

Jörg Monar

The External Dimension of the EU's Area of Freedom, Security and Justice

Progress, potential and limitations
after the Treaty of Lisbon

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Lisbon

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Preface

While the Area of Freedom, Security and Justice is generally viewed as an internal policy of the European Union, it also has a significant external dimension. Following several initiatives from the European Council, the EU has thus become a global player in areas such as migration policy, the fight against terrorism and organised crime. Indeed, the Treaty of Lisbon intends to enhance the Union's capacity to act on the international stage, and notably as regards the various aspects of the AFSJ.

Published in the context of the SIEPS research programme on The EU external action and the Treaty of Lisbon, the present report provides a timely assessment of the impact which the new Treaty is having on the external posture of the EU as regards its fast developing AFSJ.

Anna Stellingner
Head of Agency

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About the author

Jörg Monar is Professor and Director of Political and Administrative Studies at the College of Europe (Bruges, Belgium) and Professor of Contemporary European Studies at the Sussex European Institute, University of Sussex (Brighton, UK).

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Executive summary

Although the European Union's (EU) "area of freedom, security and justice" (AFSJ) is primarily an internal political project to provide citizens with an area without internal frontiers, in which the free movement of persons is ensured, external action is of vital importance to its realisation. Many of the challenges the AFSJ is expected to respond to have a major – and in some cases, such as organised crime, terrorism and illegal immigration, even a primarily – international dimension. Not meeting the international threats to the huge vulnerable open internal space which the AFSJ constitutes could put into question its very existence.

This report considers first the reasons for the development of the AFSJ external dimension and the post-Lisbon legal and institutional frameworks before then analysing the major forms of EU action and assessing the implications of this external dimension for both the EU and the Member States and its future developments prospects.

The emergence of the external dimension of the AFSJ has allowed the EU to complement internal action on AFSJ objectives with an increasingly wide range of forms of action: from strategy formulation over cooperation with third-countries, capacity-building and common action within international organisations. The use of the combined political weight of the EU, regrouping both the Member States and other EU external policies of relevance to third-countries, has made it easier to secure cooperation of third-countries on a range of AFSJ relevant issues from readmission, over anti-money-laundering measures to the sharing of law enforcement data.

Yet the benefits which the external AFSJ dimension is bringing to the EU do not stop with their contribution to achieving the AFSJ's internal objectives. The rapid growth of this domain of EU external action since 1999 has added a substantial new dimension to the Union's role in international relations beyond its already established actorness in fields like trade, development and foreign and security policy. There can be no doubt that in the aftermath of the 9/11 terrorist attacks the fact that the EU could – via its new external competences introduced by the Treaty of Amsterdam – become the agent of a collective international European response and be accepted as such by the United States has added to its international weight and visibility. The same can also be said, for instance, with regard to visa facilitation as third-countries have had

to accept that with the harmonisation of EU (Schengen) visa lists, the only way of obtaining visa concessions has become to engage negotiations with the EU as whole which, inter alia, normally means accepting readmission agreements in return.

The Treaty of Lisbon has strengthened the EU's potential to further develop the external dimension of the AFSJ through the abolition of the 'pillar structure', the creation of a single legal personality, a unified procedure for the negotiation and conclusion of agreements, the extension of qualified majority voting and some extension of EU internal competence on AFSJ matters which – if used – could extend external action possibilities. The 2009 to 2014 Stockholm Programme also places a greater emphasis on this dimension of the AFSJ than any of its predecessors. This, as well as the fact that the external challenges to the AFSJ continue to figure prominently in EU threat assessments, should contribute to a growing expansion of the AFSJ external dimension until the end of the current programming period, and beyond. Such an expansion will not come without funding implications, especially in view of the EU's interest in law enforcement and migration management capacity building in (mostly neighbouring) third countries. The negotiations on the upcoming new Multiannual Financial Framework 2014-2020 provide an opportunity to establish an adequate financial framework for the growth potential of the AFSJ external dimension.

Yet a number of factors will continue to impact negatively on the development potential of the external side of the AFSJ: The diversity of the fields covered – from asylum and immigration over civil and criminal justice to police cooperation – limits the potential for the external AFSJ dimension to develop into a single 'policy'. The resulting relative fragmentation makes it more difficult for AFSJ external objectives to be given the same political weight as that of other more established and homogenous external EU policies (such as the CFSP, trade, development). This in turn contributes to the difficulties of its effective integration with other external EU policies, which is also hampered by different strings of decision-making and the complex post-Lisbon institutional structure. If one adds to this the continuing limitations of the EU's only 'shared' competences, it seems clear that ultimately further progress will continue to depend heavily on the Member States' realisation of their common interests in this domain of vital interests to their citizens – and to agree on common external action accordingly.

List of abbreviations

AA	Association Agreement
AFSJ	Area of Freedom, Security and Justice
AMLAT	Latin America Working Party (EU Council)
CATS	Article Thirty-Six Committee/ Comité de l'Article Trente-Six (EU Council)
CEPOL	European Police College
CEPS	Centre of European Policy Studies
CFSP	Common Foreign and Security Policy
COAFR	Africa Working Party (EU Council)
CORDROGUE	Horizontal Working Party on Drugs (EU Council)
COREPER	Comité des représentants permanents / Committee of Permanent Representatives
COSI	Comité de sécurité intérieure / Committee on Internal Security
CRIMORG	Multidisciplinary Group on Organised Crime (EU Council)
CTC	Counter-Terrorism Coordinator
CSDP	Common Security and Defence Policy
DG	Directorate General
EASO	European Asylum Support Office
EC	European Community
ECJ	European Court of Justice
EEAS	European External Action Service
ENISA	European Network and Information Security Agency
ENP	European Neighbourhood Policy
ESDP	European Security and Defence Policy
EU	European Union
FBI	Federal Bureau of Investigation
FRA	Fundamental Rights Agency
HLWG	High Level Working Group on Migration and Asylum
HRVP	High Representative and Vice-President of the Commission
ILO	International Labor Organization (UN)
JAIEX	JHA-RELEX Working Group (EU Council)
JHA	Justice and Home Affairs
LIBE	Committee on Civil Liberties, Justice and Home Affairs
MIGR	Migration and Return Working Party (EU Council)

OCTA	Organised Crime Threat Assessment
OECD	Organisation for Economic Cooperation and Development
OJ	Official Journal of the European Union
OSCE	Organisation for Security and Cooperation in Europe
PCA	Partnership and Cooperation Agreement
PKK	Partiya Karkerên Kurdistan
PNR	Passenger Name Records
QMV	Qualified Majority Voting
SAA(s)	Stabilisation and Association Agreement(s)
SCIFA	Strategic Committee on Frontiers, Immigration and Asylum
SSR	Security Sector Reform
SWIFT	Society for Worldwide Interbank Financial Tele- communication
TEC	Treaty establishing the European Community
TE-SAT	Terrorism Situation and Trend Report
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TFTP	Terrorist Finance Tracking Programme
UK	United Kingdom
UN CTED	UN Counter-Terrorism Committee Executive Directorate
UNHCR	United Nations High Commissioner for Refugees
UN	United Nations
US	United States

1 Introduction

The European Union's "area of freedom, security and justice" (AFSJ) has developed into a much more dynamic and substantial European policy-making domain than its modest origins might have suggested. What was still referred to as mere "cooperation" in the fields of justice and home affairs (JHA) at the time of the Maastricht Treaty has turned into a major political project of the EU which the Treaty of Lisbon has placed even before the Internal Market and Economic and Monetary Union in the list of fundamental treaty objectives of Article 3 of the Treaty on European Union (TEU). More than 1400 texts dealing with AFSJ matters adopted by the JHA Council¹ since the extensive Treaty of Amsterdam reforms of 1999 and the creation of a range of special offices and agencies (starting with the formation of the Europol Drugs Unit in 1994) testify to the enormous growth of this policy-making domain.

The main rationale of the AFSJ as a political project is clearly an internal one. Article 3(2) TEU expresses this in clear terms by providing that the Union "shall offer to its citizens" an AFSJ "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". While the objective is to offer citizens the fundamental public goods of "freedom, security and justice" in an internal area, this objective can never be achieved by purely internal EU measures because of the essentially transnational nature of the primary challenges of asylum, migration and crime on which the Treaty provides for "appropriate measures" of the EU. These cross not only borders inside the EU but also – and this is the often the bigger challenge – the EU's external borders, so that external action in relations with third-countries is not an option but a necessity.

The development of an external dimension can thus be regarded as intrinsically linked to the project of an internal AFSJ. Starting with the Tampere European Council of October 1999, all EU five-year programmes for the development of the AFSJ have therefore provided for external action to help achieve the AFSJ internal objectives. In the latest of these programmes, the 2010–2014

¹ Figure based on annual lists of JHA Council texts provided by Directorate-General H of the EU Council Secretariat.

Stockholm Programme, an entire section is dedicated to the “external dimension” of the AFSJ on top of a whole range of external measures provided for in the individual policy fields.² Unsurprisingly this external dimension has been growing with the rapid extension of internal action since the Amsterdam Treaty reforms, and by 2011 26 out of a total of 136 texts adopted by the JHA Council, i.e., 19.1%, dealt primarily with the conclusion of agreements with third-countries and other external dimension issues with.³ As a result the EU has also increasingly emerged as an international actor in its own right on AFSJ matters and has been recognised as such by third-countries. This is demonstrated, for instance, by the obvious interest of the US in counter-terrorism cooperation with the EU since the 9/11 attacks.

As the external dimension has been of such growing importance for the Union’s AFSJ, and as it has clearly also added a new dimension to previously existing fields of EU external relations, an assessment of the progress the EU has made in developing this dimension, its further potential and its limitations seems very appropriate at a moment when EU external action possibilities have again been strengthened by the reforms of the 2009 Lisbon Treaty. That assessment is the objective of this report: It will first consider the reasons for the development of the external dimension of the AFSJ and the post-Lisbon legal and institutional frameworks, then analyse the progress and limitations of major forms of EU action and assess – in the concluding part – the implications of this external dimension for both the EU and the Member States and the prospects for its future development.

As a caveat it should be noted that this analysis will focus on the external dimension of the AFSJ as it is defined by the substantive provisions of Title V of Part Three of the Treaty on the Functioning of the European Union. There will therefore be no more than passing reference to external JHA measures which are part of CFSP peace-keeping operations.

² European Council: The Stockholm Programme, OJ C 115 of 4.5.2010, pp. 33-37.

³ Own calculations based on annual lists of JHA Council texts (see note 1).

2 The reasons for the development of the AFSJ external dimension

2.1 The instrumental nature of the AFSJ external dimension

The development of EU JHA cooperation – which eventually led to the introduction of the AFSJ as a fundamental treaty objective – was historically driven to a considerable extent by the need to develop compensatory measures for the partial – in the case of the Internal Market – and even total – in the case of the Schengen countries – dismantling of internal border controls. In order to avoid the resulting liberalisation of cross-border movements having negative repercussions for the fight against crime, migration management and asylum issues, the Member States felt the need to adopt a wide range of common “compensatory” measures in the respective JHA fields.⁴ This rationale of “compensatory” JHA action being needed as a result of the dismantling of internal borders is also part of the core of the AFSJ project which, as mentioned above, is defined in Article 3(2) TEU in the first place as an area “without internal frontiers” requiring “appropriate” JHA measures for the fulfilment of the objective of free movement of persons.

The external dimension of the AFSJ is part of the range of these “compensatory” measures “appropriate” for establishing and maintaining the AFSJ, and as such it is an instrument of its internal construction. This was put in clear terms in the 2005 EU “Strategy for the External Dimension of JHA” which described the AFSJ as “the starting point” for engaging with third-countries on JHA issues and that the building of the AFSJ has generated “a need to ensure a commensurate priority is given to JHA issues in the EU’s external action”.⁵ The AFSJ external dimension therefore appears as a necessary external instrument and complement to the internal efforts to construct an AFSJ without internal borders. This provides both a powerful political rationale for its development – as the external side of a major internal political project – and a political limitation – as it cannot be considered as an external policy in its own right, like the Common Commercial Policy or

⁴ On the emergence and growth of the rationale of JHA “compensatory” measures in the 1980s and 1990s, see Wenceslas de Lobkowicz: *L’Europe et la sécurité intérieure*, Paris: La documentation française 2002, pp. 25-61.

⁵ Council of the European Union: *A Strategy for the External Dimension of JHA: Global Freedom, Security and Justice*, Council document 15446/05 of 6.12.2005, pp. 5 and 8.

the CFSP, but only as an instrumental ancillary dimension of the essentially internal political project of the AFSJ.

2.2 Responding to external JHA challenges

The attainment of fundamental internal AFSJ objectives depends to a considerable extent on the capacity of the EU to master external challenges to these objectives. This applies, in particular, to the objective of ensuring “a high level of security” within the AFSJ provided for by Article 67(3) TFEU. The most recent Europol reports have, again, highlighted the extent of these challenges.

While there is a wide range of organised crime groups of EU origin, organised crime from outside the EU contributes very significantly to security threats within the EU. According to the 2011 Organised Crime Threat Assessment (OCTA) Report of Europol: West African, Albanian and Lithuanian groups have acquired a new prominence in the trafficking of drugs into the EU; Chinese, Vietnamese, Pakistani, and again West African groups in the source-to-destination trafficking of illegal immigrants; and Chinese and Nigerian groups in the trafficking of human beings. Over recent years a new “Balkan axis” for trafficking to the EU has emerged, through which Albanian, Turkish and Former Soviet Union criminal groups “are seeking to expand their interests in the EU, and may exploit opportunities in the possible accession of Bulgaria and Romania to the Schengen Zone, and recent and prospective EU visa exemptions for Western Balkan states, the Ukraine and Moldova”.⁶ In other major organised crime fields too, such as fraud, Euro and commodity counterfeiting, weapons trafficking and environmental crime, the involvement of non-EU crime groups was reported to be extensive.

As regards terrorist threats, the initial focus in the EU on the global threat posed by Islamist terrorists after the 9/11 attacks has given way to a more differentiated threat assessment which gives due weight to the extensive terrorist activities of “home-grown” origin. This especially concerns separatist terrorist attacks which, according to Europol’s 2011 Terrorism Situation and Trend Report (TE-SAT), accounted for 160 out of 249 terrorist

⁶ Europol: EU Organised Crime Assessment. OCTA 2011, The Hague: Europol 2011, pp. 6-7, 16 and 18.

incidents during 2010.⁷ Nevertheless the threat posed by Islamist terrorist networks based outside of the EU remains important, with one-third of all arrested suspects in 2010 having been born in Algeria, Egypt, Morocco and Tunisia. Much of the terrorist propaganda and incitement sources originate from outside of the EU, and training is provided for EU-born “jihadists” in Afghanistan, Pakistan, Somalia and Yemen.⁸ Some third-country separatist terrorist groups, like the Kurdish PKK and the “Tamil Tigers”, are also carrying out extortion operations as well as drug-trafficking and trafficking in human beings in the EU.⁹

With the EU being one of the most privileged regions in the world in terms of peace, stability and prosperity, it has been a destination of choice for large numbers of third-country nationals seeking to make a living somewhere within the EU or simply wanting to escape from the misery in their home countries. The challenge this poses to the management of migration flows from third-countries into the EU is reflected in the fact that the EU’s external border management agency Frontex reported in its annual Risk Analysis for 2011 that there were 108,500 refusals of entry, 104,049 detections of illegal crossings at EU external borders and 348,666 cases of illegal stay of third-country nationals within the EU during 2010.¹⁰ While most of the third-country nationals in question have no connection with criminal activities, some of them do – organised crime is heavily involved in the lucrative facilitation of illegal entry and the trafficking of human beings. As a result most Member States, apart from having to deal with illegal migration as a difficult issue in their domestic politics, also regard it as a security issue.

Last but not least the EU is also a major destination for refugees from third-countries seeking political asylum or temporary protection from war or violent strife affecting their home countries. During 2010 the EU Member States received in total 235,930 asylum applications, three times more than the next most important asylum destination in the developed world, Canada

⁷ Europol: EU TE-STAT 2011. Terrorism Situation and Trend Report, The Hague: Europol 2011, p. 26.

⁸ Ibid., pp. 17-20.

⁹ Ibid., pp. 22-23.

¹⁰ Frontex: Annual Risk Analysis 2011, Warsaw: Frontex 2011, p. 13.

and the US (78,690).¹¹ While asylum policy clearly lies outside of the security mandate of the AFSJ it is enough of a concern for Member States faced with lengthy and costly asylum procedures involving large numbers of applications which turn out to be unfounded, and the ensuing difficulties of returning rejected applicants to third-country of origin or transit.

All these external challenges for the AFSJ have in common that the EU's capacity to respond effectively to them depends crucially on cooperation with third-countries.

The EU's external borders can reduce but not stop crime and terrorism challenges threatening the EU from the outside, and once they are inside "the beast is loose" in an area of largely dismantled borders.¹² As a result purely national responses would be as ineffective as purely internal EU measures. Crime and terrorism challenges can only be effectively tackled if the countries from which they originate or through which they transit agree with the EU on the need to tackle them effectively on their own territories, if they cooperate with the EU as regards law enforcement intelligence sharing, and if the EU can help them – where needed – to build up their law enforcement and judicial capabilities. It is also only through their common collective weight that the Member States can hope to put sufficient pressure on third-countries to cooperate and to have the maximum chance to achieve the best possible negotiation outcomes in international fora like the UN. More than just being an added value, the AFSJ external dimension is therefore a necessity in the fight against crime and terrorism.

The same applies to migration and asylum policy challenges. The numbers of migrants entering the EU illegally can be reduced if countries of origin or transit cooperate with the EU by better controlling their borders, building-up border management capabilities and sharing relevant intelligence about migration routes, traffickers and facilitators. Perhaps even more importantly,

¹¹ UNHCR: *Asylum Levels and Trends in Industrialized Countries*, Geneva: UNHCR 2011, p. 15.

¹² Jörg Monar and Hans Nilsson: *Enhancing the EU's effectiveness in response to international criminality and terrorism: current deficits and elements of a realist post-2009 agenda*, in: Olaf Cramme (ed.): *Rescuing the European Project: EU legitimacy, governance and security*, London: Policy Network 2009, p. 119.

the cooperation of third-countries is a *conditio sine qua non* for EU Member States to be able to return identified illegal immigrants or rejected asylum seekers to countries of origin or transit. Without its external dimension, EU asylum and migration policy as part of the AFSJ would face the prospect of both higher pressures on its (porous) borders and fewer possibilities to send third-country nationals in an irregular situation back, which could add significantly to the domestic political problems many Member States are experiencing in this policy field.

In the field of judicial cooperation in civil matters the EU does not face external pressures of similarly political sensitivity as those impacting on internal security and migration management, yet there are forceful reasons for common external action as well. The interests of both EU citizens and companies can be affected very negatively by the absence of legal certainty and foreseeability in civil and commercial matters involving legal systems outside of the EU. These can only be provided by international agreements, and the EU also has to protect the uniform application in international negotiations which might affect it.¹³

2.3 Internal growth of the AFSJ

In addition to the external dimension being part of “compensatory” and “appropriate” measures rationale of the construction of the AFSJ and to the need to respond to major external challenges, the development of this additional dimension has also been driven forward by the massive internal growth of the AFSJ. The extension of EU internal action possibilities through the Maastricht (1993), Amsterdam (1999) and Lisbon (2009) treaty reforms, the growth of the internal legal *acquis* and the establishment and successive strengthening of the special agencies Europol, Eurojust and Frontex have all contributed to a parallel growth of the rationale, possibilities and needs of EU external action.

An obvious example for the dependency of external AFSJ action on internal progress is that of the visa facilitation agreements with third-countries of which the EU has been negotiating and concluding an increasing number,

¹³ Council of the European Union: External relations strategy in the field of judicial cooperation in civil matters, Council document 6571/1/08 REV 1 of 7.5.2008, p. 2.

starting with Hong Kong in 2001/2002. It only became possible for the EU to engage in negotiations with third-countries on visa facilitation after the EU¹⁴ had completed its common visa policy with the adoption of Council Regulation (EC) 574/1999¹⁵ determining the third-countries whose nationals must be in possession of visas when crossing the external borders of the Member States. This possibility became at the same time also the only way for EU (Schengen) Member States to grant visa facilitation arrangements to third-country nationals.

The same dependency of the external dimension on internal developments can also be observed with regard to the institutional capabilities of the EU. An example is the posting of third-country liaison magistrates to the EU, which only became possible after the establishment in 2002 of the EU cross-border prosecution unit Eurojust to which currently three third-country prosecutors are posted.¹⁶

The internal development of the AFSJ has also made the EU an increasingly important partner for third-countries seeking to reinforce cooperation on specific JHA issues, forcing the EU in turn to meet that demand. An example of the development of the AFSJ external dimension in response to external demand is the rapid and significant expansion of EU-US counter-terrorism cooperation following to the transmission of a long list of requests from US President George W. Bush to Commission President Romano Prodi on 16 October 2001 in response to the 9/11 terrorist attacks.¹⁷ Although many of the requests were not accepted by the EU, counter-terrorism cooperation with the US subsequently broke new ground for the external dimension of the AFSJ. This is reflected in the holding of regular cooperation meetings at different levels, the negotiation of two Europol agreements on the sharing of data in 2001 and 2002 and of two agreements on extradition and mutual legal assistance in 2003, coordination work on terrorist lists, the posting of

¹⁴ Consisting of the countries of the Schengen group only as Ireland and the UK are not participating in the common visa policy.

¹⁵ Subsequently replaced by Council Regulation (EC) No 539/2001 of 15 March 2001, OJ L 81 of 21.3.2001.

¹⁶ From the US, Canada and Croatia. Europol fact sheet on liaison magistrates: http://www.eurojust.europa.eu/coll_imp.htm

¹⁷ Text of the letter: <http://www.statewatch.org/news/2001/nov/06Ausalet.htm> (last visited on 30 April 2012).

liaison officers in Washington and FBI liaison officers in The Hague, and eventually the conclusion of the (highly controversial) EU-US agreement on the collection, transfer and storing of Passenger Name Records (PNR).¹⁸

¹⁸ See Kristin Archick: US-EU Cooperation Against Terrorism, Washington: Congressional Research Service 2005, pp. 2-4. The 2004 PNR agreement was invalidated by the EU Court of Justice in 2006 on the grounds of absence of an appropriate legal basis, but it was replaced by a largely similar interim agreement in October 2006. That in turn was replaced in 2007 by a new agreement which is still only provisionally in force as it was not ratified by the European Parliament because of concerns about inadequate data protection safeguards. A revised agreement was signed on 14 December 2011 but currently (March 2012) it is still in need of ratification by the Parliament.

3 The post-Lisbon legal framework of the AFSJ external dimension

3.1 The changed position of the AFSJ in the treaty architecture

In view of the “pillar” architecture of the TEU prior to the entry into force of the Treaty of Lisbon on 1 December 2009, the AFSJ was split between four policy areas based on Title IV TEC (asylum, migration, border controls and judicial cooperation in civil matters) and two which were based on Title VI TEU (judicial cooperation in criminal matters and police cooperation). This not only had the consequence that different legal instruments and different procedures had to be used for the adoption of internal measures but also that external relations were governed by substantially different rules depending on whether “first pillar” (Title IV TEC) or “third pillar” (Title VI TEU) matters were concerned. In the first case agreements were negotiated and concluded as European Community agreements on the basis of shared or exclusive EC competences – depending on the nature of EC internal competences on the respective subject-matter –, with the Commission as chief negotiator and the Council deciding after consultation of the European Parliament on the conclusion by either qualified majority voting (QMV) or unanimity, depending on the voting rules applicable to the adoption of internal rules on the subject-matter. In the second case the negotiation and conclusion of agreements was subject to former Article 24 TEU (dealing with CFSP agreements), providing for the Council Presidency to negotiate and the Council by unanimity to conclude the respective agreements.¹⁹ These agreements were concluded as agreements of the EU (rather than the Member States) with the third-countries concerned²⁰ although the TEU did not explicitly confer upon the Union either an international legal personality or a shared or exclusive competence. The peculiar nature of “third pillar” international agreements was reinforced by the fact that most Member States insisted on those agreements being – often rather lengthily – ratified in line with national constitutional rules by their

¹⁹ See Jörg Monar: *The EU as an International Actor in the Domain of Justice and Home Affairs*, in: *European Foreign Affairs Review*, Vol. 9, no. 3, 2004, pp. 396-403, and Steve Peers: *EU Justice and Home Affairs Law*, Oxford: Oxford University Press 2006 (second edition), pp. 81-85.

²⁰ An example are the aforementioned 2003 agreements with the USA on extradition and mutual legal assistance which were negotiated in the aftermath of the 9/11 terrorist attacks (OJ L 181 of 19.7.2003, p. 27 and 34).

parliaments,²¹ which further distinguished these agreements from AFSJ “first pillar” agreements.

Internationally the pre-Lisbon “first/third pillar” divide made the EU appear as an actor that was split in legal terms. This not only added to the complexity of internal procedures regarding the negotiation and conclusion of AFSJ international agreements but also allowed third-countries in certain cases to question – for tactical reasons – the legal capacity of the EU to enter into binding agreements on “third pillar” matters because of the absence of an explicit legal personality and competence of the Union as such.²²

The Treaty of Lisbon reforms have put an end to the “pillar divide” in the external dimension of the AFSJ by merging the formerly legally separated fields into Title V of the Third Part of the TFEU. The negotiation and conclusion of agreements with third-countries on AFSJ matters has now achieved a single and clearer framework through the establishment of a single EU legal personality (Article 47 TEU) and a single treaty-making procedure (Article 218 TFEU). Although different decision-making rules still apply depending on the subject-matter (see below) the EU can now as a result of the changed position of the AFSJ in the treaty architecture act internationally with greater legal coherence and a reduced potential for confusion or even a questioning of the Union’s legal capacity on the part of third-countries.

3.2 Competences

In line with the principle of conferral the EU can “act only within the limits of the competences conferred upon it by the Member States in the Treaties” (Article 5(2) TFEU). The EU Treaties do not provide for an express general competence of the EU to act on external AFSJ matters, let alone an AFSJ external dimension as such. The only explicit references made to external action are to be found in Article 78(2)(g) TFEU, with regard to partnership and cooperation with third-countries for the purpose of managing inflows

²¹ The need for national parliamentary ratification led to considerable delays of the entry into force, more than six years in the case of the two 2003 agreements with the US which the Council was only able to conclude in October 2009 (Council Decision 2009/820/CFSP of 23.10.2009, OJ L 291 of 7.11.2009, p.40).

²² See, on the pre-Lisbon problems in this respect, Philippe de Schoutheete and Sami Andoura: *The Legal Personality of the European Union*, Brussels: Royal Institute for International Affairs 2007, pp. 233-235 and 241-243.

of people applying for asylum or subsidiary or temporary protection, and Article 79(3) TFEU, with regard to the conclusion of readmission agreements with third-countries. These two explicit legal bases for external action have been newly introduced by the Lisbon Treaty but are in fact only a codification of existing practices as the EU – acting as the EC as these were former “first pillar” matters – had already been active on both accounts.²³

However, the fact that explicit EU powers under the TFEU are currently limited to the sole cases of Articles 78(2)(g) and 79(3) does not constitute an impediment against external action on a wide range of AFSJ issues:

Already before the Lisbon Treaty the European Court of Justice had established, through major case-law going back to the early 1970s, that the EC had legal capacity to enter into international commitments within the whole field of objectives defined in the Treaty, with such competence either being explicitly stated in the Treaty or resulting implicitly from the provisions of the Treaty.²⁴ The Court had made the existence of “implied” (i.e. non-explicit) external powers dependent on three conditions: First the existence of treaty *objectives* for whose achievement the external action is to be undertaken,²⁵ second the existence of *explicit internal powers* on the matter on which external action is to be undertaken,²⁶ and third the existence of a *necessity* to

²³ In case of the readmission agreements, the Council issued the first negotiation mandates to the Commission – for agreements with Morocco, Pakistan and Russia – as early as September 2000.

²⁴ Case 22/70 (AETR/ERTA) *Commission v Council* [1971] ECR 263, Joined cases 3, 4 and 6/76 *Kramer, Cornelius and others* [1976] ECR 1279 and Opinion 2/91 (Re: ILO Convention) [1973] ECR I-1061. – The principle of implied powers was forcefully reconfirmed by the Court in its 2006 Opinion on the Lugano Convention: Opinion 1/2003 on the Lugano Convention, [2006] ECR I-1145.

²⁵ Case 22/70 (AETR/ERTA) *Commission v Council* [1971] ECR 263; Joined cases 3,4 and 6/76 *Kramer, Cornelius and others* [1976] ECR 1279; Opinion 1/94 (Re: Competence of the Community to conclude international agreements concerning services and the protection of intellectual property rights) [1994] ECR I-5267.

²⁶ Opinion 1/76 (Re: Draft Agreement for a Laying-up Fund for Inland Waterway Vessels) [1977] ECR 741; Opinion 2/94 (Re: Accession of the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms) [1996] ECR I-1759.

act externally for the achievement of the respective treaty objectives.²⁷ Before Lisbon, all external AFSJ action in the context of the (EC) “first pillar” could be based on these so-called “implied external powers” in conjunction with the respective AFSJ objectives provided for by the EC Treaty. Yet such implied external competences could not be invoked for external action in the context of the “third pillar” where the interpretation of the extent of EU external competences was largely left to the intergovernmental consensus amongst the Member States.

The Lisbon Treaty reforms have for the first time codified the “implied external powers” jurisdiction of the Court of Justice in revised Article 216(1) TFEU which provides that the Union may conclude an agreement with third-countries or international organisations “where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union’s policies, one of the objectives referred to in the Treaties”. As the former “third pillar” fields have been merged with the former “first pillar” fields within the TFEU this means that now the entire AFSJ external dimension is governed by the principle of implied external powers. This means that, apart from the field specific forms of external action provided for by Articles 78(2)(g) and 79(3) TFEU, the EU can act externally only on an AFSJ subject-matter if there is a treaty based internal objective and if external action is necessary to achieve that objective.²⁸ One can therefore conclude that, in terms of its potential for legal action, the external dimension of the AFSJ is similarly dependent on and limited by AFSJ internal objectives, as it is politically dependent on the essentially internal nature of the AFSJ as an EU political project (see above, sub-section 2.1).

²⁷ Opinion 1/76 (Re: Draft Agreement for a Laying-up Fund for Inland Waterway Vessels) [1977] ECR 741; Opinion 1/94 (Re: Competence of the Community to conclude international agreements concerning services and the protection of intellectual property rights) [1994] ECR I-5267; Cases C-467/98 *Commission v Denmark* [2002] ECR I-9519; C-468/98 *Commission v Sweden* [2002] ECR I-9575; C-469/98 *Commission v Finland* [2002] ECR I-9627; C-471/98 *Commission v Belgium* [2002] ECR I-9681; C-472/98 *Commission v Luxembourg* [2002] ECR I-9741; C-475/98 *Commission v Austria* [2002] I-9797; C-476/98 *Commission v Germany* [2002] ECR I-9855.

²⁸ For a more detailed analysis of post-Lisbon EU implied external powers in the context of the AFSJ, see Marise Cremona: EU External Action in the JHA Domain. A Legal Perspective, in: Marise Cremona, Jörg Monar and Sara Poli (eds.): *The External Dimension of the European Union’s Area of Freedom, Security and Justice*, Brussels: P.I.E. Peter Lang 2011, pp. 82-87, and Piet Eeckhout: *EU External Relations Law*, Oxford: Oxford University Press 2011 (second edition), pp. 157-163.

There are further limitations on the competence side which need to be considered. One results from the nature of EU competences in the context of the AFSJ. According to Article 4(2)(j) TFEU, the AFSJ is a domain of “shared competence” between the Union and the Member States. This means that Member States can continue to exercise their competence on AFSJ matters to the extent the Union has not exercised its competence (Article 2(2) TFEU). There are so far very few AFSJ matters on which the EU has exercised its competences to the extent of full harmonisation so that as a result it enjoys exclusive powers on related external action. One of those is the full harmonisation of visa lists which, as a result, gives the EU exclusive powers for the conclusions of visa waiver agreements.²⁹ On most AFSJ matters, however, such full harmonisation has not taken place, so that the Member States retain at least partial competence and hence the right to participate in any international agreement together with the EU. Such “mixed agreements” being more complicated to negotiate and needing ratification by all national parliaments, Member States have so far not insisted on their right to join AFSJ related external agreements as contracting parties, except in the case of major multilateral legal instruments such as the 2000 UN Convention against Transnational Organised Crime (Palermo Convention) and the 2003 UN Convention against Corruption.³⁰

Nevertheless, in the absence of EU exclusive competences Member States can – and indeed do – continue to conclude international agreements on AFSJ related subject matters (see below section 5.2). They have even explicitly reserved for themselves the right to continue to negotiate and conclude agreements on matters relating to the crossing of external borders,³¹ and a Declaration attached to the Lisbon Treaty Final Act³² does the same for agreements in the fields of judicial cooperation in civil and criminal

²⁹ See Steve Peers: *EU Justice and Home Affairs Law*, Oxford: Oxford University Press 2011 (third edition), p. 128.

³⁰ In the case of the 2007 Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (which replaced the 1988 Lugano Convention), the ECJ ruled against “mixity” in favour of exclusive Community competence. Opinion 1/03 (Lugano Convention) [2006] ECR I 1145.

³¹ Protocol 23 to the TEU and the TFEU on “external relations of the Member States with regard to the crossing of external borders” (OJ C 83 of 30.3.2010).

³² Declaration 36 on Article 218 of the Treaty on the Functioning of the European Union concerning the negotiation and conclusion of international agreements by Member States relating to the area of freedom, security and justice (OJ C 83 of 30.3.2010).

matters as well as police cooperation. As in all of these cases the conclusion of such agreements is subject to their compatibility with EU law, however, this can be regarded just as a further reaffirmation of the principle of shared competences.³³

The Union's possibilities to act are also restricted by the principle of subsidiarity of Article 5(3) TEU according to which

in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

Taken together the principles of shared competence and subsidiarity therefore mean that the EU can only act on an AFSJ matter – be it an internal or an external one – if it has been shown that the objectives of the proposed action cannot be achieved by the Member States themselves and that as long as this has not been shown and the EU has not been able to act Member States remain free to act on the matter at their own level. Far from being a theoretical issue the Member States have repeatedly underlined this restriction on the expansion of EU action. A recent example has been the insistence of the JHA Council in its Conclusions on the Commission communication on “The European Union internal security strategy in action”, which fully recognised the need for a better linking of the internal and external aspects of EU internal security, on a prior demonstration of “the added value of action at Union level”.³⁴

Finally it also needs to be mentioned that according to Article 4(2) TEU –

³³ As a result these reservations can hardly be interpreted as a further restriction of EU competences. The same conclusion is reached in Ramses A. Wessel, Luisa Marin and Claudio Matera: *The External Dimension of the EU's Area of Freedom, Security and Justice*, in: Christina Eckes and Theodore Konstadinides (eds.): *Crime within the Area of Freedom, Security and Justice. A European Public Order*, Cambridge: Cambridge University Press 2011, p. 297.

³⁴ Council of the European Union: *Draft Council conclusions on the Commission communication on the European Union internal security strategy in action*, Council document 6699/11 of 21.02.2011, pp. 4-5 (approved by the Council in its session of 24/25 February 2011).

newly introduced by the Lisbon Treaty – the Union is obliged to respect the Member States’ “essential state functions” which include “maintaining law and order and safeguarding national security”, with national security “in particular” remaining “the sole responsibility of each Member State”. This clearly limits the scope of the EU’s aforementioned internal security mandate of Article 67(3) TFEU in terms of both internal and external action.

While consolidating and simplifying the EU’s external action possibilities through the abolition of the “pillar divide”, the Treaty of Lisbon has thus also confirmed and partially even extended previously existing general restrictions of EU external competences in the AFSJ domain. This has to be set against certain extensions of the EU’s internal AFSJ competences which can – if the aforementioned conditions are met – also expand its external action potential. The most relevant of those are:

- 1 The codification in the TFEU of the already existing political objective of introducing an integrated external border management system (Article 77(1)(c) TFEU) could also provide a basis for new forms of border management cooperation with third-countries.
- 2 The introduction of the – already programmed – uniform asylum and subsidiary protection status (Article 78(2)(a) and (b) TFEU) could provide a better basis for the partnership and cooperation with third-countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection provided for by Article 78(2)(g) TFEU.
- 3 The introduction of a formal principle of “solidarity” including its “financial implications” for the fields of asylum and migration policy as well as external border management (Articles 67(2) and 80 TFEU) offers enhanced possibilities for the use of the EU budget for capacity building measures in favour of cooperating third-countries.
- 4 The enhanced action potential on common rules regarding criminal procedure (Article 82(2) TFEU) and seven “new” fields of approximation of substantive criminal law – and potential extension to other fields (Article 83(1) and (2) TFEU) could, via its strengthening of the internal EU *acquis*, provide a stronger common platform for mutual legal assistance agreements with third-countries and the defence of common positions in

the criminal justice domain in relevant international organisations like the UN and the Council of Europe.

- 5 The potential establishment of the European Public Prosecutor's Office (Article 86 TFEU) could offer new possibilities of cooperation with the prosecution services of third-countries.

In each case, however, the use of a potential new legal competence will depend on the Member States willingness to exploit it and their perception of its potential to provide substantial “added value” to existing EU or purely national measures.

3.3 Relationship with other EU external policies

As already indicated the Treaties do not provide for an external dimension of the AFSJ as such, let alone a self-standing “policy” in this domain. Yet EU external action on AFSJ matters is clearly part of overall EU external relations and is as such governed by the objectives of the Union’s “relations with the wider world” defined in Article 4(5) TEU. Several of those objectives have an obvious link with the objectives of the AFSJ. This applies, in particular, to: “the protection of its citizens” which corresponds to the AFSJ security mandate of Article 67(3) TFEU; the contribution to “security” in the world which, given the international nature of crime and terrorism challenges, clearly covers external AFSJ action as well; and the contribution “to the strict observance and the development of international law, including respect for the principles of the United Nations Charter”, a formulation wide enough to cover law enforcement and judicial cooperation as well as – through the reference to the UN framework – asylum policy issues. The external dimension of the AFSJ also serves several of the “principles” by which, according to Article 21 TEU, “the Union’s external action should be guided”. These are: the advancement of “the rule of law” and the “respect for the principles of the United Nations Charter and international law” (Article 21(1) TEU), and the objectives “to safeguard [...] its security” and to “consolidate and support [...] the rule of law, human rights and the principles of international law” (Article 21(2)(a)-(b) TEU. According to Article 21(3), these principles and objectives apply not only to the CFSP but also to the “external aspects” of the Union’s “other policies”.

The external AFSJ dimension, although not a self-standing EU external policy, has thus to be regarded as an integral part of EU external relations

overall governed by the principles and objectives of Articles 3(5) and 21 TEU. This raises the question of the coherence between external action on AFSJ matters and other EU external policies. This question is addressed by Article 21(3) TEU, second paragraph, which provides for the Union to “ensure consistency between the different areas of its external action and between these and its other policies”, a double consistency obligation, applying both to different domains of external action and between each of those and internal policies. Council, Commission and the High Representative and Vice-President of the Commission (HRVP) are given a special responsibility to ensure that consistency (see below). Consistency between the Union’s “policies and activities” is also established as a general principle by Article 7 TFEU. It is important to mention in this context that the Treaties do not establish any hierarchy between external policies. In view of the prominent position given to the CFSP through the long range of “specific provisions” in the TEU, the CFSP might easily appear to be in the position of a “lead” policy whose objectives enjoy priority over other fields of external EU action when it comes to ensuring “consistency”. Yet the Treaties do not make any provision for other fields of EU external action needing to be consistent “with” the CFSP, so that, at least formally, the external AFSJ dimension finds itself on an equal footing with the CFSP, and indeed other EU external policies, with regard to the requirement of consistency. This provides a legal justification for the tendency of both the JHA Council and the Commission to treat external AFSJ issues as a substantially autonomous external domain with regard to the CFSP.

It should be noted that there is a potential for overlap between the CFSP – with its general external security mandate – and the external dimension of the AFSJ because of the aforementioned international context of most of the serious cross-border crime issues falling within the AFSJ internal security mandate of Article 67(3) TFEU. This is particularly the case in the field of counter-terrorism which has traditionally also been a CFSP priority. This overlap can give rise to questions and even tensions between institutions regarding the boundaries between external AFSJ and CFSP measures, as was been shown by the action of annulment which the European Parliament brought on 11 March 2010 against EU Council Regulation 1286/2009 imposing financial

restrictions for counter-terrorism purposes³⁵ on the grounds that the Council had adopted this Regulation on the basis of (CFSP) Article 215(2) TFEU instead of (AFSJ) Article 75 TFEU.³⁶ Article 75 TFEU in fact provides an explicit legal base for the adoption of administrative measures aimed at freezing terrorist assets but the Council had preferred – no doubt primarily in order to avoid co-decision by the European Parliament under the “ordinary legislative procedure” (see section 3.4 below) – to use the much wider legal basis provided by Article 215(2) TFEU for imposing economic and financial sanctions in the CFSP context – which provides only for the information of the Parliament. This case is currently still pending before the ECJ, but the Opinion delivered by Advocate General Yves Bot on 31 January 2012 has shown all the difficulties of drawing precise borderlines between the respective AFSJ and CFSP domains: The Advocate General endorsed, on the one hand, the Council’s choice of legal basis on the grounds of its overarching CFSP objectives of preserving peace and strengthening international security. On the other hand, he rejected the Council’s view that the delimitation of the respective spheres of application of Articles 75 TFEU and 215(2) TFEU should be based on a distinction between “internal” terrorists, “external” terrorists and “international” terrorists as being contrary to the very nature of terrorism “which, by attacking common values and the very foundations of the rule of law, affects the entire international community, irrespective of the geographical scale of the threat”.³⁷ While the element of inter-institutional power struggle in this case is perfectly obvious, the AFSJ/CFSP boundary issue raises the wider question to what extent international counterterrorism measures should be guided more by a foreign policy or more by an internal security rationale. As both rationales are far from incompatible the obvious answer should be to combine and integrated both rationales. Such an

³⁵ Council Regulation (EU) No. 1286/2009 of 22 December 2009 amending Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban; OJ L 346 of 23.12.2009.

³⁶ Case C-130/10, *European Parliament v Council of the European Union*; OJ 134 of 22.5.2010. See Marise Cremona: The Two (or Three) Treaty Solution: The New Treaty Structure of the EU, in: Andrea Biondi, Piet Eeckhout and Stefanie Ripley (eds.): *EU Law after Lisbon*, Oxford: Oxford University Press 2012, p. 57.

³⁷ Court of Justice of the European Union: Opinion of Advocate General Bot delivered on 31 January 2012. Case C-130/10 *European Parliament v Council of the European Union*, paragraphs 64 and 75 (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010CC0130:EN:HTML>; accessed 3 April 2012).

integration of internal security and wider foreign policy rationales is clearly in line with the “consistency” requirement of Article 21(3) TEU – but in this respect the EU faces certain institutional challenges (see section 4.3 below).

3.4 Decision-making rules

With the entry into force of the Treaty of Lisbon the “ordinary legislative procedure” (Article 294 TFEU) with qualified majority voting in the Council and co-decision by the European Parliament has become the standard decision-making procedure for AFSJ matters. The only exceptions³⁸ with potential implications for the external dimension of the AFSJ are measures in the domain of family law (Article 81(3) TFEU: unanimity and consultation only of the European Parliament), measures in the field of criminal procedural law not already foreseen by the Treaty (Article 82(2)(d) TFEU: unanimity and consent only by the European Parliament), minimum rules in the domain of substantive criminal law in other areas than already defined by the Treaty (Article 83(1) TFEU: unanimity and consent by the European Parliament) and establishment of the European Public Prosecutor’s Office and extension of its powers (Article 86(1) and (4): unanimity and consent of the European Parliament).

The negotiation and conclusion of formal agreements with third-countries is governed by Article 218 TFEU which provides for a decision of the Council on the opening of the negotiations (on the basis of a proposal by the Commission), the authorisation of the signing and the conclusion. In all of these cases the Council has to act by qualified majority, except if the agreement covers a field for which unanimity is required (Article 218(8) TFEU). By virtue of Article 218(7) TFEU the European Parliament’s consent is now required for all international agreements covering AFSJ matters to which either the ordinary legislative procedure or a special legislative procedure with consent applies, which means that only in the case of an agreement covering family law matters (Article 81(3) TFEU) would its conclusion not depend on the Parliament’s consent.

Two observations may be made with regard to these post-Lisbon decision-making rules: The first is that the extension of qualified majority voting

³⁸ Referred to as “special legislative procedures”.

with the “ordinary legislative procedure” to most AFSJ fields – including the former “third pillar” fields of judicial cooperation in criminal matters and police cooperation – has definitely strengthened EU decision-making capacity: As in all EU policy fields qualified majority voting means that the pressure on diverging national interests to agree to compromises and not to delay a decision unduly increases significantly because of the risk of being outvoted, with beneficial effects on both the substance and the speed of decision-making. The second observation is that the Lisbon Treaty reforms have led to a massive strengthening of the role of the European Parliament with regard to the external dimension of the AFSJ, with parliamentary co-decision or consent now being required to almost all EU acts. This constitutes a significant reinforcement of the EU-level democratic legitimacy basis of EU external action in this domain which – especially as regards most categories of international agreements – was largely missing before the Lisbon Treaty.

3.5 Differentiation: the implications of the “opt-outs”

While the Lisbon Treaty has simplified the treaty architecture regarding the AFSJ it has not removed the “opt-out” positions granted to Ireland, the UK and Denmark (whose opt-out is different because of its participation in the Schengen system). These have, on the contrary, even been expanded as the previously existing “opt-outs”, which applied only to the “communitarised” AFSJ fields of the “first pillar” (asylum, migration, border controls, judicial cooperation in civil matters) have now been extended also to the former “third pillar” fields (police and judicial cooperation in criminal matters) in order not to expose the three Member States concerned to the perceived risks and inconveniences of the “community mode” of decision-making now applicable to most AFSJ matters in the context of the new TFEU.³⁹ This means that these three Member States now enjoy a comprehensive “opt-out” from new AFSJ measures, unless they make use of their right to a selective opt-in as defined in the applicable protocols,⁴⁰ and are bound only by existing ones they have decided to opt into in the past.

³⁹ On the background and legal and political complexity of these “opt-outs” see Jörg Monar: The ‘Area of Freedom, Security and Justice: ‘Schengen Europe’, Opt-outs, Opt-ins and Associates, in: Kenneth Dyson and Angelos Sepos (eds.): Which Europe? The Politics of Differentiated Integration, Houndmills: Palgrave Macmillan 2010, pp. 279-292.

⁴⁰ By way of Protocol 21 on the position of Ireland and the United Kingdom in respect of the Area of Freedom, Security and Justice, and Protocol 22 on the position of Denmark (OJ C 83 of 30.3.2010), p. 295 and 299.

Quite apart from the curious situation that the “masters of the treaties” have thus granted an in principle complete opt-out to three of their number from what is defined as a fundamental common treaty objective in Article 3(2) TEU, this also has implications for the external dimension of the AFSJ. According to Article 2 of the British and Irish and Article 2 of the Danish “opt-out” protocols,⁴¹ no provision of any international agreement concluded by the EU pursuant to the provisions relating to the AFSJ is binding or applicable to these three Member States. The territorial application of any such agreement is thus limited to the other Member States, constituting an exception from the general principle of EU international agreements applying to the entire territory of the Union.⁴² Certain “opt-in” possibilities for Ireland, the UK⁴³ and Denmark exist, but there can be major political and/or legal obstacles to using these. The most prominent example is the EU/Schengen “common policy on visas” (Article 77(2)(a) TFEU) which is based on common visa requirements for short-stay visas for up to 90 days in a 180-day period applicable to the territories of the EU Schengen Member States (“Schengen visas”). As Ireland and the UK are not participating in the common visa system obviously they also cannot participate in any of the visa facilitation agreements concluded by the EU. The Danish position is even more complicated: Denmark is part of the Schengen group and thus therefore has a strong incentive to participate in the visa facilitation agreements. Yet its “opt-in” possibilities do not extend to measures that do not build upon the original Schengen *acquis*. As visa facilitation agreements fall into the latter category Denmark has to conclude legally separate visa facilitation agreements with the respective third-countries even if the substantial provisions of these are identical with those of the respective EU/Schengen agreements.⁴⁴ As a result of these various “opt-out” arrangements the EU has had to negotiate and conclude such agreements with third-countries without three of its Member States, a peculiarity which

⁴¹ Protocols 21 and 22 to the TEU and TFEU.

⁴² See Bernd Martenczuk: Variable Geometry and the External Relations of the EU, in: Bernd Martenczuk and Servaas van Thiel (eds.): Justice, Liberty, Security: New Challenges for EU External Relations, Brussels: Brussels University Press 2008, pp. 508-509.

⁴³ Article 3 of Protocol 21 on the position of Ireland and the United Kingdom in respect of the area of freedom, security and justice, which provides “opt-in” possibilities for these two Member States, also applies to international agreements.(OJ C 115 of 9.5.2008).

⁴⁴ See Steve Peers: EU Justice and Home Affairs Law, Oxford: Oxford University Press 2011 (third edition), p. 238; Florian Trauner and Imke Kruse: EC Visa Facilitation and Readmission Agreement, Brussels: Centre for European Policy Studies (CEPS Working Document 290) 2008, p. 10.

is also reflected in the consequent need to define at the beginning of the respective agreements the meaning of “Member State”. It is thus stated in Article 3 of the 2007 visa facilitation agreement with the Russian Federation that

For the purpose of this Agreement:

(a) ‘Member State’ shall mean any Member State of the European Union, with the exception of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland.⁴⁵

The “opt-outs” have also forced the EU to introduce differentiation elements in its participation in multilateral conventions. The 2006 Council Decision on the conclusion by the EC of the Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the 2000 United Nations (“Palermo”) Convention Against Transnational Organised Crime, for instance, thus states in Recital 5

the UK and Ireland are not bound by this Decision to the extent that it concerns the exercise of an external power by the Community in fields where its internal legislation does not bind the UK and/or Ireland,

and in Recital 6

This Decision is without prejudice to the position of Denmark under [the Danish Protocol], hence Denmark does not take part in its adoption and is not bound by it.⁴⁶

Needless to say, such differentiation does not add to the credibility and coherence of the Union as an international actor in the AFSJ domain, especially as the “opted-out” Member States then frequently negotiate parallel bilateral agreements with the respective third-countries.⁴⁷ The EU’s external posture is also not helped by the variations between the three “opt-outs”. As regards

⁴⁵ OJ L 129 of 17.5.2007, p. 3.

⁴⁶ Council Decision 2006/617/EC, OJ L 262 of 22.9.2006, p. 34. – It should be noted, however, that Denmark, Ireland and the UK adhered to the Protocol – which came under Community/ Member States “mixed competence” – alongside the Community.

⁴⁷ Denmark, for instance, concluded in 2008 a bilateral visa facilitation agreement with Russia which was largely similar to the abovementioned EU-Russia agreement of 2007.

EU readmission agreements, for instance, the UK has so far opted into all of them, Ireland into most of them and Denmark into none of them.⁴⁸ The differentiation can even affect the external relations of EU special agencies: When the EU border management agency Frontex negotiates and concludes working arrangements with third-country authorities (see below) Ireland and the UK are not part of these arrangements as they do not participate in Frontex.

At this stage it is difficult to predict how much use Denmark, Ireland and the UK are going to make of their extended “opt-outs” after the entry into force of the Lisbon Treaty and of the extent to which these “opt-outs” will then affect the AFSJ external dimension. The case of the recent 2011 EU Directive on Preventing and Combating Trafficking in Human Beings and Protecting Victims⁴⁹ – which is of importance to potential common external action in this field – has, however, shown all the potential for further differentiation: The British government decided in 2010 to opt-out, although it revised its position in favour of an opt-in after the finalisation of the Directive.⁵⁰

⁴⁸ Further examples are given and analysed in Marise Cremona: *EU External Action in the JHA Domain: A Legal Perspective*, Florence: European University Institute (Working Paper Law 2008/24) 2008, pp. 28-30.

⁴⁹ Directive 2011/36/EU, OJ L 101 of 15.4.2011.

⁵⁰ UK Home Office: *EU directive on human trafficking*, 22 March 2011 (<http://www.homeoffice.gov.uk/publications/about-us/parliamentary-business/written-ministerial-statement/eu-direct-human-trafficking-wms/?view=Standard&pubID=869472>).

4 The post-Lisbon institutional framework of the external AFSJ dimension

4.1 The role of the EU institutions

The Treaty of Lisbon has reinforced the supreme political guidance function of the European Council with regard to the development of the AFSJ: By virtue of Article 68 TFEU it is the European Council that “define[s] define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice”. This is not a purely formal role: Although the five-year programmes for the development of the AFSJ – of which the aforementioned Stockholm Programme is the latest – have been largely finalised at the level of the JHA Council, the European Council has on several occasions given a considerable political impetus to the development of the AFSJ. This also applies to the external dimension: The Santa Maria de Feira European Council meeting of June 2000, for instance, accelerated the development of the AFSJ external dimension by not only endorsing a set of priorities but also requesting a report on progress made with the implementation by the end of 2001.⁵¹ Another example is the adoption of the “Global Approach to Migration” by the European Council in December 2005 which placed an increased emphasis on linking different external policy measures (including financial and development policy instruments) for achieving EU migration management objectives in the context of a reinforced cooperation with third-countries and requested the Commission to report on progress by the end of 2006.⁵² In each of those cases the prioritisation defined by the Heads of State or Government put some political pressure on the Commission and Council to accelerate progress along the lines indicated. It should also be noted that, according to Article 22(1) TEU, it is the European Council that has to identify the “strategic interests and objectives” of the EU’s external action in general: This reinforces its role as an overarching authority on any strategy involving external AFSJ issues.

AFSJ external issues are normally only substantially discussed at European Council meetings if several Heads of State or Government are particularly

⁵¹ European Council: Presidency Conclusions Santa Maria da Feira European Council, 19/20 June 2002, Council document 200/1/00, paragraph 51.

⁵² European Council: Presidency Conclusions European Council, 14/15 December 2005, Council document 15914/1/05 REV 1, paragraphs 8-10.

concerned about any challenges in this field at that particular moment. This was the case, for instance, at the June 2011 European Council which followed a bilateral summit and joint letter of Italian Prime Minister Silvio Berlusconi and French President Sarkozy from April 2011⁵³ on the increased immigration pressure on the EU's southern borders as a result of the political turmoil of the "Arab Spring". This led to an "extensive debate" on migration challenges during the June European Council meeting and a new prioritisation of "a wide-ranging structured dialogue on migration, mobility and security" with the neighbouring countries to the south and east, including the development of conditional "mobility partnerships".⁵⁴

The semi-permanent President of the European Council, newly introduced by the Treaty of Lisbon, has according to Article 15(6) TEU the task to "drive forward" the work of the European Council and to ensure its "continuity". The President would, thus, have the possibility to make the external AFSJ dimension more of a regular issue for the European Council and to get the European Council to exercise potentially more political leadership in this field. There is little indication that the current incumbent, Herman Van Rompuy, who it has to be said has had his hands full with the Eurozone troubles ever since he came into office, regards this dimension as one into which he wants to invest much political capital. Yet he has, in case of need, facilitated a measured response by the European Council. In the context of the 2011 Mediterranean migration "crisis", as presented by Prime Minister Berlusconi and President Sarkozy, for instance, he tried effectively to calm the waters on the migration challenges in the Mediterranean ahead of the aforementioned June 2011 European Council by warning that these challenges should not be exaggerated.⁵⁵

In terms of implementation of the external AFSJ dimension, the JHA Council remains the principal decision-making institution. As a "double" Council formation comprising both the ministers of interior and of justice it has to

⁵³ French Embassy to the UK: Franco-Italian Summit, 26 April 2011 (<http://www.ambafrance-uk.org/Letter-from-French-and-Italian>).

⁵⁴ European Council: Presidency Conclusions European Council 24/25 June 2011, Council document EUCO 23/11, pp. 1 and 10-11.

⁵⁵ Le Soir (Brussels): Révoltes arabes : il ne faut pas « exagérer le danger migratoire », 17.4.2011.

integrate interests which do not always coincide. It is up to the JHA Council to approve all programming documents for the JHA external dimension,⁵⁶ whether these are submitted to the European Council for formal adoption or not, adopt all relevant legislative acts, take the decisions on the opening, signing and conclusion⁵⁷ of international agreements in the AFSJ domain, approve the Commission's negotiation mandates, decide on external risk assessments⁵⁸ and define action priorities regarding specific third-countries or -regions⁵⁹. The Lisbon Treaty reforms have slightly weakened the strong position of the Council as it now has to decide on (nearly) all legislation under co-decision with the European Parliament and has to seek its consent on the conclusion of practically all international agreements.

As in the case of all Council formations the ministers have little time for substantive discussions so that most texts relevant to the AFSJ external dimension arrives on their desks as "A"-points ready for adoption. These texts are negotiated and finalised by the competent Council working groups, a process that often involves several working groups and complex coordination needs. In the case of the 2010 "Action-oriented paper on combating organised crime (especially drug trafficking) originating in West Africa",⁶⁰ for instance, no less than six different working groups⁶¹ were involved until the Council approved the finalised text on 26 April 2011. With the Council AFSJ working groups being primarily focused on internal EU AFSJ issues (with representatives normally from the ministries of interior and justice) necessary additional expertise on relations with the third-countries concerned or the situation within them can be brought in by the Group on External JHA Issues (JAIEX), which gathers experts on international AFSJ issues from

⁵⁶ Of which the most important so far is the still valid "Strategy for the External Dimension of JHA: Global Freedom, Security and Justice" which was endorsed by the JHA Council on 1 December (Council document 15446/05 of 6.12.2005).

⁵⁷ After the consent of the European Parliament.

⁵⁸ An example is the "Council conclusions on a Latin-American and Caribbean (LAC) organised crime analysis", Council document 5070/4/10 REV of 21.5.2010.

⁵⁹ An example is the "Action-oriented paper on strategic and concerted action to improve cooperation in combating organised crime, especially drug trafficking, originating in West Africa", Council document 5069/3/10 of 25.3.2010.

⁶⁰ Ibid.

⁶¹ The working groups on organised crime (CRIMORG), horizontal drugs issues (CORDROGUE), external JHA issues (JAIEX), Africa (COAFR), internal security operational cooperation (COSI) and migration (MIGR).

the national ministries, and the respective regional CFSP working groups. The June 2010 Council conclusions on the creation of a Latin-American and Caribbean organised crime threat assessment report, for instance, involved the AFSJ organised crime group (CRIMORG) as lead group but also JAIEX and the CFSP group on Latin-America (AMLAT).⁶²

The JAIEX group finds itself in a key position below the political level of the Council a regards the preparation of decisions on the external AFSJ dimension. Yet, as indicated in the fourth report on the implementation of the Strategy for the External Dimension of July 2011, the fact that the group holds just one monthly meeting often prevents it from addressing urgent matters quickly enough, and JAIEX delegates also seem to have a tendency to present only their national positions rather than really discussing issues.⁶³ It should be noted as well that the JAIEX group still remains subordinate to the authority of the Committee of Permanent Representatives (COREPER), which remains the supreme coordinating body below the level of the Council, and that there are other Council committees and working parties which have a key role in defining external priorities in their respective fields. These include the Strategic Committee on Frontiers, Immigration and Asylum (SCIFA), the Article 36 Committee (CATS), which deals with external aspects of police and judicial cooperation in criminal matters, and the High Level Working Group on Migration and Asylum (HLWG) which analyses the situation in countries of origin and prepares external action plans in response to the identified challenges.

A special position within the Council is the EU Counter-terrorism Coordinator (CTC) who works under the authority of the HRVP but takes his instructions from and reports primarily to the JHA Council. The CTC not only coordinates counter-terrorism activities within the Council and monitors the implementation of EU counter-terrorism measures but can also be described as the Union's chief counter-terrorism diplomat, as he has the task of ensuring the effective communication of EU objectives and cooperation offers to third-countries.⁶⁴

⁶² Council document 9656/10 of 21.5.2010.

⁶³ Council of the European Union: Fourth Implementation Report of the "Strategy for the External Dimension of JHA: Global Freedom, Security and Justice" by the Council Secretariat (JAIEX working party) - Period of Reference: January 2010–June 2011, Council document no. 11678/11 of 4.7.2011, pp. 11-12.

⁶⁴ This task was reconfirmed by the Stockholm Programme: European Council: The Stockholm Programme, OJ C 115 of 4.5.2010, p. 24.

The European Commission has greatly expanded its role in the AFSJ domain since the Treaty of Amsterdam, with there now being two Commissioners and two Directorate-Generals (DGs) – one for “Home Affairs” and one for “Justice” – in charge, and a formal right of initiative under the Treaties which covers the entire domain.⁶⁵ Since the entry into force of the Amsterdam Treaty in 1999 the Commission has more or less constantly pushed for the further development of the AFSJ external dimension through general policy recommendations,⁶⁶ proposals for developing relations on AFSJ matters with specific third-countries or -regions,⁶⁷ enhanced capacity building in third-countries and the negotiation of agreements with third-countries. Apart from substantive policy reasons, the Commission’s proactive conduct in this domain may also have been motivated by a certain institutional self-interest as it has allowed it to develop a more and more important role in a field that in the 1990s was still completely dominated by intergovernmental cooperation between the Member States.

As the executive institution of the EU and the one responsible for the implementation of the budget it has also often fallen to the Commission to respond fairly rapidly to crisis situations affecting the AFSJ through proposals for revised external action priorities including the use of EU funding instruments. The most recent example of this emergency executive function of the Commission has been the package of proposals the Commission presented to Council and Parliament on 4 May 2011 in response to the surge of immigration pressure on the EU’s southern borders in conjunction with the “Arab Spring” developments including both enhanced and new forms of cooperation (such as the establishment of “trust-funds”) with the third-countries concerned.⁶⁸

⁶⁵ By virtue of Article 76 TFEU, however, a minimum of one-quarter of the Member States can also introduce legislative initiatives in the fields of police and judicial cooperation in criminal matters, so that the Commission right is non-exclusive in these fields.

⁶⁶ Key examples are the October 2005 Communication on a “strategy” for the external AFSJ dimension (COM(2005)491 of 12.10.2005) and the proposals for external action in the April 2010 Communication on the “Action Plan Implementing the Stockholm Programme” (COM(2010)171 of 20.4.2010, pp. 58-64).

⁶⁷ A major example is the 2004 Commission proposals on making the JHA domain a priority action field in relations with the European Neighbourhood Policy (ENP) countries (COM(2004)373, pp. 16-17, 21 and 23).

⁶⁸ European Commission: Communication on migration, COM(2011)248 of 4.5.2011.

The Lisbon Treaty has left the institutional position of the Commission with regard to the external AFSJ dimension largely unchanged, except for the fact it has to take into account the strengthened position of the European Parliament. Yet there is a structural change within the Commission which, although not caused by it, coincided with the entry into force of the Lisbon Treaty; the splitting of the AFSJ portfolio between two Commissioners (Cecilia Malmström and Viviane Reding) and the subsequent splitting (in 2009) also of the old JHA DG into the new “Home Affairs” and “Justice” DGs. The full effects of this on the Commission’s role in this domain will probably only become clear over time. There are initial indications, however, that this separation of the “home affairs” and “justice” AFSJ fields may result in a less “joined-up” approach of the Commission as regards the external AFSJ dimension: In the Commission’s November 2010 Communication on action for implementation of the EU’s 2010 Internal Security Strategy – which was prepared by the DG Home Affairs – the section on “Internal security in a global perspective” did not contain a single reference to international criminal justice cooperation and relegated the external role of Eurojust to a footnote.⁶⁹ There are also other Commissioners and their respective DGs whose responsibilities are often affected by AFSJ external issues, such as the domains of transport (Commissioner Siim Kallas), the fight against fraud (Commissioner Algirdas Semeta) and enlargement and the European Neighbourhood Policy (Commissioner Stefan Füle). These also therefore need to be involved in decision-making on the respective external aspects.

In relation with both the Council and the Commission, a hybrid structure has to be considered which – although not an institution in the formal sense – is surely the biggest institutional innovation introduced by the Lisbon Treaty: the European External Action Service (EEAS). This “Service” is headed by the HRVP, and its staff has been drawn from the Commission (mainly from the DG External Relations and part of the DG Development), the Council (Policy Unit, DG E) and officials from the Member States’ foreign ministries (on temporary secondment). In spite of the comprehensive mandate (“external action”) which its title and the rapidly growing number of its personnel suggests, it seems unlikely that the EEAS will have any major impact on policy formulation in the external dimension of the AFSJ. Not only

⁶⁹ European Commission: The EU Internal Security Strategy in Action: Five steps towards a more secure Europe, COM(2010)673 of 22.11.2010, p. 3.

have the Commission's DG "Home Affairs" and "Justice" and the Council's DG H (JHA) retained their respective external relations responsibilities, but the EEAS – which has its main focus CFSP and the external diplomatic representation of the EU – also lacks any unit in its "Global and Multilateral Issues" Department specifically tasked to cover external AFSJ matters. Perhaps more importantly, the HRVP (currently Baroness Catherine Ashton) has also so far stayed largely clear of major external AFSJ matters such as illegal immigration and the fight against international organised crime. During her high profile visit to Tunisia in February 2011, for instance, the HRVP avoided answering questions about migration challenges although thousands of Tunisian illegal immigrants had by that time already reached Italian shores.⁷⁰ While CFSP issues (and the internal battles over the EEAS) have no doubt kept her busy enough, her abstention on the external AFSJ side is likely to be motivated also by the wish to avoid a potential turf war with the JHA Council and especially the ministers of interior, who have been accustomed during the last decade to handle "their" external JHA issues largely amongst themselves. Yet the EEAS itself could – as the Commission noted in its November 2010 Communication on the implementation of the EU Internal Security Strategy – bring to the AFSJ external dimension additional "skills and expertise" from the Member States and help with the deployment of expertise in the field to EU delegations abroad.⁷¹ The EEAS only started to function during 2011, so time will tell whether this potential is going to be realised.

As already pointed out, the European Parliament's position with regard to the external side of the AFSJ has been much strengthened by the Lisbon Treaty through the extension of both its co-decision rights and its consent rights to the conclusion of international agreements. In addition the Parliament already had a strong means of influence in this field through its budgetary powers. The Parliament demonstrated its extended external relations powers on 11 February 2010 when it rejected – with an overwhelming majority of 378 to 196 – the SWIFT Interim Agreement between the EU and the US which was intended to ensure continued access of US law enforcement authorities to the financial messaging data handled by the international SWIFT bank

⁷⁰ Focus Magazin (Munich): Ashton weicht Frage nach Migration in Tunis aus, 14.2.2011.

⁷¹ European Commission: The EU Internal Security Strategy in Action: Five steps towards a more secure Europe, COM(2010)673 of 22.11.2010, p. 3.

consortium. This Interim Agreement had already been concluded by the Council and it provisionally entered into force on 1 February 2010, which was arguably a rather cavalier way of dealing with the Parliament's newly extended powers of consent. In spite of intense lobbying not only from the Commission and Member States – most of which regarded transatlantic cooperation on financial messaging data of major importance for the fight against terrorist financing – but also from the US (including Secretary of State Hillary Clinton) for which the agreement was crucial for the Terrorist Finance Tracking Programme (TFTP), the Parliament's committee in charge of AFSJ matters (the LIBE Committee) successfully recommended to the plenary a rejection of the agreement. The grounds cited were inadequate data protection provisions, especially as regards access of the US to “bulk” rather than individually targeted data, the absence of a judicial authorisation requirement and lack of rules on retention and oversight.⁷² This forceful intervention of the Parliament in the external dimension of justice and home affairs, however, lost part of its moral strength when the EP voted through on 7 July 2010 the text of a hastily re-negotiated definite EU-US agreement which provided only limited additional data protection safeguards.⁷³ This cleared the way for an entry into force of the agreement on 1 August 2010, but made the European Parliament's earlier stance appear to have been influenced more by an interest in affirming institutional prerogatives than substantive policy reasons. Nevertheless the SWIFT case has shown that the Council and Commission as well as third-countries now have to reckon with the Parliament as an important factor in the external dimension of the AFSJ. During the re-negotiation of the SWIFT agreement the Commission, the Council Presidency and the US went to great lengths in briefing and communicating with the LIBE Committee – which is likely to set a precedent for future negotiations also.

⁷² European Parliament: Draft Recommendation on the proposal for a Council decision on the conclusion of the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Program, Committee on Civil Liberties, Justice and Home Affairs, Rapporteur: Jeanine Hennis-Plasschaert, PE438.440v01-00, 3.2.2010.

⁷³ Council of the European Union: Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program, OJ L 195 of 27.7.2010.

4.2 The role of the special agencies

The special agencies created in the context of the AFSJ – Europol, Eurojust, Frontex, the European Police College (CEPOL) and the new European Asylum Support Office (EASO) – have functions primarily of internal EU information exchange, analysis and cooperation support. Yet all four have been vested with the power to negotiate agreements with third-countries or third-country authorities. Europol has already concluded⁷⁴ a range of agreements with third-countries on the sharing of strategic data (fight against organised crime and terrorism, in particular) and – wherever the data protection regimes of the respective countries allow it – also on the sharing of personal data (so-called “operational agreements”). Operational agreements have been signed with eight countries and Interpol, the most far-reaching with the US (two agreements), Canada and Switzerland, and the less far-reaching “strategic agreements” with nine countries and two international organisations, including Russia, Serbia and Turkey,⁷⁵ which from the EU perspective offers insufficient guarantees on the data-protection side. Eurojust can also enter into agreements with third-countries.⁷⁶ The most advanced agreement-based form of cooperation exists with the US, which has also posted a Federal Prosecutor as liaison magistrate to Eurojust. A similar arrangement exists with Norway and Switzerland. Agreements have also been signed with other countries such as Croatia, the Former Yugoslav Republic of Macedonia and Iceland, as well as the Memoranda of Understanding with the Iberoamerican Network of International Legal Cooperation and the UN Office on Drugs and Crime.⁷⁷ Frontex can enter into “working arrangements” on technical matters

⁷⁴ The legal basis is now – after replacement of the original Europol Convention – Article 23 of the Council Decision of 6 April 2009 establishing the European Police Office (Europol) (2009/371/JHA), OJ L 121 of 15.5.2009.

⁷⁵ Current (September 2011) list taken from Europol website:
<https://www.europol.europa.eu/content/page/international-relations-31>.

⁷⁶ On the basis of Article 26 of the amended Eurojust Decision (Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime, OJ L 138 of 4.6.2009).

⁷⁷ All agreements currently (March 2012) in force are listed on the Eurojust website:
<http://eurojust.europa.eu/doclibrary/Eurojust-framework/Pages/agreements-concluded-by-eurojust.aspx>.

of operational cooperation,⁷⁸ and has done so already with fourteen countries and two international organisations.⁷⁹ CEPOL can conclude cooperation agreements with third-country training institutes, especially those from EU candidate countries and Schengen associates.⁸⁰ The new European Asylum Support Office has been empowered to enter into “framework arrangements” with third-country authorities, in particular with a view to promoting and assisting capacity building in the third-countries’ own asylum and reception systems and implementing regional protection programmes,⁸¹ but – having become operational only in June 2011 – it has not yet used this possibility. The scope of the international agreements or arrangements the special agencies can enter into – which need to be authorised by the Council or, in the case of the EASO, by the Commission – is limited by the absence of any operational powers or operational means they control. Yet the agencies can facilitate information exchange with third-countries as well as operational cooperation between the Member States and third-countries, and they can within their respective fields serve as interlocutors on the EU side for third-countries or third-country authorities. There are also initial plans to allow for the posting of joint liaison agents of the agencies with EU delegations abroad, following the establishment of the EEAS.⁸²

It should be added that the special agencies can also influence EU decision-making on external AFSJ issues via reports identifying external challenges – such as the aforementioned regular OCTA and TE-SAT reports of Europol. Some agencies – such as the European Network and Information Security

⁷⁸ On the basis of Article 14 of the Council Regulation (EC) No. 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 349 of 25.11.2004.

⁷⁹ The Russian Federation, Ukraine, Croatia Moldova, Georgia, the Former Yugoslav Republic of Macedonia (FYROM), Serbia, Albania, Bosnia and Herzegovina, the United States, Montenegro, Belarus, Canada and Cape Verde, as well as with the CIS Border Troop Commanders Council and the MARRI Regional Centre in the Western Balkans (Frontex website September 2011: http://www.frontex.europa.eu/external_relations/).

⁸⁰ On the basis of Article 8(2) of Council Decision 2005/681/JHA of 20 September 2005 establishing the European Police College (CEPOL), OJ L256 of 1.10.2005.

⁸¹ Articles 7 and 49 of the Regulation (EU) No 439/2010 of 19 May 2010 establishing a European Asylum Support Office, OJ L 132 of 29.5.2010.

⁸² See Madalina Busuioc and Deirdre Curtin: The EU Internal Security Strategy, the EU Policy Cycle and the Role of (AFSJ) Agencies – Promise, Perils and Pre-requisites (Study PE 453.185), Brussels: European Parliament 2011, p. 10.

Agency (ENISA) and the Fundamental Rights Agency (FRA) – have no external power as such but can still make an input into the decision-making process through their monitoring function and expertise in their respective fields.

4.3 Challenges of consistency and leadership

As already mentioned, Article 21(3) TEU, second paragraph, provides for the Union to “ensure consistency between the different areas of its external action”, and such consistency is surely a crucial factor for the effectiveness of Union action on the international stage. The external dimension of the AFSJ faces a double consistency challenge, one between the different AFSJ fields themselves and one between the external dimension and other EU external policies:

As regards consistency between external action in the different AFSJ fields, the fact that the external dimension is still under the control of a single Council formation (the JHA Council) and that the aforementioned JAIEX group covers all external AFSJ matters has so far ensured adequate coordination across the different fields of external AFSJ action. Yet there could be a risk of a growing “drifting apart” of the external home affairs and external justice fields as a result of the aforementioned new separation of these fields within the Commission and the tendency also in the Council working structures for home affairs and justice issues to be dealt with by different meetings or even parts of meetings at different times.⁸³ This could reduce the potential for a comprehensive and integrated EU approach especially on international law enforcement cooperation issues.

The second consistency challenge, the one between the AFSJ external dimension and other EU external policies, has been identified as such for quite a while. In his December 2008 report on the implementation of the 2003 EU Security Strategy, High Representative Solana seemed to admit that there were serious shortcomings in bringing AFSJ objectives more systematically

⁸³ In the 2011 evaluation of the work and future of the senior Council committee dealing with police and judicial cooperation (CATS), it was noted that CATS meetings have been normally divided into two days, which are split between home affairs and justice delegates. While this was considered justified for a number of files, the evaluation recommended that “more synergy should be encouraged” as it could “provide a more comprehensive picture and avoid a fragmented approach” (Council document 13206/11 of 22.7.2011, p. 6).

and concretely into the EU's external relations strategy when he stated that, in conjunction with the fight against terrorism and organised crime, "[w]e need to improve the way in which we bring together internal and external dimensions".⁸⁴ In the context of the Stockholm Programme the European Council again stressed, in December 2009, "the need for the increased integration of these policies [AFSJ] into the general policies of the Union".⁸⁵ One reason for the difficulties with this "integration" is the tendency of ministries and ministers to protect their respective turfs, The foreign ministries clearly have little interest in seeing their "foreign policy" agenda invaded by "home affairs" interests from the interior ministries, and neither do the interior or the justice ministers relish the prospect of the foreign ministers using the EU context for appropriating some of their themes and instruments to add sparkle and legitimacy to their sphere of action. It also does not help that the Foreign Ministers have tended to want to keep the deployment of EU policing and judicial cooperation capabilities for CSDP civilian crisis management purposes under their exclusive control, although these capabilities normally have to be provided by their colleagues from the interior and justice departments.⁸⁶

Tensions between external AFSJ and CFSP (or other) external policy objectives have not arisen frequently. One such case has been visa facilitation towards third-countries, an issue on which foreign ministers have often tended to favour earlier concessions to third-countries, whereas their colleagues from the ministries of interior who in general have made those concessions more conditional on internal security considerations and/or the parallel conclusion of readmission agreements which have become the EU's primary external migration management instrument.⁸⁷ In order to overcome these tensions a

⁸⁴ Council of the European Union: Report on the implementation of the European Security Strategy, Council document S407/08 of 11.12.2008, p. 4.

⁸⁵ European Council: The Stockholm Programme, OJ C 115 of 4.5.2010, p. 33.

⁸⁶ In the 2008 "Future Group Report" the personal representatives of the Ministers of Interior criticised the current lack of "correlation" and "prior consultation" between the AFSJ and the CFSP/ESDP frameworks in relation to civilian crisis management operations. Council of the European Union: Freedom, Security, Privacy – European Home Affairs in an open world. Report of the Informal High-Level Advisory Group on the Future of European Home Affairs Policy, Council document 11657/08 of 9.7. 2008, pp. 42-43.

⁸⁷ On the importance of readmission agreements in this field, see Carole Billet: EC readmission agreements: a prime instrument of the external dimension of the EU's fight against irregular immigration. An assessment after ten years of practice, in: European Journal of Migration and Law, vol. 12 (2010), pp. 45-79.

“common approach” on visa facilitation was agreed in December 2005 which consisted of the principle that a visa facilitation agreement would not take place if no readmission agreement was in place, the provision for monitoring mechanisms and suspension clauses in the agreements and the need for the Commission to consult with Member States in both the JHA and the geographical CFSP Council groups on its proposal for a negotiating mandate. In terms of ensuring coherence during the decision-making on the negotiating mandate, the “common approach” (which is still applicable) provides for the full involvement of both AFSJ and CFSP groups:

To ensure the coherence between issues relating to external relations on the one hand, and to freedom, security and justice concerns on the other, relevant JHA Council groups, in close consultation with the relevant geographical working groups, will prepare the adoption of negotiating directives in Council.⁸⁸

It seems, however, that in practice cooperation with the geographical working groups does have its problems as the fourth report on the implementation of the Strategy for the External Dimension of July 2011 noted generally that joint meetings of the JAIEX group with geographical groups “have not proved very successful”.⁸⁹

The TEU assigns a general responsibility for ensuring consistency of external action to the Council and Commission “assisted” by the HRVP (Article 21(3) TEU). Yet Article 18(4) TEU places a bigger emphasis on the responsibility of the HRVP as he “shall ensure the consistency of the Union’s external action” and shall be responsible for “coordinating other aspects of the Union’s external action”. In addition the General Affairs Council is entrusted with ensuring consistency in the work of the different Council formations (Article 16(6) TEU). With responsibilities for external consistency being so widespread and – as mentioned before – with the Treaties not putting CFSP or any other external policy domain “in the lead” – the HRVP (who chairs the General Affairs Council) might still be in the best position to monitor

⁸⁸ Council of the European Union: Common approach on visa facilitation, Council document 16030/05 of 21.12.2005, pp. 3-4.

⁸⁹ Council of the European Union: Fourth Implementation Report of the “Strategy for the External Dimension of JHA: Global Freedom, Security and Justice” by the Council Secretariat (JAIEX working party), Period of Reference: January 2010–June 2011, Council document no. 11678/11 of 4.7.2011, p. 11.

and ensure consistency between the external AFSJ dimension and other policies. It remains to be seen, however, whether in the case of a serious clash of approaches or priorities between the JHA Council and other Council formations (or between Commissioners) – which have so far not emerged – the HRVP would have the political weight to make consistency prevail.

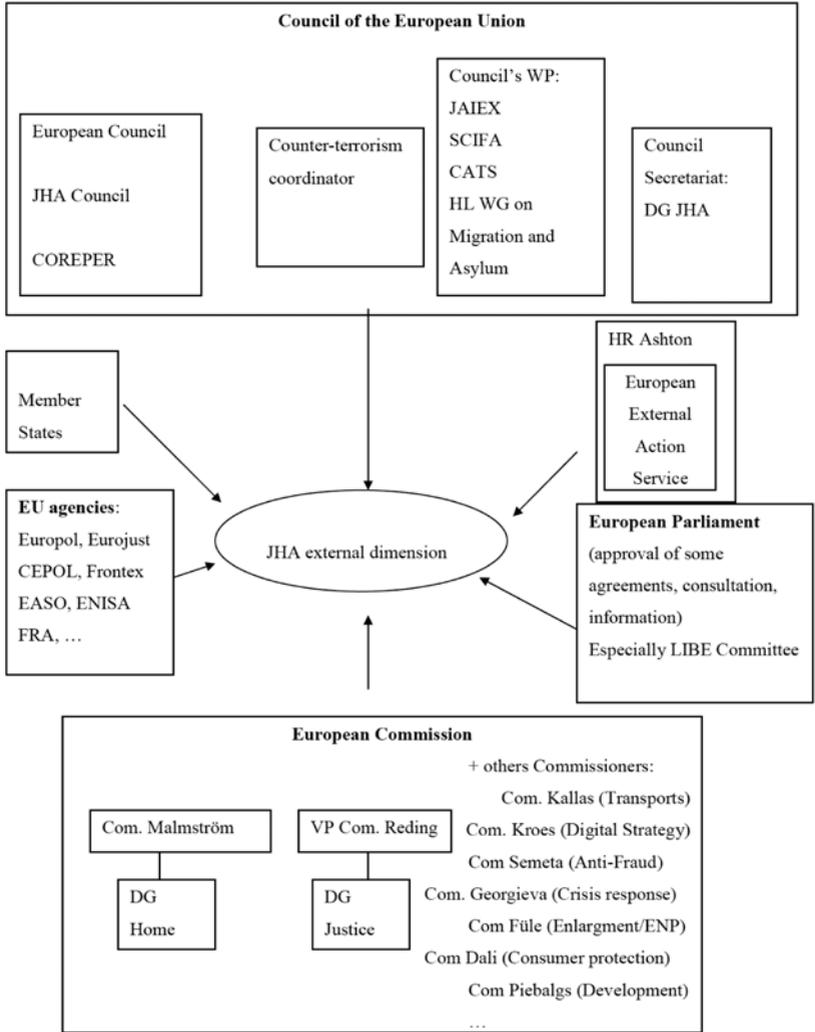
Overall the institutional architecture of the AFSJ external dimension is clearly one of considerable complexity with commensurate challenges to ensure consistency. This has also been recognised in the 2011 JHA External Relations Trio Presidency Programme which actually used the term “complexity”⁹⁰ with regard to the following “unofficial” *organigramme* of all entities with an impact on the AFSJ external dimension (see figure on opposite page).

As regards political leadership in the external AFSJ dimension the situation after the Lisbon reforms is almost equally diffuse: The European Council – as mentioned before – has a broad strategic leadership function, but it exercises this only intermittently, and often only when special interests of Heads of State or Government are at stake as in the case of the 2011 Arab Spring migration “crisis”. Neither its President nor the HRVP has so far shown any ambition to play a major role in this field. This leaves leadership largely to the two European Commissioners in charge (currently Cecilia Malmström for home affairs and Viviane Reding for justice) and to interest coalitions in the JHA Council where the agenda-setting powers of the Council rotating presidency continues to have some influence as well.⁹¹ While the Commission has clearly submitted most of the proposals regarding the external dimension of the AFSJ these proposals are normally heavily influenced or even determined by declared interests or suggestions from Member States – strongly reflected in the Presidency “Trio Programmes” (see next section), so that in practice leadership always has a strong ‘collective’ dimension.

⁹⁰ Council of the European Union: JHA External Relations – Trio Programme, Council document 12004/11 of 4.7.2011, p. 2.

⁹¹ The Polish Presidency of the second half of 2011, for instance, identified the strengthening of cooperation with the EU’s Eastern neighbours in combating drug-related crime as one of the priorities of its programme, which is hardly surprising given its geographical position and internal drug-trafficking challenges (Ministry of Foreign Affairs: Programme of the Polish Presidency of the Council of the European Union, Warsaw 2011, p. 23).

Unofficial architecture of the actors involved in the JHA external dimension



Source: 2011 JHA External Relations Trio Programme, Council document 12004/11 of 4.7.2011, p. 23.

5 Main forms of external EU AFSJ action

5.1 Strategy formulation and programming

Since the Tampere European Council of October 1999 the AFSJ has been the object of a steadily increasing range of strategy and programming documents, of which four categories can be distinguished.

The first are strategy documents for the development of the AFSJ as a whole in which the external dimension appears as one field of action amongst all the others. The main category of these are the multi-annual (five-year) programmes. The AFSJ external dimension has so far invariably been placed at the end of these programmes, which underlines its complementary role with regard to the objectives and strategy elements defined for the individual internal policy fields which are covered in the previous sections. The first two, the 1999–2004 Tampere “programme” (which actually took the form of “Presidency Conclusions” only) and the 2004–2009 “Hague Programme”, provided only in very general terms for a “stronger external action”⁹² and the “development of a coherent external dimension of the Union policy of freedom, security and justice as a growing priority”⁹³, leaving detailed objectives and programming of action to specific AFSJ external strategies still to be elaborated. The 2009–2014 Stockholm Programme, however, provides in its final section not only for general principles, but also for a list of thematic priorities with “new tools”, geographical priorities, agreements with third-countries and common positions in international organisations.⁹⁴ This can be taken as an indication both for the increased political importance of the external dimension and the desire to set clearer points of reference for implementation programming. Whether such more detailed longer-term strategy-making is effective, however, is an altogether different question as it can be quickly overtaken by events (such as the 9/11 attacks or the 2011 “Arab Spring” challenges).

⁹² European Council: Tampere European Council 15 and 16 October 1999, Bulletin-EU no. 10 (1999), paragraphs 59-62.

⁹³ European Council: The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, OJ C53 of 3.3.2005, p. 14.

⁹⁴ European Council: The Stockholm Programme, OJ C 115 of 4.5.2010, pp. 33-37.

The second category of strategy documents are those focused on the implementation of the external AFSJ dimension itself. As the first of those one can regard the initial definition of priorities for the external dimension by the Feira European Council in June 2000⁹⁵ which were followed by external-dimension specific “multi-presidency programmes” with increasingly detailed programming. These programmes were eventually followed by the more substantial and more focussed aforementioned “Strategy for the External Dimension of the Area of Freedom, Security and Justice” of December 2005 which remains the main framework programming document and covers thematic priorities, principles, delivery mechanisms and tools as well as structures and processes.⁹⁶ The 2005 Strategy has survived for such a relatively long time because its elements – focused on strategic issues – are sufficiently general to allow periodic updating and retargeting at the implementation level with regard to key topics, regional priorities and changes in approaches and procedures. This retargeting is done every eighteen months through a combination of assessment and new programming.

The assessments come in the form of the regular “implementation reports” on the external AFSJ Strategy prepared by the JAIEX working group. The implementation reports consist of a first part providing an overview of progress made during the last eighteen months and a second part identifying “areas for attention” which identify necessary priorities and other changes in the light of new challenges and problems which have become apparent during the reporting period. The most recent report from July 2011, for instance, made recommendations on institutional and procedural changes (JAIEX methodology and topics, coordination with other EU external policies), the use of EU financial resources, capacity building in third-countries and relations with the Eastern and Southern Neighbourhood.⁹⁷ The new programming takes the form of the “Trio Programmes” (successor of the former multi-presidency programmes) which are mainly based on the JAIEX implementation reports,

⁹⁵ European Council: Presidency Conclusions, Santa Maria da Feira European Council, 19/20 June 2002, Council document 200/1/00.

⁹⁶ Council of the European Union: A Strategy for the External Dimension of JHA : Global Freedom, Security and Justice, Council document 15446/05 of 6.12.2005.

⁹⁷ Council of the European Union: Fourth Implementation Report of the “Strategy for the External Dimension of JHA: Global Freedom, Security and Justice” by the Council Secretariat (JAIEX working party). Period of Reference: January 2010–June 2011, Council document 11678/11 of 4.7.2011, pp. 11-16.

but also on discussions at the Council level and priorities of the three incoming presidencies. The most recent “Trio Programme” of the Polish, Danish and Cyprus Presidencies of July 2011, for instance, although addressing key issues in the “implementation report” (such as JAIEX methodology and reports), also placed a major emphasis on reinforcing the fight against drug-trafficking,⁹⁸ a major Polish priority, although this had not been identified as an “area of attention” in the 2011 implementation report.

The third category of strategy and programming documents are those related to individual AFSJ fields. Specific strategy and programming documents defining objectives and priorities have been introduced for all major AFSJ policy fields, and during the last decade external dimension elements have become an integrated part of all of them. To give just two examples; first, in May 2008 the Council adopted an “External relations strategy in the field of judicial cooperation in civil matters” which defines primary areas of cooperation from jurisdiction issues to the taking of evidence, as well as working methods, primary target countries and preferred international forums (in particular the Hague Conference on International Private Law).⁹⁹ Second, in June 2011 the Council adopted “Conclusions on priorities for the fight against organised crime 2011–2013” which defines a range of external objectives in relation to internal priorities: the weakening of the capacity of organised crime groups active or based in West Africa to traffic cocaine and heroin to and within the EU; the mitigation of the role of the Western Balkans as a key transit and storage zone for illicit commodities destined for the EU and logistical centre for organised crime groups; and the reduction of the capacity of organised crime groups to facilitate illegal immigration to the EU, particularly via southern, south-eastern and eastern Europe, and notably at the Greek-Turkish border and in crisis areas of the Mediterranean close to North Africa.¹⁰⁰ Such field-specific programming of external dimension elements is normally linked to objectives in other related fields. The above mentioned June 2011 “Conclusions on priorities for the fight against organised crime”,

⁹⁸ Council of the European Union: JHA External Relations – Trio Programme, Council document 12004/11 of 4.7.2011, pp. 5-6.

⁹⁹ Council document 6571/1/08 REV 1 of 7.5.2008.

¹⁰⁰ Council of the European Union: Council conclusions on setting the EU’s priorities for the fight against organised crime between 2011 and 2013, Council document 11050/11 of 6.6.2011, pp. 4-5.

for instance, have clear links with the relevant objectives of the 2009–2012 EU Drugs Action Plan¹⁰¹ as regards action against drug-trafficking. Fields of action considered to be of major importance can also be singled out for specific external action programming on their own, as has been the case, for instance, for measures against trafficking in human beings.¹⁰²

The fourth, and final, category consists of strategy and programme documents regarding specific third-countries or groups of third-countries. These range from external AFSJ objectives as part of general EU regional strategy documents – e.g. the external AFSJ objectives defined in the Commission’s Council endorsed 2004 European Neighbourhood Policy (ENP) Strategy Paper (which is still valid)¹⁰³ – over specific AFSJ external regional action plans – e.g. the aforementioned 2010 Action-oriented paper on combating organised crime (especially drug trafficking) originating in West Africa¹⁰⁴ and the 2011 Council Conclusions on Cooperation in the Area of Justice and Home Affairs within the Eastern Partnership¹⁰⁵ – to the formulation of country specific AFSJ external strategy elements – e.g. the quite specific objectives defined for JHA cooperation in the 2009 EU-Ukraine Association Agenda.¹⁰⁶

The enormous recent proliferation of AFSJ external strategy and programming documents of general, field-specific and geographical orientation, is all the more noteworthy as there were hardly any such efforts made in the 1990s. This can be taken as an indication of the “mainstreaming” of the external AFSJ dimension across both all AFSJ fields and within EU external policy in general. Most EU external strategy formulations now comprise objectives directly related to the AFSJ. Examples are the strong emphasis on the fight

¹⁰¹ Council of the European Union: EU Drugs Action Plan 2009–2012, Council document 16116/08 of 21.11.2008.

¹⁰² Council of the European Union: Action Oriented Paper (AOP) on strengthening the EU external dimension on action against trafficking in human beings, Council document 11450/5/09 of 19.11.2009.

¹⁰³ European Commission: European Neighbourhood Policy Strategy Paper, COM(2004)373 of 12.5.2004, pp. 16-17.

¹⁰⁴ Council document 5069/3/10 of 25.3.2010.

¹⁰⁵ Council document 17596/11 of 28.11.2011.

¹⁰⁶ Council of the European Union: EU-Ukraine Association Agenda, Council document UE-UA 1056/2/09 REV 2 of 15.10.2009, pp. 14-16.

against terrorism in the country strategy papers on Pakistan¹⁰⁷ and the Philippines,¹⁰⁸ and the highlighting of the need for more effective border management and action against corruption in the issuing of passports in the strategy paper on Russia.¹⁰⁹

However, while the external AFSJ dimension has clearly become part of external EU strategy formulation, this does not mean that it is perfectly integrated with other external policies. The aforementioned 2011 “Trio Programme” on JHA external relations¹¹⁰ contains in 23 pages only two references to the CFSP and nothing concrete on how, for instance, migration, police and judicial cooperation issues should be brought into CFSP strategy or what CFSP instruments should be used more specifically for AFSJ objectives. The same vagueness and lack of substance can be observed on the “other side”, i.e. CFSP strategy documents. In spite of the “European Union Security Strategy” and repeated European Council affirmations of the importance of the external AFSJ agenda for EU external relations, most of the country or regional policy and strategy papers – which are essentially CFSP guided – contain at best one or two vague references on how to approach internal security issues in relation to the respective third-countries, and this almost exclusively in the context of providing assistance for capacity building. A telling example is the “EU Policy” on the Horn of Africa¹¹¹ adopted in December 2009. Although the Horn of Africa surely does not lack challenges as regards organised crime – the acts of piracy affecting EU shipping being the most visible aspect –, terrorism and illegal migration to the EU (the latter two are explicitly acknowledged), the Council’s policy document does not contain a single reference to AFSJ objectives or instruments in the sections on maximising the effectiveness of the EU’s response and synergies between EU instruments. Even when it comes to the need for the Union to “systematically address the spread of corruption”, no reference whatsoever is made to the objectives and range of external cooperation instruments which have been

¹⁰⁷ European Commission, Pakistan-European Community Strategy Paper 2007–2013, pp. 15-16.

¹⁰⁸ European Commission, The EC-Philippines Strategy Paper 2007–2013, pp. 20-22

¹⁰⁹ European Commission, Russian Federation Country Strategy Paper 2007–2013, pp. 8-9.

¹¹⁰ Council of the European Union: JHA External Relations – Trio Programme, Council document 12004/11 of 4.7.2011.

¹¹¹ Comprising Djibouti, Ethiopia, Eritrea, Kenya, Somalia, Sudan and Uganda.

developed in the AFSJ context.¹¹² This can be regarded as a direct reflection of the different strings of decision-making within the institutional framework (see above section 4.3).

5.2 Cooperation with third-countries

Any cooperation between the EU and third-countries going beyond diplomatic or informal exchanges requires the existence of formal agreements. In the external dimension of the AFSJ one can distinguish between multilateral or bilateral framework agreements concluded with third-countries in which cooperation on AFSJ matters is provided for as one of several fields of cooperation and agreements addressing specifically external AFSJ matters: As regards the first category, the framework agreements, the EU has since the Treaty of Amsterdam more or less systematically sought to introduce certain external AFSJ elements into the negotiation and conclusion of such framework agreements. This applies, in particular, to “readmission clauses”, i.e., clauses providing for the principle of re-admission of nationals residing unlawfully in the territory of an EU Member State, cooperation on readmission issues and often also the later negotiation of a specific agreement on that matter. Over time the content of these clauses has been increasingly tightened. While the first ever readmission clause in the 1996 Cooperation Agreement between the European Community and the Republic of Vietnam was still relatively vague

[Annex III] The European Community recalls the importance that it and its Member States attach to the principle of readmission of nationals to their countries of origin, reference to which is made in the fifth recital of the preamble to the Agreement¹¹³

the wording of one of the most recent clauses, the one used in the 2009 Stabilisation and Association Agreement with the Republic of Albania, imposes the principle in much stricter terms:

[Article 81(1)] The Parties shall cooperate in order to prevent and control illegal immigration. To this end, the Parties agree that, upon request and without further formalities, Albania and the Member States:— shall readmit any of their nationals

¹¹² Council of the European Union: An EU Policy on the Horn of Africa – towards a comprehensive EU strategy, Council document 17383/09 of 10.12. 2009, p. 12..

¹¹³ Cooperation Agreement between the European Community and the Socialist Republic of Vietnam, OJ C136 of 7.6.1996.

illegally present on their territories, – shall readmit nationals of third countries and stateless persons illegally present on their territories and having entered the territory of Albania via or from a Member State, or having entered the territory of a Member State via or from Albania.¹¹⁴

Since the 9/11 terrorist attacks the EU has also regularly sought the insertion of counter-terrorism cooperation clauses in framework agreements. A recent example is Article 5 of the Partnership and Cooperation Agreement with Indonesia (signed in 2009, but still awaiting conclusion) which provides in Article 5 for the signatories to cooperate generally in the prevention and suppression of terrorist acts and more specifically through

- exchange of information on terrorist groups and their support networks in accordance with international and national law;
- exchange of views on means and methods used to counter terrorism, including in technical fields and training, and by exchange of experiences in respect of terrorism prevention;
- cooperation on law enforcement, strengthening of the legal framework and addressing conditions conducive to the spread of terrorism;
- cooperation on the promotion of border control and management, strengthening capacity building through the establishment of networking, training and education programmes, exchange of visits of high officials, academics, analysts and field operators, and organising seminars and conferences.¹¹⁵

The counter-terrorism clauses are based on a standardised model defined by the Council, but they vary in scope and detail depending on the specifics of EU relations with the respective countries and the demands put forward by them during the negotiations.

Apart from the insertion of clauses on specific AFSJ matters in framework agreements the EU has also increasingly sought to use such agreements

¹¹⁴ Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part, OJ L107 of 28.4.2009.

¹¹⁵ Council of the European Union: Framework Agreement on Comprehensive Partnership and cooperation between the European Community and its Member States, of the one part, and the Republic of Indonesia, of the other part, Council document 14032/09 of 21.10.2009, p. 12.

to create a broader framework for cooperation with partner countries on a wider range of issues in this domain. All Association Agreements (AAs) and Stabilisation and Association Agreements (SAAs) concluded during the last decade contain clauses on cooperation in various JHA fields in line with internal AFSJ objectives. In the case of the 2005 AA with Algeria, for instance, detailed provisions on AFSJ related institution-building, migration issues, the fight against organised crime, drug-trafficking, terrorism and corruption as well as on legal and judicial cooperation have been included.¹¹⁶ But the politically and institutionally less far-reaching Partnership and Cooperation Agreements (PCAs) have also provided pathways for broader cooperation on AFSJ related issues. The 1997 PCA with the Russian Federation, for instance, provided a basis for the development of the “EU-Russia Common Space on Freedom, Security and Justice” set up under the 2003 EU-Russia Partnership and Cooperation Agreement which in spite of serious political and data-protection problems has made possible, inter alia, cooperation progress on visa facilitation, drugs precursors, training of law enforcement agencies and border management cooperation.¹¹⁷ Even agreements primarily focused on economic issues can contain provisions on various AFSJ related matters, from the fight against drug-trafficking and money laundering to migration issues, enabling a broader cooperation.¹¹⁸

Of the second abovementioned category of agreements, those addressing specifically external AFSJ matters, the EU has since the entry into force of the Treaty of Amsterdam concluded 58, of which 21 are multilateral and 37 bilateral agreements.¹¹⁹ The multilateral agreements consist mainly of the participation of the EU/Member States in AFSJ related international legal

¹¹⁶ Articles 82-91 of the Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the People’s Democratic Republic of Algeria, of the other part, OJ L265 of 10.10.2005.

¹¹⁷ European Commission: EU-Russia Common Spaces Progress Report 2010 of March 2011 (no pagination).

¹¹⁸ The Trade, Cooperation and Development Agreement with South-Africa, for instance, has provided a legal basis for the establishment of a “Migration Dialogue Forum” which focuses on information exchange and best practice transfer and also covers issues of asylum and trafficking in human beings. Council of the European Union: EU-South Africa Cooperation Council: Migration Report, Council document UE-ZA 4913/11 of 12.9.2011.

¹¹⁹ European Commission Treaties Office Database: List of agreements in the fields of “Justice, freedom and security”, (<http://ec.europa.eu/world/agreements/AdvancedSearch.do>; accessed 3.4.2012).

instruments – such as the 2007 (“Lugano II”) Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters¹²⁰ (which has replaced the 1988 Lugano Convention) – and the agreements concluded with Iceland, Norway, the Swiss Confederation and Liechtenstein concerning aspects of their association with the Schengen system. The majority of the bilateral agreements concern cooperation on readmission and visa facilitation, but there are also agreements on criminal justice¹²¹ and cooperation on law enforcement¹²² as well as the association of third-countries with the EU’s Monitoring Centre for Drugs and Drug Addiction. A special sub-category consists of the agreements which Europol, Eurojust, Frontex and the EASO (see above section 4.2) can conclude with third-country authorities. While the number of these agreements is steadily increasing – Europol alone has already concluded eighteen agreements with third-countries and three with international organisations¹²³ – their scope is limited to the exchange of certain categories of information, support for operational cooperation between national authorities and training.

The range of agreements specifically concluded on AFSJ issues in particular shows how the EU has become an actor in its own right in the AFSJ external dimension, and that it has as such also been recognised by third-countries. The already mentioned simplification of the treaty architecture and the formal codification of the EU’s legal personality by the Treaty of Lisbon can further facilitate the negotiation and conclusion of cooperation agreements with third-countries in this domain. The Stockholm Programme states explicitly that

¹²⁰ Council Decision 2009/430/EC (OJ L 147, 10.6.2009).

¹²¹ Such as the aforementioned 2003 EU-US agreements on extradition and mutual legal assistance (both OJ L181 of 19.7.2003) – which because of lengthy ratification procedures only entered into force on 1 February 2010 – and the EU-Japan agreement on mutual legal assistance in criminal matters (OJ L39 of 12.2.2010).

¹²² Such as the 2010 “Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program” (OJ L195 of 27.7.2010). The “second-generation” PNR agreements with Australia, Canada and the US currently in the process of ratification also fall within this category.

¹²³ Europol: International Relations (<https://www.europol.europa.eu/content/page/international-relations-31>; accessed 3.4.2012).

The new basis under the Treaty for concluding international agreements will ensure that the Union can negotiate more effectively with key partners. The European Council intends to capitalise on all these new instruments to the fullest extent.¹²⁴

It identifies agreements on data protection, judicial assistance, extradition, trafficking in human beings, visa facilitation, readmission and civil law as primary fields for such action.¹²⁵

At the same time, the persistent limitations of the EU's possibilities to establish agreement-based cooperation frameworks with third-countries are evident. Unless the EU has completely pre-empted a field by common internal and/or external action, the current system of "shared competences" and the protection of essential state functions in the internal security field means that Member States remain free individually to conclude agreements with third-countries – a freedom which is amply used in line with national interests. A recent example is the agreement which Germany signed with the US on 1 October 2008 on access to biometric data and the spontaneous sharing of data about known and suspected terrorists, which also provides for mutual assistance in preventing serious threats to public security, including terrorist entry into either country. There was no EU involvement in the negotiation of this agreement, and only its preamble contains a vague reference to an expectation that other EU Member States might follow the model of this agreement.¹²⁶ Bilateralism clearly also remains a major factor in cooperation on readmission with third-countries,¹²⁷ and even the ECJ's upholding in the *Lugano Opinion*¹²⁸ of an implied exclusive competence of the Community as regards jurisdiction and the recognition and enforcement of judgments in civil matters has not entirely ended Member States' individual international

¹²⁴ European Council: The Stockholm Programme, OJ C 115 of 4.5.2010, p. 34.

¹²⁵ *Ibid.*, pp. 11, 17, 22, 31 and 34-35.

¹²⁶ Deutscher Bundestag: Entwurf eines Gesetzes zu dem Abkommen vom 1. Oktober 2008 zwischen der Regierung der Bundesrepublik Deutschland und der Regierung der Vereinigten Staaten von Amerika über die Vertiefung der Zusammenarbeit bei der Verhinderung und Bekämpfung schwerwiegender Kriminalität, Drucksache 16/13123, 25 May 2009.

¹²⁷ See Jean-Pierre Cassarino: Resilient Bilateralism in the Cooperation on Readmission, in: Marise Cremona, Jörg Monar and Sara Poli (eds.): *The External Dimension of the European Union's Area of Freedom, Security and Justice*, Brussels: P.I.E. Peter Lang 2011, pp. 191-208.

¹²⁸ *Opinion 1/03 (Lugano Convention)* [2006] ECR I 1145.

action possibilities in this latter field.¹²⁹ The continuation of separate bilateral treaty-making by Member States surely does not add to the cohesiveness and credibility of the Union as an international actor on internal security matters. Another limitation is due to the fact that the Union has no “operational capabilities” in the sense of deployable personnel (police, judicial or other) and technical means of its own to participate in joint operations (law enforcement, intelligence sharing, border protection, migration management, etc.) as all these capabilities remain at the level of the Member States. This reduces both the potential scope of agreements and the attractiveness of concluding agreements with the EU from the perspective of third-countries which may still achieve more effective operational cooperation arrangements by concluding bilateral agreements with individual Member States.

5.3 Capacity building in third-countries

Although part of EU cooperation with third-countries and based on bilateral agreements, capacity building can be considered as a separate form of AFSJ-related external action as, rather than being aimed at merely cooperating with third-countries, it is aimed at transforming their JHA systems for them to fit in better with AFSJ-defined objectives. According to the EU’s aforementioned external AFSJ Strategy of 2005: “EU funding and expertise provide important support for institutional and capacity building in third countries across a range of JHA areas, from law enforcement to border control”, something which is considered “essential to the rebuilding and transformation of weak law enforcement institutions and court systems”.¹³⁰ Such capacity building – which has become the financially most substantial form of action of the

¹²⁹ See Jan-Jaap Kuipers: *The External Exclusive Competence of the Community under Article 81 TFEU. Lugano re-opened?*, in: Marise Cremona, Jörg Monar and Sara Poli (eds.): *The External Dimension of the European Union’s Area of Freedom, Security and Justice*, Brussels: P.I.E. Peter Lang 2011, pp. 287-320.

¹³⁰ Council of the European Union: *A Strategy for the External Dimension of JHA : Global Freedom, Security and Justice*, Council document 15446/05 of 6.12.2005, p. 4.

external dimension of the AFSJ¹³¹ – is based on the simple rationale that one can transform third-countries into more effective cooperation partners for addressing external challenges to the AFSJ by building-up their national capabilities in terms of organisation, infrastructure, training and legal framework. External capacity building measures have been developed in most AFSJ policy fields, from asylum and immigration policy over border control and surveillance to police and judicial cooperation in criminal matters. External AFSJ capacity building was tried out for the first time – and on a large scale – with regard to the candidate countries during the pre-accession process of the 2004 enlargement. Because of the major leverage provided by pre-accession conditionality, EU capacity building objectives regarding the accession countries attained their objectives to a large extent, although in the case of Bulgaria and Romania it was felt necessary to add a post-accession “Cooperation and Verification Mechanism” to keep up the pressure on those two new Member States after their accession in 2007 regarding compliance with EU implementation capacity targets.¹³²

The (relatively) successful programme of accession-related external capacity building in the AFSJ domain has provided a model for EU attempts to enhance the capabilities of a much wider range of third-countries. These have in fact become an important part of overall external strategy. The capacity building objectives are particularly wide-ranging on the external side of AFSJ

¹³¹ External AFSJ capacity building uses a range of different EU policy and geographical budget lines. Amongst the most important in the 2012 budget are: budget item 19 02 01 (cooperation with third countries in the field of asylum and immigration), Euro 57.6 million; budget item 19 06 01 (crisis response and preparedness, Instrument for Stability, can be used, inter alia, for capacity building in rule of law): Euro 232.8 million, budget item 19 06 03 (transregional actions in the fight against organised crime, trafficking and terrorism): Euro 22.0 million, budget item 19 08 01 01 (ENP financial cooperation with Mediterranean countries, basis for capacity building on a range of JHA issues, including promotion of rule of law and fight against illegal immigration): Euro 1.2439 billion, budget item 19 08 01 03 (ENP financial cooperation with Eastern Europe, basis for capacity building on a range of JHA issues, including fight against corruption and illegal immigration): Euro 728.4 million; and budget item 19 08 02 01 (cross-border cooperation at EU external under the European Neighbourhood and partnership Instrument, including fight against organised crime and ensuring secure borders): Euro 92.8 million (commitment appropriations, all figures rounded; OJ L 56 of 29 February 2012).

¹³² See Sandra Lavenex: Channels of Externalisation of EU Justice and Home Affairs, in: Marise Cremona, Jörg Monar and Sara Poli (eds.): *The External Dimension of the European Union's Area of Freedom, Security and Justice*, Brussels: P.I.E. Peter Lang 2011, pp. 125-126.

internal security objectives where they partially overlap with CFSP/ESDP objectives as regards security sector reform (SSR) in third-countries.¹³³ The global context of many of the EU's internal security challenges has resulted in countries that are even more geographically remote being targeted by capacity building measures. The support provided by the EU to the Jakarta Centre for Law Enforcement for its training programmes in the fight against transnational crime is an example.¹³⁴ Yet most of the capacity building is currently focused on the ENP and Western Balkan countries as they constitute, in a sense, the Union's external "glacis" when it comes to preventing crime and migration challenges from reaching and crossing the EU's external borders. Enhancing neighbouring countries' law enforcement and border management capabilities has so far clearly been the predominant rationale of these capacity building efforts, for which the external AFSJ approach to the Mediterranean is a primary example.¹³⁵ Measures can address all major internal security issues from terrorism through organised crime to illegal immigration, using a wide variety of instruments from the transfer of technical expertise and training through advice on legislation and the restructuring of police, court and border management services to the funding of equipment. One of the operationally most advanced examples is the EU Border Assistance Mission to Moldova and Ukraine (EUBAM), established in 2005, which in 2010 alone involved 99 customs and border police experts from the EU Member States for advice, training and risk analysis development as well as significant equipment procurement with a total annual budget of Euro 12 million.¹³⁶

In most cases, the capacity building is based on objectives, practices and standards applied within the EU (or at least the Member States in charge of a certain assistance measure), so that this sphere of external action has a

¹³³ See Panos Koutrakos: *The External Dimension of the AFSJ and Other EU External Policies: An Osmotic Relationship*, in: Marise Cremona, Jörg Monar and Sara Poli (eds.): *The External Dimension of the European Union's Area of Freedom, Security and Justice*, Brussels: P.I.E. Peter Lang 2011, pp. 152-160.

¹³⁴ Under the EuropeAid project 127452 "Support to improved security by provision of capacity building to the Jakarta Centre for Law Enforcement Co-operation (JCLEC)".

¹³⁵ See Francesca Longo: *The Mediterranean Dimension of the Area of Freedom, Security and Justice*, in: Marise Cremona, Jörg Monar and Sara Poli (eds.): *The External Dimension of the European Union's Area of Freedom, Security and Justice*, Brussels: P.I.E. Peter Lang 2011, pp. 367-388.

¹³⁶ *European Union Border Assistance Mission to Moldova and Ukraine: Annual Report 1 December 2009–30 November 2010*, Odessa (Ukraine) 2011.

clear dimension of intended “system export”. This may include the transfer of even very specific AFSJ governance mechanisms. An example is the efforts made in the cooperation with the Western Balkan countries in the field of counter-terrorism to transfer EU know-how and practices regarding peer review procedures. It involves members of national counter-terrorism units of both the Member States and the participating Balkan countries¹³⁷ and covers best practices in coordination of prosecutions, inter-agency cooperation, the use of intelligence as evidence and the provision of the legal base for a range of investigative techniques. From July 2008 to May 2009 the EU then sent expert missions to the respective Balkan countries with the objective of (1) introducing the main aims and the context of counter-terrorism peer evaluations, (2) presenting the outcomes and recommendations of the first round of peer evaluations, (3) explaining the added value of the peer evaluation recommendations, and (4) pointing out that the recommendations were a strong tool for improving national counterterrorism structures, in particular because they helped to push forward amendments to the national legal framework.¹³⁸ Not only the peer evaluation framework but also the methodology used – the elaboration of questionnaires which are then used as a basis for the self-assessment of counter-terrorism structures and arrangements in the participating countries – mirrors largely the use of peer evaluations within the AFSJ, so that the aim of exporting an EU governance feature to the partner countries could hardly be more obvious. In July 2011 the Austrian government proposed in the Council to engage in similar efforts to transfer EU best practices to the Western Balkan countries as regards asset recovery, cross-border surveillance, crime scene investigations, undercover operations, witness protection and anti-corruption measures.¹³⁹

Although internal security objectives remain predominant, external AFSJ capacity building has also extended to refugee support and migration management measures in third-countries. In response to increasing numbers

¹³⁷ Albania, Bosnia and Herzegovina, Croatia, Montenegro, Serbia and the Former Yugoslav Republic of Macedonia.

¹³⁸ Council of the European Union: Implementation of the Council Conclusions on the cooperation with Western Balkan countries on the fight against organised crime and terrorism – interim report, Council document 10232/1/09 REV 1, 28.5.2009, pp. 3-4.

¹³⁹ Council of the European Union: Police Equal Performance (PEP) – an initiative for a focused operational approach in the cooperation between the EU and the Western Balkans in fighting serious and organised crime, Council document 11224/11 of 7.6.2011.

of asylum seekers and refugees in North Africa, from 2005 onwards the EU started to fund a range of capacity building programmes in migration management and the delivery of support services to refugees by governments, international organisations and civil society organisations in North Africa, this often in close cooperation with the UNHCR.¹⁴⁰ The current EU-Morocco Action Plan, for instance, includes specifically the development of appropriate administrative infrastructure to process and follow up asylum applications through cooperation, in particular as regards training for the staff concerned.¹⁴¹ Specific capacity building measures are also carried out as part of the EU's "Regional Protection Programmes" which are aimed at increasing asylum and refugee protection capabilities in partner countries. An example was the 2009–2011 Regional Protection Support Project in Belarus, Moldova and Ukraine funded by the EU and implemented by the UNHCR. This involves joint missions with the participation of the governments, NGOs and the UN Refugee Agency, and training sessions on international refugee law and human rights for asylum authorities, border guards, police officers and judges.¹⁴²

In terms of future prospects the Treaty of Lisbon slightly enhances the legal basis for further measures on the capacity building side: Articles 67(2) and 80 TFEU provide explicitly for the first time for "solidarity" between Member States and a "fair sharing of responsibility, including its financial implications". This could strengthen the Commission's hand in proposing financially more ambitious external capacity building measures in these fields – for which the negotiations on the new EU Multiannual Financial Framework 2014–2020 will provide a major opportunity.

In the Stockholm Programme, external capacity building is given a prominent place. Specifically mentioned fields of action include; support for the reform of justice systems, for well-functioning infrastructures and sufficient administrative capacity to handle all aspects of migration (especially in the context of "Mobility partnerships" with countries of origin, transit and

¹⁴⁰ See Johannes van der Klaauw: Multi-dimensional migration challenges in North Africa, in: *Forced Migration Review*, No. 28, 2007.

¹⁴¹ European Commission: EU/Morocco Action Plan, 27.7.2005, action 46.

¹⁴² UNHCR: Second Regional Steering Committee of the Regional Protection Support Project meets in Kyiv (Press release), Kyiv April 2010.

destination), for capabilities in the fight against illegal immigration and trafficking in human beings, for the improvement of border management systems and for effective asylum protection capabilities of third countries, this also in the context of the Regional Protection Programmes.¹⁴³ Emphasis is placed on the need for financial instruments to be made more flexible to allow for a more rapid response to requests, especially in the fields of the fight against organised crime and terrorism and migration management.¹⁴⁴ The complexity of EU budgetary rules and procedures has indeed often made it difficult to adapt capacity building programmes to newly identified deficits and rapidly changing crime risks in the respective third-countries. The Programme's identified geographic priorities for capacity building with internal security relevance include the Western Balkans (organised crime and corruption), the ENP countries (capacity and institution-building for an independent and impartial judiciary, law enforcement authorities and anti-corruption efforts), the Black Sea region (border and migration management, fight against cross-border crime), the Mediterranean (border and migration management and fight against drug trafficking) and West Africa (fight against drug trafficking and other transnational crime).¹⁴⁵ More remote regions and countries are mentioned as well, but it is noticeable that the more geographically remote, the vaguer the wording in terms of potential capacity building measures, so that the focus clearly remains on the Union's neighbouring countries.

While the rationale of third-country capacity building as one way of reducing external challenges for the AFSJ seems compelling enough, it has its problematic side when it comes to implementation. The potential and limits of the Union's possibilities to bring third-countries to adopt or at least cooperate on EU internal security objectives and standards depend crucially on the Union's political leverage.¹⁴⁶ In the case of the Western Balkan countries, the EU membership perspective clearly accounts for a greater leverage than, for instance, for ENP countries that do not have such a perspective. The European

¹⁴³ Council of the European Union: The Stockholm Programme, OJ C 115 of 4.5.2010, pp. 17, 26, 28, 31 and 33-35.

¹⁴⁴ *Ibid.*, pp. 7 and 28.

¹⁴⁵ *Ibid.*, pp. 34-36.

¹⁴⁶ See Sandra Lavenex: Channels of Externalisation of EU Justice and Home Affairs, in: Marise Cremona, Jörg Monar and Sara Poli (eds.): *The External Dimension of the European Union's Area of Freedom, Security and Justice*, Brussels: P.I.E. Peter Lang 2011, pp. 130-132.

Commission's progress reports on ENP partners¹⁴⁷ confirm that, in spite of capacity building assistance, progress can be very limited if this leverage is low or non-existent. Examples are the persisting significant shortcomings of Azerbaijan as regards the fight against corruption and money-laundering,¹⁴⁸ the continuing deficits of national capabilities and legislation with regard to asylum and trafficking in human beings in the Ukraine,¹⁴⁹ the still "totally unsatisfactory" reform of the judiciary in Tunisia in spite of major EU efforts,¹⁵⁰ and the almost complete lack of progress regarding the putting into place of an effective legislative framework for asylum and refugee policy which the Commission reported, again, for Morocco in 2011.¹⁵¹

The fact that the Commission has to contract out many of the capacity building measures to other international organisations and non-public contractors is also not always a guarantor of quality. As scarce public resources – probably in the future even scarcer as a result of the financial crisis – are invested in third-country capacity building, a more critical monitoring of the effectiveness of such measures is clearly necessary. The Stockholm Programme explicitly recognises the need for a more effective evaluation, transparency and accountability-based implementation of capacity building measures.¹⁵²

Another problem of AFSJ-related capacity building abroad is that the EU cannot always be sure that the upgraded capabilities of third-country governments will only be used for the legitimate purposes EU policy-makers have in mind. In a discussion paper of June 2011 the EU's Counter-Terrorism Coordinator, Gilles de Kerchove, warned about the repressive policies of third-countries with which the EU is having a counter-terrorism dialogue actually contributing to the spread of terrorism through these policies and emphasised the need for making human rights an essential component of EU counter-terrorism capacity building in third countries.¹⁵³

¹⁴⁷ See the Commission's latest ENP individual country progress reports (European Commission, SEC(2011) 637-652, 25.5.2011).

¹⁴⁸ SEC(2011) 640, 25.5.2011, pp. 4 and 11.

¹⁴⁹ SEC(2011) 646, 25.5.2011, p. 15.

¹⁵⁰ SEC(2011) 652, 25.5.2011, p. 4.

¹⁵¹ SEC(2011) 651, 25.5.2011, p. 15.

¹⁵² Council of the European Union: The Stockholm Programme, OJ C 115 of 4.5.2010, p. 33.

¹⁵³ EU Counter-Terrorism Coordinator: EU Counter-Terrorism Strategy – Discussion paper, Council document 10622/1/11 REV 1, 7.6.2011, p. 6.

5.4 Cooperation with and within international organisations

International organisations, especially the UN, the Council of Europe, the Organisation for Security and Cooperation in Europe (OSCE), the Hague Conference on Private International Law and the Organisation for Economic Cooperation and Development (OECD), constitute important frameworks for pursuing external AFSJ objectives. In many fields seeking progress within the framework of international organisations is the most effective way to pursue common external AFSJ interests at a multilateral level, this not only because of an existing international organisational framework but also because previously established multilateral conventions bind the EU Member States. The primary fora for multilateral action by the EU in the fight against corruption, for instance, thus remain the UN, the Council of Europe and the OECD.¹⁵⁴ The internal EU controversies surrounding the implementation of UN Security Council Resolutions regarding the freezing of funds and financial resources of individuals and entities suspected of being involved in terrorist financing – which led to the ECJ’s landmark judgment on the (in) famous “terrorist listing” in the *Kadi* and *Al Barakaat* cases¹⁵⁵ – has shown that the legal obligations defined in the context of international organisations can also raise fundamental questions about the extent to which the EU is a mere instrument of execution of these obligations or retains a certain degree of autonomy and the capacity to maintain its own benchmarks in a important field such as counter-terrorism.¹⁵⁶

There can be no question that the EU has increasingly asserted its position within international organisations as an actor on various JHA matters – in line with the growth of its internal powers – since the entry into force of the Treaty of Amsterdam. Major indicators of this increasing actorness within international organisations are the Community (now Union) adhesion to

¹⁵⁴ See Valsamis Mitsilegas: The European Union and the Implementation of International Norms in Criminal Matters, in: Marise Cremona, Jörg Monar and Sara Poli (eds.): The External Dimension of the European Union’s Area of Freedom, Security and Justice, Brussels: P.I.E. Peter Lang 2011, pp. 241-242.

¹⁵⁵ Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat v Council and Commission* [2008] ECR I-6351.

¹⁵⁶ See Piet Eeckhout: Kadi and the EU as Instrument or Actor. Which Rule of Law for Counter-Terrorism?, in: Marise Cremona, Jörg Monar and Sara Poli (eds.): The External Dimension of the European Union’s Area of Freedom, Security and Justice, Brussels: P.I.E. Peter Lang 2011, pp. 326-335 and 338.

the 2000 UN Convention against Transnational Organised Crime (Palermo Convention), to its three Protocols regarding the prevention of illicit manufacturing and trafficking in firearms, the prevention of the smuggling of migrants and the prevention of trafficking of persons, and to the 2003 UN Convention against Corruption.¹⁵⁷ In the domain of international judicial cooperation in civil matters also the EU has been able to increase its presence significantly as is shown by its accession in 2007 to the Hague Conference on International Private Law and its subsequent signing in 2009 of the (Hague) Convention on Choice of Court Agreements and in 2011 of the 2007 (Hague) Convention on the International Recovery of Child Support and Other Forms of Family Maintenance.¹⁵⁸ The Union is also making use of its ability to define formal “Common Positions” – as was the case, for instance, in the third session of the Conference of the States Parties to the UN Convention against Corruption in Doha in November 2009¹⁵⁹ – and it maintains a dialogue with international organisations to facilitate the coordination of activities, such as with the Council of Europe in the criminal law field.¹⁶⁰

International organisations are also important partners and channels for EU capacity building measures. The EU’s financial and operational involvement in counter-terrorism capacity building efforts regarding vulnerable third-countries (such as Mali, Mauretania, Niger and Pakistan) in close cooperation with the UN Counter-Terrorism Committee Executive Directorate (UN CTED) is a major example of that.¹⁶¹

The Treaty of Lisbon strengthens the position of the Union in international organisations through the already mentioned introduction of a single EU legal

¹⁵⁷ Council Decisions 2001/748/EC (OJ L 280, 24.10.2001), 2004/579/EC (OJ L 261 of 6.8.2004), 2006/616/EC, 2006/617/EC, 2006/618/EC, 2006/619/EC (all OJ L 262, 22.9.2006) and 2008/801/EC (OJ L 287 of 29.10.2008).

¹⁵⁸ Council Decisions 2006/719/EC (OJ L 297, 26.10.2006), 2009/397/EC (OJ L 133, 29.5.2009) and 2011/220/EU (OJ L 93 of 7.4.2011).

¹⁵⁹ Council of the European Union: Adoption of draft Council Common Position on the UN Convention against Corruption – Preparation of the 3rd Conference of the States Parties to the UNCAC (Doha, Qatar, 9–13 November 2009), Council document 14176/09, 8.10. 2009.

¹⁶⁰ See Council of the European Union: Summary of conclusions of the meeting between the Troika of the Article 36 Committee and the Council of Europe, Strasbourg, 21 June 2010, Council document 11473/10 of 28.6.2010.

¹⁶¹ European Commission, “The Instrument for Stability – Multi-annual Indicative Programme 2009–2011”, C(2009)2641, 8.4.2009, pp. 14-15.

personality as well as the new provision on Union delegations – under the authority of the High Representative for CFSP – representing the Union in international organisations (Article 221 TFEU). The Stockholm Programme underlines the importance of cooperation with and within international organisations, putting particular emphasis on the UN and the Council of Europe.¹⁶² Yet the relevant sections are rather vague in terms of objectives, and the failure to mention the OSCE is somewhat surprising considering its role in the south-eastern and eastern European neighbourhood which is related to many of the EU’s internal security-related capacity building efforts.¹⁶³

¹⁶² Council of the European Union: The Stockholm Programme, OJ C 115 of 4.5.2010, pp. 35 and 37.

¹⁶³ This has to some extent been remedied by the 2011 Trio Presidency Programme which identifies several elements for a “deeper cooperation” with the OSCE, including exchanges of good practice and the strengthening of ties with the Anti-Terrorist Unit. Council of the European Union: JHA External Relations – Trio Programme, Council document 12004/11 of 4.7.2011, p. 21.

6 Conclusions

6.1 Implications for the EU

For the EU as a whole, the emergence of the external dimension of the AFSJ appears to be a primarily positive development: It has allowed the EU gradually and with an increasingly wide range of external instruments to complement internal action on AFSJ objectives with external action. Because many of the challenges to which the AFSJ has to respond have a major – and in some cases, such as illegal immigration, even a primarily – external EU dimension (see section 2.2), the development of a corresponding dimension of external action constitutes a necessary part of the development of the AFSJ itself and of the effectiveness of its policies. The use of the combined political weight of the EU – regrouping both the Member States and other EU external policies of relevance to third-countries – has made it easier to secure cooperation of third-countries on a range of issues relevant to AFSJ, from readmission through anti-money-laundering measures to the sharing of law enforcement data. The adoption of common positions on fundamental AFSJ issues also offers the EU and its Member States a better chance to defend common interests – such as high standards of personal data protection in law enforcement cooperation – even against powerful external pressures like those of the US in the context of counter-terrorism cooperation.¹⁶⁴

Moreover, the benefits which the external AFSJ dimension brings to the EU do not stop with the added benefits they bring in terms of contributing to achieving the AFSJ's internal objectives. The rapid growth of this domain of EU external action since 1999 has added a substantial new dimension to the Union's role in international relations beyond its already established actorness in fields like trade, development and foreign and security policy. There can be no doubt that in the aftermath of the 9/11 terrorist attacks the fact that the EU could – via its new external competences introduced by the Treaty of Amsterdam – become the agent of a collective international European response and be immediately accepted as such as an interlocutor by the US has added to its international weight and visibility. The same can also be said about visa facilitation as third-countries have had to accept that with the harmonisation of EU (Schengen) visa lists the only

¹⁶⁴ See Annegret Bendiek: *An den Grenzen des Rechtsstaates: EU-USA-Terrorismusbekämpfung*, Berlin: Stiftung Wissenschaft und Politik 2011 (SWP-Studie S 3), pp. 13-14.

way of obtaining visa concessions has become to engage in negotiations with the EU as whole which, *inter alia*, normally means accepting readmission agreements in return.

However, there are also three more problematic implications of the emergence of the AFSJ external dimension:

The first is that this relatively “new” external dimension has added to the complexity of EU decision-making in the domain of external relations as a whole range of “new” issues, especially related to migration management and the fight against serious forms of crime, have entered the EU’s external agenda. This has generated additional consistency challenges for EU external policies and corresponding coordination needs between the different strings of decision-making (see section 4.3). These seem as yet not to have been fully mastered, especially as regards the integration of AFSJ external objectives within the CFSP and its wider foreign policy rationale.

The second is that – as the EU has now become an actor in its own right on AFSJ external issues – it is inevitably also more exposed to third-country interests and pressures. Third-countries have quickly realised that it can be advantageous for them to seek an agreement on JHA issues of particular concern to them with the EU as a whole rather than to have to negotiate agreements with all or some of the Member States individually. This can result in third-countries trying to impose on the EU as a whole concessions on certain AFSJ matters which are controversial both amongst the EU institutions and in at least some Member States. A major example for this more problematic aspect of the EU’s newly gained international actorness is the aforementioned EU-US agreement on the collection, transfer and storing of PNR data in which the US Administration clearly tried to impose its counter-terrorist law enforcement interests on the EU side¹⁶⁵ to the extent that in the end even the European Commission’s Legal Service expressed, with regard to the latest (still to be ratified) version of the agreement, “grave

¹⁶⁵ See, Vagelis Papakonstantinou and Paul De Hert: The PNR Agreement and transatlantic anti-terrorism co-operation: no firm human rights framework on either side of the Atlantic, in: *Common Market Law Review*, vol. 46 (2009), pp. 885-919.

doubts as to its compatibility with the fundamental right to data protection”.¹⁶⁶

The third more problematic implication is that – with AFSJ matters often involving major national interests – the external dimension of the AFSJ can expose the EU to serious tests of cohesiveness and solidarity, as occurred at the peak of the EU-US visa reciprocity problems in 2008. Frustrated by a lack of progress on refusal of the US to extend bilateral visa waiver arrangements to all new EU Member States, which was partly attributed to an insufficient willingness of the “old” EU Member States that benefited from the US visa waiver to put sufficient pressure on the US, on 26 February 2008 the Czech Government signed a memorandum of understanding with the US in which it agreed to an enhanced transfer of data on passengers, suspected terrorists and migration-related matters to the US in exchange for access to the US visa waiver programme, thereby seriously undermining the common EU position on these issues as well as the common visa policy in general. As five other new Member States – Estonia, Latvia, Lithuania, Hungary and Slovakia – lost little time in following this demonstration of coherence of the enlarged EU, the Commission preferred not to take legal action against the ‘bilateral’ approach, as it had initially indicated, focusing instead on a new round of negotiations with the US. Both inner-EU and transatlantic tensions over the issue were later largely defused by the US extending its visa waiver programme to the six “bilateralists”,¹⁶⁷ but the case has shown the challenges of solidarity to which the external AFSJ dimension can expose the EU.

6.2 Implications for the Member States

As the AFSJ constitutes a fundamental common political EU project – with the qualification that the three “opt-outs” do not fully participate in it (see section 3.5) – the Member States obviously benefit generally from its external dimension making a substantial contribution to achieve AFSJ internal objectives which, especially in the case of fight against crime and migration management, address major concerns of their citizens. Yet there are

¹⁶⁶ European Commission, Legal Service: Note for the attention of Mr. Stefano Manservigi, Director-General, DG Home. Subject: Draft Agreement on the Use of Passenger Name Records (PNR) between the EU and the United States, 18.5.2011 (SJ(2011) 603245), available at <http://www.statewatch.org/news/2011/jun/eu-usa-pnr-com-ls-opinion-11.pdf>

¹⁶⁷ European Commission: Fifth Report from the Commission to the Council and the European Parliament on certain third countries’ maintenance of visa requirements in breach of the principle of reciprocity, COM(2009) 560, 19.10. 2009, pp. 6-10.

additional benefits Member States can draw from EU external AFSJ action which depend on specific national interests and situations:

Smaller Member States can benefit relatively more from the collective political weight of the EU when it comes to third-countries agreeing to concessions – for instance, on readmission of illegal immigrants and rejected asylum applications. Some Member States may be able to use the AFSJ external dimension to support their relationship with a major international partner – as the UK did with regard to its “special relationship” with the US when it acted as one of the protagonists in the EU of closer counter-terrorism cooperation with the US in the aftermath of the 9/11 attacks. Still other Member States may have specific regional interests in migration management and the fight against crime which can influence priorities for cooperation with third-countries and capacity building. The Nordic Member States have thus often pioneered or influenced external AFSJ measures in the Baltic Sea region, the Eastern EU Member States cooperation with the EU’s eastern neighbours (now in the context of the “Eastern Partnership”) and the EU’s southern Member States cooperation priorities with the North African countries, especially regarding migration management.

The counterpart of the benefits and opportunities that the external AFSJ dimension offers to Member States is a loss of autonomy which ranges from fields with an extensive transfer of competences to the EU – such as visa policy – to fields where EU external action does not go beyond information sharing and capacity building – such as police cooperation. Given the major limitations of EU competences which persist after the Treaty of Lisbon reforms (see section 3.2) the “cost” for the Member States of the AFSJ external dimension in terms of restrictions on their autonomy of international action in this field can still be considered as relatively low – as is shown by the continuation of significant bilateral treaty-making with third-countries (see section 5.2).

6.3 Further development prospects

The Treaty of Lisbon has strengthened the EU’s potential to further develop the external dimension of the AFSJ through the abolition of the “pillar structure”, the creation of a single legal personality, a unified procedure for the negotiation and conclusion of agreements, the extension of qualified majority voting and some extension of EU internal competence on AFSJ

matters which – if used – could extend external action possibilities (see sections 3.1, 3.2 and 3.4). The 2009–2014 Stockholm Programme also places a greater emphasis on this dimension of the AFSJ than any of its predecessors. This – as well as the fact that the external challenges to the AFSJ continue to figure prominently in EU threat assessments – should contribute to a growing expansion of the AFSJ external dimension until the end of the current programming period and beyond. Such an expansion will not come without funding implications, especially in view of the EU’s interest in law enforcement and capacity building for migration management in (mostly neighbouring) third-countries. The negotiations on the forthcoming new Multiannual Financial Framework 2014–2020 provide an opportunity to establish an adequate financial framework for the growth potential of the AFSJ external dimension.

A number of factors will, however, continue to impact negatively on the potential for development of the external side of the AFSJ. The diversity of the fields covered – from asylum and immigration through civil and criminal justice to police cooperation – limits the potential for the external AFSJ dimension to develop into a single “policy”. The resulting relative fragmentation makes it more difficult for AFSJ external objectives to be given the same political weight as those of other more established and homogenous external EU policies (such as the CFSP, trade or development policy). This in turn contributes to the difficulties of its effective integration with other external EU policies, which is also hampered by different strings of decision-making and the complex post-Lisbon institutional structure (see section 4.1). If one adds to this the continuing limitations of the EU having only “shared” competences in the AFSJ domain, it seems clear that ultimately progress will continue to depend essentially on the extent of the Member States’ interest in common external action in this domain, which may vary considerably not only between the Member States but also from one case or issue to the other. As this interest is generally very much conditioned by the perception of international challenges and threats, it may well be that over the next few years the most important role for EU bodies – and in particular for the European Commission and the AFSJ agencies – will be to make Member States fully realise the nature and extent of the commonality of international challenges in the various AFSJ fields – and hence the need for corresponding common external action.

7 Sammanfattning på svenska

Det som inom Europeiska Unionen kallas för ”ett område med frihet, säkerhet och rättvisa” är i första hand ett politiskt projekt för att garantera EU:s medborgare ett område med fri rörlighet för personer. Men projektet har också en internationell dimension: organiserad brottslighet, terrorism och illegal invandring gör inte halt vid EU:s gräns. De yttre hoten mot något så stort, öppet och sårbart som ”ett område med frihet, säkerhet och rättvisa” (den engelska förkortningen för ”area of freedom, security and justice”, AFSJ, används fortsättningsvis) måste bemötas.

I den här rapporten diskuteras först och främst hur den yttre dimensionen av AFSJ har utvecklats. Även det juridiska och institutionella ramverket efter Lissabonfördragets ikraftträdande belyses. Därefter analyseras EU:s agerande och vilken betydelse den internationella dimensionen har för såväl EU som för medlemsländerna.

EU har kompletterat interna åtgärder inom unionen med externa för att uppfylla målen i AFSJ: allt ifrån strategiformulering och samarbete med tredje land, till kapacitetsbyggande och gemensamt agerande i internationella organisationer. Att på det sättet samla EU:s politiska tyngd har också gjort det lättare att samarbeta med länder utanför EU i viktiga frågor som återtagandeavtal, åtgärder mot penningtvätt och utväxling av polisinformation.

Sedan 1999 har framväxten av AFSJ:s yttre dimension gett unionen en helt ny roll internationellt – en roll som sträcker sig bortom den traditionella inom områden som handel, utveckling och utrikes- och säkerhetspolitik. Det råder inga tvivel om att EU efter terroristattacker den 11 september 2001 – genom de nya befogenheter man fick i Amsterdamfördraget – blev en samlad kraft för ett europeiskt agerande internationellt, en roll som också har accepterats av USA. EU:s roll har också stärkts globalt när det gäller exempelvis underlättande av visumhantering, där länder utanför EU har tvingats acceptera att det är nödvändigt att förhandla med hela unionen.

Lissabonfördraget ger EU möjlighet att ytterligare utöka den internationella dimensionen av AFSJ, genom avskaffandet av ”pelarstrukturen”, etablerandet av EU som juridisk person, införandet av en enhetlig procedur

för förhandlingar och ingående av avtal, ökat användande av kvalificerad majoritet vid beslutsfattande samt viss ökning av EU:s kompetens när det gäller AFSJ-området.

Även Stockholmsprogrammet 2009-2014 lägger större tonvikt vid den internationella dimensionen i AFSJ än någon av föregångarna. EU:s kartläggning av hotbilder kommer sannolikt att göra att man behåller detta fokus även under nästa programperiod. Detta får givetvis konsekvenser för finansieringen, särskilt som EU har ett betydande intresse av polisverksamhet och migrationskontroll i angränsande länder. Förhandlingarna om EU:s långtidsbudget för perioden 2014-2020 är därför ett bra tillfälle att lägga fast en tillräcklig finansiell ram för AFSJ:s externa del.

Men ett antal faktorer kommer i fortsättningen att kunna hindra att den externa dimensionen av AFSJ förstärks. Att området är så pass omfattande och täcker såväl asyl och migration som civil- och straffrätt samt polissamarbete begränsar möjligheten att utveckla den externa delen av AFSJ till gemensam enhetlig politik. Omfattningen gör det också svårt att uppnå samma politiska kraftsamling som i andra mer etablerade och sammanhållna yttre politikområden i EU (utrikes- och säkerhetspolitik, handel och bistånd). Därmed försvåras också integrationen med andra yttre politikområden. Lissabonfördragets olika former för beslutsfattande och komplicerade institutionella struktur är en annan försvårande omständighet. Läger man till det begränsningarna i EU:s ”delade kompetenser” är det uppenbart att det är medlemsländernas egna insatser på det här för medborgarna viktiga området som är avgörande – och att man kommer överens om ett gemensamt agerande.

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Sieps ●●●

Swedish Institute for European Policy Studies

Fleminggatan 20

SE-112 26 Stockholm

Ph: +46-(0)8-8-586 447 00

Fax: +46-(0)8-8-586 447 06

E-mail: info@sieps.se

www.sieps.se