THE AREA OF "FREEDOM, SECURITY AND JUSTICE" AND THE EUROPEAN COURT OF JUSTICE—A PERSONAL VIEW

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THE Treaty of Amsterdam enshrines in Article 2 (formerly Article B) of the Treaty on European Union under the new Title I called "Common Provisions" (which contains, with some amendments, the provisions of the former Articles A to F) a new objective for the Union, namely:

> "to maintain and develop the Union as an area of freedom, security and justice in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime."

The Treaty allocates the pursuit of this objective, in the first instance, to the new Title IV of the EC Treaty. Secondly, the Schengen Agreement, aimed at "enabling the European Union to develop more rapidly into an area of freedom, security and justice", is integrated by the Schengen Protocol into the institutional and legal framework of the Union, the Schengen *acquis* being allocated as appropriate between the EC Treaty and the Treaty on European Union. Thirdly, Title VI TEU on Police and Judicial Cooperation in Criminal Matters has as its objective "to provide citizens with a high level of safety within an area of freedom, security and justice". (Article 29 TEU)

This variation in the pursuit of the declared objective is matched by a corresponding variation in the terms for the exercise of the jurisdiction of the Court of Justice, the subject with which this contribution is principally concerned. Article 2 itself, like its predecessor, Article B, remains outside the purview of the Court, which has no power to interpret it.[1]

The principal innovations of the Treaty of Amsterdam concerning the role of the Court of Justice relate to the preliminary ruling procedure. Article 234 EC (formerly 177) has stood unmodified, since its introduction on the coming into force of the Treaty of Rome on 1 January 1958. It has constantly been described as the corner-stone of Community law. The Court has ensured that it perform that function by means of direct communication and close cooperation with the courts of the Member States at every level. It was by virtue of the preliminary ruling mechanism that it came, in 1963, to make its historic declaration of the existence of:

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1. Order of inadmissibility, Case C-167/94 *Grau Gomis* [1995] E.C.R. I-1023, para.6.

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> "a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals."[2]

Through it, likewise, the Court was enabled to establish all of the primary principles of Community law, such as direct effect, the supremacy of Community law and the effectiveness of the basic freedoms of movement of goods, workers, services, establishment and capital and the underpinnings of the single market, in short, to develop the distinctive character of Community law.

It should not come as a surprise, therefore, that the Court, in its Report to the Reflexion group preparing the ground for the last Intergovernmental Conference (the IGC Report) took a strong stand in favour of the retention of the right of all courts in the Member States to make references for preliminary ruling to the Court of Justice. It said:

> "The preliminary ruling system is the veritable cornerstone of the operation of the internal market, since it plays a fundamental role in ensuring that the law established by the Treaties retains its Community character with a view to guaranteeing that that law has the same effect in all circumstances in all the Member States of the European Union. Any weakening, even if only potential, of the uniform application and interpretation of Community law throughout the Union would be liable to give rise to distortions of competition and discrimination between economic operators, thus jeopardising equality of opportunity as between those operators and consequently the proper functioning of the internal market."

It added a statement, repeated in the Court's recent report to the Council on the Future of the Judicial System of the European Union (the 1999 Report), that:

> "To limit access to the Court would have the effect of jeopardizing the uniform application and interpretation of Community law throughout the Union, and could deprive individuals of effective judicial protection and undermine the unity of the case-law."

The context of these remarks should be recalled. The so-called pillar arrangement of the Treaty on European Union (the Maastricht Treaty) had involved a partial disintegration of a hitherto unified treaty structure. Important new competences in respect of "cooperation in the fields of justice and home affairs" were established outside the Community legislative framework as "matters of common interest" to the Member States. Consequently and more to the point of the Court's comment, the jurisdiction of the Court was effectively excluded from the entire of the third pillar by the terms of Article L. Member States were only permitted

2. Case 26/62 *Van Gend en Loos* [1963] E.C.R. 1.

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by Article K.3(2)(c) to confer interpretative jurisdiction on the Court in respect of conventions recommended by the Council to the Member States for adoption, a provision which did not apply, therefore, to "joint positions" or "joint actions" adopted under the same Article.

This departure from its established general jurisdiction prompted the Court to draw attention in its report to the IGC to "the legal problems which [might] arise in the long or even the short term", emphasising that "it is obvious that judicial protection of individuals affected by the activities of the Union, especially in the context of cooperation in the fields of justice and home affairs, must be guaranteed and structured in such a way as to ensure consistent interpretation and application both of Community law and of the provisions adopted within the framework of such cooperation".

The objective of establishing an "area of freedom, security and justice" is the device employed to reorganise the pillar structure created at Maastricht. Even if that reorganisation is often not coherent and the legal provisions are frequently confusing, its developments are, on the whole, positive. The Court is to exercise jurisdiction not only in respect of those former "third-pillar" matters such as visas, asylum and immigration now assigned to Title IV EC and thus "communitarised", but also in respect of action taken within the reconstituted and expanded third pillar itself, i.e. Title VI TEU. These provisions, however, circumscribe that exercise in several novel respects. The most serious negative aspect is the adoption of special Protocols excepting most of Title IV EC from application to three Member States, to wit Denmark, Ireland and the United Kingdom.

Article 5 TEU (ex Article E) provides that the Court (with the other institutions) is to exercise its "powers under the conditions and for the purposes provided for, on the one hand, by the provisions of the Treaties establishing the European Communities and of the subsequent Treaties and Acts modifying and supplementing them and, on the other hand, by the other provisions of this Treaty". This provision, introduced at Maastricht, already foresaw that the conditions for the exercise of the Court's powers would not necessarily be the same in each Treaty. Article 5 is, however, amongst the provisions excluded by Article 46 EC (ex Article L) from the jurisdiction of the Court. This provision makes clear something that was, I think, always implicit, to wit, that the Court's jurisdiction is conditional on a Treaty provision providing for its exercise. To that extent Article 5 is merely declaratory. Jurisdiction cannot, for example, be conferred by the terms of a convention or agreement and accepted voluntarily by the Court, a point which needs further consideration in the light of Treaty changes removing existing jurisdictional provisions.

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The Court's jurisdiction is adapted or qualified by the Treaty of Amsterdam in the areas of freedom, security and justice in the following respects:

- Article 68(1) EC limits the power to make references for preliminary ruling under Title 1V EC to courts of the Member States against whose decision there is no judicial remedy under national law;
- Article 68(3) EC provides for requests to be addressed to the Court by the Council, the Commission or a Member State for rulings on the interpretation of Title IV EC or acts adopted under it, i.e. outside the framework of any litigation;
- Article 69 EC subjects the entire of Title IV EC to the Protocols relating to the positions of the United Kingdom, Ireland and Denmark and is expressed to be "without prejudice" to a further Protocol on the application of Article 14 EC to the first two of these Member States;
- Article 35 TEU read with Article 46 (ex Article L) as amended provides for the exercise by the Court of substantive interpretative jurisdiction, subject to the making of individual declarations by Member States;
- Article 35 TEU confers on the Court jurisdiction to resolve disputes between Member States or between Member States and the Commission.

I will review each of these subjects briefly. Naturally, it must be stated with some emphasis that the views expressed are personal to the author. Some of the provisions are entirely novel. Some are confusing or even contradictory. It will be some time before the occasion arises to consider their import. Nonetheless, a number of interesting questions emerge from even a superficial study of the new jurisdictional provisions as a whole.

Title IV EC

Title IV EC contains two express new provisions for the exercise by the Court of its interpretative function: an adapted reference procedure from national courts and a new procedure for reference by institutions or Member States.

The limitation in Article 68(1) EC of the right to make references for preliminary ruling to courts of final jurisdiction has faithfully reproduced the existing language of the third paragraph of Article 234 EC including the concomitant obligation to refer. This approach has widely been recognised by the Court as being justified by two practical features likely to be specific to Title IV cases, namely their probable very great number and the need for urgent judicial decisions. The United Kingdom drew attention to the urgency that is (or should be) inherent in asylum cases,

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when commenting on the Court's 1999 Report—although the UK is not (unless it chooses to opt in) a participant in Title IV EC.

The distinction thus drawn between levels of courts which may make references is likely, however, to present national courts with some interesting dilemmas when considering the making of a reference. Lower courts will retain the right to make references when faced with questions of interpretation of parts of the EC Treaty other than Title IV. Where a case raises an issue of interpretation of Article 14 (ex Article 7a), or of a Council measure adopted under Article 14(3), a lower court can refer. Those provisions concern "free movement of persons" within the internal market as does Article 61(a) EC within Title IV, where only a final appeal court can do so. Furthermore, the application of Article 14 to the UK and Ireland is modified by a Protocol referred to in Article 69. However, that Protocol has effect independently of Article 69. Thus Article 14 EC (ex Article 7a) may fall to be interpreted or, to be more precise, applied differently in relation to the United Kingdom and also to Ireland so long as the common travel area with the United Kingdom is concerned, as compared with other Member States. Furthermore, courts at levels other than final appeal are precluded from making references where the subject matter arises from Title IV EC, but not otherwise. The likely outcome is that national courts will be slow to refer in cases where their jurisdiction to do so is in doubt. On the other hand, any jurisdictional gap as well as delays inevitably consequent on the reservation of the referring functions to courts of final appeal arising from the absence of a right to make references for the lower courts is designed, as I will suggest, to be compensated by the provisions of Article 68(3).

Next it is interesting to consider the effect of Article 68(2). Article K.2(2) of the Maastricht Treaty provided that Title VI TEU was "not to affect the exercise of the responsibilities incumbent on Member States with regard to the maintenance of law and order and the safeguarding of internal security". This provision remains as Article 33 in Title VI TEU but is also reproduced in Article 64(1) EC. However, Article 68(2) EC provides that "the Court of Justice shall not have jurisdiction to rule on any measure or decision taken pursuant to Article 62(1) relating to the maintenance of law and order and the safeguarding of internal security". This exclusion is mirrored in Article 2 of the Schengen Protocol. At first sight it might appear that the terms of Article 68(2) arise from some sort of error of transcription, since Article 62(1) contains no reference to matters of "law and order" or "internal security". However, the identical provision appears consistently in the English and French versions of the Treaty of Amsterdam both in its original and consolidated (therefore revised) version, as well as in the version published in the Official Journal. The emerging considered view is that Article 68(2) EC should not be read as containing a mistaken reference to Article 62(1), instead of Article

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64(1) EC. It is true that an exclusion of Court jurisdiction pursuant to Article 68(1) EC to interpret or rule on the validity of acts performed in the exercise of the expressly reserved powers of the Member States would make no sense. That Article concerns only acts of "the institutions of the Community based on this Title ..." and could not apply to Member State action of the type referred to in Article 64(1). However, the alternative interpretation is not without its problems. Neither Article 62(1), to which Article 68(2) refers, nor any other provision of Title IV EC (nor naturally Title VI TEU) contains any provision conferring competence on the Community or its institutions to legislate regarding the "maintenance of law and order" or "the safeguarding of internal security". Indeed the consistent provisions of both Treaties (Article 64(1) EC and Article 33 TEU) declare in clear terms that these remain "responsibilities incumbent on the Member States" which are not affected by the Treaties. There may, of course, be a link between the aim of "ensuring the free movement of persons" (Article 61(a) EC) which includes ensuring "absence of controls on persons ... when crossing internal borders" (Article 62(1) EC) and "directly related flanking measures with respect to external border controls ..." (Article 61(a) EC). The latter obviously imply respect for "law and order" and "internal security", but, it seems to me, without affecting the "responsibilities incumbent in Member States". The very least that can be said is that the drafting lacks clarity.

It is arguable that a solution is to be found in Article 64(2) EC, which reads:

> "In the event of one or more Member States being confronted with an emergency situation characterised by a sudden inflow of nationals of third countries and without prejudice to paragraph 1, the Council may, acting by qualified majority on a proposal from the Commission, adopt provisional measures of a duration not exceeding six months for the benefit of the Member States concerned."

Council action of the sort envisaged by this power might include measures concerning law and order or internal security, but then it is not the provision referred to in Article 68(2). What is more, "measures or decisions" under Article 62(1) can only be taken, for at least five years, pursuant to Article 67, i.e. unanimously. Furthermore, the removal of any judicial review at Community level or even interpretation of a Community measure of this sort seems very far-reaching, especially in the light of Article 6(2) TEU which obliges the Union to respect fundamental rights, as guaranteed by the European Convention on Human Rights and "as general principles of Community law". In the result the judicial review function would devolve on the national courts.

It may, in that light, be argued that Article 68(2) EC should be treated as a derogating provision meriting the strict interpretation normally reserved for the like exceptions to general provisions of Community law.

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The Treaty recognises, respectively in Article 39(3) (ex Article 48(3)) and Article 46 (ex Article 56), that Member States retain certain rights to curtail the freedom of movement, guaranteed by the EC Treaty for Community nationals, on grounds of "public policy, public security and public health". These provisions, because they constitute a derogation from a fundamental principle of Community law are strictly construed.[3] It is not so obvious that this approach is open to the Court, where the derogation is contained, not in a substantive Treaty provision, but in a provision expressly excluding the very terms for the exercise of its own jurisdiction.

The second limb of Article 68 is that the modified application of Article 234, effected by Article 68(3), is supplemented in a novel way:

> "The Council, the Commission or a Member State may request the Court of Justice to give a ruling on a question of interpretation of this Title or of acts of the institutions of the Community based on this Title. The ruling given by the Court of Justice in response to such a request shall not apply to judgments of courts or tribunals of the Member States which have become res judicata."

This is generally regarded as a species of procedure in "the interests of the Law", permitting the Council, the Commission (though not the European Parliament), or a Member State to submit abstract questions of interpretation. It does not encompass questions of validity which may be raised under Article 68(1). It is modelled on Article 4 of the Protocol to the Brussels[4] Convention of 1968 on the jurisdiction and enforcement of judgments in civil and commercial matters, a possibility which has never to date been invoked. The normal system of reference for preliminary ruling has, in the event, proved adequate. Article 68(3) presumably envisages situations of conflicting views on the correct interpretation of Title VI either between the institutions, between Member States or between an institution and one or more Member States. It is quite likely that such requests will arise from differences in interpretation by the courts of Member States. Since national courts of first instance are precluded from referring questions for preliminary ruling and, since Article 68(3) and Article 68(1) both cover "a question of interpretation of this title or of acts of the institutions based" on it, this provision may be used to resolve such a problem or conflict directly and quickly rather than waiting for the matter to be taken on appeal within the national system. Some inspiration may be gained by the Court from its experience on the

3. Case 41/74 *Van Duyn* v. *Home Office* [1974] E.C.R. 1337.

4. Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters; a consolidated (but unofficial) up to date version of the amended text of the Convention has been published at O.J. C27/3, 26 Jan. 1998. The power is there conferred on the "competent authority of a contracting State" in the event of a conflict between judgments in that State and those of other States or the Court of Justice.

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procedures followed in giving Opinions on the compatibility of proposed international agreements pursuant to Article 300 EC (ex Article 228). The first task of the court is, of course, to propose new Rules of Procedure for the exercise of this new jurisdiction. One of the questions to be addressed is whether to follow the model of Article 300 regarding the Opinion of the Advocate General, where, pursuant to Article 108 of its Rules of Procedure, the Court hears all the Advocates General, but in private, with no opinion being published. The cases to be referred under Article 68(3) may be more specific and more appropriate for treatment in the normal way with a single Advocate General delivering his Opinion in public.

Before leaving Title IV EC, it is important to recall that it is only in respect of Article 234 EC that the jurisdiction of the Court is modified. Direct actions are unaffected. The Commission will have the power to bring infringement actions pursuant to Article 226 (ex Article 169) against Member States for breach of the provisions of Title IV EC, as, for example, by failing to introduce required implementing legislation. Article 230 EC (ex Article 173) will permit Member States or the Commission to seek annulment of acts adopted pursuant to Title IV. Article 230 EC applies also, of course, to natural or legal persons who can pass the difficult test of "direct and individual concern" contained in its fourth paragraph.

In summary, Title IV constitutes an important stage in recognising the role of the Court in respect of the area of "freedom, security and justice". Its limitations may not turn out to be as severe as appears at first glance. Finally, Article 67(2) EC allows the Council, after five years, unanimously, and after consultation of the European Parliament (the Parliament's sole appearance in Title IV) to adapt the provisions relating to the powers of the Court.

Title VI TEU

The terms upon which the Court is to exercise its entirely new jurisdiction under Title VI of the Treaty on European Union (TEU) are more complex both in respect of the preliminary ruling procedure and direct actions. Such jurisdiction is exercisable, as laid down by Article 46 TEU (ex Article L), only "under the conditions provided for by Article 35".

Acceptance of the preliminary ruling jurisdiction by Member States is, in effect, voluntary. In addition, the material scope of the procedure is limited, namely, to "the validity and interpretation of framework decisions, and decisions, on the interpretation of conventions established under this Title and on the validity and interpretation of the measures implementing them". The interpretative jurisdiction is, therefore, limited to acts of secondary legislation, and does not extend to Title VI TEU

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itself, presumably because direct effect for that Title is expressly excluded by Article 34(2)(b) TEU. In any event, the Court can surely not avoid interpreting the Title if asked to rule on the validity of a framework decision based upon it.

The existence of this jurisdiction is dependant, pursuant to Article 35(2) TEU, on a declaration by a Member State made either at the time of signing of the Treaty of Amsterdam or "at any time thereafter". Furthermore, Member States may limit the jurisdiction to refer to national courts or tribunals from "whose decisions there is no judicial remedy under national law" (the Article 234 formulation), or extend it to all courts or tribunals. None the less, a declaration, once made, appears to be irrevocable.

To date eleven Member States have made declarations. Spain has accepted jurisdiction under Article 35(3)(a) TEU [i.e. for courts against whose decisions there is no judicial remedy under national law], while Austria, Belgium, Finland, Germany, Greece, Italy, Luxembourg, the Netherlands, Portugal and Sweden have accepted jurisdiction under Article 35(3)(b) [any court].[5] Seven Member States (Austria, Belgium, Germany, Italy, Luxembourg, the Netherlands and Spain) have reserved the right to make such references obligatory for courts against whose decisions there is no judicial remedy under national law, a possibility not foreseen in Article 35, but clearly inspired by Article 234 EC. Germany has incorporated this option by law.[6] Neither Ireland, the UK, France or Denmark has to date made a declaration. It is not clear whether these omissions flow from policy considerations. A Member State which has not made a declaration is not deprived of the normal right to take part in the preliminary ruling procedure by making submissions where a question is referred by a court of another Member State. (Article 35(4) TEU).

The restrictive terms of Article 46 TEU would not permit the exercise in respect of Title VI EC of the general jurisdiction of the Court in relation to direct actions to which I have referred above. Article 35(6) TEU provides, however, that the Court "shall have jurisdiction to review the legality of framework decisions and decisions in actions brought by a Member State or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers". The most obvious difference between this jurisdiction and that now exercised by the Court of Justice and, more especially, the Court of First Instance, pursuant to article 230 (ex Article 173) is the exclusion of any provision for natural or legal persons. The grounds of review are the

5. O.J. 1999 L114/56 (and O.J. 1999 C120/24).

6. Gesetz betreffend die Anrufung des Gerichtshofes der Europäischen Gemeinschaften in Wege des Vorabentscheidungsverfahrens BGBl 1998 I, p.2035, Art.1(2).

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same. The power of review extends, however, only to two types of Council action, to wit framework decisions and decisions. Common positions or conventions are excluded, the former presumably because of their essentially political rather than legal character and the latter because their binding effect flows from Member State ratification rather than Community legislative activity.

The Court is also given jurisdiction, by Article 35(7) TEU, "to rule on any dispute between Member States regarding the interpretation or the application of acts adopted under Article 34(2) whenever such dispute cannot be settled by the Council within six months of its being referred to the Council by one of its members". Unlike the power of review, referred to in the preceding paragraph, this power to settle disputes extends to the interpretation or application "of any act", thus apparently including common positions, adopted under Article 34(2). Finally, the Court is to have power to "rule on any dispute between Member States and the Commission regarding the interpretation or the application of conventions established under 34(2)(d)".

The last provision appears to replace a corresponding provision in the Maastricht Treaty. Doubts may, however, be entertained as to the existence of a jurisdictional lacuna. Article L(b) TEU, post Maastricht, included among the provisions concerning which the Treaty powers of the Court of Justice might be exercised: "the third subparagraph of Article K.3(2)(c)". The latter provided that conventions recommended by the Council to the Member States might "stipulate that the Court of Justice [should] have jurisdiction to interpret their provisions and ... rule on any disputes regarding their application". Both of these provisions have now disappeared from the Treaties, to be replaced by similar, though not identical provisions, namely the last paragraph of Article 35(7), quoted in the preceding paragraph and Article 34(d) TEU permitting the Council to "establish conventions which it shall recommend to the Member States for adoption ... ". A question arises as to the continued existence of the jurisdiction of the Court to interpret conventions recommended or adopted pursuant to the now repealed provisions of the Maastricht version of the Treaty on European Union. The Court, if it is to have jurisdiction, must either found it on the repealed Article K.3(2)(c) on the basis that the conventions were adopted under it or on an extended interpretation of Article 35(7), which refers to "conventions established under Article 34(2)(d)".

This question calls, one would think, for a saving or transitional provision. There does not appear to be any in the Treaty on European Union. The nearest approximation is to be found in the Treaty of Amsterdam. At this stage, we are all, of necessity, working on the basis of not fully official versions both of the Treaty of Amsterdam and of the Consolidated Treaties. References to Treaty Articles are especially

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confusing, because of partial duplication of numbering between the two Treaties as well as the renumbering of existing Treaty provisions. This is effected under Part Two, entitled "Simplification" of the Treaty of Amsterdam. Here, to add to the confusion, it is necessary to refer to the articles of that Treaty, of which there are fifteen only. Part Two contains Articles 6 to 11. Article 10 contains a transitional provision, whose first two paragraphs read as follows:

> "1. The repeal or deletion in this Part of lapsed provisions of the Treaty establishing the European Community, the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community as in force before the entry into force of this Treaty of Amsterdam and the adaptation of certain of their provisions shall not bring about any change in the legal effects of the provisions of those Treaties, in particular the legal effects arising from the time limits laid down by the said Treaties, nor of Accession Treaties.
>
> 2. There shall be no change in the legal effects of the acts in force adopted on the basis of the said Treaties."

The first of these provisions would preserve the jurisdiction of the Court of Justice in respect of any provisions of the EC Treaty repealed because of Simplification, but not otherwise. It does not, in any event, refer to the Treaty on European Union.

Article 10(2) of the Treaty of Amsterdam may be more helpful in reasoning a somewhat different question that may arise regarding Article 100c EC, inserted by the Maastricht Treaty, which provided:

> "1. The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, shall determine the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States."

This provision has been repealed and replaced by a number of provisions of Title IV EC, for example, Article 62(2)(b)(i) EC which speaks, *inter alia*, of rules on "the list of countries whose nationals must be in possession of visas when crossing the external borders and whose nationals are exempt from that requirement". The latter provision, however, relates only to "visas for intended stays of no more than three months" (Article 62(2)(b)). Council Regulation (EC) No.2317/95[7]

7. Council Regulation of 25 Sept. 1995 determining the third countries whose nationals must be in possession of visas when crossing the external border of the Member States (O.J. 1995 L234, p.1).

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adopted under that provision was annulled by the Court in 1997.[8] It has been replaced by Council Regulation (EC) No.574/1999.[9] In this case, it is the legal basis for adoption of the measure rather than the jurisdictional basis for its interpretation which has been changed.

The two questions, none the less, are without precedent. For the first time, substantive Treaty provisions conferring competence have been repealed. Even if the most closely corresponding provisions are to be taken as replacing them, they presumable speak for the future only. Where, in particular, is the Court's jurisdiction to rule on conventions adopted and ratified pursuant to the Treaty on European Union prior to the entry into force of the Treaty of Amsterdam? As to Council measures adopted also prior to that date under provisions now repealed, the question is rather one of substantive law. Does a measure of secondary legislation survive the repeal of its legal basis?

As I have already stated, the Court also requires a Treaty basis, even when a contractual basis for the exercise of its jurisdiction is required. Article 238 EC (ex Article 181) and Article 239 EC (ex Article 182) confer, respectively, jurisdiction in respect of arbitration clauses in certain contracts concluded by or on behalf of the Community and disputes between Member States relating to the subject matter of the Treaty. The most that can be said at present is that the Treaty of Amsterdam does not contain any sufficiently clear transitional or saving provision for the jurisdiction of the Court where the legal basis for it has been repealed.

Treaty Conflicts

Thus endowed with powers of interpretation relating both to the EC Treaty and the TEU, the Court must consider the relationship between the two treaties. Article 47 (formerly Article M) is the relevant provision. It says, in affect, that nothing in the TEU is to "affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying or supplementing them". The precedence of the EC Treaty is thus to be respected.

The Court has had to interpret this provision in its pre-Amsterdam context in the "airport visas" case,[10] where the Commission sought the annulment of a Joint Action adopted by the Council on the basis of Article K.3 of the TEU on airport transit visas. The United Kingdom intervened in support of the Council and argued that the application was

8. Case C-392/95 *Parliament* v. *Council* [1997] E.C.R. I-3213.

9. Council Regulation (EC) No. 574/1999 of 12 Mar. 1999 determining the third countries whose nationals must be in possession of visas when crossing the external borders of Member States (O.J. 1999 L72, p.2).

10. Case C-170/96 *Commission* v. *Council* [1998] E.C.R. I-2763.

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inadmissible pursuant to Article L (now Article 46) which excluded the Court's jurisdiction over acts adopted under the TEU. The Court, however, drew attention to the basic argument of the Commission that the Act challenged should have been adopted on the basis of Article 100c of the EC Treaty. It then pointed out that the terms of Article L allowed the Court to exercise its powers in relation to Article M. It concluded that it was "the task of the Court to ensure that acts which, according to the Council, fall within the scope of Article K.3(2) of the Treaty on European Union do not encroach upon the powers conferred by the EC Treaty on the Community". In the event, having ruled it admissible, the Court dismissed the action on its merits. However, the decision on admissibility remains important. It shows that the Court will continue to protect the competence of the Community—against encroachment from the exercise by the Member States and now even the Union of concurrent powers outside the framework of the Treaty.[11] The principle, first developed in reference to action by the Member States, has thus been extended even to formalised action by the Institutions, as a result of Article 47.

This supervision of the boundaries between the TEU and the EC Treaty, even with the assistance of Article 47 TEU may not always be easy. That Article provides that "nothing in" the Treaty on European Union is to affect the EC Treaty. However, there are areas of overlap. Article 61 EC lists types of measures the Council "shall adopt" in order to establish the "area of freedom, security and justice". Two of these incorporate provisions of TEU by express reference. Article 61(a) EC includes "measures to prevent and combat crime in accordance with the provisions of Article 31(e)" TEU. Article 61(e) EC includes "measures in the field of police and judicial cooperation in criminal matters and at a high level of security by preventing and combating crime within the Union in accordance with the provisions of The Treaty on European Union". This encompasses much of the subject matter of Title VI TEU.

A question of interpretation of Article 61 EC can be referred to the Court only by a court of a Member State (in effect of any Member State other than Denmark, Ireland or the UK) from which there is no appeal. Where matters fall under TEU their interpretation can be referred to the Court only by a court of a Member State that has made a declaration pursuant to Article 35(3)(b) TEU. A court of the latter type could refer a question as to whether a measure adopted pursuant to Title VI TEU is invalid having regard to Article 47 TEU and, in particular, because it affects the EC Treaty, specifically Article 61(a) or (e) but not a question regarding Article 61 itself. It is not profitable at this early stage to speculate too wondrously on the possibilities or conundrums opened up by the Treaty of Amsterdam.

11. Case 22/70 *Commission* v. *Council* [1971] E.C.R. 263 ("ERTA").

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I would prefer to dispel the fog of obscurity rather than add to it. The approach of the Court is consistently pragmatic. It prefers to seek solutions to problems. In *Busseni*,[12] for example, it assimilated the quite different terms of Article 41 of the European Coal and Steel Treaty to the (then) Article 177 of the EC Treaty, stating that they both "express a two fold need: to ensure that utmost uniformity in the application of Community law and to establish for that purpose effective cooperation between the Court of Justice and national courts".

Perhaps one benign outcome of the rather disorganised extension of the Court's jurisdiction by the Treaty of Amsterdam will be a change in the name of the Court. Unlike other institutions, it did not avail of the occasion of the Treaty of Maastricht to change its name to include reference to the European Union. It has carefully preserved the title: Court of Justice of the European Communities. With its new powers over the Treaty on European Union, is it—time to consider calling it the Court of Justice of the European Union?

12. C–221/88 *European Coal and Steel Community* v. *Acciaierie e ferriere Busseni SpA* [1990] E.C.R. 495, para.13.

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