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THE TREATY OF LISBON AND THE
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COURT OF JUSTICE IN THE FIELD
OF JUSTICE AND HOME AFFAIRS

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**THE TREATY OF LISBON AND THE REFORMED
JURISDICTIONAL POWERS OF THE EUROPEAN COURT OF
JUSTICE IN THE FIELD OF JUSTICE AND HOME AFFAIRS**

**STEPHEN CARRUTHERS, PhD, Lecturer in Law at the Dublin Institute
of Technology**

Summary

This Article analyses the jurisdictional powers of the Court of Justice of the European Union (ECJ) in respect of Justice and Home Affairs (JHA) measures both under pre-Lisbon Title VI TEU and post-Lisbon under Title V of Part Three TFEU. In Part One, it assesses the deficiencies of the pre-Lisbon system. In particular it analyses the negative consequences for legitimacy arising from the restrictions on justiciability in respect of pre-Lisbon JHA measures in light of case law of the ECJ and the European Court of Human Rights. In Part Two, it outlines the genesis and substance of the reforms in the Treaty of Lisbon, including a summary of the transitional regime that will to apply to the jurisdiction of the ECJ over the pre-Lisbon *acquis*. In conclusion, the Article assesses the effectiveness of the Treaty of Lisbon jurisdictional reforms from the perspective of compliance with the rule of law.

THE TREATY OF LISBON AND THE REFORMED JURISDICTIONAL POWERS OF THE COURT OF JUSTICE OF THE EUROPEAN UNION IN THE FIELD OF JUSTICE AND HOME AFFAIRS (JHA)

INTRODUCTION

A key criterion for assessing justice in the Union's Area of Freedom, Security and Justice (AFSJ), both under its pre-Lisbon split structure and under the unified Treaty of Lisbon (TL) regime, is the effectiveness of the Union's legal order in providing access to the remedy of judicial review of acts of the Union's institutions to control compliance with international human rights standards.¹ In undertaking this assessment, this Article focuses on the jurisdictional powers of the Court of Justice of the European Union (ECJ) over Union acts implementing judicial cooperation in criminal matters and police cooperation (Justice and Home Affairs or JHA) adopted pre-Lisbon under Title VI TEU (pre-Lisbon JHA) and post-Lisbon under Chapters 1, 4 and 5 of Title V TFEU (Lisbon JHA).

¹ See S. Carruthers, 'Human Rights in EU Law: Justice, Terrorism and Constitutional Reform' (VDM, 2009), pp. 1-6. A distinction should be drawn between jurisdiction, which is the primary concern of this Article, and the standard of judicial review to be applied once jurisdiction has been established. This distinction is demonstrated by *Kadi*, below Section 2.4, where the issue was not primarily one of jurisdiction but the standard of judicial review. Reference to the Treaty of Lisbon is to *The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community*, signed at Lisbon on 13 December 2007 [2007] OJ C306/1. The date of entry into force of the TL is referred to as the TL Effective Date: Pre-Lisbon refers to Union law prior to that date and Post-Lisbon to Union law as from that date. If an Article of the Pre-Lisbon TEU or TEC is substantially unamended by the TL the pre-Lisbon corresponding numbering is stated in brackets.

The deficiencies of the regime of justiciability in respect of pre-Lisbon JHA acts and, to a more limited extent, the restrictions on the jurisdictional powers of the ECJ to review acts adopted under pre-Lisbon Title IV EC Treaty on the Union's policies on Border Checks, Asylum and Immigration,² attracted sustained criticism and demands that the ECJ be granted full jurisdiction over all areas of the AFSJ on the same conditions as other areas of Union law.³ The normalization of the ECJ's jurisdiction over the AFSJ, albeit subject to potential continuing limitations in the security domain, constitutes one of the principal achievements in the TL, building on the reforms in the Constitutional Treaty,⁴ in an area where security requirements had traditionally taken precedence over access to justice and the protection of human rights at the national and Union level. Indeed, the retention in the TL of the substance of the AFSJ reforms agreed in the Constitutional Treaty was a considerable

² The pre-Lisbon Title IV TEC jurisdiction of the ECJ is described in Carruthers, above n.1, at pp. 231-235. The TL Protocol on Transitional Provision does not provide for any transitional period in respect of the provisions on the ECJ's jurisdiction under pre-Lisbon Title IV TEC and they therefore cease to apply even in respect of Pre-Lisbon Title IV TEC measures. The jurisdiction of the ECJ in respect of the pre-Lisbon and post-Lisbon Schengen *acquis* under the pre-Lisbon and post-Lisbon Schengen Protocols is not discussed. See on the Schengen Protocols pre- and post-Lisbon, S. Peers, 'In a World of their Own? Just and Home Affairs Opt-Outs and the Treaty of Lisbon' (2007-2008) 10 *CYELS*, pp. 383-412, at pp. 386-389 and pp. 394-397.

³ See the submissions to Working Group II on *Incorporation of the Charter/Accession to the ECHR* (WGII): listed in Working Document 21 of 1 October 2002, at p. 3, n. 7: available on the European Convention website at: <http://european-convention.eu.int/>.

⁴ Reference to the Constitutional Treaty is to the *Treaty establishing a Constitution for Europe* signed at Rome on 29 October 2004: [2004] OJ C310/1.

political achievement for the German Presidency that submitted the 2007 IGC mandate.⁵ Following the rejection by the French and Dutch electorate of the Constitutional Treaty in 2005, the Council was reluctant to accede to a substantial extension of the jurisdiction of the ECJ over the JHA through the transfer mechanism provided for in Pre-Lisbon Article 42 TEU.⁶ The reforms to the jurisdictional powers of the ECJ over the AFSJ were closely tied to the fate of the TL.⁷

This Article is divided into two parts. Part One outlines the restricted jurisdictional powers of the ECJ over the pre-Lisbon JHA and analyses the negative consequences for the legitimacy of the Union's legal order arising from those restrictions. It also examines the jurisprudence of the ECJ and the ECtHR in response to this anomalous and restrictive jurisdictional regime.

⁵ The *IGC 2007 Mandate* is attached as Annex 1 to the European Council Presidency Conclusions of 21/22 June 2007: Document No. 11218/07. See Grainne de Burca, 'Reflections on the EU's Path from the Constitutional Treaty to the Lisbon Treaty' (2008) *Fordham Law Legal Studies Research Paper No. 11245866* (copy kindly provided by Fordham University School of Law).

⁶ See *Communication from the Commission to the Council and the European Parliament: Implementing the Hague Programme: The Way Forward*, 28 June 2006, COM(2006) 331 final, at para. 3.2. The Council also failed to adopt the Commission's Communication of 28 June 2006, *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* (COM(2006) 346 final) approved by the European Parliament by a legislative resolution of 25 April 2007 (A6-0082/2007).

⁷ The rejection of the TL in a referendum held in Ireland on 12 June 2008 delayed the entry into force of the TL beyond the original scheduled date of 1 January 2009. Following approval of the TL in a second referendum held on 2 October 2009, Ireland ratified the TL. The terms for the final ratification by the Czech Republic is under negotiation.

Part Two describes the genesis and scope of the reforms in the TL of the jurisdictional powers of the ECJ over the JHA and assesses the TL Protocol on Transitional Provisions.

PART ONE

THE SCOPE OF THE ECJ'S JURISDICTION OVER PRE-LISBON JHA

1.1. INTRODUCTION

This Part focuses on the scope and deficiencies of the jurisdictional powers of the ECJ in respect of pre-Lisbon JHA measures.⁸ An understanding of the pre-Lisbon JHA jurisdictional regime remains relevant even after the entry into force of the TL. Firstly, Article 10(1) of the TL Protocol on Transitional Provisions preserves the jurisdictional powers of the ECJ under pre-Lisbon Title VI TEU in respect of unamended pre-Lisbon JHA measures until five years after the TL Effective Date.⁹ Secondly, an assessment of the continuing relevance of ECJ jurisprudence decided under the pre-Lisbon JHA regime requires an understanding of that regime.

The provisions on the jurisdiction of the ECJ in respect of the pre-Lisbon JHA are complex and purposively restrictive. This restrictive approach would have been less open to criticism if pre-Lisbon JHA measures had been subject to effective scrutiny by national courts and the ECtHR. However, as discussed in Section 1.5, such protection was problematic. In this

⁸ V. Hatzopoulos, 'With or without you ... judging politically in the field of Area of Freedom, Security and Justice' (2008) 33 *E.L. Rev.*, pp. 44-65; and H. Labayle, 'Architecte ou spectatrice'? La Cour de Justice de l'Union dans l'Espace de liberté, sécurité et justice' (2006) 42 *Revue Trimestrielle de Droit Européen*, pp. 1-46.

⁹ See Section 2.3.

constrained legal environment, the ECJ strove, in particular in its *Pupino* and *Segi* judgments, to provide effective access to judicial review of pre-Lisbon JHA acts in line with the requirements of international justice.¹⁰

The Treaty of Maastricht excluded in Article L any ECJ jurisdiction over the JHA, save that Article K.3 provided for an optional jurisdiction in respect of JHA conventions.¹¹ The Treaty of Amsterdam, as part of the restructuring of JHA into the AFSJ, introduced in pre-Lisbon Article 46 TEU provisions for limited jurisdictional powers for the ECJ over the TEU. Pre-Lisbon Article 46 TEU provides that the provisions of the EC Treaty and Euratom Treaty governing the powers of the ECJ and their exercise shall apply, *inter alia*, only to the following listed TEU provisions:

‘... (b) provisions of Title VI, under the conditions provided for by Article 35; ... (d) Article 6(2) with regard to the action of the institutions, insofar as

¹⁰ ‘Indeed the right to effective justice is universal in the sense that it belongs to everybody and, while some restrictions may be imposed on its exercise to restore or maintain national or international security, the right is non-derogable.’: J. Almqvist, ‘A Human Rights Critique of European judicial review: counter-terrorism sanctions’ (2008) 57 *ICLQ*, pp. 302-331, at p. 330. S. Peers, ‘Salvation outside the Church: Judicial Protection in the Third Pillar after the *Pupino* and *Segi* Judgments’ (2007) 44 *CMLR*, pp. 883-929.

¹¹ See J. Barrett, ‘Co-operation in Justice and Home Affairs in the European Union - An Overview and Critique’, in Barrett (ed.), *Justice Cooperation in the European Union* (Institute of Foreign Affairs, 1997), pp. 3-47, at pp. 26-28.

the Court has jurisdiction under the Treaties establishing the European Communities and under this Treaty; and ... (f) Articles 46 to 53.¹²

There is, however, no conferral of jurisdiction on the ECJ to interpret pre-Lisbon Article 6(1) TEU, pre-Lisbon Title V TEU regulating the Common Foreign and Security Policy (CFSP), or the common provisions in pre-Lisbon Title I TEU other than Articles 6(2) and 7. The following sections analyse the scope of pre-Lisbon Articles 46(d) and 35 TEU in determining the scope of the ECJ's pre-Lisbon jurisdictional powers.

1.2 THE SCOPE OF PRE-LISBON ARTICLE 46(d) TEU

The purpose of pre-Lisbon Article 46(d) TEU was to remedy the anomalous situation under the Maastricht Treaty that the ECJ was technically prevented by Article L TEU from applying Article F(2) (pre-Lisbon 6(2)) TEU as a formal basis for its case law on human rights as general principles.¹³ However, pre-Lisbon Article 46(d) TEU limits the scope of application of the powers of the ECJ under the EC Treaty in respect of pre-Lisbon Article 6(2) TEU in two ways which substantially restricted its effectiveness as a basis for judicial review of pre-Lisbon JHA measures.

¹² The most relevant provision referred to in pre-Lisbon Article 46(f) TEU is pre-Lisbon Article 47 TEU that confers jurisdiction on the ECJ to adjudicate on the boundaries between the TEU and the EC Treaty which was considered in *ECOWAS: Case C-170/96, Commission v. Council* [1988] ECR I-2763. See C. Hillion and R. Wessell, 'Competence Distribution in EU External Relations after *ECOWAS*: Clarification or Continued Fuzziness?' (2009) 46 *CMLR*, pp. 551-586. Pre-Lisbon Article 47 TEU is replaced by Article 40 TEU.

¹³ See B. de Witte, 'The Role of the ECJ in Human Rights', in Alston (ed.), *The EU and Human Rights* (OUP, 1999) pp. 859-897, at p. 885.

Firstly, pre-Lisbon Article 46(d) TEU provides that the jurisdictional provisions of the EC Treaty concerning the powers of the ECJ and their exercise apply to pre-Lisbon Article 6(2) TEU ‘with regard to action of the institutions’. The reference to ‘action of the institutions’ is open to the interpretation that the action of the Member States in implementing or derogating from pre-Lisbon JHA measures is not subject to judicial review by the ECJ on grounds of violation of Article 6(2) TEU. Such an interpretation would disapply pre-Lisbon Article 6(2) TEU to situations where the ECJ has established that the Member States in implementing or derogating from Union law remain subject to the obligation to comply with Union human rights standards.¹⁴ While such a restrictive interpretation of Article 46(d) TEU is not supported by the *travaux préparatoires* to the Treaty of Amsterdam,¹⁵ and would conflict with the ECJ’s practice of expansively interpreting its jurisdictional powers,¹⁶ it is supported by the general context of the JHA regime’s emphasis on limiting the powers of the Union to interfere with the Member State’s sovereign rights in the field of internal security.¹⁷

¹⁴ For a summary of the ECJ’s case law see: de Witte, in Alston (ed.), above n. 13, at pp. 870-874.

¹⁵ *Ibid.*, at p. 885.

¹⁶ Peers argues, in the context of the interpretation of pre-Amsterdam Conventions, for a ‘general interpretative principle of ‘wide jurisdiction’ for the ECJ, with the effect that the ECJ’s jurisdiction can usually only be restricted or ousted by express, unambiguous wording’: ‘Human Rights and the Third Pillar’, in Alston (ed.), *The EU and Human Rights* (OUP, 1999), pp. 167-186., at p. 172.

¹⁷ Lenaerts makes this point to underpin his view that pre-Lisbon Article 46(d) TEU was intended by the Member States to exclude application of pre-Lisbon Article 6(2) TEU to their action in implementing or derogating from JHA and Title IV EC Treaty measures: ‘Fundamental Rights in the European Union’ (2000) 25 *EL Rev.*, pp. 575-600, at pp. 588-589.

Secondly, pre-Lisbon Article 46(d) TEU restricts the applicability of the ECJ's jurisdictional powers under the EC Treaty in respect of pre-Lisbon Article 6(2) TEU to jurisdictional powers conferred elsewhere in the TEU or the EC Treaty. Pre-Lisbon Article 6(2) TEU does not therefore serve as the basis for any extension of the ECJ's jurisdiction over pre-Lisbon JHA measures beyond those jurisdictional powers specified in pre-Lisbon Article 35 TEU. This interpretation was confirmed by the CFI in *Segi v. Council*¹⁸ where the applicants sought compensation for being listed as a terrorist organization in the Annex to Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism.¹⁹ The CFI ruled that the claim for compensation failed on the grounds that an action for damages was not provided for in the exhaustive list of jurisdictional powers provided for in pre-Lisbon Article 35 TEU and that pre-Lisbon Article 46(d) TEU did not create an additional basis of jurisdiction.²⁰ On appeal, the ECJ supported this analysis: 'Article 35 TEU confers no jurisdiction on the Court of Justice to entertain any action for damages whatsoever.'²¹ The ECJ specifically pointed out that pre-Lisbon Article 41(1) TEU, which lists the articles of the TEC that apply to Title VI TEU, does not include reference to the second paragraph of pre-Lisbon Article 288 or Article 235 EC Treaty which form the

¹⁸ Case T-338/02 [2004] ECR II-1647.

¹⁹ [2001] OJ L344/93.

²⁰ Above n. 18, at paras. 36-37.

²¹ Case C-355/04 P [2007] ECR I-1657, at para. 46. This situation stands in contrast to the availability of a claim for damages under the second paragraph of Article 340 (288) TFEU where a person's assets are frozen not by a Common Position but by a Council Decision implementing a Regulation: Case C-266/05P, *Sison v Council* [2007] ECR II-73, at paras. 232-251

basis for the extra-contractual liability of the Community.²²

Thirdly, even in respect of pre-Lisbon JHA measures over which the ECJ has jurisdiction under pre-Lisbon Article 35 TEU, the narrow formulation of pre-Lisbon Article 6(2) TEU resulted in it being treated by the ECJ as an affirmation of its existing case law on human rights as general principles rather than providing an enhanced normative status for ECHR rights and the common constitutional principles: ‘The principles established by that case-law were reaffirmed in the preamble to the Single European Act and subsequently in Article F.2 of the Treaty on European Union’.²³ So even in the restricted circumstances in which pre-Lisbon Article 6(2) TEU applied to pre-Lisbon JHA measures, the provision added little or no substantive value to the ECJ’s general principles case law.²⁴ Moreover, the general principles case law is itself subject to significant limitations in ensuring human rights are given effective recognition in Union law.²⁵

²² *Ibid.*, at para 47.

²³ Case C-112/00, *Schmidberger v Austria* [2003] ECR I-5659, at para. 72.

²⁴ See in this sense, de Witte, in Alston (ed.), above n. 13, at p. 885. AG Ruiz-Jarabo Colomer, at para. 77 of his Opinion of 12 September 2006 in *Advocaten voor de Wereld VZW v Leden van de Ministerraad*, adopted a more expansive reading of pre-Lisbon Article 6(2) TEU by emphasising the significance of the Charter of Fundamental Rights as an authoritative source of human rights under pre-Lisbon Articles 6(2) and 46(d) TEU: Case C-303/05 (2007) ECR I-3633.

²⁵ See Carruthers, above n. 1, at pp. 128-130.

1.3 ECJ JURISDICTION UNDER PRE-LISBON ARTICLE 35 TEU

Pre-Lisbon Article 35 TEU established three exhaustive²⁶ categories of ECJ jurisdiction over JHA measures: Article 35(1) establishes an optional preliminary reference procedure; Article 35(6) TEU establishes a limited judicial review procedure; and Article 35(7) a procedure for resolving Member State and institutional disputes. Each of these procedures is examined below.

1.3.1. The Pre-Lisbon Article 35(1) TEU Preliminary Ruling Procedure

Pre-Lisbon Article 35(1) TEU provides that the ECJ:

‘shall have jurisdiction, subject to the conditions laid down in this Article, to give preliminary rulings on the validity and interpretation of framework decisions and decisions, on the interpretation of conventions established under this Title [Title VI] and on the validity and interpretation of the measures implementing them’.²⁷

The scope of pre-Lisbon Article 35(1) TEU is significantly more restrictive than the equivalent pre-Lisbon Article 234 EC Treaty procedure. Common positions adopted under

²⁶ *Segi v Council*, above n. 18, at para. 36. The CFI also rejected the applicant’s submission that the CFI had a general jurisdiction to declare a violation by the Council of human rights as general principles of Union law: *ibid* at para. 48. In *Spain v Eurojust* the Grand Chamber confirmed that pre-Lisbon Article 35 TEU is the sole basis for ECJ jurisdiction over Title VI TEU measures: Case C-160/03 [2005] ECR I-2077, at para. 38.

²⁷ In *Advocaten voor de Wereld*, above n. 24, the ECJ held that by necessary implication it had jurisdiction under pre-Lisbon Article 35(1) TEU to interpret provisions of primary law, in this case pre-Lisbon Article 34(2)(b) TEU.

pre-Lisbon Article 34(2)(b) TEU are not subject to the preliminary ruling procedure and the ECJ may only rule on the interpretation and not the validity of conventions adopted under pre-Lisbon Article 34(2)(d) TEU.²⁸ Furthermore, since pre-Lisbon Article 34(2)(b) TEU provides that framework decisions ‘shall not entail direct effect’, it had seemed it would be difficult for an individual applicant to invoke a framework decision in the context of national proceedings.²⁹ However, the ECJ has broadened the scope of its jurisdictional powers under pre-Lisbon Article 35(1) TEU.

Firstly, basing itself on pre-Lisbon Article 46(b) TEU, the ECJ has ruled that that a preliminary reference under pre-Lisbon Article 35(1) TEU is subject to the same procedural framework as a reference under pre-Lisbon Article 234 EC Treaty: ‘It follows that the system under Article 234 EC is capable of being applied to the Court’s jurisdiction to give preliminary rulings by virtue of Article 35 EU, subject to the conditions laid down by that provision.’³⁰

²⁸ This exclusion of jurisdiction to rule on the validity of pre-Lisbon JHA conventions follows from, and provides support for, the proposition that the ECJ does not have jurisdiction to rule on the validity of primary Union law. See in this sense see Tridimas, ‘The European Court of Justice’, in Lynch, Neuwahl and Rees (eds.), *Reforming the European Union: From Maastricht to Amsterdam* (Longman, 2000), pp. 74-84, at p. 79.

²⁹ See Craig and de Búrca, *EU Law: Text, Cases and Materials* (4th edn.) (OUP, 2008), at pp. 268-271; and B. de Witte, ‘Direct Effect, Supremacy, and the Nature of the Legal Order’, in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law* (OUP, 1999), pp. 177-213.

³⁰ Case C-105/03, *Maria Pupino* [2005] ECR I-5285 at para. 19. See also: Case C-467/05, *Criminal Proceedings against Dell’Orto* [2007] ECR I-5557 and Case C-296/08 PPU, *Extradition Proceedings against Goicoechea* [2008] ECR I-6307.

Secondly, in *Segi v Council* the ECJ extended its substance over form approach to the categorization of legislative acts under the EC Treaty to JHA common positions. The ECJ held that a common position adopted under pre-Lisbon Article 34(2)(a) TEU ‘is not supposed to produce of itself legal effects in relation to third parties’.³¹ It then used this proposition to leverage a substantial extension in the scope of acts capable of being referred for a preliminary reference under pre-Lisbon Article 35(1) TEU to include ‘all measures adopted by the Council and intended to produce legal effects in relation to third parties.’³² If a national court was in doubt as to whether a common position did produce legal effects it would be entitled to refer the issue to the ECJ and if the latter concluded the common position did produce such effects it could rule on the interpretation or validity of the act.³³ Effectively the ECJ introduced a new category of JHA acts into pre-Lisbon Article 35(1) TEU to be treated on the same basis as framework decisions and decisions.³⁴

Thirdly, in *Maria Pupino*³⁵ the ECJ adopted an expansive interpretation of pre-Lisbon Article 34(2)(b) TEU by applying the doctrine of indirect effect, developed in the context of directives, to framework decisions on the basis that the wording of pre-Lisbon Article

³¹ Above n. 21, at para. 52. The ECJ justified this conclusion by reference to the limitation in pre-Lisbon Article 35(6) TEU of acts subject to judicial review by the ECJ to framework decisions and decisions.

³² *Ibid*, at para. 53.

³³ *Ibid*, at para. 54.

³⁴ The ECJ adopted a similar line of reasoning to expand the scope of acts subject to review under pre-Lisbon Article 35(6) TEU, see Section 1.3.2.

³⁵ Case C-105/03 [2005] ECR I-5285.

34(2)(b) TEU mirrored that of Article 249 EC Treaty.³⁶ At issue was whether Articles 2, 3 and 8 of Framework Decision 2001/220/JHA (FD 2001/220) on the standing of victims in criminal proceedings³⁷ had been correctly implemented into the Italian Code of Criminal Procedure (ICPP). Maria Pupino was under investigation for alleged mistreatment of her pupils and the Public Prosecutor requested that the special provisions of the ICPP for hearing vulnerable witnesses at home be applied. The Italian Court stated this request would have to be rejected as the category of offence alleged against Pupino did not fall within those listed in the ICPP but sought a preliminary ruling as to whether, on a proper interpretation of Articles 2, 3 and 8 of FD 2001/220, the ICPP should nevertheless be construed so as to provide a right to a home hearing.

The French Government submitted that the ECJ should reject the reference since pre-Lisbon Article 34 (2)(b) TEU provided framework decisions did not entail direct effect.³⁸ The Italian and UK Governments argued that, in the absence of an equivalent in the pre-Lisbon TEU to pre-Lisbon Article 10 EC Treaty imposing a duty of sincere cooperation on the

³⁶ For the doctrine of 'indirect effect', see T. Hartley, *The Foundations of European Community Law* (6th edn.) (OUP, 2007), pp. 216-220; A. Hinarejos, 'On the Legal Effects of Framework Decisions and Decisions: Directly Applicable, Directly Effective, Self-Executing, Supreme? (2008) 14 *ELJ*, pp. 620-634; and M. Fletcher, 'Extending "indirect effect" to the third pillar: the significance of *Pupino*? (2005) 30 *ELRev.* pp. 862-877.

³⁷ [2001] OJ L82/1.

³⁸ Above n. 35, at para. 24.

Member States, no interpretative obligation should be imposed on the national courts in respect of Framework Decisions.³⁹ The Grand Chamber rejected these arguments:

‘...the Court concludes that the principle of interpretation in conformity with Community law is binding in relation to framework decisions adopted in the context of Title VI of the Treaty on European Union. When applying national law, the national court that is called upon to interpret it must do so in so far as possible in the light of the wording and purpose of the framework decision in order to attain the result which it pursues and thus comply with Article 34(2)(b) EU.’⁴⁰

However, the ECJ confirmed that this interpretative principle is subject to its case law developed in the context of directives, and in particular to the general principles of legal certainty and non-retroactivity, so that it could not be applied so as to aggravate the criminal liability of an accused nor result in an interpretation of national law *contra legem*.⁴¹ Moreover, the ECJ ruled that FD 2001/220 had to be interpreted in conformity with the human rights protected by the Union as required by pre-Lisbon Article 6(2) TEU, and in particular in accordance with the right to a fair trial set out in Article 6 ECHR.⁴²

The opportunities for national courts to refer the interpretation of framework decisions to the ECJ were enhanced by *Pupino* since it substantially extends the potential impact of

³⁹ *Ibid*, at paras. 25-26.

⁴⁰ *Ibid*, at para. 43.

⁴¹ *Ibid*, at paras. 45-47.

⁴² *Ibid*, at paras. 58-59.

framework decisions on the national legal orders.⁴³ The principle of indirect effect developed in *Pupino* widens the circumstances in which a national court may refer the validity of framework decisions under pre-Lisbon Article 35(1) TEU since the validity of a framework decision may be challenged in the context of a dispute as to whether it should be used as an aid to the interpretation of national legislation.⁴⁴

Where a reference may be made under pre-Lisbon Article 35(1) TEU in respect of a qualifying JHA measure, the grounds for a ruling on the validity of the measure must include a review of its conformity with pre-Lisbon Article 6(2) TEU, on the basis of pre-Lisbon Article 46(d) TEU, and with the human rights protected as general principles of Union law under the ECJ's case law.⁴⁵

Pre-Lisbon Article 35(2) TEU provides that the ECJ's preliminary ruling jurisdiction under Article 35(1) TEU will only apply to Member States who by declaration accept it. Pre-Lisbon Article 35(3) TEU requires a Member State accepting the ECJ's jurisdiction under Article

⁴³ In *Criminal Proceedings against dell'Orto* the Milan Tribunal referred a question on the interpretation of Council Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings in order to assist in interpreting the Italian Code of Criminal Procedure and, by reference to the *Pupino* judgment, the ECJ declared the reference admissible: above n. 30, at para. 44.

⁴⁴ The national court would be precluded from itself ruling that a framework decision is invalid: Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199.

⁴⁵ In *Advocaten voor de Wereld VZW v Leden van de Ministerraad*, the ECJ referred generally to Article 6 TEU as the basis for its review of the validity of Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant, above n. 24, at para. 45. See E. Fahey, 'How to be a Third Pillar guardian of fundamental rights? The Irish Supreme Court and the European arrest warrant' (2008) 33 *E.L.Rev.*, pp. 563-576.

35(1) to specify either that references may be made by a court of tribunal ‘against whose decisions there is no judicial remedy under national law’ (Article 35(3)(a)) or by any court or tribunal of the Member State (Article 35(3)(b)).⁴⁶ Within the group of Member States that have made a Declaration under Article 35(2) TEU, the scope of the power of national courts to refer varies significantly.⁴⁷ The structure of the pre-Lisbon Article 35 TEU preliminary reference procedure creates a divergent standard of judicial protection since the preliminary reference procedure is the only means for an individual to challenge the validity of a pre-Lisbon JHA measure as direct review proceedings under pre-Lisbon Article 35(6) TEU are restricted to a Member State or the Commission.

However, on the basis that the doctrine of supremacy also applies to Union law,⁴⁸ a court in a Member State which has not made a declaration under pre-Lisbon Article 35(2) TEU is nevertheless bound to apply a ruling of the ECJ on the validity or interpretation of a pre-Lisbon JHA measure on a reference from a Member State which has so agreed. Thus the principle of interpretative effect applied to framework decisions by the ECJ in *Pupino*⁴⁹ will have to be applied by the courts of Member States which have not made a declaration under

⁴⁶ See the list of declarations pursuant to Article 35(2) and (3) TEU at: http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/art35_2008-09-25_17-37-4_434.pdf.

⁴⁷ Article 10(1) of the TL Transitional Protocol retains for the transitional period the acceptance of jurisdictional powers of the ECJ under pre-Lisbon Article 35(2) TEU.

⁴⁸ See K. Lenaerts and T. Corthaut, ‘*Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law*’ (2006) 31 *ELRev.*, pp. 287-315 at p. 288. TL Declaration No. 17 on Primacy provides ‘the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of the Member States’ under the conditions laid down by the ECJ’s ‘well settled’ case law.

⁴⁹ Above n. 30.

Article 35(2) TEU. This conclusion is supported by the right of intervention granted to such Member States in Article 35(1) TEU references under Article 35(4) TEU.⁵⁰

1.3.2. *Pre-Lisbon Article 35(6) TEU Judicial Review Proceedings*

Pre-Lisbon Article 35(6) TEU provides the ECJ shall have jurisdiction to review the legality of framework decisions and decisions in actions brought by a Member State or the Commission within two months of the publication of the measure on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the TEU or of any rule of law relating to its application, or misuse of powers.⁵¹ The grounds of review under pre-Lisbon Article 35(6) TEU, which replicate the grounds of review set out in the second paragraph of pre-Lisbon Article 230 EC Treaty save for the reference to infringement of the TEU in lieu of the EC Treaty, would also encompass the human rights protected as general principles and, by virtue of pre-Lisbon Article 46(d) TEU, as protected by pre-Lisbon Article 6(2) TEU.⁵²

The restrictions on *locus standi* in pre-Lisbon Article 35(6) TEU are particularly onerous since under pre-Lisbon Article 34(2) TEU framework decisions and decisions must be adopted unanimously by the Council acting on the initiative of any Member State or the

⁵⁰ This right was referred to by the ECJ in *Pupino*, above n. 30, at para. 37.

⁵¹ In *Segi* the ECJ stated that it had jurisdiction under pre-Lisbon Article 35(6) TEU to review the lawfulness of JHA measures intended to produce legal effects even if not formally categorised as framework decisions or decisions, above n. 21, at para. 55.

⁵² See Peers, in Alston (ed.), above n. 16, at p. 174.

Commission. The only realistic challenge is therefore likely to be by the Commission in the event of a proposal by a Member State.⁵³

An individual applicant is, however, excluded from access to the ECJ under pre-Lisbon Article 35(6) TEU.⁵⁴ An individual applicant's only potential redress in Union law is to seek a reference for a preliminary ruling under pre-Lisbon Article 35(1) TEU on the validity of a framework decision or decision or on the validity of measures implementing them. However, as discussed at Section 1.3.1, there are substantial obstacles to obtaining such a reference even if the relevant Member State has made a pre-Lisbon Article 35(2) TEU Declaration. In addition, an applicant would be faced with the same general problems associated with the preliminary reference procedure under pre-Lisbon Article 234 EC Treaty.⁵⁵ Alternatively, an individual applicant could seek to challenge the validity of the framework decision or decision in the national courts⁵⁶ or challenge the validity of any implementing national

⁵³ In *Commission v Council*, the Commission successfully brought an action under pre-Lisbon Article 35(6) TEU challenging the validity of Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law on the grounds the measure should properly have been adopted as a directive under pre-Lisbon Article 175 EC Treaty: Case C-176/03 [2005] ECR I-7879.

⁵⁴ Since pre-Lisbon Article 35(6) TEU is primary Union law, the ECJ is precluded from ruling on its conformity with the right of access to justice guaranteed in international human rights instruments: Case C-253/94, *Roujansky v Council* [1995] ECR I-7, at paras. 9-11.

⁵⁵ For an analysis of the deficiencies of the the pre-Lisbon Article 234 EC Treaty procedure, see AG Jacob's Opinion in *Unión de Pequeños Agricultores v Council (UPA)*: Case C-50/00 [2002] ECR I-6677, at paras. 40-44.

⁵⁶ Although in the light of *Foto-Frost*, above n. 44, the national court has limited powers in respect of ruling on the validity of Union measures without a reference to the ECJ.

measures.⁵⁷ If no effective remedy is available in either the national or Union legal system, an application may lie to the ECtHR for a breach of the right of access to justice guaranteed by Articles 6 and 13 ECHR.⁵⁸

1.3.3. The Pre-Lisbon Article 35(7) TEU Dispute Resolution Procedure

Pre-Lisbon Article 35(7) TEU provides the ECJ shall have jurisdiction to rule on any dispute between Member States regarding the interpretation or the application of acts adopted under pre-Lisbon Article 34(2) TEU whenever the Council cannot settle a dispute within six months of referral to the Council by one of its members. Pre-Lisbon Article 35(7) TEU provides the ECJ shall ‘also have jurisdiction to rule on any dispute between Member States and the Commission regarding the interpretation or the application of conventions established under Article 34(2)(d)’ TEU. However, pre-Lisbon Article 35(7) TEU does not confer jurisdiction on the ECJ to rule on the validity of pre-Lisbon JHA measures. By restricting the dispute resolution procedure to the Council and Member States, and in the case of Conventions, the Commission, pre-Lisbon Article 35(7) does not address the onerous restrictions on the individual applicant’s right of access to justice in respect of pre-Lisbon JHA measures.

⁵⁷ This potential avenue of redress was highlighted by the ECJ in *Segi*: above n. 21, at paras. 56-57.

⁵⁸ See Section 1.5.

1.4. THE INTERNAL SECURITY OUSTER OF ECJ JURISDICTION UNDER PRE-LISBON ARTICLE 35(5) TEU

The jurisdiction of the ECJ under pre-Lisbon Article 35 TEU is subject to pre-Lisbon Article 35(5) TEU which provides the ECJ:

‘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.’

The scope of this exclusion has to be read in conjunction with the more general provision in pre-Lisbon Article 33 TEU demarcating the limits of Union competence in the pre-Lisbon JHA.⁵⁹

While the ouster of jurisdiction in pre-Lisbon Article 35(5) TEU is drafted in broad terms its scope is subject to limitations. Firstly, as a provision of pre-Lisbon Title VI TEU, the ECJ has jurisdiction to interpret its scope under pre-Lisbon Article 46(b) TEU if it is relied upon in an action falling within pre-Lisbon Article 35 TEU.⁶⁰ Secondly, as a limitation on the

⁵⁹ Pre-Lisbon Article 33 TEU provides Title VI: ‘... 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’. See Section 2.2 for analysis of the corresponding provision in Article 72 TFEU introduced by the TL .

⁶⁰ *Advocaten voor de Wereld*, above n. 24, at para. 18.

jurisdiction of the ECJ, pre-Lisbon Article 35(5) TEU should be interpreted restrictively.⁶¹ The concept of ‘internal security’ should therefore be given a narrower scope than that of public security.⁶² ‘The case-law of the Court of Justice shows that the concept of public security does not have a single and specific meaning. Thus the concept covers both the internal security of a Member State and its external security’.⁶³ Thirdly, pre-Lisbon Article 35(5) TEU only excludes ECJ jurisdiction in respect of action undertaken by the Member States and not in respect of JHA measures adopted by the Council.⁶⁴ In this respect, pre-Lisbon Article 35(5) TEU is less restrictive than pre-Lisbon Article 68(2) EC Treaty that excluded ECJ jurisdiction in respect of any act adopted pursuant to pre-Lisbon Article 62(1) EC Treaty ‘relating to the maintenance of law and order and the safeguarding of internal security.’⁶⁵

⁶¹ See: Peers, in Alston (ed.), above n. 16, at p. 172; and Tridimas, in Lynch, Neuwahl and Rees (eds.), above n. 28, at p. 77.

⁶² Public security is a basis for derogations under pre-Lisbon Articles 30, 39, 46, 296, and 297 EC Treaty. The ECJ has held that these provisions: ‘... deal with exceptional and clearly defined cases. It is not possible to infer from those articles that there is inherent in the Treaty a general exception excluding from the scope of Community law all measures taken for reasons of public security. To recognise the existence of such an exception, regardless of the specific requirements laid down by the Treaty, might impair the binding nature of Community law and its uniform application’: Case C-285/98, *Kreil v. Bundesrepublik Deutschland* [2000] ECR I-69, at para. 16.

⁶³ Case T-174/95, *Svenska Journalistförbundet* [1988] ECR II-2289, at para. 121.

⁶⁴ See Peers, in Alston (ed.), above n. 16, at p. 175.

⁶⁵ Pre-Lisbon Article 68(2) TEC is repealed by the TL.

1.5 THE SUPERVISORY JURISDICTION OF THE ECtHR OVER PRE-LISBON JHA ACTS

Notwithstanding the liberal interpretation adopted by the ECJ as to the scope of its jurisdictional powers under pre-Lisbon Article 35 TEU, there remain, as in *Segi v Council*,⁶⁶ situations where a potential litigant is deprived of an effective remedy to challenge the validity of a JHA measure before the ECJ. In this scenario, the ECtHR offers an alternative for a litigant who had exhausted national remedies.⁶⁷ However, *Segi and Gestoras Pro-Amnistía v Germany* cast doubts on the availability of a remedy under the ECHR in such circumstances.⁶⁸ The ECtHR declared inadmissible the application, on behalf of the Basque youth movement Segi, challenging the Common Position of 27 December 2001 on the application of specific measures to combat terrorism adopted under pre-Lisbon Articles 15 and 34 TEU (the 2001/931 Common Position)⁶⁹ for violation of Articles 6, 6(2), 10, 11 and 13 of the ECHR and Article 1 of Protocol No. 1 to the ECHR. The ECtHR held that Article 4 of the 2001/931 Common Position did not affect the applicants directly and that in consequence they were not ‘victims of a violation of the Convention within the meaning of

⁶⁶ Above n. 18 and 21.

⁶⁷ See, S. Douglas-Scott, ‘A Tale of Two Courts: Luxembourg, Strasbourg and the growing European Human Rights *Acquis*’ (2006) 43 *CMLR*, pp. 629-665, at pp. 636-639.

⁶⁸ Decision of 23 May 2002 (Tr.), Nos 6422/02 and 9916/02, 2002-V DA, pp. 1-10. See J. Callewaert, ‘The European Court of Human Rights and the Area of Freedom, Security and Justice’ (2007) 8 *ERA Forum*, pp. 511-518.

⁶⁹ 2001/931/CFSP: [2001] OJ L344/93.

Article 34 of the Convention'.⁷⁰

The ECtHR justified its decision in *Segi and Gestoras Pro-Amnistía* on the basis that Article 4 of the 2001/931 Common Position did not in itself confer additional powers exercisable against the applicants and that national or Community measures implementing Article 4 would 'be subject to the form of judicial review established in each legal order concerned, whether international or national.'⁷¹ The ECtHR also questioned, albeit *obiter*, whether the applicants had exhausted 'the remedies which the European Union could offer them, such as a compensation claim or even an application for annulment' in the light of the CFI's judgment in *Jégo-Quéré v Commission*.⁷² However, key assumptions on which the ECtHR based its 2002 decision in *Segi and Gestoras Pro-Amnistía* are open to criticism.

Firstly, it is arguable the ECtHR underestimated the detrimental consequences for an organisation of being listed as a terrorist organisation in the Annex to the 2001/931 Common

⁷⁰ *Segi and Gestoras*, above n. 68, at p. 9. Article 4 of the 2001/931 Common Position provided an obligation for Member States to engage in police and judicial cooperation under pre-Lisbon Title VI TEU to prevent terrorist acts and in particular in respect of enquiries and proceedings in respect of persons, groups and entities listed in the annex to the 2001/931 Common Position, which included the applicants.

⁷¹ *Segi and Gestoras*, *ibid.*, at p. 9. The reference to international judicial review presumably extends to the role of the ECtHR in reviewing national measures implementing pre-Lisbon JHA measures.

⁷² *Ibid.*, at p. 6. On 3 May 2002 the CFI had reformulated the test for 'individual concern' under paragraph four of Article 230 EC Treaty in a manner favourable to individual applicants: Case T-177/01 [2002] ECR II-2365, at para. 51.

Position.⁷³ Indeed, the decision in *Segi and Gestoras Pro-Amnistía* itself refers to the measures adopted three months previously by the Spanish investigating judge suspending Segi's activities and detaining eleven of its leaders pending trial where the judge referred to the 2001/931 Common Position.⁷⁴

Secondly, *Segi and Gestoras Pro-Amnistía* in retrospect overestimated the potential for judicial review of implementing measures, at least as regards redress at the Union level.⁷⁵ The basis for the ECtHR's assessment of the availability of Union remedies was undermined when the ECJ reversed the CFI's decision in *Jégo-Quéré*⁷⁶ and the CFI, and on appeal the ECJ, ruled in *Segi v. Council* that there was no jurisdiction under pre-Lisbon Article 35 TEU for a compensation claim in respect of a JHA measure such as Article 4 of the 2001/931 Common Position.⁷⁷

Indeed in *Segi v Council* the CFI expressed doubts as to whether the applicants had access to *any* effective remedy whether before the Community or national jurisdictions for their listing

⁷³ See Bowring and Korff, 'Terrorist Designation with Regard to European and International Law: The Case of the PMOI', Joint Opinion presented at the International Conference of Jurists on 10 November 2004: <http://www.statewatch.org/news/2005/feb/bb-dk-joint-paper.pdf>, at pp. 15-16.

⁷⁴ *Segi*, above n. 68, at p. 2.

⁷⁵ Bowring and Korff argue that a strategy based on exhausting national remedies and then applying to the ECtHR is preferable to seeking redress before the CFI or ECJ: above n. 73, at p. 31.

⁷⁶ Case C-263/02 P, *Jégo-Quéré v Commission* [2004] ECR I-3425.

⁷⁷ Above n. 18 and 21.

in the Annex to the 2001/931 Common Position.⁷⁸ However, the CFI held itself precluded by the ECJ decision in *UPA* from adopting its reasoning in *Jégo-Quéré* or that of AG Jacobs in *UPA* that such a denial of access to justice was incompatible with the guarantees in Articles 6 (1) and 13 ECHR and Article 47 of the Charter.⁷⁹ In those circumstances, the CFI stated that the only grounds on which the claim for compensation could succeed would be if it was established that Article 4 of the 2001/931 Common Position should have been adopted under the EC Treaty rather than pre-Lisbon Article 34 TEU thereby grounding a claim for compensation under pre-Lisbon Articles 235 and 288 EC Treaty. However, since no such wrongful use of legal basis was demonstrated, the CFI rejected the application as manifestly unfounded.⁸⁰

On appeal, the ECJ in *Segi v Council* extended its analysis in *UPA* to conclude that the system of legal remedies under pre-Lisbon Title VI TEU, although less extensive than under the EC Treaty, nevertheless did not violate the requirements of effective judicial protection.⁸¹ Indeed, the ECJ went further than the CFI in stating categorically that no action in damages would lie before the national courts in respect of the contested Common Position 2001/931 since it was an act of the Council ‘adopted jointly by the Member States’ and the liability of the Member States was not severable.⁸² However, the ECJ emphasized that national courts

⁷⁸ Above n. 18, at para 38.

⁷⁹ *Ibid*, at para. 38. See on Article 47 of the Charter: Angela Ward, ‘Access to Justice’ in S. Peers and A. Ward (eds.), *The European Union Charter of Fundamental Rights* (Hart, 2004), pp. 123-140, at p. 137.

⁸⁰ Above n. 18, at paras. 41-47.

⁸¹ Above n. 21, at para. 57.

⁸² *Ibid*, at para 36.

must provide an effective remedy sounding in damages for challenging the validity of national measures implementing Union law.⁸³

In the absence of jurisdiction to review directly pre-Lisbon JHA measures, the ECtHR's jurisdiction to control the conformity with the ECHR of implementing measures adopted by the Member States provides an alternative method of redress. However, in the context of the a State implementing obligations arising from membership of an international organization, the ECtHR has established limits to the exercise of that jurisdiction:

‘In the Court’s view, State action taken in compliance with legal obligations is justified as long as the relevant organization is considered to protect human rights as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides’.⁸⁴

In *Bosphorus*, the ECtHR held Community law provided equivalent protection for human rights to that of the ECHR system and as a result Ireland benefited from a presumption of conformity with the ECHR in implementing in domestic law the relevant EC sanctions Regulation.⁸⁵ However, the ECtHR subjected this presumption to the caveat that it only

⁸³ *Ibid* at para. 56.

⁸⁴ *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland* (Grand Chamber) [2006] 42 EHRR 1, at para. 155.

⁸⁵ *Ibid.*, at para. 165. For a summary of preceding ECtHR case law in this area see Craig and de Burca, above n. 29, at pp. 420-42; and Carruthers, above n. 1, at pp. 50-62. A. Hinajeros Parga, ‘*Bosphorus v Ireland* and the

applied to the extent a Member State was implementing ‘its strict international obligations’.⁸⁶

Bosphorus was a case decided in respect of national measures implementing an EC Regulation which in turn was implementing a United Nations Security Council resolution.⁸⁷ It did not address the issue of national measures implementing pre-Lisbon JHA measures where, as has been discussed, the scope of the ECJ’s jurisdiction is more limited. In this context, Peers has argued, on the authority of *Cantoni*,⁸⁸ that at least in respect of pre-Lisbon JHA framework decisions and national measures ratifying conventions the ECtHR could exercise supervisory jurisdiction over national implementing measures.⁸⁹ The guiding principle it is submitted should be that the ECtHR has jurisdiction to review the compatibility with the ECHR of national measures implementing JHA measures in any case where the

protection of fundamental rights in Europe’ (2006) 31 *ELRev.*, pp. 251-259; and C. Costello, ‘The *Bosphorus* Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe’ (2006) 6 *Human Rights Law Review*, pp. 87-130.

⁸⁶ *Ibid.*, at para. 157.

⁸⁷ In *Agim Behrami* the ECtHR analysed the scope of *Bosphorus* in the context of a case on the alleged liability of the defendant states for their actions in Kosovo during the NATO deployment: *Agim Behrami and Bekit Behrami and Ruzhdi Saramati v France, Norway and Germany* (Grand Chamber) [2007] 45 EHRR 52, at paras 145-151. See: Tridimas and Gutiérrez-Fons, ‘EU Law, International Law and Economic Sanctions against Terrorism: The Judiciary in Distress’ (2009) 32 *Fordham Law Review*, pp. 660-730, at pp. 685-689; and M. Milanović and T. Papić, ‘As Bad as it Gets: the European Court of Human Rights’s *Behrami and Saramati* Decision and General International Law’ (2009) 58 *ICLQ*, pp 267-296.

⁸⁸ Case 45/1995/551/637, ECHR Reports (Judgements and Decisions) 1996 V-1614.

⁸⁹ Although he considers that ECtHR jurisdiction over pre-Lisbon JHA decisions in the absence of national implementing measures is more problematic, above n. 16, at p. 175.

measures are not themselves subject to review by the ECJ.⁹⁰

1.6 CONCLUSIONS

Segi and Gestoras Pro-Amnistía and *Segi v. Council* demonstrate the potential for jurisdictional ‘black holes’ in respect of pre-Lisbon JHA measures in terms of effective legal redress for individuals for a violation of human rights. The decision of the ECtHR in *Bosphorus* opened the way for the ECtHR to revise its conclusions in *Segi and Gestoras Pro-Amnistía* in the light of the decisions of the ECJ in *Jégo-Quéré* and *Segi v. Council* and to review the conformity with the ECHR of pre-Lisbon JHA measures not subject to scrutiny by the ECJ. The absence of ECJ jurisdiction to review the legality of secondary Union law may, on an extensive interpretation of *Bosphorus*, ground jurisdiction for the ECtHR to review the measure.⁹¹

⁹⁰ See in this sense, Lenaerts, above n. 17, at p. 589.

⁹¹ This point was not directly at issue in *Bosphorus* since the contested EC Regulation 990/93 was subject to a review of its legality by the ECJ on an Article 234 EC Treaty reference by the Supreme Court in Ireland: Case C-84/95, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v Minister for Transport, Energy and Communications* [1996] ECR I-3953.

PART TWO

THE SCOPE OF THE ECJ'S JURISDICTION OVER POST-LISBON JHA

2.1 REFORM PROPOSALS

In the light of the acknowledged deficiencies in the ECJ's jurisdiction to review pre-Lisbon JHA and Title IV EC Treaty acts, there was substantial pressure for reform at the European Convention. The mandate of Working Group X (WGX) on 'Freedom, Security and Justice' did not specifically refer to reform of the judicial architecture.⁹² However, reform was implicit in the reference to striking a better balance 'between security requirements and respect for fundamental values' and pursuing the 2001 European Council Laeken Declaration objective of simplification of the 'particularly complex institutional and legal systems' in the JHA.⁹³ WGX therefore concluded that a fundamental reform of the ECJ's jurisdiction was necessary:

'The Working Group takes the view that the limited jurisdiction of the Court is no longer acceptable concerning acts adopted in areas (e.g. police co-operation, judicial co-operation in criminal matters) which directly affect

⁹² Mandate of WGX of 12 September 2002, CONV 258/02.

⁹³ *Ibid*, at p. 3

fundamental rights of the individuals. The same view applies to the limited judicial control foreseen in Article 68 TEC.’⁹⁴

WGX therefore recommended that the specific mechanisms in pre-Lisbon Article 35 TEU and Article 68 EC Treaty should be abolished and that ‘the general system of jurisdiction of the ECJ should be extended to the area of freedom, security and justice, including action by Union bodies in this field’.⁹⁵

On the issue of the restrictions on the ECJ’s jurisdiction under pre-Lisbon Article 35 (5) TEU and Article 68(2) EC Treaty relating to the ‘maintenance of law and order and the safeguarding of internal security’, WGX recommended that pre-Lisbon Article 68(2) should be abolished in view of the significance for human rights of measures relating to the free movement of persons adopted under pre-Lisbon Article 62(1) EC Treaty. However, opinion was divided in WGX on abolishing pre-Lisbon Article 35(5) TEU, with some members arguing for its retention and others of the view that the incorporation in the Constitutional Treaty of the text of pre-Lisbon Article 33 TEU was sufficient ‘to make clear that national acts taken under these responsibilities lie outside the scope of Union law, and consequently outside the jurisdiction of the Court.’⁹⁶

⁹⁴ WGX Final Report, CONV 426/02, 2 December 2002, at p. 25.

⁹⁵ *Ibid.* The reference to Union bodies was to Europol and Eurojust: see pp. 18-20 of WGX Final Report.

⁹⁶ *Ibid.*, at p. 19.

2.2 THE TREATY OF LISBON AND THE JURISDICTIONAL STRUCTURE OF THE AFSJ

The TL amends the TEU and the EC Treaty, renamed as the Treaty on the Functioning of the European Union (TFEU), to incorporate the principal recommendations in WGX's Final Report on judicial control of the AFSJ by abolishing the special jurisdictional rules in pre-Lisbon Article 35 TEU and Article 68 EC Treaty.⁹⁷ AFSJ measures adopted under the TFEU are therefore generally subject to the same jurisdictional grounds of review as other Union policy areas.⁹⁸ The direct actions in Articles 230, 232, 235 and 288(2) EC Treaty are retained on substantially the same terms in Articles 263, 265, 268 and 340(2) TFEU respectively and apply to all AFSJ measures.⁹⁹

The general preliminary reference procedure set out in Article 267 (234) TFEU also applies on the same conditions to all AFSJ measures. The fourth paragraph of Article 267 (234) TFEU introduces an additional procedural protection in that if a question is raised 'in a case pending before a court or tribunal of a Member State with regard to a person in custody, the

⁹⁷ The TL adopts in this area substantially the same provisions as had been contained in Chapter IV of Title III of Part III of the Constitutional Treaty. See Carruthers, above n. 1, at pp. 211-213; and Peers, 'Finally "Fit for Purpose"? The Treaty of Lisbon and the End of the Third Pillar Legal Order' in Eeckhout and Tridimas (eds.), *27 Yearbook of European Law* (OUP, 2009), pp. 47-64.

⁹⁸ The CFSP, however, continues to be subject to the special jurisdictional rules in Article 275 TFEU.

⁹⁹ The principal reform consists in a limited improvement in the *locus standi* rules for non-privileged applicants in paragraph four of Article 263 (230) TFEU.

Court of Justice of the European Union shall act with the minimum of delay'.¹⁰⁰ Furthermore, a Member State that fails to fulfill an obligation under the AFSJ is subject to enforcement action by the Commission under Article 258 (226) TFEU or by another Member State under Article 259 (227) TFEU.¹⁰¹

The various types of pre-Lisbon JHA measures listed in pre-Lisbon Article 34(2) TEU are replaced by the standard Union legislative acts.¹⁰² However, existing measures adopted under the pre-Lisbon JHA will remain in force pursuant to Article 9 of the Protocol on Transitional Provisions 'until they are repealed, annulled or amended in implementation of the Treaties.' Article 9 provides the same regime applies to the pre-Lisbon JHA Conventions.

Article 276 TFEU contains a major concession to the security and sovereignty concerns of the Member States in a modified version of pre-Lisbon Article 35(5) TEU:

¹⁰⁰ An expedited AFSJ preliminary ruling procedure under Article 23a of the Protocol on the Statute of the ECJ and Article 104b of its rules of procedure was introduced following Council Decision 2008/79/EC of 20 December 2007: [2008] OJ L24/42.

¹⁰¹ ~~Pre-Lisbon Article 226 and 227 EC Treaty enforcement procedures did not apply to the JHA. WGX recommended that these procedures be so extended: WGX Final Report, above n. 94, at p. 21.~~

¹⁰² The legal acts of the Union are set out in Article 288 (249) TFEU. The specific type of instrument to be adopted under the AFSJ is determined in accordance with Chapter 2 of Title I of Part Six TFEU.

Deleted: ¶

‘In exercising its powers regarding the provisions of Chapters 4 and 5 of Title V of Part Three relating to the area of freedom, security and justice, the Court of Justice of the European Union 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.’¹⁰³

Article 72 TFEU re-enacts pre-Lisbon Article 64(1) EC Treaty and Article 33 TEU: ‘This Title [Title V] 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.’ Article 68(2) EC Treaty is, however, repealed.

The TL reforms to the jurisdictional powers of the ECJ over AFSJ measures substantially address the criticisms of the pre-Lisbon structure. In conjunction with the other major TL reforms of human rights protection, the legal recognition of the Charter under Article 6(1) TEU and the mandate for the Union to accede to the ECHR under Article 6(2) TEU,¹⁰⁴ the

¹⁰³ Chapters 4 and 5 of Title V cover the JHA regime formerly in pre-Lisbon Title VI TEU: namely judicial cooperation in criminal matters (Chapter 4) and police cooperation (Chapter 5).

¹⁰⁴ See the TL Protocol on the Accession of the Union to the ECHR.

TL provides a significant enhancement in the level of recognition and protection of human rights in the AFSJ.¹⁰⁵

However, the retention in Article 276 TFEU of a general internal security exclusion of ECJ jurisdiction over Member State action in the field of judicial cooperation in criminal matters and police cooperation has the potential to undermine the benefits of these reforms. The ECJ, as in the case of pre-Lisbon Article 35(5) TEU, should it is submitted interpret Article 276 TFEU in a manner that ensures due respect for human rights is guaranteed in JHA measures whether adopted by the Union institutions or implemented by the Member States. The second paragraph of Article 19 TEU introduced by the TL provides support for such an approach.¹⁰⁶

2.3 THE JHA JURISDICTION OF THE ECJ UNDER THE TL TRANSITIONAL PROTOCOL

Article 10(1) of the TL Protocol on Transitional Provisions (TL Transitional Protocol) preserves the jurisdictional powers of the ECJ under pre-Lisbon Title VI TEU in respect of pre-Lisbon JHA acts. Articles 10(2) and (3) of the TL Transitional Protocol respectively provide that these transitional provisions cease to apply to any pre-Lisbon JHA act amended prior to that date for any Member State to which that amended act applies and in any event expire five years after the TL Effective Date. As a result, the scope of the ECJ's jurisdiction

¹⁰⁵ In addition, Article 6(3) TEU retains the substance of pre-Lisbon Article 6(2) TEU. See S. Carruthers: 'Beware of Lawyers Bearing Gifts: A Critical Evaluation of the Proposals on Fundamental Rights in the EU Constitutional Treaty' (2004) 4 *EHRLR*, pp. 424-435.

¹⁰⁶ 'The Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.' See Carruthers, above n.1, at pp. 161-163.

will depend on whether a JHA act was adopted before or after the TL Effective Date and, if adopted before that date, whether or not it has been amended. It is hard justify this system that will prolong the deficiencies of the pre-Lisbon JHA jurisdictional regime. The impact of Article 10(1) of the TL Transitional Protocol will be substantial in view of the significant body of pre-Lisbon JHA measures.¹⁰⁷

The UK has negotiated its own opt-out/opt-in regime under Article 10(4) and (5) of the TL Transitional Protocol allowing it, not later than six months before the expiry of five years after the TL Effective Date, to elect to disapply *all* pre-Lisbon JHA acts and subsequently to reverse this decision in respect of any such acts. If the UK decides to exercise this opt-out/opt-in it will add to the Byzantine complexity of the various opt-outs and opt-ins applying to Denmark, the UK, and Ireland in the AFSJ under the relevant TL Protocols.¹⁰⁸ However, these Protocols do not in themselves raise issues of legitimacy as regards the

¹⁰⁷ The October 2008 up-date of the Union *Acquis* in Pre-Lisbon JHA is at: http://ec.europa.eu/justice_home/doc_centre/intro/docs/jha_acquis_1008_en.pdf. See also: V. Mitsilegas, 'The Third Wave of Third Pillar Law: Which Direction for EU Criminal Justice?' (2009) 34 *European Law Review*, pp. 523-560.

¹⁰⁸ Pre-Lisbon Protocols attached to the EC Treaty and the TEU by the Treaty of Amsterdam established specific derogations for Ireland and the United Kingdom from the application of pre-Lisbon Article 14 EC Treaty and Title IV EC Treaty (Protocols 3 and 4) and Denmark from the application of pre-Lisbon Title IV EC Treaty (Protocol 5). These Protocols, and the Protocol on incorporation of the Schengen *acquis*, have been amended by the TL: see: Peers, above n. 2; and M. Fletcher 'Schengen, the European Court of Justice and Flexibility under the Lisbon Treaty: Balancing the United Kingdom's 'Ins' and 'Outs'' (2009) 5 *European Constitutional Law Review*, pp 71-98.

jurisdictional powers of the ECJ since the relevant JHA acts do not apply to the opted-out Member State.¹⁰⁹

2.4. THE ROLE OF THE ECtHR POST-LISBON IN REVIEWING JHA ACTS

As discussed in Section 1.5, the ECtHR adopted a cautious approach in determining the scope of its jurisdiction to review the conformity with the ECHR of Union measures adopted under pre-Lisbon JHA acts either directly or through implementing national measures. In particular, in *Segi and Gestoras Pro-Amnistía* the ECtHR refused to review the legality of a pre-Lisbon Common Position on grounds that are open to criticism. However, developments since *Segi and Gestoras Pro-Amnistía* are likely to reinforce this approach.

Firstly, the Grand Chamber of the ECJ in *Kadi* asserted the overriding obligation on the Union courts to control the legality of Union measures with fundamental rights:

¹⁰⁹ The same cannot be said, however, for the TL Protocol on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom. Article (1) of the Protocol provides: ‘The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.’ See, C. Barnard, ‘The ‘Opt-Out’ for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reality?’, in S. Griller and J. Ziller (eds.), *The Lisbon Treaty* (Springer, 2008), pp. 257-283.

‘It follows from the foregoing that the Community judicature must, in accordance with the powers conferred on it by the EC Treaty, ensure the review, in principle the full review, of the lawfulness of all Community acts in light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.’¹¹⁰

Secondly, the TL has aligned the jurisdiction of the ECJ over the JHA with its general jurisdictional powers. As a result, it is unlikely the *Bosphorus* test for ECtHR review will be met post-Lisbon, except arguably in respect of pre-Lisbon JHA acts subject to Article 10(1) of the TL Transitional Protocol. Finally, the accession of the Union to the ECHR under Article 6(2) TEU will further undermine the case for ECtHR review of JHA acts outside the framework of the Union accession to the ECHR.

CONCLUSIONS

The complexity of the pre-Lisbon TEU provisions on the scope of the ECJ’s jurisdiction over JHA measures, combined with the instability created by the delayed ratification process, resulted in the pre-Lisbon JHA presenting a confusing and ineffective legal structure for

¹¹⁰ Joined Cases C-402/05 P and C-415/05P, *Kadi and Al Barakaat International Foundation v Council and Commission*, [2008] I-6307, at para. 326.

human rights protection. The ECJ sought to alleviate some of the deficiencies of this system, in particular in *Pupino* and *Segi v Council*. Nevertheless there remain serious concerns as regards the availability of access to justice for individuals and effective judicial control over pre-Lisbon JHA measures. The ECtHR in *Segi and Gestoras Pro-Amnistía* declined the opportunity to assert a jurisdictional role in reviewing pre-Lisbon JHA measures outside the framework of the Union's legal order. Although the ECtHR's judgment in *Bosphorus* left open the possibility of ECtHR jurisdictional review of national JHA implementing measures, the strengthening of the ECJ's jurisdictional powers in the TL over the JHA has reduced the likelihood of such a development.

The reforms in the TL provide a structure for effective judicial control of JHA acts that respects the rule of law and provides a coherent framework for the protection of human rights in the Union's legal order. The legal recognition of the Charter and the mandate for the Union to accede to the ECHR enhance this protection. The benefits of these reforms have, however, been undermined by the transitional provisions applying to the pre-Lisbon JHA *acquis*. As a result the existing case-law on the scope of the ECJ's jurisdiction to review a pre-Lisbon JHA act will continue to be relevant until the expiry of the TL transitional regime.