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Jelena Vukadinović *

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CONSTITUTIONAL MIXITY OF EC AND EU ECJ C-91/05, COMMISSION V. COUNCIL

1. THEORETICAL BACKGROUND OF DISPUTE

1.1. Unclear line in the competence division between the EC and the EU

The root of dispute in case 91/05 Commission v Council[1], could be search in broad and unclear or "fuzziness"[2] provisions delimiting competences between EC and EU Treaties on one side and, from their overlapping, on the other side. From there derive the understandings that "the current Treaties establish a patchwork of individual external policies with specific objectives and mandates for action,"[3] and that "watertight separation" of different EU policy provisions of EU Treaty (further: TEU) concerning Common Foreign and Security policy (CFSP, Title V TEU) and cooperation in judicial and criminal

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* MA Student, Europa Institut, Saarland.

1 Case C-91/05, *Commission v Council*, [2008] ECR I-3651.

2 C. Hillion, R. Wessel, Competence Distribution in EU External Relations after ECOWAS: Clarification or Continued Fuzziness, *CML Rev.*, 46(2009), 551-586, at p. 551

3 D. Thym, Foreign Affairs, Forthcoming in: *Principles of European Constitutional Law*, 2nd ed., (ed. Bogdandy, Bast), Hart 2009, available on: http://pernice.rewi.hu-berlin.de/index.php?id=140, p. 3.

matters (Title VI TEU)[4] was not workable. Because of that, the issue of clear determination of competences of EC and EU and their delimitation has become one of the main issues[5] in community law and EU law and practice, answer of which influence not only on the legal status of the EU, but on maintenance and preserving of attaining *acquis communautaire* in the European Community. In that sense, the issue of delimitation of the EC and EU competences is not only legal issue,[6] but high level political one. Therefore, this issue can not be approached only from the legal point of view, because "the specificity of the CFSP lies in the fact that conducting a purely legal analysis here is almost impossible without considering its actual policy and characteristics."[7]

On the other side, this issue can be approached from the substantive as well as the procedural point of view. From the substantive point of view, it is necessary to delimit competences between the EC and the EU *ratione materiae*, and to determine the questions and fields of acting of the EC and the EU. Such a division would make it possible to create a list of concrete competences and solve the problem of the nowadays-existing patchwork division.

With regard procedural point of view, the competences can be divided according to the applied procedure in their exercising, e.g. according the process of decision-making by the competent institutions. We have in mind that in the first pillar, which is in the EC, decisions are made mostly by qualified majority voting, while the second and third pillar are characterized by consensus and intergovernmental decision-making procedures.

Only after having clearly determined which competences are conferred on the EC and EU, it is possible to find the appropriate legal base for measures

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[4] C. Hillion, R. Wessel, *op. cit.*, p. 551.

[5] See European Convention Secretariat, Delimitation of Competition between the European Union and the Member States, - Existing system, problem and avenues to be explored, CONV 47/02, Brussels, 15 May, 2002, available on: http://register.consilium.eu.int/pdf/en/02/cv00/00047en2.pdf See also, Case C-170/96 *Commission v Council (The Airport Transit Visa case)*, [1998] ECR I-2763.

[6] R. A. Wessel, *The European Union's Foreign and Security Policy*, Kluwer Law International, The Hague 1999.

[7] M. Brkan, Exploring EU Competence in CFSP: Logic or Contradiction?, *CYELP* 2 [2006], pp. 173-207, p. 174, at: http://hrcak.srce.hr/file/44718.

and actions that can be taken by their institutions, as well as the measures for protection of interests in the case of violation of legal base. We should keep in mind that the EC and EU can only act in framework of conferred competences or attributed competences. In that sense the respecting of conferred competences represents constitutional principle, which is known as the principle of maintaining or preserving constitutional balance.

From a legal point of view, the principle of institutional balance is one "manifestation of rule that the institutions have to act within the limits of their competences" and refers to the fact that "the Community institutional structure is based on the division of powers between the various institutions established by the treaties."[8] The proposal of this principle is similar to the Montesquieu's principle of separation of powers, which aimed "to protect individuals against the abuse of power. In the absence of a separation of powers (in EC and EU), the principle of institutional balance made it possible to guarantee to undertakings that a modification of the institutional balance would not call into question the decision-making process envisaged by the treaties and accompanying guarantees provided by the treaties."[9] On the other side, this principle aims to prohibit any encroachment by one institution on the powers conferred to other institution in order to not only maintain balance (to protect interests of institutions and member states[10]), but also to protect the interests of private individuals.[11] In general, the principle institutional balance aims to protect community heritage (*acquis communautaire*) and simultaneously, to enable the EU to exercise its competences in areas of CFSP and PJCC in order to attain its aims.

Having in mind that competences are envisaged in the pillars (First, Second and Third), we can say about the constitutional balance between Pillars, that it is an interpillar or cross-pillar balance. The protection of cross-pillar balance

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[8] J-P. Jacque, The Principle of Institutional Balance, *CMLRev*., 41(2004), 383-391, at p. 383. The author refers on Merony case (9/56 Merony, [1958] ECR 11, as the first case in which ECJ referred on genuine institutional balance.

[9] *Ibid*, p. 384. Addendum in brackets is mine.

[10] See F. G. Jacobs, The Evolution of the European Legal Order, *CML Rev*., 41(2004) 303-316, at p. 310, 311.

[11] The ECJ case law evidences on some attempts from the EU to "enter" in EC competences, while in small cases was opposite. See ECJ Joined Cases C-317/04 and 318/04, *Parliament v Council* [2006] ECR I-4721 (*Passenger Name Record case*) where action is taken on the basis of the TEC, when the EC had not competence to do so.

is recognized in Art. 47 TEU, by wording: "…nothing in this Treaty shall affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying or supplementing them." The control of respecting of this principle in EC is entrusted to the ECJ.

Having in mind those theses, the paper is divided into three parts. The topic of the first part is a short presentation of the nature of the EC and the EU and their competences. The second part is giving an analysis of the constitutional mixity between the community (EC) law and EU legal order. In the third part I am giving an inside look into the problem, presenting the case C-91/05.

1.2. Fuzzined nature of the EU and its competences

By the time that the Maastricht Agreement was created the EU as one diffuse and unclear organization was based on three pillars in the process of creating "an ever closer union among the peoples of Europe…" In that "process", the Union shall be founded on the European Communities, supplemented by the policies and forms of cooperation established by this Treaty.[12] With other words, the European Union was imagined as a roof structure with three pillars. The first pillar makes the European Communities, second, Common Foreign and Security policies (CFSP) and the third, Cooperation in Criminal and Judicial matters, which latter transformed in police and judicial cooperation in criminal matters (PJCC). Regarding its legal nature some authors considered the EU as a classic international organization or permanent intergovernmental conference, but others, as an association of states acting in common framework in order to achieve common objectives.[13] Although the theoretical consideration of this question falls out of the framework of this paper[14], it is important to keep in mind that from the qualifications of the EU also the character of the Union itself depends and the character of the relationships between the EU law and the Community law.

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[12] Art. 1, Para. 3, first sentence.

[13] See D. Curtin, I. Dekker, The EU as a "Layered" International Organization: Institutional Unity in Disguise, in: *The Evolution of EU Law* (ed. P. Craig, G. de Burca), Oxford 1999, pp. 83-136;

[14] We refer to D. Curtin, I. Dekker, *op. cit.*, pp. 83-136; C. W. Herrmann, Much Ado about Pluto? The "Unity of the Legal Order of the European Union" Revisited, *EUI Working Papers RSCAS* 2007/05, http://www.eui.eu/RSCAS/Publications/

Determination of the EU as a classical international organization can have as a consequence that the acts adopted under the second and third pillar are being described as agreement between the member States, i.e. as traditional public international law acts, not as secondary law of EC. It has, as consequences avoiding those supranational characteristics, such as supremacy, direct effect and judicial review from community law would be applied to the EU legal order. Only with the Amsterdam Treaty some of these obscurities could be clarified and it made also "crystal clear that the Union system is founded on the principle of the rule of law thus making this principle applicable to CFSP law."[15]

Leaving beside the broad discussion about the legal nature of the EU, it is clear that between the pillars there are differences in objectives and in the process of decision-making. While in first pillar the EC and its economic, social and, partially political objectives are settled, the second pillar was reserved for establishing and implementing common foreign and security policy (CFSP). As we said, in the first pillar the decision making process is mainly characterized by the majority voting or the qualified majority voting, while the second and third pillars are characterized by the intergovernmental method, based on consensus of all participants – member states, by using basically the instruments of classic international law: international agreements and resolutions, latter called joint positions and joint actions. In that sense there is an opinion that one of the aims of the introduction of the "pillar structure" in the Maastricht Agreement and in TEU, is the separation of these two decision-making processes: one in the EC and the other in the newly established EU.[16]

As regards of the scope and nature of competences, according the prevailing opinion[17] the EU enjoys external powers in second and third pillars[18], but opinions are divided about their nature and the constitutional structure.

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[15] G. Bono, Some Reflections on the CFSP Legal Order, *CML Rev.*, 43: 337-394, 2006. p. 347.

[16] See N. Lavranos, In dubio pro first pillar. Recent Developments in the delimitation of the competences of the EU and the EC, p. 312, available on http://www.elr.lu/archiv_pdf/Ausgabe_ 2008_nr09.pdf

[17] See, for example A. von Bogdandy, J. Bast, The European Union's Vertical Order of Competences: The Current Law and Proposals for its Reform, *CML Rev.*, 39(2002), p. 227-268.

[18] P. Craig, G. de Burca, *EU Law*, part 6 EU International Relations Law, Oxford University Press, 2007. p. 167. et. seq.

Some scholars consider that in CFSR there is not conferred competence, but see them as so called "newly created competences",[19] or as the replacement of national foreign politics, while in constitutional sense, there is opinion that the "EU foreign relations are regulated by norms arising from at least three different legal orders, including national, the international, and the EU legal order with its varied pillar structure.[20]

Furthermore, it means that the duties of the Member States and of the institutions of the EU are, in order to ensure that CFSP measures, adopted and implemented in accordance with the provision of the TEU. Problems arise due to the fact that the ECJ doesn't have jurisdiction over the matters of CFSP measures, it doesn't have the right to interpret them, except with regard to *acquis communautaire*. The responsibility for ensuring compliance of the CFSP measures with the EU Treaty is transferred to the political level of the EU and to the Member States. The lack of ECJ jurisdiction concerning the judicial review of the EU (CFSP) instruments represents the first confusion.

The *second* confusion arises from the fact that EU has its own objectives, but hasn't its own institutions independent from those of the EC. Although it is not clearly said, it can be concluded from Article 3 TEU: "The Union shall be served by a single institutional framework which shall ensure the consistency and the continuity of the activities carried out in order to attain its objectives while respecting and building upon the *acquis communautaire*," that EU borrows institutions from EC. In that situations, according to Article 5 of TEU, "The European Parliament, the Council, the Commission, the Court of Justice and the Court of Auditors shall exercise their 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." To be in situation to serve two masters ("Herren") is not easy and not without misunderstandings.

The *third*, main, cause of fuzziness lies in the fact that there is as established legal order or system of European Communities, composed from primary and secondary law, as a main parts, while the state of place of EU Law and

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[19] R. A. Wessel, The European Union's Foreign and Security Policy, A Legal Institutional Perspective, Kluwer Law International, The Hague 1999, p. 254.

[20] M. Krajewski, European Foreign Policy and Constitution, 2004, 23 *Yearbook of European Law* (*YBEL)*, p. 435.

CFSP as its inherent part are not clear. In regard to EC law, after some dissonant views, it is established, prevailing common opinion about community law as a special autonomy legal system which characterizes some *sui generis* principles as: direct application, direct effect, supremacy. The process of adopting these rules, their method of implementing and enforcing as well as jurisdiction of ECJ for their reviewing contributed to be EC treated as community based on rule of law.[21]

If we look at CFSP, as a quintessential of the second pillar, the question arises: does the CFSP create a new legal order of the EU? Only if the CFSP represents, alone or with the third pillar, parts of a new legal (EU) order it is possible to make a comparison between the two orders: EC and EU legal orders and speak about their constitutional mixity.

The concept of a legal order assumes "an objective presence of legal norms when relations between states are concerned."[22] For the second pillar the sources of these norms we can be found only in the TEU, within that is in corresponding competences of the EU or its institutions. However, the problem arises because the TEU laid down numerous objectives, before the EU did it itself, as for example in Art. 3 of the TEU, which charges the Union "in particular [to] ensure the consistency of its external activities as a whole in the context of its external relations, security, economic and development policies," but without providing the legal base for the EU to act in this matters. The existence and the choice of legal basis are of vital importance for the determination of the procedures by which instruments and measures may be adopted. The importance of choosing the correct legal base and the consequences of not doing so, were explained in the Opinion 2/00 in which the European Court of Justice held that the choice of the appropriate legal basis "has constitutional significance" because the Community has only conferred competences only. The ECJ highlights especially that it is so vitiate "where the Treaty does not confer on the community sufficient competence …, or where the appropriate legal basis for the measure concluding the agreement lays down a legislative procedure different from that which has in fact been followed by the Community institutions." [23] The ECJ also finds that in situations where a measure has more than one purpose, where one

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[21] Case 294/83, Parti écologiste "Les Verts" v European Parliament, [1986] ECR 1339.

[22] R. Wessel, *op. cit*., p. 319.

[23] Opinion 2/000 (Re Cartagena Protocol, [2001] ECR I-9713., para 5.

purpose is incidental and the other predominant, it should be based on a single legal basis rather than two. Where, however, the objectives were inseparably linked, more than one legal basis could be used.

There are also some obscurities in the sense of the so called *implied competences* of the EU to act in international relations (so called international legal personality). The EEC was in a similar situation, but the ECJ has dealt with this issue in the AETR case, while this is not a possibility in our case, because the ECJ was not given a direct jurisdiction over CFSP matters, except to control the delimitation of powers between the CFSP and EC, according to the Art. 47. TEU. That is also the reason why about the character and the nature of the EU competences in the Common Foreign and Security matters, the EU had to search for help in the regulations of the international law. From the perspective of international law, two factors are relevant for determining the status of the EU and its nature: the manner in which EU's objectives are worded in the TEU, and the behavior of the EU in practice.[24] Such way of thinking is necessary to accentuate, due to the fact that sometimes the TEU norms "simply create factual legal situations, which in turn shape the legal framework for the conduct of the actors involved in formulating and implementing CFSP,"[25] but in the TEU there are nowhere specific provisions to be found, similar to those in Article 281. of the TEC about the legal personality of the EU. On the other side, in contrast with the European Community, the transfer of competences on the EU level is "neither provided for nor required under present and future constitutional arrangements underlying the CFSP."[26] Therefore, some authors speak about "uncertain legal foundations of the Title V of the TEU"as a main cause of ambiguity and different understanding of unity of EU legal order.[27] Even if we can image the CFSP as a non purely "intergovernmental" form of international cooperation, but as a source of new kind of legal norms obliging member states of the EU, or as a new legal order in *statu nascendi*, for the title of this paper is important to analyze relationships between these two legal orders, as regarding to the

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[24] See Reparation for Injuries Suffered in the Service of the United Nations [1949] ICJ Rep. 174, 179-180.

[25] Ibid.

[26] D. Thym, Foreign Affairs, forthcoming in: *Principles of European Constitutional Law* (ed. Bogdandy, Bast), 2nd ed., Hart, 2009, p. 30.

[27] R. G. Bono, Some Reflections on the CFSP Legal Order, *CML Rev.*, 43: 337-394, 2006, p. 338, 339.

application of some principles from the community law (direct effect, superiority of community law under CFSP law, jurisdiction of ECJ to review CFSP instruments). Though, we can observe differences in opinions also in that field: one stream supports the convergence of the Union and the Community legal order, and the other sees parallelism between intergovernmental Union law and classical public international law.[28]

2. WHAT DOES MEAN MIXITY CONSTITUTIONALITY IN COMMUNITY LAW AND EU LAW

Putting aside numerous discourses and schools of thinking, relating to many faces of constitution and constitutionalism, from practical point of view, we understand the principle of constitutionality as a set of basic rules for governing the of vital relationships between member states or other constituents of the community (system basic governing rules) and for the protection of basic (fundamental) freedoms and rights. According to the G. de Burca, the formal constitution "corresponds to the foundational legal values which allocate and govern the exercise of power within the polity, while the real or substantive constitution relates more generally to the way in which political power is actually exercised, to the conventions and practices of the actors and institutions which exercise public power."[29] Concerning the meaning of constitutionalism or constitutionality it relates to "the extent to which a particular legal system does or does not possess the features associated with a constitution."[30]

Concerning the nature of the EEC/EC law and of the EC Treaty, ECJ has already showed his direction in the *Van Gend*[31] and the *Costa v ENEL*[32] cases and pointed out that there are some constitutional principles in the Community law, like direct application and direct effect, explaining that as

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[28] For the proponents of these opinions see D. Thym, *op. cit.*, p. 30, and authors in footnotes 176 and 177.

[29] G. de Burca, The Institutional Development of the EU: A Constitutional Analysis, in: P. Craig and G. de Burca, *The Evolution of EU Law*, Oxford, 1999, p. 61.

[30] P. Craig, Constitutions, Constitutionalism, and the European Union, *European Law Journal*, Vol. 7(2002), No 2, p. 127.

[31] Case 26/62, Van Gend en Loos v. Nederlandse Administratie der Belastingen [1963] ECR 1.

[32] Case 6/64 , *Flaminio Costa v. ENEL* [1964] ECR 585.

following: due to the nature and the spirit of the Treaty or based on the place in the Treaty where the provision is stated. Finally, the ECJ recognized the EEC Treaty as a constitutional charter, only in the 80-ies, in the case *Les Verts*.

Recognition of the EEC Treaty as a constitutional charter had as its consequences the duty of community subjects to act on advanced prescribed manner, according to the EC Treaty. This duty was mandatory for both, for the process of adopting as for the process of enforcement of the whole Community law (on their subjects). From the point of view of the member states, it meant that they were obliged to respect not only vertical conferred competences, but also horizontal allocation according to the EC Treaty. In this way, the ECJ recognized a paramount role to the EC Treaty, as a constitution, or Kelsen's basic norm (pranorm), or *Grundnorm,* or Hart's rule of ultimate rule of recognition, what had as consequences the qualifying of community law, based on a constitution or as a positive law based on constitutional principles. The constitutional character of Community law assumes further existence of the hierarchy or range between its norms in the vertical sense and the horizontal harmonization.

If we want to consider the problem of the relationship between community law and EU law, it is first of all necessary, to give an answer to the questions: does EU law exist and who makes it?

We start from the hypothesis that EU law makes instruments as a rule unanimously adopted (intergovernmental) from EC institutions, as EU's organs in the framework of the second and third pillars. Those instruments like framework decisions, joint actions and joint decisions can hardly be treated as a legal acts with normative power, which characterizes community law, but rather than as a part of international law, regarding their mode of adopting, and mode of enforcement and, especially, because the ECJ hasn't jurisdiction to review them. As regard to the legal nature of the CFSP provisions there are different opinions.[33] We consider that the CFSP provisions make a part of EU Law, while meeting only minimum requirements: they are compatible with each other and subordinated to a "Grundnorm", which forms part of the same legal system, and which resolves any incompatibility between the rules.[34] As regards the status and nature of EU, we accept the opinion that the EU constitutes a new *sui generis*

[33] See R. G. Bono, *op. cit.*, pp. 366-379.

[34] *Ibid*., p. 367.

international organization which exists parallel to the European Communities. Concerning the nature of EU law and its relations to Community law, we accept the position that the rules (from all three pillars)don't form a single legal system, but have common objectives and principles. Instead this one single legal system tree legal sub-systems coexist at the same time: Community law, the CFSP legal order and policy and Criminal Cooperation law.[35]. The reason for that is the fact that there are some features distinguishing Community law from CFSP legal order: community law has direct effect on individuals, primacy over national law, and judicial review from ECJ, what gives the Community law constitutional status in laws of Member States. On other side, "CFSP legal order constitutes a much less intrusive order of international law than Community law: it does not have the Community law principle of conferral of powers, it has not have the same working methods and procedures, parliamentary control is weak,"[36] what it makes to an "unfinished" and "evolutionary" trait.[37]

If we decide to follow the thesis that the EC law and the EU law coexist at the same time, even as subsystems, created by institutions following different means (the aims of the Member States or their nationals), we should follow also the understanding of constitutional mixity as a institutional balance between the EC and the EU, the so called cross-pillar balance. The goal of this balance is the preservation of the competences that were already confirmed to the European Community by the Member States and the obviation of the encroachment of competences of the EC (between the EU and EC.) That would have as its consequence the dereliction of the *acquis communautaire*, but also the endangering of the decision making way of the Community, because it would mean, that in all matters confirmed to the European Union in areas of CFSP or PJCC it would be possible to make decisions by consensus and that would be endangering the Community voting system. And in the end, it would mean also the change of the legal nature of the European Community from a *sui generis* supranational organization to a classical international organization.

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[35] U. Everling, Reflexions on the structure of the European Union, *CMLRev.*, 29(1992), 1053-1077, at p. 1063.

[36] G. Bono, *op. cit.*, p. 393.

[37] De Burca, The Institutional Development..., *op. cit.*, p. 55 et seq, at p. 67.

3. THE CASE: C - 91/05, ECOWAS

3.1. Background to the case

By its action brought under Article 230 EC Treaty, the Commission of the European Communities instituted proceeding against Council asking of the Court to annul Council Decision 2004/833/CFSP of 2 December 2004 implementing Joint Action 2002/589/CFSP with a view to a European Union contribution to Economic Community of West African States (ECOWAS) in the framework of the Moratorium on Small Arms and Light Weapons[38] ('the contested decision') and to declare it inapplicable, because of its illegality and to declare illegal and hence inapplicable the Joint Action, in particular Title II thereof.

Namely, the Council adopted the Joint Action 2002/589/CFSP of 12 July 2002 on the European Union's contribution to combating the destabilizing accumulation and spread of small arms and light weapons repealing former Joint Action 1999/34/CFSP[39] ('the contested Joint Action'). Mentioned Joint Action 2002/589/CFSP was adopted in accordance to the partnership agreement between the members of the African, Caribbean and Pacific Group of States, on the one side, and the European Community and its Member States, of the other part[40] (the Cotonou Agreement), form 23 June 2000 and was approved on the behalf of the Community by Council Decision 2003/159/EC of 19 December 2002.[41]

The objectives of the contested Joint Action were as the following:

"to combat, and contribute to ending, the destabilizing accumulation and spread of small arms, to contribute to the reduction of existing accumulations of these weapons and their ammunition to levels consistent with countries' legitimate security needs, and to help solve the problems caused by such accumulations."[42]

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[38] OJ 2004 L 359, p. 65.

[39] OJ 2002 L 191, p. 1.

[40] OJ 2000 L 317, p. 3.

[41] OJ 2003 L 65, p. 27.

[42] See Article 1(1).

As regard to other elements important to the Commission, we are stating Title II of the contested Joint Action, headed "Contribution by the Union to specific actions", in which have provided financial and technical assistance to programs and projects which make a direct and identifiable contribution to the principles and measures referred to in Title I. Further, in Article 9(1) in Title II was stated: "The Council and the Commission shall be responsible for ensuring the consistency of the Union's activities in the field of small arms, in particular with regard to its development policies…"

In order to implement the contested Joint Action and with a view to a European Union contribution to ECOWAS in the framework of the Moratorium on Small Arms and Light Weapons, the Council adopted on 2 December 2004, the contested action, on the bases Article 3 of Joint Action and Article 23(2) TEU.

By Article 3 of the contested decision, the Commission was entrusted with the financial implementation of this Decision and, in that sense should have concluded financial agreements with ECOWAS. Finally, by Article 4(2) of the contested decision, the Commission was charged to submit regular reports on the consistency of the European Union's activities in the field of small arms and light weapons, in particular with regard to its development policies.

When the contested decision was adopted, the Commission made two "reserves": on its legality stating that "this Joint Action should not have been adopted and the project ought to have been financed from 9th (European Development Fund – EDF) under Cotonou Agreement, and that Joint Action falls within the shared competences on which Community development policy and the Cotonou Agreement are based. Such areas of shared competences are just as much protected by Article 47 TEU as areas of exclusive Community competence.

3.2. Legal issues

In the procedural sense the basic question looking for a straight answer was the question of admissibility of the application for annulment of the contested decision, admissibility of the plea of illegality of the contested Joint Action and jurisdiction of the ECJ.

In the substantial sense the main issue was the interpretation of Art. 47 of TEU: "Subject to the provisions amending the Treaty establishing the European Economic Community with a view to establishing the European Community, the Treaty establishing the European Coal and Steel Community

and the Treaty establishing the European Atomic Energy Community, and to these final provisions, nothing in this Treaty shall affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying or supplementing them."

So the task given to the ECJ was not only to interpret Art. 47 TEU in a way that it would provide a final solution to the reorganization of the competences inside of the EU organs, but also the difficult task to define division of competences between EC and EU.[43]

3.3. Observations of the parties

In regard to the admissibility of the application for annulment, the Council and interveners have not argued to the contrary.

As regard to admissibility arguments, the opinions of the parties were opposed. The Council and governments of UK and Spain considered the Commission's plea of illegality as inadmissible for two reasons: the ECJ *has no jurisdiction* to rule on the legality of measure under the CFSP and, secondly, the Commission as the privileged applicant is barred from pleading the illegality of an act, because the annulment of that act, it could have sought directly by an action under Article 230 TEC.

The Commission rebutted these objections and considered that plea of illegality raised only in light of Article 47 TEU – for the same reasons as those on which its principal application for the annulment of the contested decision is based, and that privileged applicants have the right to plead the illegality of a legislative act where such illegality is revealed fully when the act is actually applied, after the expiry of the period laid down by the fifth paragraph of Article 230 TEC for bringing an action for annulment of that act.

Regarding the legal interests in the material sense, the Commission as the applicant considered oneself "invited" and responsible to institute this proceeding, having in mind Articles 3 TEU, which entrusts the Council and the Commission with the duty of cooperation in order to "ensure the consistency of its external activities as a whole in the context of its external relations, security, economic and development policies." The Commission

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[43] For this aspect see M. Cremona, A Constitutional Basis for Effective External Action? An Assessment of the Provisions on EU External Action in the Constitutional Treaty, *EUI Working Papers*, Law, No 2006/30.

considered that the Council, by adopting the contested decision, has encroached upon Community competences and, therefore, infringed Article 47 TEU.[44] As concerning matter of dispute, the Commission observed that objective of combating the proliferation of small arms fell firmly under Community competence within the framework of its development co-operation policy, and ought to adopt under and on the basis EC Treaty.

The United Kingdom presented a very interesting statement, claiming: "In order to regard a measure based on the EU Treaty as contrary to Article 47 EU, it is necessary, first, that the Community be competent to adopt a measure having the same purpose and the same content. Second, the measure based on the EU Treaty must encroach on a competence conferred upon the Community by preventing or limiting the exercise of that competence, thus creating a pre-emptive effect on Community competence. Such an effect is however impossible in an area such as development cooperation, where the Community has concurrent competences."[45] On other side, the Council and the United Kingdom Government added that, "were an incidental effect on the objectives of a Community competence sufficient to bring the matter under that competence, there would no longer be any limits to the scope of Community competences, thus undermining the principle of conferred competences." [46]

3.4. Opinion of the AG

3.4.1. Issue of admissibility or jurisdiction of ECJ

Due to the fact that the Council didn't not reproach the admissibility of the complain for annulment and rose directly the question of the ECJ jurisdiction, this question became subject threw the interpretation issue of Art. 241 TEC. The wording of Article 241 TEC is as follows: "Notwithstanding the expiry of the period laid down in the fifth paragraph of Article 230, any party may, in proceedings in which a regulation adopted jointly by the In order to regard a measure based on the EU Treaty as contrary to Article 47 EU, it is necessary, first, that the Community be competent to adopt a measure having the same purpose and the same content. Second, the measure based on the EU Treaty

[44] See para. 29. of the Judgment.

[45] See para. 44 of the Judgment.

[46] Para 48.

must encroach on a competence conferred upon the Community by preventing or limiting the exercise of that competence, thus creating a pre-emptive effect on Community competence. Such an effect is however impossible in an area such as development cooperation, where the Community has concurrent competences."[47] On other side, the Council and the United Kingdom Government added that, "were an incidental effect on the objectives of a Community competence sufficient to bring the matter under that competence, there would no longer be any limits to the scope of Community competences, thus undermining the principle of In regard admissibility of the plea of illegality of the contested joint action, the Council and some interveners considered that Court has no jurisdiction to rule on the legality of a measure falling within the CFSP due to the reasons mentioned already (because CFSP measures don't fulfill the requirements of Article 230 (2) TEC and because the plea was introduced by the so called privileged applicant).

In his very detailed opinion AG Mengozzi considered that: "Although the contested decision, based on Article 23 EU and on the contested Joint Action adopted pursuant to Title V of the EU Treaty, is not, in principle, subject to judicial review under Article 230 EC it must observed that, in accordance with Article 46(f) EU, the provisions of the EC Treaty concerning the powers of the Court of Justice and the exercise of those powers are applicable to Article 47 EU, which provides that *nothing in the EU Treaty shall affect the EC Treaty*."[48]

"Following the example of what has been inferred from Articles 46(f) and 47 EU with regard to the judicial review of acts of the Council adopted on the basis of the present Title VI of the EU Treaty (the third pillar), it is therefore the task of the Court to ensure that acts which, according to the Council, fall within the scope of Title V of the EU Treaty do not encroach on the powers conferred by the EC Treaty on the Community."[49]

By making parallel between the second and the third pillar cases, and by calling on Article 46(f) in order to find the basis for competence of the Court

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[47] See para. 44 of the Judgment.

[48] Para. 30 of the Opinion.

[49] Para 31. of the Opinion. See also Case C-170/96 *Commission v Council* [1998] ECR I-2763, paragraph 16, and Case C-176/03 *Commission v Council* [2005] ECR I-7879, paragraph 39.

of Justice for application of Article 47 TEU, AG Mengozzi gave acceptable substantive and procedural arguments for jurisdiction of the ECJ.

Our comment. On jurisdiction of the ECJ we can speak and in material sense, starting from the fact that the Court is, according to Article 46(1) TEU, charged to ensure that "nothing in this Treaty shall affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying or supplementing them."

In material sense the wording "nothing in this Treaty" we can image as cover all measures, without its legal nature with meaning that no provision of EC Treaty can be affected by a provision of EU Treaty. In other words, decisive role haven't content and legal nature of measures, but its *effect* on EC Treaty, that is on *acquis communautaire*. Behind these truly meaning there are practical aims. According to the Commission, Article 47 TEU aims to protect the Community's competences against the activity of the European Union based on the EU Treaty by "establishing fixed boundary between the competences of the Community and those of the European Union."[50] In that context very interesting argument raised the UK as intervener arguing that Article 47 TEU could only be infringed in cases of existing of exclusive competences on side EC,[51] but we will refer to this matter later in the paper.

In procedural sense, jurisdiction of the Court in this case AG explained in Para. 57 on following way: "As the provisions of the EC Treaty relating to the Court's jurisdiction and its exercise, of which Article 241 certainly forms part, apply to Article 47 EU, the Court may be required to ascertain whether a joint action of the Council adopted by virtue of Article V of the EU Treaty, which forms the basis of the decision which is the subject of the action, is inapplicable in so far as the Council, by adopting the joint action, encroached on the competences conferred on the Community by the EC Treaty."

3.4.2 Issue of EU competences

The second set of raised questions related on the existing of competences of the EC and EU, their content, legal nature and mode of exercising.

First of all, the applicants considered that contested decision impinges upon competences conferred upon the Community in area of development

[50] See Para. 76 AG Mengozzi opinion.

[51] See Para. 44 and 48 of the Judgment.

cooperation, thus infringing Article 47 EU.[52] As regard of relations between EC and EU, the Commission and the Parliament take a view that Article 47 establishes a "fixed" boundary between the competences and those of the Union. In regard of kind of competences, they stated that development cooperation policy represent area of shared competences in which "the Member States retain the competence to act by themselves, whether individually or collectively, to the extent that the Community has not yet exercised its competence, the same cannot be said for the Union ….'[53] In regard its objectives and content, according the Commission, the contested decision falls within the scope of Community competences and could therefore properly have been adopted on the basis of the EC Treaty.[54]

The position of other side was contrary. With regard aims, the Council considered that these provisions aims to protest the balance of powers established by the Treaties and cannot be interpreted as aiming to protect the competences conferred upon the Community to the detriment of those enjoyed by the Union.

AG Mengozzi considered that the nature of competence given to the Community and the distribution of competences between it and the Member Stets are immaterial for the purpose of applying Article 47, provided that competence exists.[55] In regard nature of competences of EC and EU AG considered that "the distribution of spheres of competences between the Community and the Member States must be distinguished from the distribution of spheres competence governed by Article 47 EU between the Community and the European Union, acting in the framework of the second and third pillars."[56] As regard the scope of wording "nothing" in the TEU "shall affect" the EC Treaty, AG considered that it could not be read in isolation, but must be interpreted in the light of the common and final provisions of that Treaty in order to "ensures overall coherence of the provisions of the EU Treaty."[57] In the final, AG considers that "the

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[52] Para. 35 of the Judgment.

[53] *Ibid*., para. 36.

[54] *Ibid*., para. 40.

[55] *Para* 100.

[56] *Para* 110.

[57] *Para* 122.

interpretation of the scope of Article 47 EU cannot be a function of the distribution of competences between the Community and Member States by virtue of the EC Treaty."[58] .

3.5. Finding of the ECJ

In the reasoning to its decision the ECJ was starting from the point that the "... Article 47 EU aims, in accordance with the fifth indent of Article 2 EU and the first paragraph of Article 3 EU, to maintain and build on the *acquis communautaire*."[59] In regard to measure having legal effect adopted under Title V of the EU Treaty, it is apparent from case law of the Court that measure " affects the provisions of the EC Treaty within the meaning of Article 47 EU whenever it could have been adopted on the basis of the EC Treaty, it being unnecessary to examine whether the measure prevents or limits the exercise by the Community of its competences,"[60] and it is of no importance what kind or nature of competence it is, but just its very existence is considered to be enough..[61]

In consideration of the choice of a legal base in the situation "a measure reveals that it pursues a twofold aim or that it has a twofold component and if one of those is identifiable as the main one, whereas the other is merely incidental, the measure must be based on a single legal basis, namely that required by the main aim or component."[62] Starting from that the Court found: "since the measure falling within the CFSP which the contested decision is intended to implement does not exclude the possibility that its objectives can be achieved by measures adopted by the Community on the basis of its competences in the field of development cooperation, it is necessary to examine whether the contested decision, as such, must be regarded as a measure which pursues objectives falling within Community development cooperation policy."[63] On this ground the Court annulled Council Decision in question.

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[58] Para 127.

[59] Para 59 of the Judgment.

[60] Para 60 of the Judgment.

[61] See para 62.

[62] Para 73.

[63] Para 92.

4. CONCLUSION

This case and cases mentioned in this analyses show that development of the European Union from Maastricht to Nice and Lisbon Treaty, gradually upgrading of decision-making in second pillar and CFSP including the use of QMV, the possibility of constructive abstention and enhanced cooperation what resulted in blurring borders between two pillars. But, "this does not mean that all differences between the Community and the other pillars have disappeared and that by now 'Union law' can be equated with Community law.[64] We consider this conclusion acceptable with following arguments.

The European Court of Justice recognized the constitutional character only to the EC Treaty, but not yet to the Treaty on European Union.[65] Except that, the ECJ has developed a system of judicial review over all decision-making processes and application of all legally binding community law acts (except Founding Treaties) and on this way made community law itself as constitutional. On other side, by accepting the special principles like: principle of direct application, direct effect and primacy of community law over national law, the Member States recognized their constitutional force in their own national legal systems.

In that sense it is possible to speak about constitutionality in and outside of a state and that means also on the level of the European Community.

Nevertheless, when we are discussing the EU law, we have seen in this case that the EU law doesn't dispose with specific legislative competences to create legal acts with normative powers (legislative acts), but it disposes only with legal instruments. Although these instruments, like joint strategies, joint actions and decisions are binding for their addressees, they are binding only based on intergovernmental agreements and not on normative powers.

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[64] R. Wessel, The Dynamics of the European Union Legal Order: An Increasingly Coherent Framework of Action and Interpretation, *European Constitutional Law Review, 5: 117–142, 200,* p. 141., available on http://journals.cambridge.org/download.php?file=%2FECL%2FECL5_01%2FS1574019609001175a.pdf&code=cde3edc5e0cad7840e528452fc6608c7

[65] But, in cases Yusuf and Kadi, (Case T-306/01, Ahmed Ali Yusuf and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities, Case Case T-315/01, Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities), the Court of First Instance confirmed "the constitutional architecture of the pillars" considering that EU and Community law coexist "as integrated but separate legal orders", para. 156 Yusuf case.

Therefore, the question stays: Is it possible for the acts of the EU to get normative power if they are seen together with the law of the European Community?

In the case C-91/05 the ECJ by accepting the competence for judicial review, regardless the fact that it came to it threw the indirect interpretation (having in mind the protection of the *acquis communautaire* by the instruments of the CFSP threw encroachment), the ECJ demonstrated this integration or bound between these two systems, but these were not the only conclusions of this case. The consideration of the concept of legality of the contested decision under the criteria from community law, particularly regarding the meaning of the concept competences and manners of their exercise, ECJ expanded the area of the application of the principles of the EC to the EU law, which means also to the instruments of the CFSP area. That was a means to achieve the constitutionalisation as the process of providing constitutional character to specific legal acts continued and developed also in the field outside of the Community, started to be applied also to acts adopted under Title V of the TEU and also the EU law as a separate legal order. So, the process of constitutionalisation is not stopped, but given into the hands of the ECJ.

There are many practical consequences due to this process, in the political and legal field and concern mostly the relation between the Member States and the EC and the EU as well, as the future of the idea of the EU.

If we look at the hierarchical relation between the community law and EU legal instruments in the CFSP measures, the ECJ, has confirmed the thesis about the coexistence of two legal subsystems. But, looking at the relation between the Member States and the EU regarding the principle of preemption that is used when we are talking about exercising of competences between the Member States and the EC, the ECJ didn't confirm the same to the EU. The reason for that is, that the "EU, does not enjoy the same complementary competence, (but) must respect the competences of the Community, whether exclusive or not, even if they have not been exercised."[66]

5. FUTURE

Although the Treaty of Lisbon introduces numerous clarifications and simplifications, SFSP and CSDP are not made a matter of the Community.

[66] See position of Commission, Para 36 of the Judgment

That means that the SFCP will also after the Reform Treaty (if it comes to that) comes into force, remain a subject to stricter rules of coordination and cooperation between Member States and the pillars of foreign action basically remain within the national competence and without judicial review of the its measures taken from ECJ.[67] Nevertheless, the actual praxis of the ECJ shows us that there is a "clear trend towards the integrations of those policies falling under the TEC and these falling under the TEU."[68] Such a process of "cross-pillarization" which resembles an increased interconnectivity between different EC external policies "makes the choice of a correct legal basis, consistently treated as a 'constitutional question' by the ECJ, increasingly troublesome."[69]

Jelena Vukadinović*

Ustavna pomešanost prava EZ i prava EU

Rezime

U radu je analizirano ustavno preklapanje i pomešanost nadležnosti kojima su nakon sporazuma iz Mastrihta do stupanja na snagu Lisabonskog sporazuma raspolagale EZ i EU. Nejasna ili maglovita linija podele nadležnosti često je u praksi dovodila do sporova između organa EZ i EU što je kvalifikovano i kao potkradanje nadležnosti od strane EU, naročito kod regulisanja pojedinih pitanja iz zajedničke spoljne i bezbednosne politike (drugi strub) i sudske saradnje u krivičnim predmetima (treći stub). Stoga se pred Sudom pravde kao jedno od osnovnih, postavilo pitanje jasnog razgraničenja pomenutih nadležnosti radi očuvanja i zadržavanja postignutih

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[67] I. Pernice, Introduction Multilevel Constitutionalism in Action, p. 17.

[68] See M. Cremona, External relations of the EU and the Member States: Competence, Mixed Agreements, International responsibility, and Effects if International Law, *EUI Working Paper* LAW No. 2006/22, pp. 9 et seq.

[69] C. W. Hermann, *op. cit*., p. 6.

* Student master studija na Evropa Institutu u Sarbrikenu (Nemačka).

komunitarnih tekovina (acquis communautaire). O stavu Suda autor pše komentarišući njegovu odluku u predmetu ECOWAS.

Ključne reči: EZ, EU, ustavna načela, spoljne nadležnosti, pomešanost, razgraničenje, komunitarne tekovine.

Key words: EC, EU, constitutional principles, external competences, constitutional mixity, delimitation, acquis communautaire.