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Spillover or Activist Leapfrogging? Criminal Competence and the Sensitiveness of the European Court of Justice

Abstract

The law concerning the choice of legal basis represents an important constitutional development in Community law. The European Court of Justice (ECJ) has through its case-law shaped and defined the boundaries between the European Union and its Member States and between the actors involved in the lawmaking process of the European Union. This article is based on three levels of analysis of this case-law. It argues that a "sensitiveness" reading of four high-profile cases on the choice of legal basis and Community internal and external competence could help explain these cases as well as more recent legal developments. The four cases, *Titanium Dioxide, Waste, Tobacco Advertising* and *Environmental Crimes*, were ruled upon in different time periods and exemplify different types of competence battles. According to this analysis the *Environmental Crimes* case from 2005, which highlights the division of competence between the pillars and the supranational and intergovernmental elements of the European Union, is neither a result of spillover, nor activist leapfrogging between pillars. In contrast, it should be read in the light of the unison will of the Member States as pronounced in a Treaty change, not necessarily yet in force. Arguably, such a *rule of sensitive interpretation* falls within the ambit of the current Treaties, although seeking guidance in changes not necessarily yet in force.

Introduction

The Community legislature derives its competence from the various legal bases[1] in the EC Treaty. The choice of legal basis for a proposed Community measure determines the legislative procedure to be followed within the policy area concerned. This in turn decides the power and level of influence of the various actors in the legislative process.[2] Whereas Community internal competence refers to the division of power between the Community institutions, external competence is about limits between the Community and its Member States or between the Community and other bodies. The limits of internal and external Community competence are set by the ECJ when interpreting the various legal bases and analysing the contested measures in the cases brought before it. The arguments of this article are illustrated by four high-profile cases on the choice of legal basis. For the purposes of this article, these cases were chosen for their representativeness, their significance within their respective time period, and as illustrating both internal and external competence battles.[3]

Over time there have been relatively few legal battles over competencies most of which have concerned internal Community competence. Legal battles have been fought by the Community institutions over the right legal basis – and the right level of involvement in the legis-

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1 The term 'legal bases' refers to the various provisions in the EC Treaty which give the Community competence to adopt legally binding acts within the respective policy area.

2 For a recent publication on a number of issues surrounding the choice of legal basis, including empirical evidence of legal basis disputes over time, see Jupille, J. The Legal Basis Game and European Governance, Sieps 2006: 12.

3 These high-profile and prominent cases have been chosen from 53 ECJ cases identified by a simple search on 'legal basis' where judgement was given between March 1987 and March 2007 at http://eur-lex.europa.eu. Methodologically, a more advanced search might have identified more than these 53 cases but hardly any more representative than those chosen for the purpose of this article.

lative process by the various institutions. In the early 1990s environmental measures clearly fell within Community competence,[4] and prominent legal battles, including the challenging of two waste directives in the *Titanium Dioxide* and *Waste* cases, revolved in particular around the competence of the European Parliament in relation to the internal market and the environmental legal bases respectively.

A broad competence to regulate traditional spillover competencies such as environmental issues with reference to the internal market was not curtailed until 2000 when the ECJ in the *Tobacco Advertising* case ruled to the benefit of Germany in an external competence battle concerning Community *vis-à-vis* Member State competence. A far-reaching Community-wide ban on tobacco advertising and sponsorship was annulled and implicitly held to be *ultra vires.* Only limited health protection measures could be approximated within the framework of the internal market legal basis. Measures taken under this provision must at least have the potential to improve the functioning of the internal market, which the Court held was not the case. For the first time an entire legislative measure was annulled possibly due to lack of competence.

Five years later, in another high-profile judgement, the *Environmental Crimes* case, the ECJ again annulled a legislative measure but this time because it *should have* been based on the Community environmental competence, and not the third pillar criminal competence. Although this case is reasoned as criminal competence being necessary to achieve effective environmental protection, the case ought not to be explained as a simple result of spillover[5] between sectors. Seemingly activist, a sensitiveness reading of the case offers an alternative explanation to activist leapfrogging[6] between pillars.

Accordingly, a rule of sensitive interpretation of the current Treaties taking into consideration the unison will of the Member States as pronounced in a Treaty change, not necessarily yet in force, could help explain all four cases.

The article takes a narrow legal analysis as a starting point. The choice of legal basis must be guided by objective factors which are amenable to judicial review, including, in particular, the aim and content of the measure. It then adds a contextual analysis for each time period of the respective judgements. The article finally rounds off with a third level analysis towards one guiding principle, the *rule of sensitive interpretation* on part of the ECJ.

A First Level Legal Analysis Based on the Case-Law of the ECJ

According to Article 230(1) EC Treaty the ECJ shall review the legality of acts taken by the Community legislature.[7] The second paragraph outlines the four grounds for annulment, i.e. lack of competence, infringement of essential procedural requirements, infringement of the Treaty, and finally misuse of powers. Put differently, there are three types of preconditions that must be fulfilled for a legislative act to be validly adopted. Firstly, procedural requirements, including that acts should be published and motivated. Secondly, that the Community must have competence in the policy area concerned. According to the principle of *attributed powers*[8] the Community shall act within the limits of the powers conferred upon it by the Treaty. In brief, this means that the Community does not have any *Kompetenz-Kompetenz*[9] and in particular that there must be a legal basis for all legislative acts. When interpreting treaty provisions, due respect must also be given to the doctrine of *implied powers*. In short, in securing the principle of effectiveness of Community law, competencies not explicitly given to attain the objectives in the treaty must be implied. Thirdly, even where the Community has competence, it must be properly used. In the areas where competence is shared between the Community and the Member States,

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4 Environmental issues were formally incorporated into the Treaty structure by the Single European Act 1987.

5 In political science literature, functional spillover refers to when integration in one industry/sector necessitates further integration in the same, as well as in other industries/sectors. Cultivated spillover assumes that the Commission will propel European integration. Finally, institutional or political spillover describes a phenomenon where changing demands and expectation on the part of interest groups, political parties and bureaucracies leads to an increase of new powers and tasks to a central institutional structure. For a brief overview see e.g. Howell, K. Developing Conceptualizations of Europeanization and European Integration: Mixing Methodologies. ESRC Seminar 1, 2002, at http://aei.pitt.edu/1720/01/Howell.pdf

6 This term has been borrowed from the English legal system when a certain (infrequently used) type of appeal from the High Courts directly to the House of Lords (instead of to the Court of Appeal) is commonly referred to as "leapfrogging". "This (infrequently used) procedure exists because a trial judge's decision may be bound by a previous Court of Appeal or House of Lords decision and a point of law of general public importance may be involved." Nathanail, P. Introduction to the Legal System in England, at http://www.lqm.co.uk/free/2002%20uk%20law.pdf. In this context, the term refers to a kind of leapfrogging between pillars in the three pillar structure of the European Union.

7 According to Article 249 EC Treaty there are three types of binding Community acts: regulations, directives and decisions.

8 Articles 5.1 and 7.1 EC Treaty and Article 5 EU Treaty.

9 This is originally a German term. In this context it means that the Community only has the powers that the Member States have transferred to it in the basic treaties. In short, the Community has no competence to give itself new legislative competence.

Community competence must be in conformity with the principles of subsidiarity and proportionality.[10] To this point in time, there have been relatively few cases where a subsidiarity-based challenge has been raised and so far no case where Community action has not conformed with the principle.[11]

The Choice of Legal Basis

The ECJ has repeatedly stated that the choice of legal basis must be based on objective factors which are amenable to judicial review, including, in particular, the *aim* and *content* of the measure.[12]

The main rule, the so called *predominant purpose rule*, is that legislative acts should be based on a sole legal basis: 'If examination of a Community measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of these is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the act must be based on a single legal basis, namely that required by the main or predominant purpose or component.' [13]

Only exceptionally more than one legal basis can be tolerated: [14] 'Exceptionally, if it is established that the act simultaneously pursues a number of objectives, indissociably linked, without one being secondary and indirect in relation to the other, such an act may be founded on the various corresponding legal bases.' [15]

However, no dual legal basis is possible where the procedures laid down for each provision are incompatible with each other.[16] When the choice lies between legal bases with different levels of influence of the legislative bodies, arguments regarding the correct legal basis cannot be dismissed as concerning formal defects only.[17] On the contrary, in such cases, the choice of legal basis could strongly affect the determination of the content of the proposed measure.[18] As a result, where the Court cannot ascertain the predominant purpose of a measure, the *inextricably associated rule* entails a different test by which it operates a formal hierarchy between the different legal bases, looking to the relationship specified in the EC Treaty between each.[19]

For example, the legal basis on agriculture in Article 37 EC Treaty takes precedence over the general provisions relating to the establishment of the common and internal market in Articles 94 and 95 EC Treaty.[20] Article 93 EC Treaty as far as concerns the harmonisation of leg-

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[10] See Article 2.2 EU Treaty, Article 5.2 EC Treaty and Article 5.3 EC Treaty respectively as well as the protocol on subsidiarity and proportionality to the EC Treaty.

[11] So far the subsidiarity-based challenges before the ECJ question the appropriateness rather than the legal competence of the Community adopting acts in a particular field. See e.g. Case C-84/94 UK v Council [1996] ECR I–5755; Case C-233/94 *Germany* v *Parliament and Council* [1997] ECR I–2405 (the deposit-guarantee case); Case C-376/98 *Tobacco Advertising,* in footnote 32; Case C-377/98 *Netherlands* v *Parliament and Council* [2001] ECR I–7079; Case C-491/01 in footnote 17; Case C-110/03 *Belgium* v *Commission* [2005] ECR I–2801; Joined Cases C-154/04 and 155/04 *Q* v *Secretary of State for Health, ex parte: Alliance for Natural Health and Nutri-Link Ltd* (C-154/04) and *Q* v *Secretary of State for Health and National Assembly for Wales, ex parte: National Association of Health Stores and Health Food Manufacturers Ltd* (C-155/04) [2005] ECR I-6451.

[12] Case C-300/89 *Titanium Dioxide*, in footnote 24, paragraph 10, and a number of subsequent cases.

[13] Case C-36/98 *Spain* v *Council* [2001] ECR I–779, paragraph 59; See also Case C-155/91 *Waste*, in footnote 27, paragraphs 19–21; Case C-42/97 *Parliament* v *Council* [1999] ECR I–869, paragraphs 38–40.

[14] Within some policy areas dual or more legal bases are still frequently used by the Community legislature. Where there is broad consensus amongst the actors in the lawmaking process, this practice will hardly be challenged before the ECJ.

[15] Case 336/00 *Huber* [2002] ECR I-7699, paragraph 31. See also Case C-300/89 *Titanium Dioxide*, in footnote 24, paragraphs 13 and 17, in which case this rule for not applicable. For an example where the rule was applied, see Case C-94/03 *Commission* v *Council* [2006] ECR I–1, paragraph 51, in which a decision was annulled since it concerned two indissociably linked components and therefore should have been based on Article 133 jointly with Article 175(1) EC Treaty. Likewise, in Case C-178/03 *Commission* v *Parliament and Council* [2006] ECR I–107, both the purposes and the terms of the contested regulation contained commercial and environmental components which were so indissociably linked that recourse to both Article 133 EC and Article 175(1) EC was required for the adoption of that measure (paragraph 44). In contrast to the *Titanium Dioxide* case, where recourse to a dual legal basis was not possible where the procedures laid down for each legal basis were incompatible with each other or where the use of two legal bases were liable to undermine the rights of the Parliament, no such consequences followed from using both Articles 133 and 175(1) EC Treaty (Case 94/03 paragraph 52 and Case 178/03 paragraph 57).

[16] Case C-338/01 *Commission* v *Council* [2004] ECR I–4829 *(Recovery of Indirect Taxes),* paragraph 57.

[17] Cf. Case 491/01 *Q* v *Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd.* [2002] ECR I–11453, in particular paragraphs 98 and 103–111. In this case, to have added Article 133 to Article 95 EC, which was held to be the appropriate legal basis, was only a formal defect and did not give rise to irregularities in the procedure applicable to the adoption of the act. See also Joined cases C-184/02 and C-223/02 S*pain and Finland* v *Parliament and Council* [2004] ECR I–7789, in particular paragraphs 41–44.

[18] See e.g Case 68/86 *UK* v *Council* [1988] ECR 855, paragraph 6; Case C-131/87 *Commission* v *Council* [1989] ECR 3743, paragraph 8; Case C-300/89 *Titanium Dioxide*, in footnote 24, paragraphs 17–21.

[19] Chalmers, D., et al. European Union Law, Cambridge University Press, Cambridge 2006, at p. 143. See, to that effect Case C-300/89 *Titanium Dioxide*, in footnote 24, paragraph 13: 'It follows that, according to its aim and content, as they appear from its actual wording, the directive is concerned, indissociably, with both the protection of the environment and the elimination of disparities in conditions of competition.'

[20] Case 68/86 *UK* v *Council* [1988] ECR 855, paragraphs 15–16 (common market).

islation covering turnover taxes, excise duties and other forms of indirect taxation takes precedence over Article 95 EC Treaty.[21] The general internal market provision takes precedence over the environmental legal basis in Article 175 EC Treaty.[22] Finally, all other legal bases take precedence over the residual powers clause in Article 308 EC Treaty.[23] Yet, due to its narrow application, the *inextricably associated rule* is of rather limited practical importance.

Legal Basis Cases before the ECJ

Over time there have been relatively few legal competence battles most of which have concerned internal Community competence. Legal battles have been fought by the Community institutions over the right legal basis. Typically, one institution has felt that a particular legislative measure should have been based on a specific treaty article thus involving a particular degree of institutional participation in the legislative process. Prominent legal battles include the Commission and the European Parliament arguing for waste directives to be based on the internal market rather than the environmental legal basis. Previously, those provisions involved different voting procedures in the Council and different degrees of participation by the European Parliament.

The Titanium Dioxide Case

In two internal competence cases, both brought by the Commission and supported by the European Parliament, different legal basis tests were applied by the ECJ. In the *Titanium Dioxide* case from 11 June 1991,[24] the Commission challenged the Council's choice of legal basis for the directive on waste from the titanium dioxide industry. The directive had a twofold aim of environmental protection and improvement of the conditions for competition. These aims were indissociably linked but a dual legal basis was excluded since the legal bases involved different voting rules in the Council as well as a different degree of participation for the European Parliament. Whereas the environmental legal basis required unanimity in the Council and merely the European Parliament being consulted, the internal market provision required recourse to the cooperation procedure.[25] To use a dual legal basis would mean that the European Parliament would only be consulted and thus jeopardize the very purpose of the cooperation procedure, which was to increase the involvement of the European Parliament in the legislative process. A dual legal basis would therefore not be in accordance with the fundamental democratic principle 'that the peoples should take part in the exercise of power through the intermediary of a representative assembly'.[26] The inextricably associated rule with its formal hierarchy test had to be used and the internal market provision took precedence over the environmental provision. Hence, the Court agreed with the Commission that the environmental legal basis was inadequate for the proposed action. Since the directive was based on an inadequate legal basis, it was annulled by the ECJ.

A Second Level Contextual Case by Case Analysis

The Waste Case

The logic applied in the *Titanium Dioxide* case was not quite followed in a subsequent case from 17 March 1993 where the legal basis of another waste directive was challenged. In the *Waste* case the ECJ ruled that the directive on waste only had an incidental effect of harmonising market conditions within the Community.[27] Hence, the application of the predominant purpose rule meant that the directive had validly been taken on the environmental legal basis.

However, in comparing these cases, the directives at issue were not that divergent as to require different legal basis tests. In short, the first directive imposed obligations concerning the treatment of waste from the titanium dioxide production process, whereas the second directive imposed obligations concerning the production and recycling of waste. If accepting the guiding principle of the *Titanium Dioxide* case and the importance of a representative assembly, another explanation seems more feasible.

The Maastricht Treaty was adopted between the judgements of 11 June 1991 and 17 March 1993. Although entering into force only on 1 November 1993, the ECJ was of course well aware of its content. The existing differences in the legislative procedures to adopt

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[21] Case C-338/01 *Recovery of Indirect Taxes*, in footnote 16, paragraph 60; C-533/03 Commission v Council [2006] ECR I-1025, paragraphs 44–46.

[22] Case C-300/89 *Titanium Dioxide*, in footnote 24, paragraphs 22–25.

[23] See Case 45/86 *Commission* v *Council* [1987] ECR 1493, paragraph 13.

[24] Case C-300/89 *Commission* v *Council* [1991] ECR I-2867 *(Titanium Dioxide).*

[25] Under the cooperation procedure the Council acts by a qualified majority where it intends to accept the amendments to its common position proposed by the Parliament and included by the Commission in its re-examined proposal, whereas it must secure unanimity if it intends taking a decision after its common position has been rejected by the Parliament or if it intends to modify the Commission's re-examined proposal.

[26] Case C-300/89 *Titanium Dioxide*, in footnote 24, paragraph 20.

[27] C-155/91 *Commission* v *Council* [1993] ECR I-939 *(Waste),* paragraphs 19–20. See also Case C-187/93 *European Parliament* v *Council* [1994] ECR I-2857 *(Shipments of Waste).*

single market or environmental protection measures were to diminish. Subsequently, less concern for the democratic principle embracing a representative assembly was needed in the search of the most appropriate legal basis for environmental matters. The intent of the Member States was clearly set on using the cooperation procedure for environmental matters, and the co-decision procedure for all internal market measures. This difference vanished in 1997 when the Treaty of Amsterdam applied the co-decision procedure to both fields of law.

Yet, the diverse outcome of *Titanium Dioxide* and *Waste* shows that neither the predominant purpose rule nor the narrow inextricably associated rule are easy to apply to particular sets of circumstances. Arguably, this might show that a narrow legal analysis is insufficient in predicting the outcome of individual ECJ cases. Similarly, in commenting the predominant purpose rule, it has been suggested that 'the Court has to engage in highly selective analysis to justify a particular legal base for a measure'.[28] In relation to the inextricably associated rule, the same authors have argued that, despite its narrow application, it has been applied in some cases 'suggesting that sometimes, for ulterior motives, the court simply wishes to discard the "predominant purpose" rule.' [29]

Ultra Vires Action

The internal competence cases have not generally involved an assumption that the Community lacked power to act, but rather that a particular legislative measure should have been shaped by a different legal basis and a different legislative procedure. In short, there have been more power quarrels between the institutions than questions of the Community acting beyond its power, i.e. *ultra vires.*

Although there has been a broad discussion on the limits of Community competence including the principle of attributed competence, the principle of subsidiarity, and the appropriate role of Community rather than Member State action, there are still very few cases where the ECJ has censured the Community legislature for infringing these principles.[30] Up to this point, the ECJ has not annulled an entire legislative Community measure *explicitly* due to lack of competence.[31]

The Tobacco Advertising Case

Up to now, the only case really worth mentioning in connection with the term *ultra vires* is the *Tobacco Advertising* case from 5 October 2000.[32] This was the first time the ECJ annulled an entire piece of legislation *probably* due to lack of competence. The court did not explicitly say so, but this is the most feasible reading of the case.

A Community-wide ban on tobacco advertising and sponsorship was adopted after an outdrawn legislative process involving a wide spectrum of interested parties. The legal service of the European Parliament had never before been lobbied as heavily but agreement could only be reached in the Council after a change of government in the UK. The legal service of the Council had already at an early stage uttered doubts about the appropriateness of one of the legal bases chosen in the end, i.e. the general internal market provision in Article 95 EC Treaty.[33] Yet the Council and the European Parliament had later to defend themselves before the ECJ against allegations that Article 95 EC Treaty was not the proper legal basis for the directive.

The ECJ analysed the relevant treaty provisions and the directive itself. The directive sought to harmonise Member State laws on advertising and sponsorship of tobacco products. The national measures to be harmonised were largely inspired by public health policy objectives. Although the public health provision in Article 152 EC Treaty explicitly excludes any Community harmonising measures, acts with a high level of health protection can be adopted on the basis of other treaty provisions. Health requirements form a decisive part of the Community's other policies and Article 95 EC Treaty expressly requires that a high level of human health protection is to be ensured in the process of harmonisation.

Nevertheless, the Court ruled that Article 95 EC Treaty could only be used for measures that genuinely have as

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[28] Chalmers, D., et al. in footnote 19, at p. 144.

[29] Ibid.

[30] De Búrca, G., The ECJ's Tobacco Advertising Judgement, CELS Occasional Paper No. 5, Centre for European Legal Studies, University of Cambridge, 2001, at p. 7.

[31] In 1987 *some sections* of a Commission decision establishing a mechanism for consultation between Member States concerning non-EU migrant workers were declared by the ECJ to be beyond competence. Yet, much of the decision was upheld in the joined cases 281, 283–285, 287/85 *Germany* v *Commission* [1987] ECR 3203. Although not involving an annulment or censure of Community competence, the ECJ ruled upon the legislative limits to Article 308 EC Treaty in Opinion 2/94 [1996] ECR I-1759 which established that the Community lacked competence under Article 300 EC Treaty to accede to the European Convention on Human Rights. See further De Búrca above.

[32] Case C-376/98 *Germany* v *European Parliament and Council*, ECR 2000, p. I–8419 *(Tobacco Advertising).* For some interesting developments concerning the scope of Article 95 EC Treaty and the Community discretion in relation to the words 'measures for the approximation', see Case C-66/04 UK v European Parliament and Council [2005] ECR I-10553, paragraph 45; Case C-217/04 *UK* v *European Parliament and Council* n.y.r., paragraph 43–44; and Case C-380/03 *Germany* v *European Parliament and Council* n.y.r., paragraphs 42–43.

[33] Together with this Article, Articles 47 and 55, the freedom of establishment and the freedom to provide services were used as legal bases for the directive.

their object the improvement of the conditions for the establishment and functioning of the internal market. This clearly limited the competence of the Community legislature. There is no general competence to regulate the internal market. The fact that some provisions of the directive affected the functioning of the internal market was not sufficient for Article 95 EC Treaty to apply. The directive had only the incidental effect of harmonising market conditions within the Community.[34] As a result only certain parts of the directive could have been adopted on the basis of the general internal market provision. The Community legislature closely followed this ruling and a comparably limited version of the annulled directive was soon after adopted.[35]

Although the ECJ did not clearly state that the Community lacked competence altogether to adopt the directive, but simply that it could not validly be adopted on the chosen legal bases, this is an attempt to set clear constitutional limits to Community competence as set out in the Treaty. As such, it is more about the scope of Community competence and less about the preference of a specific treaty article and a particular degree of institutional participation in the legislative process. Although the residual powers clause in Article 308 EC Treaty was not even mentioned there should be little doubt that this provision could not have been used as an alternative legal basis for the Advertising Directive. This is particularly true since Article 152 EC Treaty explicitly excludes harmonising measures on public health. In short, if this ruling implicitly limited the scope of Article 308 EC Treaty, it gave no further room for *Kompetenz-Kompetenz* in this context.

A Third Level Contextual Analysis towards one Guiding Principle

The Environmental Crimes Case

Five years later, on 13 September 2005, another high-profile judgement on Community competence followed. In stark contrast to the *Tobacco Advertising* case, this ruling widened the scope of Community competence. This was yet again a power struggle between institutions, but at the same time an external competence case. The *Environmental Crimes* case[36] is framed in the terminology of ensuring the effectiveness of Community law, and thereby refers to the doctrine of *implied powers*. This is nothing new,[37] but since the result shapes the distribution of power in the Union, the case will in all probability have far reaching consequences.

According to the ECJ, a framework decision on the protection of the environment through the harmonisation of Member State criminal laws could not validly be taken with reference to a legal basis in the third pillar. While this decision was being prepared, there was a similar proposal for a directive under the Community pillar. Yet, the Commission was unable to obtain the necessary support for its adoption in the Council although the adoption of an environmental measure after the Maastricht Treaty only requires a qualified majority. Instead, the then fifteen Member States adopted a framework decision with reference to police and judicial cooperation in criminal matters. Third pillar measures are mainly intergovernmental in nature and the framework decision was taken unanimously.

Hence, it was little surprise that as many as 11 of the Member States supported the Council in the proceedings before the ECJ. The most obvious reason why a framework decision was chosen before a directive concerns the legal effects. Both measures need implementation by the Member States but in contrast to a directive a framework decision lacks direct effect and cannot be invoked by individuals before national courts, and the Commission or another Member State have no power to bring infringement proceedings against a misbehaving Member State. The two most useful tools to make EU law effective therefore only exist within the Community pillar. According to the ECJ the measure in question was mainly about making Community environmental law effective and should therefore have been based on the environmental provision in Article 175 EC Treaty. In accordance with the first level analysis presented above, both the aim and the content of the relevant articles of the framework decision had as their main purpose the protection of the environment. Accordingly, the ECJ annulled a legislative measure yet again but this time because it *should have* been based on the Community environmental competence, and not the third pillar criminal competence. This is the first major case on division of competence between the pillars. In this respect, it has been argued that it adopts a one-sided logic since it suggests that first pillar action always takes precedence over second or third pillar action.[38]

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[34] Cf. Case C-377/98 *Netherlands* v *European Parliament and Council* [2001] ECR I-7079 (Legal Protection of Biotechnological Inventions), in particular paragraphs 27–29.

[35] This directive was unsuccessfully challenged in Case C-380/03 *Germany* v *European Parliament and Council*, n.y.r.

[36] Case C-176/03 *Commission* v *Council* [2005] ECR I-7879 (Environmental Crimes).

[37] See for example Case 22/70 *Commission* v *Council* [1971] ECR 263.

[38] Chalmers, D., et al. in footnote 19, at p. 141. Cf. also Case C-170/96 Commission v Council [1998] ECR I-2763 (Airport Transport Visas) in which case the Community did not have a certain competence vested outside the Community pillar.

Yet, instead of changing the balance between the principles of attributed and implied powers,[39] this case and previous high-profile cases could be explained by using one guiding principle. The rule of 'sensitive interpretation', thus referring to the ECJ's sensitiveness towards the unison will of the Member States as pronounced in a treaty change, not necessarily yet in force.

The Rule of Sensitive Interpretation

In 1986, environmental issues were formally incorporated into the treaty structure by the Single European Act, SEA. Already before then, environmental measures had been adopted with reference to the dual legal basis of the Common Market and the residual powers clause, what is now Articles 94 and 308 EC Treaty. To give an example, while the 1975 directive on the quality of bathing water was adopted with reference to this dual legal basis, subsequent measures are based on the environmental provision in Article 175(1) EC Treaty.[40] Clearly, this directive is more about environmental concern than about the functioning of the Common Market.

In 1991, the ECJ ruled that the *Titanium Dioxide* directive should have been based on the general internal market provision. In March 1993, the court ruled in the *Waste* case that another waste directive could validly be based on the environmental provision. Whereas the Maastricht Treaty, signed in February 1992, only entered into force on 1 November 1993, it might have had a decisive impact on the outcome of the second *Waste* case. In a sensitiveness reading, the concern about the importance of a representative assembly in *Titanium Dioxide* towards the preference of the general internal market provision was not equally acute in March 1993, although the Maastricht Treaty had not yet entered into force.

The Public Health Title X was introduced with the Maastricht Treaty. What might at a first glance have looked like an extension of Community competence into a new area was in fact quite the contrary. Limits to the Community's competence within this policy field were inserted directly in the Treaty excluding any harmonisation of the laws and regulations of the Member States. After 1997 and the Treaty of Amsterdam, this limit is now included in Article 152 EC Treaty.

In the light of a *rule of sensitive interpretation*, the *Tobacco Advertising* case took due account of the Treaty changes limiting the Community competence in the field of public health. As the court stated, harmonising measures with a high level of health protection can be adopted on other treaty provisions. Still, despite the ECJ's focus on the appropriateness of Article 95 EC Treaty as a legal basis, it is possible to argue that the outcome might have been different in the absence of the restrictive public health provision. This is particularly important given the number of equivalent provisions covering a number of other policy areas.[41]

If one reads the *Tobacco Advertising* case from October 2000 in this new light, an explanation might be found to this unusually restrictive case. Seen as sensitiveness by the ECJ towards the unison will of the Member States, which was undoubtedly to restrict Community competence within the field of public health, the case seems less ambiguous.

Furthermore, whereas the 2001 Treaty of Nice did not offer solutions to the problem of division of competencies, the 2004 Constitutional Treaty has more to offer. It is highly relevant that it departs from the three pillar structure and declares qualified majority voting in the Council for acts on police and judicial cooperation.

The resemblance between the wording of the *Environmental Crimes* case and Article III-270(2) of the Constitutional Treaty is striking. Whereas the ECJ states: 'As a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence… [this] does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective.'[42]

Article III-270(2) reads as follows:[43] 'If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, European framework laws may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. …'

This comparison might further indicate the importance of the ECJ's ruling in relation to other policies be-

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[39] On this subject see the recent Sieps working paper by Hanna Goeters, New Criminal Law Developments in the Community Legal Order, Sieps 2007:1u, at www.sieps.se

[40] Council Directive 76/160/EEC of 8 December 1975 concerning the quality of bathing water, OJ 1976, L 31/1.

[41] Identical or similar limits are introduced elsewhere in the EC Treaty: Article 13 on non-discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation; Article 137 on social policy; Article 149 on education, Article 150 on vocational training policy; Article 151 on culture; and Article 129 on employment.

[42] Case C-176/03 *Environmental Crimes*, in footnote 36, paragraphs 47–48.

[43] According to Article III-270(3) the Member States might follow a particular procedure if a proposed measure would effect fundamental aspects of its criminal justice system.

sides environmental protection. According to the Constitutional Treaty, the approximation of Member State criminal laws would be possible for all Union policies that have been subject to harmonisation measures, which embrace a number of policies besides environmental protection. Furthermore, whereas a third pillar framework decision previously has been granted indirect effect by the ECJ,[44] this time, the content of a framework decision should validly have been adopted within the first pillar. Clearly, the long criticised three pillar structure, which would disappear with the entering into force of the Constitutional Treaty, has already started to dissolve.

Arguably, since the ECJ did not determine the appropriate legal basis through the reference to provisions not yet in force, but rather seems to have *interpreted* the current treaty provisions against the background of changes yet to enter into force, this analysis is neither contrary to the principle of legal certainty in general, nor the *Bovine Animals* case in particular.[45] In this case the ECJ ruled that: '…Community measures must be adopted in accordance with the Treaty rules in force at the time of their adoption. It would be contrary to the principle of legal certainty if, in determining the legal basis of such a measure, account were to be taken of an alleged development in relations between institutions which does not yet find confirmation in any provisions of the Treaty currently in force or in the provisions of a treaty which has not yet entered into force.'[46] Likewise, the ECJ stated that whether or not the contested measure was correctly adopted: '… must be determined by reference to the EC Treaty as it was in force at the date on which the contested regulation was adopted.'[47] Clearly, this is nothing less than what is required by the principle of legal certainty.

Conclusions and Outlook – Limits to the Rule of Sensitive Interpretation?

What might seem like unconnected results of four high-profile cases involving principles such as the importance of a representative assembly, the principle of attributed powers and the principle of implied powers, arguably have a common explanation. By using a *rule of sensitive interpretation* of the current treaties, guidance could be found in treaty changes not necessarily yet in force. Firstly, in comparing *Titanium Dioxide* and *Waste*, the Maastricht Treaty played a role even before it entered into force. Secondly, in *Tobacco Advertising,* the ECJ took due notice of treaty changes limiting the competence of the Community legislature. Thirdly, in *Environmental Crimes*, the ECJ obtained inspiration from the Constitutional Treaty in spite of the constitutional crisis and its uncertain status. Since the ECJ did not apply treaty provisions which have not yet entered into force, but simply interpreted the current treaty provisions against the background of such changes, this analysis is neither contrary to the principle of legal certainty in general, nor the *Bovine Animals* case in particular.

Certainly, it could be argued that there are limits to the rule of sensitive interpretation. In particular the *Environmental Crimes* case raises doubts about the legitimacy of cases which seem to take into consideration changes not yet in force, and perhaps not ever to enter into force. In this case the ECJ was well aware of the distinct French and Dutch no-votes to the Constitutional Treaty. Almost three years after its agreement, the future of the Constitutional Treaty is still unclear. Still, the resemblance between the outcome of the *Environmental Crimes* case and Article III-270(2) of the Constitutional Treaty is too noticeable to ignore. Put differently, falling within the possible limits of interpretation of the current treaties a diverse outcome of the case would have been more likely in the absence of the Constitutional Treaty provision.

Still, a more nuanced analysis of the case might be needed. Does it mean that the *Environmental Crimes* case lacks legitimacy? Certainly, there is always a risk of legitimacy loss were the court to transgress the vague and fluctuating line of possible interpretations in a Union based on the rule of law. Yet, indisputably important, such arguments go far beyond the assessment of this article. For the purposes of this article it is enough to identify some associated problems without necessarily presenting comprehensive solutions.

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[44] Case C-105/03 *Criminal Proceedings against Maria Pupino* [2005] ECR I-5285.
[45] Case C-269/97 *Commission* v *Council* [2000] ECR I-2257 *(Bovine Animals).*
[46] Ibid., paragraph 45.
[47] Ibid., paragraph 46.

This said, according to the author, the *Environmental Crimes* case might possibly be explained without legitimacy losses for the ECJ. It is possible to argue that the case stands firm within the scope of possible interpretations within the current treaties with or without the entering into force of the Constitutional Treaty. In fact, in rephrasing harmonisation of criminal matters in terms of making Community policy effective and thus further blurring the boundaries between the supranational and the intergovernmental features of the European Union, the case gives a hint of reasonable as well as possible future developments. Not surprisingly, harmonisation of criminal matters and the departure from the three pillar structure have been presented as key concerns irrespective of the fate of the Constitutional Treaty. Awaiting political clarification one might hope that the extent of criminal law competence under the present EC Treaty will be clarified by the ECJ in the pending *Ship Source Pollution* case.[48] At the earliest, a ruling might be expected by the end of 2007. Meanwhile, the first reading by the Council of a legislative proposal on approximation of sanctions within the field of intellectual property rights is pending.[49]

Still, to concentrate on provisions currently in force which are open to interpretation, while at the same time seeking data for interpretation in treaty provisions not necessarily yet in force, is something different from either spillover or activist leapfrogging between pillars. The rulings are more than a general spillover between sectors, but less than ad hoc activist rulings of the ECJ which in the long term might undermine the legitimacy of its precedents. Conclusively, such a rule of *sensitive interpretation* could help explain high-profile cases on Community competencies including the notorious *Environmental Crimes* case from 2005, and possibly also offer guidance in predicting the outcome of future legal basis cases. ●

[48] Case C-440/05 *Commission* v *Council,* pending.

[49] Amended proposal for a Directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights. COM(2006) 168 final. See further House of Lords European Union Committee, The Criminal Law Competence of the EC: Follow-Up Report: Report with evidence, 11th Report of Session 2006-07, (13 March 2007), HL Paper 63, at pp. 6-7. This is a follow-up report to, House of Lords European Union Committee, The Criminal Law Competence of the European Community: Report with evidence, 42nd Report of Session 2005-06, (28 July 2006), HL Paper 227.