The Lisbon Treaty Versus Standing Still: A View from the Third Pillar

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Third pillar – European Arrest Warrant – Nature of third pillar – Litigation before national constitutional courts – Primacy of EU law over national law – Differing national attitudes with regard to the status of third pillar law – Process of approximation: first pillar and third pillar – Achieving consistency through primacy of third pillar – Judicial protection of position of individual – Lisbon Treaty and the unification of EU law

Introduction

Across national borders, voices against the Lisbon Treaty have argued that ratification of this document would bring about undesirable changes in the nature of the European Union and the way it operates.[1] These voices believe that there is nothing wrong with the Union at present ('if it ain't broke, don't fix it') or that, although the Union is in fact 'broke', it cannot be fixed with the Lisbon Treaty. Either way, the result is the belief that not doing anything is preferable to ratifying the Lisbon Treaty. This paper shows that, contrary to such belief, it is precisely not doing anything that will allow the most undesirable changes to happen in what is arguably the most sensitive and fast-developing area of the EU, the third pillar.

The paper will argue that the way in which third pillar law is being considered and applied by national courts varies and that these discrepancies epitomise an evolution that is likely to culminate in third pillar law being treated in the same way as first pillar law, and more specifically allowing it to have primacy over national

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[1] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, *OJ* [2007] C 306/1, 17.12.2007. The consolidated version will be used throughout this paper: Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, *OJ* [2008] C 115/1, 9.5.2008.

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law as a matter of EU law. This may come as a result of changes in national judicial attitudes, ECJ case-law or a combination of both. Since, in the absence of the Lisbon Treaty, this evolution would not come paired with other necessary changes, it would be liable to cause a grave imbalance in the constitutional structure of the Union and would lead to gaps in judicial protection and, possibly, a re-ignition of the conflict between national constitutional courts and the European Court of Justice (ECJ). If, on the other hand, the change in the nature of third pillar law from 'weak' public international law to 'strong' EC law[2] takes place as a result of an all-embracing treaty overhaul (as it would be the case were the Lisbon Treaty to be ratified), it will be accompanied by an extension of the system of judicial protection that will ensure an unproblematic transition.

Third pillar law

The law adopted in the first pillar of the EU (EC law), on the one hand, and the law adopted in the second and third pillar of the EU, on the other, have different legal effects. There is disagreement in the literature as to whether EC law is a special kind of public international law, or something completely different from it.[3] It is not necessary, for the purposes of this paper, to dwell on this discussion: what is important is that EC law has developed stronger effects than those of classic international law. 'EC law' will be used throughout this piece, then, to denote something different from 'public international law'. Note that the latter label refers to *classic* public international law; all arguments put forward in this paper are compatible with considering EC law as a particular and distinct branch of international law that has developed stronger features.

EU law is adopted outside the framework of the Community, by means other than the Community method. Consequently, it is different from EC law and has traditionally been considered public international law of sorts. This means not only that EU measures, in theory, do not have the effects of EC law measures (direct effect, primacy, etc.),[4] but also that national courts – depending on na-

[2] 'Union law', in the language of the Lisbon Treaty. This label would apply to all law adopted by the EU, and such measures would have the features of current EC law.

[3] The majority of the doctrine considers EC law and public international law two separate systems: *see*, e.g., J.H.H. Weiler and U.R. Haltern, 'Constitutional or International? The Foundations of the Community Legal Order and the Question of Judicial Kompetenz-Kompetenz', in A.M. Slaughter et al. (eds.), *The European Courts and National Courts: Doctrine and Jurisprudence* (Oxford, Hart 1998) p. 331. De Witte, on the other hand, argues very convincingly that EC law is international law that has developed innovative features: B. de Witte, 'The European Union as an International Legal Experiment', forthcoming *EUI Working Paper*, on file with the author.

[4] As a matter of EU law, i.e., not because such features are accorded to public international law as a matter of national law.

tional law – may be in a position to review these measures according to national standards and disapply them.[5] This is not possible with measures of EC law because, firstly, they have primacy over all national law and thus cannot be reviewed against national law standards[6] and, secondly, because of the *Foto-Frost* principle: only the ECJ can review an EC law measure and leave it without effect.[7]

What has been described is the orthodox view of EU law, applicable to both second and third pillars of the Union (Common Foreign and Security Policy, and Police and Judicial Co-operation in Criminal Matters, respectively). In the case of the third pillar, however, the situation is slightly more complex. Whereas the effects of the measures adopted under the second pillar can still be fully explained using classic international law terminology, this is not so easy in the case of the third pillar. The latter offers a wider range of possible measures, some of which are comparable to some extent to EC measures (framework decisions and decisions on the one hand, directives and regulations on the other).[8] More importantly, although direct effect is explicitly excluded in the TEU, the ECJ has extended other features of EC law to third pillar measures in its case-law,[9] creating the impression that the line between EC and EU (third pillar) law is fuzzier than ever;[10] as a consequence, it has been argued that the most distinct feature of EC law, primacy, should also be recognised as a feature of the law adopted in the third pillar.[11] I do not share this view, though it is clear that the range and nature of

[5] P. Eeckhout, 'The European Court of Justice and the "Area of Freedom, Security and Justice": Challenges and Problems', in D. O'Keeffe (ed.), *Judicial Review in European Union Law Liber Amicorum in Honour of Lord Slynn of Hadley* (London, Kluwer 2000) p. 160.

[6] *Inter alia*, case 11/70 *Internationale Handelsgesellschaft mbH* v. *Einfuhr- und Vorratstelle für Getreide und Futtermittel* [1970] *ECR* 1125.

[7] Case 314/85 *Foto-Frost* v. *Hauptzollamt Lübeck-Ost* [1987] *ECR* 04199.

[8] Their descriptions are identical, except for the fact that direct effect is excluded for framework decisions and decisions (Art. 34 TEU).

[9] C-105/03 *Criminal Proceedings against Maria Pupino* [2005] *ECR* I-5285, where the ECJ stated that the duty of conform interpretation applies in the third pillar. *See also* E. Spaventa, 'Opening Pandora's Box: Some Reflections on the Constitutional Effects of the Decision in Pupino', 3 *EuConst* (2007) p. 5; E. Spaventa, 'Remembrance of Principles Lost: On Fundamental Rights, the Third Pillar and the Scope of Union Law', 25 *Yearbook of European Law* (2006) p. 153; S. Peers, 'Salvation Outside the Church: Judicial Protection in the Third Pillar after the Pupino and Segi Judgments', 44 *Common Market Law Review* (2007) p. 885.

[10] Note the ambiguous remark of the ECJ in *Kadi* that the EU and the EC are 'integrated but separate legal orders': Case C-402/05 P *Kadi* v. *Council and Commission*, judgment of 3 Sept. 2008 (not yet reported) para. 202.

[11] This view presupposes that only 'narrow' direct effect is excluded by Art. 34 TEU, and thus that the so-called exclusionary effect is a manifestation of primacy and not of direct effect. Accordingly, the primacy of third pillar measures would have consequences that would not be barred by the exclusion of direct effect for this area. The most polemic contribution in this respect has been Lenaerts and Corthaut's compelling submission that the principle of primacy applies already both in

third pillar measures is more complex than that of the second one, and that brings this area closer, in any case, to the EC pillar. The pragmatics of European integration have pushed this area further, resulting in something other (or 'more') than orthodox public international law. This was to be expected: after all, the whole of EU law should be regarded from the start as a public international law 'of sorts'. It is still the case, however, that third pillar measures are closer to classic international law than they are to EC law: even features such as indirect effect can be explained in terms of classic international law – allowing of course for special alterations due to the fact that these particular measures of international law are adopted within the very special setting of the EU. Although there is a trend of approximation between first and third pillar, the distinction between both types of law is still valid and, what is more important, should remain in place as long as other institutional arrangements remain untouched. This will be argued in detail later on in this paper; for the moment, suffice it to say that the situation would change if all institutional arrangements – most importantly, judicial oversight – were reformed at once to unify first and third pillar. In such a scenario, the unification of EC and EU law would be, to a great extent, unproblematic. This reform, first proposed in the Constitutional Treaty and now taken up in the Lisbon Treaty, will also be further explored below.

A case study: the national courts and the European Arrest Warrant (EAW)

One of the main contentions of this paper is that there is uncertainty among national courts as to the present status of third pillar law. This is caused by a number of factors – the decision of the ECJ in *Pupino*,[12] for one, has already been mentioned. Others include the general phenomenon of *Reflexwirkung* between the pillars,[13] in the sense that it is difficult to keep two different legal orders with the same origin from influencing each other, also in the way they are applied by courts. Perhaps some national courts feel a certain pressure to over-comply with EU law, lest they be criticised for their backward stance. Finally, the parallel political ef-

the second and in the third pillar: K. Lenaerts and T. Corthaut, 'Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law', 31 *European Law Review* (2006) p. 287. On the relationship between narrow/broad direct effect and primacy in the third pillar, A. Hinarejos, 'On the Legal Effects of Framework Decisions and Decisions: Directly Applicable, Directly Effective, Self-executing, Supreme?', 14 *European Law Journal* (2008) p. 620.

[12] Case C-105/03 *Criminal Proceedings against Maria Pupino* [2005] *ECR* I-5285. For further references, *see supra* n. 9.

[13] C. Timmermans, 'The Constitutionalisation of the European Union', 21 *Yearbook of European Law* (2002) p. 1 at p. 10. M. Claes, *The National Courts' Mandate in the European Constitution* (Oxford, OUP 2006) p. 105.

forts to unify the pillars in the Constitutional and afterwards Lisbon Treaty may have also played a role in confusing actors as to the current state of play.

In order to illustrate this uncertainty, this section will focus on the litigation generated by the Framework Decision on the European Arrest Warrant[14] before several national constitutional courts across the Union,[15] and recently also before the ECJ.[16] Against this background, this section will briefly showcase the different attitudes towards third pillar law taken by several national courts across the Union.

The EAW Framework Decision creates a speedy surrender procedure between judicial authorities of EU member states that replaces traditional methods of extradition based on public international law.[17] The new procedure is based on the principle of mutual recognition of judicial decisions in criminal law and, in a large number of cases, it does away with the traditional requirement of double criminality.[18] The challenges involving the EAW Framework Decision before national constitutional courts concerned the validity of the national laws implementing it, generally because they conflicted with a prohibition on the extradition of nationals contained in the national constitution.[19] In the German case, the *Bundesverfassungsgericht* was of the opinion that the national legislator could have found a constitutional implementation within the latitude afforded by the framework

[14] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, *OJ* [2002] L 190/1, 18.7.2002.

[15] *Inter alia*, Bundesverfassungsgericht (German Constitutional Court), Decision of 18 July 2005 (2 BvR 2236/04); *Trybunal Konstytucyjny (Polish Constitutional Court), Judgment of 27 April 2005, No. P 1/05*; Judgment of the Czech Constitutional Court of 3 May 2006, Pl ÚS 66/04; Supreme Court of Cyprus, judgment of 7 Nov. 2005, App. No. 294/2005; *Minister for Justice & Law Reform* v. *Robert Aaron Anderson* [2006] IEHC 95; *Office of the King's Prosecutor* v. *Cando Armas* [2005] UKHL 67.

[16] Case C-303/05 *Advocaten voor de Wereld* [2007] *ECR* I-3633.

[17] An extensive recollection of the legislative process can be found in J. Spencer, 'The European Arrest Warrant', 6 *Cambridge Yearbook of European Legal Studies* (2004) p. 201. For more information on the European Arrest Warrant, *see* R. Blekxtoon and W. van Ballegooij, *Handbook on the European Arrest Warrant* (The Hague, T.M.C. Asser Press 2005); J. Wouters and F. Naert, 'Of Arrest Warrants, Terrorist Offences and Extradition Deals: an Appraisal of the Main Criminal Law Measures Against Terrorism after "11 September"', 41 *Common Market Law Review* (2004) p. 909.

[18] For a comprehensive overview of the problems prompted by the application of the principle of mutual recognition to criminal matters, *see* V. Mitsilegas, 'The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU', 43 *Common Market Law Review* (2006) p. 1277.

[19] Although not only – in the Czech Republic, for example, the challenge also concerned the abolition of the requirement of double criminality. Concerning the different national prohibitions on the extradition of nationals and the problems they pose for the implementation of the EAW, *see* J. Komárek, 'European Constitutionalism and the European Arrest Warrant: in Search of the Limits of "Contrapunctual Principles"', 44 *Common Market Law Review* (2007) p. 9 at p. 14-16; for an analysis of this rule in a wider context, *see* M. Plachta, 'Non-extradition of Nationals: A Never-ending Story?', 13 *Emory International Law Review* (1999) p. 77.

decision, but failed to do so.[20] In the Polish case, the court found that it was impossible for the legislator to find a constitutional way to implement the EU measure, but it decided to patch up the conflict until the national constitution could be reformed.[21] The Czech Constitutional Court could find a way to reconcile the national implementing measures and the national constitution through interpretation.[22] None of these courts referred the case to the ECJ. In Belgium, however, the validity of the framework decision itself was questioned and the ECJ was asked to give a preliminary ruling under Article 35 TEU in the case *Advocaten voor de Wereld*.[23] Among other things,[24] the claimant argued that, because of the suppression of the requirement of double criminality in a set number of instances, the framework decision ran counter to the principles of legality and equality.

The litigation in national courts surrounding the EAW goes right to the heart of the nature of third pillar measures and how they are perceived by national constitutional courts. The German Constitutional Court was quick to label the framework decision clearly as international law, and deny it any effects typical of EC law (even indirect effect, thereby contradicting *Pupino*). The conflict was manageable because the framework decision allowed for a constitutional implementation; if this had not been the case, the German Court would have probably declared the framework decision inapplicable on German soil, at least under the national constitution as it now stands. From the German Court's point of view, it is clear that the differences between EU and EC law remain very much in place.

The Polish Constitutional Court found a conflict between the national constitution and the third pillar measure that could not be solved through interpretation. The question was, then, whether third pillar measures have supremacy over national law. Of course, the problem before the Court concerned the compatibility of the national implementation law with the constitution, but the framework decision did not offer discretion to the national legislator to implement it in a

[20] For a comment of this case, A. Hinarejos, 43 *Common Market Law Review* (2006) p. 583.

[21] So that Poland would not breach its EU law obligations, the Polish court delayed the entry into force of its judgment by 18 months, while stating the obligation of the legislature to amend the Constitution in the meantime. For a comment of this case, D. Leczykiewicz, 43 *Common Market Law Review* (2006) p. 1181. As a result of the Court's judgment, Art. 55 of the Polish Constitution was amended (statutes approved by the *Sejm* on 8 Sept. 2006, and by the Senate on 14 Sept. 2006). It has been argued that the amended provision can still not be reconciled fully with the content of the EAW Framework Decision: A. Górski et al., 'The European Arrest Warrant (EAW) and its Implementation in the Member States of the European Union. International Research Questionnaire', part of the 'EAW Database' available at: <http://www.law.uj.edu.pl/~kpk/eaw/data/poland.html>, visited 10 Jan. 2009.

[22] For a comment of the Czech case, *see* Komárek, *supra* n. 19.

[23] Case C-303/05 *Advocaten voor de Wereld* [2007] *ECR* I-3633.

[24] The claimant also argued that the subject-matter of the framework decision should have been implemented by way of a convention.

manner that did not conflict with the national constitution. The Polish court could have annulled the implementing national law and made it clear that no possible implementation of the framework decision would be considered constitutional in the future, thereby making it inapplicable on Polish soil as long as the constitution remained unchanged. However, this would have meant that Poland would not only be in breach of its obligations under EU law, but also of Article 9 of its own constitution: '[Poland] shall respect international law binding upon it'. To be on the safe side, the Court decided to delay the annulment of the national implementation measure, while instructing the legislator to amend the national constitution in the meantime. The Polish Court's attitude as regards third pillar measures is hesitant and reflects the growing confusion on the boundaries between EU and EC law.[25] It is perhaps a shame that this national court could not put its doubts on the primacy of third pillar measures to the ECJ – something that, on the other hand, squares well with the 'silent' inter-court dialogue that often takes place in the Union.[26]

The Czech Court was also hesitant as to the position of third pillar law in the member states' legal order. While it made it clear that there are important differences between EU and EC norms, it also remarked that '[t]he consequences of these differences for the current nature and status of such norms in relation to Member State legal orders, have not as yet been definitively and clearly settled in the case-law of the ECJ.'[27] It was possible for the Czech Court to reconcile the national implementation law with the constitution through interpretation, which meant that it did not need to ask the ECJ to clarify the legal effects of third pillar measures any further; it concluded that the question remained open.[28]

The only national court to refer the question to the ECJ, the Belgian *Arbitragehof*, arguably considered that the EAW Framework Decision had primacy over national law. This can be inferred from the following: the claimant had challenged the legality of the national implementing law, yet the *Arbitragehof* did not simply assess the compatibility of the national law with national human rights standards. It reasoned that the national law was merely the *verbatim* implementation of a Union measure that did not leave any room for national discretion on the points at stake in the case, and it thus considered itself unable to assess it against national

[25] Although the Court refers to the framework decision as an international agreement, it also wonders in its judgment whether third pillar law has primacy over national law, as a matter of EU law: Leczykiewicz, *supra* n. 211, p. 1185. The English summary of the judgment may be found at <www.trybunal.gov.pl/eng/summaries/wstep_gb.htm>, visited 10 Jan. 2009.

[26] Even if the Polish Constitutional Court had wanted to ask the ECJ on this point (something we are not in a position to know), it would have been impossible because Poland has not accepted the jurisdiction of the ECJ in the third pillar of the European Union. *See infra* n. 43.

[27] Judgment of the Czech Constitutional Court of 3 May 2006, Pl ÚS 66/04, para. 58.

[28] Ibid., para. 60.

standards – presumably since that would amount to assessing the framework decision itself against national standards, something that is not allowed if the Union measure is considered supreme over national law. Instead, it referred the question to the ECJ and asked the Court to assess the validity of the framework decision against EU human rights standards.[29]

All these different approaches to the nature and legal effects of the EAW Framework Decision illustrate the uncertainty in the field: an uncertainty that was not dispelled by the ECJ. The Court subjected itself to the letter of the questions asked by the *Arbitragehof*, thus reflecting only on the compatibility of the framework decision with EU human rights standards in a brief and, at times, thinly argued judgment.[30] No attempt was made at clarifying the status of third pillar law fully – something that is not very surprising, given the altogether different focus that the Belgian court gave to its questions. The ECJ did nevertheless remark that not only the institutions of the Union, but also the member states when implementing Union law, 'are subject to review of the conformity of their acts with the Treaties and the general principles of law':[31] the precise meaning of this statement is unclear. First, the Court seems to be saying that, also in the third pillar, the Treaties and the general principles of law have a certain degree of primacy over national law, presumably at least as regards respect for fundamental rights.[32] This, in itself, is not shocking: the member states are bound by the TEU when implementing Union law, and thus by Article 6. It is logical for the ECJ to claim that, in theory, Article 6 TEU and the obligation enshrined in it has primacy over national law; after all, the ECJ is an international court and we cannot expect an international court to do anything other than to uphold the principle of *pacta sunt servanda*, or primacy as a theoretical claim of public international law.[33]

Secondly, however, the Court uses the words 'subject to review', meaning that it may be going further than just stating a theoretical claim. Who, we may wonder,

[29] Vandamme shows that the Belgian *Arbitragehof* has consistently merged Belgian and EC/EU legal principles for the purpose of their interpretation. This 'merger' ensures that there is no discrepancy between EC/EU law and Belgian law: T. Vandamme, 'Prochain Arrêt: La Belgique! Explaining Recent Preliminary References of the Belgian Constitutional Court', 4 *EuConst* (2008) p. 127.

[30] For a more general critique of the judgment, *see* A. Hinarejos, 'Recent Human Rights Developments in the EU Courts: The Charter of Fundamental Rights, the European Arrest Warrant and Terror Lists', 7 *Human Rights Law Review* (2007) p. 793 at p. 795-802; D. Leczykiewicz, 'Constitutional Conflicts and the Third Pillar', 33 *ELR* (2008) p. 230.

[31] *Advocaten voor de Wereld*, *supra* n. 23, para. 45. The Court had already made this statement in *Segi*: Case C-355/04 P *Segi and others* v. *Council* [2007] *ECR* I-1657, para. 51.

[32] D. Sarmiento, 'European Union: The European Arrest Warrant and the Quest for Constitutional Coherence', 6 *International Journal of Constitutional Law* (2008) p. 171 at p. 180-181. Spaventa has also argued for the primacy of fundamental rights as general principles in the third pillar: Spaventa 2006, *supra* n. 9, p. 170-172.

[33] Claes, *supra* n. 13, p. 167-168.

is going to carry out this review of national action in practice? The obvious candidates are national courts, since there are no infringement proceedings in the third pillar. To the extent that a number of countries have accepted the jurisdiction of the ECJ in this area, some of the national courts may ask for guidance through the preliminary ruling procedure. It may be that, in the near future, the Court expressly imposes on national courts the duty to disapply national law that is in conflict with EU fundamental rights standards as enshrined in primary law, something hinted at in *Advocaten voor de Wereld*. The Court is also leaving the door open to deciding itself (through the preliminary ruling procedure if available) whether national action complies with EU human rights standards as long as the member state is acting within the scope of EU law.[34]

The question is whether the process will stop here. What of third pillar primary law that does not concern the protection of fundamental rights? What of secondary law? It seems that, if any of these national courts asks the ECJ at some point whether any third pillar measure other than those at stake in *Advocaten voor de Wereld* should prevail over national law, the answer is also likely to be 'yes': the Court, as an international court, has to uphold the principle of *pacta sunt servanda*. It has been convincingly argued in the literature that the fact that the Court declared EC law supreme over national law in *Costa* v. *ENEL* was not at all surprising, since it amounted to asking an international court about the status of international law. What made the primacy of EC law have stronger effects was that it could be ascertained by the ECJ in the middle of a case that was being heard by a national court. These stronger effects were the result of the way the judicial system is structured in the EC and, in particular, of the existence of a (*ex-ante*) preliminary ruling mechanism.[35] To the extent that this mechanism is available in the third pillar, the foundations are there for the ECJ to declare the primacy of the whole of third pillar law over the whole of national law, at least in theory. Whether this would be done in the same terms as in *Costa* and *Simmenthal* is,[36] of course, a different matter. In *Costa*, the ECJ put forward several arguments that spoke in favour of a strong principle of primacy in the first pillar.[37] To the extent

[34] Within the first pillar this control extends not only to cases where the member state is implementing EC law, but also where it is derogating from it: *see*, respectively, Cases *5/88 Wachauf* [1989] *ECR* 2609 and C-260/89 *ERT/DEP* [1991] *ECR* I-2925.

[35] *See also* on this point D. Wyatt, 'New Legal Order, or Old', 7 *European Law Review* (1982) p. 147; Claes, *supra* n. 33; de Witte, *supra* n. 3.

[36] Case 6/64 *Costa* v. *ENEL* [1964] *ECR* 585, where the ECJ famously first declared the primacy of EC law, and Case 106/77 *Amministrazione delle Finanze dello Stato* v. *Simmenthal* [1978] *ECR* 629, where the ECJ stated that national courts have a duty to disapply all national law that is inconsistent with EC law.

[37] An autonomous legal system that demands consistency; a Community of unlimited duration with its own institutions and legal personality, resulting from a limitation of sovereignty/transfer of powers from the member states.

that some of these arguments are, arguably, not yet fully applicable to the third pillar and that other policy considerations would have to be weighed, the ECJ may feel obliged to adopt a more ambiguous or even weaker position on the primacy of third pillar law: by even avoiding answering the question if at all feasible, for example, or by stating such primacy in a theoretical manner but not spelling out its effects in practice, leaving them for national courts to decide. In any case, the discussion as to the status of third pillar law continues; the only remark that the ECJ made in *Advocaten voor de Wereld* in this regard did not fully clarify the matter, although it did make it clear that the 'slippery slope' towards full-fledged primacy in the third pillar may be closer than we think.

To sum up: national courts view and deal with third pillar law in very different manners. The spectrum goes from considering it public international law to considering it akin to EC law, with intermediate stages. This section has pointed to some likely causes for what seems to be uncertainty as to the current state of play in the third pillar, something that is manifest in both the academic discussion as to what the nature of third pillar law is and should be, and in an array of different judicial attitudes towards it. We have also seen how the ECJ itself has not clarified the status of third pillar law. It has been argued, however, that it may be only a matter of time until the ECJ is asked to make a pronouncement in this respect, with uncertain results.

Standing still: the future without the Lisbon Treaty

The pitfalls of stronger third pillar measures

One of the main contentions of this paper is that the state of uncertainty as regards the status of third pillar law and the array of differing national judicial attitudes towards it is likely to bring about a gradual change in the nature of these measures, from international law to something close to first pillar law. The particular milestones in this process may come from changes in the way national courts deal with third pillar law, from ECJ decisions, or from a combination of both. The result of this gradual change may never be that third pillar measures have identical effects to first pillar ones, given that direct effect is explicitly barred by the Treaty; but it may be that these third pillar measures end up being treated as having primacy over national law, as a matter of EU law. The process of approximation is already underway and is not likely to stop. The question is, therefore, whether the change takes place in a piecemeal manner, through changing judicial attitudes, or whether it happens as part of an all-embracing, legislative overhaul. In this section, I shall explore the consequences of a gradual, piecemeal change – the one likely to take place over the next few years if the Lisbon Treaty is not ratified.

It has been already pointed out that the change from public international law to something closer to EC law would grant these measures 'stronger' legal effects, i.e., supremacy over national law.[38] The most acute problems would be caused by the extension of the principle of primacy to the third pillar in the absence of guarantees that are present in the first one. The lack of a comprehensive system of judicial control at EU level in the third pillar is only excusable as long as third pillar measures are treated as measures of public international law that can be checked by national courts for their compliance with national standards, and disapplied if necessary.[39] If national courts start doubting their competence (as a matter of EU law) to do this, third pillar measures will be allowed to affect individuals in a much stronger fashion that they were ever supposed to; national law will not be able to offer any guarantees. The problem is, of course, that an EC measure that has supremacy over national law can be controlled at the EC level in a number of ways, whereas an EU measure cannot. Under the first pillar, control has been taken out of the hands of national courts and given to the ECJ. On the contrary, if third pillar measures are treated as supreme under the current judicial arrangements, control is taken away from the national level without being taken up at the EU level.

An EC measure can be reviewed directly by the ECJ at the instance of an individual, something that is lacking in the third pillar.[40] But more importantly, an EC measure can be reviewed indirectly when any national court has doubts as to its interpretation or validity and uses the preliminary reference procedure. In the third pillar, the ECJ may give preliminary rulings in relation to the validity and interpretation of framework decisions and decisions and in relation to the interpretation of conventions.[41] The Court's jurisdiction is nevertheless voluntary and varies among the member states,[42] since the latter decide which national courts

[38] In some countries, it is already the case that international treaties have primacy over secondary legislation, but not over the national constitution. In these cases, the change caused by the move from classic international law to first pillar law would be to make third pillar law superior to the national constitution (at least from the point of view of EU law).

[39] Of course, the extent of the national court's powers depends on national law.

[40] Art. 35(6) TEU: direct actions challenging the validity of framework decisions and decisions may only be brought by the Commission and the member states. Since *Segi*, this is to be interpreted to apply to common positions that have legal effects on third parties: Case C-355/04 P *Segi and others* v. *Council* [2007] *ECR* I-1657, paras. 52-56. For an analysis of the case: Peers, *supra* n. 9, p. 885-902; Hinarejos, *supra* n. 30, p. 809-811.

[41] Art. 35(1) TEU.

[42] With exceptions: according to Art. 35(5) TEU, the Court cannot review the validity or proportionality of operations carried out by the police or law enforcement services of a member state and of decisions relating to the maintenance of law and order and the safeguarding of internal security. For a critical view of the judicial arrangements in the third pillar, *see* A. Albors-Llorens, 'Changes in the jurisdiction of the European Court of Justice under the Treaty of Amsterdam',

may ask for a preliminary ruling and whether the national court of last resort has an obligation to do so.[43] Finally, there is no infringement action against a disobedient State,[44] nor is there a damages action against the Union institutions for third pillar acts.[45]

In *Costa* v. *ENEL*, the ECJ famously stated that 'the executive force of Community law cannot vary from one state to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty set out in Article 5(2) and giving rise to the discrimination prohibited by Article 7.'[46] Consistency across the Union was, therefore, one of the main reasons behind primacy in the first pillar. It could perhaps be argued that the same reason – achieving consistency – would speak in favour of extending primacy to the current third pillar as well. It is, however, submitted that doing so would not achieve the desired effect because the competence of the Court to review measures indirectly through the preliminary ruling procedure varies among the member states. Accordingly, the Court would be able to offer guidance on the proper interpretation of third pillar measures to some national courts, but not others. The latter would then have to deal with allegedly supreme measures of EU law without being clear as to their correct meaning and, therefore, as to whether there is a conflict with national law and what its consequences should be. As a result, the interpretation and effect given to these measures would vary across the Union. The results are even more worrying when we consider the assessment of validity of a third pillar measure, rather than just its interpretation. When faced with an EU measure that is potentially invalid – e.g., because of a breach of fundamental rights – and if we assume that the *Foto-Frost* principle would also apply within the

35 *Common Market Law Review* (1998) p. 1273, 1278; Peers, *supra* n. 9; S. Douglas-Scott, 'The Rule of Law in the European Union – putting the security into the EU's Area of Freedom Security and Justice', 29 *European Law Review* (2004) p. 219.

[43] At the time of writing, all member states of the Union of 15 have accepted the jurisdiction of the Court with the exception of Denmark, Ireland and the UK: *OJ* [1999] C 120/24, 20.5.2005. Of the ten member states that acceded in 2004, only the Czech Republic and Hungary have accepted the jurisdiction of the Court, *OJ* [2005] L 327/19, 20.12.2008. Of the fourteen member states that have accepted the Court's jurisdiction, all except Spain and Hungary permit all national courts to ask for a preliminary ruling. Nine member states have reserved the right to require their final courts to refer (the exceptions are Greece, Portugal, Finland, Sweden and Hungary). S. Peers, *EU Justice and Home Affairs Law* (Oxford, OUP 2006) p. 41. *See also* A. Arnull, *The European Union and its Court of Justice*, 2nd edn. (Oxford, OUP 2006) p. 133.

[44] There is no equivalent provision to Arts. 226-228 EC in the TEU: only a mechanism of interstate and Commission-state dispute settlement, typical of a public international law setting (Art. 35(7) TEU).

[45] Confirmed by the CFI and the ECJ in Case T-338/02 *Segi and others* v. *Council* [2004] *ECR* II-1647, para. 40, and Case C-355/04 P *Segi and others* v. *Council* [2007] *ECR* I-1657, paras. 46-48, respectively.

[46] Case 6/64 *Costa* v. *ENEL* [1964] *ECR* 585, 589.

third pillar,[47] a national court which is not allowed to ask the ECJ for guidance would have to enforce the 'suspicious' measure or else disapply it, in breach of *Foto-Frost*. The first option is undesirable for obvious reasons;[48] the second one would be a further source of inconsistency and inequality across the Union. In fact, it has been argued that *Foto-Frost* should not apply in the current third pillar in any case.[49] This would preclude the situation where a national court has to decide between protecting the right to judicial protection or complying with its *Foto-Frost* obligation. The result would still be, however, inconsistency and inequality across the different member states. In conclusion: one of the main purposes of the application of supremacy to the first pillar in *Costa*, consistency in the application of EC law, would not be served in the least by the extension of primacy to the third pillar.

One could counter, of course, that not extending supremacy to the third pillar does not serve consistency either, since member states are able at the moment to adopt inconsistent national rules, as there is no principle of primacy to make them 'toe the line'. Does this mean that, in terms of consistency, we have nothing to gain by extending primacy – but also nothing to lose? Hardly: inconsistency within a third pillar without primacy does not seem to damage individuals' interests as badly as inconsistency within a third pillar with supremacy. If third pillar measures do not have direct effect (expressly excluded in the TEU) they cannot directly govern an individual's legal position; but if they have primacy, they can at least preclude the application of inconsistent national measures.[50] In the second situation, the EU measure is also changing the individual's legal position: the difference

[47] Only the ECJ is competent to assess the validity of an EU measure and annul it: Case 314/85 *Foto-Frost* v. *Hauptzollamt Lübeck-Ost* [1987] *ECR* 04199.

[48] This would be a grave flaw in the system of judicial protection of the European Union. The European Court of Human Rights, for one, would be likely to consider that the EU does not offer equivalent protection to that of the ECHR. On the equivalent protection doctrine and the EC, *see* Case *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi* v. *Ireland*, 42 EHRR (2006) p. 1 and its comment in A. Hinarejos, 'Bosphorus v. Ireland and the Protection of Fundamental Rights in Europe', 31 *European Law Review* (2006) p. 251, with further references.

[49] A.G. Mengozzi argued in his Opinion in *Segi* that *Foto-Frost* should not apply in the third pillar because of the need to offer proper judicial protection. Accordingly, national courts should be allowed to assess the validity of an EU measure, albeit applying EU standards rather than national ones. It is submitted that this way of dealing with the problem would still be a source of inconsistency, although admittedly far less than if national courts applied their own national standards. In practice, it is arguably also problematic to expect courts to apply EU standards only and not national ones in this sort of situation. Opinion of A.G. Mengozzi delivered on 26 Oct. 2006, Case C-355/04 P *Segi and others* v. *Council* [2007] *ECR* I-1657.

[50] Again, I am adopting here a narrow definition of direct effect, i.e., assuming that the so-called exclusionary effect is a manifestation of primacy and not of direct effect (and thus not expressly prohibited by Art. 34 TEU). On these distinctions and their significance for the third pillar, *see* Hinarejos, *supra* n. 11.

is theoretical or, at most, one of degree. Inconsistency across the member states in the interpretation of a Union measure that cannot in any case change an individual's legal position (because it has neither direct effect nor primacy) does not seem as grave as inconsistency in the interpretation of a Union measure that is likely to affect an individual's position by deploying primacy. It is arguable that the Court has already ignored this argument when extending the duty of conform interpretation to the third pillar, given that individuals are already being affected by these third pillar measures when national courts interpret national rules in their light. There is, however, an important difference of degree: the individual is, in this case, being affected only because – and to the extent that – the national rule allows a particular reading. The third pillar measure should not affect the individual's position to the extreme of yielding a result that would have been unthinkable when reading the national rule.

To sum up: if the effects that a third pillar measure can have on an individual's legal position are limited, so are the pernicious effects of inconsistency in the application of such measure across the Union. If we are going to have inconsistency within the third pillar in any case, then let us at least restrain its pernicious effects on individuals by restraining the 'force' of third pillar measures; i.e., by not granting them primacy. The third pillar in its current form – that is, without undergoing a treaty reform like the one envisaged in the Lisbon Treaty – is not ready for the full-blown application of the EC principle of primacy. And yet that seems to be where the gradual change in the nature of third pillar law is headed.

The problem with national courts

In its famous Maastricht decision,[51] the German Constitutional Court had to decide whether the transfer of powers to the Community had gone beyond what the *Grundgesetz* permitted. The Court replied in the negative, after a careful examination of several arguments put forward by the complainant. One of them may be of interest for our discussion: the argument was that, since the jurisdiction of the European Court of Justice was excluded in the second and third pillars, there was a gap in the protection of individuals.

The *Bundesverfassungsgericht* considered that the ECJ's jurisdiction was only excluded 'in respect of provisions of the Union treaty which do not confer powers on the Union to take measures which have direct effects on holders of constitutional rights within the territory of member-states.'[52] Considering decisions adopted

[51] BVerfG Decision of 12 Oct.1993 (cases 2 BvR 2134/92 and 2159/92), 89 BVerfGE 155; [1994] 1 *CMLR* 57.

[52] Ibid., para. 14.

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within the third pillar specifically, the Court stated that 'regardless of the binding effect on the member-states in international law of such council decisions […] no law may be passed by them which is directly applicable in member-states and *can claim precedence*.'[53] What convinced the Court, then, that there was no legal gap was the nature of the measures adopted within the second and third pillars: measures of public international law, which could not directly affect German citizens. Furthermore, if those measures obliged member states to 'make encroachments which are of constitutional relevance, all such encroachments, if they occur[red] in Germany, [would] be subject to review in full by the German courts.'[54]

The reason why this argument could not be used to prove the unconstitutionality of the transfer of powers to the European Union was that 'the protection of basic rights provided by the Constitution is not displaced by supra-national law that could claim precedence.'[55] There is an important distinction between the Community and the intergovernmental pillars as regards the effects of the measures adopted within them. Foreign and security policy and justice and home affairs are objects of European co-operation, but the member states 'have deliberately not incorporated them into the supra-national jurisdiction system of the European Communities.'[56] The Court emphasised that this separation is clear and permanent, to the extent that a transfer from the realm of intergovernmental co-operation into the first pillar would have to be preceded by a Treaty amendment, ratified by all member states.

The way in which the different nature of the pillars, in general, and the lack of primacy, specifically, are used by the German Constitutional Court to justify the constitutionality of a restricted judicial control at European level is meant to show that an extension of primacy to the third pillar and the blurring of the distinction between first and third pillar could understandably reawaken old but persisting concerns about the legitimacy and constitutionality of this intergovernmental area among national courts. These concerns would be fuelled by the fact that measures adopted within the third pillar, which do not undergo the same controls of validity as EC law measures, can nevertheless affect an individual's legal position in a comparable, albeit not identical, way. From this point of view, primacy is liable to erode the protection of constitutional (national) fundamental rights, and this can be used as a sound argument for the unconstitutionality or illegitimacy of the transfer of sovereign powers to the Union that has taken place in the third pillar. The time may come when a national constitutional court deems it necessary to

[53] Ibid., para. 17 [emphasis added].
[54] Ibid., para. 22.
[55] Ibid., para. 22.
[56] Ibid., para. 18.

exercise its reserved 'subsidiary emergency jurisdiction'[57] because the ECJ cannot properly protect the rights of individuals against third pillar measures that have primacy over national law. It seems, finally, that allowing third pillar measures to be granted supremacy as a matter of EU law is not only dangerous from the EU point of view of judicial protection, consistency and equality; it could also be a cause of conflict between the ECJ and national constitutional courts.

The Lisbon Treaty

The Lisbon Treaty mostly unifies first and third pillar, doing away with the distinction made in this paper between EU law (closer to public international law) and EC law. All measures adopted by the Union would henceforth have the features of current EC law. This means that primacy would apply to what is, at present, the third pillar.

The difference is, of course, that the extension of the stronger features of EC law to the third pillar would come coupled with other politically and constitutionally necessary changes: the extension of the 'normal', comprehensive system of judicial control is the most relevant to our discussion. Two main problems have been identified in this paper so far: first, if national courts do not consider themselves competent to assess the validity of supreme EU measures, this may result in a lack of judicial protection. Secondly, in interpreting EU measures without guidance (and even more if assessing their validity without guidance), inconsistency and inequality may ensue. The Lisbon Treaty would avoid these pitfalls by allowing national courts to resort to the ECJ in the same circumstances as they do at present in the first pillar.[58] Direct and indirect review of third pillar measures is generally contemplated in the Lisbon Treaty in the same terms as in the first pillar,[59] meaning that no gaps in the system of judicial review are likely to appear.[60]

[57] A. Peters, 'The Bananas Decision 2000 of the German Federal Constitutional Court: Towards Reconciliation with the ECJ as regards Fundamental Rights Protection in Europe', 43 *German Yearbook of International Law* (2000) p. 276 at p. 281.

[58] Incidentally, this would also mean that the *Foto-Frost* rule would apply in the third pillar. Under these circumstances, it would be unproblematic.

[59] Under Arts. 263 and 267 TFEU, equivalent to the current Arts. 230 and 234 EC, respectively. An exception to the jurisdiction of the Court in the third pillar remains in Art. 276 TFEU, as regards operations carried out by the police or other law-enforcement services of a member state or the exercise of the responsibilities incumbent upon member states with regard to the maintenance of law and order and the safeguarding of internal security. This provision is the direct succesor of Arts. 35(5) TEU and 68(2) EC.

[60] There is, of course, the matter of transitional measures in the Lisbon Treaty. According to Art. 10 of Protocol No. 36, third pillar measures that are already in place before the Treaty enters into force will still be reviewed by the ECJ under the current (pre-Lisbon) arrangements. This will last five years and is acceptable as long as their legal effects are still those of public international law measures – which, it is submitted, is the interpretation that should be given to Art. 9 of the Protocol.

And finally, no conflict between the ECJ and national constitutional courts need arise because of such gaps.

Conclusion

This paper has argued that, due to several factors, there is understandable uncertainty among national judiciaries as to the way in which third pillar law should be treated. This is likely to result in a gradual change in the way these measures are applied by courts, either national or EU ones; it has been argued that these measures may progressively be allowed to deploy effects similar to those of measures adopted within the first pillar. In turn, this process may lead to gaps in judicial protection and inequality throughout the Union if it does not come paired with a necessary extension of the first pillar system of judicial protection. Moreover, if the strengthening of these measures comes as a result of ECJ case-law, it is most likely to cause new conflicts between the latter court and national constitutional courts.

On the other hand, however, the Lisbon Treaty proposes the same change in the nature of third pillar law (from public international to EC law) as part of a more general reform that also addresses the problem of judicial protection and therefore avoids the highlighted pitfalls.

We find ourselves in the midst of a debate about the ratification of the Lisbon Treaty. The Irish 'no' has ensured that this will be no smooth process with a foreseeable ending. A popular argument against the Lisbon Treaty – or at the very least in favour of apathy – is that it is not the solution to any pressing problem, but rather an unnecessary step that will pose problems of its own. This paper argues, however, that at least as regards the third pillar, standing still will lead to far more trouble than ratifying the Lisbon Treaty. The gradual change in the nature of third pillar law has already started and is not likely to stop: by taking a pro-active stance towards it, we can control the way in which it unfolds and its consequences. This need not be necessarily by ratifying the Lisbon Treaty, but in any case by means of a wide treaty reform that addresses the same issues as the Lisbon Treaty within the third pillar.[61] Otherwise the change will nevertheless come about, albeit in a

[61] Another way would be for the Council to exercise its power under the existing Art. 42 TEU to transfer the third pillar into Title IV, Part Three of the EC Treaty and then to extend the 'normal' jurisdiction of the Court to this Title, abolishing the restrictions contained in Art. 68 EC. The necessary political will, however, seems to be lacking – the Commission's proposals to this effect have been unsuccessful: 'Communication from the Commission to the European Council. A Citizens' Agenda: Delivering Results for Europe', Brussels, 10.5.2006, COM(2006) 211 final; 'Communication from the Commission to the European Parliament, the Council, the European Parliament, the Council, the European Economic and Social Committee, the Committee of the regions and the

decentralised and piecemeal manner that may lead to insufficient judicial protection, uncertainty and inequality across the Union.

Court of Justice of the European Communities: Adaptation of the Provisions of Title IV of the Treaty establishing the European Community relating to the jurisdiction of the Court of Justice with a view to ensuring more effective judicial protection', Brussels, 28.6.2006, COM(2006) 346 final.