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The 'Unity of the Legal Order of the
European Union' Revisited

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Abstract

The European Union is commonly described as a temple-like construction resting upon three pillars. Whereas the first pillar, Community law, constitutes a “new legal order” of supranational character, the second and third pillar are considered to be of intergovernmental kind, i.e. traditional public international law. However, some commentators have advocated a more integrated view, claiming the “unity of the legal order of the European Union”.

The more recent case-law of the European courts has increasingly to deal with the relationship between the pillars as well as the legal nature of Union law. The present paper analyses this case-law and takes the opportunity to revisit the “unity thesis” as put forward in learned writings, the overall conclusion is that the claim of unity is poorly suited to solve interpretative questions that concern the aforementioned questions.

Keywords

European Law, German Constitutional Court, legal personality, supremacy, CFSP/ESDP, Constitution for Europe, Treaty on European Union

'Contemporary observations are changing our understanding of legal systems, and it is important that our nomenclature for norms reflects our current understanding. This applies, in particular, to the designation "legal order".'
Modified excerpt of Resolution 5 of the International Astronomical Union of 24 August 2006

Introduction*

Since its discovery in 1930, Pluto has been considered a planet. However, this is no longer the case. Pluto has lost its prominent status following a—highly controversial¹—Resolution of the International Astronomical Union (IAU) of 24 August 2006 that defines what constitutes a planet in a contemporary astronomical sense.² Given its name, one is inclined to think that Pluto may have been doomed from the very beginning of its recognised existence. Of course, this is not a paper on astronomy, but one on European law. References to mythology and astrology are, however, very popular and virtually omnipresent in European politics and scholarship alike. Depending on the circumstances, they may be more or less useful.³ Pluto has not been used in this regard so far, and of course its chances have further dropped with its recent demotion to a ‘dwarf planet’.⁴

So why have I chosen to use Pluto as a metaphor in the title of the present paper? It was certainly not (only) because of a feeling of sympathy for some small something that has been treated disrespectfully. Instead, it was because of the clarity with which the example displays the importance of definitions for our perception of the world around us. In reflecting on the ‘unity of the European legal order’, it becomes necessary to reveal the meaning of terminology that underpins it. This is particularly important in dealing with one of the most widely used metaphors of European integration scholarship, which lies at the heart of the matter: the ‘pillar structure’ of the European Union.

To describe the European Union as a Greek temple based on three ‘pillars’ is so common among European lawyers that it does not require any explanation.⁵ It usually goes along with the perception of the EC Treaty and the EU Treaty as forming two legal orders, based on two different treaties, separate from each other with dissimilar central features. However, some scholarly contributions have always argued that EC and EU Law form part of *one single and unitary* legal order, going along with the claim of an international legal personality for the EU or even the fusion of the former Communities and the EU by the Treaty of Maastricht. The aim of the present paper is to re-analyse this ‘unity thesis’ against the backdrop of the recent case-law of the ECJ. In an increasing number of cases during the last years, the Court has had to deal with issues that—naughtily enough—disregarded our beloved pillar-picture, due to a growing trend of ‘cross-pillarization’ of the policies of the EU/EC.

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1 More than 300 scientists signed a petition protesting against the definition by the IAU, see K. Chang, Debate Lingers Over Definition For a Planet, *New York Times*, 1 September 2006, p. 13.

2 See http://www.iau.org/fileadmin/content/pdfs/Resolution_GA26-5-6.pdf.

3 It seems doubtful, whether it is e.g. really necessary that an Advocate General devotes two out of 17 pages of conclusions to references to the myth of Sisyphus and its perception in contemporary European literature, when these remarks are irrelevant to the case, but must nevertheless be translated. See conclusions of AG Colomer in C-461/03. For a critical comment see C. Herrmann, Die Reichweite der gemeinschaftsrechtlichen Vorlagepflicht in der neueren Rechtsprechung des Europäischen Gerichtshofs, *Europäische Zeitschrift für Wirtschaftsrecht* 17 (2006), Vol. 8, pp. 231 – 235 (235).

4 See http://www.iau.org/fileadmin/content/pdfs/Resolution_GA26-5-6.pdf.

5 It has even found its way into wikipedia, cf. www.wikipedia.org.

Does the description of the European Union as a single legal order make any difference, when it comes to solving legal questions? I will argue in the present paper that a lot depends on the perspective that you adopt with regard to the meaning of notions like ‘legal order’ and ‘unity’, but that the claim of unity does not contribute a great deal to the resolution of interpretative questions that occur with regard to the relationship between the different pillars of the European Union. In doing so, I will attempt to redesign our Greek temple and to abstain from architecturally unacceptable—since statically dangerous—drawings of a ‘cross-pillarized’ building, in which ‘eroding pillars of sculpted sandstone’⁶ are ‘hijacked’⁷ by ‘Russian dolls’.⁸

The Relationship of the EC and EU Legal Orders—Conservative Wisdom Reloaded

Traditional doctrine does not perceive European Law as consisting of one single and unitary legal order. Moreover, the EC and EU Treaties are deemed to form two separate legal orders, a view supplemented by the description of the EU as a temple-like construction. The perception of the European Union as a roof resting on three pillars is grounded in Article 1(3) TEU, which stipulates: ‘The Union shall be founded on the European Communities, supplemented by the policies and forms of cooperation established by this Treaty’.

The semantic differentiation between the ‘European Communities’ and the ‘policies and forms of cooperation’ lays the basis for the dichotomy between supranational EC law and intergovernmental EU law. Upon this—as well as other provisions of the TEU—rests the negation of an organizational character of the European Union—not to speak of legal personality—and its description as a mere permanent intergovernmental conference (*Regierungskonferenz*), or conference of governments. Consequently, acts adopted under the second or third pillar are described as agreements between the Member States, i.e. as traditional public international treaty law and not as secondary law of an International Organization. The key argument put forward is that the EU is not equipped with international legal personality, since the TEU lacks an explicit proviso to that end, and contains no provisions from which one could derive legal personality under the implied powers doctrine.

This view, which has been most strongly advocated by *Pechstein* and *König*,⁹ has recently gained new support by the German *Bundesverfassungsgericht* in its decision of 18 July 2005, which held the German legislation transposing the Council Framework Decision on the European Arrest Warrant¹⁰ (*European Arrest Warrant Act*¹¹) unconstitutional. The second Senate of the *Bundesverfassungsgericht* reasoned:

As a form of action of European Union law, the Framework Decision is situated outside the supranational decision-making structure of Community law [...]. In spite of the advanced state of integration, European Union law is still a partial legal system that is deliberately assigned to public

6 See B. de Witte, The pillar Structure and the Nature of the European Union: Greek Temple or French Gothic Cathedral?, in: T. Heukels/N. Blokker/M. Brus (eds.), *The European Union after Amsterdam—A Legal Analysis*, The Hague et. al. 1998, pp. 51 – 67 (55).

7 See B. de Witte, The Pillar Structure and the Nature of the European Union: Greek Temple or French Gothic Cathedral?, in: T. Heukels/N. Blokker/M. Brus (eds.), *The European Union after Amsterdam—A Legal Analysis*, The Hague et. al. 1998, pp. 51 – 67 (55).; see also D. Curtin, The Constitutional Structure of the Union: A Europe of Bits and Pieces, *CML Rev.* 30 (1993), pp. 17 – 69 (44).

8 See D. Curtin/I. Dekker, The EU as a “Layered” International Organization: Institutional Unity in Disguise, in: P. Craig/G. de Burca (eds.), *The Evolution of EU Law*, Oxford 1999, pp. 83 – 136 (101).

9 M. Pechstein/C. Koenig, *Die Europäische Union*, 3rd Ed., Tübingen, 2000, pp. 28 – 78; cf. also A. Haratsch/C. Koenig/M. Pechstein, *Europarecht*, 5th Ed., Tübingen 2006, pp. 29 – 45.

10 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision, 2002/584/JHA, OJ L 190, 18.7.2002, p. 1–20.

11 *Europäisches Haftbefehlsgesetz*, *Bundesgesetzblatt* 2004 I, pp. 1748 et seq.

international law. This means that a Framework Decision must be adopted unanimously by the Council, it requires incorporation into national law by the Member States, and incorporation is not enforceable before a court. The European Parliament, autonomous source of legitimisation of European law, is merely consulted during the lawmaking process (see Article 39.1 of the Treaty on European Union), which, in the area of the “third pillar”, meets the requirements of the principle of democracy because the Member States’ legislative bodies retain the political power of drafting in the context of implementation, if necessary also by denying implementation.¹²

This position reinforces the view already expressed by the *Bundesverfassungsgericht* had in its Maastricht decision 13 years ago, in which it emphasized the differences between Community Law and Union Law.¹³ This current reasoning is particularly striking, however, since the decision was handed down only one month after the ECJ had extended the principle of consistent interpretation to Framework Decisions in *Maria Pupino*,¹⁴ since there can be no doubt, that the duty developed by the ECJ in that case does also apply to constitutional courts of the Member States.¹⁵ However, contrary to the Polish Constitutional Court two months before the *Pupino* ruling, the *Bundesverfassungsgericht* made no attempt to interpret the German Basic Law in a way that would have saved the German legislation from nullification, even though this would have been possible even without referring to a principle of consistent interpretation.¹⁶ This reluctance to do so has been widely criticized, not only by Judges *Lübbe-Wolff* and *Gerhardt* in their dissenting opinions,¹⁷ but also in academic writings.¹⁸

However, the *Bundesverfassungsgericht* did not only disregard the duty of consistent interpretation. It also sent—in the words of Judge *Lübbe-Wolff*—‘dark signals’ to the Court of Justice, by debating whether the limited extradition of Germans amounted to an *Entstaatlichung* (a loss of core elements of statehood) of the Federal Republic of Germany, which would be inadmissible under the German Constitution. Incidentally, it also emphasised the positive effect of the different character of the third pillar:

Due to the area-specific restriction of the European ban on discrimination on grounds of Member State citizenship, a loss of the core elements of statehood, which would be inadmissible pursuant to the regulations of the Basic Law, cannot be established in this context as concerns the extradition of German citizens to other Member States. [...]

In particular with a view to the principle of subsidiarity, (Article 23.1 of the Basic Law), the cooperation that is put into practice in the “third pillar” of the European Union in the shape of limited mutual recognition, which does not provide for a general harmonisation of the Member States’ systems of criminal law, is a way of preserving national identity and statehood in a single European judicial area.

One can read this part of the decision as a warning to the Court of Justice that it should not disregard the differences between the TEC and the TEU, something the Court might be tempted to do in order to break the current constitutional deadlock and bring about some of the changes envisaged by

12 BVerfGE 113, 273 (300 et seq.); English version provided by the Bundesverfassungsgericht available at http://www.bundesverfassungsgericht.de/en/decisions/rs20050718_2bvr223604en.html, para. 82.

13 BVerfGE 89, 155 (195). English translation published in the CMLRev. 1994, pp. 1.

14 ECJ, C-105/03, *Maria Pupino*, ECR 2005, I-5285.

15 Cf. W. Cremer, *Vorabentscheidungsverfahren nach Art. 177 EGV und mitgliedstaatliche Verfassungsgerichtsbarkeit*, *Bayerische Verwaltungsblätter* 130 (1999) 9, pp. 266 – 270.

16 On the difference between the two judgments see A. Hinarejos Parga, CML Rev. 43 (2006), pp.583 – 595 and D. Leczykiewicz, CML Rev. 43 (2006), pp. 1181 – 1191.

17 See dissenting opinions of Judge G. Lübbe-Wolff (supra Fn. 14 at para. 155 – 184) and of Judge M. Gerhardt (ibid. at paras. 185 – 202).

18 See R. Streinz, *Europarecht*, 7th Ed., Heidelberg 2005, para. 231; A. Hinarejos Parga, CML Rev. 43 (2006), pp.583 – 595 (586 et seq.); See also S. Mölders, *European Arrest Warrant is Void—The Decision of the German Federal Constitutional Court of 18 July 2005*, *GLJ* 7 (2006) 1, pp. 45 – 57 with further references to German writings.

the Constitutional Treaty through the backdoor.¹⁹ The decision thus builds upon the claims of a potential unconstitutionality of the TEU if the second and third pillar were interpreted as true *competences* of the EU. In that case, the transfer of the sovereign rights of the Member States would be so all-embracing, *Pechstein* and *Koenig* contend, that the European Union could only be described as a State. That would mean to dismantle the statehood of the Member States, an *Entstaatlichung* which would run contrary to the German constitution as interpreted by the *Bundesverfassungsgericht*.²⁰

The theme of an alleged *Entstaatlichung* of Germany also lies at the heart of the pending actions against the ratification of the Constitutional Treaty brought by the German MP *Peter Gauweiler*.²¹ It is noteworthy that one of the Judge Rapporteurs in this case, Judge *Broß*, in his dissenting opinion in the European Arrest Warrant Act case, had already argued that the European Arrest Warrant Act was in breach of the limits to European integration imposed by Article 23.1 German Basic Law.²² However, the *Bundesverfassungsgericht* is obviously deeply divided about the issue. This can be inferred from the announcement made by Judge *Broß* that he will not work any further on the action against the Constitutional Treaty as long as its future remains uncertain. According to *Broß*, the *Bundesverfassungsgericht* thus wants to abstain from interfering with the constitutional process of the EU, which is increasingly precarious after the failed referenda in France and the Netherlands and a period of reflection that has lapsed without any noticeable result. However, what appears as an exercise of a rather unorthodox kind of judicial self-restraint probably finds its true reason for being in a substantial disagreement between the two different Judge Rapporteurs who are responsible for the two different types of action that have been brought by *Mr. Gauweiler*.

The ‘Unity Thesis’—Content, Foundation and Alleged Consequences

According to many other legal scholars, the European Union constitutes a single legal system, of which the Communities, the CFSP and the CPJC are mere subsystems.²³ Among the multitude of supporting arguments the usual elements are the ‘new stage’ clause of Article 1(2) TEU, the objectives of the Union (Art. 2 TEU), the single institutional framework (Art. 3 TEU), the European Council as an organ of the Union (Art. 4 TEU), the consistent references to ‘the Union’ and ‘its Members’ in the TEU, the provisions on enhanced cooperation (Art. 43 et seq. TEU) and last but not least on the

19 On the possibility of an interpretation ‘consistent with the Constitutional Treaty’ see M. Krajewski, Die institutionelle Gleichgewicht in den auswärtigen Beziehungen, in: C. Herrmann/H. Krenzler/R. Streinz (eds.), *Die Außenwirtschaftspolitik der Europäischen Union nach dem Verfassungsvertrag*, 2006, pp. 63 – 84 (82 et seq.); D. Thym, Weiche Konstitutionalisierung—Optionen der Umsetzung einzelner Reformschritte des Verfassungsvertrags ohne Vertragsänderung, *Integration* 28 (2005) 4, pp. 307 – 315 (311).

20 Cf. M. Pechstein/C. Koenig, Die Europäische Union, 3rd Ed., Tübingen, 2000, pp. 36 et seq. And 47 et seq. Cf. also E. Denza, Lines in the Sand: Between Common Foreign Policy and Single Foreign Policy, in: T. Tridimas/P. Nebbia (eds.), *European Union Law for the Twenty-First Century—Rethinking the New Legal Order*, Vol. 1, pp. 259 – 272 (272): ‘To introduce into the Treaties uncertainties over primacy in the conduct of foreign affairs and over whether the Member States retain any power of independent action in foreign affairs would call into question the separate nation status of the Member States.’

21 2 BvR 839/05. Full text (in German) available at <http://www.petergauweiler.de/pdf/themen/EU-Verf-Klage-27-5.pdf>.

22 See BVerfGE 113, 279 (319 et seq.).

23 See e.g. D. Curtin/I. Dekker, The EU as a ‘Layered’ International Organization: Institutional Unity in Disguise, in: P. Craig/G.de Bürca (Eds.), *The Evolution of EU Law*, 1999, pp. 83 – 136; S. Kadelbach, Einheit der Rechtsordnung als Verfassungsprinzip der Europäischen Union?, in: A. von Bogdandy/C.-D. Ehlermann (eds.), *Konsolidierung und Kohärenz des Primärrechts nach Amsterdam*, *Europarecht Beiheft* 2/1998, pp. 51 – 66; W. Schroeder, Verfassungsrechtliche Beziehungen zwischen Europäischer Union und Europäischen Gemeinschaften, in: A. von Bogdandy (ed.), *Europäisches Verfassungsrecht*, 2003, pp. 373 – 414; J. Wichard, Wer ist Herr im europäischen Haus, *Europarecht (EuR)* 1999, pp. 170 – 184; B. de Witte, The Pillar Structure and the Nature of the European Union: Greek Temple or French Gothic Cathedral?, in: T. Heukels/N. Blokker/M. Brus (eds.), *The European Union after Amsterdam—A Legal Analysis*, 1998, pp. 51 – 67;

amendment of the Treaties and accession to the Union as a whole (Art. 48, 49 TEU), to name only the most prominent ones. Increasingly, the thesis goes hand in hand with the claim of an international legal personality of the European Union, based in particular but not exclusively on Article 24 TEU. However, the different authors adhering to this view do not always concur with regard to the conclusions that might be drawn from the perceived unity. In general, this position seems to have become the 'middle ground' within the discussion.²⁴

Some German authors go even further. *Von Bogdandy* and *Nettesheim* in particular argue that the various European institutions may be considered institutions of the 'European Union', constituting a single organization with legal personality, and having absorbed the former three Communities (EC, ECSC, EAEC).²⁵ In the words of *von Bogdandy*,

[t]he terms "Communities" and "pillars of the European Union" do not demarcate different organizations, but only different capacities with partially specific legal instruments and procedures. All the Treaties and the secondary law form a single legal order.²⁶

The centrally claimed legal consequence is that the legal principles that the ECJ developed under the TEC could more or less also be applied to the TEU and secondary instruments adopted thereunder. Primarily, this concerns the supremacy of European Union law,²⁷ but it may also apply to the principles of loyalty, non-discrimination and the direct effect of Community law as well as to the applicability of general principles of law within the second and third pillar. Furthermore, the 'unity thesis' is considered to be the only legal construction capable of explaining the 'landmark decision' of the ECJ in the *Airport Transit Visa* case,²⁸ in which the Court, on the basis of Article 47 TEU, held itself competent to annul a measure under the TEU insofar as this encroached upon the competences vested in the EC,²⁹ a decision described as a misjudgement (*Fehlurteil*) by *Pechstein*, the main proponent of a strict separation between EC and EU law.³⁰

24 Cf. B. de Witte, The Pillar Structure and the Nature of the European Union: Greek Temple or French Gothic Cathedral?, in: T. Heukels/N. Blokker/M. Brus (eds.), *The European Union after Amsterdam—A Legal Analysis*, The Hague et. al. 1998, pp. 51 – 67 (58), who, however, at the time of writing considered the position denying a legal personality of the EU to be the 'middle ground'.

25 A. von Bogdandy, The Legal Case for Unity: The European Union as a Single Organization with a Single Legal System, *CML Rev.* 36 (1999), pp. 887 – 910; A. von Bogdandy, Die Europäische Union als einheitlicher Verband, in: A. von Bogdandy/C.-D. Ehlermann (eds.), *Konsolidierung und Kohärenz des Primärrechts nach Amsterdam*, *Europarecht Beiheft* 2/1998, pp. 165 – 183; A. von Bogdandy/M. Nettesheim, Die Verschmelzung der Europäischen Gemeinschaften in der Europäischen Union, *Neue Juristische Wochenschrift* 1995, pp. 2324 – 2328; A. von Bogdandy/M. Nettesheim, Die Europäische Union, Ein einheitlicher Verband mit eigener Rechtsordnung, *Europarecht (EuR)* 1 (1996), pp. 3 – 26; A. von Bogdandy/M. Nettesheim, Ex pluribus Unum fusion of the European Communities into the European Union, *ELJ* 2 (1996) 3, pp. 267-289.

26 A. von Bogdandy, The Legal Case for Unity: The European Union as a Single Organization with a Single Legal System, *CML Rev.* 36 (1999), pp. 887 – 910 (887).

27 A. von Bogdandy, The Legal Case for Unity: The European Union as a Single Organization with a Single Legal System, *CML Rev.* 36 (1999), pp. 887 – 910 (889),

28 C-170/96, Commission./Council, ECR 1998, I-2763.

29 A. von Bogdandy, The Legal Case for Unity: The European Union as a Single Organization with a Single Legal System, *CML Rev.* 36 (1999), pp. 887 – 910 (888 et seq.).

30 Cf. M. Pechstein, *Juristenzeitung* (1998) 20, pp. 1008 – 1009 (1008).

The Increasing Cross-pillarization of EU Policies

Recent times show a clear trend towards the integration of those policies falling under the TEC and those falling under the TEU.³¹ This development is driven by an increasing number of civil operations under the framework of the CFSP, which might also be considered as a matter of technical cooperation under Article 181a TEC; the ever-broader notion of international security, which especially brings development policies into the realm of ‘high’ foreign policy;³² the closely related fight against terrorism including sanctions directed against private individuals instead of third countries; the growing awareness of the security dimension of energy policy; and, finally, the artificial division of the Area of Freedom, Security and Justice between the TEC and the third pillar brought about by the Treaty of Amsterdam.

The process of ‘cross-pillarization’, which resembles an increased interconnectivity between different EC external policies,³³ makes the choice of a correct legal basis, consistently treated as a ‘constitutional question’ by the ECJ,³⁴ increasingly troublesome. Furthermore, ensuring a ‘coherence’ (cf. Article 3 (2) TEU) of action taken by the EC and the EU requires an increasing number of interdependent measures under both treaties or even measures resting upon complementary legal bases in both treaties. This causes problems with regard to the common reading of Article 47 TEU, which stipulates that nothing in the TEU ‘may affect’ the TEC.³⁵

Legal Unity and Legal Diversity—Recent Approaches of the European Courts

After some twelve years, during which the legal problems caused by the ‘cross-pillarization’ of Union policies played almost no role before the ECJ, they have arrived there within the last years en masse. Many of the issues brought before the Court concern the choice of legal basis. However, together with this, the effect of Union legal instruments has also been raised, as has the question of fundamental rights protection in the domain of the second and third pillar.

1. Delimitation of Competences—*Airport Transit Visa, Criminal Sanctions and Passenger Name Records*

It was in the *Airport Transit Visa* case³⁶ that the ECJ first came across the problem of the delimitation of the EC Treaty and the EU Treaty. The case concerned a Joint Action regarding airport transit visas, which the Council had adopted on the basis of the third pillar, in concreto K.3 (now Article 31) TEU. The measure aimed at the harmonisation of the Member States’ policies regarding the requirement of an airport transit visa. The Commission brought an action for annulment pursuant to then Article 173 (now Article 230) TEC, claiming that the Joint Action was in breach of then Article 100c TEC (rescinded), which would have been the correct legal basis for the measure. The United Kingdom submitted that the action was inadmissible, because the act had been adopted under the third pillar and the Court had no jurisdiction over third pillar measures under then Article L TEU. *Fenelly* AG in his

31 Cf. M. Cremona, *External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law*, EUI Working Paper LAW No. 2006/22, pp. 9 et seq.; R. Wessel, *The Inside Looking Out: Consistency and Delimitation in EU External Relations*, *CMLRev.* 37 (2000), pp. 1135 – 1171 (1145 et seq.).

32 Cf. the A Secure Europe in a better World—European Defence Strategy, 13.12.2003.

33 On that see C. Herrmann, *Gripping Global Governance—The External Relations of the EU between the Treaty of Nice and the Convention on the Future of Europe*, in: T. Tridimas/P. Nebbia (eds.), *European Union Law for the Twenty-First Century—Rethinking the New Legal Order*, Vol. 1, pp. 291 – 302.

34 ECJ, Opinion 2/00, Cartagena Protocol, [2001] ECR I-9713, paras. 5 et seq.

35 On coherence cf. Communication from the Commission to the European Council of June 2006 - Europe in the World — Some Practical Proposals for Greater Coherence, Effectiveness and Visibility, COM (2006) 278, pp. 6 et seq.

36 ECJ, C-170/96 Commission./Council, [1998] ECR-I 2763.

conclusions had pointed to a number of prior cases in which the Court had opted for a 'functional approach' in the sense that the pure formal branding of an act designed to have legal effects would not be decisive for its classification.³⁷ The ECJ, applying a much shorter reasoning and referring to then Article M (now Article 47) TEU, held that it was: 'the task of the Court to ensure that acts which, according to the Council, fall within the scope of Article K.3(2) of the [TEU] do not encroach upon the powers conferred by the EC Treaty on the Community.'³⁸

The same matter came before the Court again in 2003, in a case concerning *Criminal Sanctions* for the protection of the environment.³⁹ Following an initiative of the Danish Government, the Council had adopted a Framework Decision on the basis of Articles 29, 31(1) (e) and 34(2)(b) TEU, requiring the Member States in its core provision 'to ensure that serious environmental crime is punishable under criminal law'. At the same time, the Council rejected a similar proposal for a Directive on the basis of Article 175 TEC, which the Commission had presented one year after the Danish Government. The Commission then brought an action under Article 35 TEU, asking for an annulment of the Framework Decision as it was in breach of a Community competence.⁴⁰

Whereas in *Airport Transit Visa*, the Commission had lost on the merits, since the measure in question could not have been adopted on the basis of the TEC, this time the ECJ found that the EC indeed had a competence to impose an obligation on the Member States to provide for criminal sanctions for specific crimes against the environment. As predicted earlier,⁴¹ the ECJ, quoting its ruling in the *Airport Visa Case*, followed a 'reasoning'⁴² of 'what could that should' and declared the Framework Decision void under Article 35 TEU for encroaching upon the powers of the EC,⁴³ despite the fact that the competence under Article 175 TEC only was concurrent and not exclusive.

However, problems do not only occur when the Council decides to act under the second or third pillar instead of the Community pillar. On the contrary, a similar conflict can arise where action is taken on the basis of the TEC, where the EC has no competence to do so. An example of this is the *Passenger Name Record* case decided 30 May 2006.⁴⁴ Within the framework of the fight against terrorism, the United States passed some legislation providing that airlines operating flights to, from, or across the United States territory had to provide the US customs authorities with electronic access to the data contained in their reservation and departure control systems, the so-called 'Passenger Name Records'. Since the provision of these data is problematic under European data protection regulations, an agreement was finally concluded between the EC and the United States on the basis of Articles 25 and 26 of Directive 95/46/EC.⁴⁵ The Directive itself was based on Article 95 TEC.⁴⁶ It explicitly excluded the processing of data:

in the course of an activity falling outside the scope of Community law, such as those provided for by Titles V and VI of the Treaty on European Union and in any case to processing operations

37 Conclusions of AG Fenelly, C-170/96, [1998] ECR-I 2763, para.7 et seq.

38 ECJ, C-170/96 Commission./Council, [1998] ECR-I 2763, para. 16.

39 ECJ, C-176/03, Commission./Council, [2005] ECR-I 7879.

40 See H. Weiß, EC Competence for Environmental Criminal Law—An Analysis of the Judgment of the ECJ of 13.9.2005 in Case C-176/93, *Commission v. Council*, *Zeitschrift für europarechtliche Studien* 2006 (3), pp.381 – 421 (385 et seq.).

41 See e.g. P. Eeckhout, *External Relations of the European Union*, 2004, p. 150.

42 Neither the AG nor the ECJ made any effort to argue the question what „affects“ in Article 47 TEU actually means in any detail.

43 ECJ, C-176/03, *Commission v. Council*, [2005] ECR-I-7879, paras. 38 – 55.

44 ECJ, Joined Cases C-317/04 and C-318/04, *Parliament v. Council*, [2006] ECR-I 4721.

45 Decision 2004/496/EC, OJ 2004 L 183/83.

46 For an account of the factual and legal background of the case see conclusions of AG Lèger in Joined Cases C-317/04 and C-318/04, [2006] ECR-I 4721 at paras. 1 – 42.

concerning public security, defence, State security [...] and the activities of the State in areas of criminal law.⁴⁷

Since the purposes for which the US customs authorities required the passing on of the data were clearly related to State security, the ECJ annulled the decision to conclude the agreement, holding that it did not fall under the scope of the Directive. The EU subsequently concluded a new agreement on the basis of Articles 38 and 24 TEU.⁴⁸ However, given the clear wording of the Directive, the importance of the judgment for the determination of the relationship between the TEU and the TEC should not be overestimated. One could easily think of a similar exclusion of data processing with regard to policies inside the TEC, e.g. environmental policies.

2. *Interconnecting Treaty Objectives—Yusuf and Kadi*

Of much greater importance is the judgment delivered by the Court of First Instance in the case of *Yusuf and Kadi*.⁴⁹ The cases concerned the freezing of assets within the framework of the fight against terrorism. In order to implement UN Security Council regulations on the matter, the EU and EC had adopted a number of legal instruments, among them EC Regulations based upon Articles 60, 301 and 308 TEC. One of the issues before the CFI was, whether Article 308 TEC could have served as the sole legal basis for sanctions directed against private individuals who were not related to the rulers of any third country. For the use of Article 308 TEC, however, the measure in question must be adopted with a view to attaining one of the aims of the Community. In this respect, the Commission had claimed, that one of the general objectives of the Community was to ensure international peace and security. The CFI rejected this line of reasoning, emphasising the coexistence of Community and Union law:

Contrary to what the Commission maintains, indeed, nowhere in the preamble to the EC Treaty is it stated that that act pursues a wider object of safeguarding international peace and security. Although it is unarguably a principal aim of that treaty to put an end to the conflicts of the past between the peoples of Europe by creating ‘an ever closer union’ among them, that is without any reference whatsoever to the implementation of a common foreign and security policy. The latter falls exclusively within the objects of the Treaty on European Union which, as emphasised in the preamble thereto, seeks to ‘mark a new stage in the process of European integration undertaken with the establishment of the European Communities.

While, admittedly, it may be asserted that that objective of the Union must inspire action by the Community in the sphere of its own competence, such as the common commercial policy, it is not however a sufficient basis for the adoption of measures under Article 308 EC, above all in spheres in which Community competence is marginal and exhaustively defined in the Treaty.

Last, it appears impossible to interpret Article 308 EC as giving the institutions general authority to use that provision as a basis with a view to attaining one of the objectives of the Treaty on European Union. In particular, the Court considers that the coexistence of Union and Community as integrated but separate legal orders, and the constitutional architecture of the pillars, as intended by the framers of the Treaties now in force, authorise neither the institutions nor the Member States to rely on the ‘flexibility clause’ of Article 308 EC in order to mitigate the fact that the Community lacks the competence necessary for achievement of one of the Union’s objectives. To decide otherwise would amount, in the end, to making that provision applicable to all measures falling within the CFSP and police and judicial cooperation in criminal matters (PJC), so that the Community could always take action to attain the objectives of those policies. Such an outcome

47 Article 3 (2), first indent.

48 See Council Decision 2006/729/CFSP/JHA of 16 October 2006 on the signing, on behalf of the European Union, of an Agreement between the European Union and the United States of America on the processing and transfer of passenger name record (PNR) data by air carriers to the United States Department of Homeland Security, OJ 2006 L 298/27.

49 CFI, T-306/01, *Yusuf and Al Barakaat International Foundation v Council and Commission*, [2006] ECR-II 3533; T-315/01, *Kadi v Council and Commission*, [2006] ECR-II 3649.

would deprive many provisions of the Treaty on European Union of their ambit and would be inconsistent with the introduction of instruments specific to the CFSP (common strategies, joint actions, common positions) and to the PJC (common positions, decisions, framework decisions).⁵⁰

Despite finding that the TEU and the TEC constituted two 'integrated but separated legal orders', the CFI continued, interpreting the special provisions of Articles 60 and 301 TEC, which bridge the divide between the TEU and the TEC:

In the circumstances, account has to be taken of the bridge explicitly established at the time of the Maastricht revision between Community actions imposing economic sanctions under Articles 60 EC and 301 EC and the objectives of the Treaty on European Union in the sphere of external relations.

It must be held that Articles 60 EC and 301 EC are quite special provisions of the EC Treaty, in that they expressly contemplate situations in which action by the Community may be proved to be necessary in order to achieve, not one of the objects of the Community as fixed by the EC Treaty but rather one of the objectives specifically assigned to the Union by Article 2 of the Treaty on European Union, viz., the implementation of a common foreign and security policy.

Under Articles 60 EC and 301 EC, action by the Community is therefore in actual fact action by the Union, the implementation of which finds its footing on the Community pillar after the Council has adopted a common position or a joint action under the CFSP.⁵¹

On the basis of this reasoning, and referring also to the single institutional framework and the obligation of consistency laid upon the institutions by Article 3 TEU, the CFI held the use of Articles 60, 301 and 308 TEC as a combined legal basis for the contested Regulation to be legitimate. The reference to Article 3 TEU is particularly interesting, since Article 46 TEU does not grant the Court of Justice jurisdiction over this provision, and therefore jurisdiction is also denied to the CFI. The ECJ had hence refused to interpret then Article B (now Article 2 TEU) as being clearly outside its jurisdiction.⁵²

3. EC Law Principles Applied to EU Law—Maria Pupino

In another recent case, the ECJ was confronted with the question whether the principle of consistent interpretation also applied to Framework Decisions enacted under the third pillar. An Italian court had referred a question under Article 35 (3) (b) TEU concerning the interpretation of Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings. France and Italy had questioned the admissibility of the request for a preliminary ruling, arguing that the answer could have no relevance for the case to be decided by the Italian court. The main arguments put forward were that Framework Decisions had no direct effect, and that because of the difference between Directives and Framework Decisions, a principle of consistent interpretation could not exist with regard to Framework Decisions, or if it existed, it could not oblige a national court to construe national legislation *contra legem*. The UK and Sweden also emphasised the intergovernmental nature of the cooperation between Member States in the context of Title VI of the TEU.⁵³

50 CFI, T-306/01, Yusuf and Al Barakaat International Foundation v Council and Commission, [2006] ECR-II 3533, paras. 154 – 156.

51 T-306/01, Yusuf and Al Barakaat International Foundation v Council and Commission, [2006] ECR-II 3533, paras. 159 – 161. Cf. also CFI, Judgment of 12 December 2006, T-228/02, Organisation des Modjahedines du peuple d'Iran, paras. 105 et seq., where the CFI held that the powers of the EC under Art. 301 and 60 TEC did not constitute 'powers circumscribed by the will of the Union', i.e. that the EC has discretion whether or not to take the measures foreseen in the CFSP instrument.

52 ECJ, C-167/94, Grau Gomis, [1995] ECR-I 1023, para. 6.

53 ECJ, C-105/03, Maria Pupino, [2005] ECR-I 5285, para. 26.

The ECJ, following the conclusions of AG *Kokott* in principle, decided to the contrary. In the view of the Court, the wording of Article 34 (2) (b) TEU is closely inspired by Article 249 (3) TEC. The Court went on:

Irrespective of the degree of integration envisaged by the Treaty of Amsterdam in the process of creating an ever closer union among the peoples of Europe within the meaning of the second paragraph of Article 1 EU, it is perfectly comprehensible that the authors of the Treaty on European Union should have considered it useful to make provision, in the context of Title VI of that treaty, for recourse to legal instruments with effects similar to those provided for by the EC Treaty, in order to contribute effectively to the pursuit of the Union's objectives.⁵⁴

The ECJ then emphasised the importance of its jurisdiction under Article 35 TEU, which would be deprived of most of its useful effects if individuals were not entitled to invoke Framework Decisions in order to obtain a consistent interpretation of national law. Furthermore, the Court rejected the argument that the duty of loyalty did not exist with regard to the TEU because of the lack of a provision similar to Article 10 TEC, and that hence the principle of consistent interpretation could not be 'extended' to the third pillar. Moreover, the Court found that: '[i]t would be difficult for the Union to carry out its task effectively if the principle of loyal cooperation, [...], were not also binding in the area of police and judicial cooperation in criminal matters [...].'⁵⁵

However, even adopting the conclusion drawn by AG *Kokott* that the principle of loyalty also applied with regard to Union law, the Court abstained from a more detailed analysis of its fundamental character. This contrasts with the conclusions of the AG, who had explicitly distinguished the TEU from the EEA Treaty, by stating:

Unlike the EEA Agreement, which is concerned only with the application of rules on free trade and competition in economic and commercial relations between the Contracting Parties, but provides for no transfer of sovereign rights to the inter-governmental institutions which it sets up, the Treaty on European Union, as stated in the second paragraph of Article 1, marks a new stage in the process of creating an ever closer union among the peoples of Europe. To that end it supplements the activities of the Community with new policies and forms of cooperation. The term policies indicates that, contrary to the view of the Swedish Government, the Treaty on European Union includes not only inter-governmental cooperation, but also joint exercise of sovereignty by the Union. Moreover, the first paragraph of Article 3 EU obliges the Union to respect and build upon the *acquis communautaire*.

The increasing degree of integration expressed in the phrase 'ever closer cooperation' is also shown by the development of the Treaty on European Union which, after its creation by the Treaty of Maastricht, was brought ever more closely into line with the structures of Community law by the Treaties of Amsterdam and Nice and is to be merged fully with Community law by the Constitutional Treaty.⁵⁶

The explicit disregarding of the legal nature of the TEU demonstrated by the ECJ ('irrespective of the degree of integration') is, on the one hand, regrettable. On the other, the view taken by the ECJ is fully in line with its general approach towards the interpretation of international agreements and the exploration of their character, e.g. with a view to a possible direct effect, including the interpretation of the TEEC in *Van Gend en Loos*.⁵⁷

As we have seen, the European Courts are increasingly frequently confronted with questions related to the character of the second and third pillar of the TEU as well as with questions regarding their relationship with the first pillar, Community Law. However, the cases decided so far do not

54 ECJ, C-105/03, *Maria Pupino*, [2005] ECR-I 5285, para. 36.

55 ECJ, C-105/03, *Maria Pupino*, [2005] ECR-I 5285, para. 42.

56 Conclusions of AG *Kokott*, C-105/03, *Maria Pupino*, [2005] ECR-I 5285, paras. 32 – 33.

57 See ECJ, Case 26/62, *Van Gend en Loos*, ECR 1963, 1, paras. 8 et seq.

reveal any clear theoretical underpinning with regard to the nature of and relations between the different pillars of European Law.

The 'Unity Thesis' Revisited—Does it make any difference?

1. Theoretical Foundations

Having emphasised the importance of definitions at the outset of this paper, we must now clarify the meaning of 'legal order' and its 'unity'. The term 'legal order' (*Rechtsordnung*) usually refers to a given set of norms that belong together, e.g. because they are applicable in a given territory as law of the land or to certain subjects of law. The term implies that there are 'ins' and 'outs', i.e. some legal norms that belong to the legal order and some others that do not. At the same time, the notion 'order' refers to a certain degree of structure, arrangement or system. The idea of 'unity' appears with regard to both the question of belonging as well as the question of the internal structure of the legal order. However, the meaning in either case is not quite the same.

The notion 'unity of the legal order' has been used in manifold senses in legal theory.⁵⁸ Two different meanings deserve attention but must also be distinguished in the present context.⁵⁹ Firstly, the concept of unity is closely related to *Hans Kelsen's* Pure Theory of Law (*Reine Rechtslehre*).⁶⁰ According to this theory, every legal order is based on a basic norm (*Grundnorm*), which constitutes the highest norm in a hierarchically structured pyramid of norms (*Stufenbau der Rechtsordnung*).⁶¹ All norms that form part of the legal order formally derive their validity from the basic norm, since they were generated in accordance with the rules adopted on the basis of the *Grundnorm*. In this formalistic sense, the basic norm serves to identify the belonging of a multiplicity of norms to a *unitary* legal order. Secondly, the 'unity of the legal order' constitutes a claim of substantive, normative unity, i.e. the absence of lacunae and contradictions within an identified legal system. This claim is considered as contributing to the peacemaking and integrating function of the legal order, traditionally associated with the State and the constitution if one confines this notion to documents that not only limit existing power, but also constitute and regulate all the exercising of sovereign power.⁶² In this sense, the idea of unity is based on the assumption of a theoretical single will of the sovereign, this even being the people or the nation, which is free of contradictions, or to put it differently: which is coherent or consistent.⁶³ Given this, it is worthwhile considering using uniformity (*Einheitlichkeit*) instead of unity

58 M. Baldus, *Die Einheit der Rechtsordnung. Bedeutung einer juristischen Formel in Rechtstheorie, Zivil- und Staatsrechtswissenschaft des 19. und 20. Jahrhunderts*, 1995. For a current overview of the different usages in the context of European Law cf. J. Bast/P. Dann, *European Ungleichzeitigkeit: Introductory Remarks on a Binational Discussion about Unity in the European Union*, in: *The Unity of the European Constitution*, P. Dann/M. Rynkowski (eds.), Berlin u.a. 2006, pp. 1 – 9.

59 For a similar differentiation cf. S. Kadelbach, *Einheit der Rechtsordnung als Verfassungsprinzip der Europäischen Union?*, in: A. von Bogdandy/C.-D. Ehlermann (eds.), *Konsolidierung und Kohärenz des Primärrechts nach Amsterdam, Europarecht Beiheft 2/1998*, pp. 51 – 66 (52 et seq.).

60 H. Kelsen, *Reine Rechtslehre*, 2nd Ed., Vienna 1960.

61 H. Kelsen, *Reine Rechtslehre*, 2nd Ed., Vienna 1960, pp. 228 et seq.

62 Cf. N. Krisch, *Die Vielheit der europäischen Verfassung*, in: Y. Becker et al. (eds.), *Die Europäische Verfassung—Verfassungen in Europa*, 45. Assistententagung Öffentliches Recht, pp. 61 – 89.

63 The difference between the wording of Articles 1(3) and 3(1) and (2) TEU in the English language and in other languages has been pointed out elsewhere (see C. Tietje, *The Concept of Coherence in the Treaty on European Union and the Common Foreign and Security Policy*, 1997 (2) *EFA Rev.*, pp. 211 – 233 (211 et seq.)). On the concept of coherence in the framework of European law see in greater detail S. Barteau, *Looking for Coherence within the European Community*, 11 (2005) *ELJ* 2, pp. 154 – 172 (154 – 160); P. Gauttier, *Horizontal Coherence and the External Competences of the European Union*, 10 (2004) *ELJ* 1, pp. 23 – 41 (24 et seq.); cf. also S. Besson, *From European Integration to European Integrity: Should European Law Speak with Just One Voice*, 10 (2004) *ELJ* 3, pp. 257 – 281, who uses Dworkin's concept of integrity instead of coherence.

(*Einheit*) when claiming the internal coherence of a legal order. As a postulate, unity is a powerful tool in the construction of legal rules within a legal system, e.g. in order to avoid or solve conflicts. However, it is a theoretical construction and cannot answer every interpretative question; nor must it be used to overcome differing regulatory ideals embodied in different legal subsystems of the same legal order. Whether and to what extent a legal order envisages unity or preserves diversity is a question of interpretation in its own right. One may criticise legal systems for their low degree of uniformity and may argue that this puts their legitimacy at risk. However, there is no legal rule that requires a *pouvoir constituant* to create uniformity and avert diversity.⁶⁴ Furthermore, to claim the substantive unity of a legal order, one must first prove the connectedness of the respective norms first. There is no point in arguing that two norms that belong to different legal systems must be interpreted in conformity on the ground of unity. On the other hand, the diversity of legal rules is not a decisive sign that two norms do not belong to the same legal order.

The two different meanings of ‘unity’ laid out above, despite their differences, are closely related. As already pointed out, ‘unity’ in the sense of the peaceful resolution of conflicts is served by a legal order providing complete and coherent answers. The available legal rules will most probably be more coherent where they can be traced back to a single source of legitimacy. Lastly, this will be the easiest case, where a theoretical *Grundnorm* is mirrored by a Constitutional or Supreme Court as the ultimate arbiter of legal conflicts.

It is not always crystal clear in what sense the notion ‘unity’ is used by different authors with regard to the European Union legal order. Sometimes the different layers of analysis appear to be admixed. This picture becomes even more complicated when sociological or political science arguments are added to the analysis. The behaviour of the different actors may very well serve as an indication of their specific understanding of the legal framework. However, the normative quality of such behaviour is highly questionable outside the accepted categories of ‘subsequent practice’ or ‘customary law’,⁶⁵ the relevance of both of which concepts is rather unsettled in European law. The overwhelming practice of the ‘single institutional framework’ seems to make a clear-cut case for speaking of the European Union as a single organization or a single actor from a social science perspective. However, in a *Rechtsgemeinschaft* (Community built on the rule of law), which the EC at least constitutes,⁶⁶ we should be extremely careful about arguing on the basis of mere practice that does not have any normative foundation. I will hence deliberately confine myself in the following to developing a legal—some would say legalistic—argument. Only by doing this, I believe, can we derive methodologically correct answers to *legal questions*, i.e. to questions of interpretation and application of the law to a given or hypothetical case. In the following, then, I will turn to the most important questions connected with the theme of the ‘unity of the legal order’, in order to test its validity, necessity and utility.

2. The Common Source of the European Union Legal Order

The aim of the present paper is not to contribute to the complex theoretical debate about the *Grundnorm* or the ultimate point of recognition of European Law, its replacement or shifting, or who would ultimately decide in case of a constitutional crisis.⁶⁷ Many of these questions remain indeed

64 Cf. S. Kadelbach, *Einheit der Rechtsordnung als Verfassungsprinzip der Europäischen Union?*, in: A. von Bogdandy/C.-D. Ehlermann (eds.), *Konsolidierung und Kohärenz des Primärrechts nach Amsterdam*, *Europarecht Beiheft* 2/1998, pp. 51 – 66 (55), who argues that the *pouvoir constituant* must not rebuttable the assumption of the reasonableness of the constitution by overly fragmentation.

65 Cf. O. Dörr, *Noch einmal: Die Europäische Union und die Europäischen Gemeinschaften*, *NJW* 1995 (48), pp. 3161 – 3164 (3163 et seq.); M. Pechstein/C. Koenig, *Die Europäische Union*, 3rd Ed., Tübingen 2000, p. 31.

66 Cf. recently ECJ, Judgment of 6 October 2006, C-232/05, *Kommission./Frankreich*, para. 57, not yet reported.

67 For an account of the different positions see M. Schroeder, *Das Gemeinschaftsrechtssystem*, Tübingen 2002, pp. 223 – 255, who argues that the validity of Community Law cannot be explained by the Pure Theory of Law.

unsolved. However, to answer the question whether the European Union is a single legal order or simply a franchiser who organises the 'corporate identity' of EC Law and the second and third pillar legal systems, it is necessary to find the ultimate legal source inside the legal system of the European Union. The question of unity from this perspective would thus be, whether all European Union law, enacted under any of the pillars, derives its validity from the same legal norm. In order to answer this, we must treat all acts of the institutions, be these Regulations, Directives, Joint Actions, Common Positions or anything else, like threads poking out of a confused ball of wool. If we unroll the ball and follow all ends, will we find that all the threads are tied together into a knot in the middle?

Under the Treaties, it is clear that all secondary and tertiary instruments derive their legitimacy from being enacted on the basis of and according to the procedures laid down by the respective Treaty, but what about the TEC and Titles V and VI of the TEU? Do they stem from the same source? At first glance, it seems obvious that the existence of two different Treaties means that they do not share their source of legitimacy, but rest on separate acts of the constituent power of the Member States. However, such a description would have to leave out the fact that the different Treaties are firmly tied together, especially by Articles 48 and 49 TEU: Neither amendment nor accession can take place with in respect of only the TEC or the TEU.⁶⁸ Of course, during the IGC it may be decided to amend only provisions of Title V or VI of the TEU, but this would include a deliberate decision not to change the TEC or vice versa. The ultimate rule of recognition within the legal system of the European Union is, consequently, the collective will of the Member States, as 'Masters of the Treaty'.⁶⁹ How they establish the legality of their respective ratifications is, however, not a matter of European Union law, despite the requirements vis-à-vis the internal constitutional order that can be derived from Articles 6, 7 and 49 TEU. However, this does not mean that the European Union derives its legitimacy directly from the peoples of the Union, as sometimes purported in academic writings.⁷⁰ The peoples of Europe are only a formal source of legitimacy, as they have a say in the respective ratifications of their countries. So, we can trace back the whole body of European Community and Union law to a single source, the collective will of the Member States, which means that in a formalistic sense Community and Union law belong to the same legal order, even though the linkage is one on the highest possible level of the legal order: the ultimate source of the legal order as such.

3. The Question of Legal Personality

An analysis of the unity of the European Union's legal order cannot completely avoid the question of the EU's legal personality. However, I do not intend to add any substantive argument to a discussion which I consider—in this case rightly on the basis of international practice—a *fait accompli*.⁷¹ Even a naïve reading of the post-Amsterdam TEU, speaking of 'the Union', 'its identity' and 'its Members' makes one wonder how one could ever have questioned the existence of an entity independent of its Members. That such an entity, insofar as it is capable of acting independently also in relation to third

68 For the importance of that argument see also B. de Witte, The pillar Structure and the Nature of the European Union: Greek Temple or French Gothic Cathedral?, in: T. Heukels/N. Blokker/M. Brus (eds.), *The European Union after Amsterdam—A Legal Analysis*, The Hague et. al. 1998, pp. 51 – 67 (59); D. Curtin/I. Dekker, The Constitutional Structure of the European Union: Some Reflections on Vertical Unity-in-Diversity, in: P. Beaumont/C. Lyonis/N. Walker (eds.), *Convergence and Divergence in European Public Law*, Oxford 2002, pp. 59 – 78 (63 et seq.).

69 Cf. BVerfGE 89, 155 (190): „Herren der Verträge“. English translation published *CMLRev.* 1994, p. 1.

70 A. von Bogdandy, The Legal Case for Unity: The European Union as a Single Organization with a Single Legal System, *CML Rev.* 36 (1999), 887 – 910 (900).

71 For a detailed discussion of the issue of international legal personality of the EU see P. Eeckhout, *External Relations of the European Union*, 2004, pp. 154 et seq.; M. Schroeder, Verfassungsrechtliche Beziehungen zwischen Europäischer Union und Europäischen Gemeinschaften, in: A. von Bogdandy (ed.), *Europäisches Verfassungsrecht*, Berlin 2003, pp. 373 – 414 (386 et seq.); R. Wessel, Revisiting the International Legal Status of the EU, *EFA Rev.* 5 (2000) 4, pp. 507 – 537. The opposite view is most strongly presented by M. Pechstein, *Rechtssubjektivität für die Europäische Union?*, *Europarecht (EuR)* 1996, 2, pp. 137 – 144.

countries, or could at least be perceived as doing so, would be attributed international legal personality from the perspective of public international law, seems equally obvious and follows a fundamental necessity of law, which requires the attribution of rights and duties to those who actually appear to act.⁷² On the other hand, the wording of the Treaties is so clear in its distinction between the EC and the EU, that the artificial claim of a single legal person EU into which the EC and the EAEC have been merged, should be renounced. The current treaty-making practice of the EC and the EU confirm the distinction between the two.

Furthermore, the question of the legal personality of the EU is relatively unimportant for the assessment of the unity of the legal order. Whether or not a political entity as a whole enjoys legal personality within its own legal system or whether it always acts through organs which are equipped with legal personality is an issue of the construction of that legal order, but does not answer the question whether the legal order presents itself as a formal and substantive unity.⁷³

4. Conflicts of Norms in the European Union Legal Order

One of the central features of a legal order is its capacity to solve the conflicts that arise from contradictions between different rules of the system. The commonly applied interpretative principles such as interpretation in conformity with higher-ranking norms, *lex specialis derogat legi generali*, and *lex posterior derogat legi priori* serve this purpose. Where conflicts cannot be solved by applying these principles, one of the norms must be disregarded. If a hierarchy between the rules can be established, this will normally be the inferior norm. The same principles can also apply to whole legal subsystems, e.g. different legal regimes for different policy areas with different goals, or within federal legal systems between the federal and the state level. Where no explicit rules provide for the resolution of conflicts, they must be established by interpretation. This is more likely to happen where a single superior court has the ultimate jurisdiction to rule on these matters.⁷⁴

Applying this very basic methodology to the relationship between the TEU and the TEC, we can easily see that no general hierarchy between the pillars or the Treaties can be established.⁷⁵ Neither of the Treaties derives its validity from the other, since both rest upon the collective will of the Member States. However, there are several 'bridges' between the two Treaties, which establish specific validity-relationships between the two components, e.g. Article 301 TEC, but the existence of these bridges does not mean that they constitute two separate legal orders, nor that they form two parts of

72 Cf. R. Wessel, *The Inside Looking Out: Consistency and Delimitation in EU External Relations*, *CMLRev.* 37 (2000), pp. 1135 – 1171 (1138 et seq.). A similar development has taken place in German Company Law, where the Bundesgerichtshof held the *Gesellschaft bürgerliche Rechts* (GbR) to be rechtsfähig (having legal capacity) after more than hundred years during which legal doctrine thought of the GbR as being just a framework for the joint rights of its partners, which meant e.g. that you had to sue all the partners etc. This form of association is widespread among the free professions in Germany; see BGH NJW 2001, p. 1056.

73 For a more detailed discussion of this issue see A. von Bogdandy, *The Legal Case for Unity: The European Union as a Single Organization with a Single Legal System*, *CML Rev.* 36 (1999), pp. 887 – 910 (891 et seq.); A. von Bogdandy/M. Nettesheim, *Die Europäische Union, Ein einheitlicher Verband mit eigener Rechtsordnung*, *Europarecht (EuR)* 1 (1996), pp. 3 – 26 (15 et seq.); M. Schroeder, *Verfassungsrechtliche Beziehungen zwischen Europäischer Union und Europäischen Gemeinschaften*, in: A. von Bogdandy (ed.), *Europäisches Verfassungsrecht*, Berlin 2003, pp. 373 – 414 (382 et seq.); cf. also B. de Witte, *The pillar Structure and the Nature of the European Union: Greek Temple or French Gothic Cathedral?*, in: T. Heukels/N. Blokker/M. Brus (eds.), *The European Union after Amsterdam—A Legal Analysis*, The Hague et. al. 1998, pp. 51 – 67 (61 et seq.) who also points to the difference between equipping an International Organization with legal personality vis-à-vis third countries and its Member States.

74 Cf. also S. Kadelbach, *Einheit der Rechtsordnung als Verfassungsprinzip der Europäischen Union*, in: A. von Bogdandy/C.-D. Ehlermann (eds.), *Konsolidierung und Kohärenz des Primärrechts nach Amsterdam*, *Europarecht Beiheft* 2/1998, pp. 51 – 66 (54), R. Wessel, *The Inside Looking Out: Consistency and Delimitation in EU External Relations*, *CMLRev.* 37 (2000), pp. 1135 – 1171 (1137 et seq.).

75 See M. Pechstein/C. Koenig, *Die Europäische Union*, 3rd Ed., Tübingen 2000, pp. 57 et seq.

just one order. Similarly, the existence of provisions governing the effect of rules of Public international law within the German legal order is interpreted as supporting monist as well as dualist thinking. To which reading one adheres depends upon whether one considers the respective rules as being constitutive (supporting a dualist view) or declaratory (supporting a monist view).⁷⁶ Many of the possible conflicts between the TEC and the second and third pillar are sufficiently solved by the explicit provisions.

The absence of a general hierarchy in the sense of a validity relationship between the two main Treaties⁷⁷ does not necessarily mean that they do not belong to the same legal order. As pointed out above, they are firmly linked together by the final provisions of the TEU. The claim of unity is, however, not appropriate to solve horizontal conflicts. Indeed, for the application of the two most important principles, *lex specialis* and *lex posterior*, it is not even necessary to consider the two systems as a 'unity'. This is because even if it is assumed that both Treaties constitute two completely separate legal orders, they still would have a mutual interpretative influence if one applied the customary rules of interpretation of public international law as laid down in the Vienna Convention on the Law of Treaties, in particular in Article 31 (2) (a) and (3) (c) thereof. According to these provisions, any norm of public international law applicable between the parties has to be taken into account for the interpretation of a Treaty. Under the *lex posterior derogat legi priori* principle, which is also to be found in Article 30 (2) of the Vienna Convention, the TEU could even have partially derogated the TEC without any formal connection being established between the two Treaties, simply because the parties to the Treaties are identical. To prevent this *lex posterior* effect was one of the key functions of Article 47 TEU, to which we will now turn.

5. Demarcation of Competences between the pillars: Art. 47 TEU

One of the most important conflicts between the pillars is the possible overlap between the different legal bases that can be used for the pursuance of the objectives of the EU and the EC. The necessary demarcation between the two is governed by Article 47 TEU. As pointed out above, this provision is not the only one that is relevant for the determination of the relationship between the TEC and the second and third pillar of the TEU, nor is the delimitation of competences its only area of application. However, it is one of the key provisions and its reading has a significant impact on the construction of the European Union's legal order.

In *Environmental Criminal Sanctions*, the ECJ found, that the Council was in breach of Article 47 TEU when it enacted a Framework Decision under the third pillar, since the EC had a competence to act under Article 175 TEC. At first glance, this seems odd, given that the EC competence under the environmental policy is not an exclusive one, i.e. the Member States could still act on their own in the field of the environment. However, the Court had already taken the same position in *Airport Transit Visa* and it was predictable that—assuming a Criminal Sanctions Competence of the EC—it would arrive at the conclusion that the Framework Decision was in breach of Article 47 TEU. Arguably, the remaining concurrent competence of the Member States included the joint intergovernmental exercise under the third pillar and did not 'affect' the TEC.⁷⁸ If, on the other hand, action under the second or third pillars is considered as an action by the European Union as an organization in its own right, acting through one of its organs, there is no such thing as an intergovernmental exercise of Member State competence. The competences under the TEU would then be (non-exclusive) competences of the European Union. Alternatively could the Member States have subsequently transferred part of the

⁷⁶ Cf. M. Schweitzer, *Staatsrecht III*, 8th Ed., Heidelberg, 2004, pp. 15 et seq.

⁷⁷ Article 47 TEU to which we will turn below does not—in my submission—establish a supremacy of the TEC over the TEU (nor the other way around), but only a safeguard mechanism that operates very much similar to a *lex specialis* rule of interpretation.

⁷⁸ P. Eeckhout, *External Relations of the European Union*, 2004, p. 150.

competence they had retained when entering into the TEC, to the European Union, creating a parallel competence of the EC and EU?

Two arguments seem possible to support the approach of the ECJ. Firstly, one could argue that the power the Member States retained was categorically non-transferable. However, to make this argument, one would need to distinguish between transferable and non-transferable competences and it is difficult to see the basis for such distinction. However, on the basis of Article 47 TEU, it can be put forward that the Member States, when entering into the Treaties of Maastricht, Amsterdam and Nice, waived by virtue of Article 47 TEU their right to transfer competences to the European Union which they had—even non-exclusively—already transferred to the EC, because the creation of ‘parallel competences’ of the EC and the EU, would indeed ‘affect’ the TEC. The reason for this is that the institutional setup of the second and third pillar deviates significantly from the setup under the TEC. This institutional balance would thus indeed be affected; especially the right of initiative of the Commission and the rights of the European Parliament under Article 251 TEC, if the second and third pillar had established competences parallel to those already existing, since they would have created a way to circumvent the rules governing the exercise of the competence under the TEC. This reading of Article 47 TEU is supported by Article 1(3) TEU, which states: ‘The Union shall be founded on the European Communities, supplemented by the policies and forms of cooperation established by this Treaty.’ (emphasis added).

The word ‘supplement’ refers to something that is added to something else in order to complete the latter. This suggests a subordination of the second and third pillar, because, wherever the TEC already provided for legal rules, it was not incomplete and so did not need to be supplemented.⁷⁹ This interpretation is also in line with Article 11 (1) TEU despite the broadly-worded catch-all description of the CFSP to be found therein, since the broad scope is still very useful as to whether or not a specific issue falls into the scope of the CFSP when it comes to vertical conflicts with the Member States. Furthermore, the CFSP can be read as a fall-back competence for all cases not yet covered by the TEC. For such a *lex generalis*, it makes perfect sense to be formulated as broadly as possible.⁸⁰ Lastly, this reading of Article 47 TEU is supported by Article 30 (2) of the Vienna Convention on the Law of Treaties.

The bottom line of the argument is as simple as this: whatever could already be done under the TEC did not need to, and therefore could not be assigned to, the European Union, the integrationist character of which is much weaker. The effect of Article 47 TEU is thus to render the competences in the second and third pillar subordinate to the competences in the TEC, i.e. to make their use dependent on the non-existence of competences under the first pillar. This type of subordination is, however, not unheard of inside the TEC itself. Article 308 TEC can only be used as a legal basis if there is no other legal basis in the TEC to be found and if some additional conditions are met.⁸¹

The perception of the competences under the second and third pillar as subordinate to those under the TEC does not make the demarcation unnecessary. However, the criteria for this exercise, in particular with regard to the demarcation of the CFSP and the first pillar external relations, are not clear. The pending case on *Small Arms and Light Weapons*⁸² may shed light on this question. Given the broadly worded goals of the CFSP as laid down in Article 11 (1) TEU, as well as the mix of goals found in the reality of external relations, the ‘aims and content’ test used by the ECJ to delineate the different legal bases under the TEC⁸³ is not well-suited in that regard. More convincingly, the choice

79 Cf. the argument made by R. Wessel, *The Inside Looking Out: Consistency and Delimitation in EU External Relations*, *CMLRev.* 37 (2000), pp. 1135 – 1171 (1146 et seq.).

80 Cf. R. Wessel, *The Inside Looking Out: Consistency and Delimitation in EU External Relations*, *CMLRev.* 37 (2000), pp. 1135 – 1171 (1148 et seq.), who considers the TEC external competences to constitute *lege speciali* to the *lege generali* CFSP.

81 On the details of Article 308 TEC cf. M. Bungenberg, *Artikel 235 EGV nach Maastricht*, 1999.

82 C-91/05, OJ 2005 C 115/10.

83 Cf. e.g. ECJ, C-281/01, *Commission v. Council* (‘Energy Star’), [2003] ECR-I 12049, para. 33.

of legal basis should be based on the different kinds of instruments that are available to the EU and the EC for the conduct of their external relations, once it has been established that the measure has a foreign policy goal in a broad sense. It is obvious that there are wide differences between the catalogue of acts of the organs found in Article 249 TEC and in Article 12 TEU. Furthermore, the descriptions of Joint Actions and Common Positions under the second pillar are very specifically directed at typical foreign policy measures. According to Article 14 TEU: 'Joint actions shall address specific situations where operational action by the Union is deemed to be required.' [emphasis added]

Similarly, Article 16 TEU stipulates: 'Common positions shall define the approach of the Union to a particular matter of a geographical or thematic nature.' [emphasis added]

Both provisions reflect the *ad hoc* nature of foreign policy, which is determined by operational activities and non-legislative diplomatic activity. The possibility of international agreements—a further classic instrument of foreign policy—within the sphere of the CFSP does not contradict this submission. Moreover, the fact that international agreements are not mentioned as genuine measures by which the CFSP is to be pursued (cf. Article 12 TEU) confirms the view that the CFSP is mainly designed as a policy which does not require truly legal instruments, i.e. instruments designed to be applied by a court of law. On the other hand, the increasing use of Article 14 TEU for the establishment of agencies equipped with separate legal personality⁸⁴ may be seen as evidence that an institutionalisation of foreign policy might be necessary. Nevertheless, at present this practice is arguably illegal under the current TEU. However, to find that there might be situations in which neither the EC nor the EU can take the necessary foreign policy measures does not militate against the submitted approach toward demarcation of competences. Moreover, it would be peculiar if no gaps occurred in a system that is built on the principle of *limited* attribution of powers.

However, the real problems of demarcation between the pillars are to be found elsewhere. It is the relationship between the competences of the EC under Article 308 TEC and the competences of the EU under the second and third pillar which is particularly troublesome. Article 308 TEC has been given a rather lax interpretation by the Court of Justice, rendering the requirement that action should prove necessary '*in the course of the operation of the common market*' virtually meaningless. At least some of the current overlap between the TEU and the TEC would disappear if a more restrictive stance was taken on Article 308 TEC.⁸⁵ This holds e.g. true for the problems created by the RRM,⁸⁶ which was enacted on the basis of Article 308 TEC but has hardly any relation to the operation of the common market, a view that is supported by the fact that the Constitutional Treaty provides for an explicit competence for a similar instrument in Article III-320.

6. Unity and Coherence

The separation of powers between the EC and the EU and the different institutional setup of both areas make contradictory behaviour possible if not likely, in particular with regard to external relations. Hence, *coherence* is written into Article 1 (3) and Article 3 and Article 13 (3) TEU as a goal to strive for. The obvious problem from the perspective of the 'unity of the legal order' theme is that the obligation to ensure coherence between EU and EC policies is laid down in the TEU only, with no provision of the TEC incorporating the duty. On the other hand, Article 47 TEU is interpreted as a prohibition to read *implied* Treaty amendments into the TEU or TEC. This view is mainly based on the wording of Article 47 TEU which replicates the heading of Title II of the TEU and is therefore interpreted as meaning that except for Article 8 TEU and the Final Provisions, nothing in the TEU

84 See e.g. Joint Action 2004/551/CFSP of 12 July 2004 on the establishment of the European Defence Agency, OJ 2004 L 245/17.

85 Cf. CFI, T-306/01, Yusuf and Al Barakaat International Foundation v Council and Commission, [2006] ECR-II 3533, para. 156.

86 Council Regulation (EC) No 381/2001 creating a rapid-reaction mechanism, OJ 2001 L 57/5.

shall affect the TEC, including Articles 1 to 7 TEU.⁸⁷ If this is the correct reading of Article 47 TEU, the Commission in particular would be under no obligation of ensuring coherence when acting on the basis of its TEC powers. However, this would render the obligation almost meaningless, as has already correctly been pointed out.⁸⁸ However, to arrive at this conclusion that changes to the TEC may have been made implicitly by the TEU as well, one does not have to have recourse to the unity argument, but the submission can solely be based on the existing Treaty provisions.⁸⁹

7. EU Law as Part of the ‘New Legal Order’?

So far we have established that the European Union legal order can be described as a single legal order from a formal point of view, though being made up of three different legal subsystems. These subsystems are tightly connected by Articles 48 and 49 TEU and are based on the collective will of the Member States. At the same time it has been shown that a general hierarchy cannot be established between the subsystems, and that the claim of unity is not capable of resolving the conflicts between the different legal subsystems, embedded in the different treaties, nor even within these subsystems themselves.

So is it really irrelevant to speak of the European Union legal order as a single legal order? In my submission, the key question is not primarily a question of unity, but one as to the legal character of Union law: Does Union law share the features of the ‘new legal order’ established by the Court of Justice in *Van Gend en Loos*? As pointed out above, the application of central principles of Community law to Union law—direct effect, primacy and loyal cooperation amongst them—is the purported key legal consequence of the unity thesis. Having been swirling around ever since the creation of the European Union,⁹⁰ the question as to the nature of Union law has been increasingly raised in more recent writings, even though not necessarily as a question regarding the unity of EU and EC law.⁹¹ Given the deliberate placing of the second and third pillar outside the Community framework by the Member States, it would be difficult to argue in favour of an identical legal nature of the pillars only on the basis of a claimed unity. Moreover, some of the authors that contend most strongly the intergovernmental nature of the second and third pillar and who even deny the legal personality of the EU, go much further than others with regard to the substantive connectivity of the two Treaties by accepting that the TEU may have changed the TEC implicitly despite the wording of Article 47 TEU.⁹² The discussion has gained additional momentum with the Constitutional Treaty, which integrates all pillars, makes reference to the ‘Community basis’ (Article I-1 (1)) for the exercise of competences and declares all Union law to have primacy over the law of the Member States (Article I-6). Which exact consequences are to be derived thereof for the provisions on the CFSP is heatedly debated in academic writings.⁹³ However, the Constitutional Treaty is increasingly a mirage on the horizon, which makes it even more important to take a look at the developments that are really

87 Cf. H.-J. Cremer, Artikel 47 EU-Vertrag, in: C. Callies/M. Ruffert (eds.), *Kommentar zu EU-Vertrag und EG-Vertrag*, 2nd Ed., Neuwied 2002; H. Herrmfeld, Artikel 47 EUV, para. 7, in: J. Schwarze (ed.), *EU-Kommentar*, Heidelberg 2000.

88 Cf. R. Wessel, The Inside Looking Out: Consistency and Delimitation in EU External Relations, *CMLRev.* 37 (2000), pp. 1135 – 1171 (1148), who points to other provisions of the TEU implicitly modifying the TEC.

89 M. Pechstein/C. Koenig, *Die Europäische Union*, 3rd Ed., Tübingen 2000, pp. 58 et seq.

90 Cf. U. Everling, Reflections on the Structure of the European Union, *CMLRev.* 29 (1992), pp. 1053 – 1077 (1064), who considers the TEU to belong to the category of integration treaties, whose construction would in the first place be oriented to the objectives of integration.

91 See D. Curtin/I. Dekker, The Constitutional Structure of the European Union: Some Reflections on Vertical Unity-in-Diversity, in: P. Beaumont/C. Lyons/N. Walker (eds.), *Convergence and Divergence in European Public Law*, 59 – 78 (67 et seq.); C. Timmermans, The Constitutionalization of the European Union, *YEL* 21 (2001/2002), pp. 1 – 12 (8 et seq.).

92 M. Pechstein/C. Koenig, *Die Europäische Union*, 3rd Ed., Tübingen 2000, pp. 5 et seq. and 58 et seq.

93 Cf. M. Cremona, *A Constitutional Basis for External Action? An Assessment of the Provisions on EU External Action in the Constitutional Treaty*, EUI Working Paper LAW No. 2006/30, pp. 21 et seq. with further references to the discussion.

taking place, in particular the more recent case-law of the Court of Justice. The *Maria Pupino* case has given a first indication of the position of the ECJ, even though the Court did not make it clear whether it considers Union law to be a 'new legal order' in the sense of the *Van Gend en Loos* case. However, some of the arguments that it put forward supporting the duty of consistent interpretation closely resemble those used more than 40 years ago, among them the effectiveness of the carrying out of the Union's objectives and the jurisdiction of the Court of Justice. The mentioning of the 'similar effect' of the legal instruments available under the TEU and the *extension* of the principle of loyalty to the third pillar—instead of a foundation on provisions in the TEU itself—support the assumption that the ECJ in principle recognises the integrationist character of the TEU. Also, the very claim of a duty of national courts deriving from the Treaty implies that the TEU (not the framework decisions themselves) does not only impose obligations on the Member States as subjects of public international law, but also on their organs—the executive and the judiciary—directly. The duty of consistent interpretation as a duty of Union law thus partly deprives the Member States of their choice as to how to conform to their obligations flowing from the TEU. That is, it bears the presumption of a direct applicability of the TEU in the legal order of the Member States,⁹⁴ although this does not mean that the secondary instruments adopted under the TEU share these features, or, in the case of Framework Decisions, direct effect is explicitly ruled out by Article 34 (2) (b) TEU. Moreover, in the case of the CFSP, it seems hard to imagine how an instrument of foreign policy could have a direct effect on individuals, especially if the legal restrictions on the possible character of the instruments as laid out above were obeyed.⁹⁵ Nevertheless, if the Court had the opportunity to rule on how to resolve a conflict between a Union legal instrument and the law of the Member States (most possibly with regard to a Union agreement under the third pillar), it is hard to see the Court ruling in favour of the law of the Member States instead of declaring the primacy of Union law.⁹⁶ Ultimately, this would mean, then, that Member States' laws would have to be disapplied insofar as they are in conflict with Union law.

The Unity of the Legal Order and the Constitutional Treaty

At first glance, the Constitutional Treaty⁹⁷ seems to solve all the legal questions surrounding the 'unity question'. It brings together Community and Union law under one single treaty and establishes a new legal person called 'European Union'. The continuing existence of the autonomous legal personality of the EAEC is certainly of minor relevance. As pointed out above, the Constitutional Treaty also extends in principle of primacy of Community law to the areas of the current second and third pillar. Nevertheless, besides the persistent questions with regard to the actual meaning of primacy in the realm of the CFSP, unity-related problems persist, as demonstrated by Article III-308 Constitutional Treaty, which stipulates:

The implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Constitution for the exercise of the Union competences referred to in Articles I-13 to I-15 and I-17.

Similarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Constitution for the exercise of the Union competences under this Chapter.

94 Cf. C. Herrmann, *Europäische Zeitschrift für Wirtschaftsrecht (EuZW)* 2005, pp. 436 – 438 (438).

95 C. Timmermans, *The Constitutionalization of the European Union*, *YEL 21* (2001/2002), pp. 1 – 12 (9).

96 For the arguments supporting that view see D. Curtin/I. Dekker, *The Constitutional Structure of the European Union: Some Reflections on Vertical Unity-in-Diversity*, in: P. Beaumont/C. Lyons/N. Walker (eds.), *Convergence and Divergence in European Public Law*, 59 – 78 (67 et seq.); C. Timmermans, *The Constitutionalization of the European Union*, *YEL 21* (2001/2002), pp. 1 – 12 (10).

97 OJ 2004 C 310/1.

Article III-308 of the Constitutional Treaty is mostly regarded as replacing Article 47 TEU. It is then pointed out that, contrary to Article 47 TEU, Article III-308 CT has a Janus face, since it protects not only the traditional EC external policies from the CFSP, but also vice versa.⁹⁸ This analysis of Article III-308 CT is, of course, correct, given the clear wording of its paragraph 2. However, attention must also be drawn to the significant difference in the identification of what shall not affect or be affected. It is in this regard that Article III-308 CT deviates significantly from Article 47 TEU, which stipulates that ‘nothing in this Treaty shall affect the Treaties establishing the European Communities [...]’. Due to this wording, Article 47 TEU is widely read as a collision norm, derogating the application of the *lex posterior derogate legi priori* rule in relation between the TEU and the TEC. Within the Constitutional Treaty, which would enter into force in all parts at the same time, it loses this function completely. Consequentially, Article III-308 Constitutional Treaty could not be read as meaning that the provisions on the CFSP cannot have changed the provisions on the former EC external policies.

Furthermore, despite the unification of the pillars into one Treaty, the demarcation of competences becomes even more troublesome with regard to the possible overlaps between the CFSP and other external policies, since the provisions on the CFSP no longer contain separate objectives and the CFSP applies to ‘all areas of foreign policy’. This not only suggests that the presumption in favour of ‘EC Competences’ under the Constitutional Treaty should be upheld,⁹⁹ but also that it is not the objectives that should be used but the legal character of the measures in question, to demarcate the CFSP from other external policies once it has been established that they fall into the sphere of external action.

Concluding Observations

Given the intensity of the debate about the unity of the European Union legal order, one would expect that the question had a greater effect on the interpretation of EU law. However, on the contrary, there is hardly any question of interpretation that can be solved having recourse to the concept. The possible conflicts between the Treaties are mostly horizontal in nature and are dealt with explicitly by the Treaties. The application of the *lex posterior* rule is not applicable with regard to TEU and TEC by virtue of Article 47 TEU and in applying the *lex specialis* principle, the concept of unity is neither of great help nor is it necessary for actually deciding which rule is more specific. Applying customary rules of interpretation of public international law would create similar results in many cases. Furthermore, the cases so far decided by the ECJ are in many respects comparable with those decided under the TEC in situations that have a relationship with different EC policies. Given this, it is hardly surprising that the ‘merger of the pillars’ under the Constitutional Treaty has little impact on the questions discussed above.¹⁰⁰ What we arrive at is the conclusion that it makes little sense to claim the ‘unity of the legal order’ with regard to the relationship between the TEC and the TEU. From a formalistic point of view, there is indeed a strong case to perceive the TEU and TEC as subsystems of one single legal order. However, confronted with a great diversity of institutional designs—between the pillars as well as in-between them—there is hardly any room for a substantive claim of unity. As stated above, the formal unity of a legal order only allows for the presumption of a single will of the rule enactor, coherent and free of contradictions. However, this presumption may be rebutted by the

98 M. Cremona, *A Constitutional Basis for External Action? An Assessment of the Provisions on EU External Action in the Constitutional Treaty*, EUI Working Paper LAW No. 2006/30, pp. 21 et seq.

99 See M. Cremona, *A Constitutional Basis for External Action? An Assessment of the Provisions on EU External Action in the Constitutional Treaty*, EUI Working Paper LAW No. 2006/30, pp. 21 et seq. Cf. also P. Eeckhout, *External Relations of the European Union*, 2004, p. 151.

100 This concurs with the fact, that during the Maastricht negotiations, the structure of the Treaty was perceived more as a matter of representation than of substance, cf. B. de Witte, *The pillar Structure and the Nature of the European Union: Greek Temple or French Gothic Cathedral?*, in: T. Heukels/N. Blokker/M. Brus (eds.), *The European Union after Amsterdam—A Legal Analysis*, 1998, pp. 51 – 67

very wording of the rules actually enacted. Such is the case for the European Union legal order: it is a single, unitary, but very incoherent legal order of a constitutional character or, as the CFI put it in the *Yusuf* case, 'integrated but separate'¹⁰¹ legal orders. It is a mere play on words to deny it characterizations such as constitution, legal order, legal system or similar, for the sole reason that it does not mirror our state-experience-shaped expectations in all aspects. This being said, one should abstain from drawing too heavily on such notions as 'unity of the legal order' when making a legal argument.

The true questions to answer hence seem to be different, among them the vanishing issue of the 'legal personality' of the EU and, for the future, the question whether the second and third pillar share the character of the TEC as a 'new legal order of public international law' as well as the role and rights of private individuals under the second and third pillar.¹⁰² And yet again: to answer these, we do not need to put forward a concept of such unclear bearing as the 'unity of the legal order'. The answers instead lie in the provisions of the TEU itself.

However, for the time being, holding EU Law to constitute a 'new legal order' would require a significant amount of political will, as well as juridical capability. The Convention on the Future of Europe and the IGC 2004 had this political will and the Constitutional Treaty leaves unresolved almost only the questions of primacy and judicial oversight with regard to the CFSP. However, France and the Netherlands failed to deliver the ratifications needed for it to enter into force. Even the use of all *passerelles* in the current Treaties could not bring about the same result with regard to the nature of the legal order of the European Union. Further efforts would be needed, particularly by the Court of Justice. However, the Court's leeway is small, given the close scrutiny by the Member States' constitutional courts, as the German *Bundesverfassungsgericht* recently demonstrated manifestly once again.

So what does it matter at the end of the day whether we call Pluto a planet or a 'dwarf planet'? To me as an astronomical layman, it does not seem to have too many consequences, especially not for the question of whether it exists or not. The same seems to be true for the question whether or not to describe the legal order established by the TEU and the TEC as a unity or not. As I have tried to show, it is more of a *façon de parler* than anything else, at least beyond the sphere of pure legal theory, i.e. in the real world of European law, where interpretations are born, live, work and die.

The Architecture—Greek Temple, Gothic Cathedral or...?

According to customary rules of European legal scholarship, a treatise of the structure of the European Union must conclude with some metaphor, ideally drawn from architecture. So what do we see now, when we stand in front of this peculiar building called 'European Union'? Is it still a temple structure, resting on three pillars? Or does it instead resemble a French gothic cathedral with the similarity with the EU being one with regard to its floor plan?¹⁰³ A lot depends, of course, on the perspective which distorts our image of an object as we come up close to it. This simple truth was rediscovered by *Filippo Brunelleschi*, one of the most brilliant architects of the Renaissance, if not of all times, in 1410. Maybe we should instead describe *Brunelleschi's* masterpiece, the cupola of the Florentine dome *Santa Maria del Fiore*, as the best-suited metaphor for the EU. The cupola was built without any pillars or scaffolding supporting the growing structure, which consists of a thick inner and a much thinner outer layer. At the beginning of the work, which took 14 years for the cupola alone, it was not certain, if it could be built, nor were the necessary instruments already invented. Indeed, how exactly

101 CFI, T-306/01, *Yusuf and Al Barakaat International Foundation v Council and Commission*, [2006] ECR-II 3533, para. 156.

102 Cf. Conclusions of AG Mengozzi of 26 October 2006, C-354 and 355/04 P, *Segi and others v Council*.

103 For this metaphor see B. de Witte, *The pillar Structure and the Nature of the European Union: Greek Temple or French Gothic Cathedral?*, in: T. Heukels/N. Blokker/M. Brus (Eds.), *The European Union after Amsterdam—A Legal Analysis* (Kluwer, 1998), pp. 51 – 67 at pp. 64 et seq.

the beautiful construction was achieved remains an unresolved mystery of architecture. Spanning a diameter of 47 metres, the cupola is the greatest brick-structure roof ever built in the world.¹⁰⁴

As regards the European integration process, we still seem to be in the critical phase of construction, with a high degree of uncertainty as to whether or not the roof will hold up and with quite some judicial masonry works still ahead of us. Given that the foundations of the European Union's philosophical underpinnings were laid with the re-interpretation of the human condition during the Renaissance, the cupola does not seem to be the worst of architectural metaphors for the ongoing endeavour of European integration and the European Union. Last but not least: the dome and the cupola still exist after more than 500 years and they attract admirers from all over the world, just as the European Union does! Not to mention the hundreds permanently queuing to get into it...

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104 See R. King, *Brunelleschi's Dome: How a Renaissance Genius Reinvented Architecture*, 2001.