

## **Creeping Competence revisited: Can Article 308 EC go beyond the typical achievement of the Community's objectives by attaining the objectives of the Union?**

**Dr. Theodore Konstadinides**  
**University of Surrey**

Article 308 EC has recently acquired particular relevance in the field of Common Foreign and Security Policy (CFSP), the Union's second pillar. This has occurred, according to commentators, due to 'the cross-pillar' dimension of threats posed by global terrorism. As demonstrated in *Kadi*, the Community's residual power under Article 308 EC was considered by the EU legislature as a complementary legal basis with reference to the imposition of financial sanctions against individuals on the basis of non-Community objectives. In that respect, it can be argued that the implications of Article 308 EC go beyond the typical achievement of the Community's objectives by attaining the objectives of the Union.

Yet, in an attempt to map out the institutional separation between the CFSP and the Community pillar as well as the relationship between international and EU law, the ECJ recently seems to have envisaged Community residual competence under Article 308 EC more restrictively than the EU Institutions. Its latest jurisprudential approach towards the Community's functional powers, in relation to the adoption of counter-terrorism measures, encompasses an orthodox rhetoric as to the limited scope of the Community's cross-pillar legislative competence. The ECJ provided a narrow interpretation on the scope of Article 308 EC and its connection with the operation of the common market in order to avoid the undesired effect of UN legal instruments, which require transposition at EU level, upon the fundamental principles of Community law endorsed by the ECJ. By considering the possibilities inherent in Article 308 EC, the ECJ stood as an inactive player concerning the Treaty's residual power, and reserved the right to determine that the relationship between international law and the Community legal order is governed by the Community legal order itself.

This paper argues that such an approach is not aimed at protecting national sovereignist sensitivities but rather at revamping the principle of autonomy of Community law as a means of delimitating the distribution of competences in the framework of the Union's pillar architecture. More specifically, it is submitted that the desired outcome of *Kadi* does not imply a lucid approach from the ECJ with regards to the boundaries of Community competence and the principle of subsidiarity. Surprisingly, the ECJ confirmed that the Council had competence to adopt the contested Regulation on the basis of Articles 60, 301 and 308 EC. It did not therefore overturn the judgment of the CFI on the basis of the latter's incapacity to identify the lack of the EU Institutions' legislative competence in adopting the Regulation. It rather located the CFI's legal error in its omission to refer to one of the EC Treaty's objectives in order to make the link with the objective pursued by the contested Regulation visible.