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CONTEXT OR CONTENT? A CFSP OR AFSJ LEGAL BASIS FOR EU INTERNATIONAL AGREEMENTS

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I. INTRODUCCIÓN

With the coming of age of the external dimension of the EU's Area of Freedom, Security and Justice (AFSJ),[1] legal basis conflicts with Common Foreign and Security Policy (CFSP) are bound to occur more frequently. The case under review here concerns the scenario in which the AFSJ and CFSP agendas meetconcerning the conclusion of bilateral agreements whose content could be considered as pertaining simultaneously to Title V TEU (CFSP) and to Title V TFEU (AFSJ). The case concerns the conclusion of an Agreement for the transfer and prosecution of suspected pirates arrested in the framework of Operation Atalanta between the EU and Mauritius.[2] Operation Atalanta is the first EU naval operation and it was launched in 2008 with the objective of contributing to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast.[3]In addition to securing the waters of the Gulf of Aden, Joint Action 2008/851/CFSP introduced a regime for the purpose of prosecuting the (suspected) pirates arrested during Operation Atalanta. Indeed, Article 12 of Joint Action 2008/851/CFSP on the transfer of persons arrested and detained with a view to their prosecution essentially introduced two criteria for the transfer and prosecution of suspected pirates: the first one based on the attribution of jurisdiction to the State that has arrested the suspected pirate, the second based on the possibility of transferring suspected pirates «to a Member State or any third State which wishes to exercise its jurisdiction».[4] Following the conclusion of two separate agreements with Kenya and the Seychelles in 2009[5], the EU sought to conclude

[1] See for instance Monar, J, *The External Dimension of the EU's Area of Freedom, Security and Justice*, Stockholm: Sieps, 2012, No. 1; Matera, C, *The European Union as an International Actor in the Area of Freedom, Security and Justice: A Legal Constitutional Analysis*, 2015 (forthcoming).

[2] Case *C-658/11, European Parliament v Council (Mauritius Agreement)*, judgment 24 June 2014, NYR.

[3] Council Decision 2008/918/CFSP, in *OJ* L 330/19, 9.12.2008. For a recent analysis of the different ways the UE is involved to fight piracy in Somalia, Ehrart, Petretto, *The EU, the Somalia Challenge, and Counter-piracy: Towards a Comprehensive Approach?*, in *European Foreign Affairs Review*, 2012, pp. 261-284.

[4] Article 12, par. 1, second indent of Joint Action 2008/851/CFSP.

[5] Exchange of Letter of the 6th of march 2009 between Kenya and the EU, in *OJ* L 79/50, 25.3.2009, and Agreement between the EU and the Republic of Seychelles concluded on the 10th of November 2009, in *OJ* L 32/14, 10.12.2009.

similar agreements with other partners[6]. Indeed, the most recent example concerns the conclusion, ex Article 37 TEU, of an agreement for the transfer of suspected pirates concluded with the Republic of Mauritius on the basis of Article 12 Joint Action 2008/851/CFSP. This agreement is similar to the ones concluded by the EU with Kenya and the Seychelles, and contains detailed provisions on the transfer, detention, trial and the serving of a conviction.[7]

Each agreement thus far concluded by the EU contains provisions on pre-trial rights such as the right to have a judge deciding on the lawfulness of detention or the right to have the trial within a reasonable time or to be released. Moreover, in relation to the trial itself, the agreements impose that suspected pirates shall have a public, fair trial in front of a competent, independent and impartial tribunal. The agreements also provide for the application of the presumption of innocence principle, and impose on the contracting State to guarantee legal assistance,[8] translation facilities, the right to dispute evidence against him/her and the right to provide evidence on his/her favour. Lastly, the agreements guarantee the right to silence for suspects and prohibit, where potentially applicable, the application of the death penalty.[9]

Taking into consideration the detailed regulation of detention conditions and the rules on trials, there can be no doubt that the agreements concluded by the EU fall within the scope of criminal (procedure) law in the broad sense, i.e. independently from the division of powers and competences contained in the Treaties. Moreover, the agreements also have Mutual Legal Assistance (MLA) clauses such as the process of evidence, detention records and the preservation of seized property in possession of EUNAVFOR.[10] Lastly, since the agreements place a considerable burden on the judicial systems of the third countries, they also provide for technical cooperation and assistance: from financial resources to technical equipment and know-how as to the use of digital means to facilitate the attendance of witnesses.[11] Rather than pursuing criminal law and criminal procedure objectives, these last clauses re-

[6] Wolff S and Mounier G, «The external dimension of JHA: A new dimension of EU diplomacy», in Wolff S, Goudappel F and de Zwaan J (eds.) «Freedom, Security and Justice after Lisbon and Stockholm», T.M.C. Asser Press, The Hague 2011, p.249.

[7] See Article 4 of the EU-Mauritius Agreement, p.4.

[8] Free legal assistance in case the suspected pirate does not have means to pay his/her counsel.

[9] See Articles 4 and 5 of the EU-Mauritius Agreement for example.

[10] Idem.

[11] Articles 6 and 7 of the EU-Mauritius agreement for example.

flect 'capacity building clauses' andcome close to technical agreements concluded by the EU under its Economic, Financial and Technical Assistance policy ex Article 212 TFEU. All in all, a systematic reading of the EU-Mauritius Agreement unequivocally reveals that, as evidenced by Article 1 of the agreement,[12] this is an extradition and MLA agreement, i.e. an international agreement about cooperation in the fields of criminal law and procedure.

However, since the Agreement was concluded within the context of Operation Atalanta, and because the Agreement also contained provisions related to other instruments of EU external relations, reasonable doubts could be advanced against the decision of the Council to conclude the said Agreement on the sole basis of Article 37 TEUCFSP. With a view of clarifying the extent to which a CFSP provision can constitute the legitimate legal basis of an agreement in which non-CFSP elements are present, the European Parliament attacked Council Decision 2011/640/CFSP[13]by putting forward two pleas in law. With the first one the EP claimed that the Agreement did not relate exclusively to the CFSP within the meaning of Article 218 (6) TFEU and that, consequentially, the decision to conclude the Agreement should have been taken after obtaining the consent of the EP in accordance with Article 218 (6), subparagraphs (a)-(v).

Independently from the decision of the Court concerning the first ground, the EP brought forward a second plea concerning the alleged violation of the implementation of paragraph 10 of Article 218 TFEU. Here the EP argued that the Council failed to inform it immediately and fully at all stages of the procedure concerning the negotiation and conclusion of the agreement.

Five years since the entry into force of the Lisbon treaty, the action brought forward by the EP raised a number of pivotal constitutional questions concerning the division of external competences between the TEU and the TFEU as well as questions concerning the level of democratic participation and scrutiny existing in the context of EU external relations.

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[12] Article 1 of the Agreement reads as follows:This Agreement defines the conditions and modalities for: (a) the transfer of persons suspected of attempting to commit, committing or having committed acts of piracy within the area of operation of EUNAVFOR, on the high seas off the territorial seas of Mauritius, Madagascar, the Comoros Islands, Seychelles and Réunion Island, and detained by EUNAVFOR; (b) the transfer of associated property seized by EUNAVFOR from EUNAVFOR to Mauritius; and (c) the treatment of transferred persons.

[13] OJ [2011], L 25, p.1.

II. THE LEGAL QUESTIONS

Although the EU- Mauritius Agreement on the transfer and trial of suspected pirates is, for its *content*, an agreement on criminal law and mutual legal assistance,[14] the agreement was concluded in the *context* of operation Atalanta, a military mission established under the CFSP, or in fact under the Common, Security and Defence Policy (CSDP), as sub-policy-area of CFSP.

The European Parliament (EP) attacked the Council Decision to authorise the Conclusion of the EU-Mauritius Agreement[15] arguing that the agreement should have been concluded by combining Article 37 TEU (the basis of the competence to conclude international agreements in the CFSP area) with Articles 82 TFEU (on judicial cooperation in criminal matters) and 209 TFEU (on development cooperation) and, consequentially, under the general rules on the conclusion of international agreements laid down in Article 218 TFEU in which paragraph 6(a)(v) TFEU demands the consent of the EP for the conclusion of an agreement.[16]

In the specific context of the conclusion of international agreements, the division of external competences between the TEU and the TFEU is characterised ex Article 218(3) TFEU by a test of exclusivity that must be understood as a consequence of the different decision-making processes applicable within the TEU and the TFEU. Therefore, Article 218 TFEU establishes that whenever an agreement does not exclusively relate to the CFSP, such agreement must be concluded after the EP was either consulted or after the EP expressed its consent to the conclusion. Conversely, because the CFSP «is

[14] It does have aspects that are related to capacity building and technical assistance that could fall within the Development Cooperation Policy of the EU, see Article 6 and 7 of the agreement.

[15] Council Decision 2011/640/CFSP of 12 July 2011 on the signing and conclusion of the Agreement between the European Union and the republic of Mauritius on the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force to the Republic of Mauritius and on the conditions of suspected pirates after transfer, OJ 30.9.2009 L 254/1.

[16] Article 218 TFEU holds: «[...] The Council, on a proposal by the negotiator, shall adopt a decision concluding the agreement. Except where agreements relate exclusively to the common foreign and security policy, the Council shall adopt the decision concluding the agreement: (a) after obtaining the consent of the European Parliament in the following cases: [...] agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required».

subject to specific rules and procedures» (Article 24 TEU)in relation to which, to a large extent, the EP does not participate, Article 218 TFEU makes clear that for the conclusion of agreements exclusively relating to the CFSP, the participation of the EP in the decision-making process is excluded. Clearly, Article 218 TFEU reflects the existing dichotomy in the field of EU external relations between initiatives based on the TEU and initiatives based on the TFEU. However, because neither Article 218 TFEU nor Article 40 TEU establish a rule aimed at regulating the conclusion of agreements that pursue, simultaneously, a plurality of objectives, the conclusion of an agreement such as the one between the EU and Mauritius begged the question on the identification of a rule for the conclusion of agreements pursuing multiple objectives scattered among the different dimensions of EU external action.

Indeed, the difficulty presented by this case laid precisely in the fact that the agreement in question, albeit anchored within the context of the CFSP, was, from a content perspective, clearly linked to other EU policies belonging to the TFEU. Therefore, whilst from a CFSP perspective the participation of the EP was not an issue since this institution does not take part in the decision making process of CFSP initiatives; the recognition that the agreement in question also pursued non-CFSP objectives would have rendered, for the purpose of concluding the agreement, the applicability of the exclusivity rule ex Article 218 TFEU inapplicable. Thus, the EP could have argued that since the said agreement did not exclusively relate to the CFSP, the agreement with Mauritius should have been adopted on another legal basis and following the procedure enshrined in Article 218 (6) (a-v) TFEU.

However, even thoughthe rule of exclusivity implies an either/or type of reasoning,[17] the EP chose to put forward a more complex argument. In spite of the existing case law on the impossibility of combining legal basis that prescribe incompatible decision-making procedures,[18] the EP aimed to recon-

[17] Either the agreement exclusively belong to the CFSP and thus the conclusion of an agreement is decided by the Council alone and the EP must only be informed about the procedure ex Article 218 (10) TFEU, or the Agreement cannot be based on a CFSP provision and then the EP will participate in the decision leading to the conclusion of the agreement ex Article 218 (6) (a).

[18] See case C-130/10 *European Parliament v Council*, judgment 19 July 2012, paragraphs 47-48, NYR, Case 178/03 *Commission v Parliament and Council* (Dangerous chemicals), [2006] ECR I - 00107 and Case *C-300/89 Commission v Council* (Titanium Dioxide) [1991] ECR I 2867.

cile incompatible procedures and, because the envisaged agreement could not be considered as exclusively belonging to the CFSP, the EP asked the CJEU to declare the conclusion of the agreement on the *sole* basis of the CFSP void.It thus preferred not to put into question the choice of Article 37 TEU and merely asked for that legal basis to be integrated with Articles 82, 87 and 209 TFEUso as to render the exclusivity rule of Article 218 (6) first subparagraph inapplicable.

This lead the AG and the CJEU only to consider whether, on the basis of the 'centre of gravity test', the criminal law and development cooperation 'aspects' were capable of annulling Council Decision 2011/640/CFSP and impose the combination of different decision-making procedures for the conclusion of the agreement.

As a result, the CJEU was facilitated to frame the request of annulment in the following manner:

> «the Parliament contends that the fact that the contested decision and the EU-Mauritius Agreement pursue, albeit only incidentally, aims other than those falling within the CFSP is sufficient to preclude that decision from falling exclusively within that policy for the purposes of Article 218(6) TFEU».[19]

From this perspective, the CJEU was asked to establish whether 'incidental aims' might influence the decision on the conclusion of an agreement to the extent of preferring the incidental legal basis against the legal basis of the main aim of an agreement. Clearly the question phrased in this manner was implicitly asking the CJEU to eventually overrule some decades of judgement spertaining to the choice of the legal basis and the 'centre of gravity test' according to which incidental aims do not require the addition of a specific legal basis. However, the Court was not prepared to do so.

In the eyes of the Court, the interpretation of the 'CFSP exclusivity' in Article 218 (6) TFEU is more complex:

> «In particular, as regards a decision concluding an agreement that pursues a main aim falling within the CFSP, that form of words does not establish that, as the Council claims, such a decision may be regarded as 'relating exclusively to the [CFSP]' solely because it is founded on a substantive legal basis falling within that policy

[19] Paragraph 46

> and no other substantive legal basis, nor does it establish that, as the Parliament maintains, that decision must be regarded as relating also to other areas of EU law on account of incidental aims other than its main aim falling within the CFSP.»[20]

Thus, after having reiterated the criteria to establish the proper legal basis,[21] the CJEU rejected the argument according to which the pursuit of 'incidental aims' could affect the choice of the proper legal basis to the point of having to reconsider whether Article 218 (6) TFEU should be applied.[22] Indeed, since the EP did not argue that the principal aim of the agreement fell outside the CFSP, the CJEU only had to uphold the 'centre of gravity test' to confirm, indisputably, that the correct legal basis was Article 37 TEU and that the procedure established by the second subparagraph of Article 218 (6) TFEU was applicable.[23]

While the CJEU, facilitated by the argumentation brought forward by the EP,[24] decided the case on the basis of a formalistic approach, the AG took the time to analyse the substantive issues thoroughly. Thus, while reaching the same conclusion of the Court in relation to the choice of the proper legal

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[20] Paragraph 50.

[21] Paragraph 43: «It should be noted at the outset that the choice of the legal basis for an EU measure must rest on objective factors amenable to judicial review, which include the aim and content of that measure. If examination of a measure reveals that it pursues two aims or that it has two components, and if one of those aims or components is identifiable as the main one, whereas the other is merely incidental, the measure must be founded on a single legal basis, namely that required by the main or predominant aim or component. If, on the other hand, a measure simultaneously pursues a number of objectives, or has several components, which are inseparably linked without one being incidental to the other, so that various provisions of the Treaty are applicable, such a measure will have to be founded, exceptionally, on the various corresponding legal bases».

[22] Paragraph 46 and 47: (46) «By contrast, the Parliament contends that the fact that the contested decision and the EU-Mauritius Agreement pursue, albeit only incidentally, aims other than those falling within the CFSP is sufficient to preclude that decision from falling exclusively within that policy for the purposes of Article 218(6) TFEU». (47) «Such an interpretation of that provision cannot be accepted».

[23] Paragraph 59.

[24] From the Opinion of the AG it emerges that the EP only brought forward its view on the correct legal basis at the hearing and at the request of the Court! See paragraph 40 of the AG Opinion: «At the request of the Court at the hearing, the Parliament stated that, in its view, the contested Decision should have been founded on the following substantive legal bases, namely, in addition to Article 37 TEU, Articles 82 TFEU, 87 TFEU and 209 TFEU». See also paragraph 44 of the Judgment.

basis, the Opinion of the AG allows for an evaluation of the way in which the 'centre of gravity test' is being used. However, contrary to the calls for a recalibration of the test for the purposes of establishing the correct legal basis in cases in which the CFSP pillar meets other TFEU policies such as the AFSJ,[25] the AG remained firm in adopting the classical objectives-based approach.

In this respect paragraph 57 of the AG's Opinion is quite revealing:

> «In the present proceedings, it is common ground that, in the light of its objective and its content, the Joint Action comes under the CFSP. In my view, the same is true of the Agreement and the contested decision which are an extension thereof. I cannot see, in particular, why the very principle of the participation of third States in the Union action for the deterrence, prevention and repression of acts of piracy off the coast of Somalia and the rule that the transfer to a third State of arrested persons is subject to compliance by that State with international law, in particular as regards human rights, should come under the CFSP while the more detailed definition of the modalities for the transfer and the treatment of the persons concerned falls outside the scope of the CFSP.»

Indeed, throughout his Opinion the AG emphasises the fact that the Agreement with the Republic of Mauritius rests on Joint Action 2008/851/CFSP and, more broadly, on the UN mandate to secure the Gulf of Aden.[26]He (merely) devotes three short paragraphs to the core content of the Agreement in question, i.e. the rules on transferring (extraditing) suspected pirates to the Republic of Mauritius for trial and refrains from analysing any of the rules contained therein.[27] Thus, according to the AG it is the *contextualisation of the objectives of an agreement* that determines the choice of the correct legal basis, *not* the content. While it is not possible to conclude with certainty that the CJEU shares this view, it puts the 'exclusivity rule' into perspective and

[25] Blockmans S and Spernbauer M, «Legal obstacles to comprehensive EU external security action» EFARev2013 Special Issue, pp. 7-24, van ElsuwegeP, « EU External Action after the collapse of the pillar structure: in search of a new balance between delimitation and consistency, CMLRev 47: 987-1019 and Wessel R A and HillionC, « Competence distribution and in EU external relations after ECOWAS: clarification or continued fuzziness?, CMLRev 46: 551- 586

[26] Paragraphs 50-55 of the Opinion.

[27] Paragraphs 62-64.

maximises the approach according to which only a CFSP legal basis can be used to adopt acts or conclude agreements once CFSP has 'occupied' a certain domain, From this perspective, the 'PESCalisation' of EU external relations not only affects the EU's counter terrorism policy, but also any other initiative or policy that combines CFSP and non-CFSP elements.[28]

III. COMMENT: PRIORITIZING CONTENT OVER CONTEXT

While there can be no doubt that the strategic objectives of an agreement and itspolicy contextualisation must play a role in the determination of the choice of the proper legal basis and the application of the 'exclusivity rule' contained in Article 218 TFEU, the approach chosen by AG Bot is unsatisfactory and disproportionate. It is unsatisfactory because it fails to analyse the *content* of an agreement and places to much emphasis on the separation between CFSP and other external policies;and it is disproportionate because it promotesthe broad scope of the CFSP against policies based on the TFEU. However, this approach couldlead toresults at odds with Article 40 TEU and, consequentially, it could violate the horizontal allocation of powers and distribution of competences as established and protected by the Treaties. Moreover, the focus on the objectives and the context in which an agreement is being concluded to identify the correct legal basis in a case of cross-pillar mixityalso renders the 'exclusivity test' and the wording of Article 218 TFEU superfluous: if the analyse of the context of an agreement follows the broad interpretation that AG Bot gives of Article 21 (2) (a) -(c) TEU, then the centre of gravity test absorbs the need to identify when a certain agreement is exclusively related to the CFSP.[29]

Moreover, as this case exemplifies, the risk of preferring the context of an agreement to its content may lead to erroneous interpretations capable of creating even greater constitutional problems. As we have seen, the EU-Mauritius Agreement was concluded with the objective of creating a mechanism to transfer suspected pirates for trial and to this end the EU has imposed criminal procedure standards to the other High Contracting party. Therefore,

[28] HillionC, «Fighting terrorism through the EU Common Foreign Security Policy», in Govaere I and Poli S (eds.), «Management of global emergencies, threats and crises by the European Union», Brill/Nijhoff 2014 (forthcoming).

[29] Similarly to what the AG concluded in his Opinion in *Case C-130/10 Parliament v Council (restrictive measures), NYR.*

the substantive question to be answered was, on the basis of the content of the said agreement, whether the CFSP could be deemed 'exclusively competent' to conclude it. In substantive terms this meant to assess the extent to which EU law allows the Council *qua* CFSP to determine criminal procedure rules for extradition and impose them on a third party.

To answer questions pertaining to the choice of the proper legal basis between the CFSP and the TFEU with a view to apply the 'rule of exclusivity' codified in Article 218 TFEU, the analysis of the content of an agreement must be given precedence; and this must not be done in a rhetoric manner such as repeating formulas,[30] but by analysing the provisions contained in the agreement. If the AG and the Court of Justice had done so, there would have been no other option than to affirm the criminal procedure nature of the agreement in question and, as a consequence of this, the analysis should have focused on whether an agreement with such content could be deemed as exclusively pertaining to the CFSP. Yet, the Court deems it unnecessary to assess the content. It argues that

> «[...] in the context of the procedure for concluding an international agreement in accordance with Article 218 TFEU, it must be held that it is the substantive legal basis of the decision concluding that agreement which determines the type of procedure applicable under paragraph 6 of that provision.»[31]

Hence, a CFSP decision as the basis for an EU Agreement automatically leads to a different role for the Parliament, irrespective of the question of CFSP was the correct legal basis in the first place. The Court is right in arguing that it is not in a position to extend the scope of the EP's influence to areas that were deliberately excluded by the Member States, yet the question at stake here is whether an international agreement with elements clearly relating to criminal (procedure) law could be placed outside the Parliament's reach by simply opting for a different legal basis.However, since the EP had not put into question the choice of Article 37 TFEU, the Court was facilitated in affirming that once the substantive legal basis is set and undisputed, then there is no need to look into procedural rules.

It is submitted here that a content-based approach in this case would have led to a different conclusion. By addressing rules on transfers and trials of

[30] See Paragraph 43 of the CJEU decision.

[31] Paragraph 58.

suspected pirates arrested in the framework of operation Atalanta, the agreement has a clear legislative nature; however, Article 24 TEU clearly affirms that the adoption of legislative acts is excluded in the CFSP field. It is true that some may argue that the said provision needs to be read in connection with Article 289 TFEU;[32] however, the interpretation according to which a legislative act is an act adopted according to the ordinary or the special legislative procedure is only a *formalistic* view. The exclusion contained in Article 24 TEU could also be read in a more*substantive* or *functional* fashion: legislative acts are legal rules with general and abstract scope addressed to an undetermined group.[33]And, more importantly, since the EU is based, ex Article 2 TEU on the democratic principle and the rule of law, it could also be argued that the exclusion contained in Article 24 TEU aims to protect and maximise the democratic accountability and transparency so as to make sure than whenever third parties and individuals are affected by an act of the institutions, this can only be approved where the elected legislative body participates in the decision-making process.

This perspective would lead to the conclusion that the scope of Article 24 TEU is not only to exclude (redundantly?) the applicability of Article 289 TFEU to the CFSP context, but also (and foremost!) to exclude that the Council *qua* CFSP adopts normative acts of general application that directly affect individuals without the participation of the European Parliament. This is because the exclusion contained in Article 24 TEU should not be solely read in conjunction with Article 289 TFEU (formalistic perspective), but it should be read also in conjunction with Article 2 TEU and with Article 40 TEU as a means to protect the founding principles of the legal order which include the democratic principle, the rule of law and also the distribution of competences between the Treaties and the balance of powers between institutions.

In fact, this approach would be close to the 'symmetry-argument' presented by the Court (and the AG) in relation to the EP's role in internal and external situations:

> «Article 218(6) TFEU establishes symmetry between the procedure for adopting EU measures internally and the procedure for adopting in-

[32] Schütze R., «European Constitutional Law», CUP, (2012), p.169.

[33] Schütze R., The morphology of of legislative power in the European Community: legal instruments and the federal division of powers, Yearbook of European Law Vol. 25, p.91.

> ternational agreements in order to guarantee that the Parliament and the Council enjoy the same powers in relation to a given field, in compliance with the institutional balance provided for by the Treaties.

In those circumstances, it is precisely in order to ensure that that symmetry is actually observed that the rule identified by the case-law of the Court —that it is the substantive legal basis of a measure that determines the procedures to be followed in adopting that measure [...]— applies not only to the procedures laid down for adopting an internal act but also to those applicable to the conclusion of international agreements.»[34]

In conclusion, it appears that precisely because of its content the EU-Mauritius Agreement should not have been considered as pertaining exclusively to the CFSP. Rather, the preferable solution would have been adopting two separate legal acts: one, based on the CFSP with a view to determine the intention of the EU in the context of its Atalanta mission and another formally based on Articles 216, 82 and 87 TFEU and linked content-wise to the CFSP one.

Taking into consideration that the Union's activities intrude with the private sphere of individuals to the point of concluding extradition agreements and imposing criminal procedure rules to third countries, the 'PESCalisation' of the AFSJ brings back the question of the democratic deficit of this policy. For this reason alone the CJEU clearly missed the opportunity to call on the Council to constructively engage with the European Parliament, for example by engaging into the two-steps approach presented above.

Instead the CJEU preferred to adhere to formalistic issues rather than analysing content. This is best epitomised by the pyrrhic finale of the dispute with the annulment of the agreement with the Republic of Mauritius because the Council had failed to fulfil its obligations ex Article 218 (10) TFEU on the duty to keep the European Parliament immediately and fully informed at all stages: it had informed the EP about the conclusion of the Agreement 3 months and 17 days after the publication of the Agreement on the Official Journal.[35] With regard to this right of the EP, the Court rightfully sees no difference between CFSP and other international agreements.

In particular, it stressed that the information requirement was necessary

[34] Paragraphs 56-57.

[35] Case C-658/11 Parliament v Council (transfer of pirates) judgement 24 June 2014, Paragraph 77.

> «to exercise democratic scrutiny of the European Union's external action and, more specifically, to verify that its powers are respected precisely in consequence of the choice of legal basis for a decision concluding an agreement[36] [and that] [t]hat rule is an expression of the democratic principles on which the European Union is founded [and] the reflection, at EU level, of the fundamental democratic principle that the people should participate in the exercise of power through the intermediary of a representative assembly».[37]

While this allowed the EP not to go home empty-handed, it no doubt had higher hopes when it initiated the proceedings. Yet, and perhaps ironically, in presenting these arguments, the Court reveals an awareness of the potential implications of the agreements for «the people» that it did no seem necessary to investigate in the first part of the judgment.

Finally, this is the second case in a relatively short period in which the European Parliament —aware of its role in situations including the rights of individuals— attempted to secure its influence in cases where this was barred by the choice for a CFSP legal basis. In Case C-130/10 *European Parliament v Council*, challenged Regulation 1286/2009[38], implementing Common Position 2002/402/CFSP.[39] The EP argued that because the Regulation in question aimed at fighting terrorism, the correct legal basis should be Article 75 TFEU rather than Article 215 TFEU since this is the specific, counter-terrorism legal basis provided by the treaties and embedded within the objective of creating an area of freedom, security and justice. Secondly, the European Parliament argued that, taking into account the general scheme of the Treaties, only Article 75 TFEU could be used to adopt such type of administrative-like sanctions since only Article 75 TFEU could guarantee, thanks to the participation of Parliament in the decision-making process, the protection of fundamental rights. Also in this casethe Court held that Article 215 was the correct legal basis for the Regulation as «in the light of its objectives and of its content, the contested regulation relates to a decision taken by the Union under the CFSP.»[40]

Also striking is the fact that Article 40 TEU is not mentioned or explicitly used to solve the legal basis conflict. After all, these are exactly the situ-

[36] Paragraph 79.

[37] Paragraph 81.

[38] Council Regulation 1286/2009 of 22 December 2009, in *OJ* L 346/42, 23.12.2009.

[39] Common Position 2002/420/CFSP of 27 May 2002, in *OJ* L 139/4 of 29.5.2002.

[40] Paragraph 72.

ations foreseen by that provision. While in Case 130/10 the Council briefly refers to Article 40 in its arguments (paragraph 41), and Sweden and the UK bring it up in the Mauritius case (paragraph 42), the Court refrains from referring to the provision in both cases.Unlike its predecessor (Article 47 TEU), current Article 40 TEU calls for a balanced choice for either a CFSP or another legal basis of decisions (e.g. trade or development cooperation).[41] No longer foresees the article in a 'Community first' principle; CFSP has been placed on the same footing as other policies. In other words: the treaty not only aims to prevent an intrusion from CFSP in other areas, but also vice versa.[42] Conflicts on this issue can be brought before the Court (Articles 275(2) and 24(1) TEU). But, obviously, a conflict should then be presented clearly to the Court (in the present case the EP did not challenge the CFSP legal basis).Given the fact that Article 40 no longer provides a clear conflict-solving rule, the question of its relevance presents itself and it would have been interesting to see the Court dealing with this new provision.

IV. CONCLUSION

First of all the EP is to be complimented for its attempt to seduce the Court to combine CFSP and TFEU legal bases. Indeed, not so many issues relate exclusively to the CFSP and the consistency argument calls for combinations of external action when and where possible. Yet, refraining from challenging the CFSP legal basis the EP also allowed the Court to evade some interesting and important questions, for instance related to the function of Article 40 TEU and to the fact that irrespective of a chosen legal basis by the Council the content of an international agreement may hint at another relevant policy area. The approach chosen by the Court ('when the legal basis is set, this defines the procedure') limits its own constitutional role, which would call for a substantive objectivescrutiny of the text to assess, *inter alia*, possible implications for individuals. As argued above, the exclusion of the Court in Article 24 TEU should also be read as to prevent decisions being taken under CFSP when these clearly relate to the founding (democratic) principles of the EU.

Hence, we are basically stuck with a judgment that is not terribly excit-

[41] See on the effects of former Article 47 TEU for instanceWessel R A and HillionC, «Competence distribution and in EU external relations after ECOWAS: clarification or continued fuzziness?»,CMLRev 46: 551- 586.

[42] Cf. also Eeckhout, P, *EU External Relations Law*, OUP (2011), p. 498.

ing: as 'CFSP exclusivity' only relates to paragraph 6 of Article 218 TFEU, the rest of that provision is to be seen as general Union law, which is equally applicable to CFSP agreements. It would indeed be difficult to read Article 218 otherwise, despite the fact that the Court was indeed given a chance to underline that there mere choice for a CFSP legal basis does not allow for a complete setting aside of the European Parliament.

CJEU – JUDGMENT OF 24.06.2014 (GRAND CHAMBER) – CASE C-658/11 EUROPEAN PARLIAMENT V COUNCIL – «EXTERNAL RELATIONS OF THE EU – ANNULMENT OF THE DECISION ON THE CONCLUSION OF THE EU – MAURITUS AGREEMENT – CHOICE OF THE PROPER LEGAL BASIS».

CONTEXT OR CONTENT? A CFSP OR AFSJ LEGAL BASIS FOR EU INTERNATIONAL AGREEMENTS

ABSTRACT: In the case C-658/11 European Parliament v Council the CJEU was asked to assess the legitimacy of Council Decision 2011/640/CFSP on the conclusion of the agreement between the EU and Mauritius for the transfer and trial of suspected pirates arrested in the framework of Operation Atalanta. More specifically, whilst the EP agreed with the Council that the said agreement had to be concluded on the basis of Article 37 TEU, it nonetheless sustained that the agreement could not be concluded on the basis of Article 37 TEU alone since the agreement is not exclusively linked to the CFSP but is also linked to other policies of the EU that are based on the TFEU. Moreover, the EP also attached the decision of the Council because the latter institution failed to keep informed the EP at all stages of the procedure leading to the conclusion of the agreement.With its judgement of the 24 June 2014, the CJEU rejected the thesis of the EP. By making reference to its 'centre of gravity' test the CJEU decided to focus on the context of Operation Atalanta in which the agreement was concluded and held such link sufficient to exclude the necessity to make recourse to other, incidental, aims of an agreement to integrate the choice of the correct legal basis. On the other hand, the CJEU found that the Council had violated the right of the EP to be kept informed, at all stages, about the negotiations and conclusion of agreements and annulled the contested act. With this judgement the CJEU has contributed in making clear that the respect of procedural requirements between the Council and the EP is important even when the role of the EP is merely passive. At the same time, whilst the case brought by the EP could have been used to clarify the relationship between external action under the CFEP and other instruments of external relations based on the TFEU, the CJEU missed on this opportunity andsolvedthe case formalistically.

KEY WORDS: EU – Mauritius Agreement; Operation Atalanta; Choice of the proper legal basis; Conclusion of international agreements; Division of competences between the TEU and the TFEU; Procedure to conclude international agreements ex Article 218 TFEU; Right to be immediately and fully informed of the European Parliament.

TJUE – SENTENCIA DEL TRIBUNAL DE JUSTICIA DE 24.6.2014 (GRAN SALA), PARLAMENTO/CONSEJO, C-658/11 – «RELACIONES EXTERIORES DE LA UE – ANULACIÓN DE LA DECISIÓN RELATIVA A LA CONCLUSIÓN DEL ACUERDO ENTRE LA UE Y MAURICIO – ELECCIÓN DE LA BASE JURÍDICA ADECUADA»

¿CONTEXTO O CONTENIDO? UNA BASE JURÍDICA PESC O ELSJ PARA LOS ACUERDOS INTERNACIONALES DE LA UE

RESUMEN: En el asunto C-658/11, Parlamento/Consejo, se le ha solicitado al TJUE la evaluación de la legitimidad de la Decisión del Consejo 2011/640/PESC relativa a la conclusión del Acuerdo entre la UE y la República de Mauricio sobre las condiciones de entrega y enjuiciamiento de los individuos arrestados en el marco dela Operación Atalanta. En concreto, aunque el Parlamento Europeo estaba de acuerdo con el Consejo sobre la elección del artículo 37 TUE, ha sostenido que el Acuerdo no podía concluirse exclusivamente sobre la base de dicho artículo, porque no estaba vinculado exclusivamente con la PESC ya que tenía relación con otras políticas del TFUE. Además, el Parlamento Europeo había atacado la Decisión del Consejo porque éste había omitido la obligación de informarle en virtud del artículo 218.10 TFUE. En su sentencia de 24 de junio de 2014, el TJUE ha rechazado la tesis del Parlamento Europeo. Haciendo referencia a su doctrina del «centro de gravedad» para para la elección de la base jurídica adecuada, el TJUE ha decido concentrarse en el contexto dela Operación Atalanta en la que el Acuerdo se concluyó y ha considerado que dicho vínculo es suficiente. Por otra parte, El TJUE ha considerado que el Consejo ha infringido el derecho del Parlamento Europeo a ser informado en todas las etapas de la negociación y conclusión de los acuerdos y ha anulado el acto atacado. Con esta sentencia el TJUE aclara que el respeto de las exigencias procedimentales en las relaciones entre el Parlamento Europeo y el Consejo es importante incluso cuando la función del Parlamento Europeo es puramente pasiva. Al mismo tiempo, el TJUE ha resuelto el asunto con un enfoque bastante formalista y ha perdido la ocasión de con este asunto planteado por el Parlamento Europeo de clarificar la relación entre la acción exterior en el ámbito de la PESC y otros instrumentos de las relaciones exteriores basados en el TFUE.

PALABRAS CLAVE: Acuerdo entre la UE y la República de Mauricio; Operación Atalanta; Elección de la base jurídica adecuada; Celebración de acuerdo internacionales; Reparto de competencias entre el TUE y el TFUE; Procedimiento a seguir según el artículo 218 TFUE; Derecho del Parlamento Europeo a ser inmediata y plenamente informado de la negociación y conclusión de tratados internacionales.

ARRÊT DE LA COUR (GRANDE CHAMBRE), 24.6.2014 (GRANDE CHAMBRE), PARLEMENT/CONSEIL, AFFAIRE C-658/11, «RELATIONS EXTERIEURES DE L'UE – ANNULATION DE LA DECISION PORTANT SUR LA CONCLUSION DE L'ACCORD UE-MAURICE – CHOIX DE LA BASE JURIDIQUE APPROPRIEE»

CONTEXTE OU CONTENU? UNE BASE JURIDIQUEUNE PESC OR ELSJ POUR LES ACCORDS INTERNATIONAUX DE L'UE

RÉSUMÉ: Dans l'affaire C-658/11 Parlement Européen contre Conseil, la CJUE a été demandé d'évaluer la légitimité de la décision 2011/640/PESC concernant la conclusion de l'accord entre l'UE et Mauritius sur le transfert et le jugement des individus arrêtés dans le cadre de l'opération Atalanta. Plus précisément, alors que le Parlement Européen était en accord avec le Conseil sur le choix de l'article 37 du TUE, il a néanmoins soutenu que l'accord ne pouvait être conclu seulement sur le dit article parce-que l'accord n'était pas exclusivement liés à la PESC, et contenait des liens à d'autres politiques de l'UE contenues dans le TFUE. En outre, le Parlement Européen avait également attaqué la décision du Conseil car ce dernier a omis de tenir informé le Parlement Européen au sens de l'Article 218 (10) TFUE. Avec son arrêt du 24 Juin 2014, la CJUE a rejeté la thèse de l'EP. En faisant référence à sa doctrine du «centre de gravité» pour le choix de la bonne base juridique, la CJUE a décidé de se concentrer sur le contexte de l'opération Atalanta dans laquelle l'accord a été conclu et maintenu que tel lien était suffisant. D'autre part, la CJUE a estimé que le Conseil avait en effet violé le droit du Parlement Européen à être tenu informé, à tous les stades, sur les négociations et la conclusion d'accords et a annulé l'acte attaqué. Avec cet arrêt, la CJUE a contribué à rendre clair que le respect des exigences de procédure entre le Conseil et le Parlement européen est importante même lorsque le rôle du Parlement européen est purement passive. Au même temps, alors que le procès intenté par le Parlement Européen aurait pu être utilisé pour clarifier la relation entre l'action extérieure dans le cadre de la PESC et d'autres instruments de relations extérieures fondé sur le TFUE, la CJUE a raté cette occasion et a résolu le cas avec un approche assez formaliste.

MOTS CLÉS: Accord entre UE - Mauritius; Opération Atalanta; Choix de la base juridique appropriée; Conclusion d'accords internationaux; Répartition des compétences entre le TUE et le TFUE; Procédure à suivre selon l'Article 218 du TFUE; Droit d'être immédiatement et pleinement informé du Parlement Européen.