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LAW AND ORDER AND INTERNAL SECURITY PROVISIONS IN THE AREA OF FREEDOM, SECURITY AND JUSTICE

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Abstract
The maintenance of law and order and the safeguarding of internal security are competences at the very core of national sovereignty. It is therefore understandable that, within the framework of an ever more dynamic Area of Freedom, Security and Justice (AFSJ), the Member States have sought to emphasise that neither the EC nor the EU may lay claim to these competences, or regulate the way in which the Member States discharge them. This paper will focus on the judicial review of national measures caught by the 'law and order and internal security' AFSJ provisions introduced in the EC, EU and Lisbon Treaties. It will be argued, first, that these provisions are better interpreted as general clauses on the limits of EC/EU law rather than as derogations comparable to those available from the law of the single market. This, however, does not exclude the possibility of review by the ECJ, according to its case-law on other clauses of an analogous nature in the EC Treaty. Finally, it will be shown that Member States have responded to what they perceived as a threatening attitude on the Court's part by adding, as a second and potentially problematic safeguard, a series of provisions that aim at safeguarding national autonomy by explicitly limiting the jurisdiction of the ECJ and placing all judicial control at national level.

Keywords
Area of Freedom, Security and Justice - Third Pillar - Law and Order - Internal Security - State responsibilities - Court of Justice – jurisdiction - Lisbon Treaty

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Law and Order and Internal Security Provisions in the Area of Freedom, Security and Justice

Alicia Hinarejos[*]

I. Introduction

The maintenance of law and order and the safeguarding of internal security are competences at the very core of national sovereignty. The Member States have tried to keep both the EC and the EU from impinging upon the exercise of these responsibilities by introducing several provisions to such effect in the Treaties. Unsurprisingly, the Member States' concern in this regard reaches their peak within the framework of the Area of Freedom, Security and Justice (hereafter AFSJ); this is understandable, given to what extent 'the European Union has increased its role in securing police, customs and judicial cooperation and in developing a coordinated policy with regard to asylum, immigration and external border controls' over the past years.[1]

In terms of general judicial control, the AFSJ itself has come a long way since the creation of the third pillar at Maastricht, where the Court was given little jurisdiction in this field.[2] The Treaty of Amsterdam subsequently extended the jurisdiction of the Court to the third pillar (Title VI TEU) and to the new provisions on visa, asylum and immigration policies, which previously fell within the third pillar and were then transferred to the first one (Title IV, Part Three of the EC Treaty—hereafter Title IV EC). There are special judicial arrangements in place in the whole of the AFSJ, be it in the first or in the third pillar, and the jurisdiction of the ECJ is limited.[3]

This paper will examine, in turn, the nature and potential use of the law and order and internal security provisions to be found in Title IV EC, Title VI TEU and the Lisbon Treaty.[4]

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[1] 'The Hague Programme: Strengthening freedom, security and justice in the European Union' 13.12.2004. Council of the European Union, 16054/04 (JAI 559) 2.

[2] For an overview of the Court's early role in JHA (1971-1998), S Peers, 'Who´s Judging the Watchmen: The Judicial System of the "Area of Freedom, Security and Justice"' (1998) 17 Ybk Eur L 337, 340-350.

[3] For a more detailed account of these changes, cf A Albors-Llorens, 'Changes in the jurisdiction of the European Court of Justice under the Treaty of Amsterdam' (1998) 35 CML Rev 1273; J Monar 'Justice and Home Affairs in the Treaty of Amsterdam: Reform at the Price of Fragmentation' (1998) 23 ELR 320; P Eeckhout, 'The European Court of Justice and the "Area of Freedom, Security and Justice": Challenges and Problems' in D O´Keeffe (ed) *Judicial Review in European Union Law Liber Amicorum in Honour of Lord Slynn of Hadley* (Kluwer, London 2000); S Douglas-Scott, 'The Rule of Law in the European Union - putting the security into the EU's Area of Freedom Security and Justice' (2004) 29 ELR 219.

[4] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, OJ (2007) C 306/1, 17.12.2007. The consolidated version will be used throughout this paper:

It will become clear that the Member States have tried to assuage their concerns and protect their autonomy by introducing two different kinds of provisions in all three treaties: general clauses clarifying the separation of competences between the EC (or EU) and themselves, and more specific provisions that explicitly limit the jurisdiction of the Court of Justice. Each of the relevant treaties contains a pair of provisions that consists of one such general clause and one such specific restriction on jurisdiction. My first claim is that the general clause contained in each of the treaties studied is better understood as a clause that indicates where the limits of EC/EU legislative competence lie, rather than as a derogation similar to those available to the Member States within the single market (eg Article 30 EC). Ultimately, however, the Court's case-law shows that this does not exclude eventual review of national action at EU level. Possibly as a reaction, a safeguard has been added—again, in all three treaties—in the form of another provision that explicitly curtails the ECJ's jurisdiction, minimally in the case of Title IV EC, but more extensively in the TEU and in the Lisbon Treaty. The paper shows, finally, how the introduction of these restrictions may prove problematic: not only because they may affect national action that does fall within the scope of EU law, but also because they may hamper the Court's capacity to give useful preliminary rulings on the interpretation of EU law in certain situations. Ultimately, the restrictions on the jurisdiction of the Court of Justice aim at preserving Member State autonomy by placing the responsibility to control this sort of national action on the national courts. This is a logical arrangement that will nevertheless necessitate the cooperation of all actors involved if it is to work satisfactorily.

II. Law and Order and Internal Security Provisions in the First Pillar

Within Title IV EC, Article 64(1) EC states that '[t]his title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security'. This provision belongs to the first group mentioned earlier, that of general clauses. The first question to come to mind when reading Article 64(1) EC is whether it should be considered a derogation from EC law comparable to the derogations from the Single Market contained, for example, in Article 30 EC. This is significant for the purposes of judicial control: the Court has stated that, in those situations where a Member State seeks to derogate from EC law (*ERT*, *Familiapress*),[5] it will still be controlled for compliance with the general principles of EC law. This question is of particular interest in the case of Article 64(1) EC, since there is no subsequent provision explicitly excluding the jurisdiction of the Court as regards all national action caught by it (this, as we will see later, is what happens in the TEU with Articles 33 and 35(5) TEU). If we were to conclude that Article 64(1) EC is a derogation equivalent to that of Article 30 EC, we could safely assume that the *ERT* case-law would apply to national action caught by this provision, making the ECJ competent to assess its compliance with general principles of EC law.[6] Several authors support this view, if acknowledging the fact that the sensitive nature

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Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJ (2008) C 115/1, 9.5.2008.

[5] Cases C-260/89 *ERT / DEP* [1991] ECR I-2925; C-368/95 *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH / Bauer Verlag* [1997] ECR I-3689.

[6] Although it is, of course, unclear how extensive this control should be. AG Jacobs claimed that this second test or substantive control should only involve checking the compliance with the principles of proportionality

of 'law and order' and 'internal security' would make the Court exercise a light review of proportionality.[7]

On the other hand, it is possible to argue that Article 64(1) EC is not a derogation from EC law obligations that therefore falls within the scope of EC law, but rather an indication as to where the limits of EC competence lie.[8] This would mean that all national action covered by Article 64(1) EC is outside the legislative competence of the EC, but it does not necessarily put this national activity outside the jurisdiction of the ECJ: the Court has already stated that, even though a certain measure does not fall within the scope of EC law (in the sense of EC legislative competence) and remains in the exclusive competence of the Member States, the latter must nevertheless, when exercising said competence, respect the Treaty rules. In *Commission v France ('Spanish Strawberries')*, the Court stated that maintenance of public order and the safeguarding of internal security are matters of national competence that are nevertheless reviewable in so far as their pursuit impedes cross-border trade.[9] In *Centro-Com*, the Court recognized the Member States' competence to protect their security, but asserted that, in doing so, EC law had to be complied with.[10] In its case-law dealing with sex discrimination and the armed forces, the Court has made it clear that there is no 'general exception excluding from the scope of Community law all measures taken for reasons of public security':[11] meaning that, while it is clear that the organization of the armed forces still falls within the competences of the Member States and not of the EC, the national regulation of such matter has to, nevertheless, comply with EC law. The distinction at play is that between legislative competence and the much wider reach of EC rules (on non-discrimination, in this case). Of course, the Court is dealing here in shades of grey: as it turned out, the British rule preventing women from joining the Royal Marines in *Sirdar* and the German rule confining women's access to the army to medical and military-music services in *Kreil* could only remain in force if they were consistent with the EC rules on sex discrimination (which they were not),[12] whereas the rule that makes military service

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and non-discrimination on grounds of nationality: F Jacobs, 'Human Rights in the European Union: The Role of the Court of Justice' (2001) 26 ELR 331, 337-9. On the other hand, the wording of *ERT* and *Familiapress* seems to be wider.

[7] S Peers, 'National Security and European Law' (1996) 16 Ybk Eur L 363; D Thym, 'The Schengen Law: A Challenge for Legal Accountability in the European Union' (2002) 8 Eur LJ 218; G Simpson, 'Asylum and Immigration in the European Union after the Treaty of Amsterdam' (1999) 5 Eur PL 91. These authors (especially Peers and Thym) consider this provision analogous to all the 'public policy' derogations in the EC Treaty, and accordingly believe that the ECJ should be competent to conduct, at least, a review of proportionality. On how the Court has dealt with the public policy derogations, see S Peers 'National Security and European Law' (supra) 364-392. On the 'light' review of proportionality in these cases, see T Tridimas, *The General Principles of EU Law* (2nd edn, OUP, Oxford 2006) 225-29.

[8] A distinction used by J Weiler, 'Fundamental Rights and Fundamental Boundaries: on Standards and Values in the Protection of Human Rights' in N Neuwahl and A Rosas (eds) *The European Union and Human Rights* (Martinus Nijhoff Publishers, The Hague 1995) 69; T Tridimas (n 7) 325.

[9] Case C-265/95 *Commission v France ('Spanish Strawberries')* [1997] ECR I-6959 [33]-[35], [56]-[57]. See written evidence given by Dutheil de la Rochere in *The Future Role of the European Court of Justice* (6th Report of Session 2003-04. HL Paper 47) 73.

[10] C-124/95 *The Queen, ex parte Centro-Com Srl v HM Treasury and Bank of England* ECR [1997] I-81 [25].

[11] Case C-285/98 *Tanja Kreil v Bundesrepublik Deutschland* [2000] ECR I-69 [16].

[12] Cases C-273/97 *Angela Maria Sirdar v The Army Board and Secretary of State for Defence* [1999] ECR I-7403; *Kreil* (n 11)

compulsory only for men in Germany—at stake in *Dory*—could not be affected by the same EC rules. The reason, according to the Court, was the first two situations concerned mere 'decisions of the Member States concerning the organisation of their armed forces', whereas the latter was one of the Member States' 'choices of military organization for the defence of their territory or of their essential interests'.[13] The Court seems to have distinguished between situations which involve a fundamental policy choice, where allowing the EC rules to have an effect would be close to allowing the EC to regulate the matter, and situation which do not involve such a fundamental policy choice and where the Member State's decision is therefore subject to a proportionality test if it breaches a rule of EC law.[14] Needless to say, the line may be difficult to draw.

National security is not the only field where case-law of this sort is at hand.[15] The Court has taken a similar approach (recognizing national competence, yet claiming that EC law needs to be complied with) as regards, for example, Article 295 EC, which states that '[the] Treaty shall in no way prejudice the rules in Member States governing the system of property ownership'. Yet EC law (and hence the ECJ, if there is no express restriction to its jurisdiction) can affect it in many ways through other provisions of the EC Treaty. In *Salzmann*, the Court stated that 'although the legal regime applicable to property ownership is a field of competence reserved for the Member States under Article 222 of the EC Treaty (now Article 295 EC), it is not exempted from the fundamental rules of the Treaty'.[16] As a result, the national rules at stake—on the establishment of secondary residences in certain areas—had to comply with the EC Treaty provisions on free movement of capital. It is possible to find further examples of the Court's attitude in the fields of social security, taxation, sport, etc.[17]

To sum up: Article 64(1) EC may be considered a derogation within the scope of EC law or an indication as to where the limits of EC law lie, a provision on separation of competences.[18] From the point of view of judicial control at EC level, the distinction may not be of great significance in practice, as long as there is a conflict between the national activity and a rule of EC law: in the first case, ie if the provision is used as a derogation in

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[13] Case C-186/01 *Alexander Dory v Bundesrepublik Deutschland* [2003] ECR I-2479 [35].

[14] See N Grief 'EU Law and Security' (2007) 32 ELR 752, 763-764; Koutrakos distinguishes between Member States' primary and secondary choices: P Koutrakos 'How Far is Far Enough? EC Law and the Organisation of the Armed Forces after Dory' (2003) 66 MLR 759, 765.

[15] 'National security' encompasses both internal and external security: C-285/98 *Tanja Kreil v Bundesrepublik Deutschland* [2000] ECR I-69 [17]. For the use of these and related concepts, see N Grief 'EU Law and Security' (2007) 32 ELR 752, 755.

[16] Case C-300/01 *Salzmann* [2003] ECR I-4899 [39].

[17] Cases C-372/04 *Watts* [2006] ECR I-4325 and C-512/03 *Blanckaert* [2005] ECR I-7685 on social security; C-446/03 *Marks & Spencer* [2005] ECR I-10837 on taxation; C-415/93 *Bosman* [1995] ECR I-4921 on sport.

[18] Indeed, Article 64(1) EC could have either of these functions (derogation within EC law, limiting the scope of EC law), depending on the circumstances of the case. Article 296 EC is another example of a similar provision, if more specific in its scope. In C-414/97 *Commission v Spain* [1999] ECR I-5585, Spain used Article 296 EC as a derogation within the scope of EC law and the Court treated the provision accordingly. It is nevertheless possible to imagine a Member State using Article 296 EC as a 'sword' to attack the validity of an EC law measure that regulates or affects issues of national security connected with the production of or trade in arms, munitions and war material.

order not to comply with a specific EC law obligation, the Court could check the compatibility of the national action with the general principles of EC law straightaway (since the derogation is within the scope of EC law already). In the second case, the Court could act because the national action, albeit outside the legislative competence of the EC, can fall within the scope of the Treaty if it breaches a rule of EC law: according to the case-law, this has so far happened where national action of this kind has come into conflict with EC rules on free movement, competition and non-discrimination. As regards national security, specifically, the Court has further distinguished between Member States' decisions that involve fundamental policy choices and those that do not, making EC rules apply only to the latter: anything else would come too close to allowing the Community to regulate the matter, breaching the division of competences at play.

Thus the result of both approaches—considering this sort of general provision as equivalent to a single market derogation or not—may not differ much in practice. Ultimately, the Court's theoretical take would depend on the particular circumstances of the case; it is likely, however, that a 'light' control of proportionality would ensue at any rate, given the sensitivity of the field at stake. Until now, the Court has never had to clarify directly the interpretation and use to be given to Article 64(1) EC. It has included it on two occasions in the list of EC Treaty 'derogations applicable in situation which may involve public safety', together with Articles 30, 39, 46, 58, 296 and 297 EC,[19] but this is not sufficient evidence to assume that the Court would treat Article 64(1) EC in the same way as a single market derogation, were it to face a case that came directly within its scope. On the contrary, it is submitted that, from a theoretical point of view, the best reading of Article 64(1) EC and its counterparts in the TEU and the Lisbon Treaty is that of a general clause on division of competences, rather than as the equivalent of Articles 30, 39 or 46 EC.

Still within Title IV EC, Article 68(2) EC contains a further reference to law and order and internal security, in stating that 'the Court of Justice shall not have jurisdiction to rule on any measure or decision taken pursuant to Article 62(1) relating to the maintenance of law and order and the safeguarding of internal security'. This provision belongs to the second kind of provisions mentioned above, in that it explicitly curtails the jurisdiction of the ECJ with regard to the national measures at stake. Nevertheless, this restriction affects only the jurisdiction of the Court to give preliminary rulings (the subject-matter of Article 68 EC) and thus its jurisdiction to review such measures directly in infringement proceedings remains arguably unaffected.[20]

[19] Cases C-337/05 *Commission v Italy* Judgment of 8 April 2008, nyr [43]; C-186/01 *Alexander Dory v Bundesrepublik Deutschland* [2003] ECR I-2479 [31]. This very same list had previously been used by the Court without including Art 64(1) EC on two occasions since this provision had entered into force: Cases C-273/97 *Angela Maria Sirdar v The Army Board and Secretary of State for Defence* [1999] ECR I-7403 [16]; C-285/98 *Tanja Kreil v Bundesrepublik Deutschland* [2000] ECR I-69 [16].

[20] Arnull rightly points out that 'the Court's jurisdiction should be regarded as capable of being limited only by the clearest of language' A Arnull *The European Union and its Court of Justice* (2nd edn OUP Oxford 2006) 133; similarly, Peers believes that 'there is a presumption of full applicability that can only be ousted by express language' S Peers 'Who´s Judging the Watchmen: The Judicial System of the "Area of Freedom, Security and Justice"' (1998) 17 Ybk Eur L 337, 352. A more pessimistic approach has been adopted by the Commission,

Article 62(1) EC provides for Council measures to ensure 'the absence of any controls on persons, be they citizens of the Union or nationals of third countries, when crossing internal borders'. This provision is the legal base of Article 2(2) of the Schengen Implementing Convention (now Article 23 of the Schengen Borders Code)[21] which allows Member States to re-introduce internal border checks where public policy or national security so require; this has often been used to restrain cross-border political activity.[22] In fact, it has been suggested that Article 68(2) EC was drafted with the application of Article 2(2) of the Schengen Implementing Convention specifically in mind.[23] At any rate, Article 68(2) EC encompasses, in practice, measures which may encroach upon fundamental rights (eg freedom of association and expression) along with the free movement rights of EU citizens—yet these measures are specifically left outside the ECJ's competence to give preliminary rulings. The restriction may be considered problematic as regards the protection of individuals, who are very rarely able to bring a direct action and must normally rely on an indirect challenge through the preliminary reference procedure.[24]

Article 62(1) EC is the legal base of measures which deal with internal borders and which allow Member States to derogate from the obligations they create (by re-introducing border checks) in a situation where national security is at stake. The result is that, although measures of EC law are the potential object of Article 68(2) EC, its practical object is most likely to be national action. Such action is not the necessary result of the EC law measure, but rather a derogation from it. A sufficient standard of protection for individuals may be

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who seems to believe that Art 68(2) EC excludes any kind of jurisdiction—not only the competence to give preliminary rulings. This can be inferred from the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the regions and the Court of Justice of the European Communities: Adaptation of the Provisions of Title IV of the Treaty establishing the European Community relating to the jurisdiction of the Court of Justice with a view to ensuring more effective judicial protection. Brussels, 28.6.2006. COM(2006) 346 final, 6: 'The wording of this paragraph appears to exclude any review by the Court of Justice of Community measures adopted by the legislature on the basis of Article 62(1) of the EC Treaty […] Since, by definition, the national courts cannot rule either on the validity of such Community rules, the result is to exclude any possibility of judicial review'.

[21] Convention implementing the Schengen Agreement of 14 June 1985 [2000] OJ L 239/0019; Schengen Borders Code, EC Regulation 562/2006 [2006] OJ L 105/01.

[22] After the integration of the Schengen acquis into EC law, the Council attributed the legal base of Art 62(1) EC to the provisions of Art 2(1) to (3) of the Schengen Convention and the three relevant Executive Committee Decisions: Council Decision 1999/436/EC [1999] OJ L176/17. The power to reintroduce border checks has been used often to prevent EU citizens from taking part in political demonstrations: see K Groenendijk 'Reinstatement of Controls at Internal Borders: Why and Against Whom?' (2004) 10 ELJ 150; S Peers, *EU Justice and Home Affairs Law* (OUP, Oxford 2006), 132-135; S Peers, 'National Security and European Law' (n 7) 388-393.

[23] P Eeckhout 'The European Court of Justice and the "Area of Freedom, Security and Justice": Challenges and Problems' in D O´Keeffe (ed) *Judicial Review in European Union Law. Liber Amicorum in Honour of Lord Slynn of Hadley* (Kluwer London 2000) 164; D Thym,(n 7) 233.

[24] For a critique of the restrictions included in Article 68 EC, see generally N Fennelly, 'The "Area of Freedom, Security and Justice" and the European Court of Justice: A Personal View'(2000) 49 ICLQ 1; S Peers, 'Who's Judging the Watchmen' (n 2) 351-357; D Thym (n 7); S Peers 'The Jurisdiction of the Court of Justice over EC Immigration and Asylum Law: Time for a Change?' in H Toner E Guild and A Baldaccini (eds) *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy* (Hart Oxford 2007). On the potential conflict between this restriction and Art 47 of the Charter of Fundamental Rights, A Ward, 'Access to Justice' in S Peers and A Ward (eds) *The EU Charter of Fundamental Rights* (Hart, Oxford 2004).

achieved in practice if the national court, albeit not able to review the EC measure dealing with internal borders,[25] is able to review the national authorities' decision to re-introduce border checks. Yet this argument forgets that such arrangement can only be satisfying to the extent that national courts review the national measure for compliance with national human rights standards and national law in general. When the question, however, comes to checking the national measure for compatibility with the EC measure that allows the derogation or for compatibility with rights flowing from EC law, we are still left with the problem of fragmentation of EU law because the ECJ would have no jurisdiction and would thus be unable to offer guidance to the national courts; without it, in fact, it is even doubtful that national courts would be willing to undertake such control. As a result, the EC rights of individuals may be left unprotected.[26]

Title IV EC, to sum up, contains both a general clause on competence (Art. 64(1) EC) and a specific restriction to the Court's jurisdiction (Art. 68(2) EC) that concern the Member States' responsibilities as regards law and order and internal security. As it has already been mentioned, the Court has never had to directly clarify the way in which Article 64(1) EC is to be applied: all we can do, therefore, is guess what the Court would do if it had such an opportunity. Article 64(1) EC is a vague provision that leaves open the possibility for the Court to check, at least, the proportionality of national action in some cases—something the Court has shown itself willing to do in comparable circumstances. Against this backdrop, Article 68(2) EC (which puts the Schengen re-introduction of internal borders by Member States because of law and order and internal security concerns outside of the jurisdiction of the Court) may have been a safeguard introduced by the drafters of the Treaty to make sure that there is a hard and fast rule keeping at least this particular instance of national action from being reviewed.[27]

III. Law and Order and Internal Security Provisions in the Third Pillar

Title VI TEU, too, contains both a general clause or 'reminder' in the form of Article 33 TEU ('[t]his title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security') and a specific limitation of the Court's competence. The latter is Art 35(5) TEU, which puts 'operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security'

[25] National courts would not be able to consider the validity of a Community measure falling within the scope of Art 68(2) EC other than to uphold it, if we accept that the *Foto-Frost* principle applies in this area: Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 04199. There is no textual evidence to the contrary. Arnull, however, believes that *Foto-Frost* should not be deemed to apply in the absence of a preliminary ruling mechanism: A Arnull (n 20) 134-35. AG Mengozzi resorted to the same rationale in *Segi* when arguing that *Foto-Frost* should not apply in the third pillar because of the need to offer proper judicial protection: Opinion of A.G. Mengozzi delivered on 26 October 2006, Case C-355/04 P *Segi and others* v. *Council* [2007] ECR I-1657.
[26] The paradigmatic case would be where border checks are discriminatory or where they are conducted under such conditions that they represent an obstacle to the free movement of citizens (eg, where checks are so slow that they act as a deterrent).
[27] Two of the cases mentioned earlier (*Spanish Strawberries*, n 9, and *Centro-Com*, n 10) had already been decided by the time Articles 68(2) and 62(1) EC were introduced at Amsterdam.

outside the jurisdiction of the Court to give preliminary rulings. It should also be borne in mind that the indirect path of the preliminary ruling procedure is the only one available in the third pillar to control national action, in the absence of full-fledged infringement proceedings.[28]

Is it not the case, however, that the Court never—in theory—controls national measures under the preliminary ruling procedure? The restriction of Art 35(5) TEU could be quite limited by the fact that the Court is only ever supposed to interpret EC/Union law, spell out its requirements and leave it up to the national court to apply these requirements to national measures.[29] And yet, albeit not supposed to control national rules within the preliminary reference procedure, the Court definitely does so in practice. At the same time, the Court is aware of this anomaly and is commonly careful to formulate its rulings in a manner that is at once effective as regards national control and faithful to the constitutional 'fiction' concerning the separation of competences between itself and the national courts. It is arguable that the further restriction of Art 35(5) TEU is not without effects; rather, this provision is bound to influence the way the Court exercises its competence to give preliminary rulings in practice, since it may feel the need to be more cautious than normally when controlling national action.

A. The first restriction within Article 35(5) TEU: actions of the police and law-enforcement services

From this understanding of the significance of Article 35(5) TEU, we will now examine the first part of this restriction, on the action of national law-enforcement services. It should be noted that the wording of this provision seems to catch the action of the police and law-enforcement services that has its origins in national law, but also action that comes as a result of EU law. The following paragraphs will deal with the latter situation, in which the national law-enforcement services could be considered to be acting as 'agents' of the Union, and where the lack of control on the part of the ECJ may seem more striking. The action of police or law-enforcement services that is purely a matter of national law will, for the purposes of this study, will be subsumed into the heading of 'exercise of responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security', the second restriction contained in Article 35(5) TEU, and discussed later in this section.

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[28] The only mechanism of this sort available in the TEU can be found in Art 35(7), on disputes between the Commission and a Member State regarding the interpretation or application of a convention. In practice, conventions have been phased out since the Treaty of Amsterdam entered into force: S Peers *EU Justice and Home Affairs Law* (OUP Oxford 2006) 33-35.

[29] The Court has emphasised in its case-law that it has no jurisdiction under Art 234 EC 'either to apply the Treaty to a specific case or to decide upon the validity of provision of domestic law in relation to the Treaty, as it would be possible for it to do under Article 169 [now 226, infringement proceedings]'. Case 6/64 *Costa v ENEL* [1964] ECR 585, 592-93. The distribution of competences between the ECJ and the national courts in this field is reiterated in Declaration 7 on Article 30 TEU annexed to the Final Act of the Intergovernmental Conference of Amsterdam: 'Action in the field of police cooperation under Article TEU, including activities of Europol, shall be subject to appropriate judicial review by the competent national authorities in accordance with rules applicable in each Member State'.

The first part of Article 35(5) TEU excludes from the jurisdiction of the Court 'the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State'. It could be considered unsatisfactory that the actions of a law-enforcement service that have its origins in EU law cannot be controlled by the ECJ in any way; on the other hand, such actions may be controlled by national courts. In practice, this is a further manifestation of the division of competences between the ECJ and the national courts, and one should therefore be prepared to admit that the complexities of the EU system mean that it is not possible (or even desirable) for the Union itself—the ECJ—to have full power of review over the actions of its agents, as long as national courts do. The only problem is, arguably, that this national action will be checked for compliance with national standards of fundamental rights and other national rules, leaving the ECJ unable to set the standard of respect for fundamental rights that its agents must respect. Further, it is unlikely that national courts will control the national action for compliance with EU law in general and, if they do so, it may have to be without the ECJ's guidance. This, however, fits with the logic of an intergovernmental forum like the current third pillar, where the supremacy of EU law has not been established.[30]

On a slightly different note, it may be that the first restriction of Article 35(5) TEU somehow impairs the Court's role as authoritative interpreter of EU law, in the sense that this restriction may make it difficult for the Court to give a useful interpretation of the requirements of EU law to a national court, when the question submitted by the latter involves, to some extent, the action of the law-enforcement services. Under these circumstances, the Court may have difficulties separating both issues and providing useful guidance on how the measure of EU law is to be interpreted while at the same time not appearing to intrude into forbidden territory.

This difficulty is likely to be greater in a situation where national law-enforcement services act in order to enforce a Union measure directly. This is because the Court would probably feel more conscious of the limits of its jurisdiction due to the fact that there is no intermediate element (national implementing law) between the interpretation of the Union rule and the—off-limits—action of the national police. Normally, when spelling out the requirements of a rule of EU law, the Court is indirectly assessing whether the national action involved complies or not with them. In the standard situation, the Court could provide a useful interpretation of EU law by reference to the national implementing legislation, without having to refer to the action of the national police or law-enforcement services. If there is no national implementing legislation, the Court may need to frame its answer by reference to the action of the national police or law-enforcement services, something that comes too close to assessing its validity. That is why, depending on how the preliminary question is framed, the Court may not be able to give a very useful preliminary ruling, or it may have to deem itself incompetent. This is, of course, assuming that the Court strives to comply with the letter of Article 35(5) TEU. In practice, the Court may be willing

[30] Lenaerts and Corthaut have nevertheless argued that the principle of primacy applies already both in the second and in the third pillar: K Lenaerts and T Corthaut, 'Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law' 31 ELRev (2006) 287. For a defence of the orthodox view, see A Hinarejos 'The Lisbon Treaty vs. Standing Still: A View from the Third Pillar' EuConst (forthcoming 2009).

to risk criticism by encroaching upon the national courts' role to the extent that it is necessary to clarify an EU law measure. Even in this scenario, the Court should leave the application the ensuing proportionality test to its national counterparts.[31]

It is furthermore unlikely that we would encounter, in practice, a situation where a law-enforcement service of a Member State is carrying out a third pillar measure directly within the current third pillar framework. Council Decisions (implementing or otherwise) may seem the likeliest candidate, since the Treaty describes them as 'binding in their entirety', in rather similar terms to EC regulations. In reality, however, these measures are seldom detailed enough and normally refer to the need for national implementation.[32]

B. The second restriction within Article 35(5) TEU: law and order, internal security responsibilities

Let us now deal with the second restriction contained in Article 35(5) TEU, on 'the exercise of responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security'. This provision mirrors the wording of the general clause contained in Article 33 TEU: '[t]his title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security'.

The very same discussion on the meaning of Article 64(1) EC—and whether it is to be construed as a derogation within the scope of EC law or as an indication as to where the limits of EC legislative competence lie—can be applied to Article 33 TEU. There are only two differences between these provisions: the first one is that, whereas Article 64(1) EC could come into play within the framework of either the preliminary ruling procedure or infringement proceedings, Article 33 TEU would be most likely used in situations where the Court is asked to clarify in a preliminary ruling whether a particular EU law provision precludes a particular instance of national action—an action defended by the Member State

[31] For examples of this approach within the EC pillar, see n 37.

[32] For example, Art 36 of the Prüm Decision establishes that. 'Member States shall take the necessary measures to comply with the provisions of this Decision within one year of this Decision taking effect [...]. Member States shall inform the General Secretariat of the Council and the Commission that they have implemented the obligation imposed on them under this Decision [...]'. Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime (Prüm Decision) (2008) OJ L210/1. This seems to be a common clause; for a further example see also Art 6, Council Decision 2005/671/JHA of 20 September 2005 (2005) OJ L253/22. It is however difficult to evaluate to what extent and in what way Member States implement third pillar decisions, since there is normally no need to notify the Commission and no provision for monitoring reports: Communication from the Commission to the Council and the European Parliament, Report on Implementation of the Hague Programme for 2007, COM(2008) 373 final, 13. See also the scoreboard on national implementation attached to this report, including three third pillar decisions: Commission staff working document, Report on the implementation of The Hague programme for 2007: Follow-up of the implementation of legal instruments in the fields of justice, freedom and security at national level. 2007 Implementation Scoreboard – Table 2, 18-19, 33.

as being covered by Article 33 TEU.[33] The second difference is a crucial one: Article 35(5) TEU has the effect of placing all national action that is covered by Article 33 TEU outside the jurisdiction of the Court, contrary to what happens with Article 64(1) EC—where only a small group of measures is placed outside the Court's jurisdiction via Article 68(2) EC. Regardless of whether one considers Article 33 TEU as a derogation that the Court would normally be competent to control, or as a provision delimiting the scope of EU law (but which the ECJ would presumably claim to be able to control if it affects certain rules in the treaties), Article 35(5) TEU makes it impossible for the Court to exercise any review of the sort of national action at stake, apart from determining that it indeed falls within the scope of Article 35(5) TEU. It seems plausible that the drafters of the Treaty foresaw the possibility of the Court exercising control over Article 33 TEU in one of the described ways or another—as it has done, in fact, with other comparable clauses—and subsequently decided to avoid that danger by introducing Article 35(5) TEU. It should also be borne in mind that by placing this sort of action outside the indirect control of the Court within the preliminary reference procedure, it is effectively beyond any EU-level judicial control within the third pillar, since there is no equivalent of Article 227 EC (full-fledged infringement proceedings) in the TEU. A Member State's action may nevertheless be controlled by its national courts, if national law so provides. The limitations of this arrangement have already been pointed out.

Finally, again, the Court's role as interpreter of EU law may be somehow restricted if, when asked by a national court whether a rule of EU law forbids certain Member State action (defended by the Member State as necessary to maintain law and order and internal security), the Court feels limited by the fact that it should not be seen to be assessing this sort of national action.

IV. Law and Order and Internal Security Provisions after the Lisbon Treaty

The Lisbon Treaty contains comparable provisions, if with some innovations.[34] To start with, the drafters of the Treaty were not content with introducing a general clause clarifying the division of competences in this area between the Union and the Member States within the framework of the AFSJ. They also introduced a general clause among the Common Provisions of the TEU that is applicable across the board: Article 4(2) TEU (after

[33] This is because of the very limited nature of the 'special' infringement proceedings within the TEU. A very unlikely alternative scenario would present itself if the Court had to intervene in a dispute between the Commission and a Member State on the interpretation or application of a Convention (Art 35(7) TEU), and the source of the conflict were the Member State's action, regarded as within Art 33 TEU by the Member State but not by the Commission. Alternatively, Art 33 TEU could be used within the framework of a direct challenge to a framework decision or decision on grounds of lack of competence.

[34] This section will focus on the long-term judicial arrangements envisaged in the Lisbon Treaty in the AFSJ. There is, of course, the matter of transitional measures: according to Art. 10 of the Protocol on transitional measures annexed to the Lisbon Treaty, third pillar measures that are already in place before the Treaty enters into force will still be reviewed by the ECJ under the current (pre-Lisbon TEU) arrangements. This will last five years and is acceptable as long as their legal effects are still those of public international law measures—which, it is submitted, is the interpretation that should be given to Art. 9 of the Protocol.

LT)[35] states that the Union shall respect the Member States' essential State functions, 'including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security', before adding that, in particular, 'national security remains the sole responsibility of each Member State'.

Within Title IV, Part Three TFEU (hereafter 'AFSJ Title'), the pattern is similar to that of the current TEU: there is a general clause (Art. 72 TFEU) and a provision restricting the jurisdiction of the ECJ within a particular area within the AFSJ. Let us start with the first one: the Lisbon Treaty maintains the general clause that we currently find under Articles 64(1) EC and 33 TEU in the guise of Article 72 TFEU: 'This Title [AFSJ Title] shall not affect the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security'.

Similarly to the earlier discussion on Articles 64(1) EC and 33 TEU, it is possible to take different points of view as regards the nature of Article 72 TFEU. On the one hand, it is possible to argue that this is a derogation from Union law similar to current derogations from Community law in other areas (eg public health, public security and public policy in the realm of the common market). This situation could therefore be considered equivalent to that found in the *ERT* and *Familiapress* cases,[36] where the ECJ found that Member States were under its control for compatibility with the general principles of EC law when derogating from the latter. The question would then be to what extent the Court would be willing to extend the *ERT* doctrine to the whole of Union law, across the board. In any case, from this point of view on the nature of Article 72 TFEU, it would be in the Court's hand to decide whether and to what extent to scrutinise Member States' actions.

On the other hand, Article 72 TFEU can be interpreted differently: not as a derogation from Union law comparable to the EC derogations from the law of the single market, but as a provision that tells us where the limits of Union legislative competence lie. The practical result, however, is not likely to differ greatly. As I argued in relation to Article 64(1) EC, the Court has made it clear that it is willing to control, at least to a certain extent, national action that is undertaken in a field of national competence but which nevertheless interferes with, at least, certain rules of the Treaty. As a result, even if adopting this second reading of Article 72 TFEU, the Court would be able to check national action covered by this provision in some situations: although it is initially outside the scope of EU law, in may be 'brought back in' if a breach occurs. Due to the sensitivity of the subject-matter, the control exercised by the Court would, in any case, include a review of proportionality of the national action (ie, whether the breach of the Treaty rule was necessary and appropriate); but even if Article 72 TFEU were treated as a derogation, it is doubtful that the Court would be willing to exercise an extensive control (eg, for compliance with human rights standards). The review of proportionality would be less strict than in other cases, in

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[35] The Lisbon Treaty is not a substantive Treaty: it reforms—without turning them into a single document—the TEU and the EC Treaty, renaming the latter Treaty on the Functioning of the European Union or TFEU. For that reason, references to the Lisbon Treaty will appear as 'Article X TEU (after LT)' or 'Article X TFEU'.

[36] Cases C-260/89 *ERT / DEP* [1991] ECR I-2925; C-368/95 *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH / Bauer Verlag* [1997] ECR I-3689.

accordance with the broad discretion exercised by national governments in the field at stake.[37]

So far, we have studied the effects of the general clause of Article 72 TFEU on the whole of the AFSJ. There is, however, an additional, specific restriction to the jurisdiction of the Court that operates within a particular field of the AFSJ. Article 276 TFEU states that, within Chapters 4 and 5 of the AFSJ Title (the chapters that deal with judicial cooperation in criminal maters and police cooperation, respectively) the Court shall have 'no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.' This provision follows in the footsteps of Articles 68(2) EC and 35(5) TEU, in that it is a specific restriction to the jurisdiction of the Court of Justice. As regards its scope, however, Article 276 TFEU covers the same instances of national action covered by Article 35(5) TEU at present (judicial cooperation in criminal matters, police cooperation), but not those covered by Articles 68(2) EC. Thus, Article 276 TFEU does not catch the reintroduction of Schengen internal borders (the practical effect of the current Article 68(2) EC).[38] Further, contrary to the restrictions contained in Articles 68(2) EC and 35(5) TEU, Article 276 TFEU affects not only the Court's capacity to give preliminary rulings, but also to decide on infringement proceedings.[39]

Indeed, some may say that Article 276 TFEU may only affect the competence of the Court to deal with infringement actions, since this the only way in which the Court formally control national action, the subject-matter of Article 276 TFEU. As it has already been pointed out, the ECJ does not have jurisdiction to interpret or consider the validity of national measures when giving a preliminary ruling; all it does is interpret and spell out the requirements of Union/Community law. Arguably, this could deprive the exception of Art 276 TFEU of practical significance within the realm of preliminary rulings.[40] The distribution of competences hinted at in this Article could be simply understood as a reminder of the general principle of distribution of competences between the ECJ and the national courts that underlies the Union's judicial architecture. It is nevertheless true that the way in which

[37] Tridimas has noted that, although the standard of scrutiny is less rigorous, the Court is prepared to review proportionality even when issues of national security are at stake: T Tridimas (n 7) 229. For example, in *Albore* the ECJ expected Italy to prove the existence of 'real, specific, and serious risks which could not be countered by less restrictive procedures' C-423/98 *Alfredo Albore* [2000] ECR I-5965 [22]. Although the proportionality test was defined in strict terms, it was left for national courts to apply. In several cases involving public policy derogations, the final decision on the proportionality of the national action has been left to the national courts: 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651; C-367/89 *Criminal proceedings against Richardt* [1991] ECR I-4621; 72/83 *Campus Oil* [1984] ECR 2727 . On this point, see also S Peers 'National Security and European Law' (n 7) 392.

[38] This reintroduction would not take place under the heading of Chapters 4 or 5 of the AFSJ Title, but under Art 77 TEU (chapter 2).

[39] It is however possible to argue that Art 68(2) EC does not only affect the preliminary ruling procedure: see n 20.

[40] The view taken by A Arnull (n 20) 136. Were one to adopt this view, it would still be necessary to acknowledge the effects of the exception on infringement proceedings (where the Court does scrutinise national rules directly).

the preliminary ruling works in practice is very often far from the principle of separation of competences. The Court, however, commonly tries to preserve this 'fiction'. From this understanding it can be argued that, just as with the current Article 35(5) TEU, Article 276 TFEU may have an effect on the Court's behaviour when providing preliminary rulings, in that it may feel the need to tread more carefully than normally in this area, due to the existence of an added safeguard or reminder as to the boundaries of its jurisdiction. Article 276 TFEU, in sum, is likely to affect not only the Court's competence to decide in infringement proceedings, but also its competence to give preliminary rulings when prompted by national courts.[41]

As regards the national action it catches, Article 276 TFEU is identical to Article 35(5) TEU, and thus the discussion on the problems caused by the latter provision apply wholly to this section. As regards the first part of Article 276 TFEU, the more specific exception concerning operations carried out by the police or law-enforcement services, the only difference when compared to the current Article 35(5) TEU is that, within the framework of the Lisbon Treaty, we may be more likely to come across situations where the national law-enforcement services are carrying out an EU measure directly. It is difficult to imagine this sort of scenario in practice; should it ever arise at all, however, it will be in the post-Lisbon scenario, since directly applicable, self-executing measures are more likely to be adopted than within the framework of the current TEU. Finally, contrary to Article 35(5) TEU, Article 276 TFEU has the effect of precluding not only indirect control, but also direct control of national police action in infringement proceedings; when asked by the Commission to rule on whether a Member State has breached EU law, all the Court can do is check whether the national action is indeed caught by the first paragraph of Article 276 TFEU. If it is, there is no possibility of further review—in theory.

Let us now turn to the second, more general claim of Article 276 TFEU, regarding Member States' law and order and internal security responsibilities, and which mirrors the general clause contained in Article 72 TFEU. It has already been argued in the previous section that this clause, just as Articles 64(1) EC and 33 TEU, can be interpreted as a derogation from EU law or as a provision that lays the limits of EU legislative competence. Regardless of what reading is adopted, the Court has made it clear that it is willing to control, at least to a certain extent, national action that is undertaken in a field of national competence but which nevertheless interferes with a rule of the Treaty. This possibility is however excluded within Chapters 4 and 5 of the AFSJ Title by Article 276 TFEU, with the result that the Court would not be competent in any case to exercise either direct or indirect control of this type of national action.

Article 276 TFEU has thus the exact same scope and likely rationale as the current Article 35(5) TEU: in Maastricht, the drafters of the Treaty may have tried to prevent the Court from treating the 'law and order' provision of Article 35(5) TEU exactly as it had treated other general clauses laying down the limits of EU law: as liable to be brought within the

[41] See also the oral evidence given by AG Jacobs on this point in *The Future Role of the European Court of Justice* (6th Report of Session 2003-04. HL Paper 47) 36.

scope of the Treaties and therefore scrutinised to a certain extent.[42] In Lisbon, the Member States may have felt the need to maintain this safeguard in light of the fact that the Court, since Maastricht, has continued in its approach to the control of Member States' action taken within their fields of exclusive competence: in this sort of situation, the Court has been willing to apply EC rules to Member States' decisions, at least as long as it is not convinced that such decisions concern a fundamental policy choice.[43] Thus it is not only that the Member States fear that they may see some of their decisions in a matter such as internal security reviewed; it is also the case that they cannot foresee in what particular instances such review will take place, since the line drawn in *Dory* is hardly watertight.[44] Against this backdrop, Article 276 TFEU acts as an added safeguard, a hard and fast rule ensuring that, at least within the areas of judicial cooperation in criminal matters and police cooperation (Chapters 4 and 5, AFSJ Title), this sort of national action continues to be safe from review, regardless of whether it breaches EU rules and of whether it deals or not with a fundamental policy choice.

In general, the problems arising from Article 276 TFEU are the same ones to arise from Article 35(5) TEU; they are likely to seem, however, more acute in the context of a homogenous and 'stronger' Union, where the third pillar is no more an intergovernmental forum but a fully 'communitarised' policy. In this new setting, one would expect the Court of Justice to hold Member States to their EU law commitments and to ensure that actions carried out by its agents conform to an EU-wide standard of protection of fundamental rights.

It seems unfortunate that the ECJ will not be able to review the actions of its agents, neither directly nor indirectly. Further, whenever Member States claim to be exercising their responsibility to maintain law and order and internal security, they may be able to breach Union law without the ECJ being able to act upon it. National courts may, however, be in a position to control national action in both instances.[45] The separation of competences underlying the judicial system of the Union finds an obvious expression in an area that is uncomfortably close to the core of national sovereignty. Although problematic in some respects, this separation of competences seems unavoidable. If this arrangement is going to work, however, the actors involved have to collaborate fully and exercise self-restraint. The Court of Justice has to be allowed some leeway: it has to be able to discharge its duty as interpreter of EU law, even if this means, if some instances, framing its preliminary rulings by reference to national action that is caught by Article 276 TFEU. At the same time, the Court should always strive to leave the application of the proportionality test to the

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[42] Case C-265/95 *Commission v France ('Spanish Strawberries')* [1997] ECR I-6959; C-124/95 *The Queen, ex parte Centro-Com Srl v HM Treasury and Bank of England* ECR [1997] I-81.

[43] eg Case C-285/98 *Tanja Kreil v Bundesrepublik Deutschland* [2000] ECR I-69; Cases C-273/97 *Angela Maria Sirdar v The Army Board and Secretary of State for Defence* [1999] ECR I-7403; Case C-186/01 *Alexander Dory v Bundesrepublik Deutschland* [2003] ECR I-2479.

[44] Case C-186/01 *Alexander Dory v Bundesrepublik Deutschland* [2003] ECR I-2479.

[45] Depending on whether, and to what extent, national law foresees such control.

national court.[46] National courts, on their part, should strive to review national action for compliance not only with national law, but also with EU law.

Finally, it may be useful to remember that the draft Constitutional Treaty contained an almost identical clause to Article 276 TFEU, albeit with the final proviso 'where such action is a matter of national law'.[47] At the time, this tail-piece was considered confusing and superfluous and was subsequently removed from the definite version of the Constitutional Treaty.[48] This proviso would have indeed been superfluous as regards the 'the Member States' responsibility to maintain law and order and internal security', obviously a matter of national law as already established elsewhere (Articles 4(2) TEU (after LT) and 72 TFEU). However, as regards 'operations carried out by the police or other law-enforcement services of a Member State', it would have been desirable for the deleted proviso to remain part of what is now Article 276 TFEU. This would have ensured that the Court is competent to review such operations when they have their origin in EU law, avoiding some of the pitfalls highlighted in this section.

V. Concluding Remarks

It is understandable that the Member States view with suspicion the inroads that the Court has made into areas of exclusive national competence, and have therefore tried to keep the Court from doing the same where law and order and internal security are at stake by including explicit restrictions to the jurisdiction of the Court in the TEC, the TEU and, subsequently, in the Lisbon Treaty.

It is to be welcomed that the Lisbon Treaty does away with the restriction contained in Article 68(2) EC. The restriction contained in Article 35(5) TEU is, however, kept on in the guise of Article 276 TFEU. This provision creates an unfortunate anomaly in the Treaty structure, and it would have been preferable to omit it. Article 72 TFEU should have been enough to deter the Court from exercising control over any national action that truly lies outside the scope of Union law, either police or law-enforcement services' actions or Member States' measures concerning law and order and internal security. Whereas trying to delineate the competences of the Union is a legitimate enterprise, trying to limit judicial control by drawing artificial lines is likely to cause problems. Ideally, then, Article 72 TFEU should have caused the Court to, first, review the action of police or law-enforcement services only when they are acting as agents of the Union, and second, exercise a light proportionality review of national action undertaken to protect law and order and internal security whenever it breaches the rules of the treaties. This arrangement would have required the Court to regain some of the Member States' trust by allowing a wide margin of

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[46] As done, for example, in C-423/98 *Alfredo Albore* [2000] ECR I-5965, concerning national security. See, further, n 37.

[47] Art III-283, Draft Treaty establishing a Constitution for Europe CONV 850/03.

[48] Art III-377, Treaty establishing a Constitution for Europe [2004] OJ C310/01. See *The Future Role of the European Court of Justice* (6th Report of Session 2003-04. HL Paper 47) 37, plus oral evidence submitted by AG Jacobs (p 36) and P Craig (p 12-13) on this particular point.

national discretion in this obviously sensitive field, but it would have had the advantage of not relying on arbitrary distinctions.

Given that Article 276 TFEU has nevertheless been kept on, it would have been desirable for it to include the proviso 'where such action is a matter of national law', at least as regards the operations of national police and law-enforcement services. As it is now, the specific restriction to the jurisdiction of the Court has as a result that national action that may be rightfully considered within the scope of Union law has been excluded from the jurisdiction of the Court. The restriction may make it impossible for the Court to give useful preliminary rulings on the interpretation of a rule of EU law and its requirements in some situations, since this could be seen as effectively controlling the very instances of national action that are supposed to be off-limits. The change in the nature of EU law envisaged in the Lisbon Treaty makes this problem more likely to arise. Equally, Member States may be able to breach EU law without fear of being controlled by the Court. It has been argued that leaving all control to national courts, although justifiable in theory, may be problematic in practice unless the ECJ, on the one hand, and the national courts, on the other, strive to cooperate. Some thoughts on what would be needed on both parts have been put forward.

Article 276 TFEU is a replica, in scope and rationale, of Article 35(5) TEU. But, whereas this sort of restriction may be acceptable within the intergovernmental framework of the TEU, it seems far more problematic in a depillarised, post-Lisbon setting. Furthermore, scenarios that may seem too hypothetical at the moment (for example, because of the merely 'coordinating' or 'technical' nature of many third pillar measures) may not be uncommon in the future, due to the rapidly growing and changing remit of the AFSJ.

In general terms, the Lisbon Treaty fares well to the extent that judicial review within the AFSJ is substantially extended. It is nonetheless regrettable that an ambiguous and potentially unfortunate restriction remains in Article 276 TFEU. It has been argued that the general *caveat* of Article 72 TFEU should have been enough to achieve the drafters'—perfectly legitimate—aims of preserving the Member States' competence as regards law and order, without having to resort to an explicit exception to the jurisdiction of the ECJ. The Court's treatment of other similar general clauses laying down the limits of EU law may be to blame for this distrust. This problem should perhaps not be overstated since it is a mere glitch in what is otherwise a felicitous extension of judicial control, but it may nevertheless prove contentious in the future. After all, the Court will routinely be called upon to give preliminary rulings in two areas (judicial cooperation in criminal matters, police cooperation) where law and order and internal security occupy the centre stage, just as the Union's actions in this field become ever more forceful and diverse.