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The extent of national competence as regards internal security

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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,¹ and the Court of Justice has only briefly touched upon the interpretation of this provision.² This may, however, be due to the exclusion of the Court’s jurisdiction as regards this provision,³ a restriction which was lifted by the Treaty of Lisbon. Furthermore, Articles 344-346 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

¹ Previous Art 6(3) TEU.

² Case C-473/93 *Commission v Luxembourg* [1996] ECR I-3207.

³ See the previous Art 46 TEU, and more generally 2.2.2.2 above.

agencies are therefore limited to supporting actions of national authorities, except (and only) to the extent that the Treaty confers express powers to act on such agencies.⁴ This interpretation is also consistent with the limitation on the Court's jurisdiction pursuant to Article 276 TFEU.⁵

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 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,⁶ 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'.⁷

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

⁴ See more specifically 3.2.4, 11.2.4, and 12.2.4 below.

⁵ On Art 276 TFEU, see further 2.2.2.2 above.

⁶ See Art 79(5) TFEU.

⁷ See Art 67(3) TFEU, discussed further above.

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.⁸ 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 of 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.

Interpretation of Art. 276 TFEU:

The Court of Justice cannot 'review the validity or proportionality of operations carried out by the police or other law enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security'. This is expressly a restriction on the Court's ability to rule on certain acts committed by national authorities; it does not restrict the Court from ruling on the validity or interpretation of EU acts, and in any event, the final judgment in cases referred from national courts is given by the national courts.

Excerpt from judgment in Case C-276/12 PPU *Adil*, 19 July 2012:

- 65 First, as the Netherlands Government and the Commission *inter alia* pointed out, Article 21(a) of Regulation No 562/2006 provides neither an exhaustive list of the conditions which must be satisfied by police measures in order not to be considered as equivalent to border checks, nor an exhaustive list of the objectives which those police measures may pursue. That interpretation is confirmed by use of the words 'in particular' in the second sentence of Article 21(a) of Regulation No 562/2006 and in Article 21(a)(ii).
- 66 Second, neither Article 79(1) and (2)(c) TFEU – which provides for the development, by the European Union, of a common immigration policy aimed at ensuring, *inter alia*, the prevention of illegal immigration and unauthorised residence – nor Regulation No 562/2006, rules out Member State powers in the field of combating illegal immigration and unauthorised residence, even if it is clear that Member States must adapt their laws in that field in order to comply with European Union law (see, to that effect, Case

⁸ 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.

C-329/11 *Achughbabian* [2011] ECR I-0000, paragraphs 30 and 33). The provisions of Article 21(a) to (d) of Regulation No 562/2006 and the wording of Article 72 TFEU confirm that the abolition of internal border controls has not affected the responsibilities of the Member States with regard to the maintenance of law and order and the safeguarding of internal security.

- 67 It follows that the objective of combating illegal residence pursued by the Netherlands legislation does not render the MTV checks at issue in the main proceedings equivalent to border checks prohibited by Article 21(a) of Regulation No 562/2006.