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Keeping a(n) (Un)Fair Balance between the “Judicial Cooperation in Criminal Matters” and Fundamental Rights: The Contributions of the Court of Justice of the European Union

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, albeit subject to some transitional provisions. Like all matters falling within the sphere of AFSJ, the matters dealt within JCCM raise frequently fundamental (human) rights concerns, such as the right to a fair trial and legality of criminal law. The CJEU has recognized and protected these fundamental (human) rights as general principles of European Union (“EU”) law. Besides, since the entry into force of the Treaty of Lisbon, Charter of Fundamental Rights of the European Union 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 (continue to) contribute to the JCCM mainly on the grounds of protection of fundamental rights. Therefore, this paper aims to evaluate the (current and potential) contribution of the CJEU in the development of the JCCM among other actors of the EU (such as Commission, Council and/or European Parliament) with a specific focus on the protection of fundamental rights.

Keyword(s): Judicial Cooperation in Criminal Matters, Fundamental (Human) Rights, Court of Justice of the European Union, Treaty of Lisbon.

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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 been contributing 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, *inter alia*, 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 (human) rights concerns, such as the right to a fair trial and legality of criminal law. The CJEU has recognized and protected these fundamental (human) 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 CJEU will (continue to) contribute to the JCCM mainly on the grounds of protection of fundamental rights.

This paper, therefore, aims to evaluate the (current and potential) contribution of the CJEU in the development of the JCCM with a specific focus on the protection of fundamental rights. In this sense, this paper does not aim to analyse the JCCM legislation, for instance as to their conformity with fundamental (human) rights;² rather it deals with main issues of legal principle (or analysis of the “system”). Hence, this Paper aims to answer the question that: How will the CJEU will (continue to) contribute to the development of the JCCM in the aftermath of ToL, especially regarding the protection of fundamental rights? In the end, the Paper concludes that in the post-ToL era the CJEU (with the national courts) will (continue to) be the main actor, contributing to the JCCM on the grounds of protection of fundamental rights, which is very needed in an area such as JCCM that has the potential to raise frequently fundamental rights concerns.

I will try to come to this conclusion in four successive steps. Firstly, I will briefly examine the JCCM in institutional and substantive terms. (I) Secondly, I will consider in detail the jurisdiction of the CJEU concerning the JCCM, before and after the ToL. (II) Thirdly, I will scrutinize the Union acts related to the JCCM and their effects and illustrate the (current and potential) contributions of the CJEU to the JCCM in general, before and after the ToL. (III) Lastly, I will try to assess the current and (potential) future contributions of the CJEU to the JCCM, with a specific focus on protection of fundamental rights, by giving answers to questions such as what is the status of the fundamental rights in EU law; why the CJEU will (continue to) contribute to the JCCM mainly on the grounds of protection of fundamental rights and what is the scope and standard of this protection? (IV)

¹ Article 19 TEU as amended by ToL.

² For such kind of an effort, for instance, see **RIJKEN, CONNY**, “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.

I. Judicial Cooperation in Criminal Matters in Brief

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

1. 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–, (mainly) starting 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 paper, I will not deal with the special status of these States, *i.e.* United Kingdom, Ireland and Denmark, mainly for reasons of space.⁴

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, the first mandate of which 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, with a supranational 1st Pillar concerning the Community and (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 (with no or limited role for other Community institutions) and except (international) Conventions, legal acts were not well defined (*i.e.* Joint Actions, Joint Positions, Common Positions).

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 now titled as “Police and Judicial Cooperation in Criminal Matters” (“PJCCM”). This reform related to adding some (light) Community elements to the 3rd Pillar, drawing it to some extent away from pure intergovernmental methods, such as giving a right of initiative to the Commission, giving limited jurisdiction to the CJEU and rewriting the two legal acts which are more clear than the old ones (*i.e.* Common Positions, Framework Decisions, Decisions, Conventions). Lastly, this

³ PEERS, STEVE, “EU Justice and Home Affairs Law (Non Civil)”, (Eds.) CRAIG, PAUL – DE BÚRCA, GRÁINNE, *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 LENAERTS, KOEN and VAN NUFFEL, PIET, *Constitutional Law of the European Union*, 3rd Edition, Sweet & Maxwell, Great Britain, 2011, p. 342–347; MITSILEGAS, VALSAMIS, *EU Criminal Law*, Hart Publishing, USA, 2009, p. 53–56; PIRIS, JEAN-CLAUDE, *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 CRAIG, PAUL, *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; SHAW, JO *et. al.*, *Economic and Social Law of the European Union*, Palgrave Macmillan, Great Britain, 2007, p. 316–323.

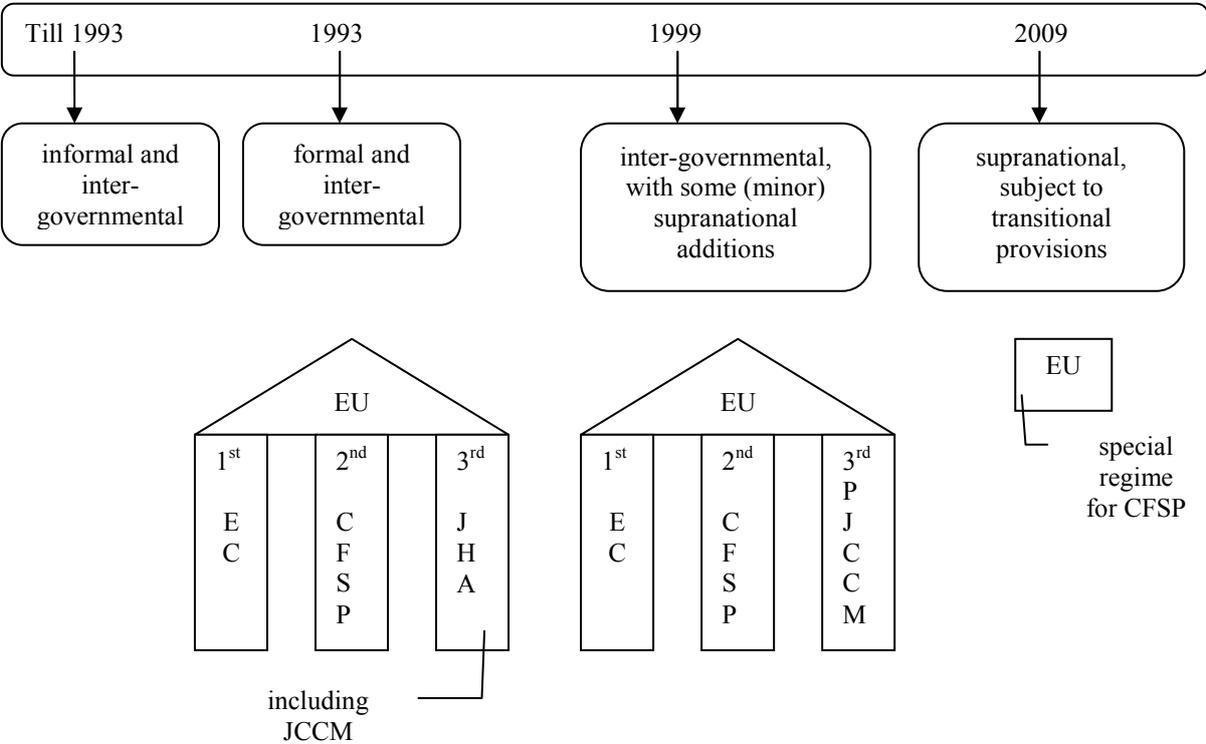
⁶ See CRAIG, p. 332.

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

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

In the fourth stage, 2009 on, EU has now been de-pillarized thanks to the ToL (though special rules still apply to the CFSP). As a result of this, JCCM now become a part of the Title V (AFSJ), Part Three of the TFEU to which Community method fully applies (that means it is the Union institutions, namely Commission, Council and Parliament that adopts the relevant measures, mostly on the basis of ordinary legislative procedure,⁹ generally speaking as the form of regulations, directives and decisions, and the CJEU has full jurisdiction), albeit subject to some transitional provisions, such as limitations on the jurisdiction of the CJEU. Accordingly, in general and for the purposes of this Paper, the ToL has (almost) put a formal end to the vulnerable setting for the protection of fundamental rights of individuals.¹⁰

Figure 1: JCCM - Institutional Development



2. Substantive Evolution

JCCM recorded little progress until 1999; nonetheless, from that time (or ToA) on progress has been increased steadily. Since ToA is still relevant today; here I will deal with

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. **STEINER, JOSEPHINE and WOODS, LORNA**, *EU Law*, 10th Edition, Oxford University Press, Great Britain, 2009, p. 581.

⁹ For their upgraded role, see **CRAIG**, p. 344–346.

¹⁰ See **GUILD, ELSPETH and CARRERA, SERGIO**, “The European Union’s Area of Freedom, Security and Justice: Ten Years On”, (Eds.) **GUILD, ELSPETH 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.

the period which is from 1999 on.¹¹ 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.¹² 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 shows 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 (human) rights.¹³ 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.¹⁴

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.¹⁵ Nevertheless, this practice has given rise to principally two interrelated problems and protection of fundamental rights lie behind both of them.¹⁶ 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?¹⁷ 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.¹⁸ Accordingly, (in simplified terms) a measure limiting the rights of individuals (or citizens) must also respect fundamental rights. Second problem, which is about the deficiency of positive integration 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.¹⁹ However, this has raised the legitimate questions that: Were they enough and/or to what extent were they (really)

¹¹ For pre-1999 see **PEERS, (2011)**, p. 292–293.

¹² See Article 68 TFEU, which catches up with reality.

¹³ In this regard, see **GUILD and CARRERA**, p. 4–5; **KOSTAKOPOULOU, DORA**, “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.

¹⁴ 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.

¹⁵ 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 **CRAIG, PAUL and DE BÚRCA, GRÁINNE**, *EU Law: Texts, Cases and Materials*, 5th Edition, Oxford University Press, Oxford, 2011, p. 952; **MITSILEGAS, 2009**, p. 101; **PEERS, STEVE**, “Human Rights and the Third Pillar”, (Ed.) **ALSTON, PHILIP**, *The EU and Human Rights*, Oxford University Press, United States, 1999, p. 176.

¹⁶ 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 **PEERS, STEVE**, *EU Justice and Home Affairs Law*, 3rd Edition, Oxford University Press, Great Britain, 2011, p. 768.

¹⁷ 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.

¹⁸ **MITSILEGAS, 2009**, p. 118.

¹⁹ **PEERS, (1999)**, p. 176.

enforced?²⁰ 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.²¹ 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.²²

Against this background, the substantive evolution of the JCCM can be divided into two main stages. In the first stage, 1999 to 2009, the JCCM rested mainly upon the principle of mutual recognition of judicial decisions and judgements²³ and to some extent upon approximation of substantive and procedural criminal law, largely by Framework Decisions.²⁴ In this regard, three examples may be given.²⁵ Firstly, there is the Framework Decision on European Arrest Warrant (EAW) which is based on the principle of mutual recognition.²⁶ This measure (and the measures followed the approach of it, such as European Evidence Warrant)²⁷ 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.²⁸ Secondly, regarding substantive criminal law, there are Framework Decisions related to so-called Euro-crimes, such as terrorism,²⁹ organised crime³⁰ and racism and xenophobia,³¹ setting minimum standards.

²⁰ For these and other questions, for instance see **DE SCHUTTER, OLIVIER**, "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; **DOUGLAS-SCOTT, SIONAIDH**, "Freedom, Security, and Justice in the European Court of Justice: The Ambiguous Nature of Judicial Review", (Eds.) **CAMPBELL, TOM et al.**, *The Legal Protection of Human Rights: Sceptical Essays*, Oxford University Press, 2011, p. 282-283.

²¹ In this regard, see **RIJKEN**, p. 1491. Also for instance Bazzocchi states that to enhance mutual trust within the European Union, 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 European Union. **BAZZOCCHI, VALENTINA**, "The European Charter of Fundamental Rights and the Area of Freedom, Security and Justice", (Ed.) **DI FEDERICO, GIACOMO**, *The EU Charter of Fundamental Rights: From Declaration to Binding Instrument*, Springer, Dordrecht, 2011, p. 186-187.

²² See fn. 36. 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

²³ Tampere European Council, 15 and 16 October 1999, Presidency Conclusions, point 33.

²⁴ 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 the JCCM see **CRAIG**, p. 361-363; **MITSILEGAS, 2009**, p. 59-113.

²⁵ For the third wave of 3rd Pillar acts, see **MITSILEGAS, VALSAMIS**, "The Third Wave of Third Pillar Law: Which Direction for EU Criminal Justice?", *European Law Review*, Cilt: 34, No: 4, 2009, s. 523-560.

²⁶ 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.

²⁷ 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.

²⁸ **PEERS, (2011)**, p. 293-294.

²⁹ Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism [2002] OJ L 164/3.

³⁰ Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime [2008] OJ L 300/42.

³¹ 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.

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.³²

In the second stage, from 2009 on, the JCCM continues to rest mainly upon the principle of mutual recognition of judicial decisions and judgements, gone together with approximation of substantive and procedural criminal law, mostly by Directives.³³ 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.³⁴ Secondly, as regards substantive criminal law, some of the Framework Decisions has been amended and updated by Directives, in relation to crimes such as trafficking in human beings and sexual offences against children, setting minimum rules concerning the definition of criminal offences and sanctions.³⁵ 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.³⁶

Overall, as Peers observes, 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.³⁷ 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 the 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, more favourable decision-making procedure set out by ToL and third, the full jurisdiction of the CJEU, at the latest from 30 November 2014 on, in conjunction with the CFR which is now a binding instrument having the status of primary law.³⁸ The focus of this Paper is on this last novelty. Hence, next, I will deal with the jurisdiction of the CJEU in relation to the JCCM.

³² Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings [2001] OJ L 82/1.

³³ The relevant legal bases are Article 82–84 TFEU. For the details about the competence with regard to the JCCM see **CRAIG**, p. 363–370; **MITSILEGAS, 2009**, p. 59–113.

³⁴ 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.

³⁵ 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 sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA OJ L 2011] OJ L 335/1.

³⁶ 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.

³⁷ **PEERS, (2011)**, p. 297.

³⁸ In this regard, see **RIJKEN**, p. 1456. With regard to AFSJ in general, see **KOSTAKOPOULOU**, p. 153, 158–159, 164.

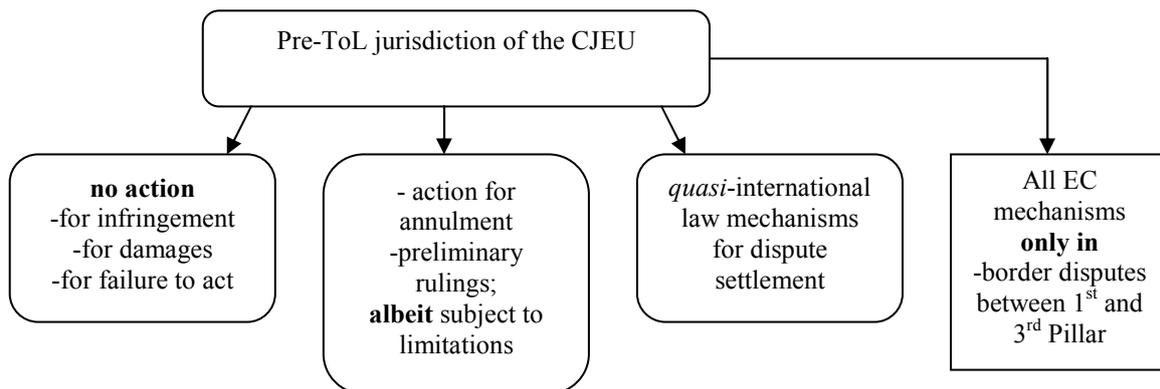
II. Jurisdiction of the Court of Justice of the European Union Regarding the Judicial Cooperation in Criminal Matters

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

1. 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 contribution of the CJEU to the area of JCCM was significantly curtailed at the procedural level.³⁹

Figure 2: Pre-ToL Jurisdiction of the CJEU



The system of remedies regarding the JCCM in the pre-ToL era is both deficient and restricted.⁴⁰ To begin with, there is no action for infringement or action for damages in the 3rd Pillar.⁴¹ In addition to this, literally, there is no action for failure to act in the 3rd Pillar.⁴²

On the other hand, there are action for annulment and preliminary ruling procedure, subject to limitations, and some *quasi*-international law mechanisms for dispute settlement as well. 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).⁴³ Secondly, the CJEU can rule on the validity and interpretation of Framework Decisions and Decisions (but

³⁹ See LENAERTS, KOEN, “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.

⁴⁰ See Article 35 TEU as amended by ToN, which is the main provision about this system of remedies.

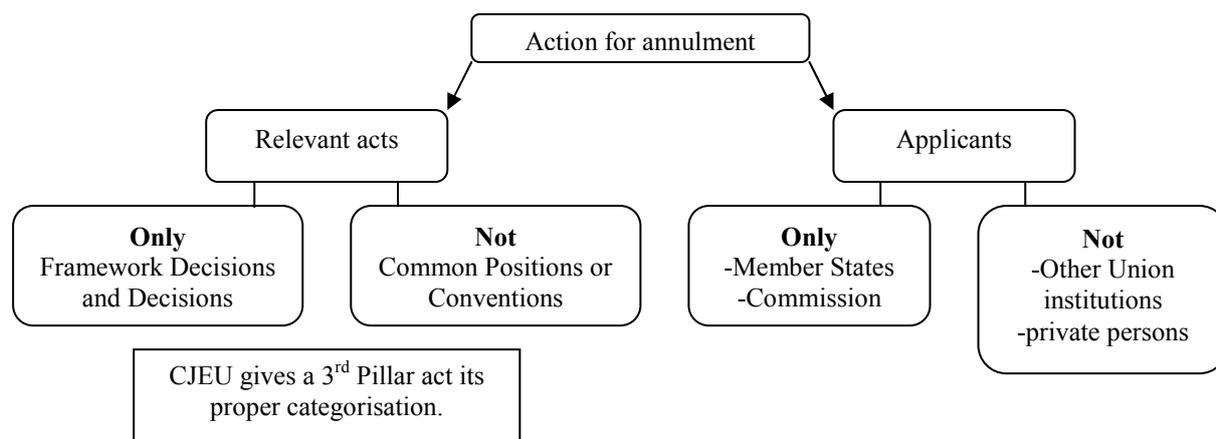
⁴¹ Case C-354/04 P *Gestoras Pro Amnistía and Others v Council of the European Union* [2007] ECR I-1579 para. 46–48.

⁴² Nonetheless, 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 so requires. (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 have 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 on.

⁴³ Article 35(6) TEU as amended by ToN.

not Common Positions), on the interpretation of (3rd Pillar) Conventions and on the validity and interpretation of the measures implementing them.⁴⁴ Nonetheless, each Member State has to accept the jurisdiction of the CJEU in this regard, by means of a declaration, by which they also select whether only their highest courts or all courts may refer questions to the CJEU.⁴⁵ 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.⁴⁶ 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.⁴⁷

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



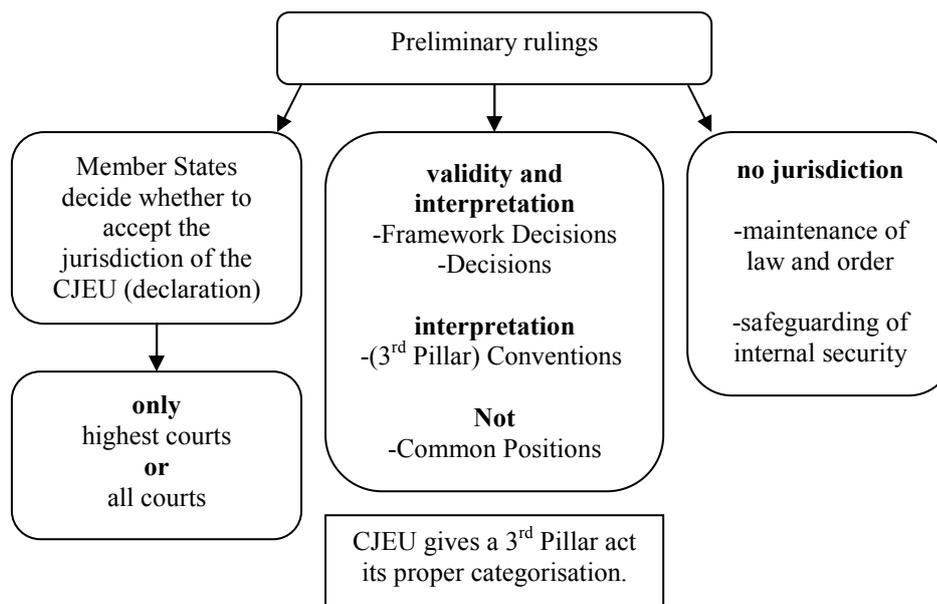
⁴⁴ Article 35(1) TEU as amended by ToN.

⁴⁵ 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 **CHALMERS, DAMIAN et. al.**, *European Union Law: Text and Materials*, 2nd Edition, Cambridge University Press, United Kingdom, 2010, p. 592. For a similar view, see **SPAVENTA, ELEANOR**, “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 apply it in their domestic context. **MITSILEGAS**, 2009, p. 19.

⁴⁶ 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 **HINAREJOS, ALICIA**, *Judicial Control in the European Union: Reforming Jurisdiction in the Intergovernmental Pillars*, Oxford University Press, United States, 2009, p. 73–77; **HINAREJOS, ALICIA**, “Law and Order and Internal Security Provisions in the Area of Freedom, Security and Justice: Before and After Lisbon”, (Eds.) **ECKES, CHRISTINA and KONSTADINIDES, THEODORE**, *Crime within the Area of Freedom, Security and Justice: A European Public Order*, Cambridge University Press, United Kingdom, 2011(b), p. 258–263.

⁴⁷ Article 35(7) TEU as amended by ToN.

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.⁴⁸ In this respect, for instance, an individual may bring an action for annulment against such a 3rd Pillar act.⁴⁹ 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”.⁵⁰ 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, according to 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.⁵¹

2. After the Treaty of Lisbon

The ToL has de-pillarized the Union, one of the consequences of which is giving full jurisdiction to the CJEU in relation to the JCCM; however, transitional provisions apply in this regard.

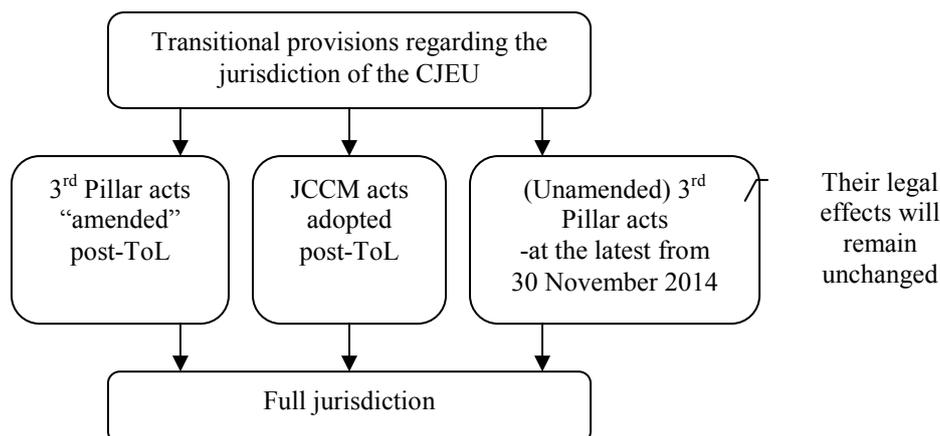
⁴⁸ Article 46 and 47 TEU as amended by ToN. Some examples are: Case C-170/96 *Commission of the European Communities v Council of the European Union* [1998] ECR I-2763 para. 12–18; Case C-176/03 *Commission of the European Communities v Council of the European Union* [2005] ECR I-7879 para. 38–40; Case C-440/05 *Commission of the European Communities v Council of the European Union* [2007] ECR I-9097 para. 52–54.

⁴⁹ In this regard, for a detailed review see HINAREJOS, 2009, p. 87–94.

⁵⁰ Case C-354/04 P *Gestoras Pro Amnistía and Others v Council of the European Union* [2007] ECR I-1579 para. 53.

⁵¹ See LENAERTS and VAN NUFFEL, p. 940.

Figure 5: Transitional Provisions regarding the Jurisdiction of the CJEU



The transitional provisions regarding the jurisdiction of the CJEU is as follows: Firstly, with respect of 3rd Pillar acts, the Commission cannot bring an action for infringement and the CJEU will continue to have powers, as it has before the ToL, until five years will pass after the date of entry into force of the ToL.⁵² Secondly, as soon as a 3rd Pillar act is “amended”, the Treaties become fully applicable to that act.⁵³ Accordingly, in relation to pre-existing 3rd Pillar acts, jurisdiction of the CJEU continues to be governed by Article 35 x TEU until they are amended or at the latest until 30 November 2004.⁵⁴

Which acts, therefore, are under the full jurisdiction of the CJEU and what we mean by “full jurisdiction”?⁵⁵ Three categories are relevant in this regard: (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 pre-existing non-amended 3rd Pillar acts will come under the full jurisdiction of the CJEU as from 30 November 2014; their legal effects will remain unchanged.⁵⁶ For those acts which are subject to the full jurisdiction of the CJEU, the CJEU is now competent to rule on the following cases: the review of legality, *i.e.* action for annulment⁵⁷ and action for failure to act,⁵⁸ fulfilment of obligations under the Treaties by Member States, *i.e.* action for infringement,⁵⁹ liability of Union institutions for the damages caused by them, *i.e.* action for damages⁶⁰ and implementation of Union law by national courts, *i.e.* preliminary rulings.⁶¹

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.⁶² Regarding action for annulment, not only a Member State or the Commission; but also other (relevant) Union institutions or private

⁵² Article 10(1, 3) of the Protocol (No 36) on Transitional Provisions annexed to ToL.

⁵³ Article 10(2) of the Protocol (No 36) on Transitional Provisions annexed to ToL.

⁵⁴ See **LENAERTS**, p. 269–270. For the meaning of “amend”, see below p. 17.

⁵⁵ 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.”

⁵⁶ Article 9 of the Protocol (No 36) on Transitional Provisions annexed to the ToL.

⁵⁷ Article 263–265 TFEU.

⁵⁸ Article 266, 265 TFEU.

⁵⁹ Article 258–260 TFEU.

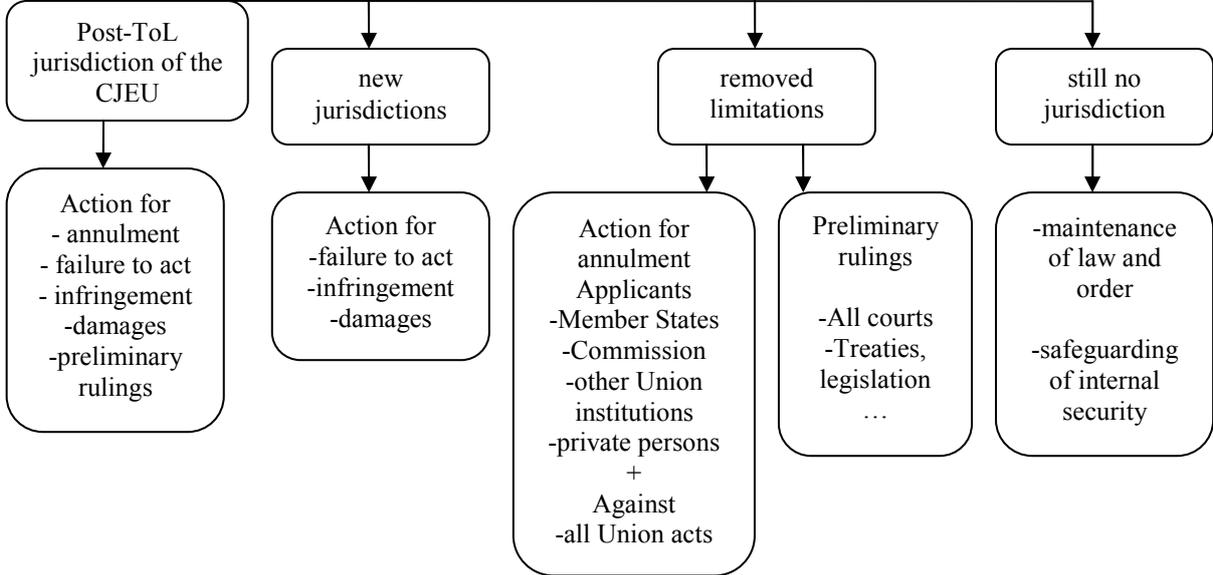
⁶⁰ Article 268, 340 TFEU.

⁶¹ Article 267 TFEU.

⁶² See **HINAREJOS**, 2009, p. 115.

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 as the case may be should) refer questions to the CJEU, relating to Treaties and EU acts.

Figure 6: Post-ToL Jurisdiction of the CJEU



A (not procedural; but substantive) derogation to the jurisdiction of the CJEU has been remained in Article 276 TFEU.⁶³ According to this Article, with regard to the 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.⁶⁴ The CJEU has not ruled on the meaning of this Article yet.⁶⁵ According to Peers, this proviso 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.⁶⁶ 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.⁶⁷

Besides, ToL brings some improvements with regard to these remedies, which may also be relevant for JCCM.⁶⁸

⁶³ 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.

⁶⁴ 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.

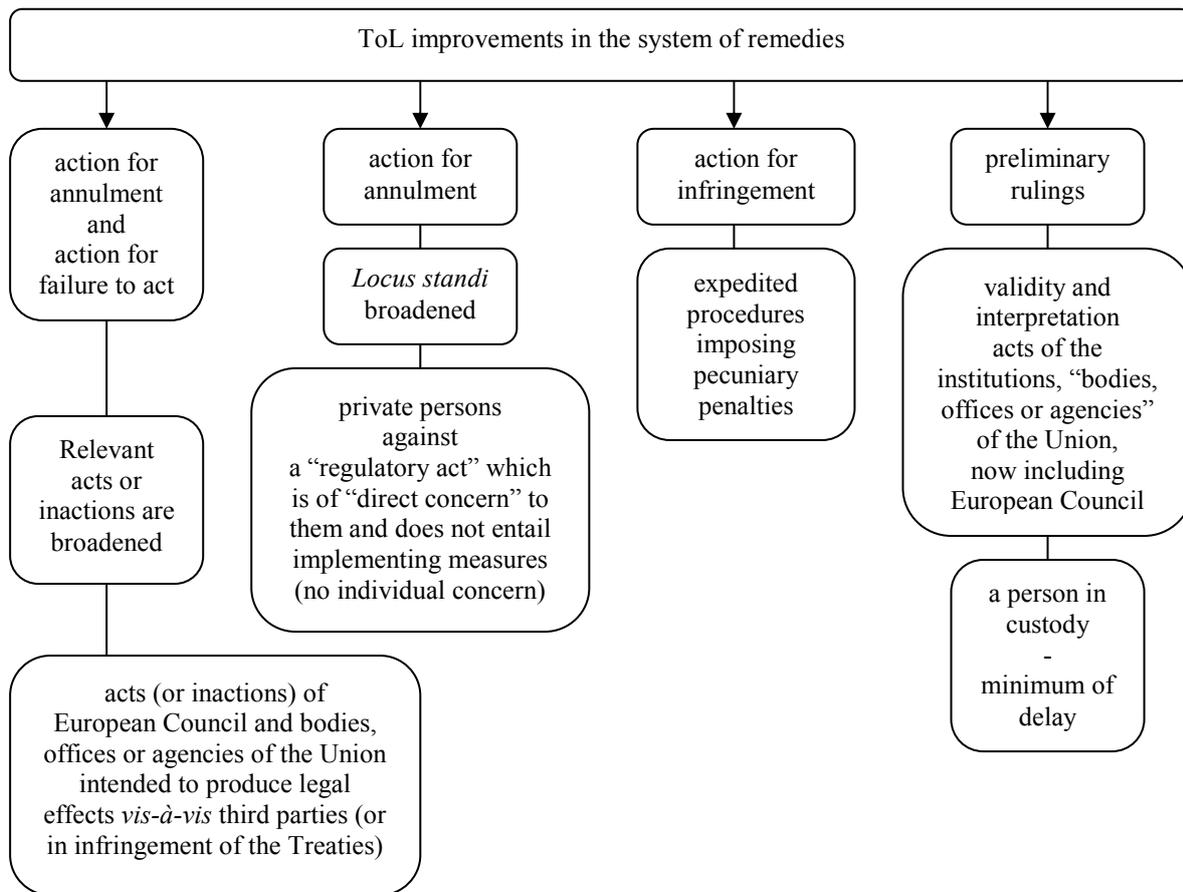
⁶⁵ For some other “speculations”, see **HATZOPOULOS, VASSILIS**, “Casual but Smart: The Court’s new clothes in the Area of Freedom Security and Justice (AFSJ) after the Lisbon Treaty”, *College of Europe: European Legal Studies: Research Papers in Law*, 2/2008, 2008, p. 12; **MITSILEGAS, 2009**, p. 44.

⁶⁶ **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.

⁶⁷ **HINAREJOS, (2011b)**, p. 266, 268–269.

⁶⁸ For these changes in general, see **HATZOPOULOS**, p. 4–13.

Figure 7: ToL Improvements in System of Remedies



First of them relates to review of legality. On the one hand, with regard to action for annulment,⁶⁹ 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.⁷⁰ On the other hand, regarding action for failure to act,⁷¹ 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,⁷² 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).⁷³ Therefore, ToL sought to facilitate direct access of private parties to the Union judiciary,⁷⁴ in addition to (officially) broadening the list of defendants, which may now include Europol and Eurojust that have increased tasks in relation to the JCCM.⁷⁵

⁶⁹ Article 263 TFEU.

⁷⁰ 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.

⁷¹ Article 266 TFEU.

⁷² Article 263 TFEU.

⁷³ Article 265 TFEU. For the meaning of this novelty see **CRAIG**, p. 130–132.

⁷⁴ **LENAERTS**, p. 265.

⁷⁵ See Article 85, 88 TFEU.

Secondly, as regards action for infringement,⁷⁶ 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,⁷⁷ 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 concerns a person in custody. Nonetheless, there have already been special procedures for dealing with such cases even before ToL.⁷⁸

What are the consequences flowing from this full jurisdiction of the CJEU with regard to the JCCM? Firstly, from the perspective of (ascending) volume of litigation, the contribution of the CJEU to the JCCM is 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.⁷⁹ Thirdly, giving full jurisdiction to the CJEU is, on its own, a significant step towards preserving rule of law⁸⁰ and protecting fundamental rights, such as right to an effective remedy.⁸¹ 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.⁸²

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”,⁸³ which has been, furthermore, improved 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.⁸⁴ Nonetheless, the real

⁷⁶ Article 258–260 TFEU.

⁷⁷ Article 267 TFEU and Article 13 TEU as amended by ToL.

⁷⁸ See below p. 26.

⁷⁹ In this regard see **LENAERTS**, p. 265; **PIRIS**, p. 178, 201.

⁸⁰ For instance, according to Craig, shifting to the normal judicial controls is to be welcomed in enhancing the rule of law. **CRAIG**, p. 378.

⁸¹ In this regard, see **BAZZOCCHI**, p. 184; **MITSILEGAS, 2009**, p. 40. Also see Article 6 ECHR and Article 47 CFR.

⁸² 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.

⁸³ 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 **DE WITTE, BRUNO**, “The Past and Future Role of the European Court of Justice in the Protection of Human Rights”, (Ed.) **ALSTON, PHILIP**, *The EU and Human Rights*, Oxford University Press, United States, 1999, p. 876–877; **LECZYKIEWICZ, DOROTA**, ““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.

⁸⁴ **GUILD and CARRERA**, p. 6.

contributions of the CJEU to the JCCM can only be observed by examining the acts and the effects of them concerning JCCM, which is the subject of the next chapter.

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

I will examine the acts and effects of those acts related to the JCCM in two separate parts: before and after ToL. This examination will also reflect the influence of the CJEU in the development of legal (constitutional) principles for the JCCM.⁸⁵

1. Before the Treaty of Lisbon

Before the ToL, regarding the JCCM, the Council is competent to take measures, namely common positions, framework decisions and decisions and conventions.⁸⁶ 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 the 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, for the adoption of which the Member States will follow their respective constitutional requirements.

What about 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.⁸⁷ According to the qualifications, a distinction is necessary between those acts which are not subject to the jurisdiction of the CJEU and others (regardless of the limited nature of the jurisdiction). On the one hand, the former ones, *i.e.* common positions⁸⁸ 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, Member States should also take into account the provisions of the TEU and the case-law of the CJEU, since it has –even if limited– jurisdiction related to them.⁸⁹

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 be interpreted in such a way that fundamental rights are respected.⁹⁰ Secondly, Framework Decisions and Decisions do not

⁸⁵ In this regard, also see **MITSOLEGAS, 2009**, p. 23–31.

⁸⁶ 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. **MITSOLEGAS, 2009**, p. 16.

⁸⁷ **LENAERTS and VAN NUFFEL**, p. 938, 936. For similar remarks see **STEINER and WOODS**, p. 582. Also see **HINAREJOS, 2009**, p. 17.

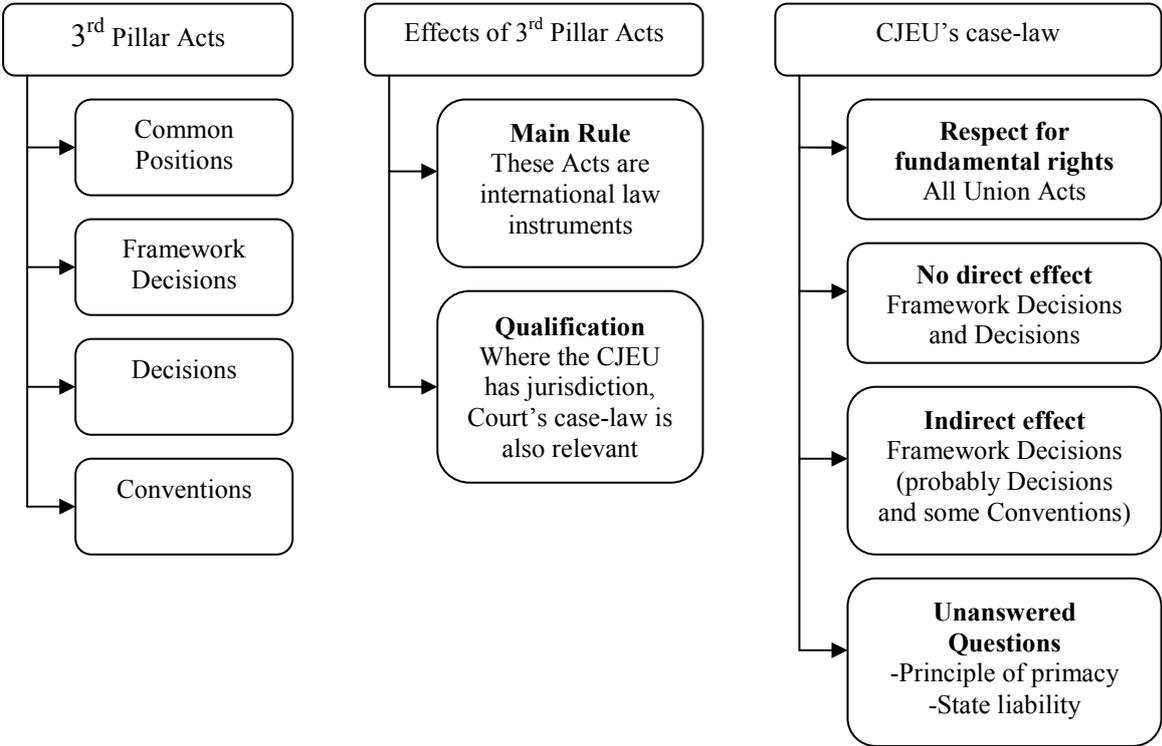
⁸⁸ In this regard, there should be a reminder: If a common position, because of its content, has a scope going beyond that assigned by the ex-TEU, *i.e.* producing legal effects in relation to the third parties, then the CJEU can give it its proper categorisation and thus taking it into its jurisdiction. 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.

⁸⁹ See **LENAERTS and VAN NUFFEL**, p. 939, 947. In this regard, also see fn. 45.

⁹⁰ See Case C-105/03 *Criminal proceedings against Maria Pupino* [2005] ECR I-5285 para. 58–59.

entail direct effect, *i.e.* generally they cannot create individual rights which national courts must protect.⁹¹ Thirdly, however, 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.⁹² 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*.⁹³ 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.⁹⁴ There are different views on these topics;⁹⁵ 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.

Figure 8: 3rd Pillar Acts and Their Effects



In sum, the CJEU contributes to the development of the 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.⁹⁶

⁹¹ TEU as amended by TN 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.

⁹² See Case C-105/03 *Criminal proceedings against Maria Pupino* [2005] ECR I-5285 para. 34, 43. In this regard, see **SPAVENTA**, p. 11.

⁹³ See Case C-105/03 *Criminal proceedings against Maria Pupino* [2005] ECR I-5285 para. 44, 47.

⁹⁴ In this regard, see **SPAVENTA**, p. 18–22.

⁹⁵ 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.

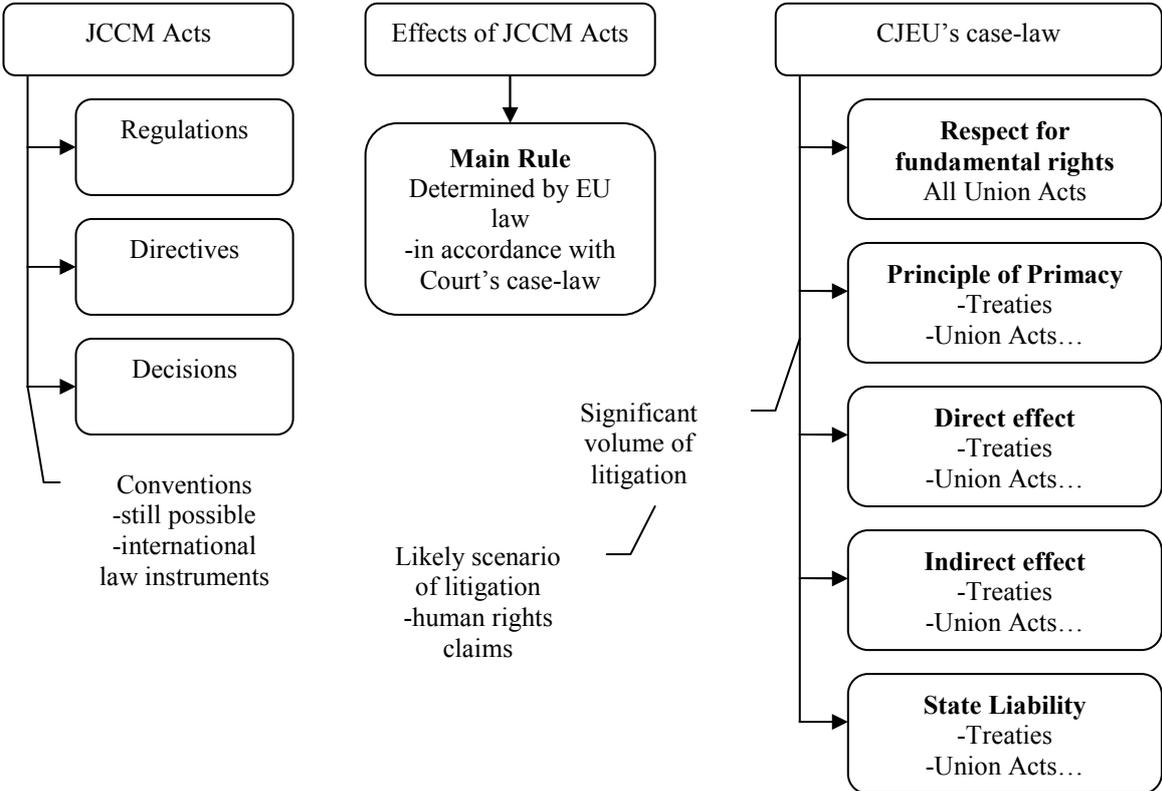
⁹⁶ See below p. 24.

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;⁹⁷ nevertheless, this principle has lots of limits which can be very legitimate in an area like criminal law.⁹⁸

2. After the Treaty of Lisbon

After the ToL, regarding the JCCM, Union (legislative) institutions are competent to adopt regulations, directives and decisions.⁹⁹ 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 its entirety, and a decision which specifies those to whom it is addressed 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,¹⁰⁰ 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 (old) 3rd

⁹⁷ In this regard, see **LENAERTS**, p. 271.

⁹⁸ In this regard, see **SPAVENTA**, p. 12.

⁹⁹ TFEU Article 288.

¹⁰⁰ This is subject to one qualification: Though the Treaties no longer mention 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.

Pillar acts will continue to have the effects that they have pre-ToL, until they are “repealed, annulled or amended”.¹⁰¹ This means that such acts will be subject to post-ToL status, including as regards their effects, once they are “amended”.¹⁰² 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,¹⁰³ since the transitional provisions does not distinguish between the parts amended and other, unamended, parts.¹⁰⁴

What can be said about the effects of Union acts related to the JCCM post-ToL era? Since the ToL has de-pillarized the Union, by relocating the old-3rd Pillar to the framework of old-1st Pillar which means that the JCCM is now also covered by Community method, it is fair to expect that the CJEU will transfer its principles of old-1st Pillar law to post-ToL rules related to JCCM.¹⁰⁵ 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.¹⁰⁶ Therefore, first of all, all Union acts must be interpreted in such a way that fundamental rights are respected, since the Union must respect fundamental rights, on the basis of Article 6 TEU as amended by ToL, either as general principles of law or as flowing from CFR. Secondly, the provisions of Treaties or legislation give rise to direct effect, provided that they meet the judicially created criteria for direct effect,¹⁰⁷ thus such provisions can create individual rights which national courts must protect.¹⁰⁸ Thirdly, from the perspective of the CJEU, the Union law, as a whole, will probably be deemed as to have primacy against national law.¹⁰⁹ Nonetheless, the debates concerning the principle of primacy seems to continue post-ToL era, which means that 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 the 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 the 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 the JCCM? Most probably, they will generate significant litigation, mostly by way of preliminary rulings, especially given the number of acts adopted in this area.¹¹⁰ Nonetheless, at this point, it may be useful to remind some relevant shortcomings relating to these effects. For instance, a Directive,¹¹¹ which is the main instrument of the JCCM,¹¹² “cannot, of itself and independently of a national law adopted by a Member State for its

¹⁰¹ Protocol (No 36) on Transitional Provisions annexed to the ToL Article 9.

¹⁰² 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.

¹⁰³ In this regard, see PEERS, 2011, p. 64.

¹⁰⁴ See LENAERTS and VAN NUFFEL, p. 73, fn. 54.

¹⁰⁵ In this regard see LENAERTS and VAN NUFFEL, p. 16, 71–72; MITSILEGAS, 2009, p. 37, 41.

¹⁰⁶ LENAERTS and VAN NUFFEL, p. 72. Also see HINAREJOS, 2009, p. 19, 49.

¹⁰⁷ CRAIG, s. 146, 340; CRAIG and DE BÚRCA, p. 937. Also see HINAREJOS, 2009, p. 51; LENAERTS, p. 271.

¹⁰⁸ 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.

¹⁰⁹ 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.

¹¹⁰ Regarding direct effect, see CRAIG, s. 146, 340.

¹¹¹ In this regard, for an extensive analysis of directives, see PRECHAL, SACHA, *Directives in EC Law*, 2nd Edition, Oxford University Press, Great Britain, 2005.

¹¹² See Article 82 and 83 TFEU.

implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive”.¹¹³ 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.¹¹⁴ Accordingly, in the JCCM, the most likely scenario of litigation is one where the individual is using human rights standards to challenge EU rules or their national implementation.¹¹⁵ This will be the subject that is examined next.

IV. 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 raises frequently fundamental (human) rights concerns.¹¹⁶ In this regard, I will put down this protection, by answering these questions: What is the status of the fundamental rights in the EU law; why the CJEU will (continue to) contribute to the JCCM mainly on the grounds of protection of fundamental rights and what is the scope and standard of this protection?

1. Status of Fundamental Rights

Where the fundamental rights stand in EU law? On the one hand, until ToL, they have been under protection as unwritten Community law, *i.e.* general principles of Community (Union) law; and on the other hand, since ToL, they are protected by a rights catalogue, namely CFR, in addition their protection under the general principles of Union law. 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 (as unwritten) and primary law (as written) respectively.

Till the ToL, the CJEU has been protecting 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 (human) rights are “enshrined in the [unwritten] general principles of Community law and protected by the Court”.¹¹⁷ In this regard, again in the words of the CJEU, by virtue of Article 6 TEU as amended by ToA, (not only the Community (1st Pillar); but also) the Union (including 3rd Pillar) respects fundamental rights, as general principles of Community law.¹¹⁸ 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

¹¹³ Case C-168/95 *Criminal proceedings against Luciano Arcaro* [1996] ECR I-4705 para. 37.

¹¹⁴ Case C-168/95 *Criminal proceedings against Luciano Arcaro* [1996] ECR I-4705 para. 42.

¹¹⁵ **HINAREJOS, ALICIA**, “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.

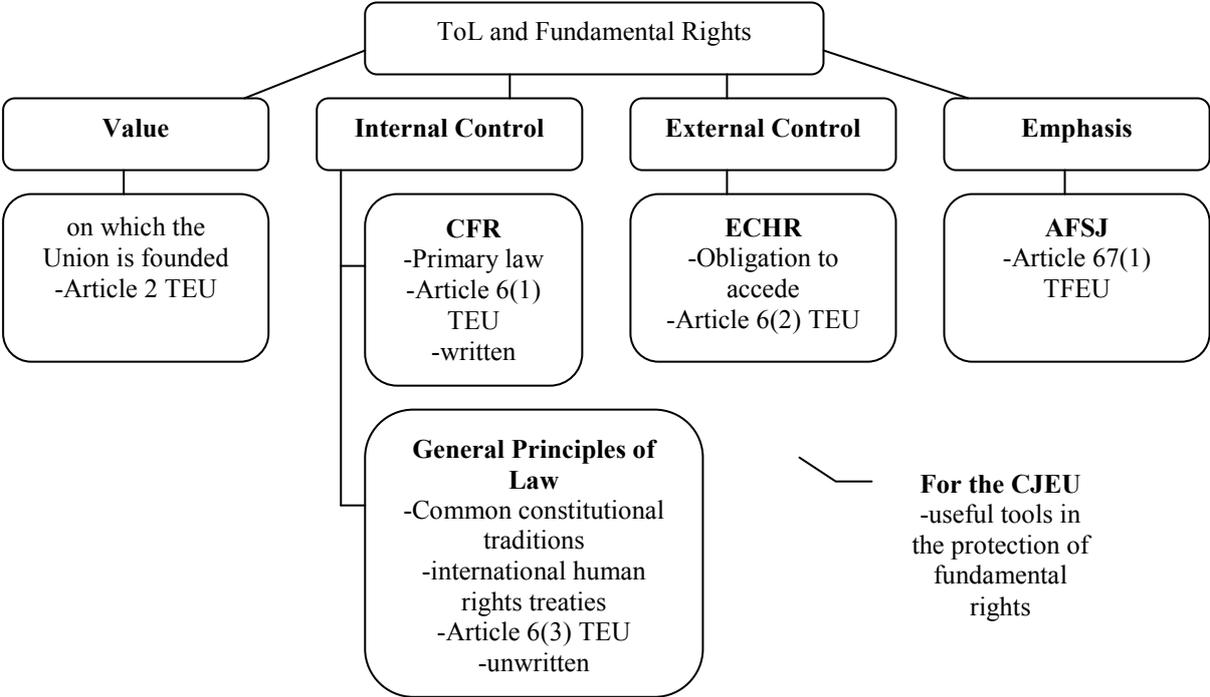
¹¹⁶ Many academics observed such concerns, for some see **CRAIG**, p. 244; **CRAIG and DE BÚRCA**, p. 925; **DOUGLAS-SCOTT**, p. 274, 276; **GUILD and CARRERA**, p. 2, 7; **HINAREJOS, (2011(a))**, p. 429; **MITSILEGAS, 2009**, p. 25.

¹¹⁷ Case 29/69 *Erich Stauber v City of Ulm – Sozialamt* [1969] ECR 419 para.7.

¹¹⁸ 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.

which the Member States have collaborated or to which they are signatories, with a special significance given to the ECHR.¹¹⁹ This practice has been reflected in the Treaties by the Member States, since the ToM.¹²⁰

Figure 10: ToL and Fundamental Rights



ToL has placed great emphasis on fundamental (human) rights, in comparison to its former counterparts. Firstly, the (de-pillarized) Union is founded on the values of, *inter alia*, respect for human rights.¹²¹ Besides, the Union has also now its own fundamental rights catalogue, namely CFR, which has the same legal value as the Treaties.¹²² Hence, fundamental rights have now been recognized as an autonomous source of Union law, with the same ranking as the provisions of primary law.¹²³ Moreover, the Union is now empowered and obliged to accede to the ECHR.¹²⁴ Furthermore, the CJEU will continue to protect fundamental rights, as general principles of law, as they flow from ECHR and national constitutional traditions.¹²⁵ In addition to these general provisions, with regard to AFSJ, it is stated that the Union shall constitute an AFSJ with respect for fundamental rights.¹²⁶ All these

¹¹⁹ Case C-305/05 *Ordre des barreaux francophones et germanophones and Others v Conseil des ministres* [2007] ECR I-5305 para. 29.

¹²⁰ 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.

¹²¹ Article 2 TEU as amended by ToL. Also see Article 3(1, 5) and 7 TEU as amended by ToL.

¹²² Article 6(1) TEU as amended by ToL.

¹²³ **LENAERTS and VAN NUFFEL**, p. 825.

¹²⁴ 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 **CALLEWAERT, JOHAN**, “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 Rijken rightly indicates, 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.

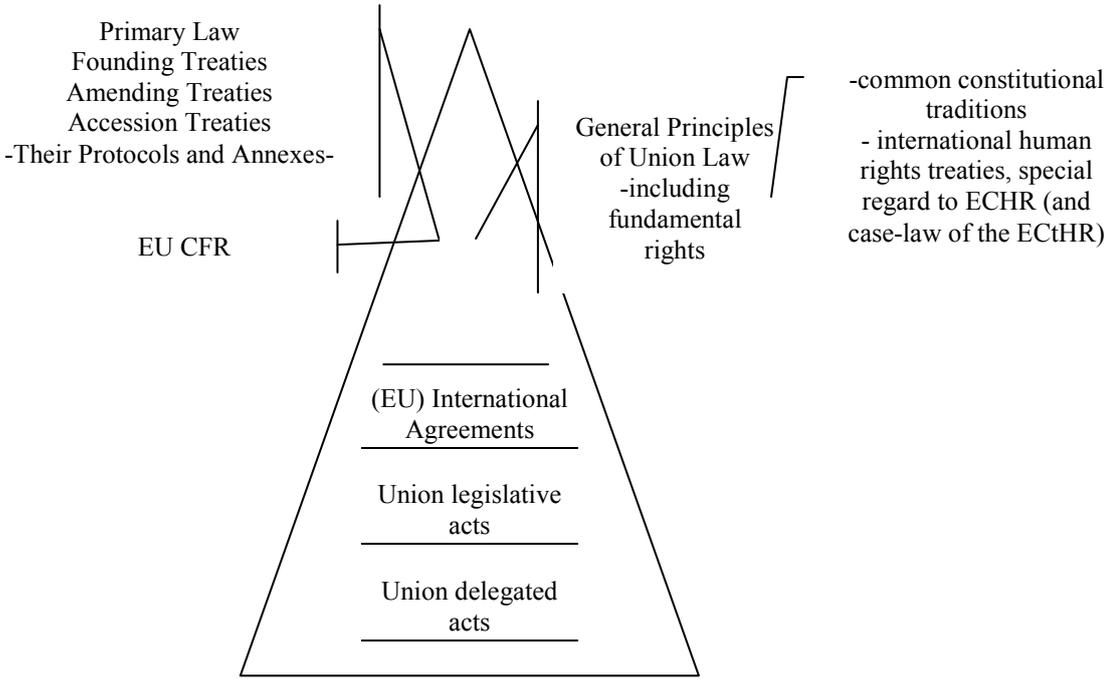
¹²⁵ Article 6(3) TEU as amended by ToL.

¹²⁶ Article 67(1) TFEU.

provisions provide useful tools for taking into account fundamental rights in the development and interpretation of the AFSJ provisions, with a central role to the CJEU in this context.¹²⁷

Fundamental rights are –with (mainly) the Treaties– at the apex of the hierarchy with regard to the all forms of EU law. 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.¹²⁸ 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”.¹²⁹ As regards fundamental rights set out in the CFR, they have the same legal value as the Treaties, thus, as mentioned above they are a part of primary law.¹³⁰

Figure 11: Fundamental Rights and Forms of EU Law

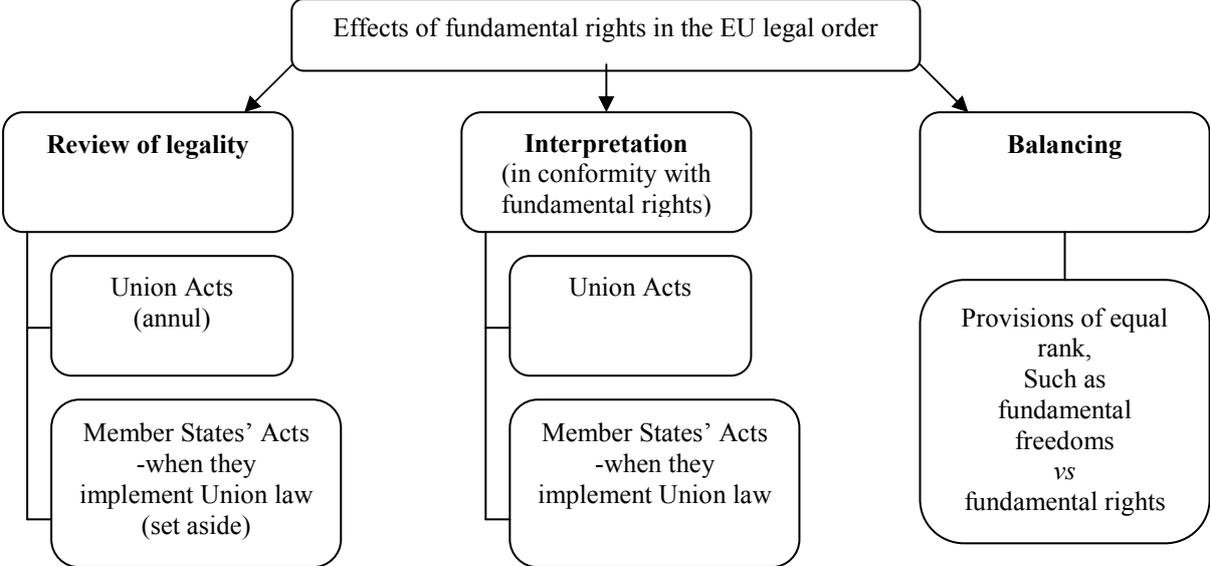


What conclusions can be drawn from the status of fundamental rights in Union law?¹³¹ First of all, the lawfulness of a Union act depends on its respect for the fundamental rights.¹³²

¹²⁷ MITSILEGAS, 2009, p. 39.
¹²⁸ See LENAERTS and VAN NUFFEL, p. 818, 819. Compare with CRAIG and DE BÚRCA, p. 108, 109.
¹²⁹ 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.
¹³⁰ Article 6(1) TEU as amended by ToL.
¹³¹ 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.
¹³² 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. 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.

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.¹³³ Besides, provisions of Union acts must be interpreted in the light of the fundamental rights.¹³⁴ In this regard, Member States, when interpreting their national law, must also rely on an interpretation of wording of Union acts which is in conformity with the (Union) fundamental rights.¹³⁵ Furthermore, fundamental rights play a role in the interpretation and application of the provisions of the Treaties.¹³⁶ In this regard, it is important to note that there are also limits to the fundamental rights,¹³⁷ which in turn, results in a balancing test between provisions of equal rank.¹³⁸

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 the JCCM. These (partially listed) fundamental rights are:¹³⁹

- the principle of equality and non-discrimination;¹⁴⁰
- the right to a fair trial (Article 6 ECHR, Article 47, 48 CFR),¹⁴¹ including:

¹³³ Case C-540/03 *European Parliament v Council of the European Union* [2006] ECR I-5769 para. 23.
¹³⁴ 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 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.
¹³⁵ Case C-305/05 *Ordre des barreaux francophones et germanophones and Others v Conseil des ministres* [2007] ECR I-5305 para. 28.
¹³⁶ **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.
¹³⁷ In this regard, see **CRAIG**, p. 221–226.
¹³⁸ As an example, see Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* [2003] ECR I-5659 para. 74.
¹³⁹ 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.
¹⁴⁰ Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] ECR I-3633 para. 55.
¹⁴¹ 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.

- 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,¹⁴²
- the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law¹⁴³
- the adversarial principle;¹⁴⁴
- the principle of the legality of criminal offences and penalties (Article 7 ECHR, Article 49 CFR);¹⁴⁵
- the principle of the retroactive application of the more lenient penalty;¹⁴⁶
- the principle of *non bis in idem* (Article 4(1) 7th Protocol to the ECHR, Article 50 CFR);¹⁴⁷
- the right to human dignity and integrity (Article 1, 3 CFR);¹⁴⁸
- the right to respect for private life¹⁴⁹ and family life¹⁵⁰ (Article 8 ECHR, Article 7 CFR);
- freedom of expression (Article 10 ECHR, Article 11 CFR);¹⁵¹
- freedom of association (Article 11 ECHR, Article 12 CFR);¹⁵²
- the right to respect for property (Article 17 CFR).¹⁵³

In addition to being at the apex of forms of Union law, as sharing (or having) the status of primary law, fundamental rights are also the main concern in the JCCM, which is under protection by the CJEU.

2. Reasons for Mainly Protecting Fundamental Rights

CJEU, in my view, will mainly function as a protector of fundamental rights in the JCCM; instead of mainly enhancing individual rights *via* direct effect (and primacy). This is so, since the JCCM concerns measures which usually functions as a limitation of individuals' rights. In this regard, Hinarejos indicates that, in general, main aim is not to grant rights to, or enhance rights of, individuals; except where secondary law, such as relating to criminal

¹⁴² 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.

¹⁴³ Case C-385/07 P *Der Grüne Punkt – Duales System Deutschland GmbH v Commission of the European Communities* [2009] ECR I-6155 para. 177.

¹⁴⁴ 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.)

¹⁴⁵ Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] ECR I-3633 para. 49.

¹⁴⁶ 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.

¹⁴⁷ 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.

¹⁴⁸ Case C-377/98 *Kingdom of the Netherlands v European Parliament and Council of the European Union* [2001] ECR I-7079 para. 70.

¹⁴⁹ Case C-450/06 *Varec SA v État belge* [2008] ECR I-581 para. 48.

¹⁵⁰ Case C-578/08 *Rhimou Chakroun v Minister van Buitenlandse Zaken* [2010] ECR I-1839 para. 44.

¹⁵¹ Case C-421/07 *Criminal proceedings against Frede Damgaard* [2009] ECR I-2629 para. 26.

¹⁵² 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.

¹⁵³ 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.

procedural law, give them certain rights; but mostly the measures result in a limitation on individuals' rights.¹⁵⁴ In this respect unlike the more economic focus of the internal market, for instance the arrest and prosecution of suspects puts Union law into more obvious potential conflict fundamental (human) rights.¹⁵⁵ In view of that, the important issue becomes how to protect fundamental rights in the face of measures related to the JCCM.¹⁵⁶ In this regard, I agree with Hinarejos who rightly argues that, unlike internal market where the CJEU furthered integration; in relation to the 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.¹⁵⁷ Thus, the Court's contribution to the JCCM will mainly be 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 fundamental rights ... that the free movement of judgments in criminal matters must not only be guaranteed but also, where appropriate, limited."¹⁵⁸

3. Scope of Protection of Fundamental Rights

Either via general principles or via CFR, the scope of protection of fundamental rights seems equal.¹⁵⁹ 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.¹⁶⁰ 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"¹⁶¹.

¹⁵⁴ HINAREJOS, (2011(a)), p. 424.

¹⁵⁵ STEINER and WOODS, p. 580. Also see, fn. 116.

¹⁵⁶ See STEINER and WOODS, p. 604.

¹⁵⁷ HINAREJOS, (2011(a)), p. 420–421, 426. Nonetheless, as Hinarejos states 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. 4.

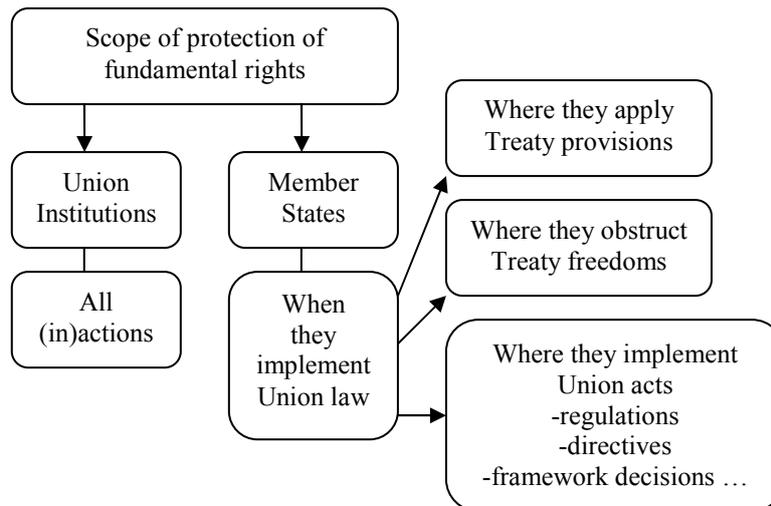
¹⁵⁸ Opinion of Advocate General Mengozzi in Case C-42/11 *Joao Pedro Lopes Da Silva Jorge*, delivered on: 20 March 2012, *nyr*, point 28. (*Emphasise added.*)

¹⁵⁹ 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.

¹⁶⁰ Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] ECR I-3633 para. 45.

¹⁶¹ Article 51(1) CFR.

Figure 13: Scope of Protection of Fundamental Rights



Unsurprisingly, it is the protection *vis-à-vis* Member States that raises problems, with regard to the boundaries of protection: When a Member State implements Union law? The answer is:¹⁶² Where they apply Treaty provisions¹⁶³ or implement Union acts,¹⁶⁴ in particular where applying or implementing regulations¹⁶⁵ or transposing directives into national law¹⁶⁶ or implementing Framework Decisions,¹⁶⁷ and obstruct the exercise of Treaty freedoms.¹⁶⁸ Accordingly, the CJEU cannot apply Union fundamental rights to a national rule, where it falls outside the scope of Union law.¹⁶⁹

4. 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, finally, on whether a measure is in conformity with fundamental rights. In this regard, we can mention two different situations.

¹⁶² LENAERTS and VAN NUFFEL, p. 834–835. In this regard also see CRAIG, p. 213; DE WITTE, p. 870, 873; PEERS, (1999), p. 170.

¹⁶³ Case 222/86 *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v Georges Heylens and others* [1987] ECR 4097 para. 14.

¹⁶⁴ 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.

¹⁶⁵ 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.

¹⁶⁶ 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.

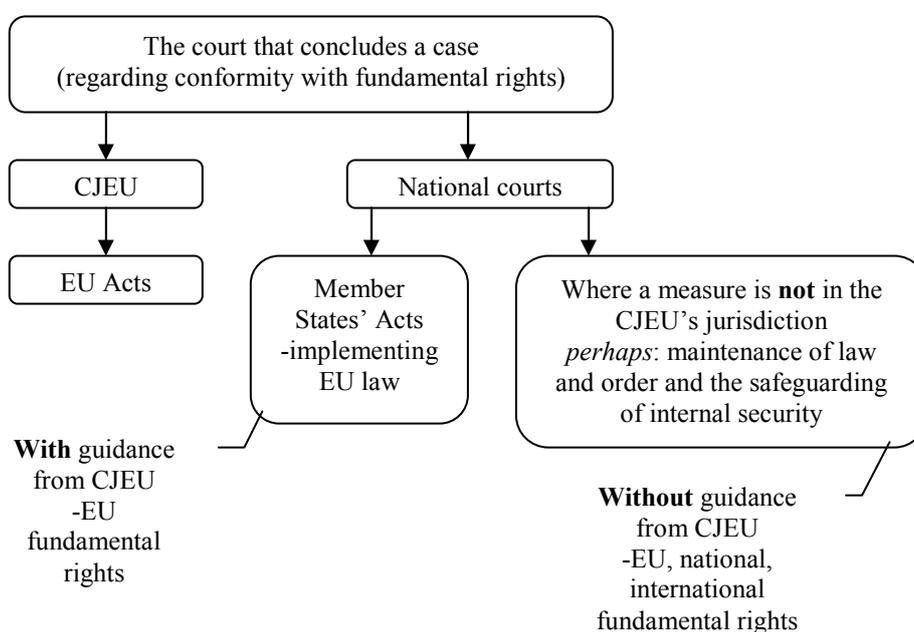
¹⁶⁷ Opinion of Advocate General Bot in Case C-123/08 *Criminal proceedings against Dominic Wolzenburg* [2009] ECR I-9621 point 115. Compare with Case C-123/08 *Criminal proceedings against Dominic Wolzenburg* [2009] ECR I-9621 para. 45.

¹⁶⁸ Case C-368/95 *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag* [1997] ECR I-3689 para. 24.

¹⁶⁹ 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 Valentin Salmerón Sánchez*, judgement of: 15 September 2011, *nyr*, para. 69.

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.¹⁷⁰ 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 guidance from the CJEU. According to the case-law of the CJEU, in a reference for a preliminary ruling, “where national 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]”.¹⁷¹ On the other hand, a measure may be out of the scope of jurisdiction of the CJEU. In this respect, national courts will, themselves, judge whether such a measure respects (Union, national or international) fundamental rights.¹⁷² For instance, if the CJEU deems the cases which are about (generally) the maintenance of law and order and the safeguarding of internal security¹⁷³ as totally out of its jurisdiction (hence, inadmissible), than it will be for the national courts to secure that fundamental rights are observed.¹⁷⁴

Figure 14: Final Judgement in a Case



Regarding the protection of fundamental rights, in theory, the CJEU is expected to maintain a certain (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.¹⁷⁵ The practical reason reflects the fact that the CJEU needs to catch

¹⁷⁰ In this regard, see Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199 para. 17.

¹⁷¹ 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.

¹⁷² 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.

¹⁷³ Article 276 TFEU.

¹⁷⁴ In this regard, also see **HINAREJOS, (2011b)**, p. 268–269.

¹⁷⁵ 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. 19.

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;¹⁷⁶ however, now this need is more striking, especially concerning the JCCM, since here the potential for clashes between Union acts and national constitutional precepts is especially prevalent.¹⁷⁷ 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.¹⁷⁸

In practice, the CJEU has been trying its best to perform a certain 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.¹⁷⁹ These procedures are the “urgent procedure” regarding AFSJ matters –thus including JCCM–,¹⁸⁰ and the “accelerated procedure” (not restricted to AFSJ matters).¹⁸¹ These procedures seem in line with the right to a fair trial, which includes a trial “within a reasonable time”,¹⁸² 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.¹⁸³

At substantive level, I will, as an example, scrutinize two cases and try to answer a question of a national court, left unanswered by the CJEU in one case. These are respectively the *Pupino*, *Advocaten voor de Wereld* and *I.B.* cases.¹⁸⁴

To begin with, in the *Pupino* case, the CJEU, while transferring the doctrine of consistent interpretation from 1st Pillar to 3rd Pillar, also emphasized the importance of the fundamental rights in 3rd Pillar.¹⁸⁵ 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.¹⁸⁶ 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.¹⁸⁷ 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

¹⁷⁶ For instance, see **DE WITTE**, p. 866.

¹⁷⁷ **CRAIG**, p. 150, 340.

¹⁷⁸ See **STEINER and WOODS**, p. 603. Also see, **LECZYKIEWICZ, DOROTA**, “Constitutional Conflicts and the Third Pillar”, *European Law Review*, Cilt: 33, No: 2, 2008, p. 238.

¹⁷⁹ For the application of these procedures, see **LENAERTS, 2008**, p. 273–281.

¹⁸⁰ 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>

¹⁸¹ Article 104(a) of the Rules of Procedure of the Court of Justice.

¹⁸² Article 6 ECHR and Article 47 CFR.

¹⁸³ **LENAERTS**, p. 273. For another concern, see **HINAREJOS, 2009**, p. 80.

¹⁸⁴ 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 Amnistía and Others v Council of the European Union* [2007] ECR I-1579 para. 49–57.

¹⁸⁵ Case C-105/03 *Criminal proceedings against Maria Pupino* [2005] ECR I-5285 para. 58–60.

¹⁸⁶ Case C-105/03 *Criminal proceedings against Maria Pupino* [2005] ECR I-5285 para. 58.

¹⁸⁷ Case C-105/03 *Criminal proceedings against Maria Pupino* [2005] ECR I-5285 para. 59.

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.¹⁸⁸ 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 Callewaert states, 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.¹⁸⁹ 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.¹⁹⁰ Moreover, 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 (the Union measure) is in breach of general principles of EU law (*i.e.* review of legality).¹⁹¹ In this case the applicants contends that, as the verification of the requirement of the double criminality is lacking for some offences, 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.¹⁹² 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.¹⁹³ To 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.¹⁹⁴ 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.¹⁹⁵ Accordingly, there is no breach of this principle by the relevant Article of the Framework Decision.¹⁹⁶ 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.¹⁹⁷ To the CJEU, first, it is for the Council to choice among offences whose seriousness justifies

¹⁸⁸ 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.

¹⁸⁹ CALLEWAERT, p. 518.

¹⁹⁰ DOUGLAS-SCOTT, p. 290.

¹⁹¹ 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.

¹⁹² Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] ECR I-3633 para. 44.

¹⁹³ Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] ECR I-3633 para. 48.

¹⁹⁴ 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.

¹⁹⁵ Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] ECR I-3633 para. 52, 53.

¹⁹⁶ Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] ECR I-3633 para. 54.

¹⁹⁷ Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] ECR I-3633 para. 55.

dispensing with the verification of double criminality,¹⁹⁸ and second, it is not the objective of the Framework Decision to harmonise the substantive criminal law,¹⁹⁹ therefore, there is no breach of this principle either.²⁰⁰

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.²⁰¹ Nonetheless, for the Douglas-Scott, this was hardly a very satisfactory judgement, since the reasons the Court gave for finding the EAW not to breach fundamental rights were unsatisfactory, leaving many questions unaddressed.²⁰² 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.²⁰³ In my view, here, the CJEU shows that (in theory) it respects fundamental rights, 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.²⁰⁴ 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.²⁰⁵ 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?²⁰⁶ 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.²⁰⁷ Nonetheless, most of the Member States have put such a clause to their laws implementing that Union act.²⁰⁸

I will try to guess how the CJEU will approach such a case; nonetheless, I would like to mention 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

¹⁹⁸ Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] ECR I-3633 para. 57–58.

¹⁹⁹ Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] ECR I-3633 para. 59.

²⁰⁰ Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] ECR I-3633 para. 60.

²⁰¹ LENAERTS, p. 298.

²⁰² DOUGLAS-SCOTT, p. 279, 290. For a similar view, also see CRAIG and DE BÚRCA, p. 950.

²⁰³ LECZYKIEWICZ, 2008, p. 231, 241.

²⁰⁴ DE WITTE, p. 882.

²⁰⁵ Case C-306/09 *I.B.*, judgement of: 21 October 2010, *nyr*, para. 41(4), 62–63.

²⁰⁶ 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.

²⁰⁷ 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.

²⁰⁸ 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.)

German court to see whether the individual's fundamental rights would be respected in the state to which he was surrendered.²⁰⁹ 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.²¹⁰ 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.²¹¹ Lastly, concerning judicial cooperation in civil matters, the CJEU seeks to uphold the protection of fundamental rights, embodied by the rule of law.²¹² 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).²¹³ 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.²¹⁴

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.²¹⁵ 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.²¹⁶ Therefore, all Union acts must be interpreted in such a way that fundamental rights are respected.²¹⁷ 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.²¹⁸ 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*".²¹⁹ As this wording covers the whole measure, this may also permit an executing court to refuse an execution of EAW, where it believes that it would result in violation of fundamental rights of concerned person. Moreover, the fundamental rights has 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."²²⁰ Accordingly, I expect that protecting fundamental rights will be the

²⁰⁹ CHALMERS *et.al.*, p. 599.

²¹⁰ Opinion of Advocate General Bot in Case C-123/08 *Criminal proceedings against Dominic Wolzenburg* [2009] ECR I-9621 point 147.

²¹¹ DE SCHUTTER, p. 543, 544.

²¹² See LENAERTS, p. 282.

²¹³ 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.

²¹⁴ 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.

²¹⁵ To the same effect, see PEERS, 2011, p. 686.

²¹⁶ 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.

²¹⁷ See Case C-105/03 *Criminal proceedings against Maria Pupino* [2005] ECR I-5285 para. 59.

²¹⁸ See Article 3 and 4 of the Framework Decision 2002/584/JHA.

²¹⁹ *Emphasis* added. Also see Recital 12 of the Framework Decision 2002/584/JHA.

²²⁰ 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.)

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.²²¹

Conclusion

CJEU has been contributing to the development of the JCCM, even though with a 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 the 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 the 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 the 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 the JCCM is (and expected to be) yet on the grounds of protection of fundamental rights. This is the case, because of the nature of the JCCM, *i.e.* it concerns measures which usually function as a limitation of individuals’ rights and also contain a potential for conflict with fundamental (human) 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 the JCCM; the most important one being the CFR which has the same status with the Treaties.²²² 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 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*,²²³ (i) CJEU does not offer protection lower than ECHR (including, case-law of the ECtHR);²²⁴ (ii) CJEU attaches fair importance to the “common constitutional traditions” of the Member States (including, case-law of the national highest courts);²²⁵ (iii) CJEU develops more detailed and persuasive arguments in relation to fundamental rights.²²⁶ 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, in the end, be to the benefit of protection of fundamental rights in the EU (and JCCM).

²²¹ Case C-306/09 *I.B.*, judgement of: 21 October 2010, *nyr*, para. 41(4).

²²² 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.

²²³ In these remarks, I am inspired by **DE WITTE**, p. 882–883.

²²⁴ See Article 52(3) and 53 CFR.

²²⁵ See Article 52(4) and 53 CFR.

²²⁶ 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.

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