Cross-Pillar Litigation Before the ECJ: Demarcation of Community and Union Competences

Ronald van Ooik*

Second pillar v. first pillar – From Union to Community powers and vice versa – Court's jurisdiction under different headings – Jurisdiction after Lisbon – Choice of legal bases in cross-pillar situations – dual competence? – Different combinations

1. Introduction

Soon after the Treaty of Maastricht had created the so-called three-pillar structure of the Union, the question arose of which part of the EU Treaty those decisions had to be based that seemed to lie somewhere in between two of the three pillars. Several of those 'cross-pillar' legal basis questions were brought before the ECJ. In all of these cases up until now, the first and the third pillar were at stake. Usually the Council based its decision on the third pillar, whereas the Commission argued that the first pillar should have been used instead.[1]

The *ECOWAS* case is the first one in which the Court had to rule on the question: '*second* pillar or *first* pillar?'[2] The Council had based a joint action on combating the accumulation and spread of small arms and light weapons[3] on Article 14 EU, one of the provisions of Title V of the EU Treaty on the Common Foreign and Security Policy (CFSP). Subsequently, the Council had implemented its joint action by adopting a (*sui generis*) decision on a financial contribution of the EU to the Economic Community of West African States (ECOWAS) to assist that

* Europa Institute, Faculty of Law, University of Amsterdam (R.H.vanOoik@uva.nl).

[1] Cases discussed in section 2.1. The *PNR* case is the only 'from pillar 1 to pillar 3' case, *see* section 2.2.

[2] Case C-91/05 *Commission* v. *Council*, judgment of 20 May 2008 (a.k.a. 'Small Arms and Light Weapons').

[3] Council Joint Action 2002/589/CFSP of 12 July 2002 on the European Union's contribution to combating the destabilising accumulation and spread of small arms and light weapons and repealing Joint Action 1999/34/CFSP (*OJ* 2002 L 191, p. 1), hereafter referred to as 'the joint action' or 'the basic decision'.

European Constitutional Law Review, 4: 399–420, 2008

doi:10.1017/S1574019608003994

organisation's moratorium on small arms and light weapons.[4] The Commission argued, supported by the European Parliament, that the implementing decision on the non-proliferation of small arms and light weapons in West Africa should have been based on the EC Treaty provisions on development co-operation policy (Article 179 EC). Such an implementing *Community* decision would have to be adopted by the Commission itself. Thus, the *ECOWAS* judgment is the first one in which the ECJ rules on the demarcation of Community powers and second-pillar Union powers.

In this contribution the *ECOWAS* case is first placed in the broader perspective of the rather recent development of cross-pillar litigation before the ECJ (section 2). Next the Court's judgment is discussed in a thematic way: its jurisdiction to rule on the (il)legality of CFSP acts (section 3); the manner in which the legal basis of secondary acts must be determined in case these legal bases belong to different pillars of the Union (section 4); whether or not the simultaneous use of Community and Union competences is possible (section 5); and if not, how to make a choice between the Community legal basis and the CFSP legal basis (section 6). Finally some concluding remarks are made (section 7).

2. Cross-pillar disputes before the ECJ

2.1 *From Union powers to Community powers*

The first case in which the Court had to rule on the demarcation of Community and Union competences was the *Airport Transit Visa* case.[5] The Council had adopted its decision on a certain type of visa on the third pillar (on Justice and Home Affairs, JHA) whereas in the view of the Commission, the EC Treaty provided a more appropriate legal basis (former Article 100C EC). Although the Commission's complaints were rejected, the most important point was that the Court considered that it had *jurisdiction* to rule on this legal basis dispute, even though it did not have any jurisdiction under the former JHA pillar. Otherwise it could not perform its task of watching over the correct demarcation of first- and third-pillar competences, which would amount to a breach of (what is now) Article 47 EU, according to which 'nothing in the EU Treaty shall affect the EC Treaty'.[6]

[4] Council Decision 2004/833/CFSP of 2 Dec. 2004 implementing Joint Action 2002/589/CFSP with a view to a European Union contribution to ECOWAS in the framework of the Moratorium on Small Arms and Light Weapons (*OJ* 2004 L 359, p. 65), hereafter referred to as 'the ECOWAS decision' or 'the implementing decision'.

[5] Case C-170/96 *Commission* v. *Council* [1998] *ECR* I-2763.

[6] Case C-170/96, paras. 12-18.

The two subsequent cases, *Environmental Criminal Law* and *Ship-Source Pollution*,[7] were of the same type ('from third pillar to first pillar') but received much more attention, not just in circles of academics but also among politicians. In the first on these cases the issue was whether rules on the protection of the environment through criminal law had to be based on the EC Treaty (Article 175 EC on environmental protection) or on Title VI on Police and Judicial Cooperation in Criminal Matters (PJCC; Article 34 EU). Prior to the Court's judgment there had been a lot of discussion about the legal basis choice: initially Denmark came up with a proposal for a third pillar act; subsequently the Commission made a proposal for a directive on the same subject-matter, based on the EC powers in the field of environmental protection (Article 175 EC); finally the Council resorted to the third pillar once again and adopted a framework decision on the protection of the environment through criminal law. In its judgment the ECJ first admits that criminal law does not belong to the first pillar but, nevertheless, if enforcement through criminal law is necessary for the effective protection of the environment, the Community is competent to act under Article 175 EC.[8]

After this remarkable judgment – to say the least – the member states awoke and twenty of them handed down written submissions in the subsequent *Ship-Source Pollution* case, dealing with the legal basis of a framework decision on imposing criminal sanctions in case of environmental pollution from ships. This time, however, the framework decision also prescribed the *type* and *level* of the criminal penalties to be imposed by the member states. Rules on those latter aspects belong to the third pillar and cannot be based on Article 175 EC, so the Court ruled.[9]

The *SEGI* case[10] was a little different in that the contested decision, a 'common position', was based on *both* the second and the third pillar (Articles 15 and 34(2)(a) EU).[11] The appellants in this case took the view that the Council had

[7] Case C-176/03 *Commission* v. *Council* [2005] *ECR* I-7879 and Case C-440/05 *Commission* v. *Council* [2007] *ECR* I-9097.

[8] Case C-176/03, paras. 47 and 48. Cf., e,g., M. Wasmeier and N. Thwaites, 'The 'battle of the pillars': does the European Community have the power to approximate national criminal laws?', *EL Rev.* (2004), p. 613-635; E. Herlin-Karnell, 'Commission v. Council: Some Reflections on Criminal Law in the First Pillar', *European Public Law* (2007), p. 69-84.

[9] Case C-440/05, para. 70. Cf., A. Dawes & O. Lynskey, 'The ever-longer Arm of EC Law: The Extension of Community Competence into the Field of Criminal Law', *CML Rev.* (2008), p. 31-158.

[10] Case T-338/02 *Segi* v. *Council* [2004] *ECR* II-1647 and, on appeal, Case C-355/04 P *Segi* v. *Council* [2007] *ECR* I-1657.

[11] Common Position 2001/931/CFSP on the application of specific measures to combat terrorism (*OJ* 2001, L 344/93). All subsequent 'updates' are also based on both pillars, *see* most recently Common Position 2008/347/CFSP of 29 April 2008 amending Common Position 2007/871/CFSP updating Common Position 2001/931/CFSP on the application of specific measures to combat terrorism (*OJ* 2008 L 116/55).

adopted this common position for the sole purpose of depriving them of the right to a remedy and that therefore Community powers should have been used. The Court of First Instance first held that it had jurisdiction to take cognisance of the action but only insofar as it was based on a failure to have regard to the powers of the Community (referring to *Airport Transit Visa*). It then held that Article 34 EU (alone) was the correct legal basis for the adoption of the part of the contested common position which was relevant to SEGI.[12] It thus turns out that *SEGI*, from the viewpoint of the applicants, is another example of the 'from pillar 3 to pillar 1' types of cases. On appeal, the ECJ merely stated that the appellants had not come up with new arguments and therefore it did not pronounce on the correct legal base for the common position.[13]

2.2 *From Community powers to Union powers*

All the above-mentioned cases, as well as the *ECOWAS* case (to be discussed in more details below), are concerned with (putative) encroachments upon *Community* competences. However, we now also have the first cases in which the EC institutions are accused of having encroached upon *Union* competences.

In the case on the legal basis of the EU-US agreement on Passenger Name Records (the *PNR* case),[14] the Court held that the agreement, which provided for the exchange of certain information on flight passengers to the United States, as well as an implementing decision of the Commission on the same issue, should not have been based on Article 95 EC (internal market) but on the PJCC pillar instead. The main reason the Court gave was that

> while the view may rightly be taken that PNR data are initially collected by airlines in the course of an activity which falls within the scope of Community law, namely sale of an aeroplane ticket which provides entitlement to a supply of services, the data processing which is taken into account in the decision on adequacy [from the Commission] is, however, quite different in nature. […] That decision concerns not data processing necessary for a supply of services, but data processing regarded as necessary for safeguarding public security and for law-enforcement purposes.[15]

[12] Case T-338/02, paras. 41 and 45-46.

[13] Case C-355/04 P, para. 21. *See* further S. Peers, 'Salvation Outside the Church: Judicial Protection in the Third Pillar after the Pupino and Segi Judgments', *CML Rev.* (2007) p. 883-929. *See* section 5.3, *infra*, for my view on the acceptability of such dual legal bases (second and third pillar).

[14] Joined Cases C-317/04 and C-318/04 *European Parliament* v. *Council* [2006] *ECR* I-4721.

[15] PNR, para. 57. *See* further the case note by M. Mendez in *EUConst* (2007/1), p. 127-147.

Ireland has initiated another interesting and important 'from pillar 1 to pillar 3' case.[16] This member state argues that the so-called Data Retention Directive[17] should not have been based on Article 95 EC (internal market) but on the PJCC pillar (Article 34 EU) because it obliges the member states to make sure that internet providers, telephone companies, etc., keep certain information about their clients for a period between six months and two years. That information must be made available to the justice authorities in case of suspicion of serious criminal activities.[18] If one reads this Directive carefully, in order to determine its main purpose and content, it seems to me that Ireland has a good case. The Directive's 'centre of gravity' clearly lies – just like the PNR agreement – in the sphere of combating serious crime and terrorism and hence falls under the scope of application of the PJCC pillar.

3. Jurisdiction of the Court in cross-pillar disputes

First of all the Court in the *ECOWAS* case considers whether it has *jurisdiction* to rule on the dispute between the Commission and the Council. The latter's act was based on CFSP provisions (Article 14 EU, albeit indirectly) for which the ECJ does not have jurisdiction (Article 46 EU). However, since the main purpose of the Commission's action for annulment was to see whether the contested act, which was capable of having legal effects, should have been based on the EC Treaty, and hence whether the Council had encroached upon Community competences, the Court considers that Article 47 EU does give it jurisdiction to rule on the dispute.[19]

3.1 *Action for annulment*

This conclusion is hardly surprising, given the outcome in the earlier 'from third- to first-pillar' cases (*Airport Transit Visa*, *Environmental Criminal Law, Ship-Source Pollution* and *SEGI*). Especially the first of these judgments clearly shows that the action for annulment of the *first* pillar (Article 230 EC) can be used to contest the legal basis of third-pillar decisions, provided that the argument of the appellant

[16] Case C-301/06 *Ireland* v. *Council* and *European Parliament*, still pending (summary of Ireland's arguments in *OJ* 2006 C 237/5).

[17] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (*OJ* 2006 L 105/54).

[18] *See* in particular Arts. 1(1), 4 and 8 of Directive 2006/24/EC.

[19] ECOWAS, paras. 31-34.

is that there is an encroachment upon Community competences and hence an infringement of Article 47 EU.[20]

In the other two cases brought by the Commission it used the action for annulment in the third pillar (Article 35(6) EU) which – after the entry into force of the Amsterdam Treaty – gives a similar right of appeal to the Commission (and to the member states) so that it was no longer necessary for the Commission to use the action of Article 230 EC. However, to the European Parliament and to private individuals the finding in *Airport Transit Visa* remains of great importance since they do not have standing under Article 35(6) EU but only under Article 230 EC.[21]

3.2 *Plea of illegality*

In the *ECOWAS* case, the Council and two member states (Spain, UK) also contested the Court's jurisdiction to rule on the validity of the underlying joint action of the Council, using the *plea of illegality* (Article 241 EC) as the procedural vehicle. The Court however rejected this and ruled that it does have jurisdiction to consider, in the context of an action for annulment against the implementing Council decision, the plea of illegality invoked against the underlying basic decision, provided that the party invoking the exception of illegality alleges an infringement of Article 47 EU. I.e., the appellant must argue that the basic act should have been based on the EC pillar and not on the second (or, in my view, the third) pillar; otherwise the Court does not have jurisdiction.[22]

Although under this condition the Court considers that it has competence to review the lawfulness of the basic act, it did not actually decide whether or not the Council's joint action was illegal and could therefore not be applied in this case. The reason was that, in the end, it annulled the implementing Council decision because of its own defects (a wrong legal basis).[23] But if the Court had had to rule on the legality of the joint action, I think it would have ruled that it should have been based on the EC Treaty, just like the implementing decision. The reason is that the two acts resemble one another very much: the joint action is about com-

[20] Case C-170/96, paras. 12-18, *see also* section 2.1 *supra*.

[21] Although with many restrictions for individuals in the well-known para. 4 of this provision (ex Art. 173 E(E)C). Cf., e.g., A. Albors-Llorens, *Private parties in European Community law: challenging Community measures* (Oxford, Clarendon Press 1996), 245 p.; A. Arnull, 'Private Applicants and the Action for Annulment under Article 173 of the EC Treaty', *CML Rev.* (1995), p. 7-49; N. Neuwahl, 'Article 173 Paragraph 4 EC: Past, Present and Possible Future', *EL Rev.* (1996), p. 17; K. Lenaerts, 'The Rule of Law and the Coherence of the Judicial System of the European Union', *CML Rev.* (2007), p. 1625-1659.

[22] ECOWAS, para. 34.

[23] *See* further sections 4.2.2, 5.1 and 6 *infra*, and ECOWAS, para. 111.

bating the destabilising accumulation and spread of small arms and light weapons in general, i.e., in all third countries, whereas the more specific implementing decision was intended to combat the accumulation and spread of small arms and light weapons in West Africa.

Remarkably, the Court did not pay any attention in its judgment to another argument put forward by the Council and the same two member states: since the Commission is a so-called privileged applicant, it could have asked for the annulment of the basic act (the Council's joint action) directly under Article 230 EC, within a period of two months, and on the ground that the joint action should have been based on the EC Treaty. Since the Commission did not do so, its plea that the underlying joint action was illegal, only raised later in the context of the action for annulment of the implementing Council decision, should be declared inadmissible by the Court.[24]

Although in my view this certainly is a strong argument to decline jurisdiction, the more so since private individuals do not have a comparable opportunity at decentralised level,[25] the counter-arguments are more convincing: the text of Article 241 EC uses the term 'any party' (thus including privileged applicants like the Commission and the member states) and furthermore the illegality of basic acts may only became apparent once they have been implemented in a concrete way by the Commission or the Council at level three.[26] But, as indicated, we still do not have a clear, authoritative ruling of the Court on this point.

3.3 *Preliminary references*

Apart from the direct action for the annulment of Community decisions, possibly coupled with the plea of illegality, the question of the validity/lawfulness of second and third pillar acts may also reach the Court by way of a *preliminary question* from a national court (Article 234 EC). Given the outcome in the direct actions with regard to the Court's jurisdiction (discussed above), and the fact that preliminary questions on the validity of secondary Community law serve the same purpose

[24] ECOWAS, para. 54.

[25] Case 188/92 *TWD* [1994] I-833, para. 17.

[26] This seems to be the view of the academic majority. *See*, e.g., A. Barav, 'The Exception of Illegality in Community Law: A critical Analysis', *CML Rev.* (1974), p. 366; D. Sinaniotis, 'The Plea of Illegality in EC Law', *EPL* (2001), p. 103; D. Boutet, 'Quelques problèmes concernant les effets de l'exception d'illégalité', *Revue du droit public* (1990), p. 1735; W. Barfuss & D. Czernich, 'Nichtigkeitseinrede von Mitgliedstaaten gegen Richtlinien analog Art. 184 EGV?', *EuZW* (1996), p. 621; T. van Rijn, *Exceptie van onwettigheid en prejudiciële procedure inzake geldigheid van gemeenschapshandelingen*, (Deventer, Kluwer 1978); EM no. 26.; M. Vogt, 'Indirect Judicial Protection in EC Law – The Case of the Plea of Illegality', *EL Rev.* (2006), p. 364-377.

as the action for annulment (and the plea of illegality),[27] it is clear in my view that national courts may, or even must,[28] ask for a preliminary ruling on the validity of second- and third-pillar acts, at least if the national judge questions whether the EC Treaty should have been used as the legal base for the second- or third-pillar act concerned.

The fact that in this situation the Court does have jurisdiction (under Article 234 EC) is important to all national judges of all twenty-seven member states in case one of them entertains serious doubts as to the validity of *CFSP* acts (since normally not one of them is entitled nor obliged to ask for a preliminary ruling on the interpretation or validity of second pillar measures). With respect to *PJCC* measures, notably framework decisions, the finding that the Court has jurisdiction, under Article 234 EC, to rule on the question 'pillar 3 or pillar 1?' is particularly important to the judges of the (currently) ten member states that have *not* accepted the Court's jurisdiction to give preliminary rulings under Article 35 EU (the optional preliminary reference procedure of the third pillar).[29]

3.4 *The Court's jurisdiction after Lisbon*

The Treaty of Lisbon will codify the Court's finding in ECOWAS with respect to its jurisdiction. According to Article 275 of the Treaty on the Functioning of the European Union (TFEU) 'the Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions.' However, according to the same provision 'the Court shall have jurisdiction to monitor compliance with Article 40 TEU',[30] the latter provision stating that the implementation of the CFSP shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the TFEU. Those

[27] *See*, in particular, Case C-50/00P, *UPA* v. *Council* [2002] *ECR* I-6677, para. 40. *See also* J. Usher, 'The Interrelationship of Articles 173, 177 and 184 EEC', *EL Rev.* (1979), p. 36; C. Martinez Capdevila, 'The Action for Annulment, the Preliminary Reference on Validity and the Plea of Illegality: Complementary or Alternative Means?', *Yearbook of European law* (2006), p. 451-474.

[28] Cf., Case 314/85 *Foto-Frost* [1987] *ECR* 4199.

[29] *See* the 'Council Information' on the Court's jurisdiction under Art. 35 EU, *OJ* 2008, L 70/23 and C 69/1. National courts of member states that *have* accepted the Court's jurisdiction can question the validity of framework decisions, decisions and measures implementing conventions *on all grounds* (Art. 35(1) EU). *See*, e.g., Case C-303/05 *Advocaten voor de Wereld* [2007] *ECR* I-3633.

[30] And to rule on proceedings reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title v. of the new Treaty on European Union (TEU). Cf., the well-known *Yusuf/Kadi* case-law, *see*, e.g., P. Eeckhout, 'Community Terrorism Listings, Fundamental Rights, and UN Security Council Resolutions. In Search of the Right Fit', *EUConst* (2007/3), p. 183.

articles concern the three categories of Union competences: exclusive, shared and complementary competences.[31] It thus seems that Article 40 TEU (new) performs the same function as the current Article 47 EU, as the latter was interpreted by the Court, i.e., conferring on the Court jurisdiction to review whether a secondary act was correctly placed on the CFSP side of the border or that it should have been located on TFEU territory.

Here the attention should be drawn to an important novelty in that same new Article 40 TEU: not only should implementation of the CFSP respect Union powers laid down in the TFEU, but also – conversely – the implementation of TFEU policies should respect CFSP powers. The second paragraph of new Article 40 TEU reads:

> Similarly, the implementation of the policies listed in those Articles [3-6 TFEU] shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under this Chapter [on CFSP].

This part of (new) Article 40 TEU, in conjunction with Article 275 TFEU, makes it very clear that the Court also has jurisdiction if the appellant argues that a CFSP base should have been used and not a legal basis in the TFEU. At present, one could have more doubts as to whether the Court has jurisdiction in this situation, since Article 47 EU gives preference to Community powers over Union powers such that it is much more a 'one-way-traffic' provision, into the direction of the first pillar, than the new Article 40 TEU will be. Nevertheless, the *PNR* case clearly illustrates that the Court already enjoys such jurisdiction prior to Lisbon.

As for the demarcation of the first and the (what is now) *third* pillar, a dividing line provision like current Article 47 EU or new Article 40 TEU is not necessary since the current EC Treaty and the current EU Treaty on PJCC (Title VI EU) will merge and become the TFEU. As a result, the Court will acquire *full* jurisdiction on police and justice co-operation.[32]

[31] Cf., R.H. van Ooik, 'The European Court of Justice and the Division of Competence in the European Union', in D. Obradovic and N. Lavranos (eds.), *Interface between EU Law and National Law*, ELP (2007), p. 11-40.

[32] To be more precise, the current provisions on PJCC will become part of the Union's policy with respect to the area of freedom, security and justice (AFSJ), subparts 'Judicial Cooperation in Criminal Matters' and 'Police Cooperation'. *See* Part 3, Title V, chapters 4 and 5 of the TFEU. Cf., C. Ladenburger, 'Police and Criminal Law in the Treaty of Lisbon. A New Dimension for the Community Method', *EUConst* (2008/1), p. 20.

4. Choice of legal basis in cross-pillar situations

The Court uses its ordinary legal basis method, which was developed in its case-law on purely *intra Community* competence disputes, in order to determine whether or not the ECOWAS decision was correctly based on CFSP provisions.[33] Since the Court had already done the same in another cross-pillar case, *Environmental Criminal Law*,[34] this does not come as a surprise.

4.1 *Objective legal basis test*

The legal basis of Community decisions, and now also of Union decisions, should be determined in an *objective* manner, meaning that a thorough analysis of the contested act is required in order to determine its main purpose(s) and main content (or main 'component'/'components').[35] After the quest for the decision's – as it is also often called – *centre of gravity*, the latter must be placed under the scope of competences of one or more legal bases. This second step requires an interpretation of the Treaty provisions that are presented by the parties as the most appropriate legal basis.

Three outcomes of the test are possible. First, the decision's centre of gravity falls under the scope of competences of legal basis A, which then has to be chosen as the single legal base, even if certain less important parts or objectives of the measure involved, the 'incidental' ones, fall or seem to fall under the scope of another legal basis (B). Second, the centre of gravity may (be considered to) fall under legal basis B, in which case adding legal basis A is not necessary in order to cover only the ancillary parts of the secondary measure in question. In the words of the Court:

> If examination of a measure reveals that it pursues a twofold aim or that it has a twofold component and if one of those is identifiable as the main one, whereas the other is merely incidental, the measure must be based on a single legal basis, namely that required by the main aim or component.[36]

[33] ECOWAS, in particular paras. 60, 73 and 75.

[34] Case C-176/03, para. 45.

[35] *See*, in particular, Case C-300/89 *Commission* v. *Council* [1991] *ECR* I-2867 ('Titanium Dioxide'), para. 10: 'The choice of the legal basis for a measure may not depend simply on an institution's conviction as to the objective pursued but must be based on objective factors which are amenable to judicial review. Those factors include in particular the aim and content of the measure'. *See* on this, e.g., H. Cullen, & A. Charlesworth, 'Diplomacy by other means: the use of legal basis litigation as a political strategy by the European Parliament and Member States', *CML Rev.* (1999), p. 1244; N. Emiliou, 'Opening Pandora's Box: the Legal Basis of Community Measures before the Court of Justice', *EL Rev.* (1994), p. 488-507; S. Breier, 'Der Streit um die richtige Rechtsgrundlage in der Rechtsprechung des Europäischen Gerichtshofes', *EuR* (1995), p. 46.

[36] Para. 73 of the *ECOWAS* judgment, referring to Case C-211/01 *Commission* v. *Council* [2003] *ECR* I-8913, para. 39 ('Transport agreements Bulgaria and Hungary'); Case C-338/01 *Commission* v.

Third, in a few cases the pair of scales will remain in balance after putting the two components on it: the analysis at secondary level reveals that the contested act pursues two equally important aims and/or has two equally 'heavy' components, falling under two different Treaty bases, so that a *dual* legal basis (A and B) is required:

> With regard to a measure which simultaneously pursues a number of objectives or which has several components, without one being incidental to the other, the Court has held, where various legal bases of the EC Treaty are therefore applicable, that such a measure will have to be founded, exceptionally, on the various corresponding legal bases.[37]

In case of the third outcome, the Court has however made an important exception in the *Titanium Dioxide* case: legal basis A and legal basis B cannot be used together if they contain *incompatible decision-making procedures*, which is in any event the case when the first one declares the co-operation or the co-decision procedure applicable, whereas the second legal basis requires unanimous voting in the Council.[38] It is quite remarkable that the Court does not mention this exception in the *ECOWAS* case, not only because it usually does[39] but also because in the *ECOWAS* case itself the Court later finds a, more or less, similar incompatibility between the CSFP and the EC legal base.[40]

4.2 *Application of the test in ECOWAS*

Although the legal basis test as such is quite clear and logical, it *application* to a concrete decision certainly is not. Different stakeholders usually arrive at very different conclusions as to the 'most appropriate' legal basis. The *ECOWAS* case is certainly no exception: the Commission and the European Parliament, the Council and the member states, and also the Court itself took very different views as to the correct legal basis for the ECOWAS decision of the Council.

Council [2004] *ECR* I-4829, para. 55 ('Recovery of claims'); and Case C-94/03 *Commission* v. *Council* [2006] *ECR* I-1, para. 35 ('Rotterdam Convention').

[37] Cf., Case C-211/01, para. 40 ('Transport agreements Bulgaria and Hungary') and Case C-94/03, para. 36 ('Rotterdam Convention'), referred to in para. 75 of the *ECOWAS* judgment.

[38] Case C-300/89, paras. 17-20.

[39] *See*, e.g., Case C-338/01 *Commission* v. *Council* [2004] *ECR* I-4829 ('Recovery of claims'), para. 57: 'However, no dual legal basis is possible where the procedures laid down for each legal basis are incompatible with each other'.

[40] Further discussed in section 5.2, *infra*.

4.2.1 Opinions of the applicant, defendant, intervening parties and the Advocate-General

The Commission and the European Parliament argued in favour of a *Community* legal basis. Summarised, they argued that although the contested act may have certain side-effects on international peace and security, its main purpose is to contribute to social economic development in certain third world countries. For this, a peaceful situation, political stability and democratic legitimacy are absolute prerequisites. Hence, only Article 179 EC on development co-operation policy should have been used.[41]

The Council and the six intervening member states went in an entirely different direction, arguing that the EU's financial assistance in the fight against the spread of small arms and light weapons in West Africa was mainly intended to contribute to guaranteeing peace and security in this region, and only incidentally, in a more indirect manner, to contribute to the social economic development of the ECOWAS states, so that the CFSP legal basis was correctly used.[42]

This was also the opinion of Advocate-General Mengozzi who, after carefully analysing the Council decision's aims and content, concluded that

> the contested decision does not fall within the scope of development cooperation but pursues, at least principally, the objectives set out in Article 11(1) EU, in particular those of preserving peace and strengthening international security, objectives which, as the Commission concedes, do not correspond to any of the aims assigned to the Community.[43]

Personally I agree with the opinions of the Council, the member states and the Advocate-General. To put it more bluntly than they did: a financial contribution of the Union to ECOWAS in order to help this organisation to set up an internal bureau whose task it is to combat the further accumulation and spread of small arms and light weapons in West Africa,[44] directly contributes, or at least could directly contribute, to less people getting killed as a result of gunfight, and could only indirectly and in the much longer run stimulate the social economic development of that region. Hence, although there certainly is a link with development co-operation, I feel that the implementing decision's centre of gravity falls under the Union's foreign policy, more specifically its policy to contribute to bringing peace, security and political stability in developing countries.

[41] ECOWAS, paras. 35-40.
[42] ECOWAS, paras. 42-55.
[43] Opinion of AG Mengozzi of 19 Sept. 2007, point 213.
[44] Cf., Art. 4 of the ECOWAS decision.

4.2.2 Judgment of the Court

Be that as it may, what really counts is, of course, the opinion of the Court of Justice. In fact, it could *not make a choice* between the completely diverging views of the Commission and the European Parliament on the one hand, and that of the Council, the supporting member states and the Advocate-General on the other.

In the end it concludes, again after analysing the aims and content of that very same contested decision, that it deals with both development co-operation policy and foreign affairs policy in an *equally important* manner:

> It follows from the foregoing that, taking account of its aim and its content, the contested decision contains two components, neither of which can be considered to be incidental to the other, one falling within Community development cooperation policy and the other within the CFSP.[45]

With respect to the interpretation of the legal basis involved (Article 179 EC and Article 14 EU), and thus the demarcation of Community and Union competences, the Court made some general, important, remarks. The UK Government argued that Article 47 EU can only be infringed if two conditions are met: (1) the Community must be competent to adopt the contested decision, and (2) the measure must encroach on Community competences which is only the case if the Union decision prevents or limits the exercise of that Community competence, thus creating a pre-emptive effect on Community competence. Well, such a pre-emptive effect is never possible in areas of *concurrent* (or: shared) competences, such as development co-operation.[46]

The Court however ruled that an infringement of Article 47 EU arises from the fact that a measure having legal effects adopted by the Union on the basis of the EU Treaty could have been adopted by the Community. This question – whether a measure adopted by the Union falls within the competence of the Community – relates to the *attribution* and, thus, the very *existence* of that competence, and not to its exclusive or shared nature.[47] I would add that the question whether a Community competence is exclusive or shared in nature relates to the *exercise*, the *use*, of that competence: is it the Community alone which may act, or are both the Community and the member states entitled to act? This question only arises once it has already been established *that* the Community is competent to act, in other words that a proper legal basis for Community action exists. It is therefore not

[45] ECOWAS, para. 108. For the (extensive) analysis of the aims of the ECOWAS decision, *see* paras. 79-99 and for the (equally extensive) analysis of its content, *see* paras. 100-107.

[46] ECOWAS, para. 44.

[47] ECOWAS, para. 62, referring to Case C-459/03 *Commission* v. *Ireland* [2006] *ECR* I-4635, para. 93 (the '*MOX plant* case').

relevant, as the Court correctly points out, whether in an area of shared competences – such as development co-operation – the member states are precluded or not from exercising, individually or collectively, their competences.[48]

The Court thus essentially rules that Community and Union competences stand next to each other, in a *horizontal* way, and are separated by a 'fixed boundary'.[49] Hence, the EC and the CFSP form two separate spheres of competence, under which the centre of gravity of secondary legislation must be placed. In case of the first and the third of the three possible outcomes of the legal basis test (discussed earlier), the Union indeed 'affects' Community powers within the meaning of Article 47 EU. That is, when the centre of gravity of a Union decision (CFSP or PJCC), according to the Court, falls under the scope of a single Community legal basis; and also when that decision had two centres of gravity, one falling under the Community pillar and the other under one of the Union pillars.[50] In case of the second possible outcome – having regard to its aims and content, the contested act is primarily concerned with CFSP (or PJCC) matters – there is no encroachment upon Community competences and hence no infringement of Article 47 EU.

The attempt of the United Kingdom to introduce, through the second condition mentioned above, a kind of *ERTA* reasoning fails; that case-law relates to the *vertical* division of external powers (between the EC and the member states) and tells us that the more the Community exercises its internal competences, the more the Community's external powers will become exclusive because the internal EC measures will often be 'affected' by external actions of the member states.[51] The *horizontal* variant of the ERTA doctrine would then mean that only if the Community has already exercised its competences, and only if the resulting Community decisions could be affected by actions of the member states under the CFSP pillar, they must resort to the Community pillar. The line between EC and CFSP territory would then become a *moving boundary*, the EC occupying more

[48] ECOWAS, para. 61, referring to Joined Cases C-181/91 and C-248/91 *Parliament* v. *Council and Commission* [1993] *ECR* I-3685, para. 16 ('Emergency aid Bangladesh') and Case C-316/91 *Parliament* v. *Council* [1994] *ECR* I-625, para. 26 ('Lomé Convention').

[49] The term used by the Council, *see* ECOWAS, para. 43.

[50] As we will discover in section 5, *infra*.

[51] Case 22/70 *Commission* v. *Council* [1971] *ECR* 263. Cf., e.g., S. Stadlmeier, 'Die 'Implied Powers' der Europäischen Gemeinschaften', *Austr. JIL* (1998), p. 353; M. Cremona, 'External Relations and External Competence: the Emergence of an Integrated Policy', in P. Craig and G. de Búrca, *The Evolution of EU Law* (Oxford, Oxford University Press 1998), p. 137-175; K. Lenaerts and E. de Smijter, 'The European Community's Treaty-Making Competence', *Yearbook of European Law* (1996), p. 1-58; P.J. Kuijper, *Of 'Mixity' and 'Double-Hatting': external relations of the European Union explained*, 2008 (inaugural address). An interesting illustration of the far-reaching consequences of the ERTA doctrine can be found in Opinion 1/03 [2006] *ECR* I-1145 ('Lugano Convention').

and more CFSP land with the growth of internal Community legislation. But, as stated above, this moving boundary theory is rejected by the Court; it essentially opts for the fixed boundary theory.

5. Simultaneous use of Community and Union competences?

Having regard to the final conclusion of the Court in ECOWAS – the contested decision contains two components, neither of which can be considered to be incidental to the other, one falling within the Community's development co-operation policy and the other within the CFSP – and in accordance with the general legal basis method (described above), a *dual* legal basis should have been used, i.e., both Article 179 EC on development co-operation policy and Article 14 EU on the CFSP.

However – and now we arrive at the most interesting part of the judgment – such a solution is not possible in the view of the Court:

> However, under Article 47 EU, such a solution is impossible with regard to a measure which pursues a number of objectives or which has several components falling, respectively, within development cooperation policy, as conferred by the EC Treaty on the Community, and within the CFSP, and where neither one of those components is incidental to the other.[52]

5.1 *Splitting up to avoid an impossible dual legal basis?*

First one wonders why the Court, at this point, did not simply rule that the ECOWAS decision had to be spit up into two parts, a CFSP part and an EC part, so that the difficult question as to the acceptability of a dual legal basis (EC and CFSP) could have been avoided. Probably it did not consider this an option because the aims of the decision were regarded as being *inextricably connected* and could not be separated. Indeed, one and the same instrument (the EU's financial contribution to ECOWAS) served two purposes at the same time (development co-operation policy and international peace and security). A *partial* annulment of the ECOWAS decision was therefore out of the question.

But it remains unclear to me why the Court did not say this explicitly, as it had done in, e.g., the *Titanium Dioxide* case.[53] More recently, in *Ship-Source Pollution*, the Court ruled that the provisions of the contested framework decision relating to the type and level of criminal sanctions (which fell under the PJCC pillar) were

[52] ECOWAS, para. 76.

[53] Case C-300/89, para. 13: 'It follows that, according to its aim and content, as they appear from its actual wording, the [titanium dioxide] directive is concerned, *indissociably*, with both the protection of the environment and the elimination of disparities in conditions of competition'.

'inextricably linked to the provisions concerning the criminal offences to which they relate', so that the framework decision had to be annulled in its entirety.[54] In the *Tobacco Advertising* case, as well, a partial annulment was considered to be impossible since this would fundamentally alter the main purpose of the contested directive, namely the introduction of a *complete* ban on tobacco advertisements.[55]

If the contested decision *can* be split without much difficulty – in case a dual legal basis is necessary because of its substance, but where this is not possible for reason of incompatible procedures or incompatible legal orders (*see infra*) – the Court, in my view, must opt for partial annulment. Subsequently, the political institutions will have to adopt an EC decision as well as a CFSP or PJCC act. In the *ECOWAS* case, if splitting would have been possible, this would be a Regulation of the Commission under (indirectly) Article 179 EC and a *sui generis* decision (or possibly a joint action) of the Council under (indirectly) Article 14 EU.

5.2 *Incompatible legal sub-orders*

If splitting up is impossible, I agree with the finding of the Court in the *ECOWAS* case that the first and the second pillar cannot be used simultaneously, even if the substance of the secondary act requires recourse to both pillars.[56] However, it is regrettable that the Court does not explain – apart from briefly referring to Article 47 EU – *why* both pillars cannot be used simultaneously. It could be that the ECJ did not consider it possible to combine the co-decision procedure (under Article 179 EC) with unanimous voting in the Council (required by Article 23 EU on the CFSP). But since it did not refer to the *Titanium Dioxide* exception at all,[57] this is unlikely. Moreover, since under the EC Treaty it would probably be the *Commission* that were to take the implementing ECOWAS decision,[58] whereas under the

[54] Case C-440/05, paras. 72-74.

[55] Case C-376/98 *Germany* v. *European Parliament* and *Council* [2000] *ECR* I-8419, para. 117: 'A directive prohibiting certain forms of advertising and sponsorship of tobacco products could have been adopted on the basis of Art. 100a of the Treaty [now Art. 95 EC]. However, given the general nature of the prohibition of advertising and sponsorship of tobacco products laid down by the Directive, partial annulment of the Directive would entail amendment by the Court of provisions of the Directive. Such amendments are a matter for the Community legislature. It is not therefore possible for the Court to annul the Directive partially'.

[56] *See* already R.H. van Ooik, *De keuze der rechtsgrondslag voor besluiten van de Europese Unie* (The Hague, Kluwer (1999), p. 401-404 (diss.). *See also* C.W.A. Timmermans, 'The Uneasy Relationship between the Communities and the Second Union Pillar: Back to the 'Plan Fouchet'?, *Legal Issues of European Integration* (1996), p. 61-70. For a different view, *see* R.A. Wessel, *The European Union's Foreign and Security Policy* (The Hague, Kluwer 1999), p. 302 (diss.).

[57] *See* section 4.1, *supra*.

[58] *See* Art. 202 EC, which however includes the possibility that the Council, in exceptional cases, confers implementing powers on itself. Cf., recently, Case C-133/06 *European Parliament* v. *Council*, judgment of 6 May 2008 ('Refugee Status Directive').

CFSP pillar the *Council* enjoys this competence, the Court could have considered the dual legal basis impossible for this reason. But no mention of this is made in the *ECOWAS* judgment. It could also be that the legal instruments of the first and second pillar do not match in this case: probably a Regulation of the Commission under Article 179 EC (although indirectly) versus a *sui generis* act, or perhaps a joint action, under Article 14 EU. But, again, no mention of incompatible legal instruments is made at all.

Therefore, it seems to me that the Court rejects a dual legal basis on much more *fundamental* grounds: from the – albeit brief – reference to Article 47 EU, it can be inferred that the Court sees the Communities and the Union as two intertwined but still *separate* legal orders standing next to each other. Both have their own special characteristics and therefore using the two legal orders as the competence base for one and the same secondary act would amount to unacceptably mixing those two closely connected but still discernable legal orders.

As to those diverging general characteristics of the Community legal order on the one hand, and those of the CFSP on the other, the following must be mentioned in particular. First, the well-known 'new' and 'autonomous' Community legal order of *Van Gend & Loos* and *Costa* v. *ENEL* is supreme to, and directly applicable and enforceable in, the legal order of the EU member states.[59] The Court has left open until now whether the CFSP legal order forms a comparable 'special' legal order in public international law, but such a finding seems unlikely.[60]

Second, the set of legal instruments of the first pillar (regulation, directive, individual decision) is clearly different from that of the second pillar (common strategy, common position, joint action). Because of these differences regarding the available legal instruments, a choice between the two pillars must be made. Even if the choice of the legal instrument would not pose a problem in a specific case, for example by adopting an 'EC/CFSP *sui generis* act', which is a legal instrument that is available under both pillars.

Decision-making under the Community and the CFSP pillar can also be mentioned: in general these procedures are very different, i.e., often co-decision under the EC Treaty versus unanimous voting in the Council and hardly any role for the European Parliament in the area of the CFSP. It is therefore irrelevant whether or not in a specific case the EC and CFSP legal basis contain incompatible procedures. Even if they do *not* – for example under the dual legal basis of Article 308 EC and Article 14 EU, both requiring unanimity in the Council) – such a dual legal basis is

[59] *See*, e.g., R. Barents, *The autonomy of Community law* (The Hague, Kluwer Law International 2004) (European monographs; 45); C.W.A. Timmermans, in P.J.G. Kapteyn c.s. (eds.), *The Law of the European Union and the European Communities*, (Kluwer 2008), p. 71-82.

[60] Cf., R. Gosalbo Bono, 'Some Reflections on the CFSP Legal Order', *CML Rev.* (2006), p. 337-394.

not possible on account of incompatible legal (sub-)orders within the European Union. This is an important difference with *intra*-Community combinations of legal bases: only in case of *in*compatible procedures is there a problem, otherwise accumulation of legal bases is possible.[61]

The same goes for the *jurisdiction of the Court*: under the first pillar it has full jurisdiction, under the second it has hardly any competences, so that also for that reason a combined use of an EC and a CSFP legal basis is on principle out of the question.

Maybe each one of these diverging characteristics, viewed in isolation, is not enough to exclude the possibility of a dual EC/CFSP legal basis, but it is the *sum* of all the differences which makes it impossible to use the first and the second pillar simultaneously.

5.3 *Other combinations*

Undoubtedly, the same conclusion must be drawn with respect to the simultaneous use of the *first* and the *third* pillar: a legal basis in the EC Treaty and a legal basis in Title VI EU cannot be used simultaneously for the adoption of one and the same decision, even if such a dual legal basis would be required for substantive reasons (*i.e.* because of the main aims and content of that act). The reason is that Article 47 EU determines their relationship in the same manner as the relationship between the first and the second pillar. And since also the first and the third pillar still have different general characteristics, such as diverging legal instruments (regulations, directive, decision versus common position, framework decision, decision, convention), a limited role for the Court under the third pillar (Article 35 EU), differences regarding decision-making, etc., their simultaneous use is on principle impossible.

This may become very relevant in the *Data Retention Directive* case, mentioned earlier.[62] One could argue that this directive serves in an *equally important* way both the interest of the proper functioning of the internal market and combating serious crime and terrorism by means of criminal law.[63] The dual legal basis of Article 95 EC and Article 34 EU is however excluded because of the fact that the

[61] In *Titanium Dioxide,* for example, former Art. 100A EEC (internal market) and former Art. 130S EEC (environmental protection) could not be used together since co-operation with the EP (under Art. 100A EEC) does not go together with unanimous voting in the Council (required by Art. 130S EEC). On the other hand, in *BATCO/Imperial Tobacco*, for example, the combined use of Arts. 95 and 133 EC (both providing for QMV) was accepted by the Court. *See* Case C-491/01 *British American Tobacco (Investments) Ltd & Imperial Tobacco Ltd* [2002] *ECR* I- 11453, para. 98.

[62] Section 2.2, *supra*.

[63] Although, as stated before (section 2.2, *supra*), I share the view of Ireland that the third pillar should have been used.

two legal sub-orders to which these legal bases belong are still too different to be used simultaneously.[64]

It is less clear from the *ECOWAS* judgment whether the *second* and the *third* pillars can be used at the same time for adopting secondary legislation falling within the sphere of both foreign policy and criminal law. The institutions have already adopted several decisions based on those two pillars, some of which were at stake before the CFI and the ECJ in the *SEGI* case, mentioned earlier.[65] None of them objected to the use of this dual legal basis; the CFI even ruled that as far as SEGI was concerned, the decision was only based on the third pillar. It therefore seems that the Courts do not have fundamental objections to the simultaneous use of the two 'intergovernmental' pillars.

True, Article 47 EU is not about the relationship between the second and the third pillar; it is not intended to protect the CFSP against the policies in the field of PJCC, or vice versa. On the other hand, also these two pillars differ from each other in many respects, such as on the points of the available legal instruments (Articles 12 and 34 EU), the jurisdiction of the Court (Articles 46 and 35 EU) and the role of the European Council (Articles 13 and 17 EU; absent in the third pillar). I am therefore inclined to reject the possibility of adopting one and the same decision on the basis of both the CFSP and the PJCC pillar.

5.4 *Dual legal bases after Lisbon*

After the Treaty of Lisbon, I think the conclusion of the Court that the (current) first and second pillar cannot be used together remains valid. The CFSP will be dealt with in the new Treaty on the European Union (TEU), whereas all other areas of Union policy (such as development co-operation) are brought together in the TFEU, the successor of the EC Treaty. The CFSP thus – deliberately – remains separated from the other policies of the Union, and it remains much more 'intergovernmental' in nature than those other policies, so that, in my view, a dual legal basis (Title V, Chapter 2, TEU and one of the TFEU legal bases) is still not possible.

The same goes for the simultaneous use of what is now the second and the third pillar. Such a dual legal basis will *no longer* be possible[66] as a result of the incorporation of the current third pillar into the TFEU – then part of the Union's policy on the Area of Freedom, Security and Justice.[67] Hence, decisions like the one at stake in *SEGI* cannot be adopted after Lisbon, due to the fact that the CFSP and the AFSJ constitute separate legal orders.

[64] Which implies that subsequently a choice between the two has to be made, or that the directive, if possible, has to be split into two parts. *See* further section 5.1 and the next section 6.

[65] Section 2.1, *supra*.

[66] Assuming that at present such a combination is possible, cf., the previous section 5.3.

[67] *See* Part 3, Title V, Chapters 4 and 5, TFEU.

On the other hand, where at present it is not possible to base a secondary act on both the first and the third pillar, after Lisbon this will become possible as a result of the above-mentioned incorporation of criminal law into the general Treaty on the functioning of the Union.[68]

6. Choice between the first and the second pillar

Given the fact that in the Court's view in *ECOWAS*, the first pillar cannot be used in combination with the second pillar, even though the contested decision had two equally important objectives/components, it felt that it had to make a *choice between* the two pillars. In this regard the crucial observation of the Court is that

> since Article 47 EU precludes the Union from adopting, on the basis of the EU Treaty, a measure which could properly be adopted on the basis of the EC Treaty, the Union cannot have recourse to a legal basis falling within the CFSP in order to adopt provisions which also fall within a competence conferred by the EC Treaty on the Community.[69]

Here it seems to me that the Court is trying to find only *one* centre of gravity for the ECOWAS decision, one which falls under a single EC Treaty legal basis (Article 179 EC on development co-operation). However, this is not the question once it has already been established that the contested act pursues *two* equally important purposes, one falling under the CFSP, the other falling under the EC Treaty. In such a situation it is *by definition* impossible to find logical arguments for, nevertheless, arriving at only one centre of gravity and hence a single legal basis; that stage has already been passed.

In my view it is therefore better to acknowledge that a logical choice is *per se* impossible but that because of the more general, underlying idea of Article 47 EU, which is the protection of the *acquis communautaire* against the 'intergovernmental' influences of the second and third pillar, the EC legal basis should be preferred over the CFSP legal base. Hence, if the substantive analysis of the aims and content of the contested decision reveals that, in principle, two legal bases should be used, but where this is impossible because those legal bases belong to different parts of the EU Treaty, while the decision cannot be split into two parts, the EC Treaty basis must be used and not the CFSP legal base. [70]

[68] Of course, unless *Titanimum Dioxide* incompatibilities arise (*see* section 4.1, *supra*). This may occur if the AFSJ legal basis requires unanimous voting in the Council, whereas the other TFEU legal basis refers to the ordinary legislative procedure (including QMV in the Council).

[69] ECOWAS, para. 77.

[70] With respect to dual *EC* legal bases which contain incompatible decision-making procedures, I have argued in a similar way, while admitting that a logical choice is impossible, that preference should be given to the most 'EP friendly' EC legal base. *See* Van Ooik, *supra* n. 56, p. 241.

The same conclusion must be drawn with respect to decisions which, because of their aims and content, should be based on both the first and the *third* pillar. If a choice has to be made, because the decision's aims (and content) are inextricably linked, it follows from Article 47 EU that only the EC legal basis should be used. In the *Data Retention Directive* case, this means that Article 95 EC was used properly and that Ireland is still about to lose the case.

7. Concluding remarks

Although it is often said that in the last couple of years the pillars of the Union have 'grown towards each other'[71] – whatever that may mean – it is clear that the *ECOWAS* judgment does not fit this trend. The Court rejects simultaneous recourse to Community and Union competences, even if the aims and content of the contested decision so require. Subsequently a choice has to be made, which, due to Article 47 EU, is by definition to the benefit of the Community.

One wonders why the Court chose to do it the hard way by opting for the dual EC/CFSP legal basis. It could have simply put away the incompatibility problem by tipping the balance and relegating the whole act to either the EC or the EU side – no commentator would have objected to either one of these 'easy' solutions. One might venture that the Court, nevertheless, chose to take the hard way of poising the two elements in the act, in order to be forced better to pronounce on the fundamental nature of co-operation in the field of the CFSP. This involved, in particular, taking a position against the claim of certain member states that outside of the EC, the Union is essentially a playground for them. Under its approach, the Court could make it clear that CFSP co-operation is not purely 'intergovernmental' in nature and that if member states want to be free from any Union constraints, they should act entirely outside the framework of the Union, i.e., in the – ever shrinking – area of truly reserved national powers.

The Commission thus wins the case on both the fundamental constitutional point (demarcation of first- and second-pillar competences) and on the more direct practical point (annulment of the ECOWAS decision which now can be turned into an implementing Commission decision ex Article 179 EC); and a disappointment for member states that had argued on principle that 'CFSP matters do not belong before the Court'.

[71] *See*, e.g., R.A. Wessel, 'The Constitutional Unity of the European Union: The Increasing Irrelevance of the Pillar Structure?', in Ph. Kiiver, L. Verhey and J. Wouters (eds.), *European Constitutionalism beyond the EU Constitution* (Antwerp, Intersentia 2008).