffective due to fact that they require ratification by national parliaments to enter into force and amendment is a very cumbersome process. However Member States will be permitted to conclude international agreements between themselves.

AFSJ will be governed by a unified set of legal instruments based on existing first pillar such as regulations, directives and decisions. The heterogeneity in the types of legal acts, which were products of institutional duality characterising the current AFSJ policies and their negative effects in terms of genuine nature and legal effects will come to an end. S.Peers suggests that this will foster transparency and comprehension of the

[30] See Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom ,security and justice and Protocol (No 22) on the position of Denmark ,Official Journal of the European Union C 115/201.

legislative procedures.[31] The legal effects of pre-existing third pillar acts should nevertheless be preserved until they are repealed, annulled or amended in accordance with revised Treaties.[32] New legal instruments proposed by the Constitutional Treaty which are "laws" and "framework laws" did not however find support and have not been retained under the Lisbon structure .

The three types of binding legal instruments namely regulations, directives and decisions are provided by Article 288 Treaty on the Functioning of European Union. Each of these instruments is available at three different levels of law-making: for "true" legislation, the adoption of delegated acts and the adoption of implementing acts. These instruments are called legislative acts by the Treaty not because of their content but the particular procedure leading to their adoption.[33] Therefore EU acts based on Treaty articles and adopted on the basis of ordinary or special legislative procedure are considered to be legislative acts. Such a configuration will bring substantial degree of legal certainty to the whole system. Therefore there will be three binding legal instruments of "mainstream EU law": legislative regulations, directives and decisions; delegated regulations, directives and decisions; and implementing regulations, directives and decisions.

The decision under the new structure will be changed and will be defined as follows: "A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them". This covers both decisions as defined in Article 249 EC, which are individual instruments addressed to specified

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[31] S.Peers, *EU Reform Treaty analysis 1: JHA provisions*, Statewatch, August 2007", page 4, retrieved from www.statewatch.org on 8.8.2007.

[32] As regards existing third pillar measures, Art 9 of the Protocol on transitional provisions, states: 'The legal effects of the acts of the Union adopted on the basis of the Treaty on EU prior to the entry into force of the Treaty of Lisbon shall be preserved until those acts are repealed, annulled or amended in implementation of the Treaties. Art 10 reads that 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 Commission under Article 226 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. Thus, it also states that the transitional measure mentioned in paragraph 1 shall cease to have effect five years after the date of entry into force of the Treaty of Lisbon

[33] See Article 289(3) TFEU:"Legal acts adopted by legislative procedure, shall constitute legislative acts".

parties and "sui generis" decisions adopted in the framework of the Community which have no addressee, for example, in trade policy, for the adoption of action programmes or to change organic rules.

De Witte argues that the legal instrument in the shape of decision under article 288 TFEU is not the same instrument provided by Article 249 EC. He refers to German or Dutch versions of the new Treaties where the word "Beschluss" appears instead of "Entscheidung", and the word "besluit" instead of "beschikking". To him, an age-old instrument of EC law, the decision of article 249 EC has been eliminated and Lisbon style of decision is "some kind conceptual blend of the decision in the sense of Article 249 EC".[34]

All acts adopted on the basis of secondary legislation (legislative acts) divided into delegated acts and implementing acts. The type of delegated acts, an intermediate level of law-making between the purely legislative and purely executive, is the primary novelty introduced by the Lisbon. The Commission will adopt these acts in order to "supplement or amend certain non-essential elements of the legislative acts". These delegated acts may modify legislative act, in contrast to implementing acts, albeit only on non-essential points. The modification in case would be possible if specific delegation is made within the relevant legislative act being subject to control by the institutions that adopted the act, t.e Council or Parliament.[35] For a long time the Council interpreted the Treaty in such a way where "delegated acts" were removed from the competence of the European Parliament on the pretext that execution was the responsibility of the Member States and at EU level of the Commission. The practice where the Commission due to its implementation power amended or supplemented legislative acts has already existed. However under the previous Treaty structure there was no distinction between legislative delegation and executive delegation and they both were subject to "comitology procedure". However Lisbon Treaty has replaced

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[34] Bruno de Witte, "Legal instruments and law making in the Lisbon Treaty" in Stefan Griller and Jacques Ziller (eds), *EU Constitutionalism without a Constitutional Treaty,* Springer publishing 2008, page 95.

[35] For details see Article 290 TFEU.

comitology system with an arrangement whereby the Commission takes responsibility for delegated acts under the direct control of the European Parliament and the Council giving them the possibility of opposing the measure or revoking the delegation. Best suggests that the delegated acts will cover the areas previously placed under the regulatory procedure with scrutiny and plus all those of similar nature arising in the new areas to which the ordinary legislative procedure has been extended.[36]

Implementing acts will be adopted "Where uniform conditions for implementing legally binding Union acts are needed, on the basis of implementing powers conferred in such acts on the Commission, or, in some cases, on the Council".[37] The Council and the Parliament will, through co-decision procedure, adopt "the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers".

As the adjectives "delegated" and "implementing" are inserted in the titles of acts corresponding to their nature, regulations, directives and decisions without any of these adjectives are supposed to be legislative acts. This contributes to the transparency of EU law in that the title indicates the nature of the legal instrument. From the reading the title of a given act, it will be possible to know whether it is a legislative act or non-legislative one, and whether it is adopted based on delegated or implementing powers, without having to make recourse to the text of either the act itself or the basic enabling act.

Under the Lisbon Treaty the management of the AFSJ is provided by a unified set of legal instruments adopted on the basis of co-decision procedure. The legal instruments transparent and legally certain by the nature with no negative legal effects facilitate the creation of the successful AFSJ.

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[36] Edward Best, "The Lisbon Treaty :A qualified advance for EU Decision-making and governance", European institute of public administration, Eipascope 2008/1.

[37] See Article 291 TFEU.

2. THE AREA OF FREEDOM IN THE EUROPEAN UNION

The area of freedom is provided through the adoption of common measures throughout the EU in visa, asylum, and immigration policies. It is only after the communitarisation in the Amsterdam could the Union rapidly and with no delays adopt a common approach in these policy areas what fosters the creation of the freedom area. This chapter analyses the three policy areas separately.

2.1 COMMUNITARISATION OF VISA, ASYLUM AND IMMIGRATION POLICIES IN THE AREA OF FREEDOM, SECURITY AND JUSTICE

The Treaty of Amsterdam proclaimed the start of an AFSJ, partially communitarising the JHA dossier by bringing immigration, asylum and judicial cooperation in civil matters within the remit of the first pillar (Title IV TEC). It nevertheless left behind the police and judicial cooperation in criminal matters in the third pillar (Title VI TEU) characterised by a slow and cumbersome decision-making process. Communitarisation of visa, asylum and immigration policies and other policies related to free movement of persons serves the purpose of the establishment of an area of freedom in the European Union with no internal borders between Member States. There were a number of pressures which constituted a very strong dynamic for the "communitarisation" of visa, asylum and immigration policy were at work during the IGC 1996-97.

First of all, there were pressures, stemming from the objective of free movement of persons, the realisation of which required certain flanking measures to be taken in the areas of external border control, asylum and immigration policy in order to compensate the elimination of intra-EU borders.[38] The principle of the free movement of persons, a

[38] Niemann Arne, "Dynamics and countervailing pressures of visa, asylum and immigration policy Treaty revision: explaining change and inertia from the Amsterdam IGC to the Constitutional Treaty" in *European Union Studies Association (EUSA), Biennial Conference 2005 (9th), Austin, Texas.* page 22.

principle comprises one of the four freedoms inscribed in the Treaty of Rome. Since the Tindemans report of 1975 the idea of abolishing border controls at the EC's internal frontiers has been on the Community agenda. The objective was reinforced by the adoption of the Schengen Agreement by five Member States in 1985 on the gradual abolition of controls at the common frontiers, and the Single European Act of 1986, aiming for the realisation of an internal market by the end of 1992.Schengen Convention of 1990 and 1995 strengthened this principle. Due to fact that the free movement of persons amongst the four freedoms has the most direct bearing on the lives of individual citizens, the matter acquired a considerable significance. [39] In addition to that, free movement of persons is necessary from an economic perspective, without which the proper working of the internal market would be jeopardised.[40] The link existing between the abolition of internal borders and increased co-operation in terms of external border controls and visa policy is that Member States are unwilling to waive the power of internal controls, unless they can be provided with an equivalent protection with regard to persons arriving at the external frontiers. The creation of common external frontier for the internal market necessitates common policies on immigrants, asylum-seekers and refugees. Otherwise, the restrictive efforts of one Member State would be undermined by diverging, liberal policies of other Member States, as 'the free movement of persons also means free movement of illegal immigrants' or rejected asylum seekers.[41] There was a fear that the abolition of internal borders would lead to an increased internal migration of asylum seekers denied asylum

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[39] Fortescue, John Adrian, "First Experiences with the Implementation of the Third Pillar Provisions", in Bieber, Roland and Jörg Monar, *Justice and Home Affairs in the European Union: The Development of the Third Pillar* (Brussels: European Interuniversity Press, 1995, page28.

[40] Commission of the European Communities, *White Paper on the Internal Market*, COM (85) 331 final, 1985,page 6.

[42] de Lobkowicz, Wenceslas, "Intergovernmental Co-operation in the field of Migration - From the Single European Act to Maastricht", in Monar, Jörg and Roger Morgan, (eds), *The Third Pillar of the European Union: Co-operation in the field of justice and home affairs* ,Bruges: European Interuniversity Press and College of Europe, 1994, page 104.

[43] Achermann, Alberto, "Asylum and Immigration Policies: From Co-operation to Harmonisation", in Bieber, Roland and Jörg Monar (eds.), *Justice and Home Affairs in the European Union: The Development of the Third Pillar*, Brussels: European Interuniversity Press, 1995, pages 127-40.

in the first country, and to multiple applications for asylum as well as uncontrollable influx of illegal immigrants.[42] The Dublin Convention in September 1997, to some extent, tackled the problem of asylum shopping (i.e. asylum applications in several countries).[43] However, this provision by determining the first entry state as the one having to deal with the application of an asylum seeker, created a serious problem of arbitrariness, given Member States' differing standards of reception and varying interpretation of the refugee status. As a result, minimum standards on the reception of asylum seekers were necessary. In order to reduce flanking measures, a greater degree of Community method was required, to make co-operation more efficacious and to enable co-operation to move beyond the lowest common denominator. This rationale for communitarisation was the most widely accepted and articulated one among decision-makers.

Secondly, the establishment of an AFSJ, with Title IV as a significant component part, has become one of the most important EU projects of the European Union, comprising about 250 planned binding legislative acts.[44] For the establishment of an AFSJ, the Amsterdam Treaty put concrete aims and deadlines, which were concretised by the Vienna Action Plan of 1998 and further substantiated and built on by the conclusions of the Tampere European Council in 1999. The substantial goals laid down for the achievement of AFSJ created pressure on the decision-making rules in the Council. From the perspective of effective cooperation in the area of JHA and collective goal attainment, the considerable structural and institutional weaknesses of the third pillar became a major stumbling block towards the goal of establishing the AFSJ in the

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[43] Yet, neither the Dublin Convention, nor the Regulation 343/2003 replacing it ('Dublin II'), may be wholly successful in terms of reducing multiple applications or secondary movements within the European Union. Cf., for example Immigration Law Practitioners' Association, 'Scoreboard on the Proposal for a Council Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application', London, 2001. http://www.ilpa.org.uk/submissions/dublinIIscoreboard.html .

[44] Niemann Arne, op.cit supra note 38, at page 27 referring to Monar, Jörg, 'Die Entwicklung des "Raumes der Freiheit, der Sicherheit und des Rechts". Perspektiven nach dem Vertrag von Amsterdam und dem Europäischen Rat von Tampere', Integration 23, 1, 2000, 18-33.

European Union. Such a fact constituted another dynamic for the communitarisation of visa, asylum and immigration policies. The "failure" of the third pillar has been pointed out by scholars in the run-up to the Amsterdam IGC.[45] The most important flaws included:

(1) concerning the rules governing the crossing of external borders there are overlapping competencies between the first pillar and the third pillar. Monar suggested that a "communitarisation" of issues where there is such a link to existing EC competencies promised to increase the efficiency of measures and the coherence of action taken by the Union.[46] (2) Third pillar legal instruments were regarded as flawed. For example, there was some uncertainty concerning the legal effect particularly concerning joint actions. (3) A severe obstacle to the adoption of measures under the third pillar was the unanimity requirement. The QMV option, through the "passerelle" provision, which allowed the Council, acting unanimously, to bring issues to the scope of the Community, was very difficult to invoke, and in fact never had been used. (4)The third pillar essentially lacked a generalised system of judicial review. As the third pillar affects individual rights, a strong claim could thus be made to seek judicial review in the areas covered by it. Some observers suggested that the Commission merely had the status of observateur privilégié although supposed to be fully involved in the area of JHA.[47] Policy-makers attached substantial significance to the rationale of a communitarisation of visa, asylum and immigration policy promising to improve considerably on these shortcomings and to enable goal attainment in terms of effective cooperation in that area.[48]

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[45] O'Keeffe, David, "Recasting the Third Pillar", *Common Market Law Review*, Vol. 32,1995b; Justus Lipsius, "The 1996 Intergovernmental Conference", *European Law Review*, Vol. 20, 1995, pages 235-67.

[46] Monar, Jörg, "European Union - Justice and Home Affair: A Balance Sheet and an Agenda for Reform", in Edwards, Geoffrey and Pijpers, Alfred, (eds), *The Politics of European Treaty Reform,* London: Pinter, 1997, pp. 326-339.

[47] Reflection Group, Reflection Group's Report, Brussels, 5th December 1995.

[48] Ibid.

Thirdly, among the reasons driving the Member States and Community institutions to communitarise visa, asylum and immigration policies are external factors such as large numbers of asylum seekers, immigrants and refugees entering the Community and staying there, legally or illegally. Rising levels of unemployment in Western Europe resulted in the perceived need to limit the number of third country nationals seeking asylum in and immigrating to the Community. Since the late 1980s migration was pinpointed as a serious problem.[49] Migration of third country nationals continued to be perceived as a threat to the EU. The need for a common EU response to those problems was a mixture of the perception of a common threat and the related inability of individual nation states to cope with these problems single-handedly. Since "no single country in Western Europe was capable of regulating migration flows without influencing those in other countries", national separate immigration and asylum policies became ineffective.[50] Confronted with the growth of asylum applications and illegal immigration, European states adopted ever stricter asylum and immigration regulations, which however, were unsuccessful since restrictions in one country only led to more asylum seekers in other countries until those countries adopted the same or even stricter rules. Therefore it was recognised that "solo runs" did not help and that co-operation was needed.[51] Guild and Brouwer suggested that the terrorist attacks of 11 September 2001 had certain implications for asylum and immigration policy, for the area of justice and home affairs more generally.[52] The link between terrorism and

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[49] Collinson, Sarah, *Europe and International Migration* ,London: Pinter Publishers, 1993,page 115.

[50] Baldwin-Edwards, Martin and Schain, Martin, "The Politics of Immigration: Introduction", *West European Politics*, Vol. 17, No. 2, 1994, *Special Issue on the Politics of Immigration in Western Europe*, edited by Baldwin-Edwards, Martin and Martin Schain, page 11.

[51] Achermann, Alberto, "Asylum and Immigration Policies: From Co-operation to Harmonisation", in Bieber, Roland and Jörg Monar (eds.), *Justice and Home Affairs in the European Union: The Development of the Third Pillar*, Brussels: European Interuniversity Press, 1995, pages 127-40.

[52] Brouwer, Evelien, "Immigration, Asylum and Terrorism: A Changing Dynamic Legal and Practical Developments in the EU in Response to the Terrorist Attacks of 11.09", *European Journal of Migration and Law* 4, 2003, 399-424; Guild, Elspeth, "International Terrorism and EU Immigration, Asylum and Borders Policy: The Unexpected Victims of 11 September 2001", *European Foreign Affairs Review* 8, 2003, pages 331-346.

immigration, asylum policy is the assumption that terrorists tend to come from outside and enter the country in question as third country nationals – as legal immigrants as in the case of some of the perpetrators of 9/11, as illegal immigrants or as asylum seekers. However, 9/11 was certainly a spur to work out EU level provisions, as regards Common Position on Combating Terrorism or the adoption of the Comprehensive Plan to Combat Illegal Immigration and Trafficking of Human Beings in the European Union. Yet, additional anti-terrorist measures were judged necessary, for example related to the expulsion, extradition and detention of potential terrorists.

Fourthly, the prospect of future EU enlargement in 2004 became an endogenous source of pressure for reforming EU decision-making procedures in these policy areas. It was the internal EU agenda and the way this was marketed within and outside the Union rather than demands from applicant countries which put the Union under pressure to reform its institutions and decision-making rules. Once enlargement became an internal goal, problems were created (or rather anticipated) in terms of decision-making and co-ordination among the Member States for policy areas rules by unanimity, such as asylum and immigration as well as part of visa policy. Unanimity was already regarded as problematic with 15 delegations by some. There was a fear that those areas which were still governed by unanimity would become substantially susceptible to decision-making deadlocks with 25 Member States and the corresponding diversification of interests and increased heterogeneity of political and legal cultures.

2.2 VISA POLICY

With the Maastricht Treaty, visa policy came into the Union framework, which attributed these policies to the sphere of intergovernmental co-operation within the third pillar of the Treaty on European Union. The legal instruments of third pillar are characterised by intergovernmental decision-making procedures required unanimity in the Council. In such conditions it was difficult for the Community to manage the common visa policy.

With the entering into force of the Amsterdam Treaty in May 1999, policies on visa became part of the Community framework. Article 62 EC provides that “the

Council, acting in accordance with the procedure referred to in Article 67, shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt:

1. Measures with a view to ensuring, in compliance with Article 14, the absence of any controls on persons, be they citizens of the Union or nationals of third countries, when crossing internal borders;

2. Measures setting out the conditions under which nationals of third countries shall have the freedom to travel within the territory of the Member States during a period of no more than three months."

The Amsterdam Treaty introduced part of Schengen regime into the European Union's legal framework.[53] Most EU Members have become part of the Schengen club before its incorporation within EU legal framework, except for the United Kingdom and Ireland, which together with Denmark, concluded special protocols giving them the possibility to remain outside particularly sensitive Schengen provisions. The policies in the Schengen acquis include the listing of third countries whose nationals are exempt from or must be in a possession of visas, external border controls and cooperation between the border control services, rules on free movement of persons, visa policy, extradition and readmission agreements, security standards for travel documents, anti-drugs policies, judicial cooperation in criminal matters, Schengen Information System (SIS), etc.

The main general principles of the Schengen system are threefold:

[53] Schengen acquis is composed of the Schengen Agreement of 1985 between Belgium, Luxembourg, the Netherlands, and Germany, France, on the gradual abolition of checks at their common borders and introduction of freedom of movement for all individuals who were nationals of the signatory Member States, other Member States or third countries; and of Schengen Convention of 1995 between the same States implementing agreement of 1985 which laid down among others common rules concerning immigration issues, visas, border controls, and police cooperation.

1. Creation of a common European territory without internal borders along with the establishment of common external border;[54]

2. Entry into the Schengen zone by crossing one of the common external borders constitutes admission into the whole Schengen territory;

3. Once admitted inside the common territory, a person is entitled to move freely within the whole Schengen area for a period of three months out of every six without any further checks at the internal borders of any of the participating states.[55]

The Protocol integrating the Schengen acquis into the EU therefore communitarised the section dealing with the Schengen borders *acquis* only by inserting it within the Community pillar. Those Schengen provisions dealing with police and judicial cooperation in criminal matters, customs cooperation remained however under Title VI of the third pillar,[56] with a result that any cooperation in these fields continued to be based on an intergovernmental method.

Provided by Article 62 EC the EU has adopted a set of Community legal instruments for managing a common visa policy in the European Union. The Union has drawn up a common list of 101 of the non-EU member countries whose nationals must be in possession of a visa when crossing the Member States' external frontiers, with a view to harmonizing Member States' visa policies.[57] In order to promote the free movement of persons in the European Union and for the harmonisation of national visa

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[54] Article 2 of the Schengen Convention and the Decision of the Schengen Executive Committee SCH/Com-ex (95)20, See Commission Communication, Towards integrated management of the external borders of the member states of the European Union, COM (2002) 233 final, Brussels, 7.5.2002.

[55]Decision of the Executive Committee on the definitive versions of the Common Manual and the Common Consular Instructions, SCH/Com-ex (99) 13 of 28.4.1999, OJ L 239, 22 September 2000.See also an updated version in OJ C 313, 16 December 2002.

[56] Article 29 TEU provides that "The Union's objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action…." on "closer cooperation between police forces, customs authorities and other competent authorities in the Member States…".

[57] Council Regulation (EC) No 574/1999 of 12 March 1999 determining the Non-EU Member Countries whose nationals must be in possession of visas when crossing the external borders of the Member States OJ L 72, 18.3.1999, page 2-5.

policies uniform format for visas was established.[58] Procedure for applying and issuing visas for members of the Olympic family taking part in the 2004 Olympic or Paralympic Games in Athens were simplified by the special measures.[59] Several transit simplified facilities for third country nationals were provided.[60] Council Decision 2004/512/EC of 8 June 2004 established the Visa Information System (VIS).[61] The Visa Information System (VIS) is based on a centralised architecture and consists of a central information system, the "Central Visa Information System" (CS-VIS), and an interface in each Member State, the "National Interface" (NI-VIS), which provides the connection to the relevant central national authority of the respective Member State, and the communication infrastructure between the Central Visa Information System and the National Interfaces. The purpose of the VIS is to improve the administration of the common visa policy, consular cooperation and consultation between the central consular authorities by:

1. Preventing threats to internal security in the Member States;

2. Preventing the bypassing of the criteria established by the Dublin II Regulation;

3. Facilitating the fight against documentary fraud;

4. Facilitating checks at external border checkpoints;

5. Assisting in the return of illegal immigrants.

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[58] Council Regulation (EC) No 1683/95 of 29 May 1995 laying down a uniform format for visas, OJ L 164, 14.7.1995, pages 1–4.

[59] Council Regulation (EC) No 1295/2003 of 15 July 2003 relating to measures envisaged to facilitate the procedures for applying for and issuing visas for members of the Olympic family taking part in the 2004 Olympic or Paralympic Games in Athens, OJ L 183, 22.7.2003, pages 1–5.

[60] Council Regulation (EC) No 693/2003 of 14 April 2003 establishing a specific Facilitated Transit Document (FTD), a Facilitated Rail Transit Document (FRTD) and amending the Common Consular Instructions and the Common Manual, OJ L 99, 17.4.2003, p. 8–14 ‚Joint action 96/197/JAI, of 4 March 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union on airport transit arrangements.

[61] Council Decision 2004/512/EC of 8 June 2004 established the Visa Information System,Official Journal L 213 of 15.06.2004.

Member States' authorities responsible for internal security, and Europol were granted the legal base authorizing them to get access to the Visa Information System in order to prevent and detect criminal offences, particularly terrorist offences, more effectively.[62]

Adoption of Title VI measures building upon the Schengen *acquis* however remained under intergovernmental method. The duality in location of Schengen law in the first and third pillars brought about an unfortunate lack of transparency and efficiency in these policies, involving different decision-making procedures, different legal instruments and different roles of the European Parliament and the ECJ, depending on the pillar framework. The Lisbon Treaty however by demolishing the pillar structure and generalizing all JHA matters under the heading of "Area of freedom security and justice" would put and end to this duality in Schengen *acquis* and would apply Community method to all Schengen policies.

2.3 ASYLUM

Asylum applications subject to special regimes though have increased in Europe at the time legal immigration of migrant workers from third countries into the EU Member States has been increasingly restricted. The peak of asylum applications was reached in 1992/1993, when 438.000 persons asked for asylum in Germany making approximately 70 per cent of all asylum seekers within the European Union. After 1993 the number of asylum applications declined from its peak and rose again in 1996's.[63] Only a small percentage of asylum seekers have been recognized as having asylum status under the Geneva Convention relating to the Status of Refugees.[64] European

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[62] Proposal for a Council Decision concerning access for consultation of the Visa Information System (VIS) by the authorities of Member States responsible for internal security and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences,COM(2005) 600 final.

[63] COM (2000) 755 final –towards a common asylum procedure and a uniform status ,valid throughout the Union, for persons granted asylum.

[64] In total 89,576 persons have been recognized between 1997 and 1999,of which 39% are in Germany ,16% in the United Kingdom ,15% in France and 11% in the Netherlands :see Commission Communication , COM (2000)755 final ,figure 3.

asylum policy as a result of the Maastricht Treaty third pillar became a matter of non-binding intergovernmental co-operation. By the Treaty of Amsterdam when the Justice and Home Affairs pillar of the EU was reformed, asylum with the other policies related to free movement of persons was transferred to the community method of decision-making under the first pillar and a number of Community legal instruments were adopted for managing asylum policy in the European Union.

One of the essential "pillars" of the Union's plans to create a European AFSJ is a formation of Common European Asylum Policy – with common procedures which provide a uniform legal status throughout the Union for those who are granted asylum. Tampere European Council in 1999 set up this ambitious objective to respond to the new millennium's internal and external security concerns.[65] The EU Heads of State and Government agreed at Tampere that "The European Council reaffirms the importance the Union and Member States attach to absolute respect of the right to seek asylum. It has agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention,[66] thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of non-refoulement."[67] Underlining a strong EU commitment to the common values of freedom based on human rights, democratic institutions and the rule of law, the Presidency of the European Council stressed that the European Union's common rights should be guaranteed to its own citizens but, at the same time, must "offer guarantees to those who seek protection in or access to the European Union". An open and secure European Union, therefore, has to be "fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments, and be able to respond to humanitarian needs on the basis of solidarity." It adopted a multi-annual programme defining the orientations, specific objectives and a timetable for implementing these

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[65] See Tampere Presidency Conclusions, op.cit supra note 2.

[66] 1951 Convention relating to the Status of Refugees, 28 July 1951, and its Protocol relating to the Status of Refugees, 4 October 1967, 606 U.N.T.S. 267.

[67] Tampere Conclusions op.cit supra note 2.

objectives for the period 1999-2004. Article 63 EC provided the Community with competencies and enabled it in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties, to enact standards within a period of five years relating to the following areas:

1. Minimum standards on asylum procedures;

2. Minimum standards on the reception of asylum seekers;

3. Minimum standards with respect to the qualification of third country nationals as refugees;

4. Criteria and mechanism for determining which Member State is responsible for considering an application for asylum;

5. Minimum standards for giving temporary protection to displaced persons;

6. Burden-sharing concerning the reception of refugees and displaced persons.

The EU has adopted a number of policy instruments dealing with asylum since Amsterdam.[68] The Amsterdam Treaty called for the four main legal asylum instruments: the Dublin II Regulation, the Reception Conditions Directive, the Asylum Procedures Directive, and the Directive on Qualification as a Refugee which laid the foundations

[68]Council Decision 2000/596/EC of 20 September 2000 establishing a European Refuge Fund (OJ L 252/12, 6.10.2000); Council regulation (EC) No.2000/2725 of 11 December 2000 concerning the establishment of 'EURODAC' (OJ L 316, 15.12.2000); Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a max influx of displaced persons and on measures promoting a balance of efforts between member states in receiving such persons and bearing the consequences thereof (OJ L 212/12, 7.8.2001); Council Regulation (EC) No. 2002/407 of 28 February 2002 concerning certain rules for the implementation of the EURODAC Regulation (OJ L 62/1, 5.3.2002); Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (OJ L 31/18, 6.2.2003) ;Council Regulation (EC) No 2003/343 of 18 February 2003 (the Dublin II Regulation)-establishing the criteria and mechanisms for determining member state responsible for examining an asylum application lodged in one of the member states (OJ L 50/1, 25.2.2003); Council Regulation (EC) No 2003/1560 of 2 September 2003 laying down rules for the application of the Dublin II Regulation (OJ L 222/3, 5.9.2003); Council Decision 2004/904/EC of 2 December 2004 establishing the Second European Refugee Fund for the period 2005-2010 (OJ L 381/52, 28.12.2004); Council Directive 2004/83/EC of 29 April on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection (OJ L 304/12,30.09.2004) ;Green Paper of 6 June 2007 on the future common European asylum system COM (2007) 301 Brussels.

for the development of a Common Asylum Policy, thereby creating a level playing field for asylum throughout the EU.[69]

The "Dublin II" Regulation of 2003 lays down rules governing which Member State should process the asylum claims of third country nationals, therefore restricts the possibility for multiple asylum claims to be made in different states of the Union in order to combat the practice of "asylum shopping". The Regulation entitled "Dublin II" effectively brings into the legal mechanism of the Union the Dublin Convention of 1990 the operation of which was not so effective. Frequently asylum seekers shall hide their travel route, previous residence or transit through another EU Member State. It was difficult to convince the other Member States that a particular applicant has previously entered another Member State irregularly by land, sea, air, having come from a third state in the absence of evidence on the identity and travel route of an asylum seeker. The new system under Dublin II relies on the successful operation of EURODAC system which allows identification of asylum seekers or persons illegally resident by comparison of fingerprints. Regulation replacing Dublin Convention has brought some changes by closing loopholes such as shortening delays for the processing of applications, fastening identification of the Member State responsible for examining the asylum application in case of illegal entry and getting rid of some bureaucratic requirements concerning the proof of another Member State's responsibility. If it is established that an asylum seeker has irregularly crossed the border and entered the Member State, that State will be responsible for examining the asylum claim for up to twelve month after the border crossing date. After twelve months, the responsibility for examining asylum claim will be incumbent on the Member State in which the asylum seeker has been previously living for at least five months. Articles 6-8 and 15 reflect the

[69] Council Directive 2003/9/EC of 27 January 2003 laying down the minimum standards for the reception of asylum seekers, OJ L 31/18 (06.02.03); Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326/13 (13.12.05); Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304 (30.09.04);Council Regulation (EC) 343/2003 of 18 February 2003 (Dublin II) establishes the criteria and mechanisms for determining the Member States responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 50/1 (25.02.2003).

principle of family unity making responsible the Member State to examine the asylum application of the person if his family member resides legally in that Member State. Regulation also includes the humanitarian clause in Article 16 through which even if a Member State is not responsible for examining the application, it may still do so for humanitarian reasons, in case the applicant gives his/her consent.

Reception Conditions Directive provides for the minimum requirements for the reception of asylum seekers, and should have the effect of improving reception conditions and strengthening the legal framework of reception practises in the Member States. The directive grants asylum seekers rights, such as information about any established benefits and of the obligations with which they must comply relating to the reception conditions within 15 days of applying to asylum seeker within three days of an application being lodged. However several studies indicated that the directive offers weaker protection than the standard of reception in many Member States.[70]

The Asylum Procedures Directive provides for common definitions, common requirements for inadmissible and manifestly unfounded cases including the "safe country" concept, time-limits for deciding in first instance and in appeal, a minimum level of procedural safeguards, minimum requirements for decisions and decision-making authorities, with a view to reducing disparities in member states' examination processes and avoiding "asylum shopping" for the most advantageous conditions for asylum seekers. Rodriguez criticises the "safe country of origin" principle and points out that such a procedure would put an unsafe asylum seeker from a third country deemed to be safe in danger if he/she is denied access to Member State.[71] The fear has been expressed about the broad use of "safe country of origin" that applicants coming

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[70] Preliminary assessment of the impact of the Directive on reception policies in individual Member States indicates that many of the Articles fall short of the current standard of reception in many Member States. Assessment done by ECRE, see :http://www.ecre.org .

[71] Maria de las Cuevas Rodriguez ,"Seeking asylum in the European Union: Is the spirit of Tampere present in new legislation" , page 4 retrievable at http://www.eumap.org/journal/features/2004/migration/pt2/asylum.

from countries deemed 'safe' might be denied the right to argue that their specific cases constitute an exception to a general "presumption of safety".[72]

The Directive on Qualification as a Refugee sets out a harmonised set of eligibility criteria for being granted either refugee or subsidiary protection status as in cases when people are seeking protection from civil war. It also clearly sets out the rights, benefits and obligations of each type of status. The Qualifications Directive entrenches and to a degree goes beyond the Geneva Convention standards already owed by all Member States to third country nationals who are eager to qualify for refugee status. It introduces standards for 'subsidiary protection' which guarantees to those in need of protection who, by virtue of falling outside the definition of a refugee, might otherwise not benefit from any such safeguards. It is suggested however that the relative generosity of the supplementary protection offered by Member States may continue to provide an incentive for "asylum-shopping."[73]

The "second phase" for the completion of a Common European Asylum system was set up by Hague Programme with an ambitious deadline of 2010.[74] It urges first the speedy implementation of measures under the first phase and then, based on a "thorough and complete evaluation" of these measures, the completion of the Common European Asylum System, comprising a system of uniform procedures for the reception of asylum seekers and uniform status throughout the Union for those granted asylum or subsidiary protection.

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[72] The 2007 Report of the Federal trust for education and research - Working Group consisting of Professor Jo Shaw, Dr Frank Gallagher, Dr Valsamis Mitsilegas, Professor Steve Peers, Professor Wyn Rees, "An area of freedom ,security and justice in Europe ? ", page 11.

[73] Ibid

[74] "The Hague Programme : Strengthening freedom, security and justice in the European Union" OJ C 53/1 (3.3.2005).

2.4 IMMIGRATION

Among the catalogue of measures of Tampere program to be taken within a five years period for developing of an AFSJ were measures aimed to establish a common immigration policy in the European Union. Measures on immigration policy are to be adopted by the Community according to Article 63 EC regarding:

1. Under Article 63(3) (a) EC conditions of entry and residence, and standards on procedures for the issue by Member States of long term visas and residence permits, including those for the purpose of family reunion;

2. Under Article 63(3) (b) EC illegal immigration and illegal residence, including repatriation of illegal residents;

3. Under Article 63(4) EC measures defining the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in other Member States;

In the field of regular and irregular (illegal) migration a number of policy measures and legal instruments have been adopted since Tampere.[75] Although some progress has been reached in areas where few would have expected it a decade ago, the level of policy

[75] Council Recommendation 2005/762/EC of 12 October 2005 to facilitate the admission of third-country nationals to carry out scientific research in the European Community. OJ L 289/26, 3.11.2005; Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service. OJ L 375, 23.12.2004 OJ L 375, 23.12.2004; Council Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states, amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/ EEC, OJ L 158/77, 30.4.2004 ; Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 16/44, 23.1.2004 ;Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification. OJ L 251/12, 3.10.2003; Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings. OJ L 203/1, 1.8.2002; Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities. OJ L 261/19, 6.8.2004; Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence. OJ L 328/17, 5.12.2002;Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, OJ L 328/1, 5.12.2002;Council Directive 2003/110/EC of 25 November 2003 on assistance in cases of transit for the purposes of removal by air, OJ L 321, 6.12.2003;Council Decision 2004/573/EC of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more member states, of third-country nationals who are the subjects of individual removal orders, OJ L 261/28, 6.8.2004.

convergence since Amsterdam has been rather low.[76] The Hague Programme has tried to put new life into the agenda and integration of immigrants became particularly important within the Hague Program. The Hague Programme places "immigration" (regular and irregular) under the heading of "Strengthening Freedom".[77]

The Union realises the objective of an area of freedom set by the Treaty of Amsterdam through communitarisation of visa, asylum and immigration policies. The adoption of the legal instruments having the same legal effect throughout the EU creates the legal area of freedom where people can move freely. The area of freedom can be described as completed successfully.

[76] The lack of progress has been shown by the latest European Commission's biannualreport or 'scoreboard' assessing the progress made until the first half of 2004 shows the low level of policy convergence achieved in the field of 'immigration'. European Commission (2004a), Communication, Area of Freedom, Security and Justice: Assessment of the Tampere Programme and Future Orientations, COM(2004) 4002 final, Brussels, 2.6.2004. See also, European Commission (2004), *The Area of Freedom, Security and Justice: Assessment of the Tampere programme and future orientations – List of the most important instruments adopted*, Commission Staff Working Paper, COM(2004) 401 final, Brussels, 2.6.2004.

[77] The programme highlights the need for the EU to develop 'a comprehensive approach, involving all the stages of migration, with respect to the root causes of migration, entry and admission policies and integration and return policies'. Based on that, the Commission Communication 2005/184 implementing the Hague Programme has identified as two of the ten strategic priorities for the next five years 'Migration Management: Defining a balanced approach' and 'A Common Asylum Area: Establish an Effective Harmonized Procedure in accordance with the Union's Values and Humanitarian Tradition', See Communication from the Commission, The Hague Programme: Ten Priorities for the Next Five Years – The Partnership for European Renewal in the Field of Freedom, Security and Justice, COM(2005) 184 final, Brussels, 10.5.2005.

3. THE AREA OF SECURITY IN THE EUROPEAN UNION

The establishment of the area of freedom by eliminating internal borders and other obstacles to the free movement of persons in the EU necessitated the establishment of the area of security. The chapter reviews the legal framework of the security area.

3.1 THE ESTABLISHMENT OF A SECURITY AREA IN THE AFSJ

As mentioned above, the Treaty of Amsterdam set up the aim of the progressive construction of the AFSJ by increasingly developing its Treaty-based objectives.[78] By the Treaty of Amsterdam, the European internal security regime entered a dynamic phase of transformation, marked primarily by the stronger role of EU institutions: incorporation of the Schengen *acquis* in the EU, "communitarisation" of immigration, visas and asylum policies and by a stronger political impulse to the development of the judiciary dimension of European cooperation in the field of law enforcement (European Judicial Network; Eurojust).

The integration of the Schengen regime into both Title IV TEC and Title VI TEU by the Amsterdam Treaty entailed the Schengen *acquis* becoming an essential element for the definition and the protection of the "area of freedom, security and justice". Therefore the Commission, the European Parliament and professional actors (prosecutors, judges, and senior police officers) have been brought closer to the centre of the JHA's political arena.

Schengen external borders created a single internal security zone which contributed to blur external and internal security identities as well as to disseminate threats, due to the fact that crossing of external borders therefore provided access to the rest of the EU territory as a whole. The emergence of an area of freedom as a fact has

[78] The objectives of the first pillar are stipulated in Art. 61 of the TEC and those pursued by the third pillar are presented in Art. 29 TEU.

fostered a common perception of internal security priorities and the intensification of technical and political cooperation in this area. The dreadful attacks of September 11 have led in the EU to efforts to jointly develop policies to enhance internal security. Catastrophic events in the USA provided a catalyst for the acceleration of the legislative process of creating security area which is clear if making an overview of legal and institutional measures that were adopted after the September 11, 2001. The EU has adopted a substantial amount of legislation aimed at promoting security-recognition of the importance of "security" in the EU's AFSJ which was created by the Treaty of Amsterdam. Member States met for an extraordinary European Council on September 21 with an agenda exclusively devoted to the EU response to security and the fight against terrorism after the terrorist attacks.[79] JHA Council on its October 19 meeting proposed an Action Plan which advocated for a comprehensive EU counter-terrorist strategy comprising a package of anti-terrorist measures in the areas of judicial and police cooperation, on the prevention of financing of terrorism, on improved border controls and measures to enhance cooperation with the United States.

In response to the September 11 terrorist attacks the Framework Decision on combating Terrorism was adopted.[80] It develops a common EU definition of terrorism,[81] a common list of organisations suspected of terrorism[82] (on which the European Parliament has not been consulted) and a common list of 32 serious trans-border crimes.

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[79] Conclusions of the Extraordinary Council meeting – Justice, Home Affairs and Civil Protection, Brussels, 20 September2001.Available at: http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=PRES/01/327|0|RAPID&lg=EN&dis play= .

[80] Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism. OJ L 164, 22.6.2002, pages 3–7.

[81] Terrorist acts were defined as intentional acts which may "seriously damage a country or an international organization … with the aim of (i) seriously intimidating a population, or (ii) unduly compelling a Government or an international organization to perform or abstain from performing any act, or (iii) seriously destabilizing or destroying the fundamental political, constitutional, economic, or social structures of a country or an international organization" Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism. http://europa.eu.int/eurlex/en/archive/2001/l_34420011228en.html .

[82] Included in the list are the Basque separatist group ETA, three Greek organizations, Palestinian Islamic Jihad, the violent wing of Hamas, several Irish groupings, and individuals with links to these groups.Notably absent on the list are groups such as the Irish Republican Army (which has recently decommissioned some of its weapons), Lebanon's Hezbollah, and the PKK (Kurdish Worker's Party).

Previously, only six Member States – Germany, Spain, France, Italy, Portugal and the UK – had specific anti-terrorist legislation with the definition of terrorism differing from country to country. Vitorino said by announcing the proposals, "Terrorists take advantage of differences in legal treatment between States, in particular where the offence is not treated as such by national law, and that is where we have to begin."[83] Hence, it establishes a minimum of 15 years penalties for directing a terrorist group and 8 years for participation in the activities of a terrorist group. This does not only represent a significant step forward in the fight against terrorism at the EU level, but also the harmonization of national penal laws for acts of terrorism since it ensures that they are punished by heavier sentences than common criminal offences in all EU Member States.[84] Human rights NGOs on the other hand criticised the very broad definition of terrorism. Indeed, the broadening of the concept of terrorism could have covered protests at international summits and the distinction between demonstrators and terrorist was not made clear enough.[85] A Council statement was consequently attached to the Framework Decision providing that it could not be construed so as to incriminate on terrorist ground persons exercising their right to demonstrate.[86]

In order to combat with finance of terrorism a Framework Decision on the Freezing of Assets of Person Suspected of Terrorism was adopted. [87] Similarly to the two latter Framework Decisions, this one had been on the shelf since November 2000 as

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[83] "The European Union steps up the fight against terrorism". EU background note 02/01, 21 September 2001. Available at: http://www.deljpn.ec.europa.eu/home/news_en_newsobj685.php .

[84] Monar Jörg, "Justice and Home Affairs", *Journal of Common Market Studies*, Annual Review, Vol.40, N°s1, 2002, page 130.

[85] Hayes Ben, "EU anti-terrorism action plan: legislative measures in justice and home affairs policy", Statewatch *post 11.9.01 Analyses N°6*. Available at: http://www.statewatch.org/news/2001/oct/analy6.pdf .

[86] JHA Council Conclusions of 6 and 7 December 2001 argue in favour of a balance between suppressing terrorist offences and guaranteeing fundamental rights in order to ensure that legitimate activities –such as trade union activities or the anti-globalist movements do not in any case fall under the application of the definition of terrorism. 14581/01 (Press 444-G) Brussels, 6 and 7 December 2001.

[87] Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence', *Official Journal of the European Union*, L196 (2 Aug. 2003), pages 45–55.

part of the mutual recognition programme and merely covering drug trafficking and money-laundering. The new version included terrorism activities and rendered the order to freeze assets from one Member State automatic in another one. Again, this Framework Decision relied on the central concept of mutual recognition. Finally, the EC money-laundering Directive of the December 4, 2001 amending Directive 91/308/EEC on the prevention of the use of financial system for the purpose of money laundering extended its scope, by making it possible not only to deal with drug trafficking but also with profits illegally obtained and coming from the benefit of exploiting terrorist activities.

3.2 EUROPEAN UNION AGENCIES PROVIDING SECURITY IN THE AFSJ

In an attempt to provide security in the AFSJ, the EU established agencies, groupings and ad hoc bodies which enjoy little or no external control and have confusing, obscure powers and functions. Among the areas in which "appropriate measures" (flanking measures) had to be taken in order to ensure internal security, explicit reference was made to external border controls. The management of the borders was defined within Title IV. In particular Article 62 of the Treaty provides that the following objectives should be achieved progressively within five years of the entry into force of the Treaty since 1 May 1999:

1) Removal of any controls on person who are citizens of the European Union or nationals of third countries when they cross the internal borders from any EU member state to another;

2) Establishment of rules concerning visas, as well as standards and methods for the control of persons crossing the external borders of the member states.

Establishment of the External Border Agency "Frontex", is one of the primary achievements so far in the EU Border management. It is an independent Community body set up in the light of the Hague Programme, which facilitates burden-sharing,

solidarity, a mutual trust in the management of external borders.[88] Frontex has been set up to improve integrated management at the Union's external borders. Although responsibility for the control and surveillance of external borders lies with the Member States, the Agency will facilitate the application of existing and future Community measures relating to the management of these borders. The proposal for the Regulation establishing the FRONTEX was made the year before where EU institutions declared that they conceive "of integrated border management" as the way towards convergence of national systems in order to ensure a high and uniform level of control of persons at an surveillance of the external borders as a precondition to develop the AFSJ.[89] Therefore EU conception of differentiated border management involving a high level of border control and a focus on targeted groups has created the Frontex Agency which operational activities contribute to the building –up of integrated border management.

The core of the creation of Frontex lies within the provisions of the EC Treaty, in particular Article 62 (2a) and Article 66 TEC. According to this legal basis, the Member States hold the responsibility for external border management, in particular *via* the implementation of joint operations or pilot projects. However, Frontex can coordinate the activities of the Member States, without prejudice to their competences, in order to improve operational cooperation between individual national administrations which are not able to sufficiently achieve a comprehensive and integrated European management of the operational cooperation in the fields of control of the external borders and removal of third country nationals from the territories of the Member States. Furthermore, Article 66 TEC states that Council Regulation No. 2007/2004 has to fulfil the objective of supporting the development of the AFSJ via the reinforcement of administrative cooperation between the national level and the European Commission

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[88] Council Regulation (EC) no 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, Brussels, OJ L 349,25 November 2004 ,pages 1-11.

[89] Proposal for a Council Regulation establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, Brussels, 20 November 2003, COM(2003) 687 final, page 1.

regarding the implementation of the Schengen *acquis* on border control and surveillance.

The Frontex's primary aim is to coordinate operational cooperation at the external borders of the Member States through 6 tasks. These are risk analysis (Article 4 of the Regulation), training border guards and national instructors (Article 5), follow-up to and dissemination of relevant research (Article 6), contributing to the "pooling" of technical equipment (Article 7), giving technical and operational assistance when needed (Article 8) and coordinating joint return operations (Article 9).

The Frontex regulation constitutes a development of the Schengen *acquis* which is the EU common policy on external border management. Consequently, the acceding countries will be bound by the regulation as they are required to comply with the full transposition of the *acquis* into their legal systems as it stands on the day of their accession. Furthermore, the Frontex regulation is subject to *à la carte* implementation according to the Protocols under Title IV TEC on the positions of the United Kingdom, Ireland and Denmark as well as on the participation of Norway and Iceland.

There is a need for a more democratic parliamentary control over Frontex activities. Article 10 of Council Regulation No. 2007/2004 provides that executive powers of its staff "acting on the territory of another member state shall be subject to the national law of that Member State". It means that Frontex's personnel will be allowed to exercise the powers conferred by the requesting member state according to its national law for operations taking place on its territory. On the other hand Article 18 of Council Regulation No. 2007/2004 grants the Agency's staff privileges and immunities of the European Communities. Mariani argues that such a regime would be hardly acceptable if some Member States invest the Agency's staff, which has privileges and immunities, with repressive powers affecting public order and individual freedoms.[90]

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[90] H.Jorry, "Construction of a European Institutional Model for Managing Operational Cooperation at the EU's External Borders: Is the FRONTEX Agency a decisive step forward?",challenge liberty and security research paper

The Agency was established as a regulatory agency fostering transparency in its actions, contrary to existing informal structures, and respecting rules related to transparency and communication.[91] Moreover, Select Committee on the European Union stated that "any EU body responsible for border controls should have a clear legal base and be subject to detailed accountability and data protection safeguards".[92] As a matter of fact the European Parliament is not associated with the follow-up of Frontex activities (risk analysis, research and development), except when it acts as Budgetary authority. Mariani suggests that the European Parliament should have a democratic and appropriate control over all documents related to the Agency's activities as its missions are closely linked to the exercise of public authority and fundamental freedoms.[93]

Europol was set up as a non-operational organisation under the 1995 Europol Convention.[94] The Europol was established by a third pillar instrument. It became fully operational only in July 1999 after the Convention came into force and it has its sit in Hague. Europol's original mandate was limited to providing support for criminal investigations. Under Arts 3 and 5 of the Europol Convention Europol's tasks include the exchange of information, analysis of intelligence, facilitating co-ordination of investigations, expansion of expertise and training. Europol's remit is wide[95] and extends to less serious crime. On the whole, Europol deals with "Euro-crimes", namely

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No 6,2007, page 21 referring to Thierry Mariani, Vers une police européenne des frontières? L'Agence européenne pour la gestion de la coopération opérationnelle aux frontières extérieures, Assemblée Nationale, Paris, Rapport d'information No 1477, 3 March 2004.

[91] Frontex Regulation, op.cit supra note 88, Article 28.

[92] Select Committee on the European Union, Proposals for a European Border Guard, London: The Stationary Office Limited, House of Lords, Session 2002-03, 29th report, 2003, page 24.

[93] H.Jorry, op.cit, supra note 90,reffering to Mariani, page 21.

[94] Council Act of 26 July 1995 drawing up the Convention on the establishment of a European Police Office (Europol Convention [1995] O.J. C316/29.

[95] Since January 1, 2002 Europol has been able to deal with all forms of crime listed in the annexe to the Europol Convention--Dec. of December 6, 2002 [2001] O.J. C362/1.

terrorism, money laundering, people trafficking, cyber-crime and financial fraud against the EU.

Europol has been limited to crime analysis, co-ordination and information exchange until now. It has no power to arrest suspects and to carry out investigations independently, nor may its officials carry weapons. It does have extensive powers to collect and store information on individuals on the other hand, raising serious questions as to the effectiveness of data protection. In the international context, collection of data can be particularly susceptible to error and abuse. Moreover, under the Convention, Europol officials have powers of data collection beyond those needed to combat crime.[96]

Since 9/11 events, a team of "counter terrorist specialists" was set up at Europol and its role has been augmented. The Council approved a series of co-operation agreements allowing third countries and agencies to exchange information with Europol with no human rights clauses however within them.[97] Europol has been described as operating with "minimal supervision of its implementation and a lack of independent scrutiny and management".[98] The issue of the democratic control of Europol was raised

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[96] Art.10 allows information to be collected on: (1) persons who might be called on to testify in investigations in connection with the offences under consideration or in subsequent criminal proceedings;(2) persons who have been the victims of one of the offences under consideration or with regard to whom certain facts give reason for believing that they could be the victims of such an offence; (3) contacts and associates; and (4) persons who can provide information on the criminal offences under consideration.

[97] e.g. in late 2002, an agreement was negotiated between Europol and the US concerning the exchange of personal data which has an extremely wide remit: Supplemental Agreement between Europol and the United States of America on the Exchange of Personal Data and Related Information (Docs 13689/02 Europol 82 and 13689/02 Europol ADD 1). This is one of a number of controversial agreements between the EU and the US. For example, on November 12, 2003, the EU Commission agreed that passenger data should be handed over by all airlines flying to the US to US customs and security (See Fritz Bolkestein, DN: SPEECH/03/613, December 16, 2003 for details). This agreement is considered illegal by the EU Art.29 Data Working Party for lack of data protection. However, there are a number of rules governing the transmission of data to non EU state and third parties, e.g. Council Act of November 3, 1998 laying down rules concerning the receipt of information by Europol from third parties ([1999] O.J. C26/3); Council Act of March 12, 1999 on the rules governing the transmission of personal data by Europol to third states and third bodies ([1999] O.J. C88/1). Also, Dir.95/46, EC Art.25 requires that transmission of personal data to a non-Member States be subject to compliance with special conditions, including an adequate level of protection in the country to which the data is sent. However, it is highly questionable whether such level of protection is provided in the US.

[98] Statewatch Press Release, February 7, 2002, The Activities and Development of Europol--Towards and unaccountable FBI in Europe.

in the Commission Communication.[99] The European Parliament control over Europol is very weak. Under Art.39 TEU the Parliament is required to be consulted only before conventions under Art.34 TEU are entered into. Control of Europol, tends to be indirectly through a Management Board (comprised of one representative from each Member State and the Commission with observer status) to national governments rather than through the more democratic national parliaments or the European Parliament. The Commission admitted in its recent Communication that "Parliamentary control over Europol be it at national or European level, takes a somewhat indirect form" and in addition to being indirect "the control is also 'fragmented' being shared between 15 national parliaments and the European Parliament".[100] The Commission's view seems to be that national parliaments have little control over national police and that controls on Europol should be no stronger. While national parliaments have the power to pass legislation concerning the powers and operations of the national police, the European Parliament may not do so regarding Europol, being excluded from having a real legislative role in third pillar matters.

The Protocol to the Europol Convention,[101] allows Member States to make declarations as to whether to accept the jurisdiction of the ECJ to give preliminary rulings on the interpretation of the Europol Convention. However, the Protocol grants no jurisdiction to the ECJ to determine disputes between the Member States and Europol. The European Parliament is not consulted and very often not even informed of the Europol treaties negotiated and agreed, such as those regarding exchange of information with third countries, nor is there a requirement for national parliamentary approval.

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[99] Democratic Control of Europol European Commission, COM (2002) 95 final.

[100] Ibid, at 11.

[101] The Protocol on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities of the Convention on the establishment of a European Police Office OJ C 42, 15.2.2002.

The ECJ has no ability to rule on the validity or interpretation of these treaties. In fact there seems to be no public body capable of overseeing their application. The Treaty of Lisbon however tries to remedy this situation by providing in Article 88 TFEU that "These regulations shall also lay down the procedures for scrutiny of Europol's activities by the European Parliament, together with national Parliaments."

The decision setting up Eurojust was adopted by the Council in early 2002, though the setting up of Eurojust was originally called for by the Tampere European Council in October 1999.[102] Eurojust is located in Hague along with Europol and functions as the EU's public prosecutions agency. Its purpose is to aid national judges and prosecutors to deal with cases with a cross-border dimension, working alongside the European judicial network.[103] Such cross-border co-operation serves exchange of information between Member State authorities investigating the same crime. Eurojust, however, has neither power to launch its own investigations or prosecutions, nor to prosecute a case in a court, these functions remain exclusively with the national authorities. Eurojust is an EU body with legal personality by the budget of the EC. Its composition and powers are set out in the Eurojust decision. The Eurojust team is composed of one "prosecutor, judge or police officer of equivalent competence" from each Member State. Eurojust's competences, according to Art.4, cover all crimes in which Europol is competent to act and certain others.[104]

Competent national authorities may also ask Eurojust to assist in other investigations and prosecutions. Eurojust may act either through one or more of its national members or it may act as a collegiate body.[105] A significant part of the Eurojust

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[102] Council Decision 2002/187 setting up Eurojust with a view to reinforcing the fight against serious crime.[2002] O.J. L63/1.

[103] Council Decision 2001/470/EC of 28 May 2001 establishing a European Judicial Network in civil and commercial matters, OJ L 174, 27.6.2001, pages 25–31.

[104] Eurojust's competences currently include: computer crime; fraud and corruption and any criminal offence affecting the European Communities' financial interest; the laundering of proceeds of crime; environmental crime; participation in a criminal organisation; other offences committed together with the offences referred to above.

[105] Eurojust Decision, op.cit supra note 102, Arts 5 and 6.

decision deals with the exchange of information between the Member States, processing of personal data and the maintenance of data files, as is the case with Europol.[106] Eurojust is also characterised by the lack of judicial scrutiny as in case with Europol. There is no mention of judicial oversight in the Eurojust Decision, with the exception of data protection. When Eurojust acts as a collegiate body, neither the ECJ nor the ECtHR has jurisdiction over it. The only accountability of Eurojust is provided for under Art 3.2 of the Decision according to which the agency shall provide the Council with a written report every year which is also to be forwarded to the European Parliament. However it does not have to produce an annual report to the public, like national agencies carrying out similar functions. According to Art.9, "Each Member State shall define the nature and extent of the judicial powers it grants its national member within its own territory". This leads to a confusion of powers and roles within Eurojust as these roles vary greatly from state to state. In some countries for example, police officers have equal competence to judicial officers. Prosecutors in some European countries have much wider investigative powers, including the granting and execution of search warrants. Some may have access to criminal records, others not. The different arrangements are likely to lead to incoherence. Article 27 of Eurojust Decision also provides for exchange of information with third countries. Third countries will not be bound by data protection legislation in the EU, so as with Europol, the conditions under which Eurojust exchanges information and co-operates with third countries will be crucial.

The Treaty of Lisbon will address some of these concerns. It provides in Article 85 TFEU that "the European Parliament and the Council, by means of regulations adopted in accordance with the ordinary legislative procedure, shall determine Eurojust's structure, operation, field of action and tasks" and also that “these regulations shall also determine arrangements for involving the European Parliament and national parliaments in the evaluation of Eurojust's activities." Douglas-Scott points out that the only parliamentary involvement is not enough and that there is a great need for

[106] Ibid, Articles 13-22.

parliamentary scrutiny of Eurojust.[107] Moreover, the Treaty of Lisbon amendments will provide judicial scrutiny of Eurojust acts by the ECJ as well acts of other EU agencies including those of Europol.[108]

3.3. SECURITY IS OVER FREEDOM AND JUSTICE IN THE AFSJ

There several negative concerns as regards security related measures adopted by the Union in face of terrorist threat. Douglas-Scott suggests that even a host of security measures adopted aftermath of September 11 events, the elements of the AFSJ other than security have been ignored.[109] Security concern in the European area after 9/11 disregarded the other elements of the AFSJ by the extending security tools beyond their original purpose.

Jonathan argues that the use of the Eurodac system has been largely extended since September 11.[110] The Eurodac was established to facilitate the effective application of the Dublin Convention, which only aims to check whether aliens have already applied for asylum in another Member State in order to prevent "asylum shopping" in the EU and to identify and prove the applicant's point of entry into the AFSJ.[111] Yet, one of the European Commission's immediate reactions to the U.S. administration's new anti-terrorist political agenda was to propose the "possible use of biometric data … for identifying those suspected of terrorist involvement at an early

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[107] Sionaidh Douglas-Scott,"The rule of law in the Euroepean Union-putting the security into the Area of freedom ,security and justice ",*European .Law Review* 29(2),2004, pages 219-242, page 13.

[108] According to Art 267 TFEU, The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.

[109] Douglas-Scott, op.cit supra note 107,page 14.

[110] AUS Jonathan P, "Supranational Governance in an area of freedom, security and justice: Eurodac and the Politics of Biometric Control", SEI Working Paper No 72.2003, p.32.

[111] Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention.

stage," a proposal based on the assumption that Europol, Eurodac and the SIS can also substantially assist in the identification of terrorist suspects.[112] There is a threat for infringement of fundamental rights in the use of the large Eurodac data base for other goals, especially since Europol has been given the right to unlimited access to the personal data stored in Eurodac. It is asserted that the EU increased the lack of transparency and democratic accountability within its decision-making process in developing a sound security area. During the process of building a genuine EU counter-terrorist policy, the lack of accountability of anti-terrorism measures before parliaments and the media at national level has beyond any doubt been replicated at EU level.[113] According to Bunyan, "scrutiny of new EU measures by national and the European Parliament is simply consultative and their views, when they are asked, are routinely ignored."[114] Most of anti–terrorist measures were adopted as third pillar legal instruments on the basis of intergovernmental decision making procedure the adoption of which requires unanimity and allows little involvement of the European Parliament. The lack of democratic accountability still remains. For instance, the action plan by the European Council of September 21 was not communicated to the European Parliament before it was adopted. Moreover there is very little judicial control over the Third Pillar security related measures which could directly affect individuals. The ECJ may give preliminary rulings only where the Member States have opted to let it do so under Art.35 TEU, and has no control at all in some cases, for example, over Europol, whose officers enjoy immunity for their actions. There is currently no possibility of a direct action for annulment brought by an individual as under Art.230 EC, as the ECJ is excluded from judicial review under the Third Pillar. Nor, in the majority of cases, do national courts provide a forum in order to fill this gap of court control.

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[112] Proposal for a Council Regulation on standards for security features and biometrics in EU citizens' passports, COM 2004/116 (18.02.2004).

[113] Den Boer Monica and Monar Jörg, "Keynote article: 11 September and the Challenge of Global Terrorism to the EU as a Global Security Actor", *Journal Of Common Market Studies*, Annual Review, Vol. 40,2002, page 19.

[114] Bunyan Tony,"The war on freedom and democracy" an analysis of the effects on civil liberties and democraticculture in the EU", Statewatch analysis N°13. p.6. Available at: http://www.statewatch.org/news/2002/sep/analy13.pdf.

The first program of the Tampere Programme as the first milestone aiming at achieving objectives, stated that "From its very beginning European integration has been firmly rooted in a shared commitment to freedom based on human rights, democratic institutions and the rule of law. These common values have proved necessary for securing peace and developing prosperity in the European Union. They will also serve as a cornerstone for the enlarging Union".[115]

Unlike the Tampere milestones, the Hague Programme - second multi-annual programme adopted by the Council concerning the AFSJ - started from the following ideological premise that "The security of the European Union and its Member States has acquired a new urgency, especially in the light of the terrorist attacks in the United States on 11 September 2001 and in Madrid on 11 March 2004".[116] The citizens of Europe rightly expect the European Union, while guaranteeing respect for fundamental freedoms and rights, to take a more effective, joint approach to cross-border problems such as illegal migration, trafficking in and smuggling of human beings, terrorism and organized crime, as well as the prevention thereof. "The programme seeks to respond to the challenge and the expectations of our citizens".[117] The general conceptual bases characterising the Hague Programme may therefore be summarised in the following manner.[118] First of all, it presents a blurring of the scope and division between measures dealing with freedom, security and justice. Secondly, it advocates an expansion, predominance and strengthening of the security dimension over the other two rationales. Finally, it provides a critical understanding of security according to which the security of the European Union and its Member States takes precedence over the liberties and security of the individual, and it is this last understanding that functions

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[115] Point 1 Tampere programme, op.cit supra note 2.

[116] Hague programme, op.cit supra note 3, page 3.

[117] Ibid,page 4

[118] See the UK Parliament, House of Lords European Union Committee, "The Hague Programme: A Five year Agenda for EU Justice and Home Affairs, Report with Evidence, 10th Report", HL Paper 84, Session 2004–05, House of Lords, London, 23 March 2005, pages 11–13 and page 34.

as the guiding value. As Bigo argued, the meanings and functionalities of the terms "freedom" and "justice", introduced within the Hague program, have been reconfigured as lower values compared with the priority of security (understood as coercion) and through use of a "balance metaphor" for freedom and security.[119] Guild, Carrera and Balzacq suggested that if looked at the way in which the Hague Programme understands "Strengthening Freedom"[120] allowing, for example, coercive practices of surveillance (biometrics and information systems), management and control (visa policy, return and readmission, border checks and the 'fight against illegal immigration') without taking into account their actual and potential impacts on liberty, fundamental rights and the rule of law it is clear that in practice, the balance has tilted in favour of security.[121]

The area of freedom necessitated the establishment of the area of security where individuals can move in safety. The Union realises the area of security through incorporation of the Schengen acquis. However most of the measures of the Schengen acquis aimed to provide security adopted on the basis of intergovernmental cooperation. 9/11 events accelerated the legislative process of establishing security area to a great extent. It is after these tragic events were a set of third pillar Union agencies with wide powers and no control over their action established. A number of third pillar legal instruments with their negative effects were adopted to manage security in the EU. Most security measures can be described as strict and disregarding freedom and justice aspects of the AFSJ. For the reasons mentioned above the realisation of the security area con not be characterised as successful and falls short of the objectives set in the Amsterdam.

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[119] Bigo, D. "Liberty, whose Liberty? The Hague Programme and the Conception of Freedom", in T. Balzacq and S. Carrera (eds), *Security versus Freedom? A Challenge for Europe's Future*, Aldershot: Ashgate Publishing, 2006 pages 35–44.

[120] See the Specific Orientations of The Hague Programme in point III.

[121] Elspeth Guild, S.Carrera and T.Balzacq, "The Changing Dynamics of Security in an Enlarged European Union", Challenge Paper N 12 , CEPS, Brussels,2004 page 8.

4. THE AREA OF JUSTICE IN THE EUROPEAN UNION

Common EU area of justice is an area where judicial decisions with a cross-border impact can move between Member States as freely as possible. It is provided through judicial cooperation in criminal and civil matters. The mutual recognition of judicial decisions both in civil and criminal matters has become the cornerstone of the developing European area of justice.

4.1 JUDICIAL COOPERATION IN CRIMINAL MATTERS

Cooperation between the Member States in criminal matters has been elevated into an objective of the EU in the Treaty of Amsterdam by Articles 2(4th) EU and Article 29 TEU. Under Article 29 EU this objective, referred as the European legal area, is to be achieved through "closer cooperation between police forces and judicial authorities and by approximation, where necessary, of the rules on criminal matters in the Member States". The Treaty set goals for the development of judicial cooperation in criminal matters.[122] While some policies falling within the AFSJ, with the entry into force of the Treaty of Amsterdam, were transferred into the EC competence under Title IV EC Treaty, the fields of police and judicial co-operation in criminal matters however remained under the intergovernmental forum of the TEU, within the EU third pillar framework.

Before, the Treaty of Amsterdam cooperation was based on the legislative instruments such as international conventions.[123] The Treaty of Amsterdam introduced

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[122] The goals are : 1) facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities of the Member States in relation to proceedings and the enforcement of decisions; 2) Facilitating extradition between Member States 3) Ensuring compatibility in rules applicable in the Member States, as may be necessary to improve such cooperation ; 4) Preventing conflicts of jurisdiction between Member States 5) Progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and penalties in the fields of organised crime terrorism and illicit drug trafficking. See 'The Amsterdam Treaty :freedom, security and justice' retrievable at http://europa.eu/scadplus/leg/en/lvb/a11000.htm.

[123] An example is Convention on the protection of the European Communities's Financial İnterests, Brussels ,26 July ,OJ 1995 C316/48.

two new instruments: framework decisions and decisions. The field of judicial co-operation is characterised by difficult harmonization and policy convergence. The current location of judicial co-operation in criminal matters in the third pillar made cooperation cumbersome. Moreover there is the high level of mistrust existing between the member states' judicial authorities and each other's regimes. The fact that judicial cooperation in criminal matters resides in the third pillar leads to a limited role for the EU, a lack of transparency and efficiency, a high degree of legal complexity, the exclusion of the European Parliament from the decision-making process and a limited jurisdiction of the ECJ over these fields.[124] Arap and Carrera interpret the condition put by Art 35(7) EU on the jurisdiction of the ECJ to rule dispute between Member States regarding the interpretation or the application of acts adopted under Article 34(2) EU as a limitation of its jurisdiction. They claim that the peaceful settlement will be reached behind the closed doors of the Council and the case will not reach the ECJ.[125] Moreover legal instruments adopted in the judicial cooperation in criminal matters, which are third pillar legal instruments have several negative impacts on the area of justice as mentioned above. A major obstacle for harmonisation and policy convergence in the field of mutual recognition in the EU dimension of 'Justice' is a wide diversity in each of the national legal and judicial systems. The existence of conceptual and juridical inconsistencies and divergences between each of the national legal systems has led to difficulties that the Union has encountered in fostering common action. Some Member States' authorities seem not to fully trust each other and have little understanding of each other's legal and judicial systems. The situation worsened with the EU enlargement process. The Hague Programme acknowledges it by stating that

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[124] See Opinion of the European Economic and Social Committee, Commission Communication, The Hague Programme: Ten Priorities for the Next Five Years – The Partnership for European Renewal in the field of Freedom, Security and Justice, COM(2005) 184 final, SOC/209, Brussels, 15 December 2005, point 4.3.5.

[125] J.Arap and S.Carrera, "European arrest warrant: A good testing ground for mutual recognition in the Enlarged European Union", CFSP paper No 46,retrievale at http://www.ceps.be page 15; Paragraph 7 of Article 35 EU puts a condition to ECJ jurisdiction "whenever such dispute cannot be settled by the Council within six months of its being referred to the Council by one of its members", the Court of Justice shall have jurisdiction to rule on any dispute between Member States regarding the interpretation or the application of acts adopted under Article 34(2).

"strengthening mutual confidence requires an explicit effort to improve mutual understanding among judicial authorities and different legal systems". [126]

Judicial control over executive action in the AFSJ is critical to the protection of civil liberties and fundamental rights, as well as the rule of law. The ECJ has a great role in the in the development of the area of justice.[127]

Actually, the status of the ECJ in judicial co-operation in criminal matters has experienced a huge constitutional transformation in the relationship between the first and the third pillars and the area of criminal justice. The Court affected heavily the criminal field, which was generally perceived to be the domain of Member States or their cooperation within the third pillar. It is seen from *Commission v. Council and Ship source pollution* cases.[128] In the former case the Commission brought an action asserting that the Council had encroached upon its competences under the TEC by adopting framework decision on the protection of environment through criminal law under the third pillar. The ECJ took the same view and annulled the challenged framework decision on grounds that it indeed encroached on the powers which Article 175 of the TEC in the area of environment confers on the Community.[129] The ECJ started its reasoning by stressing that Article 47 of the TEU provides that nothing in the TEU is to affect TEC.[130] Then the ECJ examined both the aim and content of the challenged framework decision and realized that indeed the main purpose of the adopted measure was the protection of the environment. As regards implied competence to criminal regulation within this field, the ECJ firstly stated that as a general rule, "neither criminal law nor the rules of criminal procedure fall within the Community's

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[126] European Council, The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, 2005/C53/01, OJ C53/1, 3.3.2005.point 3.2.

[127] Ibid, The Hague Programme, underlines the importance of the role of European Court of Justice in the development of the AFSJ in the section 'Strengthening Justice'.

[128] Case C-176/03, *Commission v. Council* of 13 September 2005 ECR; C-440/05,*Ship source pollution* 23. 10. 2007.

[129] Ibid, *Commission v. Council*, paragraph 53.

[130] Ibid, *Commission v. Council,* paragraph 38.

competence".[131] However, the ECJ did not stop here, but went further on to hold that the Community legislature is not prevented to adopt measures which relate to the criminal law of the member states: which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective; and where the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious offences.[132]

In the *Ship source pollution* the answer of the ECJ to the question, whether the criminal competence under the first pillar should be derived from the necessity to ensure the effectiveness of the crucial Community policies, as the Advocate General Mazák suggested in his opinion [133], or is limited solely to the environmental policy, is somehow ambiguous. The ECJ confirmed that the challenged measure could have been validly adopted under the first pillar within the specific competence under the transport policy; however the ECJ emphasized the link with environmental protection in this case as well.[134] The Court further stated that under the first pillar the Community does not possess the power to impose the type and level of criminal penalties.[135] It should therefore limit itself to imposing effective, proportionate and dissuasive criminal penalties and leave it up to the Member states to specify them in their respective criminal systems.[136] The case law shows how the third pillar of the Union started to be progressively rebuilt by the ECJ before Lisbon Treaty.

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[131] Ibid, *Commission v. Council,* paragraph 47.

[132] Ibid, *Commission v. Council,* paragraph 48.

[133] Opinion of the Advocate General Mazák in *Ship source pollution,* op.cit supra note 125, paragraphs 88 – 102, especially 99.

[134] *Ship source pollution*, op.cit supra note 125, paragraphs 66, 67,69.

[135] Ibid, paragraph 70.

[136] Opinion of the Advocate General Mazák, op.cit supra note 130, paragraphs 106, 107, 108 and further.

Since Amsterdam a host of instruments were adopted for managing cooperation in judicial matters in the EU.[137] One of the EU main developments in the field of judicial cooperation in criminal maters is the adoption of EAW, of the legal instrument implementing the principle of mutual recognition of decisions in criminal maters.[138] It is a cornerstone for the establishment of a single EU legal and judicial area of extradition which offers innovative features to simplify and to speed up procedures by preventing suspected criminals from evading justice. Article 1 of the Framework Decision introduces a definition of the EAW stating that it is a "judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order." It was adopted in the afterwards of September 11 events when at its extraordinary meeting the European Council stated that the terrorism is a real challenge to the world and to Europe, and that the fight against terrorism will be priority objective of the European Union.[139] Therefore a "high level of security", fundamental goal enshrined in the EU third pillar, one of the major components of the AFSJ, acquired a prominent role in political discourse. While even before the events of 11 September 2001 co-operation on criminal justice was already growing rapidly, these events provided the perfect justification to adopt 'as a matter of urgency' and as fast as possible security tools such as EAW.[140] The first reference to a

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[137] Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (OJ 2001 L82/1); Council Framework Decision of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment (OJ 2001 L 149/1); Council Framework Decision of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime (OJ 2001 L182 /1); Council Framework Decision of 6 December 2001 amending Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro (OJ 2001 L 329/3); Council Framework Decision of 13 June 2002 on combating terrorism (OJ 2002 L164/3); Council Framework Decision of 13 June 2002 on joint investigations teams (OJ 2002 L162/1); Council Framework Decision of 19 July 2002 on combating trafficking in human beings (OJ 2002 L203/1).

[138] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, Official Journal L 190, 18.07.2002.

[139] Conclusions of the Extraordinary Council meeting – Justice, Home Affairs and Civil Protection, Brussels, 20 September2001.Available at: http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=PRES/01/327|0|RAPID&lg=EN&dis play= .

[140] M.Jimeno Bulnes ,"After September 11th :The fight against terrorism in National and European law. Substantive and Procedural rules: Some examples", European Law Journal, Vol 10,No 2,March 2004,pages 235-53.

mandate for the developing an improved extradition procedure that would force suspected individuals to face justice was made in Tamper European Council Conclusions. According to point 35 of the Council Conclusions, the objective that "The formal extradition procedure should be abolished among the Member States as far as persons are concerned ….and replaced by a simple transfer of such persons, in compliance with Article 6 TEU".[141] From July 2004, EAW fully replaced the traditional EU legal instruments on extradition procedures.[142] EAW summarised 32 concrete EU offences or "Euro crimes" which have been politically agreed.[143] Some scholars raised concerns about legal loopholes in the EAW for its effective functioning, suggesting that it is too premature and over-optimistic as a legal instrument, and in terms of its practical operability, it may be 'trying to run before it can walk'.[144] Peers is against of the abolition of the principle of double criminality and the ban on extradition of nationals. For him the abolition of the dual criminality rule runs a risk of challenges to the legitimacy of the EU's criminal law measures in the national courts and in public opinion. Peers argues that "alternative approach acknowledging the differences of the criminal law legal systems should be preferred".[145]

Concerns arose as regards the respect for human rights by the new legal instrument. Article 1.3 of the EAW and recital 12 of the Framework Decision makes a direct reference to the obligation to respect fundamental rights and principles. Article

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[141] See Point 35 of the Tampere European Council Presidency Conclusions, op.cit supra note 2 .

[142] The EAW replaced the following legal instrumenets:The European Convention on Extradition of 13 December 1957; The European Convention on the Suppression of Terrorism as regards extradition of 1978;The Agreement on simplifying the transmission of extradition requests of 26 May 1989; The Council Act of 10 March 1995, adopted on the basis of Art. K.3 of the TEU, drawing up the Convention on a simplified extradition procedure between the member states of the European Union;The Council Act of 27 September 1996, adopted on the basis of Art. K.3 of the TEU, drawing up the Convention relating to Extradition between the member states of the European Union and all the relevant provisions set out in the Schengen agreement.

[143] Art 2.2 of the Framework Decision on the EAW.

[144] T.Balzacq and S.Carrera, "Security versus freedom? A challenge for Europe's future". CEPS, Ashgate September 2006,at page 26 referring to S.Alegre and M.Leaf, "European Arrest Warrant: A solution ahead of its time ?",Justice, London, November 2003.

[145] S.Peers, "Mutual recognition and criminal law in the Euroepan Union:Has the Council got it wrong ?" CMLrev 41,2004, pages 5-36.

1.3 states that "This Framework decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on the European Union". Arap and Carrera are of the opinion that the precise international and EU human rights obligations should have been included into the EAW wording instead of just a positive reference to Article 6 of the EU, which is not enough to fully guarantee the protection of the suspected person's rights for them. They suggest the adoption by the Council of a framework on minimum human rights standards for suspects and defendants in criminal proceedings and also inclusion to the list of grounds for mandatory refusal to execute EAW, the cases set forth in Article 3 of the ECHR.[146] I do not agree with them that reference to Article 6 EU in the Framework Decision is insufficient for the protection of suspected persons' rights as the ECJ referred in its several cases to Article 6 EU also in case of EAW that "The institutions are subject to review of the conformity of their acts with the Treaties and the general principles of law, just like the Member States when they implement the law of the Union".[147] For the protection of fundamental rights of the individual by due access to justice, the European Commission presented a Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings around the European Union 2004/328.[148] The initiative generally aims at laying down rules concerning procedural rights applying in all proceedings taking place within the European Union aiming to establish the guilt or innocence of a person suspected of having committed a criminal offence or to decide on the outcome following a guilty plea in respect of a criminal charge. Balzacq and Carrera are not very optimistic about the future of this legislative proposal.[149] The Proposal was debated at Justice and Home

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[146] J.Arap and S.Carrera, European arrest warrant, op.cit supra note 122, page 13; Article 3 of the ECHR stipulates that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".

[147] C-303/05, ECR 2007 Page I-03633, pargraph 45 , See also Case C-354/04 *P Gestoras Pro Amnistía and Others v Council* [2007] ECR I-0000, paragraph 51 and Case C-355/04 *P Segi and Others v Council* [2007] ECR I-0000, paragraph 51.

[148] Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, COM(2004) 328, 2004/0113 (CNS),Brussels,28.04.2004.

[149] T.Balzacq and S.Carrera, "The Hague Programme: The long road to freedom, security and justice in Security versus freedom? A challenge for Europe's future". CEPS, Ashgate September 2006.

Affairs Meeting at Luxembourg, 19-20 April 2007, but no agreement on the Framework Decision has been reached till now.[150]

As mentioned above the implementation phase of the EAW which has been evaluated by the European Commission has shown the lack of confidence about the Member States intentions and their respective judicial and legal systems.[151] Germany and Poland challenged EAW before their Constitutional Courts questioning its compatibility with their constitutional legal settings.[152]

4.2 COOPERATION IN CIVIL MATTERS

Judicial cooperation in civil matters has become part and parcel of the new European area of justice. Creation of this area is meant to simplify the existing legal environment and to reinforce citizens' feeling of being part of a common entity. Furthermore cooperation in civil matters concerns strong cooperation between the courts of different Member States. Judicial cooperation in civil matters has two meanings: On the one hand it refers to the adoption and implementation of rules allowing joint handling by the authorities of the countries concerned of individual cases involving an international dimension; on the other hand it refers to cooperation in the strict sense, the mutual recognition of judicial decisions and approximation of national laws.

The Treaty of Amsterdam represents a landmark in the process of developing judicial cooperation in civil matters, by bringing such cooperation into the Community sphere, the three agreements were thus replaced by Regulations. Within the five years after the entry into force of the Treaty of Amsterdam, cooperation in civil matters was not subject to the Community decision-making procedure. The Commission did not

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[150] 2794th European Council Meeting ,Justice and Home Affairs ,Luxembourg, 19-20 April 2007 PRESS RELEASE 8364/07 (Presse 77).

[151] Report from the Commission, op.cit supra note 21.

[152] See German Federal Constitutional Court decision and Polish Constitutional Tribunal decision, op.cit supra note 22.

have a monopoly on right of initiative, the Council almost always took decisions in this area unanimously, and Parliament only had a consultative role. The Treaty of Nice (2003) however improved the decision-making process in the adoption of measures relating to judicial cooperation in civil matters by extending co-decision under Article 251 EC to all judicial cooperation in civil matters with the exception of measures related to family law, in terms of which the Council acts unanimously and the European Parliament is simply consulted. Therefore it became subject to the procedure enshrined in Article 251 of the EC Treaty, in co-decision with the European Parliament, with the Council acting by a qualified majority. It made it possible the adoption of Community legal instruments in the field of judicial cooperation in civil matters which characterised by more transparent and democratic decision-making procedure in comparison to third pillar legal instruments which require unanimity in the Council and do not involve the European Parliament in decision-making process.

Under intergovernmental sphere the main legal instruments in the area of judicial cooperation in civil matters were conventions. Conventions require ratification by all the EU Member States in order to guarantee uniform legal value and meaning in every member state leading therefore to unity in the whole EU area. Moreover the individuals could challenge conventions indirectly through national courts before the ECJ in case only if that state accepted the jurisdiction of the Court.

With the aim of gradually building of judicial area, the Tampere European Council Conclusions states in this respect that "in a genuine European Area of Justice individuals and businesses should not be prevented or discouraged from exercising their rights by the incompatibility or complexity of legal or administrative systems in the Member States."

The Hague Programme stresses the need to make cross-border civil law procedures easier by developing judicial cooperation in civil matters and mutual

recognition. Continuing to implement mutual recognition measures is an essential priority.[153]

For the development of judicial cooperation in civil matters the Treaty set particular goals.[154] The EU's action in the area of judicial cooperation in civil matters consists primarily of adopting legally binding measures. Adopted Community instruments such as regulations, directives and decisions aim to simplify and to abolish obstacles to justice existing between the Member States in terms of recognition and enforcement of decisions issued by the courts of the Member States. Access to justice in cross border cases has also been improved by the adoption of Community instruments.

The key legal instrument adopted is the Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters,[155] which replaced the Brussels Convention of 27 September 1968 on jurisdiction, recognition and the enforcement of judgments in civil and commercial matters and laid down provisions concerning general jurisdiction and special jurisdiction in matters relating to insurance, consumer contracts, individual contracts of employment and some exclusive jurisdictions. It also contains rules on prorogation, examination, admissibility and enforcement of judgments, authentic instruments and court settlements. The instrument determines which court has jurisdiction in a cross-border case, obliges the Member States to fundamentally recognise a ruling from another Member State and regulates the procedure for declaring a ruling executable. Regarding judgments in matrimonial matters and the matters of parental responsibility the Council adopted Regulation (EC)

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[153] The Hague Programme, opt.cit supra note 3.

[154] The goals are the following: assisting other Member States in understanding judicial and extra-judicial acts adopted in a particular Member States ; improving and simplifying cooperation in the taking of evidence and the recognition and enforcement of decisions in civil and commercial cases, including decisions in extra-judicial cases; Promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction; eliminating obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States ,See The Amsterdam Treaty: 'freedom, security and justice', retrievable at: http://europa.eu/scadplus/leg/en/lvb/a11000.htm .

[155] Council Regulation (EC) 44/2001, of 22 December 2000, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJEU L 012 of 16.1.2001, page 1.

2201/2003.[156] Moreover a number of Community legal instruments were adopted which would facilitate the creation of single judicial space in the European Union.[157]

Police and judicial cooperation in criminal matters and cooperation in civil matters which aim to form an area of justice remained within different pillars of the EU. Communitarisation of the cooperation in civil matters contributes to the formation of the common area of civil justice in the EU. Nevertheless police and judicial cooperation in criminal matters are still within the intergovernmental cooperation and the negative impacts of the third pillar legal instruments remain. For the reasons mentioned above the realisation of the area of justice is not successful and falls short of the Treaty objectives.

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[156] Council Regulation (EC) 2201/2003, of 27 November 2003, concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) 1347/2000. OJEU L 338 of 23.12.2003, p. 1.

[157] Council Directive 2003/8 of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes OJEU L 026 of 31.1.2003, p. 41; Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims,OJEU L 143 of 30.4.2004, p. 15; Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters OJEU L 160 of 30.6.2000, p. 37; Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings; Council regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters; Council Decision of 28 May 2001 establishing a European Judicial Network in civil and commercial matters; Council Regulation (EC) No 743/2002 of 25 April 2002 establishing a general Community framework of activities to facilitate the implementation of judicial cooperation in civil matters.

5. JUDICIAL PROTECTION OF INDIVIDUALS IN THE AREA OF FREEDOM, SECURITY AND JUSTICE

While individuals travel in the secure area of freedom within the single judicial space it is important that they are judicially protected from AFSJ measures breaching their rights. This chapter goes on by analysing the level of judicial protection of individuals in the AFSJ after Amsterdam focusing on two judicial remedies. The second section evaluates the Lisbon treaty reforms relating to the system of judicial protection of individuals in the AFSJ.

5.1 JUDICIAL PROTECTION OF INDIVIDUALS IN THE AREA OF FREEDOM, SECURITY AND JUSTICE UNDER THE AMSTERDAM TREATY FRAMEWORK

The Treaty of Amsterdam gives the Court of Justice a larger role to play in the areas of Justice and Home affairs. Previously the Court of Justice had no powers and could not review the measures adopted by the Council in the area of Justice and Home affairs. Only in the case of Conventions did the Court have the right to interpret their provisions and rule on any dispute over their implementation - and even this only applied if they contained a special clause to that effect. In the new Title IV, which deals with free movement of persons, asylum, immigration and judicial cooperation in civil matters, the Court of Justice now has jurisdiction in the following circumstances: If a national court of final appeal requires a decision by the Court of Justice in order to be able to give its judgment, it may ask the Court to rule on a question concerning the interpretation of the title or on the validity and interpretation of acts by the Community institutions that are based on it. Similarly, the Council, the Commission, or a Member State can ask the Court to rule on a question regarding the interpretation of the new title or of acts adopted on the basis of it. The Court of Justice does not, however, have the

right to rule on measures or decisions taken to abolish all checks on individuals (both EU citizens and non-EU nationals) when they cross the internal borders.[158]

Under the Amsterdam Treaty the jurisdiction of the ECJ to review the legal instruments dealing with judicial and police co-operation in criminal matters is limited. Member States can make a declaration recognizing the jurisdiction of the ECJ to give preliminary ruling on the validity and interpretation of framework decisions and decisions, on the interpretation of conventions and on the validity and interpretation of their implementing measures.[159] Depending on the Member States' choice, either the national court of final appeal or any court in the country may then ask the Court of Justice for a ruling on any question regarding the interpretation or validity of one of the above acts, if it considers such a ruling necessary to enable it to give a judgment. The Court has no jurisdiction however to review the validity and proportionality of operations conducted by the police or other law enforcement agencies of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and safeguarding of internal security.

5.2 JUDICIAL PROTECTION OF INDIVIDUALS AGAINST THE FIRST PILLAR MEASURES OF THE AFSJ

This section examines the preliminary ruling procedure in Title IV measures of the AFSJ provided by Article 68 EC. The jurisdiction of the ECJ differs here from other policies of the first pillar.

5.2.1 Preliminary ruling procedure

Firstly, the situation with judicial protection of individuals in the AFSJ against Title IV measures which include visas, asylum, immigration and judicial cooperation in

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[158] Artcile 68 EC.

[159] Art 35.2. TEU, ' 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 1.

civil matters is examined. It must be emphasised that the lack of effective legal protection of individuals exists in the part of the Community legal system called "visas, asylum, immigration and judicial cooperation in civil matters, contained in Title IV EC which belongs to the broader "Area of Freedom, Security and Justice". The subject matter regulated by these provisions are of great importance and politically sensitive in the Union. A major criticism of the Maastricht Treaty in regard of the policies under the JHA Pillar led to the establishment of the institutional provisions and legal controls different from intergovernmental processes. After that, parts of JHA were incorporated into EC Title IV, the general aim of which according to Article 61 EC is the creation of an AFSJ. Normal Community legal regime applied to these policy areas subject however to the more limited nature of the preliminary ruling mechanism. The preliminary ruling jurisdiction over Title IV was limited to national courts from which there is no judicial remedy and it had no jurisdiction over certain free movement measures concerning law, order and internal security. [160] The Commission once proposed that the preliminary ruling jurisdiction under Article 68 EC should be brought into line with the general regime under Article 234,[161] but its proposal has not been acted on. Article 234 EC providing for the preliminary ruling procedure is a twofold restrictive as regards AFSJ matters.[162] In the Title IV matters (Article 68(1) EC), preliminary questions are only open to jurisdictions of courts "against whose decisions there is no judicial remedy under national law", but not to all courts.[163] Therefore according to Article 68 EC only the last paragraph of Article 234 applies to Title IV, where the second paragraph giving preliminary ruling request jurisdiction to all courts

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[160] See Article 68 EC.

[161] Adaptation of the provisions of Title IV establishing a European Community relating to the jurisdiction of the Court of Justice with a view to ensuring more effective judicial protection, COM(2006)346.

[162] Under this article the European Court of Justice is given jurisdiction to give preliminary rulings concerning a)The interpretation of EC Treaty;(b) the validity and interpretation of acts of the institutions of the Community and of the ECB; (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

[163] For a very critique of this Treaty provision see the Commission communication COM (2006) 346 final, of June 28th 2006, where it proposes that Article 234 EC should also become plainly applicable in the field of asylum, immigration and visas.

does not apply. The second paragraph of Article 68 states that in any event, the Court of Justice shall not have jurisdiction to rule on any measure or decision taken pursuant to Article 62(1) relating to the maintenance of law and order and the safeguarding of internal security. The limitations on Article 234 references have been criticised by commentators.[164] The relegation of immigrants, asylum-seekers and refugees to an inferior level of judicial protection inside the EC Treaty is not acceptable.[165]

The Member States were uncertain about changing the limitations in the jurisdiction of the ECJ and the restricted possibilities for references of preliminary rulings, since it could impact on their ability to process asylum applications. If any court or tribunal could request a ruling then this might mean that a large number of cases concerning asylum applicants in the same position could effectively be "frozen" pending the outcome of the ECJ's ruling, thereby rendering the attainment of "national targets" for setting asylum applications more difficult.[166] Eeckhout supports this kind of suggestion by stating that "limitation to highest courts is inspired by the concern for the potentially high number of cases at national level involving a point of Community law under Title IV and the concomitant concern to avoid a flood of cases in Luxemburg".[167] There is another type of concern inspiring this limitation, especially regarding the matters coming under title IV, asylum and immigration, an issue of expediency: Member State governments are seeking a swift resolution of such disputes and

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[164] Paul Craig & Gráinne De Burca, *EU Law: Text, Cases, and Materials*, Oxford, Oxford University Press 2007, at page 255, referring to Steve Peers, *EU Justice and Home Affairs Law, Oxford*, Oxford University Press 2006 and Cathryn Costello, "Administrative Governance and the Europeanisation of Asylum and Immigration Policy" in Herwig Hoffmann & Alexander Türk, *EU Administrative Governance*, Cheltenham, Edward Elgar, 2006.

[165] For an examination of the evolving role of the Court in the fields of immigration and asylum and its implications for individual immigrants and asylum seekers in the Union, see E. Guild and S. Peers, "Deference or Defiance? The Court of Justice's Jurisdiction over Immigration and Asylum", in E. Guild and C. Harlow (eds), *Implementing Amsterdam: Immigration and Asylum Rights in EC Law*, Oxford: Hart Publishing, 2001.

[166] P.Craig & De Burca op.cit supra note 164 at page 255, extending their gratitude to Cathryn Costello for this point.

[167] Piet Eeckhout, "The European Court of Justice and the area of freedom, security and justice: Challenges and problems" in David o'Keeffe & Antonio Bavasso (eds.), *Judicial review in European Union law: essays in honour of Lord Slynn*, The Hague, Kluwer Law International 2000 ,page 155.

references to the ECJ could be used as a delaying tactic.[168] Ward criticized the ECJ's restrictive role and held that it imposed intolerable impediments on access to judicial review, precisely given that only courts against whose decisions there is no judicial remedy are entitled to refer questions and that this is even precluded is some cases.[169] Claes on his side said that "It is deplorable … that the possibility of sending references to the Court of Justice should be restricted in exactly the area where the need for judicial protection and concern for fundamental rights seem greater than in any other area of Community law: Title IV is after all the area of the Schengen *acquis* and of the evolving common immigration policy".[170]

5.2.3 Action for annulment

Whether there is a judicial remedy for individuals to challenge directly Title IV measures of the AFSJ is to be examined. Article 230 EC provides annulment actions against allegedly illegal EC measures and gives individuals "locus standi". The paragraph of the Article regarding individuals reads as follows: "Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former."

Therefore an individual applicant (called non-privileged) may only bring proceedings against three types of acts:

1) A decision addressed to him

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[168] Ibid, referring to the reported words of Mr.Straw,Home Secretary. In the Financial Times of 6 October 1999("Any attempt to give the Court wide powers could undermine the Home Office 's resolution of 80.000 outstanding asylum applications").

[169] Angela Ward, "Access to Justice", in Steve Peers & Angela Ward (eds.), *The European Union Charter of Fundamental Rights*, Oxford and Portland Oregon, Hart Publishing 2004, at 123-124.

[170] Monica Claes, *The National Courts' Mandate in the European Constitution*, Hart Publishing, Oxford 2006, pages 576-577.

2) A decision in the form of a regulation, which is of direct and individual concern to him.

3) A decision addressed to another person which is of direct and individual concern to him.

However the concept has been broadened by the ECJ to include every act which has direct and individual concern to an individual. In *Codorniu* the Court accepted that a true regulation which has a general application could be of individual concern to the applicant.[171] Craig and de Burca commented on this ruling and stated that a willingness to accept that a norm could be a true regulation as judged by the abstract terminology test, and yet that it could be of individual concern was certainly a liberalizing move.[172] As Arnull argued, the approach of the Court of Justice since *Codorniu* has not been consistent and lacks a coherent overall policy on admissibility.[173] In *UEAPME* the Court of First Instance stated that the applicant may be regarded as directly and individually concerned by the EU Directive notwithstanding its legislative character.[174]

In determining whether a measure is a regulation or a decision, the Court of Justice used the words of Article 249 EC. It accorded to a regulation the status of legislative instrument, emphasizing the criterion of general application, and to decision the status of an administrative instrument, emphasizing the limited range of persons affected thereby.

Here is the ECJ case law relating to the interpretation of the Article 230 EC is analysed in order to find out how effectively this article operates for judicial protection

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[171] Case 309/89,*Codorniu SA v.Council* [1994]ECR I-1853,paragraph19. It held that "Although it is true, that according to the criteria in second paragraph of article 173[230EC] of the Treaty the contested provision is, by nature and by virtue of its sphere of application, of legislative nature in that, it applies to the traders concerned in general, that does not prevent it from being of individual concern to some of them".

[172] Paul Craig , Grainne de Burca ,*EU Law, text cases and materials, third edition,* Oxford 2003, p 496.

[173] Anthony Arnull "Private applicants and the action for annulment since Codorniu,CMLR,volume 38,2001, page 7.

[174] Case T-135/96, *Union Européenne de l'artisanat et des petites et moyennes entreprises (UEAPME) v Council of the European Union,* ECR 1998 Page II-02335, paragraphs 63,68,69.

of individuals. The requirement of individual concern has always been a major obstacle to the admissibility of actions brought by private applicants.[175] The ECJ has traditionally adopted a restrictive approach to the interpretation of Article 230(4). This is evident in the leading test applied by the Court, the so-called *Plaumann formula*. It was established by ECJ in *Plaumann* that "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 case of person addressed." [176] Shaw argued that the test is very restrictive and very difficult to meet. [177] The Court requires the applicants to belong to a closed category, membership of which is fixed and ascertainable at the date of the adoption of the contested measure. The Court has however continued to apply its *"Plaumann Formula"* in many further cases.[178]

In most cases the arguments, to enable direct actions in order to provide effective judicial protection were mostly set aside by the Court. The Court's reasoning was based on the view that Community measures are in principle challengeable by individuals through proceedings before national courts, and that effective judicial protection is further granted to individual applicants through preliminary rulings upon the request of national courts under Article 234 EC. Moreover the conflict between ECJ's *"Plaumann Formula"* of individual concern and request by individual applicants for an effective judicial protection increased at a time when no national remedy under 234 EC was available for individuals due to the absence of national measures implementing the Community measure.

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[175] Anthony Arnull, op.cit supra note 170, page 30.

[176] Case 25/62,*Plaumann v.Commission* [1963]ECR 95,paragraph I.

[177] Jo Shaw, *Law of the European Union, 3th edition,* Palgrave Law Masters,2000, page 508.

[178] *See* Case 1/64 *Glucoseries Réunies v Commission* [1964] ECR 417, Case 11/82 *Piraiki- Patraiki and Others v Commission* [1985] ECR 207, Case C-34/88 *Cevap v Council* [1988] ECR 6265, 6270, Case T-398/94 *Kahn Scheepvaart v Commission* [1996] ECR II-477, Case T 86/96 *Arbeitsgemeinschaft Deutscher Luftfahrt-Unte v Commission* [1999] ECR II- 179, *See* Case T-585/93 *Greenpeace International v Commission* [1995] ECR II-2205.

As Groussot points out, the principle of effective judicial protection provoked an intensive debate in relation to the standing rules under Article 230(4) EC, especially during the year 2002. [179] The main questions at stake were to determine whether the proceedings before national courts might provide effective judicial protection for individual applicants and whether alleged lack of judicial protection at the domestic level, under the preliminary ruling procedure, could justify a reform of the standing rules regarding Article 230 EC.

AG Jacobs in *UPA* and CFI in *Jeqo-Querre* proposed a new and more liberal interpretation of the individual concern requirement.[180] Both proposals sought to liberalize the interpretation of individual concern. While the CFI would have required that the incriminated measure affect the applicant's legal position**:** "a natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him".

Advocate General Jacobs' formula referred only to the applicant's interests**:** "an individual should be regarded as individually concerned within the meaning of the fourth paragraph of Article 230 EC by a Community measure where, by reason of his particular circumstances, the measure has, or is liable to have, a substantial adverse effect on his interests."

It should be borne in mind that the suggestions of both sides were similar in that they were based on the argument of the right to an effective judicial remedy as guaranteed by national constitutions, Articles 6 and 13 ECHR and Article 47 of the EU Charter of Fundamental rights. Both suggestions place the right of effective judicial

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[179] Xavier Groussot, "The EC System of Legal Remedies and Effective Judicial Protection: Does the System Really Need Reform?", Legal Issues of Economic Integration vol.30, issue 3 ,2003 , page 249.

[180] See C 50/00 *P,Union de Pequenos Agricultores v.Council* [2002] ECR I-6667,paragraph 51 and AG Jacobs Opinion in C-50/00 *P UPA v Council* [2002] ECR I-667, at paragraph 103.

protection as a yardstick when assessing individual concern. In short, opinion of AG Jacobs and judgment of CFI in *Jeqo-Querre* were attempts to use judicial interpretation in order to improve individual access to the Community courts for the judicial review of Community acts of general application and therefore provide a more adequate protection of the rights of individuals. According to them effectiveness of judicial protection should be given priority over the value which is protected by traditional test for individual concern in *Plaumann*.

Some legal scholars made proposals on modification of the wording of Article 230(4) in order to provide protection of fundamental rights in the light of Charter of Fundamental Rights. In the context of the European Convention, Meyer proposed that an explicit reference to article 230 EC should be included in Article 47 CFR. It was as follows: Under the conditions set fourth in article 230(4) EC, every person shall have the right to bring a claim due to a breach of the rights and freedoms recognized in this Charter. He also proposed a modification of paragraph 4, replacing the cumulative test of "direct and individual" by an alternative text of "direct or individual". Such a solution would certainly lead to widening gates for access to the CFI.[181] This will increase the workload of the court. Another proposal came from Vitorino who is for the limited codification of the *Jeqo-Querre* jurisprudence. He proposed to add the following formulation to the wording of article 230(4): "or against and act of general application, which is of direct concern to the applicant without calling for measure of implementation".[182] Gaja is of the opinion that, 'there is need to provide an adequate remedy to physical or legal persons when one of their human rights is infringed by European Union institutions –particularly when redress cannot be obtained from the ECJ.[183]

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[181] Meyer ,"Enforceability of the Charter of Fundamental Rights and improvement of the individual's right to legal redress :Working Group II, Working Document 017,pages 1-3.

[182] Vitorino, "The Question of Effective judicial remedies and access of individuals to the ECJ", Working Document 021 ,page 6.

[183] Gaja "New instruments and institutions for enhancing the protection of human rights in Europe" in Aston (eds) *The EU and human rights* ,Oxford University Press,1999, page 798.

The main practical consequence of *Jégo-Quéré* and the Opinion of Advocate General Jacobs in *UPA* rests with intensification of pressure on national courts and Member State political actors to address and resolve the problems with judicial architecture. With regard to the latter, the Court of Justice has sent a clear signal that any weaknesses of the current system of challenging the Community acts will not be corrected via case law. They can only be addressed by a Treaty revision. This is an important landmark in EU constitutional jurisprudence, because the ECJ established a clear boundary with respect to its constitutional responsibilities.

5.3 JUDICIAL PROTECTION OF INDIVIDUALS AGAINST THIRD PILLAR MEASURES OF THE AFSJ

The judicial protection of individuals against the Title VI measures which fall within the AFSJ of the European Union is to be examined here. The AFSJ in addition to Title IV matters concerning immigration, asylum and civil law, also covers the provisions in Title VI of EU on Police and Judicial Co-operation in Criminal Matters. The questions under third pillar are sensitive and lie at the heart of state sovereignty. For that reason the Member States have been unwilling to use the relatively open Community legislation making procedure with its key roles for the Community institutions – notably the European Parliament and the European Commission and with ECJ wide-ranging jurisdiction to review acts on these policy areas. The Member States have used instead methods closer to traditional intergovernmental decision-making procedure relying primarily on negotiations behind closed doors and a search for compromises resting on a requirement of unanimity.

According to Article 29 TEU the overall aim of the third pillar is to provide citizens with a high level of safety within the area of freedom, security and justice by developing “common action” in three areas: police co-operation in criminal matters, judicial co-operation in criminal matters and the prevention and combating of racism and xenophobia. Article 35 TEU thus establishes a preliminary reference procedure distinct from that of Article 234 EC, with the jurisdiction of the ECJ over certain measures adopted under the third pillar. Article 35(1) TEU provides that the ECJ has

"jurisdiction […] to give preliminary rulings on the validity and interpretation of framework decisions and decisions, and on the interpretation of conventions, and on the validity and interpretation of the measures implementing them." The jurisdiction of the ECJ is operative in case a Member State accepts the jurisdiction of the Court, and if it does so the Member State can then specify either that a preliminary reference can be sent by courts or tribunals against whose decision there is no judicial remedy, or by any national court or tribunal.[184] Therefore, a double limitation to Court's jurisdiction exists in the third pillar matters where Member States are not subject to the preliminary jurisdiction of the Court unless they have made a declaration to that effect.[185] Moreover Article 35 EU provides only for the interpretation by the Court of secondary legislation and not of the Treaty provisions themselves laid down by Article 234 EC.

Peers argues however that from a human rights perspective the limitations of the jurisdiction of the Court are not fatal. Firstly, because the Amsterdam Treaty has formally granted the ECJ the powers to interpret the human rights clause, Article 6(2) EU which the Court was not previously formally able to interpret.[186] Article 46 EU now allows the Court jurisdiction over 'Article 6(2) with regards to action of the institutions, insofar as the Court has jurisdiction under the Treaties establishing the European Communities and under this Treaty. Second, the amendment is a purely formal amendment in practice, since there can be little doubt that the Court would have applied the general principles of human rights protection to Title VI EU Treaty and Title IV EC Treaty, regardless of its ability to interpret Article 6(2), just as it applied such principles to EC law prior to the Amsterdam Treaty.[187]

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[184] Article 35(3) TEU.

[185] For information on which Member States accepted the jurisdiction of ECJ Look at: http://curia.europa.eu/en/instit/txtdocfr/txtsenvigueur/art35.pdf .

[186] Steve Peers, op.cit supra note 8, page.48.

[187] Ibid.

It is seen from the case law of the ECJ that the Court makes parallelism between preliminary ruling procedures under 234 and that of provided by Article 35 EU concerning interpretive rules (the qualification of the referring body as a 'court', the clarity and necessity of the question referred to the Court). In *Pupino Case* [188] the Italian Court requested a preliminary ruling from the ECJ under Article 35 EU, in relation to the interpretation of Articles 2, 3 and 8 of Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings. The ECJ rejected some admissibility claims put forward by some of the intervening Member States. The Court positioned the conditions set by 234 EC in the framework of AFSJ preliminary ruling procedure by stating that "Under Article 46(b) EU, the provisions of the EC, EAEC and ECSC Treaties concerning the powers of the Court of Justice and the exercise of those powers, including the provisions of Article 234 EC, apply to the provisions of Title VI of the Treaty on European Union under the conditions laid down by Article 35 EU. It follows that the system under Article 234 EC is capable of being applied to the Court's jurisdiction to give preliminary rulings by virtue of Article 35 EU, subject to the conditions laid down by that provision".[189] The court held that "the jurisdiction of the Court of Justice is less extensive under Title VI of the Treaty on European Union than it is under the EC Treaty" and that there is "no complete system of actions and procedures designed to ensure the legality of the acts of the institutions" in the context of the third pillar.[190] The Court goes on stating that "Concerning the acts referred to in Article 35(1) EU, Article 35(3)(b) provides, in terms identical to those of the first and second paragraphs of Article 234 EC, that 'any court or tribunal' of a Member State may 'request the Court of Justice to give a preliminary ruling' on a question raised in a case pending before it and concerning the 'validity or interpretation'

[188] C-105/03, Criminal proceedings against Maria Pupino [2005] ECR I-5285.

[189] Ibid, paragraph 19.

[190] Ibid, paragraph 35.

of such acts, if it considers that a decision on the question is necessary to enable it to give judgment."[191]

In *Gasparini* the Court has subsequently repeated the general point that Article 234 EC applies in principle to the Third Pillar.[192] Peers makes a distinction between two types of situations when he analyses the jurisdiction of the Court under Title VI. The first concerns the Court's third pillar jurisdiction *per se*; the second concerns the circumstances in which the Court's EC Treaty jurisdiction is applicable to Third Pillar matters.[193] He suggests that Community courts normally exercise their first pillar jurisdiction when they consider whether third pillar measures should have been adopted pursuant to the first pillar, rather than the EU Treaty.[194]

The Court is decisively ready to interpret the Treaty provisions of the third pillar as it is seen from *Advocaten voor de Wereld* although it has not been granted such a power under Article 35 EU. The Court upheld the validity of the Council's framework decision which established the EAW.[195] In this case a Belgian NGO contested before the Belgian courts the legality of the law which transposed into national law the Council's framework decision establishing the EAW.[196] The Belgian Court faced with one formal two substantive grounds for annulment put forward by the NGO and referred two questions for interpretation to the ECJ. The two questions raised referred: 1) to the correctness of the legal instrument chosen (the claimant contends that a convention should have been adopted rather than a Framework Decision, given its purpose, given the limits set by Art. 43(2)(b) EU), and 2) to the possible infringement of Art. 6(2) EU

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[191] Ibid, paragraph 21.

[192] Case C-467/04, *Gasparini*, [2006] ECR I-9199.

[193] *See* Case C-170/96 *Airport Transit Visa* [1998] ECR I-2763 and Case C-176/03 *Commission v Council* [2005] ECR I-7879, para 39.

[194] Steve Peers, "Salvation Outside the Church : Judicial Protection in the Third Pillar after the Pupino and Segi Judgments", CML Rev. vol. 44, issue 4,2007, page 903.

[195] Case C-303/05 *Advocaten voor de Wereld*, judgment of May 3, 2007.

[196] Framework Decision 2002/584/JHA of 13 June 2002 [2002] OJ L 190/1.

(establishing Union's obligations to respect fundamental rights), namely the violation of the principle of legality in criminal matters determined by the partial abandonment of the rule of double criminality. One of the intervening states in the proceedings before the Court considered the preliminary question inadmissible in that it (indirectly) required the Court "to examine Article 34(2)(b) EU, which is a provision of primary law not reviewable by the Court".[197] The Court remained unconvinced by this argument, as well as by the stark difference of wording of the above-mentioned Treaty provisions. It held that "Under Article 35(1) EU, the Court has jurisdiction […] to give preliminary rulings on the interpretation and validity of, inter alia, framework decisions, which necessarily implies that it can, even if there is no express power to that effect, be called upon to interpret provisions of primary law where […] the Court is being asked to examine whether a framework decision has been properly adopted on the basis of that latter provision.'[198] The Court disregarded the restrictions of Article 35 EU and interpreted the Treaty provisions themselves. The process of assimilation between the procedures of preliminary ruling regarding EC and the EU measures took place. Therefore, the Court has reshaped its preliminary jurisdiction in the third pillar in parallel with that of the first.[199]

The Court has shown its readiness to ensure that acts affecting individual rights whichever nature they have, do not evade judicial control in recent terrorist cases of of *Segi,*[200] borderlining between the AFSJ and the CFSP. The Court developed "the rule of law" in these joined cases. The action was brought by Spanish organization and by a French organisation against a Common Position implementing United Nations Security Council Resolution No 1373 of 2001, which included the names of applicants in a list of potential terrorists. I should emphasise that the Common position adopted under the

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[197] *Advocaten voor de Wereld,* opt. cit supra note 192, paragraph 17.

[198] Ibid, paragraph 18.

[199] Vassilis Hatzopoulos ,Casual but Smart: The Court's new clothes in the Area of Freedom Security and Justice (AFSJ) after the Lisbon Treaty, Research papers in law 2/2008,college of Europe, page 9.

[200] Case C-354/04 P *Gestoras pro Amnestia* and Case C-355/04 P, *Segi*, both delivered on February 27, 2007.

second pillar, a legal instrument which is neither among the acts the validity and interpretation of which the ECJ is entitled to assess through the preliminary reference mechanism under Art. 35(1) EU, nor among the acts whose legality is subject to the ECJ's review under Art. 35(6) EU. The ECJ held that the list of Art. 35(1) EU cannot be read narrowly and it must be inferred that measures listed therein are all legal acts intended to create obligations vis-à-vis third parties. In sum, the ECJ stated that every act adopted by the Council and creating legal effects vis-à-vis third parties can be subject to a preliminary reference by the national judge,[201] and for the same reason their legality can be challenged by a Member State or the Commission under Art. 35(6) EU. "As a result, it has to be possible to make subject to review by the Court a Common Position which, because of its content, has a scope going beyond that assigned by the EU Treaty to that kind of act". [202]

Fontanelli called this reasoning of the Court as praetorial refurbishment of Art 35 EU.[203] The Court, confirming on this point the CFI, started by recognizing that the system of judicial protection foreseen by the Treaty for the third pillar is incomplete compared to that of the first pillar and that no action in damages lies outside the latter.[204] It went on, however, to hold that by virtue of Article 6 EU the Union is based on the rule of law and the respect of fundamental rights. It follows that the institutions are subject to review of the conformity of their acts with the treaties and the general principles of law, just like the Member States when they implement the law of the Union.[205] In consequence, the Court found that all acts under all pillars which have the effect of directly affecting individual rights may be brought before the ECJ by way of a

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[201] Ibid, para. 53, referring to some precedents "by analogy": Case 22/70 *Commission v Council* (ERTA) [1971] ECR 263, paras 38 to 42, and Case C-57/95 *France v Commission* [1997] ECR I-1627, paragraph 7.

[202] Ibid, paragraph 54.

[203] Filippo Fontanelli, "The Court goes all in", Sant' Anna School of Advanced Studies, Department of law, STALS research paper N 3/2009, page 8.

[204] Gestoras pro Amnestia ,opt cit supra note 197, paragraph 50.

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

preliminary question, even if this is not expressly provided for in the relevant Treaty provision. They may also be challenged by the privileged applicants (EC Institutions and Member States) in accordance with Article 35(6) EU.[206] And since individual plaintiffs are not eligible to bring annulment actions against acts of the second or third pillar, "it is for the Member States and, in particular, their courts and tribunals, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the lawfulness of any decision or other national measure relating to the drawing up of an act of the European Union or to its application to them".[207] The ECJ explicitly recognises the lack of procedural means providing remedy for individuals affected by an illegal third pillar measure and calls for this Member States to enable in the national legal system effective protections for their citizens.

To Peers, the statement of the Court above, echoes the *UPA* judgment,[208] except that the latter had also referred to Member States' obligation to "establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection", and explained the obligations concerning national procedural rules as a consequence of the principle of loyal cooperation.[209] It is a fact that the ECJ is unwilling to obey the limits of its review power. The Court relies on the general principle that the EU is founded on the rule of law to provide foundation for judicial review of a common position. The nature of a measure is to be judged by its substance, not by its form. Hence if a measure carrying the name "common position" produces legal effects in relation to third parties it goes beyond the role assigned for that kind of measure by the EU Treaty and the ECJ can therefore accord it its true classification and give a preliminary ruling.

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[206] Ibid, paragraph 55.

[207] Ibid, paragraph. 56.

[208] See C 50/00 P,Union de Pequenos Agricultores v.Council [2002] ECR I-6667,paragraphs 41,42.

[209] P.Craig & De Burca 2007, op.cit 164, page 254.

It follows from the *Segi* judgment that the ECJ tries to ensure the objective of effective and uniform control of the legality of EU acts by any means while neglecting the EU Treaty provisions. There is an inevitable conflict between these two objectives in light of the wording of the EU Treaty. As compared to the EC Treaty, the third pillar provisions don not provide wide possibilities for individuals to challenge EU acts directly. The ability to bring proceedings via the national courts is obviously curtailed by the inability to obtain preliminary rulings in some of Member States and the requirement to reach the courts of last instance in another two Member States.[210] An analysis of the case law on legal remedies under the third pillar indicates that the legal system established by the third pillar cannot sufficiently ensure an effective and uniform application of EU law or an adequate system of judicial control of the legality of EU measures. Such "salvation" can only, if anywhere, be found within the core Community legal order.[211]

When analysing the system of judicial protection in the third pillar, the starting point indeed must be that the intentions of the authors of the EU Treaty were surely that the full extent of the Community legal order would not apply. Peers submits that the principle of supremacy does not apply to the third pillar, and neither does the corollary principle of direct effect or the closely connected obligation to set aside national law in order to apply Community law. If these principles applied to the third pillar, the essential distinction between the first and third pillar would, in his view, be lost, and the intentions of the Treaty authors would clearly be ignored. Does not this interpretation limit the effectiveness of EU law? Of course. But surely there is a trade-off between effectiveness and sovereignty. The clear indications are that the Member States accepted, at least for the time being that a reduction in the effectiveness of EU law was a price worth paying for increased sovereignty, and the corresponding increased

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[210] Steve Peers, op.cit supra note 194, pages 897-898.

[211] Ibid, page 885.

discretion of national governments, increased accountability and increased powers of national parliaments and courts.[212]

Fontanelli stresses that the system of protection against third pillar measures is really far from being complete, since not only some typical remedies are either expressly or implicitly ruled out (action for damages and actions for annulment brought by individuals), but also the preliminary reference, that is the "saviour" remedy singled out by the ECJ in the third pillar, is still a solution that not all the Member States have agreed to, by failing to accept the ECJ's preliminary ruling jurisdiction.[213]

It can be inferred from the above judgment that the Court partly reviewed the procedural arrangements of the Treaty based on the rule of law approach before Lisbon, in order to ensure that any act producing legal effects is subject to judicial review and its own preliminary jurisdiction. Therefore highlighting the gaps of legal protection existing in the institutional structure before Lisbon the Court sent a message and advocated for extending individual plaintiffs' rights.

Though Article 35(6) EU provides action for annulment in relation to the acts adopted under Title VI, it does not provide any standing for individuals. Consequently, the direct remedy of the annulment action is not provided for under this title, and individuals are also barred from an action for failure to act, to plea the illegality of an act or an action for damages.

5.4 JUDICIAL PROTECTION OF INDIVIDUALS IN THE AFSJ AFTER THE LISBON (REFORM) TREATY

The shortcomings of the judicial protection mentioned above are solved under the Lisbon structure. Provisions of Title IV and of Title VI would be amalgamated to create a new Title V, Part Three TFEU on the AFSJ. The Lisbon Treaty will abolish the pillar

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[212] Ibid, page 920.

[213] F.Fontanelli, op.cit supra note 203, page 9.

structure. Preliminary ruling procedures under Article 267 TFEU cover all issues of the previous first and third pillar without restriction in Title IV measures which make part of the AFSJ. Article 68 EC restricting the ECJ jurisdiction in regard to Title IV will be repealed. The reference to ECJ is obligatory for all Member States and for all jurisdictions and does not require any prior declaration or other formality. A special fast-track procedure is provided for in the last paragraph of Article 267, for cases stemming from the AFSJ, where 'a person in custody' is involved.[214] As the judgment of the ECJ in *Advocaten* showed, the Court can be called upon to interpret provisions of primary EU law, even if there is no express power to that effect. The Treaty of Lisbon however by bringing the EC and EU law within the single framework, grants explicit jurisdiction to the ECJ to interpret provisions of primary EU law. The special competence of the Court provided for in Article 68(3) EC to give interpretative judgments on the request of the Council, the Commission or any Member State has been dropped. With the collapse of the pillar structure Article 35 EU will be repealed where no corresponding provision to Article 46 EU which limited the jurisdiction of the ECJ regarding third pillar matters will be left.[215] The ECJ would have full jurisdiction to review and interpret measures on judicial cooperation in criminal matters and police cooperation. Judicial review of the acts of EU Agencies (such as Europol, Eurojust, CEPOL (College of European Police), European Border Agency) involved in the management of the AFSJ would be possible. The generalisation of the Court's

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[214] See Article 267 TFEU, The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union; Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court. If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

[215] See Article 46 EU, The provisions of the Treaty establishing the European Community, the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community concerning the powers of the Court of Justice of the European Communities and the exercise of those powers shall apply only to the provisions of Title VI, under the conditions provided for by Article 35. See Article 35.2 By a declaration any Member State shall be able to accept the jurisdiction of the Court of Justice to give preliminary rulings as specified in paragraph 1. See Article 35.2 and 35.5 EU. By a declaration any Member State shall be able to accept the jurisdiction of the Court of Justice to give preliminary rulings as specified in paragraph 1.

preliminary jurisdiction after the abolition of the three-pillar structure would bring some positive changes in the context of effective judicial protection of individuals within AFSJ.

As a result of the Reform Treaty, the competence of ECJ for annulment proceedings has been considerably extended provided by Article 263 TFEU. Restrictive formula under Article 230 EC, whereby individual plaintiffs may only oppose decisions addressed to them or regulations and decisions addressed to other persons, provided they are of direct and individual concern to the plaintiffs was replaced. The standing of individual plaintiffs is formally extended to cover "a regulatory act which is of direct concern to them" provided it does not entail any implementing measures. Therefore individual plaintiffs are more broadly admitted to bring annulment proceedings, as an individual concern is no more required where a regulatory act requiring no transposition is at stake. Any liberalisation approach in the standing of individuals contributes to the effective judicial protection. However, Hatzopoulos points out that new problems are expected to arise out of this provision of the Lisbon Treaty, as no definition is given in the Treaty of what constitutes a regulatory act.[216]

The reform must however be described as limited, as the liberalization only applies in the case of regulatory acts, defined as secondary norms in the hierarchy of norms, which the Constitutional Treaty (hereinafter CT) would have established.[217] If the CT would have come into force, it would not have applied in relation to EU laws, framework laws, decisions or implementing acts. The only way to avoid this conclusion, according to Craig and de Burca, would have been to read the phrase regulatory act to mean something broader than the term European Regulation within Article I-33(1) CT. This might have been possible, but it would have been difficult both textually and historically, in the view of the authors.[218] Moreover *"Plaumann Test"* on individual

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[216] Vassilis Hatzopoulos, op.cit supra note 199, page 6.

[217] Article I-33(1) CT.

[218] Craig & De Burca, op.cit supra note 164,page 527.

concern seems to stay unaltered. Thus if an applicant challenged an act in the form of a decision addressed to a third party, but which the applicant claimed was of individual concern to her, she would still have to satisfy the *Plaumann test* with all its difficulties. The reform did not address the more general difficulties with indirect challenge articulated by Advocate General Jacobs in the *UPA* case. It is strange that in face of several difficulties imposed by *"Plaumann formula"* for individuals to challenge directly measures affecting them, Reform Treaty makers did not miss the requirement of direct and individual concern.

As to third pillar measures, if previously in third pillar matters only two privileged plaintiffs a Member State or the Commission could bring annulment proceedings according to Article 35(6) EU, after the "depilarisation" by Lisbon individual plaintiffs and privileged plaintiffs other than the Member States and the Commission will have a right to bring annulment proceedings in the field of judicial and police cooperation in criminal matters. The lack of *"Locus Standi"* for individuals in third pillar matters has been highlighted in the *Segi* case where the Court did secure the rule of law.[219]

Hatzopoulos suggested that the rule of law principle secured by the Court in that case was indirect and imperfect. It is indirect, because it was through the intermediation of Member States that the Court sought to guarantee rights of action for individuals. Indeed, the Court held that Article 6 EU obliges Member States, when implementing EU law, to "interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the lawfulness of any decision or other national measure". It is imperfect because while opening up their dockets to European AFSJ cases, the national jurisdictions are supposed – according to the Court – to have access to the preliminary assistance of the Court. This, however, ignores the fact that only sixteen Member States have made

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[219] *Gestoras pro Amnestia,* op.cit supra note 200, paragraph 50.

declarations under Article 35(2) and that plaintiffs in national proceedings can never force their way to Luxembourg.[220]

However some restrictions under former Article 35 EU remained in the Lisbon Treaty. Article 276 TFEU would continue to exclude Court's ability, when exercising its powers in the field of police and judicial cooperation in criminal matters, to review validity or proportionality of activities of national enforcement agencies, or relating to Member State's responsibilities with regard to maintenance of law and order, or to safeguarding of internal security. [221] The Lisbon Treaty brings judicial cooperation in criminal law and police cooperation within the general framework of judicial control as applies to other areas of EU law. Hence, national courts "against whose decisions there is no judicial remedy under national law" will be obliged to refer question to ECJ.

Another innovation of the Treaty of Lisbon is the inclusion of Charter of Fundamental Rights of the European Union into primary law. The confidence of the citizen in judicial protection against any executive incursion in respect of these rights and freedoms (right to an effective remedy),[222] is a key element of the constitutional traditions of the Member States. The Treaty of Lisbon, by proclaiming that the Charter of Fundamental Rights "shall have the same legal value as the Treaties", places the EU under a clear legal obligation to ensure that in all its areas of activity, fundamental rights and freedoms are respected and actively promoted. While the Charter contains all the rights and freedoms already existing in the EU treaties, it reaffirms the rights as they result from the ECHR, constitutional traditions and international obligations common to the Member States, the Social Charters adopted by the Union and by the Council of

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[220] Vassilis Hatzopoulos, op.cit supra note 196, page 10.

[221] Under Article 35.5 EU. The Court of Justice shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.

[222] Otherwise provided in Art. 13 of the ECHR (Right to an Effective Remedy), which reads as follows: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity".

Europe, case-law of the European Court of human rights. It is now clear that the current, relatively weak, references to fundamental rights in the EU treaties have been insufficient to ensure that all the measures in AFSJ actually comply with them.[223] The inclusion of Charter of Fundamental Rights of the European Union however would have guaranteed the accountability (democratic check) of the legal measures adopted by the EU institutions and their full compliance with the rule of law and fundamental rights. Many commentators expect this to make a real difference in the litigation in the Court.[224] De Witte suggests that a written bill of rights of this nature is likely to result in many more sensitive and highly visible human rights issues of constitutional importance being decided by the Court.[225]

The examination of the two judicial remedies in the AFSJ shows that the whole level of judicial protection of individuals in the area is lower than in the remaining part of the EU law. The Treaty of Lisbon improves however the judicial mechanism of the AFSJ by eliminating restrictions of the ECJ jurisdiction and by accumulating all the policies of the AFSJ within the single judicial framework. The incorporation of the Charter of Fundamental Rights to EU law leads to accountability of measures adopted in the AFSJ with fundamental rights standards.

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[223] Art. 6.1 of the EC Treaty provides that "the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States". Paragraph 2 of the same article establishes that "the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the member states, as general principles of community law".

[224] F.G. Jacobs, "The EU Charter of Fundamental Rights" in A. Arnull and D. Wincott (eds), *Accountability and Legitimacy in the European Union* ,Oxford University Press, 2002, page 284.

[225] B. de Witte, "The past and future role of the European Court of Justice in the protection of human rights" in P. Alston (ed.), *The EU and Human Rights* , Oxford University Press,1999,page 891.

CONCLUSION

The object of my research was the AFSJ in the European Union. It is the Treaty of Amsterdam that introduced this notion and established the first stage of its establishment. The AFSJ became an important EU project being concretised by Vienna action plan and Tampere program.

The Treaty put the aim to provide the free movement of persons in the AFSJ. The free movement of persons in the EU provides not only the free travelling of third country nationals within the whole European Union area if they enter the borders of the Member State, but also European citizens safe free movement.

The area of freedom required common actions of the EU to be taken in the areas of visas, asylum and immigration to compensate the free movement of persons. However the considerable structural and institutional weaknesses of the third pillar became a major stumbling block towards the goal of establishing the AFSJ in the European Union. The research showed how difficult it is to achieve a common action within the EU in policy areas falling within intergovernmental cooperation where the adoption of a measure requires the unanimity in legislation making process. Such a fact constituted the main dynamic for the "communitarisation" of visa, asylum and immigration policies. Moreover the prospect of future EU enlargement became an important source of pressure for reforming the EU decision making procedures in these policy areas. The study shows that there are also some political factors which necessitated the "communitarisation" of policies grouped under title IV EC. These are: the external factors such as an increasing number of asylum seekers, immigrants and refugees, rising levels of unemployment in Western Europe, the trend which necessitates a common EU response.

The analysis of the current system of legal instruments used within the AFSJ revealed a number of shortcomings and obstacles for the successful achievement of AFSJ. As the research shows the legal instruments used for managing policies falling within the AFSJ are fragmented between the first and third pillars. After visas, asylum and immigration policies, which are within the AFSJ were communitarised by the

Treaty of Amsterdam, co-decision procedure under Article 251 EC applied to these areas. The result is that the Community legal instruments were adopted in these policy areas. Despite that, currently the system of Community legal instruments is characterised by the absence genuine hierarchy of legal acts as to ranking of different types of legal acts in accordance with the democratic legitimacy of their respective authors and adoption procedures. However the focus was not made on this issue as it is not specific to the AFSJ but rather to the whole EC.

Judicial cooperation in criminal matters, as one of AFSJ policies, remained within the intergovernmental cooperation and third pillar legal instruments are still adopted in this policy area. The weakness of the third pillar instruments which require the unanimity in the Council causes delays in the adoption of the acts and results in the deficit of effectiveness in the AFSJ. Moreover the research showed on the example of the EAW how cumbersome it is to guarantee a uniform legal value and meaning of Council Framework decisions which require transposition in national law of the Member States. In addition, the ratification of conventions by all the Member States do not take place as planned. The Community splits up its action related to a single subject-matter artificially between several legal instruments adopted pursuant to the different procedures that apply to the different pillars as in case with Schengen *acquis*.

The differentiation of the AFSJ by the mixture of supranational Community and intergovernmental Union measures without any doubt reduces the transparency of its structure. The mechanisms for operational cooperation in "Freedom, Security and Justice" continue to be fragmented between two separate sectors: the EC first pillar and the EU third pillar. Currently the area is characterised by complexity due to heterogeneity in the legal instruments of the AFSJ, by the lack of transparency regarding the institutional and procedural settings, by lack of democracy due to fact that the European Parliament is still not sufficiently involved in the decision-making processes covering EU third pillar policies and by a high degree of inefficiency owing to the duality in the legal dimension. Such a structure falls short for the achievement of the real AFSJ.

When assessing the judicial protection of individuals in Title IV EC on immigration, asylum and civil law and in Title VI EU on Police and Judicial Co-operation in criminal matters which belong to the AFSJ, the research revealed that the protection is ineffective and restricted. Therefore that the judicial scrutiny of the AFSJ measures currently weaker than that of mainstream Community law. These are the conclusions made from the analysis of the Treaty articles and the case law of the ECJ.

In politically sensitive police areas of Title IV EC where the need for judicial protection and concern for fundamental rights seem greater than in any other area of Community law, individuals enjoy inferior level of judicial protection to that provided in the other areas of Community law. The preliminary ruling jurisdiction over Title IV of the AFSJ is limited to national courts against whose decisions there is no judicial remedy under national law. From the perspective of effective judicial remedy this provision decreases the possibility of the individual case to reach the Court. However as research shows this restriction is not criticised by all scholars and some of them justify this limitation by some concerns. The action for annulment which is the direct challenge by individuals of EC measures is not different in relation to Title IV measures of the AFSJ from the other areas of community law. Asylum seekers, refugees and immigrants can challenge EC measures if the satisfy the requirements of direct and individual concern as interpreted by the ECJ in *Plaumann.*

As it is seen from the study the judicial protection of individuals against the Union's action in the field of police and judicial co-operation in criminal matters which is within the remit of the AFSJ is limited under the rules of Article 35 EU. The Court's jurisdiction for preliminary references is made subject to a system of voluntary acceptance by Member states. The Court's competence is excluded from member state police actions or other actions taken for the safeguarding of internal security. Direct actions by individuals against Third-Pillar Union acts are ruled out altogether. Moreover Article 35 EU provides only for the interpretation by the Court, of secondary legislation and not of the Treaty provisions themselves laid down by Article 234 EC.

The examination of the ECJ case law revealed that the Court recognises the lack of judicial protection in the third pillar. However it does not obey the limitations of its jurisdiction imposed by the Treaty and tries to provide a better effective judicial remedy for individuals. The ECJ declared in *Pupino* that there is no complete system of actions and procedures designed to ensure the legality of the acts of institutions in the context of third pillar. Due to the fact that the TEU expressly excludes direct effect, the ECJ could only promote the effectiveness of the framework decisions by the so-called indirect effect, elaborated within the first pillar. And indeed, it did so, stating that the binding character of the framework decisions which is identical to that of EC directives places on national authorities, and particularly national courts, an obligation to interpret national law in conformity.[226]

The Court recognised in *Segi* that the system of judicial protection foreseen by the Treaty for the third pillar is incomplete compared to that of the first pillar and that no action in damages lays outside the latter. After recognising explicitly the lack of procedural means providing remedy for individuals affected by an illegal third pillar measure the Court called Member States to enable in the national order effective protections for their citizens. The Court developed the "rule of law" and found that all acts under all pillars which have the effect of directly affecting individual rights may be brought before the ECJ by way of a preliminary ruling, even if this is not expressly provided for in the relevant Treaty provision. In *Advocaten voor de Wereld* the Court disregarded the restrictions of Article 35 EU and interpreted the Treaty provisions themselves, of a Treaty deemed "intergovernmental".

The impact evaluation of the Lisbon Treaty on the AFSJ makes its possible with no doubt to argue that the Treaty of Lisbon would affect AFSJ positively and would remedy most of the deficiencies existing in the current structure. In case the Lisbon Treaty is ratified by all EU Members, the all AFSJ will be managed by traditional legal instruments of the EC first pillar; regulations, directives, decisions will be adopted in

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[226] *Pupino*, op.cit supra note 185, paragraph 34.

the AFSJ on the basis of co-decision procedure under Article 294 of the Treaty on the functioning of the European Union. Moreover the Treaty of Lisbon sets a genuine hierarchy between EU institutions and between the Community legal acts, which is absent in the current structure. Legislative acts will be adopted in the AFSJ on the basis of legislative procedure under Article 294 of the Treaty on the functioning of the European Union. These will be legislative regulations, directives and decisions. The acts adopted on the basis of secondary legislation will be delegated acts and implementing acts. This will contribute to the transparency of EU law in that the nature of the legal instrument will be indicated in its title.

The current EU third pillar instruments such as framework decisions, common positions and conventions will disappear. Therefore the negative effects of different types of legal instruments in the AFSJ, in terms of their genuine nature and legal effects which I pointed out in my thesis will therefore come to an end. However the extension of the special regime granted to the United Kingdom, Ireland and Denmark in the Amsterdam to police and judicial cooperation in criminal matters introduces great complexity and diversity into the development of AFSJ policies.

The legitimacy and legality of this European area depend on individuals being able to rely on and challenge the legislation in place. Without the direct and open engagement of citizens of the Union, the AFSJ cannot succeed. Further quick and universally applicable interpretation and accountability of each EU measure dealing with these fields are vital for the development of a strong AFSJ. The Treaty of Lisbon would provide the effective judicial protection of individuals in AFSJ by eliminating previous restrictions of the Court's jurisdiction over Title IV and Title VI measures. Immigrants, asylum-seekers and refugees will no longer be put to an inferior level of judicial protection within the EU. Granted with complete jurisdiction over the acts adopted within the fields of the AFSJ with some exceptions, the ECJ would ensure a higher level of judicial control and protection in the EU. After the inclusion of Charter of Fundamental Rights of the European Union into primary law, legal measures adopted by the EU institutions will have to be in full compliance with the rule of law and fundamental rights. Consolidation of legislative, operational and judicial mechanisms of

AFSJ will considerably facilitate the development of more integrated, legitimate and coherent policies in the area.

BIBLIOGRAPHY

Books

Apap, Joanna. *Justice and Home Affairs in the EU: Liberty and Security Issues after Enlargement*, Cheltenham: Edward Elgar Publishing, 2004.

Craig, Paul & de Burca, Grainne. *EU Law, text cases and materials*, third edition, Oxford 2003.

Craig, Paul & de Burca, Grainne. *EU Law: Text, Cases, and Materials*, Oxford, Oxford University Press, 2007.

Collinson, Sarah, *Europe and International Migration*, London, Pinter Publishers 1993.

Claes, Monica. *The National Courts' Mandate in the European Constitution*, Oxford, Hart Publishing 2006.

Pollard, David & Ross, Malcolm. *European Community law, text and materials*, London, Dublin, Edinburg, Butterworths, 1994.

Peers, Steve. *EU Justice and Home Affairs Law*, London, Longman 2000.

Piris, JC. *The Constitution for Europe: A Legal Analysis*, Cambridge University Press, 2006.

Shaw, Jo. *Law of the European Union, 3th edition*, Palgrave Law Masters, 2000.

Articles

Achermann, Alberto, "Asylum and Immigration Policies: From Co-operation to Harmonisation" in Bieber, Roland and Jörg Monar (eds.), *Justice and Home Affairs in the European Union: The Development of the Third Pillar,* Brussels: European Interuniversity Press, 1995.

Alegre, Susie & .Leaf, Marisa. "European Arrest Warrant: A solution ahead of its time?" Justice publication ,London, November 2003.

Anderson, M & Apap, Joanna "Striking a Balance between Freedom, Security and Justice in an Enlarged European Union", Brussels, *CEPS,* 2002.

Arnull, Anthony. "Private applicants and the action for annulment since Codorniu, *CMLR*, volume 38, 2001.

Balzacq, Thierry & Carrera,Sergio." The Hague Programme: The long road to freedom, security and justice" in *Security versus freedom? A challenge for Europe's future" CEPS*, Ashgate, September 2006.

Balzacq, Thierry & Carrera, Sergio "Migration, Borders and Asylum: Trends and Vulnerabilities in EU Policy" in *Security versus freedom? A challenge for Europe's future" CEPS*, Ashgate, September 2006.

Baldwin-Edwards, Martin and Schain, Martin, "The Politics of Immigration: Introduction", *West European Politics,* Vol. 17, No. 2 (1994), Special Issue on the Politics of Immigration in Western Europe, edited by Baldwin-Edwards, Martin and Martin Schain.

Ben, Hayes. "EU anti-terrorism action plan: legislative measures in justice and home affairs policy", Statewatch post 11.9.01 Analyses N°6. Available at: http://www.statewatch.org/news/2001/oct/analy6.pdf .

Best, Edward. “The Lisbon Treaty: A qualified advance for EU Decision-making and governance”, Eipascope 2008/1.

Bigo, Didier, Carrera, Sergio, Guild, Elspeth & Walker, R.B.J. “The Changing Landscape of European Liberty and Security: Mid-term Report on the Results of the CHALLENGE Project”, CHALLENGE Research Paper No. 4, Brussels, CEPS, February 2007.

Bigo, Didier. “Liberty, whose Liberty? The Hague Programme and the Conception of Freedom”, in T. Balzacq and S. Carrera (eds), *Security versus Freedom? A Challenge for Europe’s Future,* Aldershot: Ashgate Publishing 2006.

Brinkhorst .L.J, “Pillar III” in *Challenge Europe; making Sense of the Amsterdam Treaty* publication, Brussels, *European Policy Centre*, 1997.

Brok, Elmar, “The European Parliament” in *Challenge Europe; making Sense of the Amsterdam Treaty* publication, Brussels, *European Policy Centre*, 1997.

Brouwer, Evelien, “Immigration, Asylum and Terrorism: A Changing Dynamic Legal and Practical Developments in the EU in Response to the Terrorist Attacks of 11.09”, European Journal of Migration and Law 4, 2003.

Butt Philip, Alan, “European Union Immigration Policy: Phantom, Fantasy or Fact?”, West European Politics, Vol. 17, No. 2 (1994), Special Issue on the Politics of Immigration in Western Europe, edited by Baldwin-Edwards, Martin and Martin Schain.

Capeta, Tamara. “Legal instruments in the reform Treaty-Simplified?” *Croatian Yearbook of European Law and Policy*, Vol 3, 2007.

de Witte, Bruno. "The past and future role of the European Court of Justice in the protection of human rights" in P. Alston (ed.), *The EU and Human Rights* OUP, 1999.

de las Cuevas Rodriguez, Maria. ”Seeking asylum in the European Union: Is the spirit of Tampere present in new legislation”, retrievable at http://www.eumap.org/journal/features/2004/migration/pt2/asylum .

Den Boer Monica.” 9/11 and The Europeanisation Of Anti-Terrorism Policy: A Critical Assessment”. Notre Europe, Policy Papers N°6, September 2003. http://www.notre-europe.asso.fr/fichiers/Policypaper6.pdf .

Den Boer, Monica and Jörg, Monar. “Keynote article: 11 September and the Challenge of Global Terrorism to the EU as a Global Security Actor”, *Journal of Common Market Studies*, Annual Review, Vol.40, 2002.

den Boer, Andrea M. “The European Convention and its implications for Justice and Home Affairs Cooperation”, in J.Apap(ed..) *Justice and Home Affairs in the EU: Liberty and security issues after Enlargement*, Cheltenham: Edwar Elgar 2004.

de Witte, Bruno. “Legal instruments and law making in the Lisbon Treaty” in Stefan Griller and Jacques Ziller(eds), *EU Constitutionalism without a Constitutional Treaty* ,Springer publishing 2008.

Douglas-Scott, Sionaidh. ”The rule of law in the Euroepean Union-putting the security into the Area of freedom, security and justice”, *E.L. Rev*. 2004, 29(2), 219-242.

de Lobkowicz, Wenceslas, “Intergovernmental Co-operation in the field of Migration - From the Single European Act to Maastricht”, in Monar, Jörg and Roger Morgan, (eds), *The Third Pillar of the European Union: Co-operation in the field of justice and home affairs* ,Bruges: European Interuniversity Press and College of Europe, 1994.

Drüke, Luise, “Harmonisation of Asylum Law and Judicial Control Under the Third Pillar”, in Bieber, Roland and Jörg Monar, *Justice and Home Affairs in the European Union: The Development of the Third Pillar,* Brussels: European Interuniversity Press, 1995.

den Boer, Monica, “Travel Notes on a Bumpy Journey from Schengen via Maastricht to Amsterdam”, in den Boer, Monica, (ed.), *The Implementation of Schengen: First the Widening, Now the Deepening* ,Maastricht: Institute of Public Administration, 1997.

Eeckhout, Piet. “The European Court of Justice and the Area of freedom, security and justice: Challenges and problems” in David O’Keeffe & Antonio Bavasso (eds.), *Judicial review in European Union law: essays in honour of Lord Slynn*, Kluwer Law International, The Hague 2000.

Fortescue, John Adrian, “First Experiences with the Implementation of the Third Pillar Provisions”, in Bieber, Roland and Jörg Monar, *Justice and Home Affairs in the European Union: The Development of the Third Pillar,* Brussels:European Interuniversity Press, 1995.

Fontanelli, Filippo. “The Court goes all in”, Sant' Anna School of Advanced Studies, Department of law, STALS research paper N 3/2009.

Gaja, Giorgio. ”New instruments and institutions for enhancing the protection of human rights in Europe, in Aston (eds) *The EU and human rights*, Oxford University Press,1999.

Groussot, Xavier. “The EC System of Legal Remedies and Effective Judicial Protection: Does the System Really Need Reform?”, Legal Issues of Economic Integration vol. 30, issue 3,2003.

Guild, Elspeth, Carrera, Sergio and Balzacq, Thierry.“The Changing Dynamics of Security in an Enlarged European Union”, CHALLENGE Paper N 12, Brussels, CEPS 2004.

Guild, Elspeth, “International Terrorism and EU Immigration, Asylum and Borders Policy: The Unexpected Victims of 11 September 2001”, European Foreign Affairs Review 8, 2003.

Hatzopoulos, Vassilis. “Casual but Smart: The Court’s new clothes in the Area of Freedom Security and Justice (AFSJ) after the Lisbon Treaty”, Research papers in law 2/2008, college of Europe.

Jacobs, F.G. "The EU Charter of Fundamental Rights" in A. Arnull and D. Wincott (eds), *Accountability and Legitimacy in the European Union,* OUP, 2002.

Joanna, Arap and Carrera, Sergio” European arrest warrant: A good testing ground for mutual recognition in the Enlarged European Union”, CFSP paper No 46,retrievale at http://www.ceps.be .

Jimeno –Bulnes, Mar.”After September 11th: The fight against terrorism in National and European law.substantive and procedural rules: Some examples”, *European Law Journal*, Vol 10, No 2, March 2004.

Jörg, Monar. “Justice and Home Affairs”, *Journal of Common Market Studies, Annual Review*, 2002, Vol.40, N°s1.

Ladenburger, Clemens. “Police and Criminal Law in the Treaty of Lisbon; a new dimension for the community method”, European Constitutional Law Review, volume 4, 2008.

Lenaerts, Koen & Desomer, Marlies. “Towards a Hierarchy of Legal Acts in the European Union? Simplification of Legal Instruments and Procedures”, European Law Journal, Vol. 11, No. 6, November 2005.

Lipsius, Justus. “The 1996 Intergovernmental Conference”, *European Law Review*, Vol. 20, 1995.

Meyer, Jürgen. ”Enforceability of the Charter of Fundamental Rights and improvement of the individual’s right to legal redress”, WG II WD 017.

Michiel, Patijn, & Peter, Ludlow. “The Dutch Presidency” in *Challenge Europe; making Sense of the Amsterdam Treaty* publication. Brussels, *European Policy Centre*, 1997.

Monar, Jörg. “Justice and Home Affairs”, *Journal of Common Market Studies*, Vol. 36, Annual Review 1998.

Monar, Jörg, “European Union - Justice and Home Affair: A Balance Sheet and an Agenda for Reform”, in Edwards, Geoffrey and Pijpers, Alfred, (eds), *The Politics of European Treaty Reform* , London: Pinter, 1997.

Nilsson, Hans G. “Decision-Making in EU Justice and Home Affairs: Current Shortcomings and Reform Possibilities”, SEI Working Paper N°57. http://www.sussex.ac.uk/sei/documents/wp57.pdf .

O’Keeffe, David, “Recasting the Third Pillar”, *Common Market Law Review*, Vol. 32, 1995b.

Peers, Steve. *EU Reform Treaty analysis 1: JHA provisions*, Statewatch, August 2007,p 4(retrieved from www.statewatch.org on 8.8.2007).

Peers, Steve. ”Mutual recognition and criminal law in the Euroepan Union:Has the Council got it wrong ?”, CMLrev 41, 2004.

Peers, Steve “Salvation Outside the Church: Judicial Protection in the Third Pillar after the Pupino and Segi Judgments”, CML Rev. vol. 44, issue 4, 2007.

Tomuschat, Christian. “Inconsistencies– The German Federal Constitutional Court on the European Arrest Warrant”, European Constitutional law review, volume 2, 2006.

Tony, Bunyan. “The war on freedom and democracy, an analysis of the effects on civil liberties and democratic culture in the EU”, Statewatch analysis N°13. Available at: http://www.statewatch.org/news/2002/sep/analy13.pdf .

Vitorino, António.”The Question of Effective judicial remedies and access of individuals to the ECJ”, Working Document 021.

von Bogdandy, Armin. “Legal Instruments in European Union Law and their Reform: A Systematic Approach on an Empirical Basis” in *Yearbook of European Law* 23, 2004.

Ward, Angela. “Access to Justice”, in Steve Peers & Angela Ward (eds.), *The European Union Charter of Fundamental Rights*, Hart Publishing, Oxford and Portland Oregon 2004.

Werner, Hoyer. “the German Government” in *Challenge Europe; making Sense of the Amsterdam Treaty* publication. Brussels, *European Policy Centre*, 1997.