THE CONTRIBUTION OF THE EUROPEAN COURT OF JUSTICE TO THE AREA OF FREEDOM, SECURITY AND JUSTICE

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Abstract The aim of this article is to provide an overview of the European Court of Justice's ('ECJ') past and present contribution— both procedurally and substantively—to the Area of Freedom, Security and Justice. While it is too early to speculate what the ECJ's contribution to this area will be under the provisions of the Treaty of Lisbon, which entered into force on 1 December 2009, the latter's modifications to the ECJ's jurisdiction merit close attention. After describing how the procedural limitations that were imposed on the ECJ's jurisdiction by ex Title IV of Part Three of the EC Treaty and by ex Title VI of the old EU Treaty have been almost entirely eliminated by the Treaty of Lisbon, this article posits that not only does the latter Treaty improve significantly the judicial protection of private individuals, but it also facilitates the dialogue between the Union and the national judiciaries in the Area of Freedom, Security and Justice. Next, the article briefly explores the special ECJ procedures which may be followed in the Area of Freedom, Security and Justice in cases where time is of the essence. There, it is argued that, when having recourse to these procedures, the ECJ strives to strike the right balance between, on the one hand, swift judging and, on the other hand, the preservation of a qualitative and fair judicial procedure. As to substantive issues, drawing on examples from the fields of judicial cooperation in civil matters, asylum and judicial cooperation in criminal matters, it is argued that the ECJ's contribution to this area is largely grounded in the protection of fundamental rights. Finally, a brief conclusion supports the contention that the ECJ's contribution to the Area of Freedom, Security and Justice has favoured a 'mutual borrowing' of concepts and principles as between this area and other fields in relation to which the EU has competences, such as the internal market and competition. The Treaty of Lisbon having entered into force, an unprecedented level of coordination between different areas of EU law on both the procedural and substantive levels is to take place. Respect for fundamental rights will definitely be a unifying factor binding them all together.

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I. INTRODUCTION

One of the fundamental objectives of the European Union ('the EU') is to offer its citizens an Area of Freedom, Security, and Justice without internal frontiers. Since this objective contemplates situations entailing cross-border elements, it will per se generate transnational litigation, and one cannot ignore in this regard the contribution of the European Court of Justice ('the ECJ').

On the European level, the objective of creating the Area of Freedom, Security and Justice is a somewhat recent one. It was only with the Maastricht Treaty (1992)[1] and, to a greater extent, the Amsterdam Treaty (1997)[2] that the Member States established the objective of maintaining and developing the Union as an Area of Freedom, Security and Justice, an area 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'.[3] It is now explicitly enshrined in the Lisbon Treaty,[4] which was signed in 2007 and entered into force on 1 December 2009.

It is difficult to define the Area of Freedom, Security and Justice because the areas of activity which it covers are very diverse. They include: immigration, visas, asylum and measures relating to the Union's external borders; private international law (conflicts of laws and jurisdiction) and rules on civil procedure; criminal matters; the protection of fundamental rights and the fight against racism and xenophobia; police cooperation, including the fight against illicit drug trafficking and organized crime; and *last but not least*, the absence of any controls on persons, whatever their nationality, when crossing internal borders.[5]

It was largely because this last area was viewed as impinging upon one of the 'crown jewels' of national sovereignty that the authors of the old EU Treaty were reluctant to apply, right from the start, the 'Community method' to the Area of Freedom, Security and Justice. Yet, as years went by, the Member States came to realize that for their citizens to move freely and securely in an area without internal frontiers, further integration was a

[1] See ex arts K-K.9 of the Treaty on European Union [1992] OJ C191/1.

[2] See ex arts 1, point 11, and 2, point 15, of the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and related acts [1997] OJ C340/1.

[3] Ex art 2, fourth indent, EU and ex arts 61–69 EC.

[4] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 [2007] OJ C306/1; see also the consolidated versions of the Treaty on European Union (hereinafter 'TEU') and the Treaty on the Functioning of the European Union (hereinafter 'TFEU') [2008] OJ C115/1. See art 3(2) TEU and art 12 c) TEU, as well as art 4 j) TFEU and arts 67–89 TFEU. References to the new EU Treaty and the FEU Treaty are to be understood as references to the consolidated versions. The Treaty of Lisbon takes over the reforms set out in the Treaty establishing a Constitution for Europe [2004] OJ C310/1, which was concluded at Rome on 29 October 2004 but failed to be ratified after the negative outcome of the French and Dutch referenda.

[5] See K Lenaerts and P Van Nuffel, *Constitutional Law of the European Union* (2nd edn, Sweet & Maxwell, London, 2005) paras 6-006–6-017.

conditio sine qua non. This gradual realization went hand in hand with the development of an institutional and legislative framework governing the Area of Freedom, Security and Justice. From Maastricht to Lisbon, via Amsterdam, there were three distinct stages on the path towards the full 'Communitarisation' of the Area of Freedom, Security and Justice.

First, when the Maastricht Treaty was concluded, areas of activity that in fact foreshadowed the Area of Freedom, Security and Justice were made fully subject to cooperation between the Member States in the fields of Justice and Home Affairs within the rubric of the old EU Treaty.[6] This cooperation could at best lead to joint positions, joint actions or international conventions.[7] The EC Treaty, for its part, limited itself in ex article 220 EC (post 1999 numbering: ex article 293 EC) to inviting the Member States to enter into negotiations so far as was necessary 'with a view to securing for the benefit of their nationals . . . the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards'.[8] This provision could only serve as a legal basis for the adoption of international conventions.[9] As a result, in the framework of both the old EU Treaty and of the EC Treaty, the Area of Freedom, Security and Justice was made subject to intergovernmental cooperation.[10]

Second, the Amsterdam Treaty marked a significant change in this respect. It transferred certain areas of activity falling within the Area of Freedom, Security and Justice to the Community pillar and significantly reformed the old EU Treaty. In its aftermath, the European Council adopted in Tampere the first comprehensive programme setting forth the action to be taken in the

[6] See ex art K.1 TEU.

[7] See ex art K.3(2) TEU. See eg Joint Position of 25 October 1996 defined by the Council on the basis of ex art K.3(2)(a) TEU, on Pre-frontier Assistance and Training Assignments [1996] OJ L281/1; Joint Action of 26 April 1999 adopted by the Council on the basis of ex art K.3 TEU, Establishing Projects and Measures to Provide Practical Support in Relation to the Reception and Voluntary Repatriation of Refugees, Displaced Persons and Asylum Seekers, Including Emergency Assistance to Persons Who Have Fled as a Result of Recent Events in Kosovo [1999] OJ L114/2; Joint Action of 29 November 1996 adopted by the Council on the basis of ex art K.3 TEU, on Cooperation between Customs authorities and business organizations in Combating Drug Trafficking [1996] OJ L322/3; and the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children [2003] OJ L48/3.

[8] Ex art 220, fourth indent (post 1999 numbering: ex art 293, fourth indent), EC.

[9] See, eg, the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters [1972] OJ L299/32; consolidated version in [2003] OJ C27/1 (hereinafter 'the Brussels Convention'). It must nonetheless be observed that the EC Treaty (ex art 293, fourth indent) was not indispensable for the conclusion of international conventions between the Member States on subject-matter within the *acquis communautaire*: see in particular the Convention on the Law Applicable to Contractual Obligations [1980] OJ L266/1, consolidated version in [1998] OJ C27/34 (hereinafter 'the Rome Convention') which was concluded in the exercise of the general treaty-making powers of the Member States rather than formally adopted on the basis of the EC Treaty.

[10] For a detailed analysis of the question of legal bases for the adoption of acts concerning private international law, see Ph-E Partsch, *Le droit international privé européen— De Rome à Nice* (Larcier, 2003) paras 15 and 297 ff.

various fields comprising the Area of Freedom, Security and Justice,[11] which was then followed by a second action plan known as the Hague Programme.[12] Despite these changes, however, the Area of Freedom, Security and Justice remained subject to dual treatment. On the one hand, it was governed by a 'Community regime' in the framework of the first pillar, and on the other hand, by an 'intergovernmental regime' in the framework of the third pillar as far as police and judicial cooperation in criminal matters was concerned. In other words, under the framework set out by the Treaty of Amsterdam, the Area of Freedom, Security and Justice combined both the Community method and the method of intergovernmental cooperation. The Community method rested on ex Title IV of Part Three of the EC Treaty, which was inserted between the provisions on the free movement of persons, services, and capital (ex Title III) and on transport policy (ex Title V) under the heading, 'Visas, asylum, immigration and other policies related to free movement of persons'. Yet despite this formal link to the free movement of persons, ex Title IV actually had a broader content. The legal bases inserted by the Amsterdam Treaty under this Title allowed the Council to act not only with regard to checks on external borders, asylum, immigration and protection of third-country nationals, but also in the field of judicial cooperation in civil matters. This breadth is reflected in the range of matters covered by the acts adopted under the auspices of ex Title IV in order to contribute to the objectives of the Area of Freedom, Security and Justice. Significant in number, they include, among other things, the Brussels I Regulation,[13] which replaced the Brussels Convention,[14] the Brussels II bis Regulation in matrimonial matters and in matters of parental responsibility,[15] the Regulation on insolvency proceedings,[16] the Regulation on the service in the Member States of judicial and

[11] See Tampere European Council, Presidency Conclusions, 15–16 October 1999. The Tampere Programme came to a close in 2004: see the Communication from the Commission to the Council and the European Parliament, *Area of Freedom, Security and Justice: Assessment of the Tampere programme and future orientations*, COM(2004) 401 final.

[12] See Hague European Council, Presidency Conclusions, 4–5 November 2004, Annex I 'The Hague Programme—Strengthening Freedom, Security and Justice in the European Union'. The Hague Programme came to an end in 2009. A new multi-annual programme—'the Stockholm Programme'—has just been launched and will run until 2014. In June 2009, the Commission presented its final report on the Hague Programme: See Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *Justice, freedom and security in Europe since 2005: an evaluation of The Hague programme and action plan*, COM (2009) 263.

[13] Council Regulation (EC) No 44/2001 of 22 December 2000 On Jurisdiction and the Recognition and Enforcement of Judgments in Civil And Commercial Matters [2001] OJ L12/1 (hereinafter 'the Brussels I Regulation').

[14] Brussels Convention (n 9).

[15] Council Regulation (EC) No 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 Council Regulation (EC) 1347/2000 [2003] OJ L338/1 (hereinafter 'the Brussels II bis Regulation').

[16] Council Regulation (EC) No 1346/2000 of 29 May 2000 on Insolvency Proceedings [2000] OJ L160/1.

extrajudicial documents in civil or commercial matters,[17] the Regulation on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters,[18] the Regulation creating a European Enforcement Order for uncontested claims,[19] the Regulation creating a European order for payment procedure,[20] the Rome II Regulation on the law applicable to non-contractual obligations,[21] the Rome I Regulation,[22] which replaced the Rome Convention on the law applicable to contractual obligations[23] and finally, the Regulation establishing a European Small Claims Procedure.[24] As far as intergovernmental cooperation was concerned, the Area of Freedom, Security and Justice encompassed ex Title VI of the old EU Treaty concerning police and judicial cooperation in criminal matters. Among the various acts adopted in this context, mention must be made of the Framework Decisions on the standing of victims in criminal proceedings,[25] on money laundering,[26] on the European arrest warrant,[27] on combating terrorism,[28] on combating the sexual exploitation of children and child pornography[29] and on illicit drug trafficking.[30]

[17] 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. This Regulation was repealed by Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the Service in the Member States of Judicial and Extrajudicial Documents in Civil or Commercial Matters [2007] OJ L324/79.

[18] 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 [2001] OJ L174/1.

[19] Council 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 [2004] OJ L143/15.

[20] Council Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 Creating a European Order for Payment Procedure [2007] OJ L399/1.

[21] Council Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations [2007] OJ L199/40 (hereinafter 'the Rome II Regulation').

[22] Council Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations [2008] OJ L177/6 (hereinafter 'the Rome I Regulation').

[23] Rome Convention (n 9).

[24] Council Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure [2007] OJ L199/1.

[25] Council Framework Decision 2001/220/JHA of 15 March 2001 on the Standing of Victims in Criminal Proceedings [2001] OJ L82/1.

[26] Council Framework Decision 2001/500/JHA of 26 June 2001 on Money Laundering, the Identification, Tracing, Freezing, Seizing and Confiscation Of Instrumentalities and the Proceeds of Crime [2001] OJ L182/1.

[27] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States [2002] OJ L190/1.

[28] Council Framework Decision 2002/475/JHA of 13 June 2002 on Combating Terrorism [2002] OJ L164/3.

[29] Council Framework Decision 2004/68/JHA of 22 December 2003 on Combating the Sexual Exploitation of Children and Child Pornography [2004] OJ L13/44.

[30] Council Framework Decision 2004/757/JHA of 25 October 2004 Laying Down Minimum Provisions on the Constituent Elements of Criminal Acts and Penalties in the Field of Illicit Drug Trafficking [2004] OJ L335/8.

Finally, the result of the EU's action under this dual framework was that, as the Commission pointed out, while '[t]here have been considerable advances towards realising many of the ambitions set out in the Hague Programme, [. . .] [p]rogress was comparatively slow in mutual recognition in criminal matters and police cooperation'.[31] It is for this reason that the 2004 Treaty establishing a Constitution for Europe ('the Constitutional Treaty')[32] had the aim of 'de-pillarising' the European Union's structure by extending the Community method to the third pillar.[33] The adoption of the Constitutional Treaty would have breathed new life into the development of the Area of Freedom, Security and Justice. However, the entry into force of the Treaty of Lisbon offers similar opportunities because, just as the Constitutional Treaty would have done, it extends the Community method particularly with regard to the Area of Freedom, Security and Justice. Broadly speaking, there are five implications that flow from the new framework set out by the Treaty of Lisbon.[34] Firstly, the Treaty of Lisbon puts an end to the dual structure of the Area of Freedom, Security and Justice, by gathering together the Treaty provisions on border checks, asylum, and immigration,[35] judicial cooperation in civil matters,[36] judicial cooperation in criminal matters[37] and police cooperation[38] under Title V of Part Three of the Treaty on the Functioning of the European Union. Secondly, the specific legal instruments provided for under the third pillar are abolished and replaced by traditional 'Community' instruments. Thirdly, the role of the European Parliament is enhanced, and the co-decision procedure (with QMV for the Council) becomes the standard decision-making process. Fourthly, as discussed below, the jurisdiction of the ECJ is expanded. Fifthly, specific provisions on enhanced cooperation are removed and replaced by new rules applicable to all areas of Union action (with the exception of the Common Foreign and Security Policy CFSP), expressly referred to in articles 82(3) and 83(3) TFEU concerning criminal procedure and criminal law.

The aim of this article is to provide an overview of the ECJ's past and present contribution—both procedurally and substantively—to the Area of Freedom, Security and Justice. While it is too early to speculate what the ECJ's contribution to this area will be in future under the provisions of the Treaty of Lisbon, the latter's modifications to the ECJ's jurisdiction merit close attention. Section II is thus devoted to describing how the limits that were imposed on the ECJ's jurisdiction by ex Title IV of Part Three of the EC Treaty and by ex Title VI of the old EU Treaty have been almost entirely

[31] See Communication, *Justice, freedom and security in Europe since 2005: an evaluation of The Hague programme and action plan* (n 12) 13–14.

[32] See for this Treaty, (n 4).

[33] See K Lenaerts and P Van Nuffel, 'La Constitution pour l'Europe et l'Union comme entité politique et ordre juridique' (2005) Cahiers de droit européen 13, paras 38–39.

[34] See M Dougan, 'The Treaty of Lisbon 2007: Winning Minds, Not Hearts' (2008) CMLR 617, 680–81.

[35] Arts 77–80 TFEU.

[36] Art 81 TFEU.

[37] Arts 82–86 TFEU.

[38] Arts 87–89 TFEU.

eliminated by the Treaty of Lisbon. This section then briefly examines the special ECJ procedures which may be followed in the Area of Freedom, Security and Justice in cases where time is of the essence. Particular attention is paid to the urgent preliminary procedure. As to substantive issues, it should be recalled that the founding principles of the EU legal order—notably, the principles of primacy and direct effect—were developed in fields, such as the internal market, social policy and environmental policy, which are quite different from those that are of interest here. Nevertheless, this observation in no way diminishes the ECJ's contribution to the Area of Freedom, Security and Justice. As illustrated below, that contribution is already significant. Drawing on examples from the fields of judicial cooperation in civil matters, asylum and judicial cooperation in criminal matters, section III posits that the ECJ's contribution is largely grounded in the protection of fundamental rights. Finally, a concluding paragraph supports the contention that the ECJ's contribution to the Area of Freedom, Security and Justice has favoured a 'mutual borrowing' of concepts and principles as between this area and other fields in relation to which the EU has competences, such as the internal market and competition.

II. THE PROCEDURAL LEVEL

Before the Treaty of Lisbon entered into force, the ECJ's jurisdiction and procedures in the Area of Freedom, Security and Justice reflected the dual Treaty structure applicable in this area. As regards the Community method, the EC Treaty established 'a complete system of legal remedies and procedures',[39] although there were certain limitations on the ECJ's jurisdiction under its ex Title IV. Likewise, the old EU Treaty (as provided for by the Treaty of Amsterdam), in which the intergovernmental method still played a dominant role, placed restrictions on the ECJ's jurisdiction. In this way, the ECJ's contribution to the Area of Freedom, Security and Justice was significantly curtailed at the procedural level. Nonetheless, the ECJ has taken steps to enhance its ability to deal rapidly with those cases which come before it by making use of important procedural mechanisms including the recently created urgent procedure for preliminary rulings in the Area of Freedom, Security and Justice.

A. Procedural Limitations under the EC Treaty

In the framework of the EC Treaty, it was well established, first of all, that the Community judicial system entitled the ECJ to control the legality of acts of

[39] Case 294/83 *Parti écologiste* '*Les Verts' v European Parliament* [1986] ECR 1339, para 23. See K Lenaerts, 'The Basic Constitutional Charter of a Community based on the Rule of Law—Case 294/83 Parti écologiste 'Les Verts' v European Parliament [1986] ECR 1339', in M Poiares Maduro and L Azoulai (eds), *The Past and Future of EU Law; The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing, Oxford, 2010).

the European institutions by virtue of actions for annulment (ex article 230 EC, now article 263 TFEU)[40] and actions for failure to act (ex article 232 EC, now article 265 TFEU)[41] and to hold the European institutions liable for any damage caused by them (ex articles 288 and 235 EC, now articles 340 and 268 TFEU).[42] The system also empowered the ECJ to ensure that the Member States fulfil their obligations under the Treaty by deciding actions for infringement of Community law brought by the Commission (ex article 226 EC, now 258 TFEU) or by a Member State (ex article 227 EC, now article 259 TFEU) and imposing sanctions for a Member State's failure to comply with the ECJ's judgment in this regard (ex Article 228 EC, now article 260 TFEU).[43] As a result, the ECJ was competent to ensure the achievement of the objectives falling within the Community pillar of the Area of Freedom, Security and Justice.[44]

Second, it should be stressed that the ECJ's enforcement of the principles of primacy and direct effect has had a significant impact on the implementation of Community law by national courts, the '*juge de droit commun*' of Community law. Indeed, national courts were under a duty to apply Community law; to set aside provisions of national law which conflict with Community law; to interpret national law in conformity with Community law (which is referred to as the principle of 'consistent interpretation'); and, where necessary, to hold a Member State liable to make good the damage caused as a result of any breach of Community law for which that Member State was responsible.[45] In this way, national courts were obliged to enforce the Community aspects of the Area of Freedom, Security and Justice.

Third, it must be recalled that the uniform and effective application of Community law was maintained through cooperation between the ECJ and the national courts within the framework of the preliminary ruling procedure.[46] This procedure gave the ECJ the opportunity to interpret, among other things, various provisions of the Brussels Convention[47] through the more than 150

[40] See K Lenaerts, D Arts and I Maselis, *Procedural Law of the European Union* (2nd edn, Sweet & Maxwell, London, 2006) paras 7-001–7-188 (hereinafter 'K Lenaerts, D Arts and I Maselis').

[41] ibid paras 8-001–8-019.

[42] ibid paras 11-001–11-070.

[43] ibid (n 40) paras 5-001–5-075.

[44] Eg, in respect of the failure to transpose, within the time-limits provided, Council Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers [2003] OJ L31/18, see Case C-72/06 *Commission v Greece* [2007] ECR I-57; and in respect of the failure to transpose, within the time-limits provided, Council Directive 2003/109/EC of 25 November 2003 Concerning the Status of Third-Country Nationals who are Long-Term Residents [2004] OJ L16/44, see Case C-5/07 *Commission v Portugal* [2007] ECR I-120, Case C-59/07 *Commission v Spain* [2007] ECR I-161; Case C-34/07 *Commission v Luxembourg* [2007] ECR I-175.

[45] See K Lenaerts, D Arts and I Maselis, (n 40) paras 3-001–3-055; D Simon, *Le système juridique communautaire* (3rd edn, PUF, 2001) paras 343–346.

[46] See generally K Lenaerts, D Arts and I Maselis (n 40) chapters 2, 6.

[47] Brussels Convention (n 9).

judgments it has delivered concerning that Convention[48] on the basis of a protocol which provides for the ECJ's jurisdiction to give preliminary rulings in this regard.[49] The ECJ was equally competent on the basis of the EC Treaty to interpret the various Community acts adopted under ex Title IV, such as the Brussels I Regulation,[50] the Regulation on insolvency proceedings,[51] the Regulation on the service in the Member States of judicial and extrajudicial documents,[52] the Brussels II bis Regulation[53] and the Rome I[54] and Rome II[55] Regulations. Nevertheless, it should be emphasized that the ECJ's competence to give preliminary rulings in the Area of Freedom, Security and Justice was limited.[56]

Even though measures adopted on the basis of ex Title IV of Part Three of the EC Treaty were, by virtue of ex articles 220–245 EC, in principle subject to the ECJ's supervision, ex article 68 EC provided for certain exceptions to the standard procedure for preliminary rulings set out in ex article 234 EC.[57] The ECJ did not have jurisdiction to rule on any measure or decision adopted with a view to ensuring the absence of any controls on persons, be they citizens of the Union or nationals of third countries when crossing internal borders which relate to 'the maintenance of law and order and the safeguarding of internal security'.[58] Moreover, and most importantly for the purposes of the present discussion, ex article 234 EC was only applicable to ex Title IV where a question on the interpretation of that Title or on the validity or interpretation of acts of the European institutions based on that Title was 'raised in a case pending before a court or a tribunal of a Member State against whose decisions there is no judicial remedy under national law'.[59] Thus, if a

[48] See eg, Case 12/76 *Tessili* [1976] ECR 1473; Case 14/76 *de Bloos* [1976] ECR 1497; recently, Case C-292/05, *Lechouritou and Others* [2007] ECR I-1519.

[49] Protocol on the Interpretation of the Brussels Convention by the Court of Justice [1998] OJ C27/1 (consolidated version).

[50] Brussels I Regulation (n 13). See Case C-103/05 *Reisch Montage* [2006] ECR I-6827; Case C-283/05 *ASML* [2006] ECR I-12041 (on this case, see also n 188–191 and accompanying text); recently, Case C-462/06 *Rouard* [2008] ECR I-3965.

[51] Council Regulation (EC) No 1346/2000, (n 16). See Case C-1/04 *Staubitz-Schreiber* [2006] ECR I-701; Case C-341/04 *Eurofood* [2006] ECR I-3813.

[52] Council Regulation (EC) No 1348/2000, now replaced by Council Regulation (EC) No 1393/2007 (n 17). See Case C-443/03 *Leffler* [2005] ECR I-9611; Case C-14/07, *Weiss und Partner* [2008] ECR I-3367.

[53] Brussels II bis Regulation (n 15). See Case C-435/06 *C* [2007] ECR I-10141; Case C-68/07 *Lopez and Lopez Lizazo* [2007] ECR I-10403; Case C-195/08 PPU *Rinau* [2008] ECR I-5271 (on the latter case, see also below, n 132–137 and accompanying text); Case C-523/07 *A*, judgment of 2 April 2009, not yet reported; Case C-403/09 PPU *Detiček*, judgment of 23 December 2009, not yet reported (on the latter case, see n 139–141 and accompanying text).

[54] Rome I Regulation (n 22).

[55] Rome II Regulation (n 21).

[56] See K Lenaerts, D Arts and I Maselis (n 40) paras 22-001–22-008.

[57] For example, ex art 68(3) EC provided that '[t]he Council, the Commission or a Member State may request the Court of Justice to give a ruling on a question of interpretation of this title or of acts of the institutions of the Community based on this title', but 'the ruling given by the Court of Justice in response to such a request shall not apply to judgments of courts or tribunals of the Member States which have become res judicata'.

[58] Ex art 68(2) EC.

[59] Ex art 68(1) EC.

request for a preliminary ruling was made by a national court or tribunal against whose decisions there *was* a judicial remedy under national law, the ECJ would issue an order declaring that it had no jurisdiction to rule on the questions referred to it.[60]

This latter restriction on the ECJ's jurisdiction could be criticized on several grounds. In particular, as illustrated by Community acts adopted in the field of private international law, it represented a setback compared to the ECJ's competence to give preliminary rulings by virtue of the protocols attached to the Brussels[61] and Rome[62] Conventions, which entitled national lower instance courts to make preliminary ruling requests to the ECJ. It also seemed unfortunate, in terms of the sound administration of justice, particularly the need to deliver justice without unreasonable delay, that problems of judicial and legislative competence or issues related to the service of documents or matters of parental responsibility,[63] for example, could only be addressed before a court of last instance. In fact, this restriction was even more regrettable because it was somewhat paradoxical. On the one hand, preliminary rulings relating to matters falling within the Area of Freedom, Security and Justice were subject to the condition that the reference was made by a national court of last instance, which meant that important issues could not be resolved until no further appeal was available at national level. Yet, on the other hand, there was also the possibility for this court to request that the urgent preliminary ruling procedure be applied so that it could receive the ECJ's preliminary ruling more quickly.[64] This difficulty could have been resolved on the basis of ex article 67(2) EC,[65] and the Commission did indeed make a proposal to bring into line the provisions relating to the ECJ's preliminary ruling jurisdiction under ex article 68 EC with the procedure of ex article 234 EC.[66]

[60] See eg, Case C-24/02 *Marseille Fret* [2002] ECR I-3383, order of 22 March 2002; Case C-555/03 *Warbecq* [2004] ECR I-6041, order of 10 June 2004.

[61] Brussels Convention and Protocol (n 9) and (n 49) respectively.

[62] Rome Convention (n 9); see the First Protocol on the Interpretation of the Rome Convention by the Court of Justice and the Second Protocol Conferring on the Court of Justice Powers to Interpret the Rome Convention [1998] OJ C27/34 (consolidated version).

[63] Council Regulation (EC) No 1393/2007 and Council Regulation (EC) No 2201/2003, (n 17) and (n 15) respectively.

[64] See Case C-195/08 PPU *Rinau* (n 53), and further discussed below, (n 132)–(n 137) and accompanying text; as regards the urgent preliminary ruling procedure, see below, Part II.E.

[65] Under ex art 67(2) EC, after a transitional period of five years following the entry into force of the Amsterdam Treaty, the Council, acting unanimously after consulting the European Parliament, had to take a decision with a view to 'adapting the provisions relating to the powers of the Court'.

[66] See the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the 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*, COM(2006) 346 final. See further Editorial comment, 'Preliminary rulings and the area of freedom, security and justice' (2007) CMLR 1, 2–5.

B. Modifications introduced by the Treaty of Lisbon

The FEU Treaty not only reproduces the framework of remedies set out by the EC Treaty, but improves upon it. In particular, in relation to actions for annulment, the application of the restrictive *Plaumann* case-law[67] is excluded in respect of actions brought by natural or legal persons against 'a regulatory act which is of direct concern to them and does not entail implementing measures'. This shows that the Treaty of Lisbon sought to facilitate direct access of private parties to the Union judiciary where, in situations such as that examined in *Jégo-Quéré*,[68] it is difficult for private parties to find national measures enabling indirect challenges against EU acts.

In addition, the duties of national judges as '*juge de l'Union*' regarding the interpretation and application of EU law continue to be part and parcel of the '*acquis de l'Union*'. In fact, new specific Treaty provisions highlight the importance of the role of national judges in ensuring effective judicial protection of EU rights. For instance, article 19 TEU states that 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'. Likewise, article 47 of the Charter of fundamental rights of the European Union[69] ('the Charter'), which now stands on an equal footing with the new EU Treaty and the FEU Treaty,[70] confers the right to an effective remedy against the violation of freedoms and rights guaranteed by EU law.

Most importantly, the limits placed on the ECJ's jurisdiction to give preliminary rulings disappear.[71] From now on, inferior courts may engage in dialogue with the ECJ in respect of issues relating to the Area of Freedom, Security and Justice. Consequently, urgent matters concerning visas, immigration, asylum or judicial cooperation in civil matters must no longer reach national courts of last instance before they can be addressed by the ECJ. Instead, an inferior court may refer an urgent question to the ECJ which, by having recourse to the urgent preliminary ruling procedure, will try to provide a ruling as quickly as possible. This is good news for litigants faced with important questions, such as child custody or deportation orders, as these modifications contribute to reinforcing the judicial protection of individuals by providing them with faster justice.

[67] Case 25/62 *Plaumann* v *Commission* [1963] ECR 95.

[68] In broad terms, art 263 TFEU codifies the ruling of the European General Court (formerly the Court of First Instance) in Case T-177/01 *Jégo Quéré v Commission* [2002] ECR II-2365, and consequently supersedes the ruling of the ECJ in Case C-263/02 P *Commission* v *Jégo-Quéré* [2004] ECR I-3425.

[69] See the Charter of Fundamental Rights of the European Union, proclaimed in Nice on 7 December 2000 [2000] OJ C364/1. See also the recently published version of the Charter of Fundamental Rights [2007] OJ C303/01, which specifies that it 'adapts the wording of the Charter proclaimed on 7 December 2000, and will replace it as from the date of entry into force of the Treaty of Lisbon'.

[70] Art 6 TEU.

[71] Art 2, point 67 of the Treaty of Lisbon provides that ex art 68 EC is to be repealed.

C. Procedural Limitations under the Old EU Treaty

In the framework of the old EU Treaty, the system of legal remedies and judicial procedures deriving from ex article 35 EU was not as complete or as effective as its Community counterpart. First of all, for measures adopted on the basis of ex Title VI of the old EU Treaty concerning police and judicial cooperation in criminal matters, the only direct remedy vis-à-vis Union acts was the action for annulment brought by a Member State or the Commission against framework decisions and decisions.[72] Moreover, the old EU Treaty did not provide for actions for infringement or actions for damages. Indeed, in *Gestoras Pro-Amnistía* and *Segi*,[73] the ECJ confirmed that it was not competent to rule on an action for damages under the third pillar,[74] despite the applicants' claim to have suffered damage as a result of being placed on a list of terrorist organizations by virtue of certain common positions adopted by the Council.[75] The ECJ rejected the applicants' argument that they had been deprived of all judicial protection.[76] This was because although its jurisdiction relating to preliminary rulings and actions for annulment under ex article 35 EU did not, in principle, include judicial review of common positions, the ECJ considered that, since the preliminary ruling procedure was 'designed to guarantee observance of the law in the interpretation and application of the Treaty, it would run counter to that objective to interpret [ex] article 35(1) EU narrowly'.[77] The ECJ inferred from this that the power for national courts to make a preliminary reference must exist 'in respect of all measures adopted by the Council, whatever their nature or form, which are intended to have legal effects in relation to third parties'.[78]

As regards the duty of the Member States to fulfil their obligations pursuant to ex Title VI of the old EU Treaty and acts adopted on the basis of that Title,

[72] See ex art 35(6) EU.

[73] Case C-354/04 *Gestoras Pro Amnistía and Others v Council* [2007] ECR I-1579; Case C-355/04 P *Segi and Others v Council* [2007] ECR I-1657. Given that the relevant considerations of the ECJ in both cases are nearly identical, mention will be made to the first case only for the purposes of this discussion. For detailed discussion of these judgments and their significance, see, eg S Peers, 'Salvation Outside The Church: Judicial Protection In The Third Pillar After The *Pupino* And *Segi* Judgments' (2007) CMLR 883; M-G Garbagnati Ketvel, 'Almost but not quite: The Court of Justice and Judicial Protection of Individuals in the Third Pillar' [2007] European Law Reporter 223; M Nettesheim, 'UN Sanctions Against Individuals—A Challenge To The Architecture Of European Union Governance' (2007) CMLR 567.

[74] Case C-354/04 *Gestoras Pro Amnistía and Others v Council* (n 73), paras 46–48.

[75] ibid para 1.

[76] ibid para 51.

[77] ibid paras 52–53.

[78] ibid para 53. The ECJ added that it would also have jurisdiction to review the lawfulness of such acts where an action had been brought by a Member State or the Commission on the conditions fixed by ex art 35(6) EU. It also stressed that it is for courts and tribunals of the Member States to interpret and to apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before such courts the lawfulness of any decision or other national measure relating to the drawing up of an act of the European Union or to its application to them and to seek compensation for any loss suffered. ibid paras 55–56.

not only was there no possibility of bringing an infringement action, but Member States could even invoke the failure of another Member State to justify their own failure to perform their obligations (ie, the so-called '*exceptio non adimpleti contractus*'). Under the first pillar, the Community method left no room for a Member State to invoke, in the context of the infringement procedure, the breach of Community law by another Member State.[79] The only remedy for one Member State against another Member State in breach of its obligations under Community law was to commence an infringement action, either indirectly by notifying the Commission or directly and independently of the Commission's assessment by itself initiating an action before the ECJ.[80] However, this only concerned the first pillar and not the third pillar concerning police and judicial cooperation in criminal matters, since the latter was still subject to the intergovernmental cooperation method. This was clearly illustrated when, following the annulment by the German Constitutional Court[81] of the German law implementing the Framework Decision on the European arrest warrant,[82] judges in Spain[83] and Greece[84] refused the application of their national implementing provisions vis-à-vis Germany.[85] It was precisely because the rules adopted under the third pillar were based on a system rooted in the intergovernmental method that the *exceptio non adimpleti contractus* was raised in that context,[86] in accordance with the Vienna Convention on the Law of Treaties.[87] It should also be noted

[79] See Case 52/75 *Commission v Italy* [1976] ECR 277, para 11; Case C-265/95 *Commission v France* [1997] ECR I-6959, para 63.

[80] On infringement actions brought by a Member State on the basis of art 227 EC, see Case 141/78 *France v United Kingdom* [1979] ECR 2923, Case C-388/95 *Belgium v Spain* [2000] ECR I-3146; Case C-145/04 *Spain v United Kingdom* [2006] ECR I-7917. See further K Lenaerts, D Arts and I Maselis (n 40), para 5-029.

[81] Judgment of the Bundesverfassungsgericht of 18 July 2005, 2 BvR 2236/04, *Deutsches Verwaltungsblatt* 2005, 1119–1128. In its judgment, the German Constitutional Court emphasized the differences, on the level of judicial enforcement, between the Community pillar and the third pillar.

[82] Council Framework Decision 2002/584/JHA (n 27).

[83] See the decision of the Audienica Nacional of 20 September 2005, reported (in French) in the *Bulletin 'Reflets', Informations rapides sur les développements juridiques présentant un intérêt communautaire*, 2005, n° 3, p. 14, available on the ECJ's website (http://curia.europa.eu/fr/coopju/apercu_reflets/common/recdoc/reflets/frame1.htm).

[84] See the judgment of the Areios Pagos (Greek Supreme Court) of 20 December 2005, reported (in French) in *Bulletin 'Reflets', Informations rapides sur les développements juridiques présentant un intérêt communautaire*, 2006, n° 1, p 21, available on the ECJ's website (http://curia.europa.eu/fr/coopju/apercu_reflets/common/recdoc/reflets/frame1.htm).

[85] It must be noted that, in its judgment n° P 1/05 of 27 April 2005 (ZU 2005/4A/42, Dz U 2005.77.680 of 4 May 2005), the Trybunal Konstytucyjny (the Polish Supreme Court) considered that the provisions of the criminal code implementing the Framework Decision on the European arrest warrant violated the Polish Constitution. See D Leczykiewicz, Case note, (2006) CMLR 1181.

[86] See further K Lenaerts and T Corthaut, 'Of Birds And Hedges: The Role Of Primacy In Invoking Norms Of EU Law' (2006) ELRev 288.

[87] See arts 60 and 72 of the Convention on the Law of Treaties, concluded at Vienna on 23 May 1969.

that the Framework Decision on the European arrest warrant provides for further qualifications based on the constitutional rules of the Member States.[88]

The ECJ's jurisdiction to give preliminary rulings within the context of the third pillar was also significantly restricted by ex article 35 EU. Pursuant to this provision, the ECJ's jurisdiction had to be accepted by each Member State by means of a declaration made at the time of signature of the Amsterdam Treaty or at any time thereafter.[89] While a large number of Member States has submitted a declaration allowing all their courts to make preliminary ruling requests,[90] one Member State, Spain, has limited this possibility to the highest courts only, and several other Member States have not yet submitted any declaration whatsoever.[91]

As demonstrated by the *Pupino* case,[92] however, these limits did not prevent the ECJ from extending the principle of 'consistent interpretation' to acts adopted under the third pillar. In that case, an Italian court made a preliminary reference to the ECJ as to whether, in view of the Framework Decision on the standing of victims in criminal proceedings,[93] it was to allow several children claiming to be victims of abuse by Ms Pupino to give their testimony under special arrangements outside the confines of the trial proceedings even though the relevant Italian legislation greatly restricted the use of such arrangements.[94] In response, the ECJ held that, in applying national law, the national court was required to interpret it as far as possible in the light of the wording and the purpose of the Framework Decision in order to attain the result that instrument sought to achieve, adding that, where necessary, the national court must consider 'the whole of national law' in this regard.[95] Consequently,

[88] The 12th recital, second para, of the Preamble to the Framework Decision on the European Arrest Warrant, (n 27) provides that it 'does not prevent a Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media'.

[89] Information concerning the declarations by the Republic of Hungary, the Republic of Latvia, the Republic of Lithuania and the Republic of Slovenia on their acceptance of the jurisdiction of the Court of Justice to give preliminary rulings on the acts referred to in Article 35 of the Treaty on European Union [2008] OJ L70/23; [2008] C69/1.

[90] This is the case for the following 18 Member States: Austria, Belgium, Cyprus, the Czech Republic, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Portugal, Romania, Slovenia and Sweden.

[91] This is the case for the following eight Member States: Bulgaria, Denmark, Estonia, Ireland, Malta, Poland, Slovakia and the United Kingdom.

[92] Case C-105/03 *Pupino* [2005] ECR I-5285. For further discussion of this judgment, see, eg, S Peers, (n 73); M Fletcher, 'Extending "Indirect Effect" to the Third Pillar: The Significance of *Pupino*' (2005) ELRev 862; C Lebeck, 'Sliding Towards Supranationalism? The Constitutional Status of EU Framework Decisions after *Pupino*' (2007) German Law Journal 501; T Magno, 'The *Pupino* Case: Background in Italian Law and Consequences for the National Judge' (2007) ERA Forum 215; E Spaventa, 'Opening Pandora's Box: Some Reflections on the Constitutional Effects of the Decision in *Pupino*' (2007) EuConst 5; A Weyembergh, P De Hert and P Paepe, 'L'effectivité du troisième pilier de l'Union européenne et l'exigence de l'interprétation conforme: la Cour de justice pose ses jalons' (2006) Revue trimestrielle des droits de l'homme 269.

[93] Council Framework Decision 2001/220/JHA, (n 25).

[94] Case C-105/03 *Pupino* (n 92) paras 12–18.

[95] ibid paras 43–47.

even though the Framework Decision at issue did not define the concept of a victim's vulnerability, the ECJ concluded that the children could be considered 'particularly vulnerable' so that recourse to special arrangements might be justified.[96]

It is worth noting that it was an Italian lower court that submitted the reference for a preliminary ruling in that case by virtue of Italy's declaration under ex article 35 EU allowing all courts to make such references in relation to the third pillar.[97] That fact illustrates that where Member States have submitted declarations restricting references to the highest courts or failed to submit any such declaration altogether, this had significant implications for the relationship between the ECJ and the national courts and the effectiveness of EU law. In an attempt to resolve that problem, the Commission envisaged the possibility of implementing the '*passerelle* clause' of ex article 42 EU,[98] the extension of the Community method to the third pillar, but that attempt failed.

D. Modifications Introduced by the Treaty of Lisbon

The Treaty of Lisbon repeals the jurisdictional limitations contained in ex article 35 EU, subject to one specific exception provided for in paragraph 5 of that provision. However, in light of article 10 of Protocol (No 36) on transitional provisions annexed to the Treaty of Lisbon, a distinction must be drawn between EU acts in the field of police cooperation and judicial cooperation in criminal matters which had been adopted before the entry into force of the Treaty of Lisbon ('pre-existing EU acts') and EU acts adopted thereafter.

As to the former category of EU acts, article 10 provides that for a period of five years after the entry into force of the Treaty of Lisbon, the Commission may not bring infringement actions in respect of them. Article 10 also states that for the same period of time, the jurisdiction of the ECJ 'in the field of police and judicial cooperation in criminal matters, in the version in force prior to entry into force of the Treaty of Lisbon, shall remain the same'. Stated differently, in relation to pre-existing EU acts, the jurisdiction of the ECJ

[96] ibid paras 53–56, 61. At the same time, the ECJ pointed out that the Framework Decision concerned had to be interpreted so as to ensure respect for Ms. Pupino's fundamental rights, particularly the right to a fair trial under art 6 of the European Convention on Human Rights as interpreted by the European Court of Human Rights. ibid paras 57–60.

[97] See (n 90).

[98] See the Communication from the Commission to the Council and the European Parliament, *Implementing The Hague Programme: the way forward*, COM(2006) 331 final, particularly point 3.2. In the relevant passage, ex art 42 EU provided that the Council 'acting unanimously on the initiative of the Commission or a Member State, and after consulting the European Parliament, may decide that action in areas referred to in ex art 29 [EU] shall fall under [ex] Title IV of the [EC Treaty], and at the same time determine the relevant voting conditions relating to it'.

continues to be governed by ex article 35 EU until 30 November 2014.[99] Upon expiration of the transitional period, pre-existing EU acts are subject to the regime described below.

As to EU acts adopted after 1 December 2009 (which include pre-existing EU acts amended after that date),[100] the ECJ enjoys jurisdiction to review the legality of acts adopted in the Area of Freedom, Security and Justice by way of actions for annulment[101] or on the occasion of actions for damages.[102] Hence, if today the Council adopts an EU act containing a list of terrorist organizations in relation to which the EU aims to reinforce police and judicial cooperation, such organizations may bring an action for annulment as well as an action for damages against the Council. In other words, regarding EU acts adopted after the entry into force of the Treaty of Lisbon, there would be a different outcome to a case like *Gestoras Pro-Amnistía* and *Segi*. Likewise, the Commission (or a Member State) may bring proceedings against a Member State which fails to fulfil its obligations under Title V of Part Three of the FEU Treaty. This means that the *exceptio non adimpleti contractus* ceases to be a valid justification. In addition, the jurisdiction of the ECJ to issue preliminary rulings is no longer conditioned upon a declaration of a Member State to this effect. Nor is the preliminary reference procedure limited to national courts of last instance. However, when the EU exercises its powers regarding Treaty provisions on police cooperation and judicial cooperation in criminal matters, article 276 TFEU, which reproduces ex article 35(5) EU, provides that the ECJ lacks 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'.

Moreover, in order to assess the legal effects of EU acts in the field of police and judicial cooperation in criminal matters, the distinction between pre-existing EU acts and acts adopted after the entry into force of the Treaty of Lisbon is also relevant. In this regard, article 9 of Protocol (No 36) states that

[99] See M Dougan, (n 34) 683, who argues that the transitional regime of the Treaty of Lisbon may be praised and despised at the same time. On the one hand, this transitional regime is 'unobjectionable' because it seemed the only way for some Member States to accept the full legal order of Title V of the FEU Treaty. Indeed, it mirrors the gradual integration in the field of justice and home affairs that began with the Maastricht Treaty, continued with the Amsterdam Treaty and is supposed to end with the expiration of the transitional period laid down in art 10 of Protocol (No 36). On the other hand, this transitional regime has given rise to considerable criticism. Since the level of judicial protection under the former third pillar was clearly insufficient, this transitional regime cannot be justified.

[100] See art 10 (2) of Protocol (No 36) on Transitional Provisions Annexed to the Treaty of Lisbon.

[101] Under art 263 TFEU, the ECJ is competent to review the legality of acts of the institutions and other bodies of the Union intended to produce legal effects *vis-à-vis* third parties.

[102] On this point, the Treaty of Lisbon does not bring substantial changes to ex arts 235 and 288(2) EC.

the legal effects of pre-existing EU acts should be preserved until those acts are repealed, annulled or amended. In accordance with ex article 34(2)(b) EU, this means that pre-existing EU acts (Framework Decisions) may not have direct effect unless the EU legislator decides to amend them. Thus, the *Pupino* jurisprudence is still of paramount importance, requiring national courts to interpret national law in the light of the wording and the purpose of pre-existing EU acts. For acts adopted after 1 December 2009, the classic case-law on direct effect applies.[103]

Finally, the special regime applicable to the United Kingdom and Ireland in the Area of Freedom, Security and Justice merits brief comment.[104] One should recall that two Protocols granted the United Kingdom and Ireland a right of opt-in/opt-out in matters pertaining to the Area of Freedom, Security and Justice, namely ex Protocol (No 2) integrating the Schengen *acquis* into the EU framework (in particular, articles 4 and 5)[105] and ex Protocol (No 4) on the position of the United Kingdom and Ireland in relation to Community acts adopted under ex Title IV of Part Three of the EC Treaty.[106] By contrast, no such right existed for acts adopted under the third pillar which were not Schengen-related. With the adoption of Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice annexed to the Treaty of Lisbon,[107] the United Kingdom and Ireland's right of opt-in/opt-out is expanded: it now covers all matters falling under Title V of Part Three of the FEU Treaty. This means that, for example, the United Kingdom and Ireland may henceforth opt-out of Directives harmonizing criminal offences.[108] Apart from this important innovation, Protocol (No 21)—which largely follows ex Protocol (No 4)—adds a new article 4a and a new article 6a. The former provision states that 'in cases where the Council determines that the non-participation of the United Kingdom or Ireland in the amended version of [a pre-existing EU measure] makes the application of that measure inoperable for other Member States or the Union', the original version of this measure no longer applies to them.[109] Article 6a

[103] Indeed, the application of the classic case-law on direct effect to new EU acts adopted under Title V of Part Three of the FEU Treaty is confirmed by the fact that legal instruments specific to the third pillar are abolished and replaced by Regulations, Directives and Decisions.

[104] For an historical overview of the United Kingdom's right to opt-in/opt-out, see M Fletcher, 'Schengen, the European Court of Justice and Flexibility Under the Lisbon Treaty: Balancing the United Kingdom's "Ins" and "Outs"' [2009] EuConst 71.

[105] In two cases decided in 2007, the ECJ provided useful guidance as to the relationship between arts 4 and 5 of ex Protocol (No 2). See Case C-77/05 *United Kingdom v Council* [2007] ECR I-11459 and Case C-137/05 *United Kingdom v Council* [2007] ECR I-11593. In essence, the ECJ ruled that in order for the United Kingdom to opt-in to a Community measure building on the Schengen *acquis*, it first must have accepted the relevant Schengen *acquis* upon which the measure is built.

[106] M Fletcher (n 104) 80–81.

[107] Protocol (No 21) on the Position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice.

[108] Art 83 (2) TFEU.

[109] It is worth noting that an analogous regime is provided by the amendments introduced by the Treaty of Lisbon to the new Schengen Protocol. Art 5(2) of the new Schengen Protocol provides that where the United Kingdom and Ireland have opted-in to an existing Schengen

indicates that as regards activities falling within the scope of EU acts involving police and judicial cooperation in criminal matters in relation to which the United Kingdom or Ireland does not participate, rules relating to the processing of personal data as provided for by article 16 TFEU are not binding upon them.

Moreover, article 10(4) of Protocol (No 36) states that upon expiration of the transitional period, the United Kingdom must decide whether pre-existing EU acts continue to apply to it and, if so, that it must then accept the extension of the ECJ's powers in respect of them.[110] If the reply is in the negative, those pre-existing acts will cease to apply in the United Kingdom.[111] The UK's repudiatory opt-out is an innovative feature of the Treaty of Lisbon. It is the first time that a Member State has been entitled to withdraw from parts of the existing *acquis.*[112]

E. Accelerated and Urgency Procedures in the Area Of Freedom, Security And Justice

The ECJ's contribution to the Area of Freedom, Security and Justice is greatly facilitated by certain special procedures which allow particular cases to be dealt with more rapidly when required. In all matters that fall within the Area

measure in accordance with art 4, they retain a right to opt-out of an EU measure building on this Schengen *acquis*. However, if they exercise the right to opt-out, the Council may decide that the original Schengen measure no longer applies to them in whole or in part. Art 5(3) of the new Schengen Protocol states that the Council must take its decision in accordance with the following criteria: it must 'seek to retain the widest possible measure of participation of the Member State concerned without seriously affecting the practical operability of the various parts of the Schengen *acquis*, while respecting their coherence'. Further, in order not to render art 5(1) of the new Schengen Protocol redundant, it seems that the United Kingdom and Ireland would enjoy an unconditional right of opt-in in respect of new measures building on the Schengen *acquis*. Does this mean that the new Schengen Protocol overrules the decisions of the ECJ in Case C-77/05 *United Kingdom v Council* (n 105), and Case C-137/05 *United Kingdom v Council* (n 105) ? Has the relationship between arts 4 and 5 of the old Schengen Protocol been modified by the Treaty of Lisbon? M Dougan (n 34) 685, and M Fletcher (n 104) 92, suggest that these rulings remain good law at least in part. With a view to preserving the *effet utile* of art 4, the United Kingdom and Ireland's right to opt-in should be limited to measures building on the Schengen *acquis* which can be applied autonomously. See also the Opinion of AG Trstenjak in these cases.

[110] Ireland is not subject to these transitional arrangements.

[111] Art 10 (5) of Protocol (No 36) on Transitional Provisions Annexed to the Treaty of Lisbon provides that the United Kingdom may subsequently notify to the Council that it wishes to participate in specific pre-existing acts. In that case, the new Protocol on the Schengen *acquis* or Protocol (No 21) shall apply.

[112] See M Dougan (n 34) 684 (arguing that it is very unlikely for the United Kingdom to exercise its repudiatory opt-out in practice). By contrast, see M Fletcher (n 104) 94 (opining that art 10(4) and (5) of Protocol (No 36) 'present a much greater danger to the coherence of the Area of Freedom, Security and Justice than does [Protocol (No 21)]'. In her view, these transitional arrangements may have 'a perverse incentive for the UK government dissatisfied with some of the measures adopted under [the former third pillar]', since the UK government may opt-out of chunks of pre-existing legislation adopted under ex Title VI of the old EU Treaty so that it may later 're-accept only those measures it thinks are palatable').

of Freedom, Security and Justice, swift decision-making is of the essence. This is the case not only in the field of immigration and asylum or in respect of criminal proceedings, but also in family matters, particularly as far as the custody of children is concerned. In all of these fields, the maxim '*justice delayed is justice denied*' is particularly relevant. This requirement for swift decision-making is now explicitly set out in the last paragraph of article 267 TFEU, which requires the ECJ to act with minimum delay 'if [the] question [referred] is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody'. This requirement for swift decision-making must not, however, be applied to the detriment of the protection of fundamental rights—particularly with respect to the rights of the defence—or by weakening the EU's judicial system based on a dialogue between the ECJ and national courts.

It is well-known that preliminary rulings given on the basis of article 267 TFEU have binding legal effects not only *ex tunc*, but also *erga omnes*, meaning that the ECJ's findings on points of law bind not only the referring court, but also all of the Member States. This is the reason why, on the one hand, a preliminary ruling issued by the ECJ must be translated into all official languages of the Union and why, on the other hand, all Member States are entitled, by virtue of the Statute of the Court of Justice, to submit written and/or oral observations to the ECJ concerning issues raised by a reference for a preliminary ruling.[113] To reconcile all these requirements, the preliminary ruling procedure has been the object of two important procedural developments which make it possible for the ECJ to deal with cases concerning the Area of Freedom, Security and Justice more quickly.

First, by virtue of article 104a of the Rules of Procedure of the Court of Justice, at the request of the national court, the President may exceptionally decide to apply an accelerated procedure where the circumstances concerned establish that a ruling on the question put to the ECJ is a matter of exceptional urgency.[114] In contrast to the urgent preliminary ruling procedure, the accelerated procedure is not limited to matters pertaining to the Area of Freedom, Security and Justice.[115] The accelerated procedure was recently applied in the *Kozłowski* case,[116] which concerned the execution by the German authorities of a European arrest warrant issued by the Polish authorities against Mr Kozłowski, a Polish national. The referring court submitted

[113] See art 23 of the Statute of the Court of Justice.

[114] In that event, those mentioned in art 23 of the Statute of the Court of Justice may, within a period prescribed by the President which shall not be less than fifteen days, lodge written observations, and the President may request them to restrict the matters addressed in their oral statements or written observations to the essential points of law raised by the question referred. Art 104a, paras 2–3, of the Rules of Procedure of the Court of Justice.

[115] See Case C-127/08 *Metock* [2008] ECR I-06241, para 63.

[116] As regards the application concerning the accelerated procedure, see Case C-66/08 *Kozłowski*, order of 22 February 2008. As for the ECJ's judgment, see Case C-66/08 *Kozłowski* [2008] ECR I-6041.

that the execution of the European arrest warrant issued against Mr Kozłowski was likely to be compromised to the extent that his detention in Germany would normally come to an end in November 2009.[117] In view of the relevant provisions of German criminal law concerning stays of execution of a criminal sentence, Mr Kozłowski could obtain an early release from custody after serving two-thirds of the duration of his sentence, namely from 10 September 2008 onwards.[118]

In response, the President of the Court found that it would undoubtedly be possible for the referring court to order, before the said date and taking into consideration the Polish request to surrender Mr Kozłowski, his arrest for the purposes of complying with that request.[119] However, in any event, his detention had to be for a short time only, since it had to be proportional to the five-month imprisonment to which he was sentenced for crimes committed in Poland.[120] The President of the Court then considered that the case raised problems of interpretation in a sensitive field of legislation which touched upon central aspects of the functioning of the European arrest warrant which was before the ECJ for the first time.[121] Furthermore, the interpretation of the relevant provisions of the Framework Decision requested by the referring court was liable to have consequences more generally both for national authorities required to cooperate within the framework of the European arrest warrant system and for the rights of the persons whose surrender was requested as they were liable to find themselves in situations of uncertainty.[122] Therefore, a swift reply to the questions referred to the ECJ in the instant case was needed to enable the national judicial authority seised of the surrender request to respond to it in an informed way and thereby to perform its obligations under the Framework Decision.[123] It should further be noted that the referring court had requested the ECJ to decide the case pursuant to the urgent preliminary ruling procedure,[124] but that this procedure was not yet applicable *ratione temporis*. On the substance of the case, the ECJ was asked to clarify article 4(6) of the Framework Decision, which provides a ground for optional non-execution of the European arrest warrant. This provision states that where, for the purposes of executing a custodial sentence or a detention order, the requested person 'is a national', 'is staying in' or 'is a resident of' the executing State, the executing judicial authority may refuse to execute the arrest warrant in so far as this State undertakes to execute the sentence or detention order in accordance with its domestic law. In the case at hand, the German executing judicial authority asked whether it could rely on article 4(6) of the Framework Decision as implemented by German law to refuse execution of a European arrest warrant issued by a Polish court in proceedings

[117] Case C-66/08 *Kozłowski*, order of 22 February 2008, para 10.
[118] ibid.
[119] ibid.
[120] ibid.
[121] ibid para. 11.
[122] ibid.
[123] ibid para. 12.
[124] ibid paras 5–7

involving Mr. Kozłowski, a Polish national residing illegally in Germany, staying there interruptedly, and serving a custodial sentence for having committed crimes therein. From the need for uniform application of EU law and the principle of equality, the ECJ inferred that 'staying' and 'resident' are two autonomous concepts, that is to say, Member States are precluded from giving those terms a different meaning.[125] Next, in light of the information provided, the ECJ noted that Mr Kozłowski was not a resident in Germany and proceeded to define 'staying'. A large definition of 'staying' was ruled out, given that it would run counter the objective pursued by the Framework Decision, namely simplifying and facilitating extradition procedures. Yet, 'staying' could not be interpreted too narrowly either, so as to exclude situations where the person requested had established connections with the executing State that would increase his chances of reintegrating into society upon completion of his sentence. Thus, when evaluating whether the person requested is 'staying' in the executing State, it is for the executing judicial authority 'to make an overall assessment of various objective factors characterising the situation of that person, which include, in particular, the length, nature and conditions of his presence and the family and economic connections which he has with the executing Member State [without any of them being decisive of itself]'.[126] For Mr Kozłowski this meant that he was not 'staying' in Germany for the purposes of article 4(6), given 'in particular the length, nature and conditions of his stay, the absence of family ties and his very weak economic connections with the executing Member State'.[127]

Second, the urgent preliminary ruling procedure enshrined in article 104b of the Rules of Procedure of the Court of Justice constitutes an additional, new mechanism with crucial implications for preliminary rulings in the context of the Area of Freedom, Security and Justice.[128] Following a request from the Council, the ECJ proposed the introduction of this new procedure in order to be able to deal more quickly with the most sensitive issues arising in respect of the Area of Freedom, Security and Justice, particularly where the answer to the question referred is decisive for the assessment of the legal situation of the person detained by national authorities or in proceedings concerning the parental custody of children. In other words, national courts cannot afford to wait for the replies to questions such as these for the time normally required for the consideration of preliminary rulings.

The urgent procedure, which came into force on 1 March 2008, makes a clear distinction between those who may participate in the written stage of the procedure and those entitled to participate in the oral stage only, with a view to

[125] Case C-66/08 *Kozłowski* (n 116) paras 42–43. [126] ibid para 48

[127] ibid. See also Case C-123/08 *Wolzenburg*, judgment of 6 October 2009, not yet reported.

[128] See Council Decision 2008/79/EC, Euratom of 20 December 2007 Amending the Protocol on the Statute of the Court of Justice [2008] OJ L24/42; and Amendments to the Rules of Procedure of the Court of Justice [2008] OJ L24/39.

making it possible to reach a decision quickly.[129] When a request to apply that procedure is granted, or when the President of the Court proposes of his own motion that it should be applied, the handling of the case is accelerated considerably. All cases which might potentially be decided under the urgent procedure are, from the moment they reach the ECJ, referred to a Chamber of five judges specifically designated for a period of one year to be responsible for the screening and processing of such cases.[130] Moreover, to avoid hold-ups resulting from the service of documents, communications under the urgent procedure can be conducted via electronic means.[131]

As of April 2010, five cases have been dealt with under the urgent procedure. It was applied for the first time in *Rinau*[132] concerning the Brussels II bis Regulation.[133] In that case, the Lithuanian Supreme Court was seised of an application for the non-recognition of a judgment of a German court awarding custody of a child to her father, who lived in Germany, and ordering her mother, who lived in Lithuania, to return the child to him. The referring court requested that the reference for a preliminary ruling be dealt with under the urgent procedure, since the Brussels II bis Regulation provides for the return without delay of a child who has been removed or retained and sets a deadline of six weeks by which time the court to which an application for return is made must deliver its judgment.[134] The referring court found that it was necessary to act urgently on the ground that any delay would be unfavourable to the relationship between the child and the non-custodial parent.[135] It also relied on the need to protect the child against any possible harm and to ensure a fair balance between the interests of the child and those of her parents.[136] Taking those observations into account, the ECJ granted the referring court's request that the case be dealt with pursuant to the urgent procedure.[137] On the substance of the case, the ECJ decided that once a non-return decision has been taken and brought to the attention of the court of origin, it is irrelevant,

[129] In the urgent procedure, only the parties to the main proceedings, the Member State of the court making the reference, the Commission and, if appropriate, the Council and the European Parliament, if one of their measures is at issue, are authorised to lodge written observations in the language of the case within a short period of time. The other interested parties and, in particular, the Member States other than that of the referring court, are not given the opportunity to submit written observations, but they are invited to a hearing at which they may submit their oral observations on the questions referred by the national court and on the written observations related thereto. See art 104b(2)–(3) of the Rules of Procedure of the Court of Justice.

[130] If that Chamber decides to grant the request for the urgent procedure to be applied, it will proceed to give its ruling at the close of the oral stage of the proceedings after hearing the Advocate General. See art 104b(5) of the Rules of Procedure.

[131] Communication between the ECJ and the national courts, the parties to the main proceedings, the Member States and the Community institutions will, as far as possible, be conducted electronically. Court of Justice Information for the Press No 12/08 of 3 March 2008, available at the ECJ's website, http://curia.europa.eu.

[132] Case C-195/08 PPU *Rinau* (n 53).

[133] Council Regulation (EC) No 2201/2003 (n 15).

[134] Case C-195/08 PPU *Rinau* (n 53) para 44.

[135] ibid.

[136] ibid para 45.

[137] ibid para 46.

for the purposes of issuing the certificate provided for in article 42 of the Brussels II bis Regulation, that that decision has been suspended, overturned, set aside or, in any event, has not become *res judicata* or has been replaced by a decision ordering return, in so far as the return of the child has not actually taken place. The ECJ further specified that, since no doubt had been expressed as regards the authenticity of that certificate and since it was drawn up in accordance with the standard form set out in Annex IV to the Regulation, opposition to the recognition of the decision ordering return was not permitted and it was for the requested court only to declare the enforceability of the certified decision and to allow the immediate return of the child.[138]

In the field of judicial cooperation in civil matters, the ECJ has decided to apply the urgent procedure in another case, *Detiček*, also concerning the Brussels II bis Regulation.[139] The facts of the case may be summarised as follows. In the course of divorce proceedings between Ms Detiček, a Slovenian national, and Mr Sgueglia, an Italian national, the competent court in Tivoli (Italy) provisionally granted the custody of their daughter to Mr Sgueglia. On the same day this decision was issued, Ms Detiček left Italy with her daughter to go to Slovenia. With a view to having his daughter returned to Italy, Mr Sgueglia sought to enforce the order of the Italian court in Slovenia. The order of the Italian court was declared enforceable in Slovenia but its enforcement was suspended until final disposal of the main proceedings. For her part, Ms Detiček obtained a provisional and protective measure from the Regional Court of Maribor (Slovenia) giving her custody of the child. The Regional Court of Maribor based its jurisdiction to adopt such a measure on article 20 of the Brussels II bis Regulation, holding that there had been a change of circumstances that militated against removing the child from her social environment in Slovenia. This decision was challenged by Mr Sgueglia before the Court of Appeal of Maribor, which sought guidance from the ECJ. Hence, the questions referred to the ECJ boiled down to determining whether the Regional Court of Maribor had made an appropriate use of the provisions conferring exceptional jurisdiction laid down in article 20 of the Regulation. The referring court also requested for a preliminary ruling to be dealt with under the urgent procedure on the grounds that a delayed decision would be contrary to the interests of the child, would adversely affect the relationship between Mr Sgueglia and his daughter, and would prolong the state of legal uncertainty.[140] In light of these considerations, the ECJ upheld the request from the Court of Appeal of Maribor.[141]On the substance of the case, the ECJ began by observing that in so far as article 20 of the Brussels II bis Regulation is an exception to the system of jurisdiction laid down therein, this provision

[138] ibid para 89.
[139] Case C-403/09 PPU *Detiček* (n 53).
[140] ibid para 30.
[141] The referring court submitted the reference on 19 October 2009, and the ECJ's ruling was delivered on 23 December 2009.

must be interpreted strictly. Next, the ECJ recalled the three cumulative conditions that must be fulfilled for the application of article 20, namely that the measures concerned [1] must be urgent, [2] must be taken in respect of persons or assets in the Member States where those courts are situated, and [3] must be provisional. The ECJ noted that the circumstances mentioned by the referring court did not satisfy the condition of urgency. First, the ECJ found that applying article 20 to circumstances such as those in the main proceedings would run counter to the principle of mutual recognition of judgments which underpins the Brussels II bis Regulation. Indeed, if the integration of the child into a new environment were sufficient to trigger the application of article 20, this would encourage the courts of the requested Member State to block the enforcement of a judgment rendered by a court of another Member State that had been declared enforceable.[142] Second, the ECJ acknowledged that in the present case the change in the child's circumstances resulted from wrongful removal. Accordingly, the interpretation of article 20 suggested by the Regional Court of Maribor 'would amount, by consolidating a factual situation deriving from wrongful conduct, to strengthening the position of the parent responsible for the wrongful removal'.[143] Moreover, the ECJ also found that the second condition for the application of article 20 was not satisfied either, given that Mr Sgueglia, who did not reside in Slovenia, was concerned by the measure ordering the change of custody of his daughter. Finally, the ECJ pointed out that article 20 'cannot be interpreted in such a way that it disregards article 24(3) of the Charter'. Stated differently, this provision cannot favour situations where as a result of wrongful removal, a child is deprived from maintaining on a regular basis a personal relationship and direct contact with one of his or her parents.[144]

In the field of visas, asylum and immigration, the ECJ has applied the urgent procedure only once, namely in *Kadzoev*[145] concerning the interpretation of the Return Directive.[146] In that case, Mr Kadzoev, a third country national born in the Chechnya region of Russia, was detained by Bulgarian authorities, which imposed on him a coercive administrative measure of deportation. In November 2006, he was placed in a detention centre until the relevant travelling documents as well as the necessary funds to travel to Chechnya were obtained. This turned out to be impossible as Russia refused to issue him travelling documents on the ground that it did not recognize him as a Russian citizen. While being detained, Mr Kadzoev applied unsuccessfully for refugee status and for his detention to be replaced by a less severe measure. Efforts to find a safe third country willing to receive him also failed. As a result of this

[142] Case C-403/09 PPU *Detiček* (n 53) para 47.
[143] ibid para 49.
[144] ibid para 57.
[145] Case C-357/09 PPU *Kadzoev*, judgment 30 November 2009, not yet reported.
[146] Council Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals [2008] OJ L 348/98.

ongoing state of 'legal limbo', the detention of Mr Kadzoev continued given that his deportation order could not be executed. Nor could he be released since, unlike article 15 of the Return Directive, the Bulgarian law applicable at the time did not provide for a maximum duration of detention in such circumstances. This impasse led the Bulgarian immigration authorities to commence administrative proceedings before the Sofia City Administrative Court so that the latter could rule of its own motion on the continued detention of Mr Kadzoev. Given that this case raised questions on the interpretation of article 15 of the Return Directive, the Sofia City Administrative Court decided to seek guidance from the ECJ.[147] The opening of the urgent procedure was also requested by the referring court on the ground that the case raised questions the answers to which had a bearing on the decision whether Mr Kadzoev should be kept in detention or released. In addition, the referring court argued that bearing in mind that Mr Kadzoev had been in detention for more than three years, the national proceedings should not be suspended for a prolonged period.[148] The Second Chamber of the ECJ upheld the request of the referring court and, in light of the importance of the questions referred,[149] the case was assigned to the Grand Chamber.[150] On the substance of the case, the ECJ held that the purpose of the Directive is 'to guarantee that in any event the detention [of a third country national] for the purpose of removal does not exceed 18 months'. There are four implications that flow from this objective. First, 'the maximum duration of detention must include a period of detention completed in connection with a removal procedure commenced before rules in that directive became applicable'.[151] Second, when calculating the maximum duration of detention under article 15 of the Return Directive, the period during which the execution of a removal decision is suspended because of the examination of an application for asylum of a third country national who is being held in a detention facility must be taken into account, unless national authorities adopt a decision whereby the stay of the person concerned in a detention facility complies with the conditions laid down by the provisions of EU and national law concerning asylum seekers.[152] Likewise, the period

[147] In essence, the Sofia City Administrative Court asked four questions: [1] Must the maximum duration of detention laid down in art 15 include a period of detention completed before the rules in Directive 2008/115 became applicable? [2] When calculating the period of detention for the purposes of removal under arts 15 (5) and (6) of Directive 2008/115, must the period during which the execution of the removal decision was suspended because of the examination of an application for asylum of (or because of judicial review proceedings brought against the decree of deportation by) a third country national who is being held in a detention facility be taken into account? [3] Does the concept of 'reasonable prospect of removal' remain relevant after the expiration of the period laid down in arts 15 (5) and 15 (6)? [4] May grounds of public order and public safety be put forward by national authorities to keep a person in a detention facility?

[148] Case C-357/09 PPU *Kadzoev* (n 145) para 32.

[149] This was the first time that Directive 2008/115 was interpreted by the ECJ.

[150] The referring court submitted the reference on 10 August 2009, and the ECJ's ruling was delivered on 30 November 2009.

[151] Case C-357/09 PPU *Kadzoev* (n 145) para 39.

[152] ibid para 47.

during which the execution of the deportation decree is suspended because of judicial review proceedings brought against that decree by a third country national who is being held in a detention facility must also be included for the purpose of removal under article 15.[153] Third, once the maximum duration of detention has been exhausted, the national court does not need to examine whether a reasonable prospect of removal exists.[154] As a matter of fact, 'a reasonable prospect of removal' does not exist where it seems unlikely that the person concerned will be deported to a third country prior to the expiration of the periods laid down in articles 15(5) and 15 (6).[155] Last but not least, public order and public safety do not constitute grounds for detention under the Return Directive.[156]

The urgent procedure was also applied in the field of police and judicial cooperation in criminal matters in *Santesteban Goicoechea*[157] and in *Leymann and Pustovarov*,[158] both cases concerning the Framework Decision on the European arrest warrant.[159] In the former case, the French referring court's request was granted by the ECJ because Mr Santesteban Goicoechea was being detained, after serving a sentence of imprisonment, on the sole basis of detention for the purpose of extradition ordered in the extradition proceedings in which the reference was made.[160] In this way, the ECJ was able to provide its response to the referring court's questions in about one month's time.[161] On the substance of the case, the Court held that article 31 of the Framework Decision on the European arrest warrant refers only to the situation in which the European arrest warrant system is applicable, which is not the case where a request for extradition relates to acts committed before a date specified by a Member State in a statement made pursuant to article 32 of that Framework Decision.[162] The ECJ further held that article 32 of the Framework Decision does not preclude the application by an executing Member State of the Convention relating to extradition between the Member States of the European Union drawn up by Council Act of 27 September 1996 and signed on that date by all the Member States, even where that convention became applicable in that Member State only after 1 January 2004.[163]

In *Leymann and Pustovarov*, the ECJ granted the Finnish referring court's request for a preliminary reference to be dealt with under article 104b of the

[153] ibid para 53. [154] ibid para 61. [155] ibid para 66.

[156] ibid para 70. It is worth nothing that, as a result of the ruling of the ECJ, Mr Kadzoev was released on 3 December 2009. Information available at: http://lcrien.wordpress.com/2009/12/03/said-kadzoev-has-been-released-from-the-busmantsi-detention-centre/.

[157] Case C-296/08 PPU *Santesteban Goicoechea* [2008] ECR I-6307.

[158] Case C-388/08 PPU *Leymann and Pustovarov*, judgment of 1 December 2008, not yet reported. [159] Council Framework Decision 2002/584/JHA, (n 27).

[160] Case C-296/08 PPU *Santesteban Goicoechea* (n 157) para 33.

[161] The referring court submitted the reference on 3 July 2008, and the ECJ's ruling was delivered on 12 August 2008.

[162] Case C-296/08 PPU *Santesteban Goicoechea* (n 157) para. 63.

[163] ibid para 81.

Rules of Procedure, on the ground that a clarification on the interpretation of article 27 of the Framework Decision could lead the national court to reduce the sentence imposed on Mr Pustovarov and, consequently, to bring forward his release.[164] Given that in any event, Mr Pustovarov was due to be released on parole a few months later, the urgency of the matter was particularly pressing.[165] On the substance of the case, the ECJ was called upon to clarify the meaning of an offence other than that for which the person was surrendered, as provided for by article 27(2) of the Framework Decision. In essence, the case boiled down to determining whether there was an offence other than that for which the person was surrendered 'where both the arrest warrant and the final prosecution were based on a (serious) narcotics offence but the description of the offence was subsequently altered so that the prosecution concerned a different kind of narcotics [hashish] from that referred to in the arrest warrant [amphetamines]'.[166] In the light of the objectives pursued by the Framework Decision, the ECJ ruled that the national court had to evaluate whether the constituent elements of the offence described in the arrest warrant matched those described in the later procedural document. Additionally, the national court had to examine whether the information contained in the arrest warrant sufficiently corresponded to that contained in the later procedural document. Further, alterations to the place and time of the offence as described in the arrest warrant were allowed, provided that [1] they resulted from subsequent investigations undertaken in the issuing State in relation to the offence described in the arrest warrant, [2] they did not modify the nature of the offence and [3] they did not fall within the non-execution grounds laid down in articles 3 and 4 of the Framework Decision.[167] For the case at hand this meant that a modification in the description of the offence concerning the kind of narcotic was not sufficient to trigger the application of article 27(2), given that 'the offence concerned is still punishable by imprisonment for a maximum period of at least three years and comes under the rubric 'illegal trafficking in narcotic drugs' in article 2(2) of the Framework Decision'.[168] Finally, in the light of article 27(3)(c) in conjunction with article 27(4) of the Framework Decision, the ECJ added that where there is an offence other than that for which the person was surrendered, consent from the executing judicial authority must be obtained, in so far as 'a penalty or measure involving deprivation of liberty is to be executed'. Prior to that, the issuing State may carry on with its criminal proceedings, but it may not enforce any penalty or measure involving deprivation of liberty, unless the imposition of such a penalty or measure results from other (unmodified) charges already contained in the arrest warrant.[169]

[164] Case C-388/08 PPU *Leymann and Pustovarov* (n 158) para 38.

[165] The referring court submitted the reference on 5 September 2008, and the ECJ's ruling was delivered on 1 December 2008.

[166] Case C-388/08 PPU *Leymann and Pustovarov* (n 158) para 36.

[167] ibid para 57. [168] ibid para 62. [169] ibid para 76.

III. THE SUBSTANTIVE LEVEL

The ECJ's substantive contribution to the Area of Freedom, Security and Justice is highly significant. This contribution is grounded in the protection of fundamental rights in relation to both civil and criminal matters, and more recently in the field of asylum.

A. Judicial Cooperation in Civil Matters

In the context of its interpretation of various measures concerning judicial cooperation in civil matters, the ECJ seeks to uphold the protection of fundamental rights in the form of procedural guarantees embodied by the rule of law in the EU legal order. The ECJ's case law contributes to the further development of the Area of Freedom, Security and Justice, particularly as regards the notion of 'public policy', which is central to the present analysis. For example, in the *Krombach* case,[170] the interpretation of the 'public policy' clause provided in article 27 of the Brussels Convention[171] enabled the ECJ to set some crucial guidelines on the application of this exception to the 'free movement of judgments.[172] The facts of the case may be summarised as follows. Following preliminary investigations, Mr. Krombach was committed for trial before the Paris Court of Appeal in respect of the death in Germany of a French girl. A civil claim brought by the father of the victim was joined to the criminal proceedings. Mr Krombach was ordered to appear in person at the hearing but he failed to do so. As a result, the Paris Court of Appeal found Mr Krombach guilty of contempt of court. The French Code of Criminal Procedure provided that no defence counsel could appear on behalf of the person in contempt. This meant that the Paris Court of Appeal would reach its decision without hearing the defence counsel instructed by Mr Krombach. The Paris Court of Appeal found Mr Krombach guilty of manslaughter and also ordered him to pay compensation to the father of the victim in the amount of FRF 350 000. When the father of the victim sought to enforce the judgment of the Paris Court of Appeal in Germany pursuant to the Brussels Convention, Mr Krombach argued that, since he had been unable effectively to defend himself against the judgment given against him by the Paris Court of Appeal, the latter's decision should not be enforced. On appeal on a point of law, the Bundesgerichtshof asked the ECJ whether article 27 of the Brussels Convention could be relied upon to deny the enforcement of a judgment such as that of the Paris Court of Appeal.

The ECJ began by pointing out that article 27 of the Brussels Convention must be interpreted strictly inasmuch as it constitutes an obstacle to the

[170] Case C-7/98 *Krombach* [2000] I-1935.

[171] Brussels Convention (n 9).

[172] By virtue of art 27, point 1, of the Brussels Convention, a judgment will not be recognized 'if such recognition is contrary to public policy in the State in which recognition is sought'.

attainment of one of the fundamental objectives of the Convention and therefore must be applied in exceptional cases only.[173] While making clear that it was not for the ECJ to define the content of the 'public policy' of a particular Contracting State, it was nonetheless required to set the limits within which the court of a Contracting State may have recourse to that concept for the purpose of refusing recognition to a judgment emanating from a court in another Contracting State.[174] In its reply, the ECJ focused its analysis on the protection of fundamental rights which form an integral part of the general principles of law whose observance the ECJ ensures and for the purpose of which it draws inspiration from the ECHR in particular. The ECJ recalled that it had in earlier cases expressly recognized the general principle of law that everyone is entitled to fair legal process, which draws on those fundamental rights and that ex article F(2) (post 1999 numbering: ex article 6(2))[175] EU embodies that case law.[176]

The ECJ also took the opportunity to define more clearly the notion of 'public policy' in this context. It considered that the 'public policy' exception of article 27 of the Brussels Convention could be invoked only where the recognition or the enforcement of a judgment delivered in another Contracting State would be incompatible, to an unacceptable degree, with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle of national law.[177] The ECJ specified that such infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognized as being fundamental within that legal order.[178] The ECJ further observed that the right to be defended occupies a prominent position in the organization and conduct of a fair trial and that it is one of the fundamental rights deriving from the constitutional traditions common to the Member States.[179] Having regard to the case law of the European Court of Human Rights ('ECtHR'),[180] the ECJ found that a court of a Member State is entitled

[173] Case C-7/98 *Krombach* (n 170) paras 21–22. For a selection of earlier cases, see eg, Case 145/86, *Hoffmann* [1988] ECR 645, para. 21; Case C-78/95 *Hendrikman and Feyen* [1996] I-4943 para 23.

[174] Case C-7/98 *Krombach* (n 170) para 23.

[175] Ex art F(2) (post 1999 numbering: ex art 6 (2)) EU provided: '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'. The concepts contained in this provision are now reproduced in art 6 TEU. In addition, art 6 TEU grants to the Charter the same legal value as the Treaties (art 6 (1)) and provides for the accession of the EU to the ECHR (art 6(2)).

[176] Case C-7/98 *Krombach* (n 170) paras 25–26. See also Case C-185/95 P *Baustahlgewebe v Commission* [1998] ECR I-8417, paras 20–21; Joined Cases C-174/98 P and C-189/98 P *The Netherlands and van der Wal v Commission* [2000] ECR I-1, para 17.

[177] Case C-7/98 *Krombach* (n 170) para 37.

[178] ibid.

[179] ibid para 38.

[180] See European Court of Human Rights, judgment of 23 November 1993 in *Poitrimol v France*, Series A No 277-A; judgment of 22 September 1994 in *Pelladoah v Netherlands*, Series A No 297-B; judgment of 21 January 1999 in *Van Geyseghem v Belgium*, No 26103/95.

to hold that the refusal to hear the defence of an accused person who is not present at the hearing constitutes a manifest breach of fundamental rights.[181]

This case-law concerning the protection of fundamental rights was subsequently applied to the Regulation on insolvency proceedings.[182] In *Eurofood*,[183] the ECJ considered that the right to be notified of procedural documents and, more generally, the right to be heard occupy a crucial position in the organization and conduct of a fair trial and that, in the context of insolvency proceedings, the right of creditors or their representatives to participate in accordance with the 'equality of arms' principle is of particular importance.[184] Accordingly, the ECJ ruled that a Member State may refuse to recognize insolvency proceedings opened in another Member State where the decision to open the proceedings was taken in flagrant violation of the fundamental right to be heard which a person concerned by such proceedings enjoys, especially in the case of creditors or their representatives.[185]

The interpretation of the 'public policy' exception in *Krombach* is also valid in the context of the Brussels I Regulation,[186] which has in fact codified the *Krombach* judgment in certain respects.[187] In judgments concerning the Brussels I Regulation, the ECJ has emphasised its concern that the principle of the free movement of judgments should not be implemented to the detriment of respect for fundamental rights. For example, in *ASML*,[188] the ECJ ruled that article 34(2) of the Brussels I Regulation[189] is to be interpreted as meaning

[181] Case C-7/98 *Krombach* (n 170) paras 38–40. More recently, in Case C-394/07 *Gambazzi*, judgment of 2 April 2009, not yet reported, an Italian court made a reference asking whether art 27(1) of the Convention could be relied upon with a view to denying execution of a British judgment adopted in proceedings where the defendant was excluded by an order, holding that he had not complied, within the prescribed time-limit, with the disclosure obligations imposed by an order adopted at an earlier stage. The ECJ held that though, for the purposes of defining 'public policy', the right of defence occupied a prominent position in the organization and conduct of a fair trial, this right was subject to restrictions. These restrictions had to correspond to a legitimate objective of public interest and not be a manifest and disproportionate breach of the right of defence. Said differently, it is for the national court to carry out a balancing exercise. Given that excluding the defendant from participating in the proceedings is the most serious restriction on the rights of defence, the ECJ ruled that '*such a restriction must satisfy very exacting requirements*'. ibid para 33. As a result, the ECJ was very thorough in listing all the circumstances that the Italian court had to examine before ruling out the exception contained in art 27(1). Indeed, the ECJ compelled the national court in which enforcement was sought to undertake a '*comprehensive assessment of the proceedings*'. ibid paras 41-45.

[182] Council Regulation (EC) No 1346/2000 (n 16).

[183] Case C-341/04 *Eurofood* [2006] ECR I-3813.

[184] ibid para 66.

[185] ibid para 67.

[186] Brussels I Regulation, (n 13).

[187] For instance, it is made explicit that the 'public policy' clause of art 34(1) of the Brussels I Regulation can only apply in cases that are 'manifestly' contrary to public policy, in conformity with the ECJ's judgment in *Krombach* (n 170) on the Brussels Convention, which did not state this explicitly.

[188] Case C-283/05 *ASML* (n 50).

[189] Art 34(2) of the Brussels I Regulation provides that a judgment will not be recognised where it was given in default of appearance 'if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so'.

that it is 'possible' for a defendant to bring proceedings to challenge a default judgment against him only if he was in fact acquainted with its contents under circumstances where it was served on him in sufficient time to enable him to arrange for his defence before the courts of the State in which the judgment was given.[190] To justify this conclusion, the ECJ considered that the objective of the Brussels I Regulation, namely to ensure the free movement of judgments from Member States in civil and commercial matters by simplifying the formalities with a view to their rapid and simple recognition and enforcement, must not be achieved at the expense of undermining, in any way, the right to a fair hearing.[191] In the same vein, in *Apostolides*,[192] the ECJ held that a fair balance between the free movement of judgments in civil and commercial matters and respect for the rights of the defence did not oppose the recognition or enforcement of a default judgment in so far as the defendant was able to commence proceedings against it, and those proceedings gave him an opportunity to argue that the relevant documents had not been properly served on him, thus ensuring protection of his rights of defence.[193]

The ECJ confirmed this line of reasoning in relation to the Regulation on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters.[194] In *Weiss und Partner*,[195] for instance, the ECJ considered that 'every effort must be made to reconcile the objectives of effectiveness and speed in the transmission of procedural documents, which are necessary for the sound administration of justice, with that of the protection of the rights of the defence'.[196]

As defined by the ECJ, the notion of 'public policy' demonstrates that the free movement of judgments in civil and commercial matters is not absolute but must comply with fundamental rights. Mutual respect and deference among national courts cannot lead to a situation that is detrimental to basic procedural rights. However, once fundamental rights are sufficiently protected, mutual trust prevents a court of Member State 'A' from questioning the jurisdiction of a court of Member State 'B' on grounds of expediency, bad faith of the applicant, or a better position to rule on the merits. Otherwise, national courts would distrust each other's capacity to examine their own jurisdiction, triggering the fragmentation of the Area of Freedom, Security and Justice. The importance of fundamental rights in the field of judicial co-operation in civil matters is highlighted by contrasting *Krombach* and the case-law of the ECJ on anti-suit injunctions.[197]

[190] Case C-283/05 *ASML* (n 50) para 49. [191] ibid paras 23–24.
[192] Case C-420/07 *Apostolides*, judgment of 28 April 2009, not yet reported.
[193] ibid para 78.
[194] Council Regulation (EC) No 1348/2000, now replaced by Council Regulation (EC) No 1393/2007, (n 17). [195] Case C-14/07 *Weiss und Partner* (n 52).
[196] ibid para 48.
[197] An anti-suit injunction may be defined as an order issued by a national court (usually a common law court) precluding the opposing party from bringing proceedings in another jurisdiction. Failure to comply with this order is a contempt of court, for which sanctions may be

The purpose of anti-suit injunctions is to protect an exclusive jurisdiction clause or an arbitration agreement from delaying tactics, by preventing a party from bringing an abusive action before 'a forum renowned for slow moving civil process [...], caus[ing] undue delay and unnecessary costs and thereby pressuris[ing] the other party to settle at an unduly low level'.[198] By discouraging oppressive and abusive procedural tactics, anti-suit injunctions are intended to reinforce the effectiveness of jurisdiction clauses and arbitration agreements,[199] while limiting the automatic application of the *lis pendens* rule.[200] Bearing in mind that rationale, AG Léger in *Gasser* suggested that the court second seised, which enjoys exclusive jurisdiction by virtue of a jurisdiction clause, should not always stay proceedings until the court first seised declines jurisdiction in its favour. Instead, the court second seised should give judgment 'where there is no room for any doubt as to [its] jurisdiction'.[201] However, the ECJ has repeatedly rejected this approach. In cases such as *Gasser, Turner*, and *Allianz*[202] it has held that anti-suit injunctions are not compatible with the scheme set out by the Brussels I Regulation (the Brussels Convention). Not only are anti-suit injunctions precluded in civil or commercial disputes whose subject-matter falls within the scope of application of the Brussels I Regulation[203] (the Brussels Convention), but also in proceedings which, while falling outside its scope, undermine its effectiveness.[204] This would be the case for anti-suit injunctions which 'prevent a court from another Member State from exercising the jurisdiction conferred on it by [the Brussels I Regulation]'.[205]

In essence, the ECJ has put forward three reasons justifying the incompatibility of anti-suit injunctions with the Brussels I Regulation (the Brussels Convention), namely legal certainty, mutual trust, and the *effet utile*. First, inspired by civil law systems, the Brussels I Regulation (the Brussels Convention) seeks to guarantee the predictability and inviolability of rules on jurisdiction.[206] Consequently, a balancing approach such as that traditionally followed by common law systems in the context of conflict of laws was

imposed. In addition, the foreign judgment may not be recognised or enforced in the jurisdiction where the anti-suit injunction was issued.

[198] A Clarke, 'The Differing Approach to Commercial Litigation in the European Court of Justice and the Courts of England and Wales' (2007) EBL Rev 101, 105.

[199] Art 23 of the Brussels I Regulation (n 13); art 17 of the Brussels Convention (n 9).

[200] Art 27 of the Brussels I Regulation (n 13); art 21 of the Brussels Convention (n 9).

[201] Opinion of AG Léger in Case C-116/02 *Gasser* [2003] ECR I-14693, para 83.

[202] Case C-116/02 *Gasser* [2003] ECR I-14693; Case C-159/02 *Turner* [2004] ECR I-3565; Case C-185/07 *Allianz*, judgment of 10 February 2009, not yet reported.

[203] In order to determine whether a dispute falls within the substantive scope of the Brussels I Regulation, the ECJ ruled that 'reference must be made solely to the subject-matter of the proceedings', that is, to 'the nature of the rights which the proceedings in question serve to protect'. See Case C-185/07 *Allianz* (n 202) para. 22

[204] ibid para 24. See also Opinion of AG Kokott in the same case, paras 53 and 54.

[205] ibid paras 24–26.

[206] Case C-116/02 *Gasser* (n 202) para 51.

discarded by the Union legislator.[207] This legislative choice explains why the ECJ has held that the principle of legal certainty excludes anti-suit injunctions.[208] Since anti-suit injunctions would require a case-by-case assessment, they seem incompatible with a clear and predictable *lis pendens* rule. Further, critiques accusing the ECJ of civilising the common law,[209] of supporting utopian solutions,[210] and of encouraging abusive practices[211] do not seem well-founded as it is the Union legislator who opted for a *choice-of-court* scheme inspired by the 'virtues and vices' of civil law systems. If anything, the ECJ is deferential to the legislative choices which result from the political process.[212] Second, the principle of mutual trust[213] implies that 'the court second seised is never in a better position than the court first seised to determine whether the latter has jurisdiction'.[214] Put simply, '[h]ow can in this sisterly union, one court think itself superior to the extent of telling another court what its job is?'[215] Hence, the offensive and extra-territorial character of anti-suit injunctions runs counter to a system based on mutual trust.[216] Third, the principle of *effet utile* mandates the ECJ to be extremely cautious when introducing 'holes' into the system set out by the Brussels I Regulation (the Brussels Convention) that may adversely affect the uniform application of the rules on jurisdiction contained therein. This means that EU secondary

[207] A Clarke (n 198) 117.

[208] The ECJ has taken a similar approach in relation to the common law doctrine of '*forum non conveniens*'. See Case C-281/02 *Owusu* [2005] ECR I-1383, paras 37–46 (where the ECJ held that '[i]t is common ground that no exception on the basis of the *forum non conveniens* doctrine was provided for by the authors of the Convention' and that '[a]pplication of the *forum non conveniens* doctrine, which allows the court seised a wide discretion as regards the question whether a foreign court would be a more appropriate forum for the trial of an action, is liable to undermine the predictability of the rules of jurisdiction laid down by the Brussels Convention, [. . .] and consequently to undermine the principle of legal certainty, which is the basis of the Convention').

[209] TC Hartley, 'The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws' (2005) ICLQ 813.

[210] See, for example, A Briggs, 'Anti-suit Injunctions and Utopian Ideals' [2004] LQR 529, 533 (holding that '[s]uch answers, patched together from the law of remedies, may be little to be proud of. But with the anti-European-suit injunction having been destroyed by enemy action or friendly fire, all a litigant can do is salvage what he may from the wreckage, while the rest of us redouble our trust in the legal systems of the other Member States').

[211] See, for example, TC Hartley (n 209) 822 (stating that '[t]hanks to the European Court, a litigant can now bring proceedings in bad faith in Italy simply to prevent himself from being sued elsewhere. *Pacta servanda sunt* no longer appears to apply to choice-of-court agreements').

[212] A Giannakoulias and H Meidanis, Case note (2009) CMLR 1709, 1724 (concluding that 'the solution given by the ECJ was the only possible one in the EU context. It is certainly a matter of future policy and of the new text of the Regulation to face the problem that may arise in case an arbitration (or a jurisdiction) clause is not honoured by one of the parties').

[213] For a detailed analysis of the concept of 'mutual trust', see F Blobel and P Spath, 'The Tale Of Multilateral Trust And The European Law Of Civil Procedure' [2005] ELRev 528.

[214] Case C-116/02 *Gasser* (n 202) paras 48–49; Case C-185/07 *Allianz* (n 202) para 29.

[215] T Kruger, 'Case Comment— The Anti-Suit Injunction in the European judicial space: Turner v Grovit', (2004) ICLQ 1030, 1036. Case C-159/02 *Turner* (n 202) paras 25–26.

[216] Case C-159/02 *Turner* (n 202) para 24; Case C-116/02 *Gasser* (n 202) para 72; Case C-185/07 *Allianz* (n 202) para 30.

legislation adopted in the field of judicial cooperation in civil matters must be interpreted so as to avoid 'parallel litigation' which could lead to conflicting decisions. It follows that provisions such as article 27 of the Brussels I Regulation, which facilitate free movement by preventing contradictory rulings, must be interpreted broadly.[217] Conversely, procedural tools of national law derogating from these provisions are subject to important limitations.[218]

Apart from being contrary to legal certainty, mutual trust and *effet utile*, it could be argued that anti-suit injunctions are difficult to reconcile with article 6 ECHR in so far as they restrict access to justice. As noted by AG Kokott in *Allianz*, '[by virtue of an anti-suit injunction], a claimant who has brought the matter before the court because he considers that the agreement is invalid or inapplicable would be denied access to the national court. That would be contrary to the principle of effective judicial protection which, according to settled case-law, is a general principle of [Union] law and one of the fundamental rights protected in the [Union].'[219]

In summary, while the *Krombach* case-law shows that fundamental rights may operate as a limit to the free movement of judgments in civil matters, a careful reading of cases such as *Allianz* would suggest that the ECJ will normally stand in the way of procedural tools of national law which, in addition to restricting free movement, might limit the right to effective judicial protection.[220]

B. The Role of the ECJ in the Field Of Asylum

Arguably, EU policy on asylum is governed by two often conflicting dimensions.[221] On the one hand, in order to create an Area of Freedom, Security and Justice, EU policy on asylum must contribute to strengthening the controls on

[217] Case C-116/02 *Gasser* (n 202) para 41.

[218] Case C-159/02 *Turner* (n 202) para 30.

[219] Opinion of AG Kokott in *Allianz* (n 202) para 58. See also Case C-185/07 *Allianz* (n 202) para 31. The ECJ has also deployed the principle of effective judicial protection to exclude the application of the *forum non coveniens* doctrine, see Case C-281/02 *Owusu* (n 208) para 42.

[220] It is worth noting, however, that, in *Gasser*, the United Kingdom argued that the *lis pendens* rule should not be automatically applied where '(1) the claimant has brought proceedings in bad faith before a court without jurisdiction for the purpose of blocking proceedings before the courts of another Contracting State which enjoy jurisdiction under the Brussels Convention and (2) the court first seised has not decided the question of its jurisdiction within a reasonable time.' Put simply, the court second seised should continue with the proceedings in the event of an 'Italian torpedo'. The United Kingdom relied on art 6 ECHR, which guarantees that everyone has a right to a fair hearing within a reasonable period of time to determine his civil rights and obligations. The ECJ dismissed this suggestion. First, it argued that art 21 of the Brussels Convention does not cease to apply because of the length of proceedings before the courts of the Contracting State concerned. Second, even if the legal systems of some Contracting States are far from being perfect, Contracting States must continue to trust each other. Finally, an exception to the automatic application of the *lis pendens* rule would undermine legal certainty. Case C-116/02 *Gasser* (n 202) paras 71–72.

[221] C Teitgen-Colly, 'The European Union and Asylum: An Illusion of Protection' (2006) CMLR 1503.

the external borders of the Union, so that asylum is not used as a means of circumventing the rules on entry into the Union. Put differently, the 'control of migration flows' dimension of EU policy on asylum aims to limit protection to those who genuinely deserve it. On the other hand, EU policy on asylum must also ensure that the Union is seriously committed to respecting the standards set out by international law, in particular by the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees. From the standpoint of international law, asylum does not focus on 'State border control', but on granting an effective protection to asylum seekers. Not only is the human rights dimension of EU asylum policy inspired by international legal instruments, but it is also recognised by the EU legal order itself. In particular, article 18 of the Charter recognises asylum as a right vested in individuals ('the right to receive asylum'), rather than as a prerogative of States ('the right to grant asylum').[222]

To date, the EU legislator has adopted five major pieces of legislation in the field of asylum, namely the Temporary Protection Directive,[223] the Reception Directive,[224] the Dublin II Regulation,[225] the Qualification Directive,[226] and the Procedures Directive.[227] Some scholars have criticised the approach followed by the legislator, arguing that it has paid too much attention to the control of migration flows, while disregarding human rights. For example, in relation to the Procedures Directive, they posit that this Directive 'should have established clear minimal guarantees, but instead cast a negotiated settlement in law, apparently reinvesting national administrations with discretion that they had lost in some measure, due to domestic and ECtHR rulings'.[228] As to

[222] M Gil-Bazo, 'The Charter of Fundamental Rights of the European Union and the Right to Be Granted Asylum in the Union's Law' [2008] Refugee Survey Quarterly 33, 42 (holding that '[a]n examination of the Charter's *travaux préparatoires* provides insight into art 18 and confirms that the right to asylum was conceived as a right of individuals').

[223] Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving Such Persons and Bearing the Consequences Thereof [2001] OJ L 212/12 (hereinafter 'the Temporary Protection Directive').

[224] Council Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers [2003] OJ L 31/18 (hereinafter 'the Reception Directive').

[225] Council Regulation (EC) No 343/2003 of 18 February 2003 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged In One of the Member States by a Third-Country National [2003] OJ L 50/1 (hereinafter 'the Dublin II Regulation').

[226] 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 [2004] OJ L 304/12 (hereinafter 'the Qualification Directive').

[227] Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status [2005] OJ L 326/13 (hereinafter 'the Procedures Directive').

[228] C Costello, 'The Asylum Procedures Directive in Legal Context: Equivocal Standards Meet General Principles' in A Baldaccini, E Guild and H Toner (eds), *Whose Freedom, Security and Justice?* (Hart Publishing, Oxford, 2007) 192.

the Qualification Directive, it has been criticised as falling 'short of international standards in a number of ways, notably, in relation to the qualifying grounds and the status of individuals under subsidiary protection and to the provisions on exclusion, revocation and *non-refoulement*, which should never have found their way into the Directive'.[229] Yet, it is argued that the margin of discretion enjoyed by national authorities in implementing these Directives is limited by the general principles of EU law. Hence, national courts and the ECJ would be bound to interpret and, where appropriate, declare invalid national implementing or EU measures that fail to comply with general principles. Reliance on general principles would then be the appropriate method for raising the level of protection offered by EU secondary legislation to asylum seekers (or to persons seeking subsidiary protection)[230] as well as a means of reconciling EU law with international standards.[231] However, before the entry into force of the Treaty of Lisbon, one could raise two objections to such an application of general principles. First, the EC Treaty restricted the scope of Community measures adopted in the field of asylum to minimum harmonization. Regarding pre-existing Community legislation in the field of asylum, it remains unclear whether general principles apply to national measures located above the 'regulatory floor' set out by the Community legislator ('the upwardly-flexible area').[232] Second, due to the restrictions on

[229] M Gil-Bazo, 'Refugee Status and Subsidiary Protection under EC Law: The Qualification Directive and the Right to Be Granted Asylum' in A Baldaccini, E Guild and H Toner, (n 228) 262. See also C Teitgen-Colly, (n 221) 1562 (arguing that '[m]oderate progress and some truly regressive steps, these are the two trends that predominate in the [Qualification Directive]'); J McAdam, 'The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime' [2005] Intl J Ref L 461, 516 (concluding that '[t]he Directive should not be viewed as an example of complementary protection for universal adoption. [. . .] its scope is far narrower than protection principles under international human rights law, humanitarian law and international criminal law provide').

[230] See M Costello (n 228) (184–188) (who argues that general principles 'provide a legal tool to read exceptions in the Procedures and Qualification Directives narrowly'. For example, she draws on the general principle of effective judicial protection—Case 222/84 *Johnston* [1986] ECR 165—to argue that the qualification of a third country or of a country of origin as 'safe' must be open to judicial scrutiny in individual cases).

[231] See art 19 of the Charter. See also M Gil-Bazo (n 229) 245–252 (opining that, although art 21 of the Qualification Directive may be consistent with art 33 (2) of the 1951 Geneva Convention as regards the security derogations to *non-refoulement*, this provision may raise tensions with 'broader international law obligations of the Member States', in particular the case-law of the ECtHR on art 3 ECHR. See *Chahal v United Kingdom* judgment of 15 November 1996, Reports of Judgments and Decisions 1996-V. Recently confirmed by *Saadi v Italy*, judgement of 28 February 2008, Application No 37201/06).

[232] For a discussion on the application of general principles to minimum harmonization, see F de Cecco, 'Room To Move? Minimum Harmonization and Fundamental Rights' (2006) CMLRev 9 (The author reckons that there are three different scenarios where general principles may apply to the upwardly-flexible area, namely: (1) where it is impossible to separate the stricter national measure from the minimum EU standard ('non-severability of national measures'); (2) where national legislation refers back to concepts defined in EU secondary legislation ('EU law concepts'); and (3) where 'sufficient connections exist between the [EU] regulatory framework and national legislation to justify the latter being subjected to judicial review as a matter of [EU] law').

its jurisdiction to issue preliminary rulings, the capacity of the ECJ to guide national courts in interpreting general principles was seriously undermined. Currently, these two objections no longer apply. As opposed to setting only minimum standards, new EU measures adopted in the field of asylum will aim to establish a 'uniform status' for refugees as well as for persons benefiting from subsidiary protection.[233] As mentioned above, the ECJ now enjoys jurisdiction to answer questions referred by inferior courts, which will certainly contribute to improving the dialogue between the judiciary at national and EU level.

The jurisdictional limitations imposed on the preliminary reference procedure may explain why the case-law of the ECJ in the field of asylum is scarce. Most of litigation has focused on infringement actions brought by the Commission against Member States failing to implement asylum Directives on time.[234] As of April 2010, only three cases dealing directly with the interpretation of EU legislation in the field of asylum have been decided under the preliminary reference procedure,[235] namely *Petrosian*,[236] *Elgafaji*[237] and *Salahadin Abdulla and Others*.[238]

In *Petrosian*, the ECJ was asked to clarify the meaning of article 20(1)(d) of the Dublin II Regulation. One should recall that, in accordance with article 16 of the Dublin II Regulation, the Member State that has rejected the asylum application of a person who is in the territory of another Member State without permission is obliged to take that person back. Article 20 provides that the transfer must be carried out 'at the latest within six months of acceptance of the request that charge be taken by another Member State or of the decision on an appeal or review where there is a suspensive effect'. In essence, the referring court asked whether the period of six months for implementation of the transfer begins to run as from the time of the provisional judicial decision suspending the implementation of the transfer procedure or only as from the time of the judicial decision ruling on the merits of that procedure. In the light

[233] S Peers, 'Legislative Update: EU Immigration and Asylum Competence and Decision-Making in the Treaty of Lisbon', [2008] EJML 219, 233.

[234] See, for example, for the Temporary Protection Directive: C-455/04 *Commission v United Kingdom* [2006] ECR I-32; for the Reception Directive: C-102/06 *Commission v Austria* [2006] ECR I-111; Case C-72/06 *Commission v Greece* (n 44); for the Qualification Directive: C-356/08 *Commission v United Kingdom*, judgment of 30 April 2009, not yet reported. For a case involving an inter-institutional conflict between the European Parliament and the Council, see Case C-133/06 *Parliament v Council* [2008] ECR I-3189.

[235] In Case C-357/09 PPU *Kadzoev* (n 145) para 45, the ECJ also interpreted art 18 of the Procedures Directive and art 21 of the Reception Directive, although these two articles were not the main focus of the case. The ECJ pointed out that detention for the purpose of removal under these two Directives and detention for the purpose of removal under Directive 2008/115, (n. 146), 'fall under different legal rules'.

[236] Case C-19/08 *Petrosian*, judgment of 29 January 2009, not yet reported.

[237] Case C-465/07 *Elgafaji*, judgment of 17 February 2009, not yet reported.

[238] Joined Cases C-175, 176, 178 and 179/08 *Salahadin Abdulla and Others*, judgment of 2 March 2010, not yet reported.

of the wording of article 20(1)(d) of the Dublin II Regulation, the ECJ drew a distinction between two situations. Where national rules of procedure do not provide for an appeal to have suspensive effect, 'the period for implementation of the transfer starts to run as from the time of the decision, explicit or presumed, by which the requested Member State agrees to take back the person concerned'. This is so regardless of 'the uncertainties surrounding the appeal against the decision ordering the transfer'.[239] Conversely, where an appeal produces suspensive effects, the period for the implementation of the transfer begins to run 'only as from the time of the judicial decision which rules on the merits of the procedure and which is no longer such as to prevent its implementation'.[240] The ECJ held that this finding was supported by two sets of considerations. First, a Member State which had opted for a high level of judicial protection in the context of implementing a transfer by setting out appeal remedies with suspensive effect could not be placed in a less favourable position than those Member States which did not provide such remedies.[241] Second, the principle of procedural autonomy opposes an interpretation of article 20 (1) (d) whereby the period for the implementation of the transfer would always begin to run as from the time of the provisional judicial decision having suspensive effects. Indeed, the ECJ acknowledged that such an interpretation would place enormous time pressure on national courts wishing to honour both the suspensive effects of the provisional judicial decision and the time limit of six months. Owing to the complexity of the proceedings, this would have been a very difficult, if not impossible, task.[242]

While *Petrosian* was confined to questions of statutory interpretation,[243] albeit important ones, *Elgafaji* may be regarded as the first important contribution of the ECJ to building-up the EU *acquis* in the field of asylum. In *Elgafaji*, the ECJ was asked by the Dutch Raad van State to provide some guidance on the definition of 'subsidiary protection'. Before examining this case, it is worth providing a brief description of the two alternative types of international protection offered by the EU under the Qualification Directive, namely 'conventional protection' and 'subsidiary protection'.

As its name clearly indicates, conventional protection under the Qualification Directive is largely based on the 1951 Geneva Convention. In accordance with article 2(c) of the Qualification Directive, this type of protection applies to 'a third country national who, owing to a well-founded fear of being persecuted [for the reasons listed in article 1A(2) of the 1951 Geneva Convention],[244] is outside the country of nationality and is unable or, owing to

[239] Case C-19/08 *Petrosian* (n 236) para 38.
[240] ibid para 46.
[241] ibid para 49.
[242] ibid para 52.
[243] Note that in *Petrosian* the ECJ decided that no Advocate General's Opinion was required and that the case should be allocated to a Chamber of 5 judges for deliberation.
[244] These reasons are: race, religion, nationality, political opinion or membership of a particular social group.

such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom [the exclusion grounds laid down in] article 12 [do] not apply'.[245] Persons falling within the scope of conventional protection acquire refugee status.

Taking the view that the 1951 Geneva Convention did not address other categories of persons in need of international protection, the European Council decided, at its special meeting in Tampere, that the EU should adopt a complementary regime. In relation to the definition of subsidiary protection,[246] one must first observe that this protection only applies where the person concerned does not qualify as a refugee.[247] Granting subsidiary protection to an applicant who was actually entitled to refugee status is by no means a trivial mistake. Given that persons enjoying refugee status are placed in a more favourable legal position than those awarded subsidiary protection,[248] national authorities are indeed obliged to confer refugee status whenever the conditions laid down in the Directive are met by the applicant. This difference in treatment has been criticised by some scholars[249] and the UNHCR,[250] urging the EU to put an end to it. Second, just as it happens with conventional protection, subsidiary protection is limited to third country nationals and stateless persons. Hence, EU citizens are excluded from the

[245] It is worth noting that in pending Case C-31/09 *Bolbol* the ECJ has been asked to interpret art 12 (1) (a) of the Qualification Directive. According to this provision, a person receiving the protection or assistance of a UN organ or agency (other than the UNHCR) cannot have refugee status. Art 12 (1) (a) adds that '[w]hen such protection or assistance has ceased for any reason, without the position of such persons being definitely settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Directive'. In essence, the referring court asked three questions. First, is refugee status excluded where the person concerned is entitled to protection or assistance of the UN agency or is it also necessary for him actually to avail himself of that protection or assistance? Second, when does the cessation of the agency's protection or assistance take place? Finally, if the agency's protection has ceased as regards the person concerned, is he recognised as a refugee (or, alternatively, awarded subsidiary protection) automatically or does he simply fall within the scope *ratio personae* of the Directive?

[246] See J McAdam (n 229) 469–487.

[247] Art 2(e) of the Qualification Directive defines 'person eligible for subsidiary protection' as 'a third country national or a stateless person who does not qualify as a refugee'.

[248] The Qualification Directive provides exclusion clauses applicable to subsidiary protection with a far wider reach than those for refugees (compare art 12 (refugees) with art 17 (subsidiary protection) of the Qualification Directive). Beneficiaries of subsidiary protection do not enjoy similar working conditions, social welfare entitlements, and access to health care as refugees do. See J McAdam (n 229) 498–514.

[249] See J McAdam (n 229) 499–500.

[250] UN High Commissioner for Refugees, *UNHCR's Observations on the European Commission's Proposal for a Council Directive 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 (Brussels, 12 September 2001, COM(2001) 510 final, 2001/0207 (CNS))*, 1 November 2001, available at: <http://www.unhcr.org/refworld/docid/3c6a69254.html>.

scope *ratio personae* of the Qualification Directive.[251] Last but not least, in order to be granted subsidiary protection, the person concerned must demonstrate that there are 'substantial grounds for believing'[252] that if the person concerned is returned, he 'would face a real risk of suffering serious harm'. Article 15 of the Qualification Directive states that 'serious harm may consist of (a) death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict'.

The legal basis of articles 15(a) and 15(b) of the Qualification Directive stems from the ECHR.[253] Article 15(a) implements the prohibition laid down in Protocol 6 to the ECHR, whereby the death penalty is prohibited in peace time. Article 15(b) aims to guarantee a legal status to persons classified as non-removable, that is, to persons covered by article 3 ECHR as interpreted by the ECtHR.[254]

In contrast to articles 15(a) and 15(b), it appears that the situation described in article 15(c) of the Qualification Directive is more difficult to apprehend. Perhaps, this is due to the prima facie semantic tension between, on the one hand, the terms 'serious and individual threat' and, on the other hand, the terms 'indiscriminate violence'.[255] The questions referred in *Elgafaji* were specifically directed to resolving the apparent contradiction in terms contained in article 15(c). The facts of the case may be summarised as follows. In 2006, Mr and Mrs Elgafaji, two Iraqi nationals, applied for temporary residence permits in the Netherlands. They argued that there would be a risk of serious harm, if they were sent back to Iraq. Before moving to Europe, Mr Elgafaji had worked for a British company providing security clearance between the Baghdad airport and the 'green zone'. His uncle had been killed by a terrorist attack and a threatening letter stating 'death to collaborators' had been fixed on his door. However, the Dutch Minister for Immigration considered that Mr and Mrs Elgafaji had failed to demonstrate 'a serious and individual threat to their lives'. The Dutch Minister for Immigration reckoned that the degree of individualization of the threat required by article 15(c) was identical to that required by article 15(b). Stated differently, the armed conflict in Iraq that prompted indiscriminate violence was not sufficient to award subsidiary

[251] Note that, in contrast to the 1951 Geneva Convention which applies to 'any person', the Qualification Directive excludes EU citizens. This is due to the Protocol (No 24) on asylum for nationals of Member States of the European Union.

[252] J McAdam (n 229) 471 (observing that 'the substantial grounds test requires an analysis of the country conditions and human rights standards as a prerequisite for determining whether persecution or serious harm may exist in a given situation').

[253] See J McAdam (n 229) 476–479.

[254] See *Salah Sheekh v the Netherlands*, judgment of 11 January 2007, Application no 1948/04 (where the ECtHR appears to give a broader content and scope to art 3 ECHR).

[255] Opinion of AG Poiares Maduro in *Elgafaji* (n 237) of 9 September 2008, not yet reported, para 31.

protection. The applicants also had to demonstrate that they were individually targeted by reasons of factors particular to them. It is worth observing that the Dutch Minister for Immigration was not alone in defending his interpretation as other Member States had endorsed the same approach.[256] Additionally, he relied on Recital 26 of the Qualification Directive, which reads '[r]isks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm'. However, Mr and Mrs Elgafaji challenged those assertions. In light of Recital 25 of the Qualification Directive, they posited that a high degree of individualization of the threat would fall foul of international refugee and human rights law which provide the basis on which the elegibility criteria for awarding subsidiary protection are drawn.[257] Their approach echoes that of the UNHCR, which recommended the EU legislator to amend article 15(c) of the Qualification Directive so as to delete the term 'individual' from its wording as well as from Recital 26.[258] Hence, when interpreting article 15(c) of the Qualification Directive, the ECJ was confronted with two conflicting views. The one supported by the Dutch Ministry reflected national fears of excessively broadening the scope of article 15(c) so that Member States would be unable to control the flow of persons coming from countries embroiled in armed conflict. The other view, supported by the applicant and the UNHCR, emphasized that EU subsidiary protection must not become an 'empty promise', merely codifying at EU level the rights already guaranteed by virtue of the ECHR.

The ECJ began by shedding some light on the relationship between article 15 of the Qualification Directive and article 3 ECHR, a provision which forms part of the EU legal order as general principle, observance of which the EU judiciary ensures. The ECJ noted that 'it is [. . .] Article 15(b) which corresponds, in essence, to article 3 of the ECHR'.[259] By contrast, article 15(c) is an autonomous concept whose interpretation must be carried out independently but without prejudice to fundamental rights as guaranteed by the ECHR.

Next, the ECJ embarked on a systematic interpretation of article 15 of the Qualification Directive, comparing the three types of 'serious harm' defined therein. It pointed out that articles 15(a) and 15(b) of the Qualification Directive both require the applicant to be 'specifically exposed to the risk of a particular type of harm'. Conversely, article 15(c) covers 'more general risks of harm'.[260] Indeed, the degree of individualization applicable to articles 15(a)

[256] See Opinion of AG Poiares Maduro in *Elgafaji* (n 255) para 16. See also UN High Commissioner for Refugees, *Asylum in the European Union. A Study of the Implementation of the Qualification Directive*, November 2007, available at: <http://www.unhcr.org/refworld/docid/473050632.html>, 71–73.

[257] UN High Commissioner for Refugees, *Asylum in the European Union. A Study of the Implementation of the Qualification Directive* (n 256) 74.

[258] ibid 15.

[259] Case C-465/07 *Elgafaji* (n 237) para 28.

[260] ibid paras 32–34.

and 15(b) cannot be transposed to situations covered by article 15 (c). Otherwise, this latter provision would become redundant. Besides, the terms 'armed conflict' and 'indiscriminate violence' imply general situations where many people are at risk.

The ECJ then proceeded to link the terms 'individual threat' to the concept of 'indiscriminate violence'. It held that 'indiscriminate violence' puts at risk all persons located in the geographical zone of the armed conflict. Hence, it would be logically impossible to interpret the terms 'individual threat' as requiring a link between the threat and factors particular to the applicant. Instead, the ECJ reasoned that article 15(c) covers situations where the level of indiscriminate violence resulting from an armed conflict is so high that the mere presence of the person concerned in the relevant country or region puts him at real risk of being subject to the serious threat referred to in article 15(c) of the Directive.[261] The ECJ added that this definition of 'individual threat' does not run counter to Recital 26. While the latter covers risks to which the population generally is exposed, article 15(c) is limited to 'exceptional situations'.[262] The ECJ observed that the level of indiscriminate violence and the level of individualization are not unrelated concepts. On the contrary, as regards the standard of proof they are inversely proportional: 'the more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection'.[263]

This case demonstrates that the ECJ is fully aware of the conflicting dimensions governing EU policy on asylum. It did its best to strike the right balance between an excessive broadening of article 15(c) and the effectiveness of subsidiary protection. From the standpoint of human rights protection, the solution followed by the ECJ in *Elgafaji* seems correct. First, it renders subsidiary protection effective by interpreting article 15(c) as offering supplementary protection to that guaranteed by article 3 ECHR. Second, as noted by AG Poiares Maduro, the interpretation followed in *Elgafaji* was 'the only one that made it possible to fulfil the priority objective of the Directive',[264] namely to grant international protection where a risk of harm to human rights is likely to arise. Indeed, a reading of article 15(c) requiring applicants to prove factors particular to their personal circumstances would lead to the absurd result that the higher the level of indiscriminate violence was, the greater the numbers of persons adversely affected would be, and the harder it would therefore be for individual applicants to rely on the protection of article 15(c). Third, in light of *Elgafaji*, the Qualification Directive offers individual protection to victims of serious violations of human rights, regardless of whether the applicant has been a victim of discrimination. This narrows down the differences between conventional and subsidiary protection as regards the

[261] ibid para 35. [262] ibid para 36. [263] ibid para 39.
[264] Opinion of AG Poiares Maduro in *Elgafaji* (n 255) para 38.

degree of individual risk to an individual's human rights which is required. Finally, in deferring the assessment of the level of indiscriminate violence to the competent national authorities,[265] the ECJ entrusted the latter with a key aspect of article 15(c), namely the turning point at which indiscriminate violence becomes an exceptional situation.

Moreover, how must article 11(1)(e) of the Qualification Directive concerning the cessation of refugee status be interpreted? What would happen if there were a change in the circumstances in connection with which a person was recognised as a refugee but she were still exposed to serious harm pursuant to article 15 of the Qualification Directive? Does she lose her refugee status or does she keep it? In *Salahadin Abdulla and Others*, the ECJ was asked to answer these questions by clarifying the concept of 'cessation of refugee status' as well as its legal implications.[266] In this respect, the ECJ held that 'refugee status ceases to exist where the national concerned no longer appears to be exposed, in his country of origin, to circumstances which demonstrate that that country is unable to guarantee him protection against acts of persecution against his person for one of the five reasons listed in article 2(c) of the [Qualification] Directive'.[267] Put simply, article 11(1)(e) only applies where the refugee's country of nationality offers protection from persecution. Such protection only exists if it can be shown that this country has 'an effective legal system for the detection, prosecution and punishment of acts constituting persecution and that the national concerned will have access to such protection if he ceases to have refugee status'.[268] The ECJ added that the cessation of refugee status only occurs in the event of a 'significant and non-temporary' change in the circumstances in connection with which a person was recognised as a refugee.[269] It also noted that multinational troops operating under the mandate of the international community may offer protection from persecution, provided that they comply with the standards set out in article 7 of the Qualification Directive.[270] The ECJ also considered that 'the cessation of refugee status cannot be made conditional on a finding that a person does not qualify for subsidiary protection status'.[271] Otherwise, there would be a serious distortion of the respective domains of the two types of international protection laid down in the Qualification Directive. In the same way, the possible cessation of refugee status does not adversely affect the right of the person concerned to request the granting of subsidiary protection status as provided for by article 15 of the Qualification Directive.[272] Most importantly, the ECJ stressed that, in assessing the extent of the risk of suffering from acts of persecution, the competent authorities 'must, in all cases, [operate]

[265] Case C-465/07 *Elgafaji* (n 255) 35.
[266] Joined Cases C-175, 176, 178 and 179/08 *Salahadin Abdulla and Others* (n 238).
[267] ibid para 69.
[268] ibid para 70. See also the Opinion of AG Mázak in the same Case, of 15 September 2009, not yet reported, para 54.
[269] ibid para 72.
[270] ibid para 75.
[271] ibid para 79.
[272] ibid para 80.

with vigilance and care, since what are at issue are issues relating to the integrity of the person and to individual liberties, issues which relate to the fundamental values of the Union'.[273] Therefore, just as in *Elgafaji*, *Salahadin Abdulla and Others* confirms that the ECJ is seriously committed to respecting the 'fundamental rights dimension' of EU asylum policy.

C. Police and Judicial Cooperation in Criminal Matters

The ECJ is driven by the same concern to uphold the protection of fundamental rights in the context of the Area of Freedom, Security and Justice as far as police and judicial cooperation in criminal matters is concerned. In this context, mention must be made of the ECJ's seminal judgment in *Advocaten voor de Wereld.*[274] That case concerned a reference for a preliminary ruling made by the Belgian Constitutional Court in the context of an action seeking to annul the Belgian law transposing the Framework Decision on the European arrest warrant.[275] The applicants in the national proceedings contested the legal basis of the Framework Decision and argued that it violated the principles of legality in criminal matters and of equality and non-discrimination.[276]

After dismissing the first argument, namely that it followed from ex article 34(2)(b) EU that the subject-matter of the European arrest warrant ought to have been implemented by way of a convention,[277] the ECJ rejected the applicants' second argument based on the protection of fundamental rights. Recalling its judgments in *Gestoras Pro Amnistía*[278] and *Segi*,[279] the ECJ observed that 'by virtue of [ex] article 6 EU, the Union is founded on the principle of the rule of law and it respects fundamental rights, as guaranteed by the ECHR, and as they result from the constitutional provisions common to the Member States, as general principles of Community law' and 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'.[280]

In particular, the applicants submitted that under article 2(2) of the Framework Decision the list of more than thirty offences in respect of which the traditional condition of double criminality would be abandoned if those offences were punishable in the issuing Member State by a custodial sentence

[273] ibid para 90.
[274] Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633.
[275] Framework Decision 2002/584/JHA, (n 27).
[276] Case C-303/05 *Advocaten voor de Wereld* (n 274) paras 11–13.
[277] ibid paras 27–43.
[278] Case C-354/04 *Gestoras Pro Amnistía* (n 73).
[279] Case C-355/04 P *Segi* (n 73).
[280] Case C-303/05 *Advocaten voor de Wereld* (n 274) para 45. The ECJ further specified that those principles include the principle of the legality of criminal offences and penalties and the principle of equality and non-discrimination, which are also reaffirmed in arts 49, 20 and 21, respectively, of the Charter, (n 69).

or detention order for a maximum period of at least three years was so vague and imprecise that it breached the principle of legality in criminal matters, given that the offences set out in that list were not accompanied by their legal definition.[281] In response, the ECJ, referring to its case law in the field of competition, recalled that the principle of the legality of criminal offences and penalties (*nullum crimen, nulla poena sine lege*) was one of the general legal principles underlying the constitutional traditions common to the Member States and that it was also enshrined in various international treaties, including article 7(1) of the ECHR.[282]

On that basis, the ECJ ruled that even if the Member States reproduce word-for-word the list of the categories of offences set out in article 2(2) of the Framework Decision for the purposes of its implementation, the actual definition of those offences and the penalties applicable are those which are provided for by the law of the issuing Member State.[283] It followed that the Framework Decision did not seek to harmonize the criminal offences in question in respect of their constituent elements or of the penalties which they attract.[284] Likewise, the ECJ found that, in defining the offences and the penalties applicable, the issuing Member State must respect fundamental rights as set out in ex article 6 EU and hence the principle of the legality of criminal offences and penalties.[285] This in fact obliges the Member States to recognize their respective definitions of criminal offences and applicable penalties and therefore strengthens the principle of mutual recognition based on the confidence that each Member State will, when defining these offences and penalties, respect the same fundamental rights as a central component of the Area of Freedom, Security and Justice. Applying a similar rationale, the ECJ also rejected the applicants' argument in so far as it was based on the infringement of the principle of equality and non-discrimination[286] by

[281] Case C-303/05 *Advocaten voor de Wereld* (n 274) para 48.

[282] ibid para 49, where the ECJ referred to Cases C-189/02 P, C-202/02 P, C-205/02 P – C-208/02 P and C-213/02 P *Dansk Rørindustri and Others v Commission* [2005] I-5425, paras 215–219.

[283] Case C-303/05 *Advocaten voor de Wereld*, (n 274) para 52.

[284] ibid.

[285] ibid para 53.

[286] With regard, first, to the choice of the thirty-two categories of offences listed in art 2(2) of the Framework Decision, the ECJ held that the Council was able to form the view, on the basis of the principle of mutual recognition and in the light of the high degree of trust and solidarity between the Member States, that, whether by reason of their inherent nature or by reason of the punishment incurred of a maximum of at least three years, the categories of offences in question feature among those the seriousness of which in terms of adversely affecting public order and public safety justifies dispensing with the verification of double criminality. With regard, second, to the fact that the lack of precision in the definition of the categories of offences in question risks giving rise to disparate implementation of the Framework Decision within the various national legal orders, the ECJ pointed out that it is not the objective of the Framework Decision to harmonise the substantive criminal law of the Member States and that nothing in ex Title VI of the old EU Treaty, ex arts 34 and 31 of which were indicated as forming the legal basis of the Framework Decision, makes the application of the European arrest warrant conditional on harmonization of the criminal laws of the Member States within the area of the offences in question. ibid paras 56–60.

pointing to the case law concerning the Convention implementing the Schengen Agreement (the 'CISA').[287]

The CISA case law represents a significant contribution of the ECJ to the Area of Freedom, Security and Justice, especially as far as the principle of *non bis in idem* embodied in article 54 of the CISA is concerned.[288] This provision, the objective of which is to ensure that no one is prosecuted on the basis of the same facts in several Member States on account of his having exercised his right to freedom of movement[289] has been the object of abundant case law. For the purposes of this discussion, suffice it to say that the ECJ has made clear that the only relevant criterion for the purposes of the application of article 54 of the CISA is the identity of the material acts, understood as the existence of a set of facts which are inextricably linked together and that this criterion applies irrespective of the legal classification given to those acts or the legal interest protected.[290] In any event, it is important to point out that the principle of *non bis in idem* is applicable beyond the fields falling within the Area of Freedom, Security and Justice. In the field of EU competition law, it has been confirmed as a fundamental principle of EU law.[291] In competition matters, this principle precludes an undertaking from being found guilty or

[287] Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders, signed at Schengen (Luxembourg) on 19 June 1990 [2000] OJ L239/19 (hereinafter 'CISA').

[288] Art 54 of the CISA provides: 'A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.'

[289] See Joined Cases C-187/01 and C-385/01 *Gözütok and Brügge* [2003] ECR I-1345, para 38; Case C-469/03 *Miraglia* [2005] ECR I-2009, para 32; Case C-297/07 *Bourquain*, judgment of 11 December 2008, not yet reported, para 41; Case C-491/07 *Turanský*, judgment of 22 December 2008, not yet reported, para 41.

[290] See Case C-436/04 *Van Esbroeck* [2006] ECR I-2333, paras 36, 42; Case C-150/05 *Van Straaten* [2006] ECR I-9327, paras 48, 53; Case C-467/04 *Gasparini and Others* [2006] ECR I-9199, para 54; Case C-288/05 *Kretzinger* [2007] ECR I-6441, para 29. The latter case, *Kretzinger*, concerned the transport by lorry through Italy and Germany, and bound for the United Kingdom of cigarettes from countries that were not members of the European Union, which had previously been illegally smuggled into Greece by third parties. The question referred to the ECJ was whether it is a criminal prosecution of 'the same acts' within the meaning of art 54 of the CISA if a defendant has been convicted by an Italian court of importing contraband foreign tobacco into Italy and of being in possession of it there, as well as of failing to pay duty at the border on importing the tobacco, and is subsequently convicted by a German court—in connection with his earlier receipt of the same goods in Greece—of being party to evasion in relation to the (technically) Greek import duty that arose when the goods were previously imported by third parties, in so far as the defendant had intended from the outset to transport the goods to the United Kingdom via Italy, after taking delivery of them in Greece. The ECJ considered that the conduct described constituted conduct which may be covered by the notion of 'same acts' within the meaning of art 54, but added that it was for the competent national courts to make the final assessment in that respect. ibid para 36.

[291] See Case 7/72 *Boehringer Mannheim v Commission* [1972] ECR 1281, para 3; Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P -C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others v Commission* [2002] ECR I-8375, para 59; Case C-308/04 P *SGL Carbon v Commission* [2006] ECR I-5977, para 26.

proceedings from being brought against it a second time on the grounds of anti-competitive conduct in respect of which it has been penalised or declared not liable by a previous decision against which no further appeal is possible, which is reminiscent of the ECJ's case law on article 54 of the CISA.[292]

IV. CONCLUSION

In view of the foregoing, it is clear that the Area of Freedom, Security and Justice is greatly influenced by guiding principles developed by the ECJ in other areas of Union law. In fact, the case law in those areas can also be 'irrigated' by solutions adopted in the framework of the Area of Freedom, Security and Justice. This should have positive consequences with regard to the uniformity of EU law and its underlying concepts. As the ECJ's contribution to the Area of Freedom, Security and Justice develops in the years to come, with the Treaty of Lisbon entered into force, an unprecedented level of coordination between quite different areas of EU law on both the procedural and substantive levels is to take place. Respect for fundamental rights will definitely be a unifying factor binding them all together.

[292] See Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P-C-252/99 P and C-254/99 *Limburgse Vinyl Maatschappij* (n 291) para 59. Admittedly, in competition law, the application of this condition is subject to three conditions: identity of the facts, unity of offender and unity of the legal interest protected. See further K Lenaerts, 'Some thoughts on evidence and procedure in European Community competition law' [2007] Fordham Int LJ 1463, 1491–1494. The application of the principle in the context of art 54 of the CISA will be slightly different. This is because it serves different objectives in these respective fields. In competition matters, the principle is invoked in relations with third countries, whereas in the context of art 54 of the CISA, it invariably relates to interactions between Member States. Furthermore, between Member States, it is presumed that the legal interest to be protected is a common one. In competition matters, by contrast, no such presumption exists regarding the legal interest protected by the Union, on the one hand, and by a third country, on the other.