



---

## THE JEAN MONNET PROGRAM

*Professor J.H.H. Weiler*  
*European Union Jean Monnet Chair*

in cooperation with the



UNIVERSITÀ DEGLI STUDI DI TRENTO

Dipartimento di Scienze Giuridiche  
Facoltà di Giurisprudenza

*Professor Roberto Toniatti*  
*Dipartimento di Scienze Giuridiche*

EUROPEAN LEGAL INTEGRATION: THE NEW ITALIAN SCHOLARSHIP

Jean Monnet Working Paper 10/07

Tommaso Rafaraci and Rosanna Belfiore

**Judicial Protection of Individuals under the Third Pillar of the European Union**

NYU School of Law • New York, NY 10012  
The Jean Monnet Working Paper Series can be found at:  
**[www.JeanMonnetProgram.org](http://www.JeanMonnetProgram.org)**

All rights reserved.  
No part of this paper may be reproduced in any form  
without permission of the author.

ISSN 1087-2221  
© Tommaso Rafaraci and Rosanna Belfiore 2007  
New York University School of Law  
New York, NY 10012  
USA

<p>Publications in the Series should be cited as: AUTHOR, TITLE, JEAN MONNET WORKING PAPER NO./YEAR [URL]</p>
---

## **European Legal Integration: The New Italian Scholarship (ELINIS)**

This Working Paper is part of the ELINIS project: *European Legal Integration: The New Italian Scholarship*. Even the most cursory examination of the major scientific literature in the field of European Integration, whether in English, French, German and even Spanish points to a dearth of references to Italian scholarship. In part the barrier is linguistic. If Italian scholars do not publish in English or French or German, they simply will not be read. In part, it is because of a certain image of Italian scholarship which ascribes to it a rigidity in the articulation of research questions, methodology employed and the presentation of research, a perception of rigidity which acts as an additional barrier even to those for whom Italian as such is not an obstacle. The ELINIS project, like its predecessor – the New German Scholarship (JMWP 3/2003) – is not simply about recent Italian research, though it is that too. It is also new in the substantive sense and helps explode some of the old stereotypes and demonstrates the freshness, creativity and indispensability of Italian legal scholarship in the field of European integration, an indispensability already familiar to those working in, say, Public International law.

The ELINIS project challenged some of the traditional conventions of academic organization. There was a “Call for Papers” and a selection committee which put together the program based on the intrinsic interest of each proposed paper as well as the desire to achieve intellectual synergies across papers and a rich diversity of the overall set of contributions. Likewise, formal hierarchies were overlooked: You will find papers from scholars at very different stages of their academic career. Likewise, the contributions to ELINIS were not limited to scholars in the field of “European Law.” Such a restriction would impose a debilitating limitation. In Italy as elsewhere, the expanding reach of European legal integration has forced scholars from other legal disciplines such as labor law, or administrative law etc. to meet the normative challenge and “reprocess” both precepts of their discipline as well as European law itself. Put differently, the field of “European Law” can no longer be limited to scholars whose primary interest is in the Institutions and legal order of the European Union.

ELINIS was the result of a particularly felicitous cooperation between the Faculty of Law at the University of Trento – already distinguished for its non-parochial approach to legal scholarship and education and the Jean Monnet Center at NYU. Many contributed to the successful completion of ELINIS. The geniality and patience of Professor Roberto Toniatti and Dr Marco Dani were, however, the leaven which made this intellectual dough rise.

The Jean Monnet Center at NYU is hoping to co-sponsor similar Symposia and would welcome suggestions from institutions or centers in other Member States.

*--J. H.H. Weiler*

*Director, Jean Monnet Center for International and Regional Economic Law & Justice*

# Judicial Protection of Individuals under the Third Pillar of the European Union \*

Tommaso Rafaraci \*\* and Rosanna Belfiore \*\*\*

## Abstract

This paper deals with the issue of judicial protection of individuals as provided under Title VI of the European Union Treaty on judicial cooperation in criminal matters (the so-called “third pillar”). Actions and remedies provided in relation to third pillar measures are examined and compared with actions and remedies provided in relation to Community measures (referable to the so-called “first pillar”).

On account of the difference between the two pillars, this study questions whether some developments in judicial protection attained at jurisprudential level by the European Court of Justice in the context of the Community legal order can be equally applied to the context of judicial cooperation in criminal matters. Furthermore, this study aims at assessing if the difference in the system of judicial protection is justifiable and adequate in the light of “*the Union’s objective... to provide citizens with a high level of safety, within an area of freedom, security and justice*”. It is maintained that such difference has become untenable as it denies individuals both access to justice and effective judicial protection.

---

\* This is a revised version of a paper first presented at the conference “*European Legal Integration - The New Italian Legal Scholarship*”, held by the University of Trento, Trento, 10-12 December 2006. The authors are grateful to Professor Joseph H.H. Weiler for his valuable remarks and suggestions, and to the other conference participants for their helpful comments.

\*\* Professor of Criminal Procedure, Faculty of Law, University of Catania, Italy. E-mail: trafaraci@lex.unict.it.

\*\*\* PhD candidate in Criminal Procedure, Faculty of Law, University of Catania, Italy, LL.M., Durham University, UK. E-mail: rbelfiore@lex.unict.it.

## Contents

1. Introduction.....	p. 3
2. Preliminary ruling procedure .....	p. 4
2.1. The significance of preliminary rulings under the third pillar .....	p. 6
3. Infringement proceedings .....	p. 8
4. State liability .....	p. 11
4.1. The national remedial framework and the efficacy of the principle of State liability .....	p. 14
5. Action for damages .....	p. 16
6. Review of legality .....	p. 19
7. Judicial protection of human rights .....	p. 23
7.1. Human rights and national courts .....	p. 26
8. The Constitutional Treaty .....	p. 28

## 1. Introduction

The intent of this paper is to analyse, on a comparative basis, the Community legal order and the system as envisaged under Title VI of the EU Treaty – on judicial cooperation in criminal matters – with regard to the issue of judicial protection. The purpose of this analysis is to find out whether the limited protection at disposal of individuals under the third pillar is somehow justifiable and sound in the light of “*the Union’s objective... to provide citizens with a high level of safety, within an area of freedom, security and justice*”.<sup>1</sup> This comparative analysis is particularly significant with respect to the Constitutional Treaty, which aligns the different mechanisms of judicial protection by abolishing the pillar structure, so reducing the Community and the Union into a single legal order. The premise of this comparative analysis is not the idea that the Community legal order represents the best possible supranational judicial system, but rather the idea that at present the Community legal order is the most evolved system at EU level to look at.

First of all, the paper will analyse the alleged limited efficacy of the preliminary ruling procedure as framed under Title VI, due to the restricted jurisdiction of the Court of Justice (hereafter ECJ) and the discretion of national courts when referring a case. Secondly, it will be examined the possible scenario should the principle of State liability be applied to Title VI on the grounds of both the exclusion of infringement proceedings from the area of judicial cooperation in criminal matters and the express lack of direct effect of third pillar measures. It will be assessed whether the application of this principle to the area of judicial cooperation would be feasible and empirically worthy. In this wake it will be considered whether it would be coherent to provide, also in the context of the third pillar, damages actions for non-contractual liability of the institutions, as already provided under Community law. Thirdly, judicial review via direct actions will be taken into consideration, stressing that private applicants are not granted standing in order to challenge third pillar measures. It will be examined whether the exclusion of judicial review in favour of individuals is legitimate notwithstanding its crucial function as a means of control over the legislative power, in accordance with the principle of “checks and balances”. Fourthly, the specific issue of human rights’ protection will be addressed, in the light of the difficulties that may arise with regard to the assumed shortages of protection’s mechanisms at Union level, on the one hand, and the possible overlapping of different jurisdictions with human

---

<sup>1</sup> Art. 29(1), EU Treaty.

rights' competences, on the other hand. Finally, it will be provided a brief overview of the Constitutional Treaty.<sup>2</sup> In this respect it will be maintained that such Treaty would certainly represent a step forward a more integrated Union, as it would contribute to fill some of the gaps of the system of judicial protection of individuals that, at present, seem to undermine the legitimacy of the Union itself.

## **2. Preliminary ruling procedure**

Under the Community pillar Article 234 confers on the ECJ the jurisdiction to give preliminary rulings on the interpretation of the Treaty, acts of the institutions and of the European Central Bank and statutes of bodies established by an act of the Council, when those statutes so provide. It is for national courts to refer a case to the ECJ when a decision at Community level is necessary in order to give judgment at domestic level. Where a question is raised in a case pending before a court or tribunal against whose decision there is no judicial remedy under national law, that court or tribunal shall bring the matter before the ECJ. The relationship between national courts and the ECJ is therefore reference-based: it does not constitute an appellate system.<sup>3</sup>

Under the third pillar the preliminary ruling procedure provided by Article 35(1) EU Treaty is very different from that provided under Community law. First of all, the jurisdiction of the ECJ is not compulsory as it is under the first pillar: the Member States have to make a declaration in order to accept such jurisdiction. Up till now thirteen Member States out of the current twenty-seven have not made any declaration: among the oldest ones Denmark, Ireland and the United Kingdom.<sup>4</sup> In this respect, some problems may arise as to the impact of the principle of precedent, as developed under Community law, on the area of judicial cooperation. According to this principle, when a question raised before a national court is materially identical with a question which has already been the subject of a preliminary ruling in a similar case, the authority of the interpretation already given by the ECJ may deprive the need of that national

---

<sup>2</sup> On the evolution of the third pillar institutional framework see P.J. Kuijper, *The Evolution of the Third Pillar from Maastricht to the European Constitution: Institutional Aspects*, (2004) 41 CMLRev., p. 609.

<sup>3</sup> P. Craig and G. De Búrca *EU Law. Text, Cases and Materials*, 3<sup>rd</sup> ed. (2003), OUP, Oxford, p. 432.

<sup>4</sup> J.A. Usher, *Direct and Individual Concern – An Effective Remedy or a Conventional Solution?*, (2003) 28 ELRev., p. 594.

court to refer.<sup>5</sup> The creation of precedent leads to an important modification in the relationship between national courts and the ECJ: there is a shift from a bilateral to a multilateral relationship,<sup>6</sup> for an earlier ruling can be relied on by any national court, not just by the court making the reference. With particular regard to the validity of Community legislation, the ECJ expressly held that its rulings have an *erga omnes* effect: a preliminary ruling declaring a Community act invalid cannot be reopened, so precluding any further references on the same point, being in itself sufficient authority for any court in the Community to hold that provision invalid.<sup>7</sup> Undoubtedly, the success of the system of preliminary rulings is mainly due to the fact that judgments given by the ECJ are binding on all Member States' judicial authorities.<sup>8</sup> Under Title VI this possible success is undermined to begin with. The doctrine of precedent is jeopardized by the discretion enjoyed by Member States' governments: the uniformity in the interpretation and application of EU law in the area of judicial cooperation in criminal matters cannot be guaranteed since a variable number of national courts are formally bound by the rulings of the ECJ. In those Member States that have not made any declaration, compliance with ECJ's rulings is left to the sole good will of national courts. The undermined *erga omnes* effect of preliminary rulings is also likely to directly affect individuals, as to the right of access to justice<sup>9</sup> and the equality principle: nationals of different Member States are not provided with the same actions at EU level. This state of affairs is particularly questionable in consideration of the fact that the action via the preliminary ruling procedure is the only action expressly granted to individuals under the third pillar.

Secondly, under Title VI the preliminary ruling procedure provides that it is for the Member States to specify whether any national court or only those of last resort may make a reference. On the one hand, Spain and Hungary have limited the power to make references to courts against whose decisions there is no judicial remedy under national law.<sup>10</sup> This choice is

---

<sup>5</sup> Cases 28-30/62 *Da Costa en Schaake NV, Jacob Meijer NV and Hoechst-Holland NV v. Nederlands Belastingadministratie* [1963] ECR 31, para. 1 of the summary, and Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health* [1982] ECR 3415, para. 13-14.

<sup>6</sup> P. Craig and G. De Búrca (2003), p. 444.

<sup>7</sup> Case 66/80 *International Chemical Corporation v. Amministrazione delle Finanze dello Stato* [1981] ECR 1191, para. 12-13.

<sup>8</sup> A. Albers-Llorens, *Changes in the Jurisdiction of the European Court of Justice under the Treaty of Amsterdam*, (1998) 35 CMLRev., p. 1281.

<sup>9</sup> P. Eeckhout, 'The European Court after Nice', in M. Andenas and J. Usher (eds.), *Legal Issues of the Nice Treaty*, (2003) Hart Publishing, p. 327.

<sup>10</sup> OJ L 327/19, 14.12.2005.

quite problematic in the light of the predominant trend across the EU: courts of last resorts are not very prone to refer questions to the ECJ; most of the national courts that do make references are always lower courts. Therefore, the narrow implementation of the provision on preliminary rulings as subscribed to by Spain and Hungary may deprive the system of its driving force. On the other hand, Belgium, the Czech Republic, Germany, Greece, France, Italy, Luxembourg, the Netherlands, Austria, Portugal, Finland and Sweden have declared that they accept the jurisdiction of the ECJ so as to allow any court or tribunal to request a preliminary ruling on a question raised in a case pending before it.<sup>11</sup> With regard to the duty to refer on courts of last resort, despite the absence of a provision on this matter under Title VI, Belgium, the Czech Republic, France, Italy, Germany, Spain, Luxembourg, the Netherlands and Austria<sup>12</sup> have reserved the right to make provisions in their national law to the effect that where a question is raised before a court against whose decisions there is no judicial remedy under national law, that court is obliged to bring the matter before the ECJ. Therefore, a significant number of Member States have shown the will to establish, by way of their discretionary choice, the obligation to refer upon courts of last resort.

Thirdly, according to some commentators, the ECJ does not seem to have express jurisdiction to interpret the Treaty provisions of Title VI, but only the secondary legislation enacted on the basis of those provisions.<sup>13</sup> However, others claim that, by virtue of Article 46(b) EU Treaty – which establishes that the powers of the ECJ shall apply to the provisions of Title VI under the conditions provided by Article 35 – the ECJ shall clearly have jurisdiction over Title VI itself and not only over measures adopted pursuant to it.<sup>14</sup> Not only is the second line of reasoning more persuasive, since it would be incomprehensible how the ECJ could ever examine the validity of measures adopted under Title VI without being able to interpret primary legislation first, but it has been subscribed to by Advocate General Ruiz-Jarabo Colomer in his recent opinion on the legitimacy of the framework decision on the European Arrest Warrant.<sup>15</sup>

---

<sup>11</sup> *Idem*.

<sup>12</sup> *Idem*.

<sup>13</sup> A. Albors-Llorens (1998), p. 1279.

<sup>14</sup> S. Peers, *EU Justice and Home Affairs Law*, (2000) Longman, Harlow, p. 48. See also: N. Fennelly, *Preserving the Legal Coherence within the New Treaty. The European Court of Justice after the Treaty of Amsterdam*, (1998) 5 MJ, p. 193.

<sup>15</sup> Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 12 September 2006 in the case C 303/05, *Advocaten voor de Wereld VZW v. Leden van de Ministerraad*. Ruiz-Jarabo Colomer precisely stated that: "... one of

## 2.1. The significance of preliminary rulings under the third pillar

For the purpose of the analysis carried out in this paper, it is necessary to address two main questions: why the European legislator felt this to be the best way to frame the preliminary ruling procedure in the area of judicial cooperation in criminal matters; and whether this legislative choice can be deemed satisfactory or a better solution is desirable *de iure condendo*.

As to the first question, the rationale behind Article 35 EU Treaty is certainly political: criminal matters constitute a sensitive area where national governments have always been very reluctant to give up their sovereignty (all in all, the third pillar deals with, *inter alia*, terrorism, drug trafficking, security issues). It must be borne in mind that cooperation between Member States in the context of Title VI is intergovernmental in nature: the legislator of third pillar measures is the Council, namely a gathering of Ministers representing and defending strenuously their national interests. It is, therefore, hardly surprising if this legislator has decided to severely limit the powers of the ECJ: granting the ECJ the jurisdiction to rule on the interpretation of EU law, so interfering on the interpretation and application of national law without any restraint, would have actually implied giving up sovereignty in an area that the Member States jealously keep hold of. This is even more so in consideration of the inclination of the ECJ to interpret provisions so as to enhance or encourage integration to the exclusion or diminishment of Member States' competences.<sup>16</sup>

As to the question whether this legislative choice can be deemed satisfactory, it must be first investigated the significance of the preliminary ruling procedure in the EU judicial system. Under the Community pillar Article 234 is defined as the “*jewel in the Crown*” of the jurisdiction of the ECJ.<sup>17</sup> Thanks to it the ECJ has managed to guarantee the uniform application of Community law throughout the Union and has developed fundamental concepts such as those of supremacy and direct effect, strengthening legislative integration. In addition, the preliminary ruling procedure is the key component of the Community's complete system of remedies: it represents the means for individuals to denounce that their Member States have not implemented or enforced Community law. Interestingly, the preliminary ruling procedure is deemed by national courts as constituting an integral part of the system of judicial protection provided under

---

the central responsibilities of this Institution [the Court of Justice] is to interpret the Treaties and to safeguard them vis-à-vis secondary law ...” (para. 33).

<sup>16</sup> G. Conway, *Judicial Interpretation and the Third Pillar. Ireland's Acceptance of the European Arrest Warrant and the Gözütok and Brügge Case*, (2005) 13 Eur.J.Crime Cr.L.Cr.J., p. 271.

<sup>17</sup> P. Craig and G. De Búrca (2003), p. 432.

domestic law. Indeed, national courts have felt the need to protect the specific interest of individuals to ask for a preliminary ruling. An example is provided by the Italian system, where, if a national court contravenes to the duty to refer a matter to the ECJ, such contravention entails a legitimate ground to appeal against the decision taken by that court.<sup>18</sup> A further example is provided by the German system, according to which, when a national court does not refer to Luxembourg a matter that should have been referred, the German Constitutional Court is empowered to annul the sentence of that national court on the grounds of the violation of the individual right to rely on a preliminary ruling by the ECJ.<sup>19</sup>

Under the third pillar too the preliminary ruling procedure is of vital importance; this clearly emerges from a recent judgment. In the *Pupino* ruling the ECJ held that national courts have an obligation to interpret national law in conformity with Union law even when the latter has not been implemented at domestic level.<sup>20</sup> The fact that, by virtue of Article 35 EU Treaty, the jurisdiction of the ECJ is less extensive under Title VI EU Treaty than it is under the EC Treaty, and the fact that there is no complete system of actions and procedures designed to ensure the legality of the acts of the institutions in the context of Title VI, does nothing to invalidate that conclusion.<sup>21</sup> The ECJ significantly concluded that its jurisdiction would be deprived of most of its useful effect if individuals were not entitled to invoke framework decisions – which, according to Article 34(2)b EU Treaty, shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods; they shall not entail direct effect – in order to obtain a conforming interpretation of national law before the courts of the Member States.<sup>22</sup> In other words, the ECJ has paved the way for the application of the well-known principle of indirect effect (or harmonious interpretation), established since the *Von Colson* ruling<sup>23</sup> under Community law, to the third pillar sector, where such principle reveals its utmost importance in consideration of the express exclusion of framework decisions from having direct effect. In this regard, Fletcher rightly pointed out that, given that the principle of indirect effect has contributed to the protection of

---

<sup>18</sup> G. Morbidelli, *La Tutela Giurisdizionale dei Diritti nell'Ordinamento Comunitario*, (2001) Quaderni della Rivista 'Il Diritto dell'Unione Europea', Giuffrè, Milano, p. 70.

<sup>19</sup> *Idem*.

<sup>20</sup> Case C-105/03 *Criminal Proceedings against Maria Pupino*, [2005] ECR I-5285, para. 34.

<sup>21</sup> *Ibid.*, para. 35.

<sup>22</sup> *Ibid.*, para. 38.

<sup>23</sup> Case 14/83 *Von Colson & Kamann v. Land Nordrhein-Westfalen* [1984] ECR 1891, para.26 and 28.

individual rights, the potential significance of the application of this principle in the field of EU criminal law is clear, particularly in the absence of direct access to the ECJ.<sup>24</sup>

It follows that the preliminary ruling procedure under Title VI is as crucial as it is under Community law: it contributes towards enhancing the uniform and consistent application of EU law so guaranteeing its effectiveness, and provides individuals with a means of judicial protection against third pillar measures. In the light of this picture, there is no reason why to differentiate the functioning and the effects of preliminary rulings under the two pillars: “*to hide behind outdated notions of sovereignty and intergovernmental structures which leaves citizens out in the cold is no longer defensible*”.<sup>25</sup>

### **3. Infringement proceedings**

Under Community law the Commission has the power to bring an action against those Member States which it considers to be in breach of their Community obligations. Article 226 EC Treaty establishes an enforcement procedure according to which the Commission shall deliver a reasoned opinion on the matter and shall give the State concerned the chance to submit its observations. If the State does not comply with the opinion in the given period, the Commission may bring the matter before the ECJ. It is evident that individuals are not taken into consideration as possible actors in this procedure. Nevertheless, the Commission has often underlined their significant role in submitting complaints about breaches of Community law: citizens represent a vital source for the detection of infringements, so contributing to law enforcement.<sup>26</sup> The Commission even provided for a specific form, in order to encourage the submission of complaints.<sup>27</sup> Individuals, however, have no legal status in the possible proceeding initiated against a Member State by the Commission and regrettably they have no say about the discretionary choice of the Commission on whether to initiate the proceeding by issuing the reasoned opinion and to bring the matter before the ECJ. It is clear, thus, that the enforcement proceeding does not constitute a means provided for individuals to obtain judicial protection. This has been also underlined by the ECJ that stressed the difference between the infringement

---

<sup>24</sup> M. Fletcher, *Extending “Indirect Effect” to the Third Pillar: The Significance of Pupino?*, (2005) 30 ELRev., p. 874-875.

<sup>25</sup> J.A.E. Vervaele (ed.), *The European Evidence Warrant. Transnational Judicial Inquiries in the EU*, (2005), Intersentia, Antwerpen-Oxford, p. 154.

<sup>26</sup> P. Craig and G. De Búrca (2003), p. 398.

<sup>27</sup> *Idem*.

procedure and the preliminary rulings, holding that proceedings brought by an individual are intended to protect individual rights in a specific case, whereas Community enforcement proceedings are intended to ensure the general and uniform observance of Community law.<sup>28</sup> Despite this, the infringement proceeding is relevant for the purpose of this paper as it relates somehow with the issue of judicial protection.

The most common complaint in enforcement proceedings concerns the failure to implement directives correctly or at all. Precisely because of the frequency of this kind of failure the ECJ felt the need to develop the doctrine of direct effect.<sup>29</sup> Under the third pillar, framework decisions are comparable to directives since they are binding upon the Member States as to the result to be achieved but leave to the national authorities the choice of forms and methods. Thus, they always foresee an implementing stage that is afforded to the Member States. What if the competent national authorities do not implement a framework decision adopted under Title VI? In the area of judicial cooperation there is no provision corresponding to that establishing the infringement procedure under Community law: enforcement proceedings cannot be initiated against Member States for failure to implement third pillar measures. Besides, individuals cannot rely on direct effect of framework decisions, as this is expressly excluded by Article 35 EU Treaty.

It could be argued that individuals may rely upon the preliminary ruling procedure in order to benefit from a non-implemented third pillar measure. This, however, is not so straightforward. First of all, it has often been raised the objection that when there is no national implementing measure individuals may not be able to raise an issue before national courts.<sup>30</sup> This view, though, does not take into account the fact that, in practice, national courts do refer matters to the ECJ even in the absence of any implementing measure.<sup>31</sup> A clear example is given by the seminal *Marleasing* judgment,<sup>32</sup> where a preliminary ruling on a directive was invoked notwithstanding the absence of any implementing measure of that directive at domestic level. Indeed, the ECJ, by clarifying the area of applicability of the principle of harmonious interpretation, held that

---

<sup>28</sup> Case 28/67 *Mölkerei-Zentrale Westfalen/Lippe GmbH v. Hauptzollamt Paderborn* [1968] ECR 143, p. 153.

<sup>29</sup> P. Craig and G. De Búrca (2003), p. 406.

<sup>30</sup> This was the argument put forward by the applicants in Case C-50/00 *Unión de Pequeños Agricultores v. Council* [2002] ECR I-6677 and in Case T-177/01 *Jégo-Quéré et Cie SA v. Commission* [2002] ECR II-2365.

<sup>31</sup> J.A. Usher, *Direct and Individual Concern – An Effective Remedy or a Conventional Solution?*, (2003) 28 ELRev., p. 586.

<sup>32</sup> Case C-106/89 *Marleasing SA v. La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135.

national courts are called upon to interpret provisions of national law in the light of the wording and the purpose of the relevant directive, regardless that those provisions have been adopted before or after the directive.<sup>33</sup> And the same ruling is confirmed in relation to the third pillar by *Pupino*, where the reference has been put forward by the national court notwithstanding the absence of any implementing measure of the framework decision at issue: national courts are required to interpret the existing national law in conformity with Union law in any case. Secondly, as already discussed above, according to the preliminary ruling procedure as provided under the third pillar, individuals are not sure that the reference will be actually made, as national courts enjoy a wide discretion, and they may not be even allowed to make such a reference when the jurisdiction of the ECJ has not previously been accepted by their own Member States. Thirdly, provided that the ECJ's jurisdiction is accepted and that the national court decides to refer, some problems may still occur: in some cases national courts may be in the impossibility to provide a satisfactory application of Union law anyway. Recently, in the *Berlusconi* judgment,<sup>34</sup> the ECJ stated that national courts cannot be requested to determine or increase the criminal liability of a person on the grounds of a directive which has not been implemented at domestic level.<sup>35</sup> With regard to third pillar measures, in the *Pupino* judgment, the ECJ held that the obligation on the national court to refer to the content of a framework decision when interpreting the relevant rules of national law ceases when the latter cannot receive an application which would lead to a result compatible with that envisaged by that framework decision: the principle of conforming interpretation cannot serve as the basis for an interpretation of national law *contra legem*.<sup>36</sup> Furthermore, the duty of harmonious interpretation is limited by general principles of law, including legal certainty, non-retroactivity and the protection of human rights.<sup>37</sup> Therefore, the preliminary ruling procedure seems not to be the easiest way to accord individuals a remedy in the case of non implementation of third pillar measures.

From this picture, one cannot but agree with Albers-Llorens, who maintained that the denial of direct effect, coupled with the absence of any form of infringement proceedings against

---

<sup>33</sup> *Ibid.*, para. 8.

<sup>34</sup> Joined cases C-387, 391 and 403/02 *Criminal Proceedings against Berlusconi and others*, [2005] ECR I-3565. On this ruling see A. Biondi and R. Mastroianni, *Joined cases C-387, 391 and 403/02. Berlusconi and others*, (2006) 43 CMLRev., p. 553, and F. Viganò, *Recenti Sviluppi in Tema di Rapporti tra Diritto Comunitario e Diritto Penale*, (2005) 11 Dir. pen. proc., p. 1437.

<sup>35</sup> Joined cases C-387, 391 and 403/02, *Berlusconi*, cit., para. 78.

<sup>36</sup> Case C-105/03, *Pupino*, cit., para. 47.

<sup>37</sup> *Ibid.*, para. 59-60. See also: M. Fletcher (2005), p. 873.

Member States in breach of their obligations under Title VI, severely limit the control of the ECJ over illegal Member State action under that Title,<sup>38</sup> so undermining the rights of the individual.

#### 4. State liability

In order to find a solution to the state of affairs as described so far, it might be helpful to recall the important principle of State liability in damages for breach of Community law, developed by the ECJ under the first pillar. According to the *Francovich* ruling, Member States are obliged to pay compensation for harm caused to individuals by breaches of Community law for which they can be held responsible. *Francovich* clearly represents a move in the direction of enhancing the *effet utile* of unimplemented Community measures, therefore constituting an alternative remedy for individuals.<sup>39</sup> Significantly the ECJ held that the full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible.<sup>40</sup> It is desirable that a similar line of rulings is developed under the third pillar in the light of the consideration that the success and legitimacy of judicial cooperation depend heavily on implementation by the Member States.<sup>41</sup> Besides, the fact that third pillar measures have no direct effect by express provision additionally underpins the feasibility of the application of the *Francovich* ruling outside Community law. Although the ECJ has clearly stated that the principle of State liability for breach of Community law is independent of the principle of direct effect, the ECJ itself affirmed that it is where a provision is unable to produce direct effect that the principle of State liability reveals its main rationale. As a matter of fact, compensation by the Member States is particularly indispensable where the full effectiveness of Community rules is subject to prior action on the part of the State and consequently individuals cannot, in the absence of such action, enforce the rights granted to them by Community law before the national courts.<sup>42</sup>

It could be argued that the application of this principle to the area of judicial cooperation would not be possible on account of the conditions laid down in *Francovich*, which are as

---

<sup>38</sup> A. Albors-Llorens (1998), p. 1282.

<sup>39</sup> See P. Craig and G. De Búrca (2003), p. 258-259.

<sup>40</sup> Cases C-6 & 9/90 *Francovich & Bonifaci v. Italy* [1991] ECR I-5357, para. 33.

<sup>41</sup> M. Fletcher (2005), p. 870.

<sup>42</sup> Cases C-6 & 9/90 *Francovich*, cit., para. 34. See N. Emiliou, *State Liability under Community Law: Shedding More Light on the Francovich Principle?*, (1996) 21 ELRev., p. 405.

follows: the result prescribed by the directive not implemented by the Member State should entail the grant of rights to individuals; the content of that right should be identifiable on the basis of the provisions of the directive; and there should be a causal link between the breach of the State's obligation and the harm suffered.<sup>43</sup> The problems could relate to the very nature of third pillar measures, which are of general normative kind, addressed to the Member States and unable to entail the grant of rights to individuals. It is maintained that third pillar measures, in particular framework decisions, are actually able to confer rights on individuals. An example can help to fully understand the argument here put forward. Recalling the framework decision on the European Arrest Warrant (hereafter EAW),<sup>44</sup> it is noteworthy that, under the significant heading "*Rights of a requested person*", Article 11 establishes that, when a requested person is arrested, the executing judicial authority shall inform that person of the EAW and of its contents and also of the possibility of consenting to surrender to the issuing judicial authority. In the second paragraph the same article affirms that the requested person shall have the right to be assisted by a legal counsel and by an interpreter in accordance with the law of the executing Member State. Furthermore, under Article 14, the framework decision entitles the requested person who does not consent to his surrender to be heard by the executing judicial authority. In the light of these provisions, is it really possible to claim that third pillar measures do not confer rights upon individuals? Is it possible to deny that the framework decision on the EAW confers on the requested person the right to be informed of the EAW, the right to consent to it and the right to legal assistance and to an interpreter? Although it is for the Member States to implement the provisions foreseeing these rights, it is incontestable that those rights present a sufficiently precise content. If anything, the necessity for those provisions to be implemented at national level has the consequence to make it impossible to directly apply them before national courts. But, as underlined by Advocate General Mischo, as to the principle of State liability it makes no difference whether the provision breached by a Member State is directly applicable or not, as long as it confers a Community right on individuals.<sup>45</sup> Therefore, the very nature of third pillar measures – especially framework decisions – namely the lack of direct effect coupled with the

---

<sup>43</sup> Cases C-6 & 9/90 *Francovich*, cit., para. 40.

<sup>44</sup> Council Framework Decision on the European Arrest Warrant and the Surrender Procedures, 2002/584/JHA.

<sup>45</sup> Opinion of Advocate General Mischo as reported by G. Bebr, *Joined Cases C-6/90, Francovich v. Italy, Bonifazi v. Italy, Judgment of the Court of Justice of 19 November 1991*, (1992) 29 CMLRev., p. 564.

capability to confer rights upon individuals, upholds the possible application of the principle of State liability to Title VI.

In applying the principle of State liability to third pillar measures the ECJ would not face any particular problem concerning the legal basis. As explained in *Francovich*, the principle of State liability is inherent in the system of the EC Treaty: it provides the safeguard of both the full effectiveness of Community law and individual rights.<sup>46</sup> In addition, the principle is to be derived from Article 10, according to which Member States and their organs (among them the judiciary too)<sup>47</sup> are required to take all the appropriate measures to ensure the fulfilment of their obligations under Community law.<sup>48</sup> These are precisely the same arguments that the ECJ put forward in *Pupino* in order to justify the remedy of harmonious interpretation. Accordingly, as lucidly pointed out by Fletcher, even if in *Pupino* the ECJ has not addressed the issue of State liability in damages when effective judicial protection cannot be achieved by means of harmonious interpretation, it may be just a matter of time before the ECJ extends this form of liability to Title VI.<sup>49</sup>

It follows that non-implementation of third pillar measures too should be remedied through compensation for State liability, *a fortiori* in the current state of affairs where there is no provision for infringement proceedings against Member States and there is no possibility for third pillar measures to have direct effect.<sup>50</sup> *Francovich* provides individuals with a means for

---

<sup>46</sup> Cases C-6 & 9/90 *Francovich*, cit., para. 33.

<sup>47</sup> In the case 14/83 *Von Colson & Kamann v. Land Nordrhein-Westfalen* [1984] ECR 1891, the Court held that: “... the Member States’... duty under Article 5 [now Article 10] ... is binding on all the authorities of Member States including, for matter within their jurisdiction, the courts.” (para. 26).

<sup>48</sup> Cases C-6 & 9/90 *Francovich*, cit., para. 36.

<sup>49</sup> M. Fletcher (2005), p. 876-877. See also E. Spaventa, *Opening Pandora’s Box: Some Reflections on the Constitutional Effects of the Decision in Pupino*, (2007) 3 *EuConst*, p. 5 et seq.

<sup>50</sup> The express exclusion of third-pillar measures to have direct effect leads to the consequent impossibility to apply to those measures the so-called *estoppel* reasoning. Under EC law, in Ratti first (case 148/78 *Pubblico Ministero v. Tullio Ratti* [1979] ECR 1629, para. 22) and in Becker afterwards (case 8/81 *Becker v. Finanzamt Münster-Innenstadt* [1982] ECR 53, para. 24), the ECJ held that, when after the prescribed period given for implementing a directive a Member State has not adopted the implementing measure required, it may not plead, as against individuals, its own failure to perform the obligations which the directive entails. It follows that, when the provisions of a directive appear to be unconditional and sufficiently precise, those provisions may be relied upon as against any national provision which is incompatible with the directive or in so far as the provisions define the rights which individuals are able to assert against the state. Basically, the main rationale of the *estoppel* reasoning is to emphasize the punitive reasons of direct effect of directives. The *estoppel* reasoning represents a sound answer to the problem arising when harmonious interpretation is not possible: national law must be set aside in favour of the non-implemented measures, whose provisions are sufficiently precise and unconditional.

the control on the application of Community law whenever their rights have been violated;<sup>51</sup> the application of this principle to the area of judicial cooperation would certainly enhance the fundamental requirements of Union law to be effective and the protection of individuals to be guaranteed.

#### **4.1. The national remedial framework and the efficacy of the principle of State liability**

In *Francovich* the ECJ clearly held that, while the right to reparation is required by Community law, that right remains governed by the rules of national law on liability: in the absence of any Community legislation it is a matter for the internal legal order of each Member State to determine the competent courts and lay down the detailed procedural rules for legal proceedings intended fully to safeguard the rights which individuals derive from Community law.<sup>52</sup>

Although some commentators have read the ECJ's jurisprudence as gradually creating a *jus commune* in the field of judicial protection against public powers, contributing to the equalization of national practice,<sup>53</sup> leading to a European law of procedures,<sup>54</sup> it is argued in this paper that the autonomy of domestic legal systems may actually lead to the opposite, allowing differentiated standards of protection, provided by national rules, of rights of the same nature, namely Union rights. As a matter of fact, even though it is firmly established that the substantive and procedural conditions laid down by the law of the Member States on compensation for harm may not be less favourable than those relating to similar internal claims, and may not be so framed as to make it virtually impossible or excessively difficult to obtain compensation,<sup>55</sup> the rights conferred on individuals by Community law may be protected more effectively in some Member States than in others.<sup>56</sup> If Community rights must be enforced in a similar manner as internal claims, nothing would prevent from laying down procedures that are not the most

---

<sup>51</sup> E.F. Hinton, *Strengthening the Effectiveness of Community Law: Direct Effect, Article 5 EC, and the European Court of Justice*, (1999) 31 JILP, p. 329.

<sup>52</sup> Cases C-6 & 9/90 *Francovich*, cit., para. 42.

<sup>53</sup> R. Caranta, *Judicial Protection Against Member States: A New Jus Commune Takes Shape*, (1995) 32 CMLRev., p. 703 and 713-715. On this issue see also M.-P.F. Granger, *National Applications of Francovich and the Construction of a European Administrative Jus Commune*, (2007) 32 ELRev., p. 191.

<sup>54</sup> According to A. Afilalo, "... The Court is *de facto* creating a European law of procedures each time it rejects a national procedural provision as incompatible with effective judicial protection or *effet utile*...". A. Afilalo, *How Far Francovich? Effective Judicial Protection and Associational Standing to Litigate Diffuse Interests in the European Union*, Jean Monnet Working Paper No. 1/98, <http://jeanmonnetprogram.org/papers/98/98-1-.html>.

<sup>55</sup> Cases C-6 & 9/90 *Francovich*, cit., para. 43.

<sup>56</sup> A. Arnall, *The European Union and its Court of Justice*, (1999) OUP, Oxford, p. 151.

favourable within the national remedial system, but which apply equally to Community and national claims.<sup>57</sup> When there is no judicial protection for internal claims, then there is none for Community claims either.<sup>58</sup> By emphasizing national autonomy, therefore, the objective of a harmonized level of judicial protection throughout the Union cannot be achieved.<sup>59</sup> All in all, as made clear by the ECJ, it is only in the absence of any Community legislation that national courts are entrusted with the protection of Community rights.<sup>60</sup> Applying national rules should be nothing but the *extrema ratio* (or the temporary solution) in order to fill the present gap in the EU system of remedies.<sup>61</sup>

On the empirical ground, the dual nature of the principle of State liability<sup>62</sup> – the right to reparation required by Community law on the one hand, and the application of national rules on liability on the other hand – has proved to undermine the efficacy of this remedy. The procedural and substantive rules on liability that vary among Member States are several: these concern, *inter alia*, time limits, assessment of damages, causation. Especially the latter has proved to be the most difficult condition to be determined in order to obtain compensation. This is clearly shown by the final outcome following the *Francovich* ruling: the *Pretura circondariale di Vicenza*, the national judicial authority competent on the matter, denied damages on the ground that the necessary element of causation between Italy's breach and the loss complained by the applicant was absent. Significantly, the ECJ confirmed the interpretation adopted by the Italian court in a following reference on the matter.<sup>63</sup> The same outcome was reached after the seminal ECJ judgment in *Brasserie du Pêcheur*<sup>64</sup> – which developed further the *Francovich* ruling – where

---

<sup>57</sup> This is clear in the case C-231/96 *Edis v. Ministero delle Finanze* [1998] ECR I-4951, para. 37, where the Court held that: "... Community law does not preclude the legislation of a Member State from laying down ... special detailed rules, which are less favourable, governing claims and legal proceedings to challenge the imposition of charges and other levies. The position would be different only if those detailed rules applied solely to actions based on Community law for the repayment of such charges or levies."

<sup>58</sup> W. Van Gerven, *Bridging the Unbridgeable: Community and National Tort Laws after Francovich and Brasserie*, (1996) 45 ICLQ, p. 515.

<sup>59</sup> On this issue see C.M.G. Himsworth, *Things Fall Apart: The Harmonisation of Community Judicial Procedural Protection Revisited*, (1997) 22 ELRev., p. 307-311.

<sup>60</sup> See above, fn. 52.

<sup>61</sup> See: A. Arnull (1999), p. 151 et seq.

<sup>62</sup> P. Craig and G. De Búrca (2003), p. 268.

<sup>63</sup> Case C-479/93 *Francovich v. Italy* [1991] ECR I-5403, where the ECJ held that the applicant was not among those upon whom the non-implemented Directive at issue conferred rights; therefore, the losses suffered by the applicant were not the consequence of Italy's failure to implement the Directive. See E. Deards, *Brasserie du Pêcheur: Snatching Defeat from the Jaws of Victory?*, (1997) 22 ELRev., p. 623-624.

<sup>64</sup> Case C-46 and 48/93 *Brasserie du Pêcheur SA v. Germany, and R. v. Secretary of State for Transport, ex parte Factortame Ltd. and others* [1996] ECR I-1029. See *infra* § 4.

the *Bundesgerichtshof*, the referring German court, relying upon the ECJ ruling according to which the causation of damage is a question left to national courts to decide,<sup>65</sup> dismissed the plaintiffs' action on the grounds that there was no direct causal connection between Germany's sufficiently serious breach and the damage suffered.<sup>66</sup> As rightly pointed out by Deards, such an approach does allow a national court to snatch apparent victory away from an applicant, when the ECJ rules that the type of breach at issue is capable of giving rise to State liability.<sup>67</sup>

## 5. Action for damages

The system of legal remedies established by the EC Treaty includes the action provided by Article 288(2) EC Treaty, according to which, in the case of non-contractual liability, the Community shall make good any damage caused by its institutions or by its servants in the performance of their duties. As regards the grounds of admissibility for damages actions, the early approach of the ECJ required the previous annulment of the act assumed to be the cause of the claimed damage. This was held in *Plaumann*, where the ECJ ruled that a “*measure which has not been annulled cannot of itself constitute a wrongful act on the part of the administration inflicting damage upon those whom it affects. The latter cannot therefore claim damages by reason of that measure.*”<sup>68</sup> The ECJ inferred that the action for damages under Article 288 had a subsidiary nature dependent on the annulment of the act involved.<sup>69</sup> This assumption, though, frustrated the rationale of the system of remedies for damages caused by Community's acts, in consideration of both the difficulties that individuals face in proving *locus standi* for annulment under Article 230(4)<sup>70</sup> and the restriction on the range of reviewable acts provided thereof. The

---

<sup>65</sup> In the joined cases C-46 and 48/93 *Brasserie du Pêcheur*, cit., para. 65, the ECJ held that: “... it is for the national courts to determine whether there is a direct causal link between the breach of the obligation borne by the State and the damage sustained by the injured parties.”

<sup>66</sup> Tallberg significantly writes: “It is slightly ironic, if not typical, that among the examples [of claims that have been dismissed on procedural or substantive grounds] we find the cases that established and expanded the principle of state liability: *Francovich* and *Brasserie du Pêcheur*.” J. Tallberg, *Supranational Influence in EU Enforcement: the Court of Justice and the Principle of State Liability*, (2000) 7 JEPP, p. 116. See also M.-P.F. Granger (2007), p. 157 et seq., and P. Oliver, *Cases C-46/93 and C-48/93, Brasserie du Pêcheur v. Germany, and The Queen v. Secretary of State for Transport ex parte Factortame*, [1996] ECR I-1029, (1997) 34 CMLRev., p. 656 ss.

<sup>67</sup> E. Deards (1997), p. 623.

<sup>68</sup> Case 25/62, *Plaumann & Co. v. Commission* [1963] ECR 95, last paragraph.

<sup>69</sup> A. W. H. Meij, *Annotation on Joined Cases 83 & 94/76, 4, 15 & 40/77 Bayerische HNL Vermehrungsbetriebe v. Council and Commission*, (1979) 16 CMLRev., p. 481.

<sup>70</sup> It is noteworthy to recall that an applicant who wants to seek the annulment of an act has to bring the action within two months of the occurrence of the act. The generous time-limit of five years for actions under Article 288(2) would become meaningless. See: P. Mead, ‘The Relationship Between an Action for Damages and an Action for

necessity for annulment was subsequently discarded in *Lütticke*, where the ECJ held that the action for damages is established by the Treaty as an independent form of action with a particular purpose to fulfil within the system of actions.<sup>71</sup> As a matter of fact, the action for damages differs from an application for annulment in that its end is not the abolition of a particular measure but compensation for damage caused by an institution in the performance of its duties.<sup>72</sup>

Under Title VI there is no provision similar to the one under discussion. The institutions seem to enjoy full immunity when acting in the area of judicial cooperation. The rationale of this framework may be found in the intrinsic legislative nature of third pillar measures, which necessarily implies political choices by the institutions concerned. However, under EC law, actions for damages can be brought even against measures of legislative kind entailing a significant element of discretion, as the ECJ concluded in the *Schöppenstedt* ruling. According to the test established thereof, non-contractual liability vis-à-vis legislative acts presupposes, at the very least, the unlawful nature of the act alleged to be the cause of the damage. Where legislative action is concerned, the Community does not incur non-contractual liability for damage suffered by individuals as a consequence of that action, by virtue of the provision contained in Article 288(2) of the Treaty, unless a sufficiently flagrant violation of a superior rule of law for the protection of the individual has occurred.<sup>73</sup> The decisive test for finding that a breach of Community law may constitute a “*sufficient flagrant violation*”, as developed by the ECJ, is whether the Community institution concerned manifestly and gravely disregarded the limits on its powers.<sup>74</sup> This situation may well occur under Title VI when the competent institutions act beyond the objectives of the Union as set in the Treaty.<sup>75</sup> As to the concept of “*superior rules of*

---

Annulment: The Return of *Plaumann*’, in H.G. Schermers, T. Heukels, P. Mead (eds.), *Non-Contractual Liability of the European Communities*, (1988) Martinus Nijhoff, p. 250-251.

<sup>71</sup> Case 4/69, *Lütticke GmbH v. Commission* [1971], ECR 325, para. 6.

<sup>72</sup> Case 5/71, *Atkien-Zuckerfabrik Schöppenstedt v. Council* [1971] ECR 975, para. 3. The Court emphasised the difference of purpose of both types of action in order not to open the way to misuse of procedure, i.e. to allow circumventing the conditions of admissibility for one action by applying for the other. See: A. W. H. Meij (1979), p. 482.

<sup>73</sup> Case 5/71, *Schöppenstedt*, cit., para. 11. It must be pointed out that the Community liability for lawful actions has eventually been recognised. In T-184/95, *Dorsch Consult Ingenieurgesellschaft mbH v. Council* [1998], ECR II-667, para. 35, the Court of First Instance held that: “... The Community’s liability in respect of lawful acts can be incurred only if the damage alleged was not foreseeable or could not be avoided by a diligent economic operator.”.

<sup>74</sup> Cases 83, 94/76, 4, 15, 40/77 *Bayerische HNL Vermehrungsbetriebe GmbH & Co KG v. Council and Commission* [1978] ECR 1209, para. 6. This concept has been further developed in Case C-352/98 *Laboratoires Pharmaceutiques Bergaderm SA and Goupil v. Commission* [2000] ECR I-5291, para. 43.

<sup>75</sup> In this regard, following a reference made by the Belgian *Cour d’Arbitrage* (case C-303/05, *proceedings Advocaten voor de Wereld VZW v. Leden van de Ministerraad*, judgment of 3 May 2007, nyr), the ECJ has been asked to rule on the validity of the Framework Decision on the EAW, in order to assess the compatibility of this

law”, those deemed by the ECJ as likely to raise a liability issue are, *inter alia*, principles such as non-discrimination, proportionality, equal treatment, legal certainty.<sup>76</sup> It is undeniable that these principles play a significant role in the criminal law sector too.<sup>77</sup> In relation to the requirement that the superior rule of law at issue must be intended “*for the protection of the individual*”, the ECJ has adopted a liberal approach, for it is sufficient that the superior rule of law allegedly breached is for the protection of individuals generally, rather than for the protection of a specific circle of individuals.<sup>78</sup>

Although non-contractual liability of Community institutions has always been hardly found, on the grounds that the legislative authority cannot be hindered in making its decisions by the prospect of applications for damages whenever it has occasion to adopt legislative measures in the public interest which may adversely affect the interest of individuals,<sup>79</sup> the important role that this form of liability could play under the third pillar is quite evident.

A final consideration needs to be put forward: if the ECJ were ever to apply the principle of State liability to Title VI, *a fortiori* damages actions should be provided under that Title. As a matter of fact, in *Brasserie du Pêcheur*,<sup>80</sup> in order to establish a more convincing legal basis for State liability, the ECJ drew an analogy between liability of the Member States under the *Francovich* authority and non-contractual liability of the Community under Article 288(2). The ECJ held that the conditions under which the State may incur liability for damages caused to individuals by a breach of Community law cannot differ from those governing the liability of the Community in like circumstances. The rights that individuals derive from Community law cannot vary depending on whether a national or a Community authority is responsible for the

---

Framework Decision with Article 34(2)(b) of the EU Treaty, under which framework decisions shall be adopted only for the purpose of approximation of the laws and regulations of the Member States. The ECJ did not find that the contested Framework Decision had gone beyond the objective set in Article 34.

<sup>76</sup> P. Craig and G. De Búrca (2003), p. 549-550.

<sup>77</sup> In this regard, in the case C-303/05 *proceedings Advocaten voor de Wereld VZW*, cit., the ECJ has been asked to rule on the compatibility of the Framework Decision on the EAW – in so far as it sets aside verification of the requirement of double criminality for the offences listed therein – with Article 6(2) of the EU Treaty, and more specifically with the principle of legality in criminal proceedings and with the principle of equality and non-discrimination. The ECJ upheld the validity of the Framework Decision at issue.

<sup>78</sup> A. Arnall, ‘Liability for Legislative Acts under Article 215(2) EC’, in T. Heukels and A. McDonnell (eds.), *The Action for Damages in Community Law*, (1997) Kluwer Law International, The Hague, p. 136.

<sup>79</sup> Cases 83, 94/76, 4, 15 and 40/77 *Bayerische HNL Vermehrungsbetriebe GmbH & Co KG v. Council and Commission* [1978] ECR 1209, para. 5. For a critical analysis see G. Tesauro, ‘Responsabilità degli Stati per Violazione del Diritto Comunitario’, in *Judicial Protection of Rights in the Community Legal Order*, Symposium of the European Lawyers’ Union, (1997) Bruylant, Bruxelles.

<sup>80</sup> Case C-46 and 48/93 *Brasserie du Pêcheur*, cit.

damage.<sup>81</sup> All in all, the rationale behind both damages for breaches of Community law and State liability is to ensure the effectiveness of EC law<sup>82</sup> and to provide individuals with a remedy.

## 6. Review of legality

Under Community law the review of legality of EC measures can be invoked by, *inter alia*, individuals who have been recognised access to the ECJ under the conditions provided by Article 230(4) EC Treaty: direct actions can be initiated only against decisions addressed to the applicants or decisions which, although in the form of regulations or decisions addressed to other persons, are of direct and individual concern to the applicant. Direct actions against decisions addressed to the applicants do not raise any problem about the grant of *locus standi* to individuals. It is when the measures challenged are not specifically addressed to the applicants that standing is hardly granted. The reason of such difficulties is the “*direct and individual concern*” requirement. As to the definition of “*direct concern*”, the measure must directly affect the legal situation of the applicant and leave no discretion to the addressee of the measure, entrusted with its implementation.<sup>83</sup> As to the “*individual concern*” test, the ECJ has opted for a very narrow reading that would discourage the bravest individual wishing to challenge a Community act. According to the well-known *Plaumann* test, applicants are deemed as being individually concerned only if a decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed.<sup>84</sup> Hence, only a closed category of people, namely people that can be easily distinguished and singled out in the same way as the initial addressee of the decision at issue, can satisfy the requirement of individual concern.<sup>85</sup> When such test is fulfilled, standing is afforded regardless the existence of a particular factual injury to the applicant.

Under the third pillar judicial review in the form of annulment proceedings is expressly provided by Article 35(6) EU Treaty. This action, though, has been strictly limited on the grounds of several factors: *ratione formae*, the only acts that can be reviewed are framework

---

<sup>81</sup> *Ibid.*, para. 42.

<sup>82</sup> E.F. Hinton (1999), p. 336.

<sup>83</sup> Cases 41-44/70 *International Fruit Company BV v. Commission* [1971] ECR 411, para. 25.

<sup>84</sup> Case 25/62, *Plaumann*, *cit.*

<sup>85</sup> P. Craig and G. De Búrca (2003), p. 488.

decisions and decisions; *ratione materiae*, Article 35(5) excludes the jurisdiction of the ECJ 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 responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security;<sup>86</sup> *ratione personae*, only the Commission and the Member States can institute proceedings before the ECJ. Individuals have been completely left outside from such action. It is reasonable to believe that the rationale behind the exclusion of non-privileged applicants from the realm of annulment proceedings under the third pillar is the very nature of the measures that can be adopted thereof: they are general by definition as they are aimed at the promotion of cooperation, contributing to the pursuit of the objectives of the Union.<sup>87</sup> This implies that it would be very difficult for third pillar measures to be of direct and individual concern, namely to be liable to directly interfere on the legal sphere of a closed category of individuals. It must be examined, though, whether measures adopted under Title VI, and in particular framework decisions, are in reality more incisive on the sphere of individuals than they seem to be: the question relates to the feasibility of third pillar measures to be of direct and individual concern.

As to the “*direct concern*” requirement, it is maintained that, despite framework decisions are binding for the Member States only as far as the outcome is concerned, in practice their extremely detailed character leaves little room for Member states to act independently in the implementation stage.<sup>88</sup> For instance, the framework decision on the EAW leaves no discretion as to the offences for which the verification of double criminality is abolished, as to the grounds for mandatory non-execution of the warrant, as to the content and form of the warrant and as to the detailed procedures for its transmission. Such provisions, thus, by not leaving any discretion to national authorities entrusted with their implementation, comply with the requirement of “*direct concern*” as developed by the ECJ. As to the condition of “*individual concern*”, the situation is more complex. Third pillar measures do not seem to be liable to affect the position of private applicants by certain attributes peculiar to them or by reason of factual situations which differentiate them from all other persons and distinguish them individually. As rightly pointed out by Peers, if the EC Treaty’s strict standing rule for direct actions by non-privileged

---

<sup>86</sup> Art. 35(5), EU Treaty. See A. Albors-Llorens (1998), p.1278.

<sup>87</sup> Art. 34(2), EU Treaty.

<sup>88</sup> M. Kaiafa-Gbandi, *The Treaty Establishing a Constitution for Europe and Challenges for Criminal Law at the Commencement of 21<sup>st</sup> Century*, (2005) 13 Eur.J.CrimeCr.L.Cr.J., p. 487.

applicants had been transposed to the EU Treaty, then few direct actions would actually have been admissible in practice; planned measures harmonizing national criminal law and cross-border procedure will not likely affect a permanently closed class of persons.<sup>89</sup> Therefore, should standing as provided under the Community pillar be extended to Title VI, judicial protection of individuals would remain unsatisfactory: the stringent *Plaumann* test would deny effective access to justice, as it already does, to some extent, under the first pillar. Even this state of affairs would be in contrast to what the ECJ itself has wisely affirmed: access to justice is one of the essential elements of a community based on the rule of law and is guaranteed inasmuch as a complete system of legal remedies and procedures, designed to permit the ECJ to review the legality of acts of the institutions, is established.<sup>90</sup>

In the light of these considerations, the *Plaumann* test should be replaced by a formula that would encounter the existence of a particular factual injury to the applicant. The Opinion of Advocate General Jacobs in *UPA* is to be welcomed: an applicant must be deemed as individually concerned by a Community measure where the measure has, or is liable to have, a substantial adverse effect on his interests.<sup>91</sup> Regrettably, the ECJ has eventually dismissed such argument. It is noteworthy, anyway, to cite some of the advantages listed by Jacobs in support of his opinion:

“ - ... [thanks to this solution] applicants are granted a true right of direct access to a court which can grant a remedy, cases of possible denial of justice are avoided, and judicial protection is improved in various ways;

- ... [this solution] removes the anomaly under the current case-law that the greater the number of persons affected the less likely it is that effective judicial review is available ... ”<sup>92</sup>

These arguments seem to perfectly suit the situation under the third pillar. In fact, these arguments seem to be stronger if referred to the area of judicial cooperation. As a matter of fact, as noted by Jacobs, the reasons put forward by the ECJ for its strict interpretation of the “*direct*

---

<sup>89</sup> S. Peers, *Who's Judging the Watchman? The Judicial System of the Area of Freedom, Security and Justice*, (1998) 18 YBEL, p. 383.

<sup>90</sup> Case 294/83 *Les Verts v European Parliament* [1986] ECR 1339, para. 23.

<sup>91</sup> Opinion of Advocate General Jacobs in the case C-50/00 *Unión de Pequeños Agricultores*, cit., para 102(4).

<sup>92</sup> *Ibid.*, para 102(4).

*and individual concern*” test have always been mainly two: the language of the Treaty, that clearly establishes this requirement, and the fact that individuals can however seek a reference to the ECJ on the validity of a Community measure by invoking their national courts. While the first argument has never proved to be an obstacle for purposive and teleological rulings by the ECJ, it is the second argument that deserves to be discussed. In *Greenpeace*, the ECJ, by considering the action brought against a Commission decision by the environmentalist organisation, declared it inadmissible in the light of the fact that Greenpeace could have brought an action before the national courts seeking a preliminary ruling.<sup>93</sup> The ECJ has often stressed that the right to effective judicial protection,<sup>94</sup> guaranteed by Community law, is safeguarded not by Article 230 alone but by the complete system of remedies established in the Treaty.<sup>95</sup> As already discussed above, under the third pillar the chance to challenge a measure via a preliminary ruling is subject to a double possible restraint: the jurisdiction of the ECJ to give preliminary rulings has to be accepted by explicit declaration of the Member States, and national courts enjoy discretion in deciding whether or not to refer a case to the ECJ. In the light of this system, not granting *locus standi* to individuals in annulment proceedings under the third pillar constitutes a denial of the right to effective judicial protection less acceptable than under the first pillar. Not to mention that, as put forward by Jacobs, the remedy of reference from national courts seems in certain cases less satisfactory than a direct action and, therefore, does not necessarily represent a good alternative, even if available to private applicants. In some cases it may require that individuals expose themselves to criminal prosecution for failing to observe national rules which implement a Community measure first, and, only afterwards, challenge the measure before the national court. Legal certainty, on the contrary, pleads in favour of allowing a general measure to be reviewed as soon as possible and not only after implementing measures have been adopted.<sup>96</sup> In addition, only the ECJ can declare Community legislation invalid, as

---

<sup>93</sup> Case C-321/95 *Greenpeace International v. Commission* [1998] ECR I-1651, para. 32-33.

<sup>94</sup> See Case 222/84 *Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651 and Case 222/86 *UNECTEF v. Heylens* [1987] ECR 4097.

<sup>95</sup> Case C-50/00 *Unión de Pequeños Agricultores*, cit., para 40. See also C. Koch, *Locus Standi of Private Applicants under the EU Constitution: Preserving the Gaps in the Protection of Individuals’ Right to an Effective Remedy*, (2005) 30 ELRev., p. 513.

<sup>96</sup> Opinion of Advocate General in the case C-50/00 *Unión de Pequeños Agricultores*, cit., para. 102(1). A specific problem of legal protection relates to the case in which a Community measure does not entail any national measure: individuals can only obtain legal protection by infringing the provision in question and subsequently invoking the alleged illegality of the Community measure in the course of penal or other proceedings brought against him. See also R. Barents, *The Court of Justice in the Draft Constitution*, (2004) 11 MJ, p. 131.

clearly held in *Foto-Frost*.<sup>97</sup> Therefore, the preliminary ruling procedure would not entail the achievement of the main purpose aimed at by the plaintiff when applying for judicial review, namely the invalidation of the measure challenged.<sup>98</sup>

This line of reasoning has been endorsed by the Court of First Instance in *Jégo-Quééré*, where it held that standing cannot depend on whether there exist other procedural routes by which an individual may be able to bring a case before the ECJ: the procedure of preliminary rulings under Article 234 and the procedure of actions for damages under Article 288 cannot be regarded as guaranteeing persons the right to an effective remedy enabling them to contest the legality of Community measures of general application which directly affect their legal situation.<sup>99</sup> Article 230 only can fulfil that specific intent.

## **7. Judicial protection of human rights**

Article 6 of the EU Treaty is currently the only positive source of human rights under the common provisions: the Union shall respect fundamental rights as guaranteed by the European Convention on Human Rights (hereafter ECHR) and as they result from the constitutional traditions common to the Member States, as general principles of Community law. This provision is more a general statement than a specific rule, leaving the police and judicial cooperation in criminal matters without a specific written human rights regulation.<sup>100</sup> This raises some concern, since cooperation cannot be favoured to the detriment of fundamental rights of individuals. However, following the Treaty of Amsterdam, the ECJ has been empowered by Article 46 EU Treaty to review the actions of the institutions for their compatibility with fundamental rights as referred to in Article 6.

Under Community law, before the entry into force of the Treaty of Amsterdam, the ECJ had founded its human rights' competence on Article 220 EC Treaty, according to which it is for the ECJ to ensure that in the interpretation and application of the Treaty the law is observed. The ECJ had been deriving inspiration precisely from international instruments on human rights which the Member States have cooperated with or which they have adhered to, with particular

---

<sup>97</sup> Case 314/85 *Firma Foto-Frost v. Hauptzollamt Lübeck-Ost* [1987] ECR 4199.

<sup>98</sup> Opinion of Advocate General in the case C-50/00 *Unión de Pequeños Agricultores*, cit., para. 102(1).

<sup>99</sup> Case T-177/01 *Jégo-Quééré*, cit., para. 44-47.

<sup>100</sup> C. Morgan, 'The European Arrest Warrant and Defendants' Rights: An Overview', in R. Blekxtoon (ed.), *Handbook on the European Arrest Warrant*, (2005) T.M.C. Asser Press, The Hague, p. 195.

regard to the ECHR, and from the constitutional traditions common to the Member States. This judicial activism of the ECJ has been considered by many commentators of utmost importance, since “*human rights and the machinery for their protection definitely represent an integrational value. Basic freedoms enshrined and protected by law are among the elements which give society and its members a sense of identity.*”<sup>101</sup> Nonetheless, as rightly stressed by Weiler, the development of the doctrine of fundamental rights’ protection by the ECJ has not been justified as a means provided for the protection of individuals but rather as a means for assuring the integrity, unity and uniformity of the Community.<sup>102</sup> As a result, Weiler has raised the doubt about the intrinsic adequacy of the ECJ to protect fundamental rights (this is what he refers to as the “*credibility issue*”): if the ECJ has developed its human rights doctrine to protect the integrity of the Community legal order rather than the individual, is the ECJ ready to prefer individuals to the Community?<sup>103</sup>

In the context of Title VI this approach of the ECJ is already evident in the very first judgment delivered on third pillar matters in the joined cases *Gözütok* and *Brügge*.<sup>104</sup> The ECJ, by interpreting Article 54 of the Convention implementing the Schengen Agreement which establishes the *ne bis in idem* principle within the EU, held that the objective of this provision is to ensure that no one is prosecuted on the same facts in several Member States on account of his having exercised his right to freedom of movement;<sup>105</sup> Article 54 is in fact intended to facilitate the freedom of movement.<sup>106</sup> It is evident that the ECJ has not recognised the significance of the *ne bis in idem* principle *per se*, i.e. as the expression of a fundamental right, but has regarded this principle merely as the underpinning principle of the freedom of movement of persons, one of the four freedoms of the common market. Under Title VI, such a questionable approach is coupled with the absolute absence of *locus standi* for individuals in order to bring a direct action

---

<sup>101</sup> J.H.H. Weiler, ‘Human Rights and the European Community: Methods of Protection’, in A. Cassese, A. Chapman and J.H.H. Weiler (eds.), *European Union – The Human Rights Challenge*, (1991) Vol. III, European University Institute, Auflage, p. 569.

<sup>102</sup> J.H.H. Weiler (1991), p. 580. For instance, in the case 11/70 *Internationale Handelsgesellschaft v. Einfuhr und Vorratstelle für Getreide und Futtermittel* [1970] ECR 1125, para. 4, the Court held that: “The protection of such rights [fundamental rights] ... must be ensured within ... the objectives of the Community.”

<sup>103</sup> J.H.H. Weiler (1991), p. 581.

<sup>104</sup> Joined Cases C-187 and 385/01, *Criminal proceedings against Hüseyin Gözütok and Klaus Brügge* [2003] ECR I-1345. For comments on this ruling see: G. Conway (2005), p. 255; J.A.E. Vervaele, *Joined Cases C-187/01 and C-385/01, Criminal proceedings against Hüseyin Gözütok and Klaus Brügge*, (2004) 41 CMLRev., p. 795; M. Fletcher, *Some Developments to the Ne Bis in Idem Principle in the European Union: Criminal Proceedings Against Hüseyin Gözütok and Klaus Brügge*, (2003) 5 MLR, p. 769.

<sup>105</sup> Joined Cases C-187/01 and C-385/01, *Hüseyin Gözütok and Klaus Brügge*, cit., para. 38.

<sup>106</sup> *Ibid.*, para. 40.

against third pillar measures. As stressed by Jacobs, the existing situation under Title VI raises serious questions about the compatibility of the current state of the law with the ECHR.<sup>107</sup> As a matter of fact, on the grounds of the right to an effective remedy as envisaged by Article 6 and 13 ECHR, the European Court of Human Rights (hereafter, ECtHR) has often condemned unduly restrictive legal systems in relation to actions brought by individuals against normative acts.<sup>108</sup>

It might be argued that, assumed the non-full adequacy of the ECJ to protect fundamental rights and the impossibility for individuals to challenge a third pillar measure via a direct action, private applicants may anyway call upon the jurisdiction of the ECtHR, exclusively intended to protect individuals and naturally competent to address fundamental rights issues. It is claimed, in fact, that the ECtHR has acquired expertise and a moral stature which the ECJ does not share.<sup>109</sup> It must be borne in mind, though, that the ECHR is a treaty to which the Community and the Union have not adhered to, since the Community and the Union have not been recognised the human rights competence for the purpose of adhering to such treaty by explicit opinion of the ECJ.<sup>110</sup> The ECtHR, therefore, should not be entitled to rule on a possible breach of human rights when the breach is a result of the adoption of a Community or a Union act. This is true only in theory, since in *Matthews v. United Kingdom*<sup>111</sup> the ECtHR held that, while the ECHR does not preclude the transfer of national competences to an international organisation such as the Community, in the absence of any possibility of judicial review of Community acts, the responsibility of the Member States for violations of the ECHR would continue even after such a transfer.<sup>112</sup> In *Matthews* the ECtHR implicitly re-affirmed the principle established in *M. & Co. v. the Federal Republic of Germany*,<sup>113</sup> according to which acts will not escape the review of

---

<sup>107</sup> F.G. Jacobs, 'Effective Judicial Protection of Individuals in the European Union, Now and in the Future', in M. Andenas and J. Usher (eds.), *Legal Issues of the Nice Treaty*, (2003), Hart Publishing, Oxford, p. 343.

<sup>108</sup> The exclusion of any judicial review of legislative acts has been deemed contrary to Articles 6 and 13 ECHR by the ECtHR in *Posti and Rahko v. Finland*, App. No. 27824/95, Reports 2002-VII, para. 64, 65 and 66. See: K. Lenaerts and M. Desomer, *Towards a Hierarchy of Legal Acts in the European Union? Simplification of Legal Instruments and Procedures*, (2005) 11 ELJ, p. 761-762. See also E. Biernat, *The Locus Standi of Private Applicants Under Article 230(4) EC and the Principle of Judicial Protection in the European Community*, Jean Monnet Working Paper No. 12/03, <http://jeanmonnetprogram.org/papers/03/031201.pdf>.

<sup>109</sup> P. Craig and G. De Búrca (2003), p. 365.

<sup>110</sup> Opinion 2/94 on Accession by the Community to the ECHR, [1996] ECR I-1759.

<sup>111</sup> *Matthews v. United Kingdom*, App. No. 24833/94, Reports 1999-I.

<sup>112</sup> P. Craig and G. De Búrca (2003), p. 366. On this issue see also K. Lenaerts and E. de Smijter, *The Charter and the Role of the European Courts*, (2001) 8 MJ, p. 90 et seq. and K. Lenaerts, *Fundamental Rights in the European Union*, (2000) 25 ELRev., p. 575.

<sup>113</sup> *M. & Co. v. the Federal Republic of Germany*, App. No. 13258/87, ECHR 1990.

compatibility with the ECHR, in so far as an equivalent protection is not provided, simply because these acts are adopted by either the Community or the Union.<sup>114</sup> The ECHR is, therefore, of crucial importance as the Member States have a dual duty to comply with it, both as parties of an international convention to which they are signatories and as members of the Union whose *acquis* certainly comprises the ECHR.<sup>115</sup> As such, compliance with the ECHR must be guaranteed in relation to both national and European legislation.

Notwithstanding its “limited” competence to deal with human rights issues vis-à-vis Union measures and its undisputable expertise, the ECtHR seems not to be always the best possible forum.<sup>116</sup> As a matter of fact, the ECtHR can exercise its jurisdiction in a case only once all domestic remedies have been exhausted: it is for national courts to guarantee the respect for the ECHR. The ECtHR has often stressed not to be an appellate court and not to be available as a compensatory body for deficiencies at national level in the protection of human rights.<sup>117</sup> This entails that a plaintiff who may wish to apply to the ECtHR against a Union act allegedly violating a fundamental right has to be the addressee of a final adverse decision at domestic level first (which means that he has to go through all the levels of judgment foreseen by his national legal system, even when it is clear from the outset that such a system does not provide an adequate means of protection), and only afterwards he may successfully apply to the ECtHR. Not only is this economically onerous and psychologically frustrating for the individual concerned but also practically damaging of both the right to an effective remedy, as envisaged by the ECHR itself, and the principle of effective judicial protection, as subscribed to by the ECJ.

### **7.1. Human rights and national courts**

From this picture it may be argued that a solution in order to guarantee the protection of human rights vis-à-vis Union measures could be to mainly rely upon national courts, those primarily entrusted with the application of EU law, on the one hand, and the application of the ECHR, on the other hand. Emphasising protection at national level, though, is likely to put at risk the integrity and the consistency of human rights protection throughout the Union, even leading

---

<sup>114</sup> K. Lenaerts (2000), p. 585.

<sup>115</sup> C. Morgan (2005), p. 198.

<sup>116</sup> M. Anderson, M. Den Boer, P. Cullen, W. Gilmore, C. Raab and N. Walker, *Policing the European Union*, (1995) Clarendon Press, Oxford, p. 212.

<sup>117</sup> S. Alegre, *Human Rights and the Future of Extradition in the European Union: Implications of Recent Case Law in the United Kingdom, France and Spain*, (2003) 4 ERA Forum, Academy of European Law, p. 6.

to no protection at all: Member States may not be up to the task of ensuring human rights' protection and granting satisfactory remedies for violations following Union measures. Not to mention that, where national courts deem Union law as falling short of providing the minimum standard of protection as provided under domestic law, it is the integrity and consistency of Union law *per se* that is put at risk: Member States may narrow the scope of EU measures by invoking the need to guarantee a better protection of fundamental rights.<sup>118</sup> This is what happened with the judgments of two national constitutional courts. In *Solange I* the German Constitutional Court held that, in the case of a conflict between Community law and the German Constitution, the guarantee of constitutional fundamental rights prevails as long as the competent organs of the Community have not removed the conflict of norms in accordance with the Treaty mechanism.<sup>119</sup> In the subsequent *Solange II*, the Constitutional Court softened its approach on the grounds that the ECJ had developed the doctrine of “*effective protection of fundamental rights*” and that all the Member States had acceded to the ECHR.<sup>120</sup> Likewise, the Italian Constitutional Court, in *Frontini*, held that limitations of sovereignty, concretely laid down in the Rome Treaty, can nevertheless give the Community organs an unacceptable power to violate the fundamental principles of the Italian constitutional order.<sup>121</sup> Clearly, national constitutional courts are not keen on giving up their jurisdiction: the more the system of judicial protection at supranational level reveals deficiencies and shortages, the more national courts, and especially constitutional courts, feel the need to take up the role of ultimate guarantors.

A similar situation has recently occurred in relation to Title VI. The German Constitutional Court declared void the German law implementing the framework decision on the EAW, because of the violation of Articles 16(2) and 19(4) of the German Constitution:<sup>122</sup> the national

---

<sup>118</sup> See: O. De Schutter, *The Implementation of the EU Charter of Fundamental Rights through the Open Method of Coordination*, Jean Monnet Working Paper 07/04, <http://jeanmonnetprogram.org/papers/04/040701.pdf>.

<sup>119</sup> BVerfG, *Solange I* [1974].

<sup>120</sup> BVerfG, *Solange II* [1987]. The German Constitutional Court stated that: “... So long as the European Communities, and in particular the European Court, generally ensure an effective protection of fundamental rights... and in so far as they generally safeguard the essential content of fundamental rights, the Federal Constitutional Court will no longer... review such legislation [secondary Community legislation] by the standard of the fundamental rights contained in the Constitution...”.

<sup>121</sup> Italian Constitutional Court, *Frontini v. Ministero delle Finanze* [1974].

<sup>122</sup> BVerfG, 2236/04 [2005]. On this judgment see: F. Palermo, *La sentenza del Bundesverfassungsgericht sul mandato di arresto europeo*, (2005) 25 Quad. cost., p. 897; A. Hinarejos Parga, *Bundesverfassungsgericht (German Constitutional Court), Decision of 18 July 2005 (2 BvR 2236/04) on the German European Arrest Warrant Law*, (2006) 43 CMLRev., p. 583; J.P. Pierini, *Il mandato d'arresto europeo alla prova del Bundesverfassungsgericht tedesco: «schiaffo» all'Europa o cura negligente dei diritti del nazionale da parte del legislatore?*, (2006) 46 Cass. pen., p. 237.

implementing law has been deemed as encroaching upon the freedom from extradition of German citizens in a disproportionate and unwarranted manner, and as infringing the guarantee of appeal to a court. As a result this judgment has given rise to a legislative *lacuna*, which has allowed a person charged with terrorism not to be surrendered to the requesting Spanish judicial authorities pursuant to the EAW. Likewise, the Polish Constitutional Tribunal ruled on the compatibility of the national implementing law of the EAW with the Polish Constitution.<sup>123</sup> The Tribunal stated that Article 607 of the Criminal Procedure Code implementing the EAW system, insofar as it permits the surrendering of a Polish citizen to another Member State of the Union, does not conform to Article 55(1) of the Polish Constitution, which forbids extradition of nationals. What is noteworthy is that, while a judgment of the Polish Constitutional Tribunal declaring the unconstitutionality of a challenged provision usually leads to the loss of binding force of that provision from the moment of the judgment's publication in the Journal of Laws, in this case the Tribunal decided to delay the date of the challenged provision's loss of binding force for 18 months, calling upon a prompt intervention of the legislator in order to re-establish the compliance of Polish law with Union law. During this period, therefore, the domestic law has continued to fulfil the obligation of implementing the framework decision; in the Tribunal's opinion, it was necessary to ensure the continuity of the functioning of the EAW.<sup>124</sup>

In the light of this picture it is clear the importance of granting judicial protection at EU level, independently of the protection provided by the ECtHR on the one hand, and by national courts on the other hand. For this purpose, besides a fully-fledged system of actions and remedies, a more human rights oriented attitude of the ECJ is desirable: the individual has to be detached from the restrictive economic role and reach a civic dimension.<sup>125</sup> All in all, the protection of fundamental rights must not be seen as countering the *integrational* project of the

---

<sup>123</sup> Polish Constitutional Tribunal, 27 April 2005, P1/05. On this judgment see J. Sawicki, *Incostituzionale ma efficace: il mandato di arresto europeo e la costituzione polacca*, [http://www.associazionedeicostituzionalisti.it/cronache/estero/arresto\\_polonia/index.html](http://www.associazionedeicostituzionalisti.it/cronache/estero/arresto_polonia/index.html); S. Sileoni, *La Corte Costituzionale polacca, il mandato d'arresto europeo e la sentenza sul trattato di adesione all'UE*, (2005) 25 Quad. cost., p. 894.

<sup>124</sup> On the relevant judgements of national constitutional courts on the EAW, see Z. Deen-Racsmány, *The European Arrest Warrant and the Surrender of Nationals Revisited: The Lessons of Constitutional Challenges*, (2006) 14 Eur.J.CrimeCr.L.Cr.J., p. 271.

<sup>125</sup> D. O'Keefe and A. F. Bavasso, 'Judicial Protection of Fundamental Rights and the European Citizen', in *Judicial protection of Rights in the Community Legal Order*, (1997) Symposium of the European Lawyers' Union, Bruylant, Bruxelles, p. 50. See also S. Douglas-Scott, who lucidly affirmed that: "...with the common market now largely achieved, fundamental rights could take its place as the foundation, especially at a time when the EU draft Constitution seems to have been abandoned...". S. Douglas-Scott, *A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis*, (2006) 43 CMLRev., p. 661.

Union but rather as representing the minimum requirement in order to successfully fulfil such project. This is all the more so in the current Union of twenty-seven.

## 8. The Constitutional Treaty

Notwithstanding its non-legally binding status and its uncertain future, the European Constitutional Treaty is of great importance: it is the expression of the political will of the Member States and, therefore, it legitimately carries a considerable weight that cannot be ignored.

The most striking novelty that the Constitution brings about is certainly the abolition of the pillar structure and the realisation of a fully-fledged Union provided with legal personality.<sup>126</sup> While at present the Community and the Union are founded on different sources of law, characterised by different institutions and different legal instruments with different binding force, under the Constitution the Community and the Union are reduced into a single legal order. The major result of this new framework is the removal of the jurisdictional deficit that definitely characterises the current third pillar.<sup>127</sup>

Firstly, such deficit is covered with regard to the preliminary ruling procedure:<sup>128</sup> the jurisdiction of the ECJ becomes compulsory as such and national courts of last resort are burdened with a duty to refer in the area of the current Title VI too. Moreover, where a question is raised in a case pending before any court or tribunal of a Member State with regard to a person in custody, the ECJ shall act with the minimum of delay.<sup>129</sup> This provision guarantees the compliance of Union procedures with fundamental rights, such as the right to a fair trial *ex* Article 6 ECHR, which definitely concerns the length of the trial, as interpreted by the ECtHR.

Secondly, the Constitution carries out significant novelties with regard to the infringement procedure: this becomes fully applicable to the current Title VI, filling the existing untenable vacuum in case of violation, by the Member States, of obligations deriving from the third pillar.<sup>130</sup>

---

<sup>126</sup> Art. I-7.

<sup>127</sup> See R. Barents (2004), p. 129. The removal of diversified legal instruments and the normalisation of the jurisdiction of the Court of Justice in the area of judicial cooperation in criminal matters have been deemed as contributing to the “communitarisation” of the third pillar under the Constitution. On this point see K. Lenaerts and M. Desomer (2005), p. 751. See also M. Kaiafa-Gbandi (2005), p. 490-491.

<sup>128</sup> Art. III-369.

<sup>129</sup> Art. III-369, last paragraph.

<sup>130</sup> Art. III-360.

Thirdly, as to the issue of non-contractual liability, it is the Union, no longer the Community only, which shall make good any damage caused by its institutions.<sup>131</sup> Therefore, compensation is granted in relation to damages following present third pillar measures; and, according to the *Brasserie* ruling, this would certainly imply the possibility to apply the principle of State liability for non-implementation of those measures. As a matter of fact, according to the provision on “*succession and legal continuity*”, the case-law of the Court of Justice on the interpretation and application of the treaties and acts repealed by the Constitution shall remain, *mutatis mutandis*, the source of interpretation of Union law and in particular of the comparable provisions of the Constitution.<sup>132</sup>

Fourthly, as regards direct actions,<sup>133</sup> acts adopted in the area of judicial cooperation are eventually subject to judicial review in favour of individuals, since there is no longer difference between measures pursued at enhancing the common market goals and measures pursued at enhancing judicial cooperation. Furthermore, legislative acts can be challenged by express provision, as the form of the act is no longer a determining factor, although the “*direct and individual concern*” test is maintained. It follows that the *Plaumann* test would continue to be decisive: effective judicial protection of individuals via annulment proceedings seems to remain dubious under the Constitution too. Though, the new provision on direct actions must be read in conjunction with the provision according to which Member States shall provide rights of appeal sufficient to ensure effective legal protection in the fields covered by Union law:<sup>134</sup> where there is no *locus standi* of individuals before the ECJ, there is always a chance to appeal before national courts. Nevertheless, the system so framed, a clear expression of the principle of subsidiarity,<sup>135</sup> is questionable. As a matter of fact, even if individuals have the right to appeal before national courts, they cannot obtain the ultimate annulment of the act that they have challenged, so as to avoid the possible negative consequence deriving from that act: national courts cannot declare Union measures void and consequently cannot annul them. This is precisely the same problem that exists at present. As put forward by Jacobs, the obligation of

---

<sup>131</sup> Art. III-431.

<sup>132</sup> Art IV-438.

<sup>133</sup> Art. III-365(4).

<sup>134</sup> Art. I-29.

<sup>135</sup> On this issue see R. Barents (2004), p. 132.

Member States to provide for effective rights of action before their courts is not a substitute for providing for effective rights of action before the ECJ.<sup>136</sup>

Finally, as to the specific issue of human rights' protection, a proposal to create a brand-new remedy was discarded mainly because it would have meant duplicating the ordinary system of judicial remedies, on account of the difficulties in distinguishing violations of fundamental rights by other violations of the law.<sup>137</sup> As a result, it has been decided that fundamental rights must be protected in the framework of the existing system. A striking novelty is, rather, that those rights are formally recognised in a specific Charter, which forms integral part of the Constitution.<sup>138</sup> A positive source of human rights law at Union level counters the risk of both uneven standards of protection of fundamental rights throughout the Union and uneven applications of Union law by the Member States that may narrow the scope of EU law by claiming the necessity to guarantee a better protection to fundamental rights (as a matter of fact the Charter is binding when Member States implement Union law).<sup>139</sup> Besides, a positive foundation of human rights undeniably enhances legal certainty in a sector that currently is not very structured. This new source of human rights is coupled with the opening to the accession of the Union to the ECHR.<sup>140</sup> Thus, the Court of Strasbourg becomes a formally legitimated actor within the Union, namely an "additional" jurisdictional authority entrusted with the task of fundamental rights' protection.

From this brief overview of the new construction of the European Union it follows that the Constitution undeniably represents a step forward a more sound and coherent system of judicial protection of individuals. While the current state of affairs results in a situation in which the mechanisms for judicial protection at EU level significantly vary,<sup>141</sup> the abolition of the pillar structure and the subsequent harmonization of instruments and institutions would abolish the

---

<sup>136</sup> F. G. Jacobs (2003), p. 341.

<sup>137</sup> *Idem*.

<sup>138</sup> Part II of the Constitution, from Art. II-61 to Art. II-114. On the current "authority" of the Charter, see the opinion of Advocate General Ruiz-Jarabo Colomer on the Framework Decision on the European Arrest Warrant, *cit.*, para. 76-79.

<sup>139</sup> Art. II-111.

<sup>140</sup> Art. I-9(2). For an overview on fundamental rights under the EU constitutional Treaty see Jacqueline Duteil De La Rochère, *The EU and the Individual: Fundamental Rights in the Draft Constitutional Treaty*, (2004) 41 CMLRev., p. 345.

<sup>141</sup> This is what the former President of the Court of Justice, Carlos Rodríguez Iglesias, stated in the "discussion circle" on the Court of Justice CONV 572/03, quoted in Editorial, *The Court of Justice and the Third Pillar*, (2005) 30 ELRev., p.773.

questionable discrepancy that occur between different areas of law.<sup>142</sup> It has been a disappointment that the European citizens deliberately missed the opportunity to adopt such Treaty<sup>143</sup> that, even if incomplete and perfectible, would have certainly strengthened their position within the EU.

---

<sup>142</sup> In support of this argument see J. Vogel, *The European Integrated Criminal Justice System and Its Constitutional Framework*, (2005) 12 MJ, p. 143.

<sup>143</sup> The reference is clearly to the referenda held in France and in the Netherlands that proclaimed the defeat of the Constitutional Treaty.