this power was spent,[230] and this provision was duly repealed by the Treaty of Lisbon.[231]

As for the staff of the Schengen Secretariat, the Protocol provided for the Council to adopt arrangements for their integration into the Council's staff.[232] The Council's decision to this end was unsuccessfully challenged.[233]

The Council also decided to adopt further measures concerning the management and financing of contracts relating to the SIS,[234] and providing a Secretariat for the Schengen data supervisory authority.[235] The latter Decision was later repealed when a joint secretariat for different third pillar data supervisory authorities was established.[236]

The Protocol also set out specific rules for measures, adopted after the entry into force of the Treaty of Amsterdam, which 'build upon' the Schengen *acquis*. Such measures shall be 'subject to the relevant provisions of the treaties'.[237] So after that point all Schengen-related measures have had to be regarded as 'regular' parts of EC law (until the Treaty of Lisbon entered into force) or EU law, with no special rules applying as regards their legal base (and therefore no special rules relating to decision-making or the Court of Justice, other than those rules applicable to any JHA measures adopted in the same area). However, there are still differences between measures building upon the Schengen *acquis* and other measures to be adopted under the EC or EU Treaties, as regards the territorial scope of the measures.[238]

In practice, nearly all EU measures concerning visas, border controls, and irregular immigration adopted or proposed since 1 May 1999 have built upon the Schengen *acquis*.[239] So have a handful of measures concerning legal migration,[240]

[230] On the separate issue of the extension of the Schengen *acquis* to the Member States that joined the EU later, see 2.2.5.3 below; on the later extension of the *acquis* to Switzerland and Liechtenstein, see 2.2.5.4 below.

[231] It does not appear in the amended version of Art 2.

[232] Previous Art 7; this was the only provision of the Protocol which provided for the Council to act by QMV. This article was repealed by the Treaty of Lisbon, presumably because this power was now spent.

[233] [1999] OJ L 119; on the case law, see n 189 above.

[234] One set of Decisions was applicable from 1999–2003 (Council Decisions 1999/322 and 1999/323, [1999] OJ L 123/49 and 51, repealed as of 27 Nov 2003 by Council Decisions 2003/835 and 2003/836, [2003] OJ L 318/22 and 23), while the other has been applicable since 1999 and 2000 (Council Decisions 1999/870 and 2000/265, [1999] OJ L 337/41 and [2000] OJ L 85/12; the latter has been amended by Decisions 2000/664/EC ([2000] OJ L 278/24), 2003/171 ([2003] OJ L 69/25), 2007/155 ([2007] OJ L 68/5), 2008/319 ([2008] OJ L 109/30), 2008/670 ([2008] OJ L 220/19), and 2009/915 ([2009] OJ L 323/9)). See also Decision 2007/149 ([2007] OJ L 66/19) and the amendments to the relevant Decision of the Schengen Executive Committee ([2000] OJ L 239/444) in [2007] OJ L 179/50, [2008] OJ L 113/21, and [2010] OJ L 14/9.

[235] Decision 1999/438 ([1999] OJ L 176/34).

[236] Decision 2000/641 ([2000] OJ L 271/1), which replaced Decision 1999/438 as from 1 Sep 2001 (Art 6, Decision 2000/641). On third pillar data protection, see further 12.3 and 12.6 below.

[237] Art 5(1), first sub-paragraph, which was *not* amended by the Treaty of Lisbon. This applied despite any failure to allocate the original *acquis* (see Art 5(2), repealed by the Treaty of Lisbon). Despite the repeal of Art 5(2), the general rule in the first sub-paragraph of Art 5(1) would still prevent the adoption of any measure relating to the SIS (ie the only parts of the *acquis* which were not allocated to a Treaty base) from being adopted using the 'wrong' legal base.

[238] See 2.2.5 below.

[239] See 2.5 of chs 3, 4, and 7.

[240] See 6.2.5.

and certain measures concerning criminal procedure and policing.[241] The result is that a substantial proportion of the Schengen Convention and a large number of the secondary Schengen measures integrated into the EU and EC legal orders in 1999 have been or would be amended, repealed, or supplemented by EC or EU acts.[242]

The Court of Justice has ruled on the provisions of the Schengen *acquis* on a number of occasions, in relation to the double jeopardy rules;[243] the adoption of subsequent implementing measures;[244] the integration of the Schengen Secretariat staff into the Council;[245] the operation of the SIS;[246] the freedom to travel rules;[247] the rules on external borders;[248] and on the scope of the rules concerning the British opt-in to the Schengen *acquis*.[249] A case concerning SIS contracts was settled.[250]

The Court has not yet determined the legal effect of the Schengen measures, or any provision of them,[251] although it has ruled on the relationship between the Schengen *acquis* and EU free movement law.[252] Also, the Court has ruled that the integration of the Schengen *acquis* into the EC and EU legal order means that the *acquis* can no longer be interpreted according to the normal rules of public international law, but rather interpreted taking the EU framework into account.[253] On the other hand, the historical context of the pre-existence of the Schengen *acquis* was one factor justifying the Council's decision to apply unusual rules concerning the adoption of visas and borders implementing measures,[254] and the Court of First Instance (as it then was) also justified the adoption of unusual measures concerning the hiring of Council staff in light of the Schengen Protocol.[255] With respect, there appears to be a fundamental inconsistency in the case law as to whether the Schengen *acquis* should be subject to special treatment or not.

2.2.3. Treaty of Lisbon

2.2.3.1. Overview

The institutional framework governing EU JHA law again changed significantly with the entry into force of the Treaty of Lisbon on 1 December 2009.[256] First of

[241] See s 2.5 of chs 9 and 12. [242] For details, see Appendix II. [243] See 11.8 below.
[244] Case C-257/01 *Commission v Council* [2005] ECR I-345. [245] See n 189 above.
[246] Case C-503/03 *Commission v Spain* [2006] ECR I-1097.
[247] Case C-241/05 *Bot* [2006] ECR I-9627. See 4.9 below.
[248] Joined Cases C-261/08 *Zurita Garcia* and C-348/08 *Choque Cabrera*, judgment of 22 Oct 2009, not yet reported. See 3.6.1 below.
[249] Cases C-77/05 *UK v Council* [2007] ECR I-11459 and C-137/05 *UK v Council* [2007] ECR I-11593. See also C-482/08 *UK v Council*, pending (opinion of 24 June 2010). See 2.2.5.1.3 below.
[250] Case T-447/04 R *Cap Gemini* [2005] ECR II-257.
[251] See also, as regards external competence and the Schengen *acquis*, 2.7 below.
[252] Case C-503/03 *Commission v Spain* (n 201 above); see further 2.4.2 below.
[253] See *Gozutok and Brugge* (n 182 above). In particular, the double jeopardy rules aim to prevent multiple prosecutions as a consequence of exercise of free movement rights (see generally 11.8 below).
[254] Case C-257/01 (n 244 above); see further 2.2.2.1 above. [255] See n 189 above.
[256] [2007] OJ C 306.

all, the basic rules governing JHA cooperation were 'reunited' in one Title (Title V of Part Three) of the EC Treaty, which was in turn renamed the Treaty on the Functioning of the European Union (TFEU), because pursuant to the Treaty of Lisbon, the EU replaced and succeeded the European Community.[257] In effect, the previous 'third pillar' was transferred into what was formerly known as the Community legal order, and the TEU no longer contains any detailed provisions on JHA matters. However, the TEU still specifies that the development of JHA law as a whole remains an objective of the EU:[258]

> The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.

The previous third pillar has, for now, a form of legal 'afterlife', in the form of transitional rules relating to the jurisdiction of the Court of Justice over third pillar measures adopted before the entry into force of the Treaty of Lisbon ('pre-existing measures') and the legal effect of those measures.[259] Although the Treaty of Lisbon contains most of the provisions of the rejected Constitutional Treaty,[260] it is not identical to that Treaty, in particular as regards the opt-outs applicable to JHA law.

Title V contains in turn general provisions;[261] rules on immigration and asylum;[262] an Article on civil law;[263] five Articles on criminal law;[264] and three articles on policing.[265] Because of the abolition of the third pillar, 'Community' legal instruments (Directives and Regulations) have had to be used to regulate policing and criminal law since the entry into force of the Treaty of Lisbon. It follows that the principles of direct effect and supremacy of 'Community' instruments apply to measures in this field adopted after that date as well.

As for decision-making rules, the Treaty of Lisbon extended QMV in the Council and co-decision with the EP (now known as the 'ordinary legislative

[257] Art 1, third paragraph, revised TEU.

[258] Art 3(2), revised TEU. This provision is identical to the prior Art 2, fourth indent TEU, except for the added words 'without internal frontiers' and the replacement of the obligation to 'maintain and develop' the area of freedom, security, and justice with the obligation to 'offer' it. But note that the 'objectives' clause of the EC Treaty (as it then was) has been deleted by the Treaty of Lisbon, including Art 3(1)(d) EC, which had defined the objectives of the Community. This clause had been relevant in some cases concerning the interpretation of the powers of the EC; see, for instance, Case C-170/96 *Commission v Council* [1998] ECR I-2763. Equally, the Court of Justice had referred to the prior Art 2, fourth indent TEU in some criminal law judgments: see 2.2.2.2 above.

[259] See 2.2.3.3 below.

[260] [2004] OJ C 310. On the JHA provisions of the Constitutional Treaty, see the second edition of this book, pp 85–90.

[261] Ch 1 of Title V (Arts 67–76 TFEU), discussed in 2.2.3.2 below.

[262] Ch 2 of Title V (Arts 77–80 TFEU), discussed in chs 3–7 below.

[263] Ch 3 of Title V (Art 81 TFEU), discussed in ch 8 below.

[264] Ch 4 of Title V (Arts 82–86 TFEU), discussed in chs 9–11 below.

[265] Ch 5 of Title V (Arts 87–89 TFEU), discussed in ch 12 below.

procedure')[266] to legal migration and to most criminal law and policing issues.[267] However, unanimity in the Council was retained for some sensitive issues of criminal law and policing, family law, and the adoption of measures relating to passports and similar documents.[268] In most of these cases, the EP is only consulted, but it has a new power of consent in some cases.[269] These cases of decision-making are examples of 'special legislative procedures' that differ from the ordinary procedure.[270] Legislative proposals that were pending when the Treaty of Lisbon entered into force were subject to the revised decision-making procedures immediately as regards immigration, asylum, and civil law, but proposals relating to policing and criminal law lapsed due to the change in legal basis,[271] and had to be proposed again.[272]

Unanimity in the Council (or European Council) also applies to possible extensions of competence, or changes to decision-making rules.[273] The revised TEU also provides for a general power to alter decision-making rules (known as a '*passerelle*'), which applies to Title V as well as most of the rest of the Treaties. This permits a decision, without Treaty amendment, to move from unanimity to QMV or from a special legislative procedure to the ordinary legislative procedure.[274] Finally, Title V provides for two different variations of decision-making rules—a special rule (widely known as the 'emergency brake') relating to some areas of criminal law, if a Member State considers that a proposal 'would affect fundamental aspects of its criminal justice system',[275] and a special rule (referred to in this book as the 'pseudo-veto') relating to some cases where unanimity applies in the Council.[276] In either case, a 'fast track' to 'enhanced cooperation',

[266] The details of this procedure are set out in Art 294 TFEU, which does not differ in substance from the previous Art 251 EC.

[267] See s 2.3 of chs 6 and 9–12.

[268] Arts 86(1) (European Public Prosecutor), 87(3) (police operations), 89 (cross-border police operations), 81(3) (family law), and 77(3) (passports) TFEU.

[269] The EP has the power of consent as regards legislation concerning the European Public Prosecutor (Art 86(1) TFEU).

[270] On this concept, see Art 289(2) TFEU.

[271] See COM (2009) 665, 3 Dec 2009.

[272] See particularly 9.2.3, 10.2.3, and 12.2.3 below, as well as the treaties discussed in 2.7.2 below.

[273] This applies to any decision to extend criminal law competence (Arts 82(1)(d) and 83(1), third sub-paragraph TFEU), to alter decision-making rules relating to family law (Art 81(3), second sub-paragraph TFEU), or to extend the powers of the European Public Prosecutor (Art 86(4) TFEU). The latter measure would be adopted by the European Council, rather than the Council. The EP has the power of consent except as regards Art 81(3) TFEU, where it need only be consulted.

[274] Art 48(7), revised TEU. The *passerelle* procedure requires the unanimous support of the Member States and the consent of the EP, plus involvement by national parliaments. This procedure only applies to acts of the *Council*, so cannot apply to Art 86(4) TFEU, which provides for action by the European Council. There are several specific provisions in the Treaties which are not subject to this procedure (Art 353 TFEU), but none of these exemptions concern JHA matters. It should also be noted that in the context of enhanced cooperation, the Member States participating in that cooperation can agree that the decision-making rules will change *for them*: see Art 333 TFEU and further 2.2.5.5 below.

[275] Arts 82(3) and 83(3) TFEU.

[276] These cases are Arts 86 (European Public Prosecutor) and 87(3) (operational police cooperation) TFEU.

ie authorization of some Member States to proceed without the others, is provided for.[277]

Next, as regards policing and criminal law, there is no longer any right for individual Member States to submit initiatives for legislation, but it is still open to a group of one-quarter of the Member States (meaning, at present, at least seven Member States) to submit a joint initiative.[278]

JHA law is also subject to the general changes which the Treaty of Lisbon made to EU law as regards legislative and non-legislative acts. The 'ordinary' and 'special' legislative procedures (as described above) are subject to particular rules concerning openness, transparency, and scrutiny by national parliaments.[279] The Treaty also now provides for the adoption of 'delegated' acts implementing legislative measures, as follows:[280]

> A legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act.
>
> The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts. The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power.

The legislation in question must explicitly lay down the conditions for such delegations of power, which 'may' be either the revocation of the delegated power by the EP or the Council, and/or a power for the EP or the Council to block the entry into force of the delegated act by objecting to it within a specified period.[281] The conditions for the application of the delegated powers rule are very similar to those which previously applied to the 'regulatory procedure with scrutiny' (RPS), a special rule which gave the EP and the Council powers of scrutiny over the Commission's adoption of measures 'implementing' EC legislation adopted by means of the co-decision procedure (as it was then known) before the entry into force of the Treaty of Lisbon.[282] However, the *control process* is different, and the delegated powers provision applies to *all* EU legislation, not just legislation adopted by the ordinary legislative procedure (as it is now called). Due to the abolition of the previous third pillar, this also means that this provision will also apply to policing and criminal law measures adopted after the entry into force of the Treaty of Lisbon, although measures implementing pre-existing third pillar acts continue to be subject to the previous rules on implementing third pillar measures for as long as the relevant transitional rules are applicable.[283] There will not be any general rules on the use of the delegated acts procedure, but rather

[277] On the enhanced cooperation rules following the entry into force of the Treaty of Lisbon, see 2.2.5.5 below.

[278] Art 76 TFEU, discussed further below (see 2.2.3.2).

[279] See further 2.5 below.

[280] Art 290(1) TFEU.

[281] Art 290(2) TFEU.

[282] See further 2.2.2.1 above.

[283] On the substance of the previous rules, see 2.2.2.2 above; on the transitional rules, see 2.2.3.3 below.

specific provisions in each legislative act which provides for the procedure.[284] So far, no JHA legislation which provides for the adoption of delegated acts has been adopted or proposed; it remains to be seen if and when the measures adopted before the Treaty of Lisbon which provide for RPS (including the relevant JHA measures) will be amended to provide for the delegated acts procedure instead.

There is still provision for the adoption of implementing measures in other cases,[285] and the general legal framework governing the adoption of implementing measures will likely be replaced shortly after the entry into force of the Treaty of Lisbon.[286] The new general rules will replace the rules which previously governed the adoption of implementing measures (including as regards JHA measures), except for the prior rules concerning the use of the RPS procedure for measures adopted before the entry into force of the Treaty. Again, measures implementing pre-existing third pillar acts will continue to be subject to the previous rules on implementing third pillar measures for as long as the relevant transitional rules are applicable.[287]

Moving on to the jurisdiction of the Court of Justice over JHA matters, the restrictions previously imposed relating to immigration, asylum, and civil law on the one hand (the former Title IV EC), and the former third pillar on the other (the former third pillar), were both removed,[288] save for an exception which relates only to policing and criminal law (leaving aside the transitional rules for pre-existing third pillar measures).[289] This exception is the retention of the previous exception, as set out in the former Article 35(5) TEU,[290] relating to jurisdiction over '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'.[291]

The special 'urgency' procedure for certain JHA cases before the Court of Justice, first created in 2008, remains in force.[292] In addition, the Treaty of Lisbon

[284] See the Commission communication on the use of the procedure (COM (2009) 673, 9 Dec 2009).

[285] Art 291 TFEU, which amended the prior Art 202 EC. Again, on the previous rules, see 2.2.2.1 above.

[286] The Commission proposed new general rules shortly after the entry into force of the Treaty of Lisbon: COM (2010) 83, 9 Mar 2010.

[287] On the substance of the previous rules, see 2.2.2.2 above; on the transitional rules, see 2.2.3.3 below.

[288] For the basic rules on the Court's jurisdiction and functioning after the Treaty of Lisbon, see Art 19, revised TEU, and Arts 251–281 TFEU.

[289] On these transitional rules, see 2.2.3.3 below.

[290] See 2.2.2.2 above.

[291] Art 276 TFEU. Because the wording of this exception has not been amended, any future jurisprudence concerning the interpretation of the former Art 35(5) TEU must apply to Art 276 TFEU and vice versa. For interpretation of the previous clause, see 2.2.2.2 above. While, as noted above, there are no cases to date touching upon the interpretation of the former Art 35(5) TEU, it is possible that the Court will be asked to interpret this provision pursuant to its transitional jurisdiction over pre-existing third pillar measures (see 2.2.3.3 below).

[292] See 2.2.2 above.

added a new paragraph to Article 267 TFEU (former Article 234 EC), concerning preliminary rulings from national courts to the Court of Justice, which provides that:

> If such a question [for a preliminary ruling] is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

This new provision, which presumably applies also to the Court's transitional jurisdiction over pre-existing third pillar measures, has already been applied twice after the entry into force of the Treaty, as regards persons held in detention in connection with EU anti-terrorist sanctions laws and the irregular crossing of internal borders; the Court has also given an emergency ruling in a child abduction case.[293] It does not create a separate new procedure by itself, but rather requires the Court to invoke the procedures (the urgent JHA procedure or the more general accelerated procedures) already set out in the Court's Statute and Rules of Procedure.

In practice, the Court of Justice received a number of JHA references from national courts in the first few months after the Treaty of Lisbon entered into force,[294] but it was too early to tell whether the Court of Justice's case load in this area would increase significantly or not. If it does increase significantly at some point, then there will have to be consideration of measures to address the overload on the EU judicial system, which could take the form of general changes to that system and/or specific changes relating to JHA cases.[295] But it is certainly too early to consider such changes yet, at least on JHA grounds alone.

The transfer of the third pillar to the first pillar also means that the 'Community' rules on external relations are applicable to policing and criminal law matters, in place of the rules on external relations which were applicable to the former third pillar.[296] It should also be noted that the Treaty of Lisbon widened the scope of the JHA opt-out rules applicable to the UK, Ireland, and Denmark, and furthermore made significant changes to those rules. These developments are considered further below.[297]

[293] Cases (none yet reported): C-550/09 *E and F*, judgment of 29 June 2010; C-188/10 and C-189/10 *Melki and Abdeli*, judgment of 22 June 2010; and C-211/10 PPU *Povse*, judgment of 1 July 2010. A further child abduction case is pending: Case C-400/10 PPU *McB*.

[294] On immigration and asylum law: Case C-69/10 *Diouf*, pending and *Melki and Abdeli*, ibid; on civil law: Cases C-509/09 *eDate Advertising*, C-87/10 *Electrosteel*, C-112/10 *Zaza Retail*, C-139/10 *Prism Investments*, C-144/10 *Berliner Verkehrsbetriebe*, C-145/10 *Painer*, C-161/10 *Martinez*, C-191/10 *Rastelli Davide and C*, C-213/10 *F-Tex*, *Povse* (ibid), C-296/10 *Purrucker II*, C-315/10 *Companhia Siderúrgica Nacional*, C-327/10 *Lindner*, and *McB* (ibid) all pending; on criminal law: Cases C-1/10 *Salmeron Sanchez* and C-264/10 *Kita*, all pending (except *Melki and Abdeli* and *Povse*); and on both asylum law and criminal law: Case C-105/10 PPU *Gataev and Gataeva*, withdrawn. See also the annulment action in Case C-355/10 *EP v Council*, pending.

[295] See S Peers, 'The Future of the EU Judicial System and EC Immigration and Asylum Law' (2005) 7 EJML 263.

[296] See further 2.7.2 below. On the substance of the treaties which have been agreed or are being negotiated in this area, see 9.10 and 12.11 below.

[297] See 2.2.5 below.

Certain amendments were also made to the Protocol integrating the Schengen *acquis* into the EU legal order.[298]

Finally, a number of the more general amendments to the Treaties made by the Treaty of Lisbon have a particular impact on EU JHA law. The amendments relating to the legitimacy and accountability of the EU are discussed further separately,[299] as are the general amendments relating to the competence of the EU.[300] The integration of the previous 'third pillar' into the EC Treaty (now the TFEU) means also that various general and final provisions of the TFEU apply to policing and criminal law. This could be relevant as regards provisions having general application,[301] data protection,[302] non-discrimination on grounds of nationality,[303] statistics,[304] EU liability,[305] dispute settlement,[306] national security exceptions,[307] pre-existing treaties with third states,[308] the EU's 'residual powers',[309] and the territorial scope of EU law.[310] The JHA provisions of the Treaties are covered (as they were before) by the provision on Treaty

[298] For details, see 2.2.2.3 above. [299] See 2.5 below. [300] See 2.2.4 below.

[301] Arts 8–13 TFEU, requiring all EU policies to take account of (respectively) sex equality, social concerns, non-discrimination, the environment, consumer protection, and the welfare of animals.

[302] Art 16 TFEU. See further 12.2.3 below.

[303] Art 18 TFEU (former Art 12 EC). It should be noted, however, that the previous Art 12 EC already applied to third pillar cooperation: see Case C-123/08 *Wolzenburg* [2009] ECR I-9621 and Case C-524/06 Huber [2008] ECR I-9705, and the discussion in 9.4 below.

[304] Art 338 TFEU (former Art 285 EC). On crime statistics, see 10.7 below.

[305] Art 340 TFEU (former Art 288 EC), which the Court of Justice has jurisdiction pursuant to Art 268 TFEU (former Art 235 EC). As discussed above (2.2.2.2), the Court of Justice confirmed that it had no jurisdiction 'whatsoever' over this issue as regards the prior third pillar: Case C-355/04 P *SEGI* [2007] ECR I-1657.

[306] Art 344 TFEU (former Art 292 EC), which reserves exclusive jurisdiction for disputes between Member States concerning EU law upon the Court of Justice, to the extent that it has jurisdiction over the matter concerned: see Case C-459/03 *Commission v Ireland* [2006] ECR I-4635. Until 1 Dec 2014, the special rule in the prior Art 35(7) TEU will apply to disputes concerning prior third pillar measures (see the transitional rules discussed in 2.2.3.3 below).

[307] Arts 346–348 TFEU (former Arts 296–298 EC). There is no reason to doubt that the jurisprudence on the interpretation of the previous Arts 296–298 EC continues to apply after the entry into force of the Treaty of Lisbon to Arts 346–348 TFEU, given the lack of substantive amendment to these provisions. On that case law, see the cases on the borderline between foreign policy and other areas of EU law, discussed in 3.2.4 below.

[308] Art 351 TFEU (former Art 307 EC). See further 2.7 below.

[309] Art 352 TFEU (former Art 308 EC), which provides for the adoption of measures by means of unanimity in the Council and consent of the EP '[i]f action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers'. The predecessor clause did not apply to the previous third pillar: see by analogy, Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat* [2008] ECR I-6351, paras 194–205, and the discussion of Art 75 TFEU below (2.2.3.2).

[310] Art 52 TEU and Art 355 TFEU. Although the previous TEU did not define its territorial scope, some third pillar measures had specific provisions on the subject: see, for instance, Art 8 of the Framework Decision on unauthorized entry and residence ([2002] OJ L 328/1), applying that measure to Gibraltar.

amendment, including new provisions on simplified Treaty amendment.[311] There is still an obligation to ensure consistency between the various policies of the Union,[312] and the provisions concerning the relationship between the EU and its Member States, including the division of power between them, could be particularly relevant to JHA cooperation.[313] So could the revised rules on the protection of human rights within the EU legal order.[314]

2.2.3.2. General provisions

The general provisions of Title V of Part Three of the TFEU concern in turn: general objectives (Article 67 TFEU); the role of the European Council (Article 68 TFEU); the role of national parliaments (Article 69 TFEU); evaluation of JHA policies (Article 70 TFEU); the creation of a standing committee on operational security (Article 71 TFEU); a general security restriction (Article 72 TFEU); coordination of national security agencies (Article 73 TFEU); competence to adopt measures concerning administrative cooperation (Article 74 TFEU); competence over anti-terrorism measures (Article 75 TFEU); and a rule reserving power for Member States to propose policing and criminal law initiatives collectively (Article 76 TFEU). These provisions will be considered in turn.

First of all, Article 67 TFEU sets out objectives for the entire JHA Title, replacing the two separate provisions previously set out in Article 61 EC and Article 29 of the prior TEU:[315]

1. The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.
2. It shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. For the purpose of this Title, stateless persons shall be treated as third-country nationals.
3. The Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of

[311] The possible use of the *passerelle* clause (revised Art 48(7) TEU) has been discussed above, but it should also be noted that the Treaty of Lisbon created the possibility for a slightly simplified system for amending the Treaty provisions concerning EU internal policies (revised Art 48(6) TEU), which applies inter alia to Title V TFEU. See generally G Barrett, 'Creation's Final Laws: The Impact of the Treaty of Lisbon on the "Final Provisions" of Earlier Treaties' (2008) 27 YEL 3.

[312] Art 7 TFEU, replacing the prior Art 3 TEU.

[313] Arts 4 and 5 TEU. See respectively 2.2.3.2 and 2.5 below. On the general rules on EU competence (Arts 2–6 TFEU), see 2.2.4 below.

[314] Arts 6 and 7 TEU; see 2.3 below.

[315] It should be recalled that Art 3(2), revised TEU, sets out general JHA objectives as part of the EU's overall objectives: see 2.2.3.1 above.

judgments in criminal matters and, if necessary, through the approximation of criminal laws.

4. The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters.

The Court of Justice has stated that Article 67(2) is only addressed to the Union, so implicitly does not bind the Member States.[315a] Equally, the other paragraphs of Article 67 address the Union, not the Member States, so presumably must be interpreted the same way.

All of the principles set out in Article 67 could be relevant to the interpretation or even possibly the validity of JHA measures. The first paragraph places at the centre of JHA policy the twin obligation to respect both human rights and the divergences between national laws across the EU. While human rights obligations are referred to separately in the Treaty,[316] the repeated mention of this issue in the specific field of JHA should reinforce this obligation *a fortiori* in this field. The obligation to respect divergent national traditions could be regarded as a particular application of the principle of subsidiarity.[317]

The second to fourth paragraphs define in turn the concepts of 'freedom', 'security', and 'justice', although the word 'freedom' does not explicitly appear in paragraph 2. Article 67(2) is based on the prior Article 61(a) and (b) EC. As compared to the previous Article 61(a) EC, the revised provision does not use the words 'free movement' or make reference to Article 14 EC (now Article 26 TFEU) any longer. However, it should be noted that a link between JHA measures as a whole and the free movement of persons and the abolition of internal frontiers is still made by the revised Article 3(2) TEU. The Union's other immigration-related policies are no longer described partly as 'flanking' the abolition of internal border controls, and the objectives clause in the JHA Title refers expressly now to the principles of fairness (toward third-country nationals) and solidarity (as between Member States).

Furthermore, unlike the previous Article 61(a) and (b) EC, all aspects of the Union's policy are described as 'common', stateless persons are expressly defined as third-country nationals, and there are new references to fairness and solidarity. The first of these changes reflects the 'common' policy on visas, asylum, and immigration referred to in Articles 77–79 TFEU, and makes clear that all aspects of that policy must be considered common. Next, while Article 79(1) refers to 'fair treatment' of legally resident third-country nationals, Article 67(2) requires that *all* EU JHA policies relating to third-country nationals must be 'fair', applying that principle therefore to irregular migrants and to asylum, visas, and borders policies. This principle in part derives from the 'Tampere programme' on JHA

[315a] Joined Case C-188/10 and C-189/10 *Melki and Abdeli*, judgement of 22 June 2010, not yet updated, para 62.

[316] Art 6 TEU; see 2.3 below.

[317] On which, see 2.5 below.

policy objectives adopted in 1999 (see the discussion of Article 68 TFEU below). Finally, the principle of solidarity is referred to in more detail in Article 80 TFEU, and EU legislation already frequently defined third-country nationals as implicitly including stateless persons.[318]

The first part of the third paragraph (up to the words, 'prevent and combat crime') is similar to the prior Article 61(e) EC, and the remainder of the paragraph is a succinct version of the prior Article 29 TEU, with the addition of a specific reference to mutual recognition in criminal matters but without a reference to any specific crimes other than racism and xenophobia. However, mutual recognition in criminal matters is in any event referred to as the basis of EU criminal law in Article 82(1) TFEU.

The fourth paragraph is more specific than the prior Article 61(c) EC, referring now expressly to the principle of 'access to justice' and to specific principles applicable to civil law. However, it should be noted that those principles are set out again (in the same words) in Article 81(1) TFEU, and an express power to adopt measures on 'effective access to [civil] justice' is set out in Article 81(1)(e) TFEU.[319] Moreover, the reference to civil law is not exhaustive ('in particular'), and so the reference to 'access to justice' should also be understood as applying to criminal law (as regards legal aid, for instance) and to administrative proceedings relating to immigration and asylum law.

Article 68 TFEU sets out a special role for the European Council in this area:

> The European Council shall define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice.

This new provision largely reflects the role which the European Council (the EU institution made up of Member States' heads of state or government) was already playing as regards JHA law before the Treaty of Lisbon.[320] In particular, the European Council had already agreed multi-annual guidelines for JHA cooperation.[321] This provision has already been applied to adopt the 'Stockholm programme', the latest multi-year JHA action programme, in December 2009.[322] Although the European Council is not a legislative body,[323] such guidelines are certainly politically highly significant since they are taken into account by other EU institutions.[324] They might also be legally relevant when interpreting JHA legislation, and as noted above, some aspects of the original JHA guidelines

[318] See, for instance, Art 2(a) of Dir 2003/86 on family reunion ([2003] OJ L 251/12).

[319] See ch 8 below.

[320] On the composition and functioning of the European Council, see the revised Art 15 TEU.

[321] See the 'Tampere programme', adopted in 1999, as well as the Hague programme adopted in 2004 ([2005] OJ C 53/1).

[322] [2010] OJ C 115.

[323] Art 15(1), revised TEU.

[324] See the discussion of the implementation of the Tampere and Hague programmes in s 2.2 of chs 3–12, and the discussion substance of the Stockholm programme in s 2.3 of chs 3–12.

adopted by the European Council in Tampere in 1999 are reflected in the measures adopted subsequently. These guidelines are adopted by 'consensus' in the European Council, although the Treaty does not expressly define this concept.[325] There is no specific role in JHA matters for the President of the European Council.[326] Article 68 TFEU differs from the prior role of the European Council in that there is a specific reference to operational cooperation, but surely the European Council would not expect to play a major role in as regards, for instance, the planning of operations by the relevant EU agencies (Europol, Eurojust, and Frontex, the EU border agency), since EU leaders obviously lack the specialist knowledge for this, and their involvement could compromise the agencies' operations.

Article 69 refers to a specific rule for national parliaments as regards scrutiny of JHA legislation:

> National Parliaments ensure that the proposals and legislative initiatives submitted under Chapters 4 and 5 comply with the principle of subsidiarity, in accordance with the arrangements laid down by the Protocol on the application of the principles of subsidiarity and proportionality.

It should be noted that this special role for national parliaments only relates to measures concerning policing and criminal law. Article 69 is considered further as part of the analysis of the legitimacy of EU JHA measures below.[327]

Next, Article 70 TFEU permits the Council to adopt evaluation measures:

> Without prejudice to Articles 258, 259 and 260, the Council may, on a proposal from the Commission, adopt measures laying down the arrangements whereby Member States, in collaboration with the Commission, conduct objective and impartial evaluation of the implementation of the Union policies referred to in this Title by Member States' authorities, in particular in order to facilitate full application of the principle of mutual recognition. The European Parliament and national Parliaments shall be informed of the content and results of the evaluation.

These evaluation measures are non-legislative acts to be adopted by QMV in Council on a proposal from the Commission, with no involvement of the EP.[328] This is a new provision in the Treaties inserted by the Treaty of Lisbon, although in fact a number of previous measures had been adopted concerning evaluation issues prior to the Treaty of Lisbon.

In particular, a general system for evaluation was put in place, with one JHA issue selected in turn for each cycle of evaluation,[329] and there were also specific systems for evaluating candidate Member States, the application of the Schengen

[325] Art 15(4), revised TEU. [326] Art 15(5), revised TEU. [327] See 2.5 below.

[328] On the accountability of evaluation measures, see 2.5 below.

[329] Joint Action ([1997] OJ L 344/7). The issues selected have been mutual assistance, drug trafficking, the supply of information to Europol, the European arrest warrant, and financial crime.

acquis, and the implementation of commitments concerning terrorism.[330] A suggestion by the Commission for a more elaborate system of evaluating JHA policies did not attract sufficient interest in the Council.[331] As for ensuring the correct implementation of Framework Decisions in national law, Member States agreed on a largely standard approach to assessing Member States' implementation of Framework Decisions. All but one Framework Decision specified that Member States should forward information on their implementation of each measure to the Commission and Council by or soon after the implementation deadline. Subsequently, the Commission and Council draw up reports on national implementation, and the Council was supposed to assess that implementation by a specified date.[332] Applying this procedure, there have been a large number of Commission reports and Council conclusions; the Council altered its procedure in 2005 to hold a full debate among ministers concerning the Commission's assertions about non-implementation of the Framework Decision on the European Arrest Warrant.[333] However, the Council stopped drawing up conclusions on national implementation of Framework Decisions after this point. The Commission has also produced reports concerning the national application of the Decision establishing Eurojust, and of the Convention on fraud against the EU's financial interests.[334] However, there was no ongoing evaluation of the application of most Decisions or Conventions, or of the Schengen Information System, or the Schengen rules on policing, criminal law, or border control, visas, and irregular immigration.

The Stockholm programme calls for regular evaluation of EU JHA policies, starting with judicial cooperation in criminal matters but including asylum procedures. It also calls upon the Commission to make proposals to implement Article 70 TFEU.[335] The action plan on implementation of the Stockholm programme provides for a communication on evaluation of JHA policies in 2010 and proposals concerning evaluation of anti-corruption policy (2012) and criminal justice cooperation (2011).[336]

As compared to other Treaty provisions, it is clear that evaluation measures may not concern the *substance* of EU JHA policy, in the absence of any wording conferring such competence. The point is obviously important because otherwise the EP's participation in the legislative process as regards the substance of policy

[330] Joint Action ([2000] OJ L 191/8); Schengen Executive Committee Decision SCH/Com-ex (98) 26 def ([2000] OJ L 239/138); and Decision ([2002] OJ L 349/1). The Commission made two proposals to amend the Schengen evaluation mechanism before the entry into force of the Treaty of Lisbon: COM (2009) 102 and COM (2009) 105, both 4 Mar 2009. The latter proposal lapsed with the entry into force of the Treaty of Lisbon, and the other has not been agreed or adopted; it now has the legal base of Art 74 TFEU (see COM (2009) 665, 2 Dec 2009), on which see below.

[331] COM (2006) 332, 28 June 2006.

[332] The exception is the second Framework Decision on counterfeiting currency, which makes no reference to a report or assessment ([2001] OJ L 329/3).

[333] For more detail, see 9.5.2 below.

[334] See respectively 11.9 and 10.5 below.

[335] See n 322 above, point 1.2.5.

[336] COM (2010) 171, 20 Apr 2010.

would be circumvented entirely, as would the role of national parliaments.[337] Similarly, any rules on the evaluation of specific legislative measures should be included within the relevant legislation.

Article 71 TFEU, another new Treaty provision, provides for the creation of a standing committee on internal security:

> A standing committee shall be set up within the Council in order to ensure that operational cooperation on internal security is promoted and strengthened within the Union. Without prejudice to Article 240, it shall facilitate coordination of the action of Member States' competent authorities. Representatives of the Union bodies, offices and agencies concerned may be involved in the proceedings of this committee. The European Parliament and national Parliaments shall be kept informed of the proceedings.

This committee (known as 'COSI', based on the French acronym) was established by the Council shortly after the date of entry into force of the Treaty of Lisbon.[338] The Decision establishing COSI makes clear that the committee does not have the competence to adopt legislative measures, and does not conduct operations,[339] but rather 'shall facilitate, promote and strengthen coordination of operational actions of the authorities of the Member States competent in the field of internal security', and 'shall also evaluate the general direction and efficiency of operational cooperation; it shall identify possible shortcomings or failures and adopt appropriate concrete recommendations to address them'.[340] It includes representatives from JHA agencies involved in operations.[341] As a Council committee it is subject to the rules on access to documents.[342]

There is no longer any reference, following the entry into force of the Treaty of Lisbon, to the previous committees which assisted the Council's discussions as regards the legislative (and to some extent the operational) aspects of the previous third pillar.[343] However, the Council (or, more precisely, Coreper)[344] has chosen to retain the committee that previously assisted its work as regards the legislative aspects of policing and criminal law, along with the 'Strategic Committee on Immigration, Frontiers and Asylum' and a number of other JHA working parties.[345]

[337] On the latter point, see 2.5 below.

[338] [2010] OJ L 52/50. The Council established the Committee as a procedural matter, pursuant to Art 240(3) TFEU, which meant that the Decision was adopted by a simple majority with no opt-out procedures possible. There was no role for the EP or the Commission.

[339] Art 4, COSI Decision.

[340] Arts 2 and 3(2), COSI Decision.

[341] Art 5, COSI Decision.

[342] See 2.5 below.

[343] These were the Art K.4 Committee before the Treaty of Amsterdam, and the Art 36 Committee after the Treaty of Amsterdam, named after the relevant Treaty articles.

[344] See Art 19 of the Council's rules of procedure ([2009] OJ L 325/35).

[345] See Council docs 16070/09, 16 Nov 2009 and 17653/09, 16 Dec 2009. The Art 36 Committee is now called the 'Coordinating Committee in the area of police and judicial cooperation in criminal matters', but still uses its prior French acronym ('CATS'; see Council doc 17611/09, 15 Dec 2009).

The next question is the extent of national competence as regards internal security. This issue arises most obviously in respect of Article 72 TFEU, which provides 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'. In fact, this provision copies the wording of the previous Articles 64(1) EC and 33 TEU. But this issue also arises as regards Article 73 TFEU, which had no equivalent in the previous versions of the Treaties, and which provides that:

> It shall be open to Member States to organise between themselves and under their responsibility such forms of cooperation and coordination as they deem appropriate between the competent departments of their administrations responsible for safeguarding national security.

Furthermore, the revised Article 4(2) TEU provides that:

> The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.
>
> It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

Only the requirement to respect Member States' 'national identities' previously appeared expressly in the Treaties,[346] and the Court of Justice has only briefly touched upon the interpretation of this provision.[347] This may, however, be due to the exclusion of the Court's jurisdiction as regards this provision,[348] a restriction which was lifted by the Treaty of Lisbon. Furthermore, Articles 346–348 TFEU (previously Articles 296–298 EC) provide for specified exceptions relating to the arms trade and national security; those provisions were not substantively amended by the Treaty of Lisbon, and (as noted above) have applied to policing and criminal law matters as well after that Treaty entered into force.

To what extent do these provisions reserve competence to Member States? First, Article 72 TFEU should be interpreted the same way as the previous Treaty Articles with identical wording. Although these Articles have not yet been interpreted by the Court of Justice, the best interpretation is that they confirmed that the use of coercive measures in order to enforce measures adopted pursuant to the JHA provisions of the Treaties is left to the Member States' authorities, in particular as regards arrest, detention, and the use of force. EU agencies are therefore limited to supporting actions of national authorities, except (and only)

[346] Previous Art 6(3) TEU.
[347] Case C-473/93 *Commission v Luxembourg* [1996] ECR I-3207.
[348] See the previous Art 46 TEU, and more generally 2.2.2.2 above.

to the extent that the Treaty confers express powers to act on such agencies.[349] This interpretation is also consistent with the limitation on the Court's jurisdiction pursuant to Article 276 TFEU.[350]

In particular, the express restriction upon Europol taking 'coercive measures' set out in Article 88 TFEU should be understood as a specific application of this general rule. However, Article 72 TFEU should not be understood to preclude the adoption of measures pursuant to Article 86 TFEU which confer upon the European Public Prosecutor those powers which the Treaty expressly provides for, or such further judicial or prosecutorial powers as would be clearly necessary to carry out the Prosecutor's functions. Fundamentally, this exclusion should not be seen as a restriction on the *subject matter* which the EU is competent to address, but rather as a rule regarding the division of powers between the EU and the Member States as regards the *execution* of operational measures necessary to implement EU rules. Where the drafters of the Treaty of Lisbon wished to restrict the Union's competence regarding specific JHA issues, they have done so expressly,[351] and so further specific restrictions on competence over specific subject matter cannot be inferred from a general rule like Article 72.

Next, to what extent does Article 73 TFEU limit the EU's competence? This Article does not as such exclude the EU from competence to adopt measures concerning cooperation regarding national security. This is particularly obvious when comparing it to the Treaty Article which quite clearly reserves 'competence' to Member States, such as Article 79(5) TFEU. Following the model of Article 79(5), if the drafters of Article 73 had wished to reserve national competence over security services unambiguously, Article 73 could simply have provided that, '[t]his Title shall not affect the competence of Member States to organise between themselves...'. In any event, Article 73 does not impact upon the ability of the EU to regulate security services *to the extent that they participate in law enforcement.* If the EU were precluded from regulating such matters, this would restrict the effectiveness of the EU to regulate law enforcement issues, given the involvement of security agencies in law enforcement, and so such an exclusion would surely have to be provided for expressly. Furthermore, this interpretation would significantly undermine the accountability of EU action in this area.

As for the adoption of EU measures regulating internal security cooperation per se, Article 73 leaves it 'open' to Member States to cooperate on this matter, but does not expressly rule out the adoption of EU measures on this issue. Nor does such cooperation fall outside the scope of the EU's JHA objectives of ensuring a 'high level of security' by means of measures concerning police, judicial, 'and *other* competent authorities'.[352]

[349] See more specifically 3.2.4, 11.2.4, and 12.2.4 below.
[350] On Art 276 TFEU, see further 2.2.2.2 above.
[351] See Art 79(5) TFEU.
[352] See Art 67(3) TFEU, discussed further above.

Nevertheless, EU competence over the regulation of internal security agencies appears to be ruled out by one of the TEU's general clauses on the relationship between the EU and the Member States. As we have seen above, Article 4(2) TEU states that a 'particular' rule regarding the EU's respect for 'essential state functions' is that 'national security remains the sole responsibility of each Member State'. It is hard to see how an EU power to regulate such matters could be exercised without encroaching upon this 'sole responsibility'. Having said that, the general rule in Article 4(2) TEU should not be understood, any more than the specific rule in Article 73 TFEU, to exempt security agencies entirely from the scope of EU law when they exercise law enforcement functions, as distinct from functions relating to national security.

Finally, how should the broader requirement in Article 4(2) TEU of 'respect' for essential state functions, 'including... maintaining law and order and safeguarding national security', be interpreted? Since the reference to 'maintaining law and order' is identical to Article 72 TFEU in this respect, this part of Article 4(2) adds no further limitation to the EU's powers.[353] As for the reference to 'safeguarding national security', it is only relevant to the extent that *national* security is at issue, rather than *internal* security. But even to the extent of the overlap between the two provisions, the obligation to *respect* State functions as regards national security as set out in Article 4(2) TEU is less far-reaching than the requirement not to *affect* internal security responsibilities as set out in Article 72 TFEU. It must therefore be concluded that the general rule in the first sentence of Article 4(2) TEU does not lay down any additional restriction on EU action besides those spelt out in Article 72 TFEU as regards responsibilities for law and order and internal security, and in the second sentence of Article 4(2) TEU as regards the sole responsibility for national security.

Next, Article 74 TFEU provides for a power to adopt measures concerning administrative cooperation:

> The Council shall adopt measures to ensure administrative cooperation between the relevant departments of the Member States in the areas covered by this Title, as well as between those departments and the Commission. It shall act on a Commission proposal, subject to Article 76, and after consulting the European Parliament.

This power previously existed before the Treaty of Lisbon as regards immigration, asylum, and civil law (see the prior Article 66 TEC), but was expanded by that Treaty to cover policing and criminal law as well, subject to the possibility that one-quarter of Member States are able to propose a measure in this area in

[353] It might be objected that where a Treaty rule is repeated, there must be some additional legal meaning accorded to the second appearance of the rule. However, the drafters of the Treaty of Lisbon were apparently quite content to repeat several provisions of the Treaty purely for the sake of emphasis—as evidenced by Arts 4(1) TEU and the second sentence of Art 5(2) TEU, for instance.

those fields.[354] These measures are adopted by a QMV in the Council after consultation of the EP, and are not legislative. Because of the different decision-making procedure, it is important to distinguish this provision from the substantive legal bases in Title V which provide either for the ordinary legislative procedure or unanimous voting in the Council. Given the limited wording of Article 74 and the express provisions conferring competence as regards substantive law, Article 74 cannot be the legal base for any measure affecting substantive JHA law, for instance concerning border checks; the substance or procedure relating to applications for visas, asylum, or residence permits; the rules relating to civil jurisdiction or civil procedure; the mutual recognition of criminal law decisions; or the exchange of information between law enforcement authorities. Instead, the Article is a legal base for measures concerning issues such as exchanges of personnel or exchanges of general information (as distinct from the exchange of information on specific individuals for law enforcement or immigration control purposes).[355]

Next, Article 75 TFEU provides for the adoption of legislation on anti-terrorist sanctions. This is a new provision inserted by the Treaty of Lisbon, so the background first of all needs to be explained.[356] Before the entry into force of the Treaty of Lisbon, the EU adopted measures freezing the assets and income of persons and groups who were believed to be terrorists but whose alleged activities were primarily outside the EU. One category of such groups and persons were those who were allegedly linked to al-Qaeda and the Taliban, and the EU established a legal framework by means of which it simply copied the lists of such persons and groups designated by a committee of the United Nations Security Council.[357] The second category (subject to separate legislation) consisted of those persons and groups which the EU institutions believed to be terrorists, but who were listed as terrorists on the basis that a 'competent authority' was investigating or prosecuting them for terrorist offences (the 'autonomous' list).[358]

In both cases, the legal bases for the adoption of the relevant measures were Articles 60, 301, and 308 of the previous EC Treaty. Article 301 provided for the adoption of economic sanctions against third countries by QMV in Council after a Commission proposal, with no involvement of the EP, following the adoption of a foreign policy measure pursuant to Title V of the previous TEU. Article 60 of the previous EC Treaty applied the same procedure as regards financial sanctions

[354] Art 76 TFEU, discussed further below. This rules out the prospect of a Member States' initiative concerning administrative cooperation across the whole of Title V.

[355] See further 2.4 of chs 3–12.

[356] On the substance of EU anti-terrorist sanctions legislation and the litigation concerning its application, see 12.4.5 below.

[357] Reg 881/2002, [2002] OJ L 139/9, as amended by Reg 561/2003, [2003] OJ L 82/1.

[358] Reg 2580/2001, [2001] OJ L 344/79, which applied alongside a foreign policy measure (Common Position 2001/931, [2001] OJ L 344/93).

against third countries.[359] Finally, Article 308 of the previous EC Treaty was used as an additional legal base so that the EU sanctions measures could be extended to persons and groups not connected with a third state's government; this provision was subject to unanimous voting in the Council and consultation of the EP, with no requirement of a prior foreign policy measure. No EU sanctions measures were adopted against persons or groups who were believed to be terrorists but whose activity was mainly *internal* to the EU, because it was believed (correctly or not) that the EC and EU had no power to adopt sanctions in that case. Following the entry into force of the Treaty of Lisbon, the correctness of that view is now moot. However, the EU nevertheless designated some such groups and persons as 'terrorists' on its autonomous list, for the (sole) purpose of cooperating as regards 'enquiries and proceedings' in respect of such persons within the scope of the third pillar (as it then was).[360] The legal bases used for these measures were upheld by the Court of Justice, which ruled that Articles 60 and 301 EC could be used as regards the material scope of sanctions against al-Qaeda, but not as regards the personal scope of such sanctions, because those Treaty articles only provided competence to adopt sanctions measures as regards entire countries or 'the rulers of such a country and also individuals and entities associated with or controlled, directly or indirectly, by them'. Article 308 EC gave the EC the power to extend the scope of those sanctions to persons not connected to a governing regime, because the failure to adopt uniform rules in this regard could impact upon the operation of the common market (which was at the time a requirement for the use of Article 308).[361]

The Treaty of Lisbon replaced Articles 60 and 301 EC with Article 215 TFEU, which applies to both economic and financial sanctions (without any special rule relating to national financial sanctions) and also now permits the EU to apply such sanctions 'against natural or legal persons and groups or non-State entities'. The decision-making process remains the same as before, with the addition of a requirement that the EU's High Representative for foreign policy jointly propose the measure concerned.[362] Article 215 also requires the adoption of 'legal safeguards' relating to sanctions measures; measures based on this Article are not legislative acts.

But the Treaty of Lisbon also added Article 75 TFEU, which provides that:

> Where necessary to achieve the objectives set out in Article 67, as regards preventing and combating terrorism and related activities, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall

[359] Art 60(2) EC set out a specific rule relating to financial sanctions by Member States, but there was no equivalent rule in the prior Art 301 EC.

[360] See Art 4 of Common Position 2001/931 (n 358 above). The application of this provision was at issue in Case C-355/04 P *SEGI* [2007] ECR I-1657.

[361] Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat* [2008] ECR I-6351, paras 163–178, 211–216, and 222–236.

[362] On this position, see Art 18, revised TEU.

define a framework for administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities.

The Council, on a proposal from the Commission, shall adopt measures to implement the framework referred to in the first paragraph.

The acts referred to in this Article shall include necessary provisions on legal safeguards.

As compared to Article 215 TFEU, the basic measures to be adopted pursuant to Article 75 TFEU are legislative acts which must be adopted by the use of the ordinary legislative procedure, with no requirement of the adoption of a prior foreign policy act or for a joint proposal by the High Representative. There is also an opt-out from Article 75 measures for the UK and Denmark (but not Ireland), although the UK intends to opt in to such measures.[363] No opt-out applies to Article 215 TFEU.

Which of these provisions applies to the adoption of anti-terrorist measures? Unsurprisingly the EP argues that Article 75 applies,[364] but the Council and Commission argue that Article 215 applies. Shortly after the entry into force of the Treaty of Lisbon, the Council adopted a measure amending the basic framework for sanctions against al-Qeada and the Taliban on the basis of Article 215 TFEU,[365] and the EP has challenged this before the Court of Justice, primarily on the basis that this measure has the wrong 'legal base'.[366] The best view on this issue is that Article 75 is a *lex specialis* as regards anti-terrorist sanctions, and applies instead of Article 215 TFEU in the absence of any exclusion from or limitation of the scope of the JHA provision. Sanctions against any alleged terrorists contribute to the objectives set out in Article 67 TFEU (as Article 75 requires), given that Article 67 does not limit itself to actions carried out on EU Member States' territories and that the TEU provides that the protection of the EU's external objectives also takes place by means of the external aspects of the EU's internal policies.[367] Since all anti-terrorist measures are linked to some extent to Resolutions of the United Nations Security Council, the Council's approach would mean that Article 75 is deprived of all meaning. Article 215 could still be used as the legal base for the adoption of sanctions measures *not* concerning terrorism.

In the alternative, Articles 75 and 215 should be the joint legal base for the adoption of anti-terrorist measures. While there are differences between these two legal bases, in that Article 215 requires a joint proposal from the High Representative and the prior adoption of a foreign policy measure, the latter point was equally true as regards the joint use of Articles 60, 301, and 308 EC

[363] See 2.2.5.1 and 2.2.5.2 below.

[364] Use of Art 75 also entails scrutiny powers for national parliaments (see 2.5 below), whereas Art 215 does not.

[365] Reg 1265/2009, [2009] OJ L 346/42.

[366] Case C-130/10 *EP v Council*, pending.

[367] Art 21, revised TEU.

before the entry into force of the Treaty of Lisbon; nevertheless, the Court of Justice did not object to it in the *Kadi* judgment. Nor did the Court object in that judgment to the combined use of a legal base requiring consultation of the EP and a legal base giving the EP no role, so there is no reason to object to a combined legal base requiring the ordinary legislative procedure and the non-consultation of the EP.[368] The difference in the legal bases as regards the role (and non-role) of the High Representative is surely analogous, and no more problematic than, the difference as regards the role (and non-role) of the EP.[369]

However, since Articles 75 and 215 only apply to *sanctions*, they cannot be used merely to list alleged terrorists or terrorist groups for the mere purpose of enhancing judicial and police cooperation. The correct legal bases for that process after the Treaty of Lisbon are Articles 82 and 87 TFEU.[370] The Council has already made a legal error on this point, when it updated the list of external terrorist groups and persons who were subject to both sanctions and enhanced judicial and police cooperation after the entry into force of the Treaty of Lisbon, by means of the foreign policy powers conferred by Article 29, revised TEU.[371]

Finally, Article 76 TFEU provides for a continued possibility for Member States to propose measures concerning policing and criminal law:

> The acts referred to in Chapters 4 and 5, together with the measures referred to in Article 74 which ensure administrative cooperation in the areas covered by these Chapters, shall be adopted:
>
> (a) on a proposal from the Commission, or
>
> (b) on the initiative of a quarter of the Member States.

This retains a power enjoyed (and often exercised) by Member States before the Treaty of Lisbon.[372] However, as compared to the prior third pillar, Member States cannot propose measures individually, but can make initiatives only if (at least) one-quarter of Member States propose them. So far, there have been three such initiatives.[373] The question arises whether Member States can withdraw or amend such initiatives, either collectively or individually. The TFEU provides that the *Commission* can always amend its proposals, and that Member

[368] Note that the Court of Justice has accepted joint legal bases which combine consultation of the EP with its pre-Lisbon co-decision rights: see for instance, Case C-166/07 *EP v Council* [2009] ECR I-7135.

[369] In fact, it is less problematic than the combination of unanimity and QMV in the Council, which the Court accepted without comment in both *EP v Council* (ibid) and *Kadi*.

[370] On the scope of Art 87 generally, see 12.2.4 below.

[371] Decision 2009/1004, [2009] OJ L 346/58.

[372] See the prior Art 34 TEU, discussed in 2.2.2.2 above.

[373] These are initiatives for Directives on: the right to interpretation and translation in the framework of criminal proceedings ([2010] OJ C 69/1); a European protection order ([2010] OJ C 69/5); and a European investigation order ([2010] OJ C 165/22). Note that the Commission issued a competing proposal on the first subject: COM (2010) 82, 9 Mar 2010.

States must normally vote unanimously to amend *Commission* proposals.[374] The absence of a reference to Member State initiatives suggests that these rules do *not* apply to such initiatives. In other cases, the TFEU sets out special rules for Member State initiatives.[375] However, although Member States cannot withdraw or amend their initiatives, there is nothing in the Treaty to prevent (a) Member State(s) voting against initiatives that it (or they) have made, or, where relevant, pulling an 'emergency brake' concerning those initiatives.[376] While it might seem odd that a Member State would vote against its own initiative, it is conceivable that a Member State might change its mind due to a change of government or in reaction to public discussion of the proposal, or because the proposal has been amended during the decision-making process and the Member State in question disagrees with such changes.

2.2.3.3. Transitional rules[377]

The transitional rules in the Treaty of Lisbon relating to the abolition of the former third pillar appear in a special transitional Protocol, which governs a number of issues concerning the transition from the previous rules in the Treaties to the new rules introduced by the Treaty of Lisbon. There are three different issues relating to the former third pillar addressed by the Protocol: the jurisdiction of the Court of Justice over third pillar measures adopted before the entry into force of the Treaty of Lisbon ('pre-existing third pillar measures') for a five-year transitional period (ending 1 December 2014); the legal effect of those same measures (*not* subject to a transitional period); and the possibility of the UK to opt out of those measures at the end of the five-year transitional period.[378] The first two issues are considered here, while the third issue is considered further below, along with the other opt-outs for the UK on JHA matters.[379] As noted above, there are no transitional restrictions on the full extension of the Court of Justice's jurisdiction as regards immigration, asylum, and civil law.[380]

First of all, the transitional provision on the Court of Justice states that the powers of the EU institutions, namely the role of the Commission in infringement actions and the jurisdiction of the Court of Justice, remains the same for pre-existing third pillar measures as before the Treaty of Lisbon for the five-year

[374] Art 293 TFEU. It is assumed in practice, at least by the Commission, that the former rule gives full discretion to the Commission to *withdraw* its proposals.

[375] See Arts 294(15) and 238(2) and (3)(b) TFEU, as regards the ordinary legislative procedure and Council voting rules respectively.

[376] Equally, there is nothing to stop (a) Member State(s) which proposed an initiative bringing an action to annul it after its adoption.

[377] For more detailed analysis of this issue, see S Peers, 'Finally "Fit for Purpose?" The Treaty of Lisbon and the End of the Third Pillar Legal Order' (2008) 27 YEL 47.

[378] A complete list of binding pre-existing third pillar acts which were in force at the date of entry into force of the Treaty of Lisbon, as well as subsequent amendments and proposed amendments to those acts, appears in Appendix II.

[379] See 2.2.5.1.4.

[380] See 2.2.3.1.

transitional period, including where a Member State accepted the jurisdiction of the Court of Justice over references for a preliminary ruling pursuant to the previous rules.[381] Presumably this refers not only to the rules on the Court's jurisdiction applicable to measures adopted between 1999 and 2009, but also to the jurisdictional rules applicable to measures adopted before 1999 (limited jurisdiction for Conventions, no jurisdiction for other acts), to the extent that the pre-Amsterdam measures are still in force.[382] It should be recalled that the pre-existing third pillar measures include the *immigration* provisions of the SIS, except to the extent that they have been amended since 1999, until SIS II becomes operational.

What does this mean in practice? As noted above,[383] for the third pillar measures adopted between 1999 and 2009: nineteen Member States accepted the Court's jurisdiction for preliminary rulings; no infringement actions were possible; there were special rules on the Court's jurisdiction as regards dispute settlement between Member States and between Member States and the Commission; and there were special rules on annulment actions (which were moot by early 2010 due to the time limit on bringing annulment actions).[384] So the limitation on the Court's jurisdiction is particularly relevant as regards those Member States that did not opt in to the Court's jurisdiction as regards preliminary rulings, and as regards the exclusion of the Commission's ability to bring infringement proceedings. Although one interpretation of the transitional protocol would suggest that Member States which did not opt in to the Court's preliminary rulings jurisdiction as regards pre-existing third pillar measures before the entry into force of the Treaty of Lisbon could not then do so during the transitional period, the better interpretation is that they are still able to do so, as this would facilitate the underlying purpose of the Protocol of providing for a smooth transition to the new jurisdictional rules set out in the Treaty of Lisbon.[385]

The transitional protocol contains an important qualification upon the continued limitations upon the Court's jurisdiction. Once a pre-existing third pillar act is amended, the Court's new jurisdiction will apply as regards those Member States for which the amended act is applicable.[386] This takes account of the possible

[381] Art 10(1), transitional protocol. All references in this subsection are to the transitional protocol, unless otherwise indicated. On the substance of the previous rules on the Court's jurisdiction, see 2.2.2.2 above.

[382] On the substance of the pre-Amsterdam rules on the Court's jurisdiction, see 2.2.1 above.

[383] See 2.2.2.2.

[384] It should be noted that the validity of a third pillar act can still be challenged through the national courts without any time limit, by means of a reference pursuant to the previous Art 35(1) TEU or (after the end of the transitional period) Art 267 TFEU.

[385] In any event, the relevant wording of Art 10(1)—'including where they have been accepted under Article 35(2) of the said Treaty on European Union'—does not unambiguously require that the relevant jurisdiction must 'have been accepted' before the entry into force of the Treaty of Lisbon. See also, by analogy, Case C-296/08 *Santesteban Goicoechea* [2008] ECR I-6307.

[386] Art 10(2).

restriction in territorial scope of the amended act, pursuant to the special opt-out rules applying to the UK, Ireland, and Denmark, the general rules on enhanced cooperation, and the special voting rules applicable to aspects of EU policing and criminal law, which could lead to a 'fast-track' application of the enhanced cooperation rules.[387] In any event, whether a pre-existing third pillar act is amended during the transitional period or not, the Court's normal jurisdiction will apply to all those acts at the end of the transitional period.[388]

As for the special rules on the legal effect of pre-existing third pillar measures, the transitional protocol provides that the legal effect of acts adopted on the basis of the TEU before the Treaty of Lisbon entered into force 'shall be preserved until those acts are repealed, annulled or amended in implementation of the Treaties'; this also applies to 'agreements concluded between Member States on the basis of' the TEU.[389] The latter provision covers third pillar Conventions. There is no time limit on the application of this provision, which at the very least preserves the lack of direct effect of pre-existing Framework Decisions and Decisions, and also preserves other restrictions which arguably exist as regards the legal effect of pre-existing third pillar measures as compared to other EU law.[390]

Obviously, much rests on the amendment of pre-existing third pillar acts, particularly within the five-year transitional period applicable to the jurisdiction of the Court of Justice.[391] The Final Act of the Treaty of Lisbon contains a declaration specifically addressing this issue:

> The Conference invites the European Parliament, the Council and the Commission, within their respective powers, to seek to adopt, in appropriate cases and as far as possible within the five-year period referred to in Article 10(3) of the Protocol on transitional provisions, legal acts amending or replacing the acts referred to in Article 10(1) of that Protocol.

The Stockholm programme also makes specific reference to the transformation of pre-existing third pillar acts, stating that the Action Plan to implement the programme 'should include a proposal for a timetable for the transformation of instruments with a new legal basis'.[392] However, the Commission's Action Plan does not contain a specific timetable to this end, although implicitly a significant number of pre-existing measures would be replaced or amended within the transitional period.[393]

In practice, in the first nine months after the Treaty of Lisbon entered into force, the Commission tabled two proposals which would repeal prior third pillar

[387] See respectively 2.2.5.1, 2.2.5.2, 2.2.5.5, and 2.2.3.4, all below. [388] Art 10(3).

[389] Art 9. This provision also applies to pre-existing CFSP acts, but they are not considered further here. [390] On the legal effect of pre-existing third pillar measures, see 2.2.2.2 above.

[391] The amendment of pre-existing third pillar acts within the transitional period also has an impact on the scope of the UK's option to disapply all pre-existing acts at the end of that period: see 2.2.5.1.4 below. [392] [2010] OJ C 115, point 1.2.10.

[393] COM (2010) 171, 20 Apr 2010.

acts (one of which was already agreed),[394] and one proposal which would amend a prior third pillar act (this proposal was subsequently adopted).[395] A group of Member States tabled an initiative to repeal a prior third pillar act and 'replace' the corresponding provisions of several others.[396]

A crucial question as regards the transitional protocol is the definition of an 'amendment' to a pre-existing third pillar act.[397] There is no de minimis rule, so it would seem that even a minor amendment to a pre-existing third pillar act would trigger the application of the new rules on the Court's jurisdiction and the legal effect to all the measure concerned. It makes sense that where there are measures implementing a parent act, only an amendment to the parent act would trigger the new rules concerned, which would then apply to the entirety of the parent act and all implementing measures as an *ensemble*, because the implementing measures depend on the parent act for their validity. In order to give the protocol its full effect, the new rules on legal effect and Court jurisdiction should apply to a pre-existing third pillar measure as soon as an amending act enters into force, rather than the date of applicability or the deadline for Member States to apply the amending act. For the same reasons, the provisions of the Schengen *acquis* allocated to the previous third pillar should be treated as a single act for the purposes of the protocol; but these provisions must be severed from the provisions of that *acquis* which were allocated to the EC legal order in 1999 (ie immigration measures), since the latter provisions are outside the scope of the transitional protocol.

2.2.3.4. Special decision-making rules

As noted above, in order to assuage some Member States' concerns about the loss of sovereignty in vital areas relating to criminal law and policing, the JHA provisions in the Treaty of Lisbon contain two special decision-making rules, one known as the 'emergency brake' and the other referred to in this book as the 'pseudo-veto'. The emergency brake applies to decisions regarding domestic

[394] These were proposals for Directives on sexual offences regarding children (COM (2010) 94, 29 Mar 2010) and trafficking in persons (COM (2010) 95, 29 Mar 2010), which would replace the Framework Decisions on the same subjects (respectively [2004] OJ L 13/44 and [2002] OJ L 203/1). The Council agreed on the trafficking proposal in June 2010, but, at the time of writing, still has to agree the text with the EP (Council doc 10845/10, 10 June 2010).

[395] This was a proposal for a Regulation (COM (2010) 15, 29 Jan 2010), amending the previous Decision on migration from the first-generation to the second-generation SIS as regards policing and criminal law ([2008] OJ L 299/43). The Regulation was adopted as Reg 542/2010, [2010] OJ L 155/23.

[396] Initiative for a Directive establishing a European investigation order ([2010] OJ C 165/22), which would repeal the Framework Decision establishing the European Evidence Warrant ([2008] OJ L 350/72) and replace the corresponding provisions of the EU Convention on Mutual Assistance ([2000] OJ C 197/1), its Protocol ([2001] OJ C 326/1), and the Schengen Convention ([2000] OJ L 239).

[397] This question is also relevant as regards the opt-outs of the UK, Ireland, and possibly in future Denmark from JHA matters, since special rules apply if they opt out of an amendment of an act which they are already bound by. See 2.2.5.1 and 2.2.5.2 below.