

THE CONTRIBUTIONS OF THE COURT OF JUSTICE OF THE EUROPEAN UNION TO JUDICIAL COOPERATION IN CRIMINAL MATTERS WITH A SPECIFIC FOCUS ON THE PROTECTION OF FUNDAMENTAL RIGHTS*

İlke GÖÇMEN*

Abstract

The Court of Justice of the European Union (“CJEU”) is one of the main actors contributing to the development of the “Area of Freedom, Security and Justice” (“AFSJ”) in general and “Judicial Cooperation in Criminal Matters” (“JCCM”) in particular. This contribution should be expected to increase in the coming years, because the CJEU has full jurisdiction over JCCM, since the entry into force of the Treaty of Lisbon (“ToL”), albeit subject to some transitional provisions. Like all matters falling within the sphere of AFSJ, the matters dealt within JCCM raise frequently fundamental rights concerns, such as the right to a fair trial and legality of criminal law. The CJEU has recognized and protected these fundamental rights as general principles of European Union (“EU”) law. Besides, since the entry into force of the ToL, Charter of Fundamental Rights of the EU has the same legal value as the Founding Treaties and the EU attempts to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Against this background it is to be expected that the CJEU will contribute to the JCCM mainly on the grounds of protection of fundamental rights. This article aims to reveal the contributions of the CJEU to the development of JCCM with a specific focus on the protection of fundamental rights, by way of an analysis of the system.

Key Words: *Judicial Cooperation in Criminal Matters, Union Acts, Fundamental Rights, Court of Justice of the European Union, Treaty of Lisbon.*

* This Article is a revised version of the paper of the author which was presented to the UACES Conference: “Exchanging Ideas on Europe 2012: Old Borders–New Frontiers” held in Passau/Germany at 3-5 September 2012.

*Asist. Prof., Faculty of Law of the Ankara University, Department of EU Law, Ankara.

Özet

Avrupa Birliği Adalet Divanı ("ABAD"), genel olarak, "Özgürlük, Güvenlik ve Adalet Alanı"nın ("ÖGAA") ve özel olarak "Cezai Konularda Adli İşbirliği"nin ("CKAİ") gelişimine katkı veren aktörlerden birisidir. Bu katkı, gelecek yıllarda muhtemelen artacaktır; çünkü ABAD, Lizbon Antlaşması'nın yürürlüğe girmesi ile birlikte, kimi geçiş hükümlerine tâbi olmakla birlikte, CKAİ yönünden tam yetkiye kavuşmuştur. CKAİ içerisindeki konular, ÖGAA içerisindeki tüm diğer konular gibi, adil yargılanma hakkı ve ceza hukukundaki kanunilik gibi temel haklara yönelik endişelere sıklıkla yol açmaktadır. ABAD, temel hakları Avrupa Birliği ("AB") hukukunun genel ilkeleri olarak tanıyıp, korumaktadır. Ayrıca, Lizbon Antlaşması'nın yürürlüğe girmesinden beri, AB Temel Haklar Şartı, kurucu antlaşmalar ile aynı hukuki değere sahiptir ve AB, Avrupa İnsan Hakları Sözleşmesi'ne katılmak için çaba harcamaktadır. Bu arka plan karşısında, ABAD'ın CKAİ yönünden esas olarak temel hakların korunması temelinde katkı sunması beklenmektedir. Bu makale, temel hakların korunması hususuna özel ilgi göstererek, ABAD'ın CKAİ'nin gelişimine yönelik katkılarını bir sistem analizi biçiminde ortaya koymayı amaçlamaktadır.

Anahtar Kelimeler: Cezai Konularda Adli İşbirliği, Birlik Tasarrufları, Temel Haklar, Avrupa Birliği Adalet Divanı, Lizbon Antlaşması

Introduction

The Court of Justice of the European Union ("CJEU") contributes to the development of European Union ("EU") law when it ensures that "the law is observed" in the interpretation and application of forms of Union law through the actions reserved for its jurisdiction.¹ In this respect, the CJEU has contributed to the development of the "Area of Freedom, Security and Justice" ("AFSJ") in general and "Judicial Cooperation in Criminal Matters" ("JCCM") in particular, despite its limited jurisdiction in relation to these areas. Nonetheless, this contribution should be expected to increase in the coming years, because the CJEU has full jurisdiction over the JCCM, since the entry into force of the Treaty of Lisbon ("ToL"), albeit subject to some transitional provisions.

It is expected that the CJEU's contribution will be mainly on the grounds of the protection of fundamental rights, since like all matters falling within the sphere of AFSJ, the matters dealt within JCCM raise frequently fundamental rights concerns, such as the right to a fair trial and legality of criminal law. The CJEU has recognized and protected these fundamental rights as general principles of EU law. Besides, since the entry into force of the ToL, Charter of Fundamental Rights of the European Union ("CFR") has the same legal value as the Founding Treaties and the EU attempts to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"). Against this background it is to be expected that the

¹ Article 19 TEU as amended by ToL.

CJEU will contribute to the JCCM mainly on the grounds of protection of fundamental rights.

This article, therefore, aims to reveal the contributions of the CJEU to the development of JCCM with a specific focus on the protection of fundamental rights. In this sense, this article does not aim to analyse the legislation related to JCCM, for instance as to their conformity with fundamental rights;² rather it deals with main issues of legal principle or analysis of the “system”. Hence, this article aims to answer the question that: How will the CJEU contribute to the development of JCCM in the aftermath of ToL, especially regarding the protection of fundamental rights? In the end, the article concludes that the CJEU will contribute to JCCM mainly on the grounds of protection of fundamental rights which is much needed in an area such as JCCM that has the potential to raise frequently fundamental rights concerns.

This article will present the contributions of the CJEU to the development of JCCM in four successive steps. Firstly, JCCM will be examined briefly in institutional and substantive terms. (I) Secondly, the jurisdiction of the CJEU concerning JCCM will be considered in detail. (II) Thirdly, the Union acts related to JCCM and their effects will be scrutinized and general remarks about the contributions of the CJEU to JCCM will be illustrated. (III) Lastly, there will be a clarification about the current and potential contributions of the CJEU to JCCM on the grounds of protection of fundamental rights. (IV)

Judicial Cooperation in Criminal Matters in Brief

The evolution of the JCCM can be examined under two headings: institutional and substantive evolution.

Institutional Evolution

JCCM has been gradually and to a large extent built into the “Community method” –concerning decision-making, legal instruments and jurisdiction of the CJEU–, starting mainly from the Treaty of Maastricht (“ToM”) and ending in the ToL, via the Treaty of Amsterdam (“ToA”). The trade-off for this evolution has been an opt-out for those Member States with misgivings about applying a supranational institutional framework to this area.³ In this article, I will not deal with the special status of these States, *i.e.* United Kingdom, Ireland and Denmark, mainly for reasons of space.⁴

² For such kind of an effort, for instance, see **Conny Rijken**, “Re-Balancing Security and Justice: Protection of Fundamental Rights in Police and Judicial Cooperation in Criminal Matters”, **Common Market Law Review**, Vol: 47, 2010, p. 1455–1484.

³ Steve Peers, “EU Justice and Home Affairs Law (Non Civil)”, (Eds.) **Paul Craig, Gráinne De Búrca, The Evolution of EU Law**, 2nd Edition, Oxford University Press, United States, 2011, p. 269.

⁴ For those States (which may be from a broader perspective, namely concerning AFSJ) see **Koen Lenaerts and Piet Van Nuffel, Constitutional Law of the European Union**, 3rd Edition, Sweet & Maxwell, Great Britain, 2011, p. 342–347; Valsamis Mitsilegas, **EU Criminal Law**, Hart

The institutional evolution of the JCCM can be divided into four main stages.⁵

In the first stage, prior to 1993, Member States cooperated between themselves outside the Community framework and in an informal and intergovernmental way. An example of such cooperation is the TREVI group rooted in 1975 and its first mandate was to coordinate the actions of Member States as regards the fight against terrorism.⁶

In the second stage, 1993 to 1999, the EU was established by the ToM and a new Pillar structure was introduced: A supranational 1st Pillar concerning the Community and now formal intergovernmental 2nd and 3rd Pillars relating to Common Foreign and Security Policy (“CFSP”) and Justice and Home Affairs (“JHA”) respectively. JCCM was a part of that 3rd Pillar in which the main actor was the Council and there were no or limited role for other Community institutions. Moreover, regarding this Pillar, legal acts were not well defined (*i.e.* Joint Actions, Joint Positions, Common Positions), except (international) Conventions.

In the third stage, 1999 to 2009, ToA has brought some changes which are still significant today.⁷ Firstly, this Treaty shifted some matters from 3rd Pillar to 1st Pillar, such as migration and asylum, albeit reducing the degree of Community method applicable to them. Secondly, this Treaty reformed the 3rd Pillar to some extent which was then titled as “Police and Judicial Cooperation in Criminal Matters” (“PJCCM”). This reform added some Community elements to the 3rd Pillar, such as giving a right of initiative to the Commission, giving limited jurisdiction to the CJEU and providing two new forms of legal acts, namely Framework Decisions and Decisions. Lastly, this Treaty mentioned for the first time the “AFSJ” which brings together mainly of the 3rd Pillar matters of ToM, *i.e.* matters related to the JHA.⁸

Publishing, USA, 2009, p. 53–56; **Jean-Claude Piris, *The Lisbon Treaty: A Legal and Political Analysis***, Cambridge University Press, Cambridge, 2010, p. 192–200. Nonetheless, as a note, it should be stated that this “variable geometry” makes the adoption and implementation of acts in the AFSJ very difficult and complex. **Piris**, p. 192.

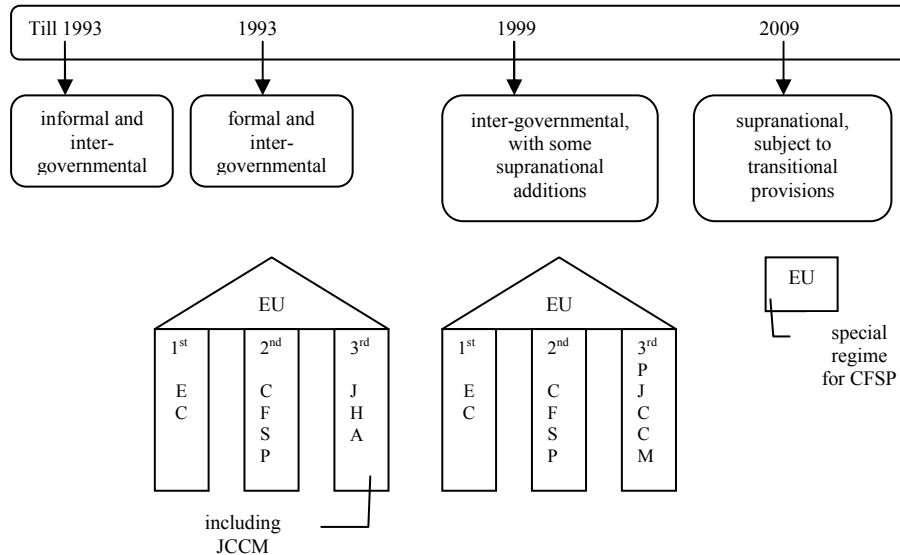
⁵ For a detailed history of evolution (which may be from a broader perspective, namely concerning AFSJ) see **Paul Craig, *The Lisbon Treaty: Law, Politics, and Treaty Reform***, Oxford University Press, United States, 2010, p. 332–347; **Mitsilegas, 2009**, p. 9–23; **PEERS, (2011)**, p. 269–279; **PIRIS**, p. 167–192; **Jo Shaw et. al., *Economic and Social Law of the European Union***, Palgrave Macmillan, Great Britain, 2007, p. 316–323.

⁶ See **Craig**, p. 332.

⁷ Between ToA and ToL, the Treaty of Nice (“ToN”) did not bring any significant changes to this area.

⁸ See **Craig**, p. 335. The label AFSJ was an attempt to provide a grand positive vision (rather like the creation of the internal market) behind various initiatives that had been developed on piecemeal and pragmatic basis. Nonetheless, the range of matter covered is not totally logical or complete. **Josephine Steiner and Lorna Woods, *EU Law***, 10th Edition, Oxford University Press, Great Britain, 2009, p. 581.

Figure 1. JCCM-Institutional Development



In the fourth stage, from 2009 onwards, EU has now been de-pillarized thanks to the ToL.⁹ As a result of this, JCCM become now a part of the Title V (AFSJ) / Part Three of the TFEU to which Community method fully applies. This means that it is the Union institutions (*i.e.* Commission, Council and Parliament) that adopt the relevant measures, mostly on the basis of ordinary legislative procedure,¹⁰ generally speaking as the form of regulations, directives and decisions, and the CJEU has full jurisdiction regarding JCCM. However, this is subject to some transitional provisions, such as limitations on the jurisdiction of the CJEU. As regards institutional terms, it is important to stress that ToL has almost put a formal end to the vulnerable setting for the protection of fundamental rights of individuals as regards JCCM.¹¹

Substantive Evolution

In substantive terms, JCCM recorded little progress until 1999; nonetheless, progress has been increased steadily from that time (or ToA) onwards. Since ToA is still

⁹ It should be borne in mind that special rules apply still to the CFSP. Article 24(1) TEU as amended by ToL.

¹⁰ For their upgraded role, see **Craig**, p. 344–346.

¹¹ See **Elsbeth Guild and Sergio Carrera**, “The European Union’s Area of Freedom, Security and Justice: Ten Years On”, (Eds.) **Elsbeth Guild et.al.**, **The Area of Freedom, Security And Justice: Ten Years on Successes and Future Challenges under the Stockholm Programme**, Centre for European Policy Studies, Brussels, 2010, p. 3–4.

relevant today; here I will deal with the period which is from 1999 on.¹² However, some preliminary remarks seem to be necessary.

These preliminary remarks are about two subjects: the role of the European Council and regulatory techniques in the JCCM. It is the European Council that programs the AFSJ in general and JCCM in particular.¹³ Till now, there are three such European Council meetings: Tampere Summit (1999), The Hague Summit (2004) and Stockholm Summit (2009). In quite simplified terms, these Summits show us that the balance between freedom and justice on the one side and security on the other side has been changing in favour of the former, with a special emphasis on fundamental rights.¹⁴ In this regard, it is interesting to note that the Stockholm Programme puts the “promotion of citizenship and fundamental rights” as a first item on the list.¹⁵

As regards regulatory techniques, they rely heavily upon the principle of mutual recognition, *i.e.* negative integration; while it is (slightly) accompanied by measures approximating the laws of the Member States, *i.e.* positive integration.¹⁶ Nevertheless, this practice has given rise to principally two interrelated problems and protection of fundamental rights lie behind both of them.¹⁷ Firstly, the question arising is that: Is the principle of mutual recognition appropriate for the JCCM? This concept is borrowed from the internal market; however, notwithstanding the criticisms to this principle in that context, can it work successfully in relation to criminal law?¹⁸ As explained by Mitsilegas, there is a different rationale between facilitating the exercise of a right to free movement of an individual and facilitating a decision that may ultimately limit this and other rights.¹⁹ Second problem, the deficiency of positive integration

¹² For pre-1999 see **Peers, (2011)**, p. 292–293.

¹³ See Article 68 TFEU, which catches up with reality.

¹⁴ In this regard, see **Guild and Carrera**, p. 4–5; **Dora Kostakopoulou**, “An open and secure Europe? Fixity and fissures in the area of freedom, security and justice after Lisbon and Stockholm”, **European Security**, Cilt: 19, No: 2, 2010, p. 159.

¹⁵ The Stockholm Programme, Brussels, 16 October 2009, point 1.1. In this regard, also see **Guild and Carrera**, p. 2. For the Programme in detail, see **Kostakopoulou**, p. 159–162.

¹⁶ Negative integration–mutual recognition–makes most of the times the positive integration – approximation of Member States’ laws– necessary. The reasons laying behind this proposition is that: In order to secure agreement on the conditions for mutual recognition, there becomes a need for harmonization of the area of the law giving rise to judgements where mutual recognition is desired, and to harmonization of procedural standards to govern the legal position when a judgement has been recognized. **Craig**, p. 373. In this regard, also see **Paul Craig and Gráinne De Búrca, EU Law: Texts, Cases and Materials**, 5th Edition, Oxford University Press, Oxford, 2011, p. 952; **Mitsilegas, 2009**, p. 101; **Steve Peers**, “Human Rights and the Third Pillar”, (Ed.) **Philip Alston, The EU and Human Rights**, Oxford University Press, United States, 1999, p. 176.

¹⁷ In addition to them, other positive integration measures, for instance the ones where EU harmonises a crime (such as organized crime) may, on its own, generate problems for human rights. In this regard, see **Steve Peers, EU Justice and Home Affairs Law**, 3rd Edition, Oxford University Press, Great Britain, 2011, p. 768.

¹⁸ In this regard, see Opinion of Advocate General Mengozzi in Case C-42/11 *Joao Pedro Lopes Da Silva Jorge*, delivered on: 20 March 2012, **nyr**, point 28.

¹⁹ Mitsilegas, 2009, p. 118.

measures, appears at this stage. In this regard, according to Peers (1999), the Council has not been very active in adopting positive integration measures, since it believed that the minimum standards were provided by international human rights obligations. Thus, the role of the human rights treaties is to serve as a type of positive legal integration justifying the negative legal integration agreed or proposed in several instruments.²⁰ However, this has raised the legitimate questions that: Were they enough and/or to what extent were they enforced?²¹ In respect of this second problem, the ToL has offered some sort of solution, *inter alia*, by giving CFR the same legal force with the Treaties and nearly full jurisdiction to the CJEU as regards JCCM. Nonetheless, it seems to be still questionable whether the EU needs more detailed rules concerning its citizens' fundamental rights, especially regarding rights of suspects.²² For now, the EU legislators have also concentrated on this side of the JCCM, by preparing and adopting piecemeal legislation in relation to rights of suspects.²³

Against this background, the substantive evolution of JCCM can be divided into two main stages. In the first stage, 1999 to 2009, JCCM rested mainly upon the principle of mutual recognition of judicial decisions and judgements²⁴ and to some extent upon approximation of substantive and procedural criminal law, and the frequently used legal instrument is the Framework Decision.²⁵ In this regard, three examples may be given:²⁶ Firstly, there is the Framework Decision on European Arrest Warrant (EAW) which is based on the principle of mutual recognition.²⁷ This measure

²⁰ Peers, 1999, p. 176.

²¹ For these and other questions, for instance see **Olivier De Schutter**, "The two Europes of Human Rights: The Emerging Division of Tasks between the Council of Europe and the European Union in Promoting Human Rights in Europe", **Columbia Journal of European Law**, Cilt: 14, 2007-2008, p. 543; **Sionaidh Douglas-Scott**, "Freedom, Security, and Justice in the European Court of Justice: The Ambiguous Nature of Judicial Review", (Eds.) **Tom Campbell, et al., The Legal Protection of Human Rights: Sceptical Essays**, Oxford University Press, 2011, p. 282–283.

²² In this regard, see **Rijken**, p. 1491. Also for instance Bazzocchi states that to enhance mutual trust within the EU, it is important to establish EU standards for the protection of procedural rights. Moreover, the strengthening of rights is seen as the essential element not only to develop confidence between national criminal authorities, but also to increase the confidence of European citizens in the EU. **Valentina Bazzocchi**, "The European Charter of Fundamental Rights and the Area of Freedom, Security and Justice", (Ed.) **Giacomo Di Federico, The EU Charter of Fundamental Rights: From Declaration to Binding Instrument**, Springer, Dordrecht, 2011, p. 186–187.

²³ See fn. 37. In this regard, also see **Council of the European Union**, "Procedural rights in criminal proceedings", 14828/09 (Presse 305), Luxembourg, 23 October 2009. <http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/jha/110740.pdf>

²⁴ Tampere European Council, 15 and 16 October 1999, Presidency Conclusions, point 33.

²⁵ The relevant legal bases are Article 29 and 31(1) of the TEU as amended by ToN. For the details about the competence with regard to JCCM see **Craig**, p. 361–363; **Mitsilegas, 2009**, p. 59–113.

²⁶ For the third wave of 3rd Pillar acts, see **Valsamis Mitsilegas**, "The Third Wave of Third Pillar Law: Which Direction for EU Criminal Justice?", **European Law Review**, Cilt: 34, No: 4, 2009, s. 523–560.

²⁷ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L 190/1.

(and the measures followed the approach of it, such as European Evidence Warrant)²⁸ sets out the principle that Member States must recognize decisions of another Member State's criminal authorities as regards surrendering (or a particular matter), subject to a limited number of grounds for refusal, detailed rules on procedures (such as time limits and standard forms), and vague provisions on human rights.²⁹ Secondly, regarding substantive criminal law, there are Framework Decisions related to so-called Euro-crimes, such as terrorism,³⁰ organised crime³¹ and racism and xenophobia,³² which set minimum standards. Thirdly, as regards procedural criminal law, there are not so many measures; but one to mention is the Framework Decision about crime victims' rights which approximates the laws of the Member States.³³

In the second stage, from 2009 onwards, JCCM continue to rest mainly upon the principle of mutual recognition of judicial decisions and judgements, together with approximation of substantive and procedural criminal law, and the regular legal instrument is the Directive.³⁴ To give some examples, firstly, there is the proposed Directive on European Investigation Order, which is based on the principle of mutual recognition and is about one or several specific investigative measure(s) with a view to gathering evidence.³⁵ Secondly, as regards substantive criminal law, some of the Framework Decisions have been amended and updated by Directives, in relation to crimes such as trafficking in human beings and sexual offences against children, which set minimum rules concerning the definition of criminal offences and sanctions.³⁶

²⁸ Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters [2008] OJ L 350/72. Some other examples are: Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders [2006] OJ L 328/59 and Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union [2008] OJ L 327/27.

²⁹ Peers, 2011, p. 293–294.

³⁰ Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism [2002] OJ L 164/3.

³¹ Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime [2008] OJ L 300/42.

³² Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law [2008] OJ L 328/55.

³³ Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings [2001] OJ L 82/1.

³⁴ The relevant legal bases are Article 82–84 TFEU. For the details about the competence with regard to JCCM see **Craig**, p. 363–370; **Mitsilegas**, 2009, p. 59–113.

³⁵ Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden for a Directive of the European Parliament and of the Council of ... regarding the European Investigation Order in criminal matters [2010] C 165/02.

³⁶ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L 101/1 and Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and

Thirdly, as regards procedural criminal law, there are two Directives, respectively, on the right to interpretation and translation, and information in criminal proceedings, setting minimum standards.³⁷

Overall, in substantive terms, as observed by Peers, the EU criminal law has based itself on the premise that it ought to facilitate the mutual recognition of judicial decisions between Member States without much harmonization of substantive law and with even less harmonization of procedural law.³⁸ In this respect, this may be an indication that the EU has not been giving enough worth to the protection of fundamental rights in relation to JCCM, since negative integration (*i.e.* mutual recognition) measures are not sufficiently supported by positive integration measures (for example, rights of suspects). However, there are at least three novelties which may be a sign to believe that more respect to individual or fundamental rights is on its way, *i.e.* first, the promising Stockholm Programme which puts the “promotion of citizenship and fundamental rights” as a first item on the list; second, the more favourable decision-making procedure set out by ToL; third, –at the latest from 30 November 2014 on–the full jurisdiction of the CJEU in conjunction with the CFR which is now a binding instrument having the status of primary law.³⁹ The focus of this article is on this last novelty. Hence, next, I will deal with the jurisdiction of the CJEU in relation to JCCM.

Jurisdiction of the Court of Justice of the European Union Regarding the Judicial Cooperation in Criminal Matters

The jurisdiction of the CJEU regarding JCCM differs significantly in the pre-ToL and post-ToL era. Hence, I will divide the subject into these two parts.

Before the Treaty of Lisbon

The jurisdiction of the CJEU was restricted in the 3rd Pillar in comparison to 1st Pillar due to the reflections of the *quasi*-intergovernmental method. In this way, the contributions of the CJEU to the area of JCCM were significantly curtailed at the procedural level.⁴⁰

sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA OJ L 2011] OJ L 335/1.

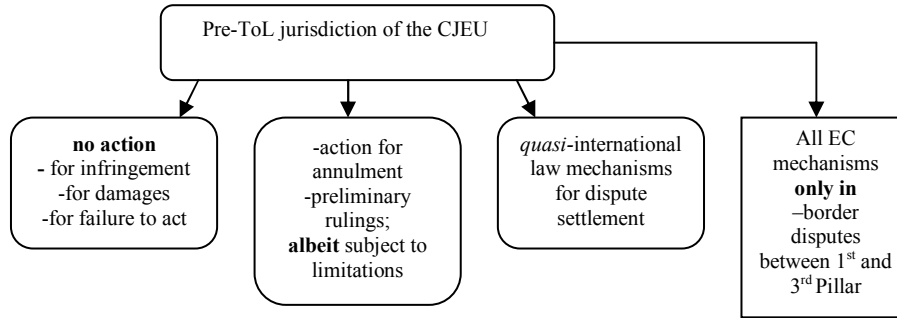
³⁷ Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings [2010] OJ L 280/1 and Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L 142/1.

³⁸ Peers, 2011, p. 297.

³⁹ In this regard, see **Rijken**, p. 1456. With regard to AFSJ in general, see **Kostakopoulou**, p. 153, 158–159, 164.

⁴⁰ See **Koen Lenaerts**, “The Contribution of the European Court of Justice to the Area of Freedom, Security and Justice”, **International and Comparative Law Quarterly**, Cilt: 59, 2010, p. 261.

Figure 2: Pre-ToL Jurisdiction of the CJEU



The system of remedies regarding JCCM in the pre-ToL era is both deficient and restricted.⁴¹ To begin with, there is no action for infringement or action for damages in the 3rd Pillar.⁴² In addition to this, literally, there is no action for failure to act in the 3rd Pillar.⁴³

On the other hand, there are action for annulment and preliminary ruling procedure which are subject to limitations and some *quasi-international* law mechanisms for dispute settlement. Firstly, the CJEU can review the legality of Framework Decisions and Decisions (but not Common Positions or Conventions), as long as the actions are brought by a Member State or the Commission (but not by other Union institutions or private persons).⁴⁴ Secondly, the CJEU can rule on the validity and interpretation of Framework Decisions and Decisions (but not Common Positions), on the interpretation of (3rd Pillar) Conventions and on the validity and interpretation of the

⁴¹ See Article 35 TEU as amended by ToN, which is the main provision about this system of remedies.

⁴² Case C-354/04 P *Gestoras Pro Amnistía and Others v Council of the European Union* [2007] ECR I-1579 para. 46–48.

⁴³ In my view, the CJEU might permit for this action on certain circumstances; nonetheless, subjecting it to the constraints applicable to the action for annulment in the 3rd Pillar, since these actions “merely prescribe one and the same method of recourse”. For instance, in the *T. Port* case, the CJEU ruled that “the possibility for individuals to assert their rights should not depend upon whether the institution concerned has acted or failed to act”. Hence, this might apply equally to the 3rd Pillar under the constraints applicable to the action for annulment in the 3rd Pillar, of course, if the circumstances require so. (Case C-68/95 *T. Port GmbH & Co. KG v Bundesanstalt für Landwirtschaft und Ernährung* [1996] ECR I-6065 para. 59.) Besides, this argument seems to be reinforced by the fact that the CJEU has been transferring some of its 1st Pillar doctrines to the 3rd Pillar, such as the principle of consistent interpretation. (Case C-105/03 *Criminal proceedings against Maria Pupino* [2005] ECR I-5285 para. 34, 43. See Case C-354/04 P *Gestoras Pro Amnistía and Others v Council of the European Union* [2007] ECR I-1579 para. 53. In this regard, also see *Shaw et. al.*, p. 319.) Nevertheless, the CJEU may not find the chance to rule on this issue or want to disregard this issue, since it will have full jurisdiction, at the latest from 30 November 2014 onwards.

⁴⁴ Article 35(6) TEU as amended by ToN.

measures implementing them.⁴⁵ Nonetheless, each Member State has to accept the jurisdiction of the CJEU via a declaration. This declaration will also state whether only highest courts or all courts may refer questions to the CJEU.⁴⁶ In addition, the CJEU has no jurisdiction as regards national operations or actions concerning (generally) the maintenance of law and order and the safeguarding of internal security.⁴⁷ Thirdly, the CJEU can rule on any dispute between Member States regarding the interpretation or the application of Common Positions, Framework Decisions, Decisions and Conventions whenever such dispute cannot be settled by the Council beforehand. In addition to this, the CJEU can rule on any dispute between Member States and the Commission regarding the interpretation or the application of 3rd Pillar Conventions.⁴⁸

⁴⁵ Article 35(1) TEU as amended by ToN.

⁴⁶ Article 35(2, 3) TEU as amended by ToN. The following 18 Member States declared that all courts can refer questions to the CJEU: Austria, Belgium, Cyprus, the Czech Republic, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Portugal, Romania, Slovenia and Sweden. On the other hand, Spain declared that it is only its highest courts that can refer questions to the CJEU. The following 8 Member States do not have declarations in this regard: Bulgaria, Denmark, Estonia, Ireland, Malta, Poland, Slovakia and the United Kingdom. [2010] OJ L 56/14. See **Lenaerts**, p. 268, fn. 90, 91. This means that uniformity of interpretation and application is not achieved as between Member States. **Steiner and Woods**, p. 600. Moreover, even Member States do not accept the jurisdiction of the CJEU, the rulings of the CJEU will continue to bind their courts, since it does not bind only the referring court. See **Damian Chalmers et. al., European Union Law: Text and Materials**, 2nd Edition, Cambridge University Press, United Kingdom, 2010, p. 592. For a similar view, see **Eleanor Spaventa**, “Opening Pandora’s Box: Some Reflections on the Constitutional Effects of the Decision in **Pupino**”, **European Constitutional Law Review**, Cilt: 3, 2007, p. 14. For instance, Mitsilegas states that denying the right to send references to the CJEU has not stopped domestic courts from taking into account CJEU’s interpretation of 3rd Pillar law and applying it in their domestic context. **Mitsilegas**, 2009, p. 19.

⁴⁷ Article 35(5) TEU as amended by ToN: “[CJEU] shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.” For an in-depth analysis, see **Alicia Hinarejos, Judicial Control in the European Union: Reforming Jurisdiction in the Intergovernmental Pillars**, Oxford University Press, United States, 2009, p. 73–77; **Alicia Hinarejos**, “Law and Order and Internal Security Provisions in the Area of Freedom, Security and Justice: Before and After Lisbon”, (Eds.) **Christina Eckes and Theodore Konstadinides, Crime within the Area of Freedom, Security and Justice: A European Public Order**, Cambridge University Press, United Kingdom, 2011(b), p. 258–263.

⁴⁸ Article 35(7) TEU as amended by ToN.

Figure 3: Pre-ToL Jurisdiction of the CJEU relating Action for Annulment

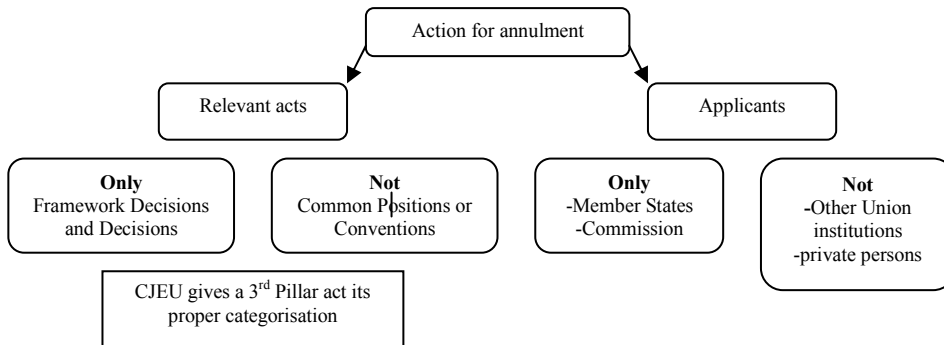
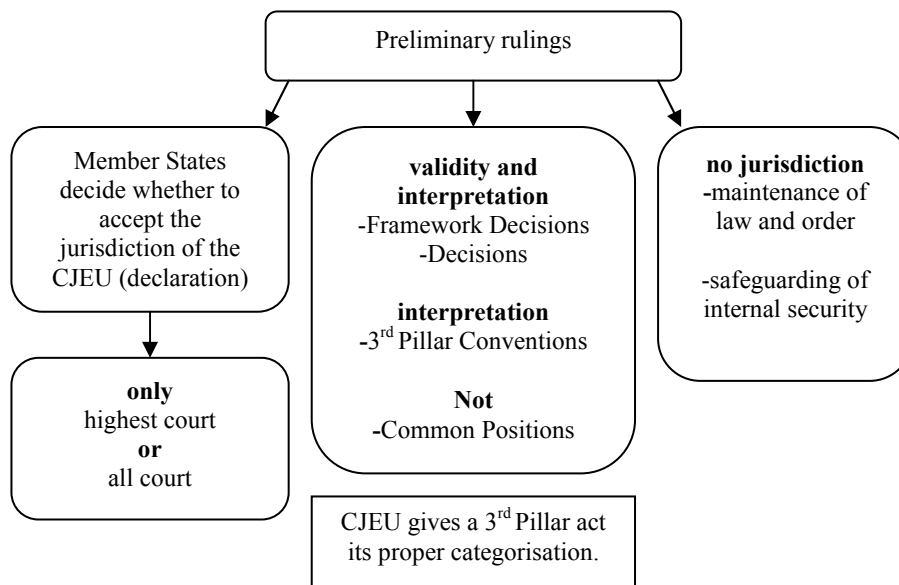


Figure 4: Pre-ToL Jurisdiction of the CJEU relating Preliminary Rulings



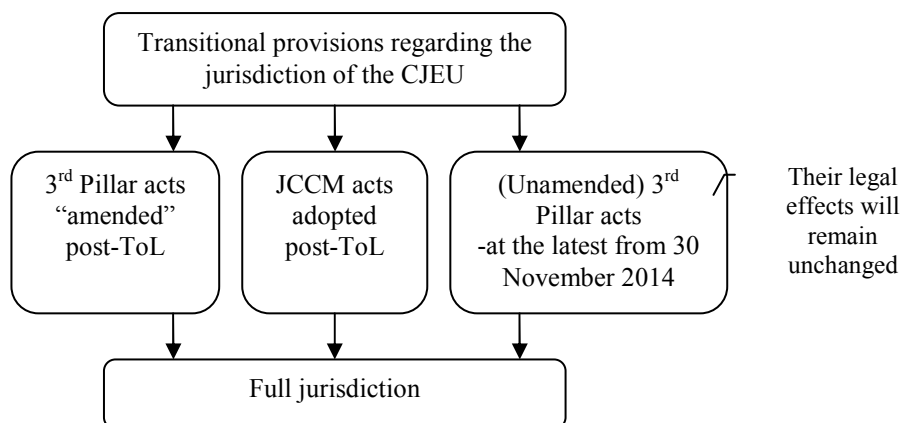
There are two qualifications to these legal rules which somewhat seem to broaden the jurisdiction of the CJEU. Firstly, the CJEU is competent to rule on cases which concern border disputes between 1st and 3rd Pillar and the Court's powers under

the ex-TEC will become applicable in this context.⁴⁹ In this respect, for instance, an individual may bring an action for annulment against such a 3rd Pillar act.⁵⁰ Secondly, in the *Gestoras Pro Amnistía* case, the CJEU stated that preliminary ruling mechanism exists “in respect of all measures adopted by the Council, whatever their nature or form, which are intended to have legal effects in relation to third parties”.⁵¹ Therefore, even Common Positions are subject to this mechanism (and also to action for annulment), as long as they intend to have legal effects in relation to third parties; though they are explicitly not mentioned as one of the acts which can be reviewed by the CJEU in accordance with the Article 35 ex-TEU. This is a result of the fact that the CJEU can give a 3rd Pillar act its proper categorisation and thus take it into its jurisdiction.⁵²

After the Treaty of Lisbon

The ToL has de-pillarized the Union; thereby giving full jurisdiction to the CJEU in relation to JCCM. However, transitional provisions apply in this regard.

Figure 5: Transitional Provisions regarding the Jurisdiction of the CJEU



The transitional provisions regarding the jurisdiction of the CJEU are as follows: Firstly, with respect to 3rd Pillar acts, the Commission cannot bring an action for infringement and the powers of the CJEU will not change until 30 November

⁴⁹ Article 46 and 47 TEU as amended by ToN. Some examples are: Case C-170/96 *Commission of the European Communities v Council of the European Union* [1998] ECR I-2763 para. 12–18; Case C-176/03 *Commission of the European Communities v Council of the European Union* [2005] ECR I-7879 para. 38–40; Case C-440/05 *Commission of the European Communities v Council of the European Union* [2007] ECR I-9097 para. 52–54.

⁵⁰ In this regard, for a detailed review see **Hinarejos, 2009**, p. 87–94.

⁵¹ Case C-354/04 P *Gestoras Pro Amnistía and Others v Council of the European Union* [2007] ECR I-1579 para. 53.

⁵² See **Lenaerts and Van Nuffel**, p. 940.

2014.⁵³ Secondly, as soon as a 3rd Pillar act is “amended”, the Treaties will become fully applicable to that act.⁵⁴ Therefore, in relation to pre-existing 3rd Pillar acts, jurisdiction of the CJEU continues to be governed by Article 35 ex-TEU until they are amended or at the latest until 30 November 2014.⁵⁵

Accordingly, which acts are under the full jurisdiction of the CJEU and what is meant by “full jurisdiction”?⁵⁶ Regarding the first question, the CJEU has full jurisdiction in respect of three categories of acts: (i) JCCM acts adopted post-ToL; (ii) pre-existing 3rd Pillar acts amended post-ToL and (iii) pre-existing non-amended 3rd Pillar acts, as from 30 November 2014. A reminder is necessary in this regard. Though the CJEU will have full jurisdiction in relation to the pre-existing non-amended 3rd Pillar acts as from 30 November 2014; their legal effects will remain unchanged.⁵⁷ Regarding the second question, the “full jurisdiction” of the CJEU covers the following cases: the review of legality, *i.e.* action for annulment⁵⁸ and action for failure to act,⁵⁹ fulfilment of obligations under the Treaties by Member States, *i.e.* action for infringement,⁶⁰ liability of Union institutions for the damages caused by them, *i.e.* action for damages⁶¹ and implementation of Union law by national courts, *i.e.* preliminary rulings.⁶²

⁵³ Article 10(1, 3) of the Protocol (No 36) on Transitional Provisions annexed to ToL.

⁵⁴ Article 10(2) of the Protocol (No 36) on Transitional Provisions annexed to ToL.

⁵⁵ See **Lenaerts**, p. 269–270. For the meaning of “amend”, see below p. 150.

⁵⁶ See **Craig**, p. 339. Also see Article 19(1) TFEU: “[CJEU] shall ensure that in the interpretation and application of the Treaties the law is observed.”

⁵⁷ Article 9 of the Protocol (No 36) on Transitional Provisions annexed to the ToL.

⁵⁸ Article 263–265 TFEU.

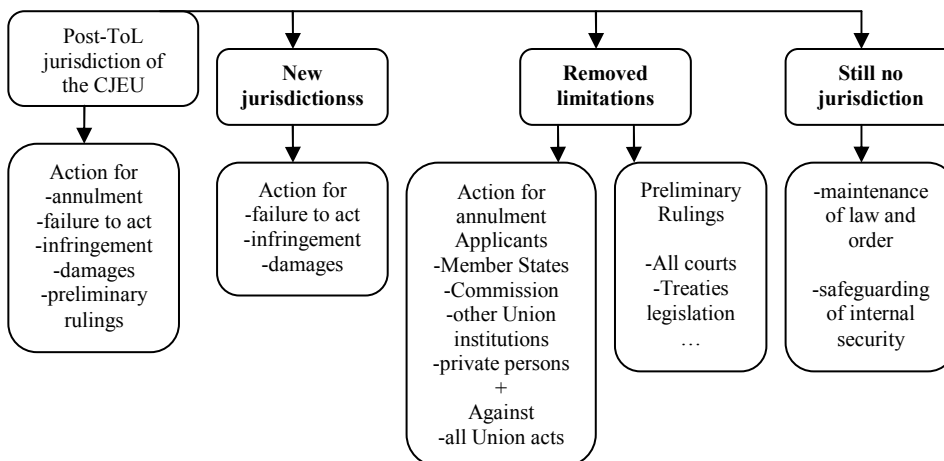
⁵⁹ Article 266, 265 TFEU.

⁶⁰ Article 258–260 TFEU.

⁶¹ Article 268, 340 TFEU.

⁶² Article 267 TFEU.

Figure 6: Post-ToL Jurisdiction of the CJEU



If we compare the pre-ToL and post-ToL situation, we will observe these novelties: Now, the CJEU has an explicit jurisdiction regarding action for failure to act, action for infringement and action for damages. In this respect, the extension of the supervisory powers of the Commission (via action for infringement) to the JCCM is of significant importance, since this mechanism has proved efficient.⁶³ Regarding action for annulment, not only a Member State or the Commission; but also other (relevant) Union institutions or private persons may now bring a case before the CJEU. Concerning preliminary rulings, not only courts of some Member States; but also (with the exception of opt-out States) all courts from all Member States can or should refer questions to the CJEU relating to Treaties and EU acts.

A substantive derogation to the jurisdiction of the CJEU has been remained in Article 276 TFEU.⁶⁴ According to this Article, with regard to JCCM, the CJEU will continue to have no jurisdiction to review national operations or actions concerning generally the maintenance of law and order and the safeguarding of internal security.⁶⁵ The CJEU has not ruled on the meaning of this Article yet.⁶⁶ According to Peers, this

⁶³ See **Hinarejos, 2009**, p. 115.

⁶⁴ Also see Article 4(2) TEU as amended by ToL and 72 TFEU. For Article 4(2) TEU as amended by ToL, see **Chalmers et al.**, p. 584. For Article 72 TFEU, see **Craig and De Búrca**, p. 936.

⁶⁵ Article 276 TFEU: “In exercising its powers regarding [JCCM and Police Cooperation], the [CJEU] shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.” For an in-depth analysis, see **Hinarejos, 2009**, p. 109–113; **Hinarejos, (2011b)**, p. 265–269.

⁶⁶ For some other “speculations”, see **Vassilis Hatzopoulos**, “Casual but Smart: The Court’s new clothes in the Area of Freedom Security and Justice (AFSJ) after the Lisbon Treaty”, **College of**

provisio refers only to acts of Member States; it does not prevent the Court from interpreting Union acts upon which national implementation and derogations are based.⁶⁷ According to Hinarejos, it is arguable that this Article may have an effect on the Court's behaviour when providing preliminary rulings, in that it may feel the need to tread more carefully than normally in this area, due to the existence of an added safeguard or reminder as to the boundaries of its jurisdiction.⁶⁸

Besides, ToL brings some improvements with regard to these remedies, which may also be relevant for JCCM.⁶⁹

First of them relates to review of legality. On the one hand, with regard to action for annulment,⁷⁰ it is extended principally to the review of the legality of acts of European Council and bodies, offices or agencies of the Union intended to produce legal effects *vis-à-vis* third parties.⁷¹ On the other hand, regarding action for failure to act,⁷² it is extended to the inactions of European Council and bodies, offices or agencies of the Union where it is in infringement of the Treaties. Additionally, concerning action for annulment,⁷³ the *locus standi* of the natural and legal persons is broadened: Whenever there is a regulatory act which is of direct concern to them and does not entail implementing measures, they may institute proceedings against that act without any further need to prove their individual concern.⁷⁴ Therefore, ToL sought to facilitate direct access of private parties to the Union judiciary,⁷⁵ in addition to broadening the list of defendants, which may now include Europol and Eurojust.⁷⁶

Europe: European Legal Studies: Research Papers in Law, 2/2008, 2008, p. 12; Mitsilegas, 2009, p. 44.

⁶⁷ Peers, 1999, p. 175. Though this comment relates to Article 35(5) TEU as amended by ToA, it is still relevant today, since this Article continues to exist as Article 276 TFEU.

⁶⁸ Hinarejos, 2011b, p. 266, 268–269.

⁶⁹ For these changes in general, see HATZOPOULOS, p. 4–13.

⁷⁰ Article 263 TFEU.

⁷¹ Compare with Case C-160/03 *Kingdom of Spain v Eurojust* [2005] ECR I-2077 para. 36–40. Compare this with Opinion of Advocate General Poiares Maduro in Case C-160/03 *Kingdom of Spain v Eurojust* [2005] ECR I-2077 points 14–17. In addition to these, acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them. Article 263 TFEU.

⁷² Article 266 TFEU.

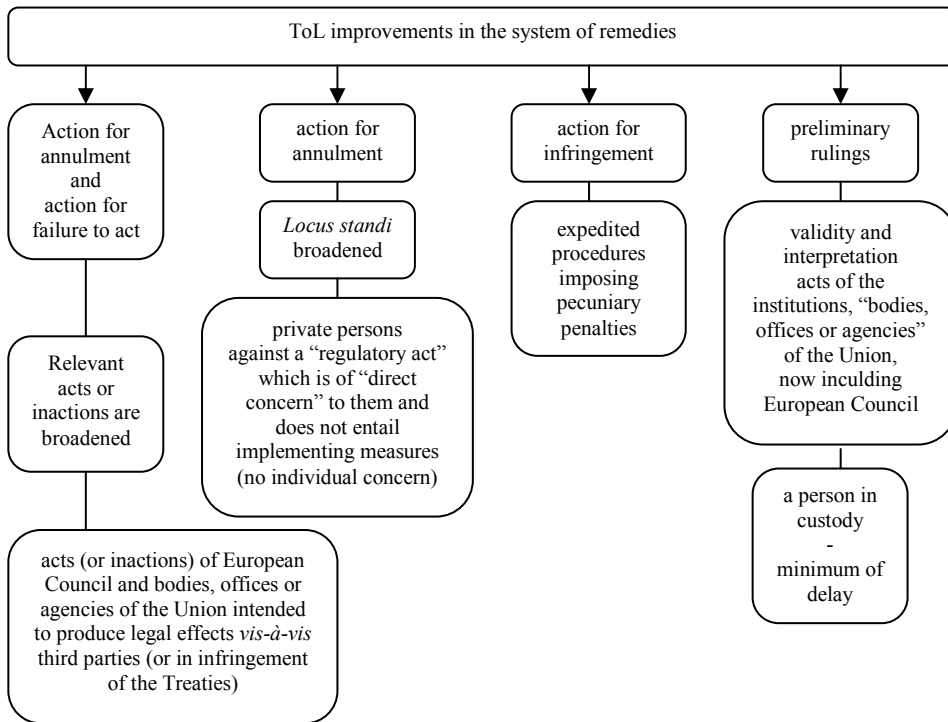
⁷³ Article 263 TFEU.

⁷⁴ Article 265 TFEU. For the meaning of this novelty see Craig, p. 130–132.

⁷⁵ Lenaerts, p. 265.

⁷⁶ See Article 85, 88 TFEU.

Figure 7: ToL Improvements in System of Remedies



Secondly, as regards action for infringement,⁷⁷ the procedure about imposing pecuniary penalties on Member States has expedited. Now, the Commission may bring a Member State before the CJEU, where the former considers that the latter has not taken the necessary measures to comply with the judgment of the CJEU, after giving it the opportunity to submit its observations or where the former thinks that the latter has failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure. This expedition may be a factor in increasing the efficiency of the infringement proceedings.

Lastly, concerning the preliminary ruling procedure,⁷⁸ it is extended to the validity and interpretation of acts of the institutions, “bodies, offices or agencies” of the Union, which now also cover European Council as an institution, and for instance Europol and Eurojust as bodies, offices or agencies. Moreover, at the level of Treaties, it is foreseen that the CJEU shall act with the minimum of delay where the national case

⁷⁷ Article 258–260 TFEU.

⁷⁸ Article 267 TFEU and Article 13 TEU as amended by ToL.

concerns a person in custody. Nonetheless, there have already been special procedures for dealing with such cases even before ToL.⁷⁹

What are the consequences flowing from this full jurisdiction of the CJEU with regard to JCCM? Firstly, from the perspective of ascending volume of litigation, the contributions of the CJEU to JCCM are expected to increase steadily; from the moment that transitional period ends. Secondly, individuals are likely to gain a better protection for their Union law rights, including fundamental rights.⁸⁰ Thirdly, giving full jurisdiction to the CJEU is, on its own, a significant step towards preserving rule of law⁸¹ and protecting fundamental rights, such as right to an effective remedy.⁸² Lastly, full jurisdiction will lead to a more uniform and effective application and better level of implementation of Union law, an important part of which will include the protection of fundamental rights, especially *via* preliminary ruling procedure which provides a useful dialogue between the CJEU and national courts.⁸³

Rights, including fundamental rights, demand remedies and the full jurisdiction of the CJEU will open the door for individuals to a “complete system of remedies”,⁸⁴ which has been improved further by the ToL. In this regard, the growing judicialisation will indeed constitute a positive central component in guaranteeing the protection and respect of the individuals’ European freedoms and rights in the JCCM.⁸⁵ Nonetheless, the real contributions of the CJEU to JCCM can only be observed by examining the acts and the effects of them concerning JCCM. This is the subject of the next chapter.

⁷⁹ See below p. 161.

⁸⁰ In this regard see **Lenaerts**, p. 265; **Piris**, p. 178, 201.

⁸¹ For instance, according to Craig, shifting to the normal judicial controls is to be welcomed in enhancing the rule of law. **Craig**, p. 378.

⁸² In this regard, see **Bazzocchi**, p. 184; **Mitsilegas**, 2009, p. 40. Also see Article 6 ECHR and Article 47 CFR.

⁸³ In this regard see **Hinarejos**, 2009, p. 106; **Lenaerts**, p. 262, 265; **Piris**, p. 202. An interesting note is that (may be coincidentally but) most of the groundbreaking decisions of the CJEU have been given as a result of references from lower courts. A well-known example is the **Costa v ENEL** case; on the other hand, **Pupino** is another such case which was about the 3rd Pillar. Case 6/64 *Costa v Ente Nazionale per l’Energia Elettrica (ENEL)* [1964] ECR 585; Case C-105/03 *Criminal proceedings against Maria Pupino* [2005] ECR I-5285.

⁸⁴ Case T-177/01 *Jégo-Quéré & Cie SA v Commission of the European Communities* [2002] ECR II-2365 para. 41. Compare with Case C-355/04 *P Segi and Others v Council of the European Union* [2007] ECR I-1657 para. 50. Moreover, there may be not at all the times a complete system of remedies. See **Bruno De Witte**, “The Past and Future Role of the European Court of Justice in the Protection of Human Rights”, (Ed.) **Philip Alston, The EU and Human Rights**, Oxford University Press, United States, 1999, p. 876–877; **Dorota Leczykiewicz**, “Effective Judicial Protection” of Human Rights after Lisbon: Should National Courts be Empowered to Review EU Secondary Law?, **European Law Review**, Cilt: 35, No: 3, 2010, s. 334–338.

⁸⁵ **Guild and Carrera**, p. 6.

Acts and Effects of Those Acts Regarding Judicial Cooperation in Criminal Matters

I will examine the acts and effects of those acts related to JCCM in two separate parts: before and after ToL. This examination will also reflect the influence of the CJEU in the development of legal and/or constitutional principles for JCCM.⁸⁶

Before the Treaty of Lisbon

Before the ToL, the Council was competent to take measures, namely common positions, framework decisions and decisions, and conventions.⁸⁷ Common positions define the approach of the Union to a particular matter. Framework decisions are adopted for the purpose of approximation of the laws of the Member States and bind them as to the result to be achieved but leave choice of form and methods to them. In addition, they do not have direct effect. Decisions are adopted for any other purpose consistent with the objectives of JCCM, while excluding any approximation of the laws of the Member States. These are binding and do not have direct effect. Conventions are international law instruments; therefore, Member States follow their constitutional requirements for their adoption.

What are the effects of these above-mentioned acts? In this regard, there is one main rule; but it is subject to qualifications. According to the main rule, it is the Member States that determine the status and legal effects of 3rd Pillar acts within their domestic legal systems; depending on the form, content and purpose of each act, which will be appraised in the light of international law.⁸⁸ According to the qualifications, a distinction is necessary between those acts which are not subject to the jurisdiction of the CJEU and others. On the one hand, the former ones, *i.e.* common positions⁸⁹ and conventions giving no jurisdiction to the CJEU, are subject to the main rule. On the other hand, in relation to the latter ones, namely Framework Decisions and Decisions, the provisions of the TEU and the case-law of the CJEU should also be taken into account.⁹⁰

⁸⁶ In this regard, also see **Mitsilegas, 2009**, p. 23–31.

⁸⁷ Article 34(2) TEU as amended by ToN. This Article “does not establish any order of priority between the different instruments listed in that provision, [hence] it cannot be ruled out that the Council may have a choice between several instruments in order to regulate the same subject-matter, subject to the limits imposed by the nature of the instrument selected.” Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] ECR I-3633 para. 37. In the post-ToA era, Framework Decisions constituted the main form of 3rd Pillar law-making and has strengthened considerably 3rd Pillar law. **Mitsilegas, 2009**, p. 16.

⁸⁸ **Lenaerts and Van Nuffel**, p. 938, 936. For similar remarks see **Steiner and Woods**, p. 582. Also see **Hinarejos, 2009**, p. 17.

⁸⁹ In this regard, there should be a reminder: If a common position, because of its content, has a scope going beyond that assigned by the ex-TEU, *i.e.* producing legal effects in relation to the third parties, then the CJEU can give it its proper categorisation and thus taking it into its jurisdiction. See **Lenaerts and Van Nuffel**, p. 940 and Case C-354/04 P *Gestoras Pro Amnistia and Others v Council of the European Union* [2007] ECR I-1579 para. 35–43.

⁹⁰ See **Lenaerts and Van Nuffel**, p. 939, 947. In this regard, also see fn. 46.

According to the CJEU, 3rd Pillar acts –especially in comparison to 1st Pillar acts– have or do not have these legal effects: First of all, since the Union must respect fundamental rights on the basis of Article 6(2) ex-TEU, all 3rd Pillar acts must respect fundamental rights.⁹¹ Secondly, Framework Decisions and Decisions do not entail direct effect, *i.e.* generally they cannot create individual rights which national courts must protect.⁹² Thirdly, they have indirect effect, *i.e.* national courts must interpret as far as possible national law in conformity with and in the light of the wording and purpose of these acts, mainly since they are binding on the Member States.⁹³ However, this duty of consistent interpretation is limited by general principles of law, particularly those of legal certainty and non-retroactivity and it cannot serve as the basis for an interpretation of national law *contra legem*.⁹⁴ Fourthly, there are some unanswered questions, such as whether the principle of primacy or state liability is applicable with regard to the 3rd Pillar acts.⁹⁵ There are different views on these topics;⁹⁶ however, the CJEU may not find the chance to rule on these issues, since 3rd Pillar acts will be subject to the normal (old-)Community case-law, as soon as they are amended or the CJEU may disregard to rule on these issues, since it may want to wait until such transformation takes place.

⁹¹ See Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] ECR I-3633; Case C-105/03 *Criminal proceedings against Maria Pupino* [2005] ECR I-5285 para. 58–59.

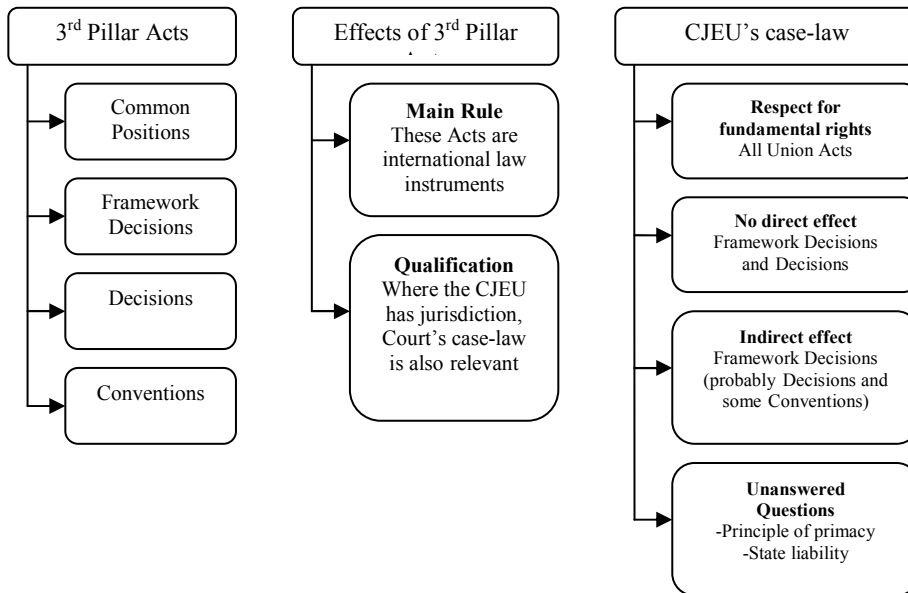
⁹² TEU as amended by ToN Article 34(2). According to Mitsilegas, the limitation is significant as it restricts considerably the potential for enforcement of 3rd Pillar law by blocking avenues for individuals to challenge their legal position, resulting from EU criminal law, before domestic courts. **Mitsilegas, 2009**, p. 26. For the result of direct effect, as an example, see Case 74/76 *Iannelli & Volpi SpA v Ditta Paolo Meroni* [1977] ECR 557 para. 13.

⁹³ See Case C-105/03 *Criminal proceedings against Maria Pupino* [2005] ECR I-5285 para. 34, 43. In this regard, see **Spaventa**, p. 11.

⁹⁴ See Case C-105/03 *Criminal proceedings against Maria Pupino* [2005] ECR I-5285 para. 44, 47.

⁹⁵ In this regard, see **Spaventa**, p. 18–22.

⁹⁶ For some examples see **Hinarejos, 2009**, p. 36–49; **Mitsilegas, 2009**, p. 23–24, 29 (fn. 157); **Steiner and Woods**, p. 601–602. Especially the national courts seem to rule out principle of primacy in relation to 3rd Pillar acts; see **Steiner and Woods**, p. 602–603; **Chalmers et.al.**, p. 602–607.

Figure 8: 3rd Pillar Acts and Their Effects

In sum, the CJEU contributes to the development of JCCM in two ways, despite the weakness in the judicial protection system and the legal effects of acts in this area: First, the CJEU makes it clear that all 3rd Pillar acts must respect fundamental rights. This is a matter, not only for the CJEU itself, but also for the national courts dealing with such acts.⁹⁷ Secondly, the CJEU gives some effect to the Framework Decisions (and probably to Decisions and some Conventions), by proclaiming their indirect effect. In the absence of direct effect, principle of primacy or state liability, the principle of consistent interpretation seems to be the only best way to give effect to 3rd Pillar law;⁹⁸ nevertheless, this principle has lots of limits which can be very legitimate in an area like criminal law.⁹⁹

After the Treaty of Lisbon

After the ToL, Union legislative institutions are competent to adopt regulations, directives and decisions.¹⁰⁰ Regulations have general application, are binding in their entirety and directly applicable in all Member States. Directives are binding, as to the result to be achieved, upon each Member State to which they are addressed, but shall leave the choice of form and methods to them. Decisions are binding in their entirety, and a decision which specifies those to whom it is addressed

⁹⁷ See below p. 160.

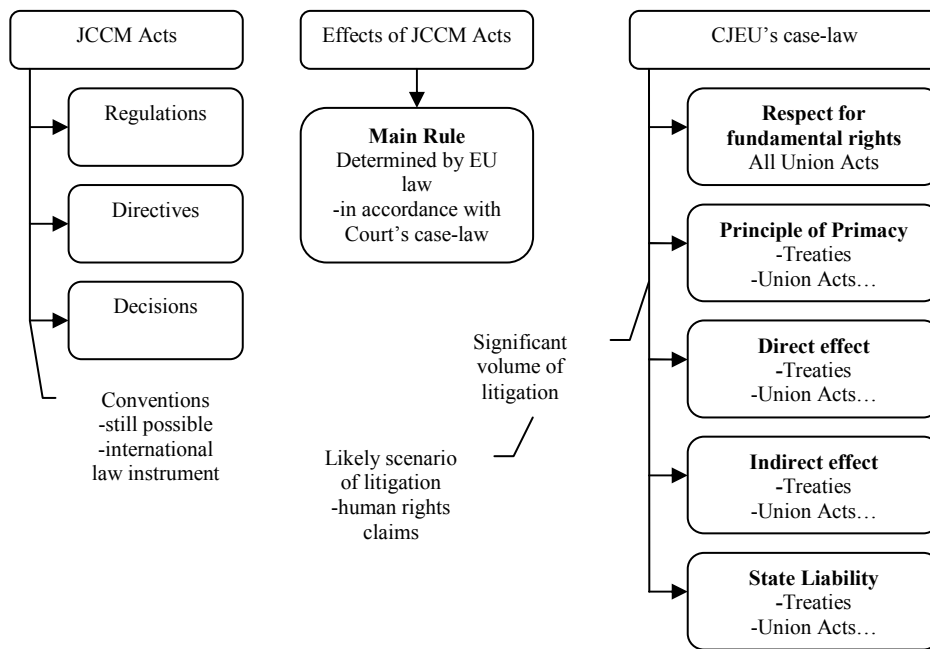
⁹⁸ In this regard, see **Lenaerts**, p. 271.

⁹⁹ In this regard, see **Spaventa**, p. 12.

¹⁰⁰ Article 288 TFEU.

shall be binding only on them. This means that 3rd Pillar acts, namely common positions, framework decisions, decisions and conventions are now disappeared as a form of law-making in the post-ToL era,¹⁰¹ the existing ones will probably be amended and take a form of regulation, directive or decision.

Figure 9: JCCM Acts and Their Effects post-ToL



There is one preliminary issue before we can continue to look for the effects of Union law after the ToL. According to the transitional provisions (attached to the ToL), the 3rd Pillar acts will continue to have the effects that they have pre-ToL, until they are “repealed, annulled or amended”.¹⁰² This means that such acts will be subject to post-ToL status, including as regards their effects, once they are “amended”.¹⁰³ This brings to the fore the meaning of the term “to amend”. In this regard, an act should be considered as “amended” in any case where even only a part of it has been amended,¹⁰⁴ since the

¹⁰¹ This is subject to one qualification: Though the Treaties mention no longer conventions between Member States as a policy instrument of the Union; there is nothing to preclude Member States from making such international agreements between themselves, even after the ToL. See **Lenaerts and Van Nuffel**, p. 948.

¹⁰² Article 9 of the Protocol (No 36) on Transitional Provisions annexed to the ToL.

¹⁰³ There is an effort, at least on the level of European Council, for such amendments. See The Stockholm Programme, Brussels, 16 October 2009, point 1.2.10.

¹⁰⁴ In this regard, see **Peers**, 2011, p. 64.

transitional provisions does not distinguish between the parts amended and other, unamended, parts.¹⁰⁵

What are the effects of Union acts related to JCCM in the post-ToL era? Since the ToL has de-pillarized the Union, JCCM is now also a part of the old Community framework. Therefore, it is fair to expect that the CJEU will transfer its principles of old-1st Pillar law to post-ToL rules related to JCCM.¹⁰⁶ In more general terms, the Union's current legal order thus replaces the pre-existing Community legal order while carrying over all its "supranational" and "constitutional" characteristics.¹⁰⁷ Therefore, first of all, all Union acts must respect fundamental rights, either as general principles of law or as flowing from CFR.¹⁰⁸ Secondly, the provisions of Treaties or legislation give rise to direct effect, provided that they meet the judicially created criteria for direct effect,¹⁰⁹ thus such provisions can create individual rights which national courts must protect.¹¹⁰ Thirdly, from the perspective of the CJEU, the Union law will probably be deemed as to have primacy against national law.¹¹¹ Nonetheless, the debates concerning the principle of primacy seem to be continued in the post-ToL era: Questions such as whether Union law is upper the national constitutions or who will be the ultimate arbiter of the *Kompetenz-Kompetenz* issue will be maintained and will continue to be a potential clash between the highest national courts and the CJEU, especially with regard to JCCM. Fourthly, as with old-3rd Pillar measures, the Union acts will continue to have indirect effects, namely the doctrine of consistent interpretation will continue to be applicable in this regard. Lastly, Member States will be required to pay compensation for incorrectly applying Union law, including the law related to JCCM, as long as the conditions of the principle of state liability are fulfilled.

What will be the consequences of such a change in effects of new or amended acts related to JCCM? Most probably, they will generate significant litigation, mostly by way of preliminary rulings, given the number of acts adopted in this area.¹¹² Nonetheless, at this point, it may be useful to remind some relevant shortcomings relating to these effects. For instance, a Directive,¹¹³ which is the main instrument of JCCM,¹¹⁴ "cannot, of itself and independently of a national law adopted by a Member State for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that

¹⁰⁵ See **Lenaerts and Van Nuffel**, p. 73, fn. 54.

¹⁰⁶ In this regard see **Lenaerts and Van Nuffel**, p. 16, 71–72; **Mitsilegas, 2009**, p. 37, 41.

¹⁰⁷ **Lenaerts and Van Nuffel**, p. 72. Also see **Hinarejos, 2009**, p. 19, 49.

¹⁰⁸ Article 6 TEU as amended by ToL.

¹⁰⁹ **Craig**, s. 146, 340; **Craig and De Búrca**, p. 937. Also see **Hinarejos, 2009**, p. 51; **Lenaerts**, p. 271.

¹¹⁰ For the result of direct effect, as an example, see Case 74/76 *Iannelli & Volpi SpA v Ditta Paolo Meroni* [1977] ECR 557 para. 13.

¹¹¹ See **Craig**, s. 150, 340; **Craig and De Búrca**, p. 937; **Hinarejos, 2009**, p. 49. Also see Declaration (No 17) concerning Primacy annexed to the ToL.

¹¹² Regarding direct effect, see **Craig**, s. 146, 340.

¹¹³ In this regard, for an extensive analysis of directives, see **Sacha Prechal, Directives in EC Law**, 2nd Edition, Oxford University Press, Great Britain, 2005.

¹¹⁴ See Article 82 and 83 TFEU.

directive”.¹¹⁵ Moreover, in parallels with this, the principle of consistent interpretation reaches a limit where it has the effect of determining or aggravating, on the basis of the directive and in the absence of a law enacted for its implementation, the liability in criminal law of persons who act in contravention of that directive’s provisions.¹¹⁶ Accordingly, the most likely scenario of litigation relating to JCCM is one where the individual is using human rights standards to challenge EU rules or their national implementation.¹¹⁷ This will be the subject examined next.

Court of Justice of the European Union and Protection of Fundamental Rights (in Judicial Cooperation in Criminal Matters)

The CJEU protects the fundamental rights in Union law in general and in JCCM in particular which raise frequently fundamental rights concerns.¹¹⁸ In this regard, I will put down this protection, by answering these questions: What is the status of the fundamental rights in EU law; why does the CJEU contribute to the JCCM mainly on the grounds of protection of fundamental rights and what is the scope and standard of this protection?

Status of Fundamental Rights

Where do the fundamental rights stand in EU law? On the one hand, they have been under protection as unwritten Community law, *i.e.* general principles of Community law until ToL; and on the other hand, they are protected by a rights catalogue, namely CFR, in addition their protection under the general principles of Union law since ToL. Both as general principles of law and as set out in the CFR, the fundamental rights have the status of being equal to primary law.

Till the ToL, the CJEU has protected fundamental rights on the basis of its case-law, in the absence of a catalogue of rights enshrined in the Treaties, and that practice has been consolidated into the Treaties from the ToM (1993) onwards. In this regard, according to the well-established case-law of the CJEU, the fundamental rights are “enshrined in the [unwritten] general principles of Community law and protected by the Court”.¹¹⁹ In this regard, by virtue of Article 6 TEU as amended by ToA, not only

¹¹⁵ Case C-168/95 *Criminal proceedings against Luciano Arcaro* [1996] ECR I-4705 para. 37.

¹¹⁶ Case C-168/95 *Criminal proceedings against Luciano Arcaro* [1996] ECR I-4705 para. 42.

¹¹⁷ Alicia Hinarejos, “Integration in Criminal Matters and the Role of the Court of Justice”, *European Law Review*, Cilt: 36, No: 3, 2011(a), p. 429. For instance, according to the Craig, in the aftermath of ToL (which brings AFSJ into the general framework of the EU legal and political order), Union courts will likely to be confronted with right-based claims and be required to grapple with complex issues concerning the interplay between civil and political rights (or in general fundamental rights) and the needs of a political order seeking to impose control over matters, such as criminal matters. *Craig*, p. 244.

¹¹⁸ Many academics observed such concerns, for some see *Craig*, p. 244; *Craig and De Búrca*, p. 925; *Douglas-Scott*, p. 274, 276; *Guild and Carrera*, p. 2, 7; *Hinarejos, (2011(a))*, p. 429; *Mitsilegas, 2009*, p. 25.

¹¹⁹ Case 29/69 *Erich Stauder v City of Ulm – Sozialamt* [1969] ECR 419 para.7.

the Community (1st Pillar); but also the Union (3rd Pillar) respects fundamental rights, as general principles of Community law.¹²⁰ For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories, with a special significance given to the ECHR.¹²¹ This practice has been reflected in the Treaties by the Member States since the ToM.¹²²

ToL has placed great emphasis on fundamental rights, in comparison to its former counterparts. Firstly, EU is founded on the values of, *inter alia*, respect for human rights.¹²³ Besides, the Union has also now its own fundamental rights catalogue, namely CFR which has the same legal value as the Treaties.¹²⁴ Hence, fundamental rights have now been recognized as an autonomous source of Union law, with the same ranking as the provisions of primary law.¹²⁵ Moreover, the Union is now empowered and obliged to accede to the ECHR.¹²⁶ Furthermore, the CJEU will continue to protect fundamental rights, as general principles of law, as they flow from ECHR and national constitutional traditions.¹²⁷ In addition to these general provisions, the Union shall constitute an AFSJ with respect for fundamental rights.¹²⁸ All these provisions provide useful tools for taking into account fundamental rights in the development and interpretation of the AFSJ provisions and the central role belongs to the CJEU in this context.¹²⁹

¹²⁰ Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] ECR I-3633 para. 45. For a beforehand evaluation of the situation, see **Peers, (1999)**, p. 171–172.

¹²¹ Case C-305/05 *Ordre des barreaux francophones et germanophones and Others v Conseil des ministres* [2007] ECR I-5305 para. 29.

¹²² Article F(2) TEU; Article 6(2) TEU as amended by ToA; Article 6(3) TEU as amended by ToL. In this regard, see Case C-7/98 *Dieter Krombach v André Bamberski* [2000] ECR I-1935 para. 27.

¹²³ Article 2 TEU as amended by ToL. Also see Article 3(1, 5) and 7 TEU as amended by ToL.

¹²⁴ Article 6(1) TEU as amended by ToL.

¹²⁵ Lenaerts and Van Nuffel, p. 825.

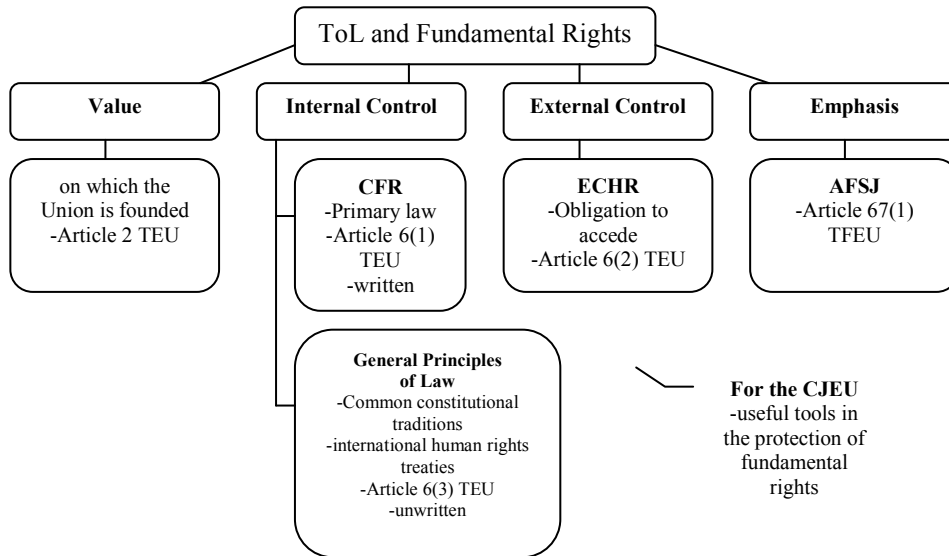
¹²⁶ Article 6(2) TEU as amended by ToL. As to the “accession” issue, see **Lenaerts and Van Nuffel**, p. 842–844. As to the how Union law is treated from the point of view of ECtHR, see **Johan Callewaert**, “The European Court of Human Rights and the Area of Freedom, Security and Justice”, **ERA Forum**, Cilt: 8, 2007, p. 511–518; **Craig**, p. 203–204; **Lenaerts and Van Nuffel**, p. 839–842. Moreover, as indicated by Rijken, if accession occurs, this will mean that there will be a kind of external control by a specialized human rights court, and from a fundamental rights perspective, this seems to be an advantage. **Rijken**, p. 1488.

¹²⁷ Article 6(3) TEU as amended by ToL.

¹²⁸ Article 67(1) TFEU.

¹²⁹ Mitsilegas, 2009, p. 39.

Figure 10: ToL and Fundamental Rights



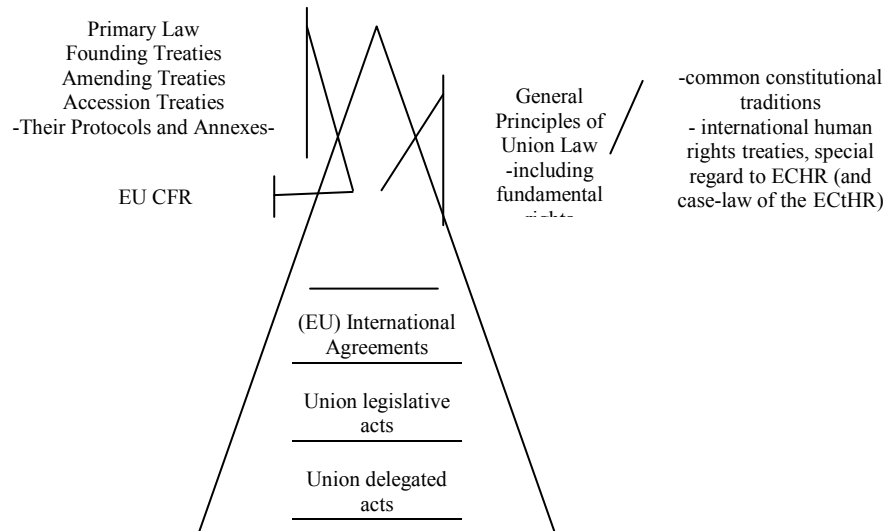
Fundamental rights are at the apex of the hierarchy with regard to the all forms of EU law, sharing this rank with the Treaties. In this regard, fundamental rights as general principles of law are at the same rank with primary law; at least in the eyes of the CJEU.¹³⁰ For instance, in *Kadi and Al Barakaat* case the CJEU held that though international agreements binding the Union have primacy over secondary Union law, “that primacy at the level of [Union] law would not, however, extend to primary law, in particular to the general principles of which fundamental rights form part”.¹³¹ As regards fundamental rights set out in the CFR, they have the same legal value as the Treaties; thus, they are part of primary law.¹³²

¹³⁰ See **Lenaerts and Van Nuffel**, p. 818, 819. Compare with **Craig And De Búrca**, p. 108, 109.

¹³¹ See Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-6351 para. 306–308.

¹³² Article 6(1) TEU as amended by ToL.

Figure 11: Fundamental Rights and Forms of EU Law



Which conclusions can be drawn from the status of fundamental rights in Union law?¹³³ First of all, the lawfulness of a Union act depends on its respect for the fundamental rights.¹³⁴ In this regard, a provision of a Union act could, in itself, not respect fundamental rights if it required, or expressly or impliedly authorised, the Member States to adopt or retain national legislation not respecting those rights.¹³⁵ Besides, provisions of Union acts must be interpreted in the light of the fundamental rights.¹³⁶ In this regard, Member States, when interpreting their national law, must also

¹³³ Moreover, it seems that fundamental rights may impose also positive duties on the Union institutions as well as on the Member States acting within the scope of EU law. **De Witte**, p. 882, where he refers to the Case C-68/95 *T. Port GmbH & Co. KG v Bundesanstalt für Landwirtschaft und Ernährung* [1996] ECR I-6065 para. 40.

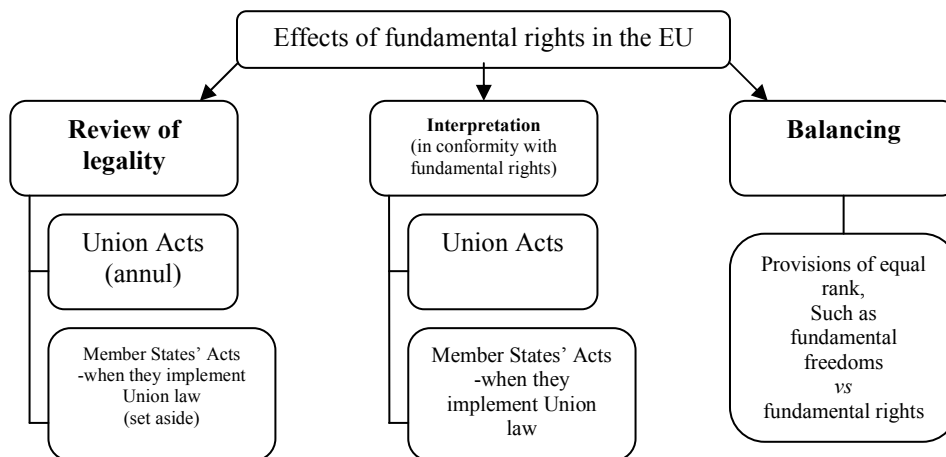
¹³⁴ See Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-6351 para. 285. Also regarding Framework Decisions see Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] ECR I-3633 para. 47. It is clear, now, that the CFR will add to the matters that can be taken into account when determining the legality of Union action. **CRAIG**, p. 215. For a similar view, (regarding AFSJ) see **Kostakopoulou**, p. 154. In addition to this, in the words of **Shaw et.al.**, the incorporation of the CFR would have added weight to the “freedom” and “justice” dimensions of the policy area and could have had an effect in ensuring that measures comply with human rights standards. **Shaw et. al.**, p. 322.

¹³⁵ Case C-540/03 *European Parliament v Council of the European Union* [2006] ECR I-5769 para. 23.

¹³⁶ Case C-578/08 *Rhimou Chakroun v Minister van Buitenlandse Zaken* [2010] ECR I-1839 para. 44. Also regarding Framework Decisions see Case C-404/07 *György Katz v István Roland Sós* [2008] ECR I-7607 para. 48; Joined Cases C-483/09 and C-1/10 *criminal proceedings against*

rely on an interpretation of wording of Union acts which is in conformity with the Union fundamental rights.¹³⁷ Furthermore, fundamental rights play a role in the interpretation and application of the provisions of the Treaties.¹³⁸ In this regard, it is important to note that there are also limits to the fundamental rights,¹³⁹ which may result in a balancing test between provisions of equal rank.¹⁴⁰

Figure 12: Effects of Fundamental Rights in the EU Legal Order



It may be useful to include a list of some of the fundamental rights that are regarded as general principles of Union law in the case-law of the CJEU which may also be relevant with regard to JCCM. These partially listed fundamental rights are:¹⁴¹

- the principle of equality and non-discrimination;¹⁴²
- the right to a fair trial (Article 6 ECHR, Article 47, 48 CFR),¹⁴³ including:

Magatte Gueye and Valentín Salmerón Sánchez, judgement of: 15 September 2011, *nyr*, para. 55. It is also clear, now, that the CFR will add to the matters that can be taken into account when interpreting Union acts. **Craig**, p. 219.

¹³⁷ Case C-305/05 *Ordre des barreaux francophones et germanophones and Others v Conseil des ministres* [2007] ECR I-5305 para. 28.

¹³⁸ *Lenaerts and Van Nuffel*, p. 818. As examples, see Case T-333/99 *X v European Central Bank* [2001] ECR II-3021 para. 38; Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* [2003] ECR I-5659 para. 74.

¹³⁹ In this regard, see **CRAIG**, p. 221–226.

¹⁴⁰ As an example, see Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* [2003] ECR I-5659 para. 74.

¹⁴¹ For a more detailed list see **LENAERTS and VAN NUFFEL**, p. 844–848. In fact, the Court has seldom refused to include an alleged right into its capacious bag of general principles; but it has been more cautious in finding an actual violation of those rights. **De Witte**, p. 868–869.

¹⁴² Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] ECR I-3633 para. 55.

- the rights of the defence,
- the principle of equality of arms,
- the right of access to the courts
- the right of access to a lawyer,¹⁴⁴
- the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law¹⁴⁵
- the adversarial principle;¹⁴⁶
- the principle of the legality of criminal offences and penalties (Article 7 ECHR, Article 49 CFR);¹⁴⁷
- the principle of the retroactive application of the more lenient penalty;¹⁴⁸
- the principle of *non bis in idem* (Article 4(1) 7th Protocol to the ECHR, Article 50 CFR);¹⁴⁹
- the right to human dignity and integrity (Article 1, 3 CFR);¹⁵⁰
- the right to respect for private life¹⁵¹ and family life¹⁵² (Article 8 ECHR, Article 7 CFR);
- freedom of expression (Article 10 ECHR, Article 11 CFR);¹⁵³
- freedom of association (Article 11 ECHR, Article 12 CFR);¹⁵⁴
- the right to respect for property (Article 17 CFR).¹⁵⁵

¹⁴³ For an outer limit of this right, as an example see Case C-507/10 *X*, judgement of: 21 December 2011, *nyr*, para. 43–44.

¹⁴⁴ For those rights mentioned till here see Case C-305/05 *Ordre des barreaux francophones et germanophones and Others v Conseil des ministres* [2007] ECR I-5305 para. 31.

¹⁴⁵ Case C-385/07 P *Der Grüne Punkt – Duales System Deutschland GmbH v Commission of the European Communities* [2009] ECR I-6155 para. 177.

¹⁴⁶ Case C-450/06 *Varec SA v État belge* [2008] ECR I-581 para. 47. This principle means, as a rule, that the parties have a right to a process of inspecting and commenting on the evidence and observations submitted to the court. However, in some cases it may be necessary for certain information to be withheld from the parties in order to preserve the fundamental rights of a third party or to safeguard an important public interest. (para. 47.)

¹⁴⁷ Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] ECR I-3633 para. 49.

¹⁴⁸ Joined Cases C-387/02, C-391/02 and C-403/02 *Criminal proceedings against Silvio Berlusconi and Others* [2005] ECR I-3565 para. 68.

¹⁴⁹ Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij NV (LVM), DSM NV and DSM Kunststoffen BV, Montedison SpA, Elf Atochem SA, Degussa AG, Enichem SpA, Wacker-Chemie GmbH and Hoechst AG and Imperial Chemical Industries plc (ICI) v Commission of the European Communities* [2002] ECR I-8375 para. 59. For the application of this principle in 3rd Pillar, see **Peers, (1999)**, p. 185–186.

¹⁵⁰ Case C-377/98 *Kingdom of the Netherlands v European Parliament and Council of the European Union* [2001] ECR I-7079 para. 70.

¹⁵¹ Case C-450/06 *Varec SA v État belge* [2008] ECR I-581 para. 48.

¹⁵² Case C-578/08 *Rhimou Chakroun v Minister van Buitenlandse Zaken* [2010] ECR I-1839 para. 44.

¹⁵³ Case C-421/07 *Criminal proceedings against Frede Damgaard* [2009] ECR I-2629 para. 26.

¹⁵⁴ Joined Cases T-222/99, T-327/99 and T-329/99 *Jean-Claude Martinez, Charles de Gaulle, Front national and Emma Bonino and Others v European Parliament* [2001] ECR II-2823 para. 231.

Fundamental rights are at the apex of forms of Union law and protected by the Court. This is all the more important, since the main concern in JCCM is the protection of fundamental rights.

Reasons for Mainly Protecting Fundamental Rights

In my view, CJEU will mainly function as a protector of fundamental rights in JCCM; instead of mainly enhancing individual rights *via* direct effect and primacy. This is so, since JCCM concerns measures which usually function as a limitation of individuals' rights. In this regard, Hinarejos indicates that in general the main aim is not to grant rights to, or enhance rights of, individuals; except where secondary law, such as relating to criminal procedural law, give them certain rights; but mostly the measures result in a limitation on individuals' rights.¹⁵⁶ In this respect unlike the more economic focus of the internal market, for instance the arrest and prosecution of suspects put Union law into more obvious potential conflict with fundamental rights.¹⁵⁷ In view of that, the important issue becomes how to protect fundamental rights in the face of measures related to JCCM.¹⁵⁸ In this regard, I agree with Hinarejos who rightly argues that unlike internal market where CJEU furthered integration; in relation to JCCM, the Court will and should function as a check on integration, rather than its champion, by controlling the compliance of legislative action with general principles of EU law.¹⁵⁹ Thus, the Court's contribution to JCCM will be mainly on the grounds of protection of fundamental rights.

To this end, the Opinion of Advocate General ("AG") Mengozzi in the *Da Silva Jorge* case, related to EAW, serves as a valuable guide. According to AG Mengozzi:

"... in the context of applying the principle of mutual recognition within the meaning of [Framework Decision 2002/584], *the protection of fundamental rights ... must be the overriding concern of the national legislature when it transposes acts of the [EU], of the national judicial authorities when they avail themselves of the powers devolved to them by [EU] law, but also of the Court when it receives questions on the interpretation of the provisions of [that act]. It is in the light of the ... protection of*

¹⁵⁵ Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-6351 para. 356–358.

¹⁵⁶ Hinarejos, 2011(a), p. 424.

¹⁵⁷ Steiner and Woods, p. 580. Also see, fn. 118.

¹⁵⁸ See **Steiner and Woods**, p. 604.

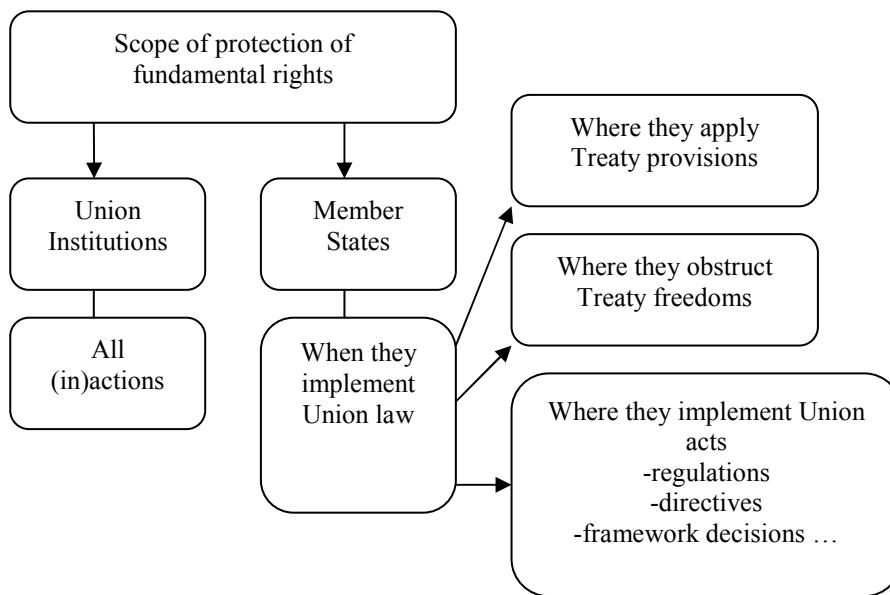
¹⁵⁹ Hinarejos, 2011(a), p. 420–421, 426. Nonetheless, as stated by Hinarejos, the CJEU, when controlling EU action and Member State action (when they implement EU law), is also ensuring that all Member States' action in this area will conform to a certain EU level of human rights standards and this certain standard may also be considered, in a loose sense, to be furthering integration. **Hinarejos, (2011(a))**, p. 429. On the other hand, according to de Witte, the affirmation of fundamental rights can be a means of bolstering the integration process by convincing citizens and national courts that cherished constitutional values are in safe hands with the CJEU. **De Witte**, p. 883. In this regard, also see above p. 134.

fundamental rights ... that the free movement of judgments in criminal matters must not only be guaranteed but also, where appropriate, limited.”¹⁶⁰

Scope of Protection of Fundamental Rights

Either via general principles or via CFR, the scope of protection of fundamental rights seems equal:¹⁶¹ The Union institutions as regards their all (in)actions and Member States, whenever they are in the context of EU law. For instance, according to the *Advocaten voor de Wereld* case which relates to the JCCM pre-ToL: The institutions are subject to review of the conformity of their acts with the Treaties and the general principles of law, including fundamental rights; just like Member States, when they implement the law of the Union.¹⁶² In addition to this, the provisions of CFR “are addressed to the institutions, bodies, offices and agencies of the Union ... and to the Member States only when they are implementing Union law”.¹⁶³

Figure 13: Scope of Protection of Fundamental Rights



¹⁶⁰ Opinion of Advocate General Mengozzi in Case C-42/11 *Joao Pedro Lopes Da Silva Jorge*, delivered on: 20 March 2012, *nyr*, point 28. (Emphasise added.)

¹⁶¹ Case C-27/11 *Anton Vinkov v Nachalnik Administrativno-nakazatelna deynost*, judgement of: 7 June 2012, *nyr*, para. 56–58. See in this regard, CRAIG, p. 211–212. For an early evaluation of this scope, see PEERS, (1999), p. 174.

¹⁶² Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] ECR I-3633 para. 45.

¹⁶³ Article 51(1) CFR.

Unsurprisingly, it is the protection *vis-à-vis* Member States that raises problems with regard to the boundaries of protection: When does a Member State implement Union law? The answer is:¹⁶⁴ Where they apply Treaty provisions¹⁶⁵ or implement Union acts,¹⁶⁶ in particular where applying or implementing regulations¹⁶⁷ or transposing directives into national law¹⁶⁸ or implementing Framework Decisions,¹⁶⁹ and obstruct the exercise of Treaty freedoms.¹⁷⁰ Accordingly, the CJEU cannot apply Union fundamental rights to a national rule, since it falls outside the scope of Union law.¹⁷¹

Standard of Protection of Fundamental Rights

Here, I will examine the standard of protection of fundamental rights, *i.e.* to what extent the fundamental rights are protected by the CJEU. However, it is necessary to begin with determining the authority (the CJEU or the national courts) which will ultimately decide on the issue of fundamental rights in a case.

Either the CJEU or the national courts rule on whether a measure is in conformity with fundamental rights. In this regard, we can mention two different situations. On the one hand, a measure may come under the jurisdiction of the CJEU. In this regard, if that measure is a Union act, than the CJEU will decide upon its compliance with EU fundamental rights.¹⁷² If that measure is an act of a Member State that implements Union law, than national court will give a ruling on whether it observes EU fundamental rights, with the help of the guidance from the CJEU. According to the case-law of the CJEU, in a reference for a preliminary ruling, “where national

¹⁶⁴ Lenaerts and Van Nuffel, p. 834–835. In this regard also see **Craig**, p. 213; **De Witte**, p. 870, 873; **Peers**, (1999), p. 170.

¹⁶⁵ Case 222/86 *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v Georges Heylens and others* [1987] ECR 4097 para. 14.

¹⁶⁶ In addition to these, national rules fall into the scope of Union law where a measure constitutes a necessary step in the procedure for adoption of a Community measure and where the Community institutions have only a limited or non-existent discretion with regard to that measure. Case C-269/99 *Carl Kühne GmbH & Co. KG and Others v Jütro Konservenfabrik GmbH & Co. KG*. [2001] ECR I-9517 para. 57.

¹⁶⁷ Case C-2/92 *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Dennis Clifford Bostock* [1994] ECR I-955 para. 16–27.

¹⁶⁸ Joined Cases C-20/00 and C-64/00 *Booker Aquaculture Ltd, trading as Marine Harvest McConnell and Hydro Seafood GSP Ltd v The Scottish Ministers* [2003] ECR I-7411 para. 88.

¹⁶⁹ Opinion of Advocate General Bot in Case C-123/08 Criminal proceedings against Dominic Wolzenburg [2009] ECR I-9621 point 115. Compare with Case C-123/08 *Criminal proceedings against Dominic Wolzenburg* [2009] ECR I-9621 para. 45.

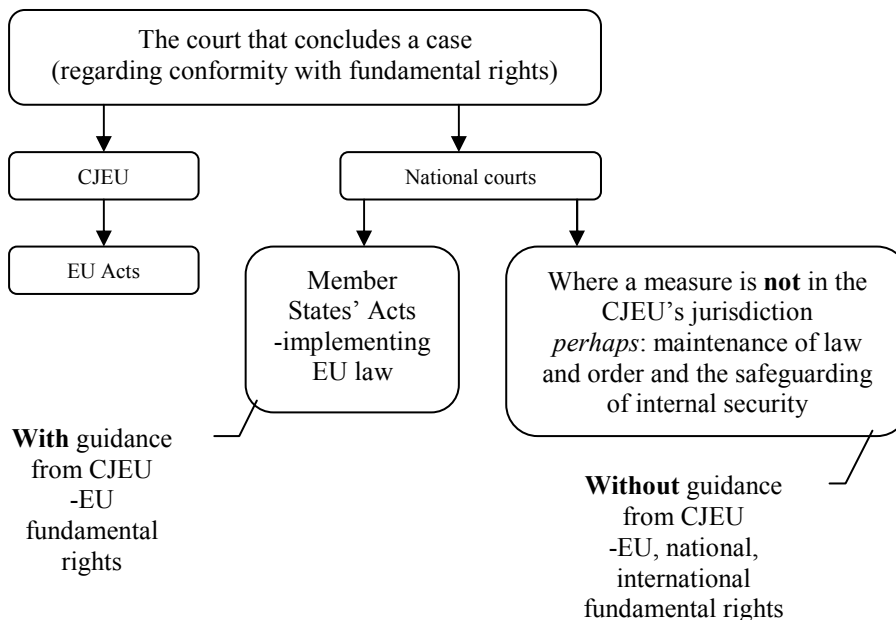
¹⁷⁰ Case C-368/95 *Vereinigte Familienpress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag* [1997] ECR I-3689 para. 24.

¹⁷¹ Case C-144/95 *Criminal proceedings against Jean-Louis Maurin* [1996] ECR I-2909 para. 12. Also regarding Framework Decisions see Joined Cases C-483/09 and C-1/10 *Criminal proceedings against Magatte Gueye and Valentín Salmerón Sánchez*, judgement of: 15 September 2011, **nyr**, para. 69.

¹⁷² In this regard, see Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199 para. 17.

legislation falls within the scope of EU law, the Court must provide all the criteria of interpretation needed in order for the national court to determine whether that legislation is compatible with the fundamental rights which derive in particular from the [CFR].¹⁷³ On the other hand, a measure may be out of the scope of jurisdiction of the CJEU. In this respect, national courts will judge whether such a measure respects (Union, national or international) fundamental rights.¹⁷⁴ For instance, if the CJEU deems the cases which are about the maintenance of law and order and the safeguarding of internal security¹⁷⁵ as totally out of its jurisdiction, then it will be for the national courts to secure that fundamental rights are observed.¹⁷⁶

Figure 14: Final Judgement in a Case



¹⁷³ Case C-27/11 *Anton Vinkov v Nachalnik Administrativno-nakazatelna deynost*, judgement of: 7 June 2012, *nyr*, para. 58. For an earlier statement to the same end, see Case C-2/92 *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Dennis Clifford Bostock* [1994] ECR I-955 para. 16.

¹⁷⁴ For instance, according to the Article 275 TFEU, the CJEU have no jurisdiction with respect to the provisions relating to the CFSP nor with respect to acts adopted on the basis of those provisions. Protection of fundamental rights in that context, therefore, rests on the protection afforded by the national legal systems (under the supervision of institutions set up by the ECHR). **Lenaerts and Van Nuffel**, p. 837.

¹⁷⁵ Article 276 TFEU.

¹⁷⁶ In this regard, also see **Hinarejos, (2011b)**, p. 268–269.

Regarding the protection of fundamental rights in theory, the CJEU is expected to maintain a sufficient standard of review, at least for two reasons: one is normative and the other is practical. The normative reason depends on the fact that the ToL has enhanced the position of fundamental rights in the EU legal order, most importantly by adding CFR to this legal sphere.¹⁷⁷ The practical reason reflects the fact that the CJEU needs to catch a certain standard of protection, in order to defend the principle of primacy (hence uniformity and effectiveness of EU law). This is a well-known story from the 1960's;¹⁷⁸ however, this need is more striking now, especially concerning JCCM, since here the potential for clashes between Union acts and national constitutional precepts is especially prevalent.¹⁷⁹ Therefore, it seems that it may be for the CJEU in order to preserve the uniform application of EU law through principle of primacy to reassure national courts that fundamental rights are not being compromised by EU criminal measures.¹⁸⁰

In practice, the CJEU has been trying its best to perform a sufficient standard of protection of fundamental rights, which is evident at both procedural and substantive level. At procedural level, the CJEU has two types of procedures at its disposal, both of which reduce significantly the delays in obtaining a decision from the CJEU in cases of exceptional urgency, such as when a person is in custody.¹⁸¹ These procedures are the “accelerated procedure”¹⁸² and the “urgent procedure” which is restricted to AFSJ matters (including JCCM).¹⁸³ These procedures seem in line with the right to a fair trial, which includes a trial “within a reasonable time”;¹⁸⁴ nonetheless, as Lenaerts reminds us, the requirement for swift decision-making must not be applied to the detriment of the protection of fundamental rights, particularly with respect to the rights of the defence.¹⁸⁵

To illustrate the standard of protection of fundamental rights at substantive level, I will scrutinize two cases and try to answer a question of a national court, left

¹⁷⁷ In this regard, see **Bazzocchi**, p. 194. Moreover, see Article 2, 3(1, 5) and 7 TEU as amended by ToL and Article 67(1) TFEU. Also see, above p. 152.

¹⁷⁸ For instance, see **De Witte**, p. 866.

¹⁷⁹ Craig, p. 150, 340.

¹⁸⁰ See **Steiner and Woods**, p. 603. Also see, **Dorota Leczykiewicz**, “Constitutional Conflicts and the Third Pillar”, **European Law Review**, Cilt: 33, No: 2, 2008, p. 238.

¹⁸¹ For the application of these procedures, see **Lenaerts, 2008**, p. 273–281.

¹⁸² Article 104(a) of the Rules of Procedure of the Court of Justice.

¹⁸³ Article 267 TFEU; Article 23a of the Statute of the Court of Justice; Article 104(b) of the Rules of Procedure of the Court of Justice. The duration of preliminary ruling proceedings was on average 16.8 months in 2008, 17.1 months in 2009, 16.1 months in 2010 and 16.4 months in 2011, and the cases to which urgent procedure applied were completed in on average 2.1 months in 2008 (3 cases), 2.5 months in 2009 (2 cases), 2.1 months in 2010 and 2.5 months in 2011 (5 cases). **Court of Justice of the European Union**, Annual Report 2011, Luxembourg, 2012, p. 110. <http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-06/ra2011_statistiques_cour_en.pdf>

¹⁸⁴ Article 6 ECHR and Article 47 CFR.

¹⁸⁵ Lenaerts, p. 273. For another concern, see **Hinarejos, 2009**, p. 80.

unanswered by the CJEU in one case. These are respectively the *Pupino*, *Advocaten voor de Wereld* and *I.B.* cases.¹⁸⁶

In the *Pupino* case, the CJEU emphasized the importance of the fundamental rights in 3rd Pillar, while transferring the doctrine of consistent interpretation from 1st Pillar to 3rd Pillar.¹⁸⁷ First of all, “the Union must respect fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, as general principles of law”, on the basis of Article 6(2) ex-TEU.¹⁸⁸ Therefore, the relevant Framework Decision (or in general all Union acts) must be interpreted in such a way that fundamental rights, such as the right to a fair trial (Article 6 ECHR) are respected.¹⁸⁹ Moreover, taking into account the special circumstances of the *Pupino* case, the CJEU ruled that the doctrine of consistent interpretation should not result in making the criminal proceedings against Mrs Pupino unfair within the meaning of Article 6 ECHR as interpreted by European Court of Human Rights (“ECtHR”), giving specific examples from the case-law of that Court.¹⁹⁰ In this case, however, it is for the national court to give a ruling on the dispute, while taking into account the observance of EU fundamental rights, with the assistance of the CJEU.

In the *Pupino* case, the CJEU gives the impression that it has been generous in its guidance of the national court regarding the fundamental rights, since it referred to the relevant Article of the ECHR and its interpretation by the ECtHR as well. Moreover, as stated by Callewaert, the main message of the *Pupino* judgement is that there can be no compliance with EU law without compliance both with the ECHR and the case-law of the ECtHR.¹⁹¹ On the other hand, according to Douglas-Scott, the cases, such as *Pupino*, are not explicitly unfriendly to rights, and yet they do not afford the centrality and attention to rights reasoning which one might hope for.¹⁹² Furthermore, this case concerned a national measure and the interpretation of it in the light of the relevant Framework Decision, which, in turn, must also be interpreted in conformity with (Union) fundamental rights.

In the *Advocaten voor de Wereld* case, the CJEU was faced with the question whether the Framework Decision on EAW is in breach of general principles of EU

¹⁸⁶ Case C-105/03 *Criminal proceedings against Maria Pupino* [2005] ECR I-5285; Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] ECR I-3633; Case C-306/09 *I.B.*, judgement of: 21 October 2010, *nyr*. Another category of cases involves issues of fundamental rights as in judicial protection at EU level. See Case C-354/04 P *Gestoras Pro Amnistia and Others v Council of the European Union* [2007] ECR I-1579 para. 49–57.

¹⁸⁷ Case C-105/03 *Criminal proceedings against Maria Pupino* [2005] ECR I-5285 para. 58–60.

¹⁸⁸ Case C-105/03 *Criminal proceedings against Maria Pupino* [2005] ECR I-5285 para. 58.

¹⁸⁹ Case C-105/03 *Criminal proceedings against Maria Pupino* [2005] ECR I-5285 para. 59.

¹⁹⁰ Case C-105/03 *Criminal proceedings against Maria Pupino* [2005] ECR I-5285 para. 60. These specific examples are: ECHR judgments of 20 December 2001, *P.S. v Germany*, of 2 July 2002, *S.N. v Sweden*, *Reports of judgments and decisions 2002-V, of 13 February 2004, Rachdad v France*, and the decision of 20 January 2005, *Accardi and Others v Italy*, App. 30598/02.

¹⁹¹ Callewaert, p. 518.

¹⁹² Douglas-Scott, p. 290.

law.¹⁹³ In this case the applicants contend that Article 2(2) of the Framework Decision is contrary to the principle of equality and non-discrimination and to the principle of legality in criminal matters, as the verification of the requirement of the double criminality is lacking for some offences.¹⁹⁴ Firstly, the applicants claim that the principle of legality in criminal matters is breached, since the list of offences for which the double criminality has been abandoned is so vague and imprecise, given that there were no legal definitions of these offences.¹⁹⁵ For the CJEU, on the basis of case-law of the ECtHR, this principle implies that legislation must define clearly offences and the penalties which they attract.¹⁹⁶ Here, the actual definition of those offences and the penalties applicable are those which flow from the law of the issuing Member State, which must respect fundamental rights, and, consequently, the principle of the legality of criminal offences and penalties.¹⁹⁷ Accordingly, there is no breach of this principle by the relevant Article of the Framework Decision.¹⁹⁸ Secondly, the applicants assert that the principle of equality is breached, since there is a distinction between the offences for which the double criminality has been abandoned or others, and it is not objectively justified one the one hand, and the lack of definition of those offences risks giving rise to disparate implementation, on the other.¹⁹⁹ For the CJEU, first, it is for the Council to choose among offences whose seriousness justifies dispensing with the verification of double criminality,²⁰⁰ and second, it is not the objective of the Framework Decision to harmonise the substantive criminal law,²⁰¹ therefore, there is no breach of this principle either.²⁰²

The views differ on this judgement. According to Lenaerts, this judgement shows that the CJEU is driven by the concern to uphold the protection of fundamental rights.²⁰³ Nonetheless, for the Douglas-Scott, this was hardly a very satisfactory

¹⁹³ Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] ECR I-3633. The reasoning of the CJEU is widely criticised; see *Chalmers et al.*, p. 604.

¹⁹⁴ Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] ECR I-3633 para. 44.

¹⁹⁵ Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] ECR I-3633 para. 48.

¹⁹⁶ Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] ECR I-3633 para. 50. Here, the CJEU refers to the case: European Court of Human Rights judgment of 22 June 2000 in *Coëme and Others v Belgium*, Reports 2000-VII, § 145.

¹⁹⁷ Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] ECR I-3633 para. 52, 53.

¹⁹⁸ Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] ECR I-3633 para. 54.

¹⁹⁹ Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] ECR I-3633 para. 55.

²⁰⁰ Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] ECR I-3633 para. 57–58.

²⁰¹ Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] ECR I-3633 para. 59.

²⁰² Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] ECR I-3633 para. 60.

²⁰³ Lenaerts, p. 298.

judgement, since the reasons the Court gave for finding the EAW not to breach fundamental rights were unsatisfactory, leaving many questions unaddressed.²⁰⁴ Besides, Leczykiewicz, who shares a similar view, mentions that the CJEU avoided any substantive review of the relevant measure in the light of the fundamental rights.²⁰⁵ In my view, the CJEU shows that it respects fundamental rights in theory, as it refers to them (including ECHR and case-law of the ECtHR) as a yardstick with which the Union measures will be evaluated. Nonetheless, it is only the beginning and does not suffice in itself for the protection of fundamental rights. Here, the CJEU seems not to have been thoroughly analysing the relevant Union measure in the light of the fundamental rights, as its reasoning appears to be insufficient. In this regard, I agree with de Witte (1999), who stated that the CJEU could take extra care in developing more detailed and persuasive arguments about why it rejects pleas of human rights breaches in a particular case.²⁰⁶ Here, this judgement is deficient mainly on this ground.

Lastly, here, I would like to express my opinion about an interesting question related to the EAW, which was asked by the national court in the *I.B.* case; however, left unanswered by the CJEU.²⁰⁷ The question was that: Can a national court refuse the execution of an EAW if there are valid grounds for believing that its execution would have the effect of infringing the fundamental rights of the person concerned?²⁰⁸ In this regard, the Framework Decision on EAW limits the circumstances under which the national court may refuse to execute an EAW, and they do not include protection of fundamental rights.²⁰⁹ Nonetheless, most of the Member States have put such a clause to their laws implementing that Union act.²¹⁰

I will try to guess how the CJEU will approach such a case; nonetheless, I would like to mention primarily some other views on this topic. Firstly, according to the German Constitutional Court, regarding the EAW, in order to conform to Article 16(2) of Basic German Law –“the rule of law is observed”–, there should be a judicial scrutiny in each individual case by a German court to see whether the individual’s

²⁰⁴ Douglas-Scott, p. 279, 290. For a similar view, also see **Craig and De Búrca**, p. 950.

²⁰⁵ Leczykiewicz, 2008, p. 231, 241.

²⁰⁶ De Witte, p. 882.

²⁰⁷ Case C-306/09 **I.B.**, judgement of: 21 October 2010, **nyr**, para. 41(4), 62–63.

²⁰⁸ Case C-306/09 **I.B.**, judgement of: 21 October 2010, **nyr**, para. 41(4). In this regard, also see **Peers, 2011**, p. 685. For instance, according to Steiner and Woords, there is likely to be further litigation regarding EAW (and other mutual recognition measures), for instance, national courts may find further cause to challenge arrest warrants issued by Member States where the trial procedures, legal aid, access to lawyers, or other matters are considered to be deficient as compared with the national law of the requested Member State. **Steiner and Woods**, p. 603.

²⁰⁹ Nevertheless, see Recital 12 and Article 1(3) of the Framework Decision 2002/584/JHA. In general, see **Craig and De Búrca**, p. 951; **Mitsilegas, 2009**, p. 128–129; **Rijken**, p. 1473, 1474.

²¹⁰ COM(2006)8 final, Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, Brussels, 24.1.2006, point 2.2.1. The Commission finds this practice as not disturbing; but wants these clauses to be invoked only in exceptional circumstances. (point 2.2.1.)

fundamental rights would be respected in the state to which he was surrendered.²¹¹ Secondly, for the AG Bot, if, in extraordinary circumstances, an application for surrender is liable to infringe a person's fundamental rights, than the executing judicial authorities have some means of protecting him.²¹² Thirdly, as to de Schutter, the EU's Member States are authorized and obliged under Union law to refuse to comply with the requirements of inter-State cooperation (such as EAW) in the AFSJ in any situation where this might conflict with fundamental rights as recognized in the legal order of the EU.²¹³ Lastly, concerning judicial cooperation in civil matters, the CJEU seeks to uphold the protection of fundamental rights, embodied by the rule of law.²¹⁴ According to the Court, "even though the [relevant measure] is intended to secure the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals, it is not permissible to achieve that aim by undermining the right to a fair hearing" (or in general fundamental rights).²¹⁵ Hence, where the court of origin breaches manifestly the fundamental rights of a person, the court of the State in which enforcement sought can recourse to the public-policy clause to limit the free movement of judgements.²¹⁶

In the light of these, it seems to me that the CJEU will probably agree that a national court is empowered to refuse the execution of an EAW when it believes that there are valid grounds that this execution would have the effect of infringing the fundamental rights of the person concerned.²¹⁷ I come to this conclusion, since the EU must respect fundamental rights, flowing from CFR and as general principles of Union law, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States.²¹⁸ Therefore, all Union acts must be interpreted in such a way that fundamental rights are respected.²¹⁹ There seems to be a leeway in the relevant Framework Decision, which may justify a refusal by the executing state to surrender a person on the grounds of protection of fundamental rights, even though it is not explicitly stated in that Framework Decision.²²⁰ In this respect, according to the Article 1(3): "*This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles*".²²¹ As this wording covers the whole measure, this may also permit an executing court to refuse an

²¹¹ Chalmers et.al., p. 599.

²¹² Opinion of Advocate General Bot in Case C-123/08 *Criminal proceedings against Dominic Wolzenburg* [2009] ECR I-9621 point 147.

²¹³ De Schutter, p. 543, 544.

²¹⁴ See Lenaerts, p. 282.

²¹⁵ Case C-7/98 *Dieter Krombach v André Bamberski* [2000] ECR I-1935 para. 43. Also see Case C-420/07 *Meletis Apostolides v David Charles Orams and Linda Elizabeth Orams* [2009] ECR I-3571 para. 72.

²¹⁶ Case C-7/98 *Dieter Krombach v André Bamberski* [2000] ECR I-1935 para. 44–45. In this regard, see Lenaerts, p. 285, 288; Peers, 2011, p. 686.

²¹⁷ To the same effect, see Peers, 2011, p. 686.

²¹⁸ See Article 6 TEU as amended by ToL. Also see Case C-105/03 *Criminal proceedings against Maria Pupino* [2005] ECR I-5285 para. 58.

²¹⁹ See Case C-105/03 *Criminal proceedings against Maria Pupino* [2005] ECR I-5285 para. 59.

²²⁰ See Article 3 and 4 of the Framework Decision 2002/584/JHA.

²²¹ **Emphasis** added. Also see Recital 12 of the Framework Decision 2002/584/JHA.

execution of EAW, where it believes that it would result in violation of fundamental rights of concerned person. Moreover, the fundamental rights have the status of primary law in the forms of EU law (upper than, *inter alia*, Framework Decisions (or Directives)) and as AG Mengozzi indicates: “It is in the light of the ... protection of fundamental rights ... that the free movement of judgments in criminal matters must not only be guaranteed but also, where appropriate, limited.”²²² Accordingly, I expect that protecting fundamental rights will be the main concern for the CJEU in such a case (and in similar cases related to the JCCM), it will come to the above-mentioned conclusion to the question in the *I.B.* case.²²³

Conclusion

CJEU has been contributing to the development of JCCM, even though it has limited jurisdiction. This contribution is expected to increase in the coming years, because of the ToL: On the one hand, the CJEU has full jurisdiction over JCCM, since the entry into force of the ToL, albeit subject to some transitional provisions. This means that the CJEU will have the chance to hear more cases, since the ToL removes the limitations on its jurisdiction in JCCM which has significantly curtailed the contribution of the CJEU to this field at the procedural level. On the other hand, the Union is now disposed of the Pillar structure, thanks to the ToL, which means that the current EU legal order succeeds the Community legal order, with all of its “supranational” features. This indicates that doctrines such as primacy and direct effect will become applicable regarding JCCM, which will probably increase the volume of litigation and further the integration in this area to some extent.

The major contribution of the CJEU to JCCM is and expected to be yet on the grounds of protection of fundamental rights. This is the case, because of the nature of JCCM, *i.e.* it concerns measures which usually function as a limitation of individuals’ rights and also contain a potential for conflict with fundamental rights. At this point, the role of the CJEU becomes crucial, since it is the main institution (with national courts) which will secure the protection of fundamental rights of individuals. In this respect, the ToL has also strengthened the position of the CJEU, since there seem to be lots of useful provisions for the Court to give a prominent position to the fundamental rights in the development of JCCM; the most important one being the CFR which has the same status with the Treaties.²²⁴ A future accession by the EU to the ECHR is also to be welcomed, from a human rights perspective, since the EU will then be subject to an external control of its actions, including the control by ECtHR.

Moreover, the CJEU has been trying its best to perform a certain standard of protection of fundamental rights, both at procedural and substantive level. In this regard, it seems that the national (highest) courts will probably follow closely the judgements of

²²² Opinion of Advocate General Mengozzi in Case C-42/11 *Joao Pedro Lopes Da Silva Jorge*, delivered on: 20 March 2012, **nyr**, point 28. (**Emphasise** added.)

²²³ Case C-306/09 **I.B.**, judgement of: 21 October 2010, **nyr**, para. 41(4).

²²⁴ Article 2 TEU as amended by ToL. (See Article 3(1, 5) and 7 TEU as amended by ToL.) Article 6(1, 2, 3) TEU as amended by ToL and Article 67(1) TFEU.

the CJEU in this new “supranational” “Union” legal order in relation to their effects on fundamental rights of individuals. In this respect, it is up to the CJEU to reassure the concerns of national (highest) courts, by giving them the feeling that the fundamental rights are at safe with it. This may be the case where, *inter alia*,²²⁵ (i) CJEU does not offer protection lower than ECHR (including, case-law of the ECtHR),²²⁶ (ii) CJEU attaches fair importance to the “common constitutional traditions” of the Member States (including, case-law of the national highest courts);²²⁷ (iii) CJEU develops more detailed and persuasive arguments in relation to fundamental rights.²²⁸ These propositions may also pay the way for a constructive dialogue between CJEU on the one hand, and ECtHR and national highest courts on the other, which will be to the benefit of protection of fundamental rights in the EU.

Bibliography

Valentina Bazzocchi, “The European Charter of Fundamental Rights and the Area of Freedom, Security and Justice”, (Ed.) Giacomo Di Federico, **The EU Charter of Fundamental Rights: From Declaration to Binding Instrument**, Springer, Dordrecht, 2011.

Johan Callewaert, “The European Court of Human Rights and the Area of Freedom, Security and Justice”, **ERA Forum**, Cilt: 8, 2007.

Damian Chalmers et. al., **European Union Law: Text and Materials**, 2nd Edition, Cambridge University Press, United Kingdom, 2010.

Paul Craig, **The Lisbon Treaty: Law, Politics, and Treaty Reform**, Oxford University Press, United States, 2010.

Paul Craig and Gráinne De Búrca, **EU Law: Texts, Cases and Materials**, 5th Edition, Oxford University Press, Oxford, 2011.

Olivier De Schutter, “The two Europes of Human Rights: The Emerging Division of Tasks between the Council of Europe and the European Union in Promoting Human Rights in Europe”, **Columbia Journal of European Law**, Cilt: 14, 2007-2008.

Bruno De Witte, “The Past and Future Role of the European Court of Justice in the Protection of Human Rights”, (Ed.) Philip Alston, **The EU and Human Rights**, Oxford University Press, United States, 1999.

²²⁵ In these remarks, I am inspired by **De Witte**, p. 882–883.

²²⁶ See Article 52(3) and 53 CFR.

²²⁷ See Article 52(4) and 53 CFR.

²²⁸ See Article 51(1) CFR. It might be so, because the CJEU is also an institution which is under an obligation, *inter alia*, to promote the application of fundamental rights.

Sionaidh Douglas-Scott, "Freedom, Security, and Justice in the European Court of Justice: The Ambiguous Nature of Judicial Review", (Eds.) Tom Campbell et.al., **The Legal Protection of Human Rights: Sceptical Essays**, Oxford University Press, 2011.

Elsbeth Guild and Sergio Carrera, "The European Union's Area of Freedom, Security and Justice: Ten Years On", (Eds.) Elspeth Guild et.al., **The Area of Freedom, Security And Justice: Ten Years on Successes and Future Challenges under the Stockholm Programme**, Centre for European Policy Studies, Brussels, 2010.

Vassilis Hatzopoulos, "Casual but Smart: The Court's new clothes in the Area of Freedom Security and Justice (AFSJ) after the Lisbon Treaty", **College of Europe: European Legal Studies: Research Papers in Law**, 2/2008, 2008.

Alicia Hinarejos, **Judicial Control in the European Union: Reforming Jurisdiction in the Intergovernmental Pillars**, Oxford University Press, United States, 2009.

Alicia Hinarejos, "Integration in Criminal Matters and the Role of the Court of Justice", **European Law Review**, Cilt: 36, No: 3, 2011(a).

Alicia Hinarejos, "Law and Order and Internal Security Provisions in the Area of Freedom, Security and Justice: Before and After Lisbon", (Eds.) Christina Eckes, and Theodore Konstadinides, **Crime within the Area of Freedom, Security and Justice: A European Public Order**, Cambridge University Press, United Kingdom, 2011(b).

Dora Kostakopoulou, "An open and secure Europe? Fixity and fissures in the area of freedom, security and justice after Lisbon and Stockholm", **European Security**, Cilt: 19, No: 2, 2010.

Dorota Leczykiewicz, "Constitutional Conflicts and the Third Pillar", **European Law Review**, Cilt: 33, No: 2, 2008.

Dorota Leczykiewicz, "Effective Judicial Protection" of Human Rights after Lisbon: Should National Courts be Empowered to Review EU Secondary Law?", **European Law Review**, Cilt: 35, No: 3, 2010.

Koen Lenaerts, "The Contribution of the European Court of Justice to the Area of Freedom, Security and Justice", **International and Comparative Law Quarterly**, Cilt: 59, 2010.

Koen Lenaerts and Piet Van Nuffel, **Constitutional Law of the European Union**, 3rd Edition, Sweet & Maxwell, Great Britain, 2011.

Valsamis Mitsilegas, **EU Criminal Law**, Hart Publishing, USA, 2009.

Valsamis Mitsilegas, "The Third Wave of Third Pillar Law: Which Direction for EU Criminal Justice?", **European Law Review**, Cilt: 34, No: 4, 2009.

Steve Peers, “Human Rights and the Third Pillar”, (Ed.) Philip Alston, **The EU and Human Rights**, Oxford University Press, United States, 1999.

Steve Peers, **EU Justice and Home Affairs Law**, 3rd Edition, Oxford University Press, Great Britain, 2011.

Steve Peers, “EU Justice and Home Affairs Law (Non Civil)”, (Eds.) Paul Craig, Gráinne De Búrca, **The Evolution of EU Law**, 2nd Edition, Oxford University Press, United States, 2011.

Jean-Claude Piris, **The Lisbon Treaty: A Legal and Political Analysis**, Cambridge University Press, Cambridge, 2010.

Sacha Prechal, **Directives in EC Law**, 2nd Edition, Oxford University Press, Great Britain, 2005.

Conny Rijken, “Re-Balancing Security and Justice: Protection of Fundamental Rights in Police and Judicial Cooperation in Criminal Matters”, **Common Market Law Review**, Vol: 47, 2010.

Jo Shaw et. al., **Economic and Social Law of the European Union**, Palgrave Macmillan, Great Britain, 2007.

Eleanor Spaventa, “Opening Pandora’s Box: Some Reflections on the Constitutional Effects of the Decision in **Pupino**”, **European Constitutional Law Review**, Cilt: 3, 2007.

Josephine Steiner and Lorna Woods, **EU Law**, 10th Edition, Oxford University Press, Great Britain, 2009.